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TABLE OF CONTENTS

EDITOR-IN-CHIEF'S NOTE

RESEARCH ARTICLES

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

Journal homepage http://ajee-journal.com

Editor-in-Chief's Note

ABOUT ISSUE 1 OF 2025

At Access to Justice in Eastern Europe (AJEE), our mission remains steadfast: to enhance global understanding of Eastern Europe's legal, social, and political landscapes, and to advance open science and research ethics in scholarly publishing. We believe in promoting rigorous, interdisciplinary inquiry that not only illuminates the realities of legal systems in transition but also shapes constructive dialogue on achieving just and equitable outcomes for individuals and communities. Our commitment extends to nurturing the next generation of legal scholars, ensuring that new voices are heard, and that high-quality research is accessible to readers around the world, free of charge.

In this issue, we are pleased to present several significant contributions, among which I highly recommend the following publications.

In his article, "International Relations and Its Effect on Enforcement of International Law: The Case Studies of Ukraine and Syria," Mohamad Almohawes critically explores how external alliances and geopolitical considerations can either hinder or facilitate the application of international legal norms in conflict zones. By highlighting the situations in Ukraine and Syria, the author underscores the influential role of powerful state actors in shaping—sometimes stalling—mechanisms intended to address human rights violations. This piece offers invaluable insights for policymakers, academics, and practitioners seeking to reinforce the rule of law in turbulent environments.

In "The Doctrine of Limited Government in the Legal Positions of the Constitutional Court of Ukraine," a team of co-authors—Tetiana Slin'ko, Yevhenii Tkachenko, Liubomyr Letnianchyn, and Serhii Fedchyshyn—focuses on the cornerstone principle of constitutionalism: limiting state power to protect individual rights. Examining key decisions rendered by the Constitutional Court of Ukraine, the authors demonstrate how the Court consistently upholds the separation of powers, reinforcing democratic governance and emphasizing the importance of robust institutional checks. Their work serves as a valuable resource for scholars of constitutional law and anyone interested in the evolution of Ukrainian constitutional jurisprudence.

A highly valuable contribution from Kazakh colleagues, "On Manoeuvring Kazakhstan's Criminal Law in Defining Torture and Other Cruel, Inhumane, and Degrading Treatment and Punishment," by Elena Mitskaya, Kurmangaly Sarykulov, and Kanat Utarov illuminates systemic weaknesses that enable torture and ill-treatment in Kazakhstan. They advocate for clearer legislative definitions and alignment with international human rights standards, revealing how ambiguous references to "official capacity" and other loopholes can perpetuate abusive practices. This research ultimately calls for both domestic and international stakeholders to drive reforms toward more accountable governance.

In "Preemptive Self-Defence in Public International Law: An Analysis Through the Lens of International Court of Justice Jurisprudence," Zaid Ali Elgawari tackles the contentious issue of anticipatory or preemptive force under Article 51 of the UN Charter. Through examinations of seminal cases such as *Nicaragua v. United States* and contemporary conflicts like the one in Ukraine, the author probes the boundaries of necessity and proportionality in self-defence claims. This contribution not only enriches scholarly debates on the legal use of force but also provides a framework for evaluating state actions within evolving geopolitical contexts.

Lastly, I would like to specifically welcome the article, "Punishability in Radioecological Safety: Case Law from Ukraine," authored by Anastasiia Ternavska, a young researcher from Ukraine. We are very pleased to provide her with a free-of-charge Open Access publication opportunity, reflecting our ongoing commitment to supporting emerging scholars. In her study, Ternavska addresses an underexplored area of Ukrainian criminal law, exposing the discrepancy between punitive legal provisions and their actual enforcement in the realm of radioecological safety. By analyzing judicial data and practices, the author reveals the over-penalization embedded in current legislation and proposes targeted revisions. Her findings prove especially

valuable to lawmakers, practitioners, and researchers striving to balance effective deterrence with proportionality in criminal sentencing.

As always, I would like to take this opportunity to extend my deepest gratitude to our Managing Editors, Peer Reviewers, Language Editors, and Production Service teams, whose dedication, expertise, and meticulous efforts ensure the scholarly integrity and overall quality of *AJEE*. Their tireless work—ranging from rigorous review processes to careful editorial oversight—has been essential in bringing this issue to fruition and upholding our publication standards.

We are delighted to present our new cover, created by Alona Hrytsyk, which visually resonates with the cyclical patterns of existence—generations come and go, the sun rises and sets, and the wind traces its circular routes. In contemplating the reflections from Ecclesiastes on these unceasing cycles, I am reminded that while life's patterns often repeat, we also encounter moments of profound transformation. This concept lies at the heart of a paradigm shift: as we navigate well-worn paths, our fundamental understanding can—and must—change.

In recent days, as reality has formed a new paradigm for our lives, I have found that embracing the idea of such a shift may be key to our ability to adapt. We extend our sincere thanks to Alona Hrytsyk for capturing this delicate interplay between constancy and disruption. May her design serve as a reminder that, even amid life's familiar rhythms, the potential for radical renewal is always present—and perhaps the very essence of the answer we seek. At the same time, it is crucial to uphold our most fundamental principles, ensuring we preserve what we have so that we may continue to live—and pass on a strong foundation to future generations.

Finally, we are delighted to announce updates to our Editorial Board and the expansion of our network of Section Editors. By welcoming new members with diverse specializations, we continue to refine our peer-review procedures and foster interdisciplinary collaboration, all with the aim of delivering the highest-quality content to our readers. We are committed to growing and adapting in order to remain a leading forum for cutting-edge legal scholarship, and we look forward to the insights this expanded team will bring in future issues of *AJEE*.

Iryna Izarova
Editor in Chief of AJEE
Professor of Department of Justice of Taras Shevchenko National University of Kyiv

RESEARCH ARTICLE

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Research Article

INTERNATIONAL RELATIONS AND ITS EFFECT ON ENFORCEMENT OF INTERNATIONAL LAW: THE CASE STUDIES OF UKRAINE AND SYRIA

Mohamad Almohawes

ABSTRACT

Background*: The aims of international law are to uphold global peace, protect human rights, and hold states accountable if violations of international law occur. However, in practice, its implementation and effectiveness are not uniform due to the dynamics of international relations (IR). In Syria, it has been difficult for the global community to hold the regime accountable for human rights violations, largely due to its powerful allies like Russia. Similarly, the Ukrainian conflict raises serious questions about the efficiency of international law when dealing with Russia's violations of the sovereignty and territorial integrity of Ukraine. This study aims to analyse the role of IR in shaping the application of international law in these two conflict zones, with a focus on how external support has enabled the aggressors to persist despite legal challenges.*

Methods*: This research adopts a qualitative research methodology. It relies on desk-based research to collect data by using primary and secondary sources. Primary sources include treaties, UN resolutions, and international legal frameworks. These also include statements from significant actors involved in the Syrian and Ukrainian conflicts, providing insight into the legal frameworks governing international law. Secondary sources include academic articles, reports from international organisations, and expert analyses. This offers context on how international law has been applied or ignored in both cases.*

Through a comparative analytical approach, the study examines areas of similarity and difference in the implementation of international law in Syria and Ukraine. It highlights shared factors, such as powerful state actor involvement, which includes Russia, and the role of geopolitical interests in hindering effective legal enforcement. It simultaneously points out some

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

differences, such as the international recognition of the Ukrainian government against the fragmented recognition of Syrian opposition groups, and how such differences have shaped responses to both crises.

The research emphasises the roles of geopolitical interests and external state actors – Russia, China, and the Western powers – in shaping international responses. The study also examines the themes of sovereignty, humanitarian intervention, and the UN veto power. It highlights how IR impacts the enforcement of international law. Using the case of Ukraine and Syria, the research contributes toward an understanding of the intersection between international law and IR, particularly those challenges emanating from geopolitical interests.

***Results and Conclusion**: The study concludes that international relations significantly shape the enforcement of international law in both Syria and Ukraine, albeit with distinct outcomes. In Syria, the survival of Assad's regime is due to sustained military, economic, and political support from Russia, China, and Iran. These states have used their influence, particularly in the UN Security Council, to block foreign interventions. This demonstrates how geopolitical interests can paralyse international legal mechanisms. In Ukraine, a more unified international response has resulted in economic sanctions, military support, and legal actions against Russia. However, the geopolitical leverage of Russia, particularly in energy and military strength, has limited the effectiveness of these measures. Russia's alliance with China further complicates efforts, as China has not clearly condemned or voted against Russia's war against Ukraine in the UN Security Council. Moreover, China and other Russia's allies have undermined sanctions by continuing trade and economic relations with Russia, weakening the collective impact of the international Western sanctions.*

The findings highlight that while international law is influenced by global politics, the degree and type of influence depend on the geopolitical stakes involved, revealing the vulnerability of the system when confronted by powerful states. It calls for reforms to strengthen international legal frameworks, ensuring they are not undermined by the geopolitical interests of key global actors.

1 INTRODUCTION

On 17 December 2010, Mohammed Bouazizi, a fruit seller, burned himself to death in Tunisia as a reaction to being harassed by the police. This reaction sparked a revolution known as the Arab Spring, which initially began in Tunisia before it spread across many states, like Libya, Egypt, Bahrain, Yemen, and Syria.[1] In some nations, like Egypt, the revolution ended in peaceful ways, allowing citizens to replace their presidents with minimal loss of life. However, in other states, like Libya, the revolution escalated violently, leading to many people being killed, prompting the United Nations (UN) to intervene and support the protesters of Libya seeking to oust their president.[2] In Syria, protesters

1 Nick Kochan and Robin Goodyear, *Corruption: The New Corporate Challenge* (Palgrave Macmillan 2011) 2, doi:10.1057/9780230343344.

2 Jean-Pierre Filiu, *The Arab Revolution: Ten Lessons from the Democratic Uprising* (OUP 2011) 380.

are still fighting their president, resulting in over 90,000 deaths and more than one million Syrians forced to flee the state.[3] This conflict has become one of the most complex conflicts of the Arab Spring.

The complexity of this conflict is due to the involvement of multiple international actors, each with competing interests. Initially a domestic uprising, it quickly attracted the interest and involvement of outside powers such as Russia, Iran, and eventually the US and Turkey. The support of Russia for the Assad regime, both militarily and diplomatically, has been a central factor in prolonging the conflict.[4] Besides that, Iran's strategic interests in the region have bolstered Assad's hold on power.[5] It also means that the West, while vocal in their support for opposition forces, has not openly intervened militarily. Furthermore, any attempts at enforcing international law through the UN have been consistently hindered by both Russia and China using their veto powers.[6] The current dynamics in international relations (IR) have rendered international law ineffective in the protection of civilians and prohibition of aggression.

Alongside this, the conflict in Ukraine in Eastern Europe represents another critical case study where international law has proven ineffective in both effectively preventing or resolving state-driven aggression. In IR, the Ukraine crisis has presented a significant turning point in the post-Cold War era. The crisis started in 2014 when Russia annexed Crimea, an action that was widely condemned for violating Ukraine's sovereignty and territorial integrity.[7] Despite these violations, international law failed to prevent the actions. The subsequent diplomatic efforts to resolve the crisis, such as the Minsk agreements, did little to de-escalate the situation.[8] The annexation was an event that called for economic sanctions against Russia, further increasing tension between Russia and the West. However, despite these sanctions and international outcry, Russia retained control of Crimea, highlighting the limitations of international law in resolving such disputes.[9]

3 Saad Abedine, Joe Sterling and Laura Smith-Spark, 'UN: More than 1.5 Million Fled Syria, 4 Million More Displaced within Nation' (*CNN*, 17 May 2013) <https://www.cnn.com/2013/05/17/world/meast/syria-civil-war/index.html> accessed 27 September 2024.

4 Samuel Charap, 'Russia, Syria and the Doctrine of Intervention' (2013) 55(1) Survival 40, doi:10.1080/00396338.2013.767403.

5 Hamidreza Azizi and Julien Barnes-Dacey, 'Beyond Proxies: Iran's Deeper Strategy in Syria and Lebanon' (*European Council on Foreign Relations (ECFR)*, 5 June 2024) <https://ecfr.eu/publication/beyond-proxies-irans-deeper-strategy-in-syria-and-lebanon/> accessed 16 October 2024.

6 Charap (n 4) 36.

7 Harald Edinger, 'Hooked on a Feeling: Russia's Annexation of Crimea Through the Lens of Emotion' (2023) 44(4) Political Psychology 749, doi:10.1111/pops.12889.

8 Sebastiaan Van Severen, 'The Minsk Agreements: Has the Glimmer of Hope Faded?' in Fabienne Bossuyt and Peter van Elsuwege (eds), *Principled Pragmatism in Practice* (Studies in EU External Relations 19, Brill 2021) 19, doi:10.1163/9789004453715_003.

9 Ajai Gaur, Alexander Settles and Juha Väätänen, 'Do Economic Sanctions Work? Evidence from the Russia-Ukraine Conflict' (2023) 60(6) Journal of Management Studies 1401, doi:10.1111/joms.12933.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

The situation worsened in 2022 with Russia's full-scale invasion of Ukraine. The invasion has been characterised by breaches of humanitarian law, mass displacements, and civilian casualties.[10] It prompted a stronger international response, including economic sanctions and military aid to Ukraine from Western powers.[11] Nevertheless, the geopolitical influence of Russia, particularly through its control of global energy markets and its strategic military alliances, has limited the effectiveness of these international measures. The Ukraine conflict, much like Syria, exposes the ineffectiveness of international law when powerful states choose to bypass or manipulate legal norms for their strategic interests. It has raised critical questions regarding the efficacy of international institutions like the UN and the role of international law in managing aggression by powerful states. Therefore, this research addresses the question: *How has the application of international law been influenced by international relations in the Syrian and Ukrainian conflicts*?

IR heavily influences how international law is applied.[12] Geopolitics and power relations within IR have consistently shaped how it is executed. Global interests in different geopolitical dynamics always break or weaken its implementation.[13] A clear example is the use of veto power within the United Nations Security Council (UNSC), where superpowers can make it impossible to undertake resolutions. In the case of Syria, Russia and China have repeatedly used their veto power to block voting resolutions, and the opposite situation is what is facing Ukraine.

The application of the legal principles of State Sovereignty and Responsibility to Protect (R2P) depends on political consensus. While in Syria, divisions among world powers have made it impossible to enforce R2P,[14] in Ukraine, there has been international support that has protected sovereignty, and yet, Russia's power still restrains full accountability. Economic interests, coalitions, and domestic politics have further made enforcement difficult. When powerful states have conflicts of interest, legal intervention is weakened or delayed.[15] The wars in Syria and Ukraine indicate how IR can shape or constrain international law, with legal norms often being at a distance from reality.

10 Tetiana Tsiselska, 'Violation of International Humanitarian Law and Forced Deportation of Ukrainian Children by the Russian Federation during Russian-Ukrainian War' (master's thesis, University of California 2023) 4 <https://escholarship.org/uc/item/6553q3sc> accessed 7 October 2024.

11 Gaur, Settles and Väätänen (n 9).

12 Robert J Beck, 'International Law and International Relations' (*Oxford Research Encyclopedia of International Studies*, 11 January 2018) <https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-406> accessed 20 November 2024.

13 William Mallinson and Zoran Ristic, *The Threat of Geopolitics to International Relations: Obsession with the Heartland* (Cambridge Scholars Publ 2016).

14 Muditha Halliyadde, 'Syria – Another Drawback for R2P: An Analysis of R2P's Failure to Change International Law on Humanitarian Intervention' (2016) 4(2) Indiana Journal of Law and Social Equality 215.

15 Wojciech Michnik, 'Great Power Rivalry in the Middle East' (*Elcano Royal Institute*, 18 January 2021) <https://www.realinstitutoelcano.org/en/commentaries/great-power-rivalry-in-the-middle-east/> accessed 17 November 2024.

The research serves two purposes. First, it undertakes an analysis of the operation of international law in the Syrian and Ukrainian conflicts and, crucially, how international actors have created the challenges to enforcing international law. In Syria, despite clear evidence of mass atrocities, international legal mechanisms to hold the Assad regime accountable have failed. This reflects the difficulties in applying international law in situations where key global powers have vested interests. Similarly, in Ukraine, there has been a more coordinated response through sanctions and legal actions against Russia. However, the geopolitical reality of Russian influence on global politics has still constrained the full enforcement of international law.

Second, this research aims to explore the role of IR in prolonging the Assad regime in Syria and shaping responses to Russian aggression in Ukraine. In both cases, the strong external actors have structurally altered the directions these conflicts have taken. In Syria, diplomatic and military support from Russia has saved Assad from international legal repercussions.[16] The international response is more aggressive in Ukraine, where there are Western economic sanctions and military aid. Still, the limits of such actions against a State with geopolitical influence like Russia are apparent. By comparing these two cases, this research highlights the ways in which IR, particularly the actions of global powers, affect the enforcement of international law, revealing the complex interaction between legal norms and political realities in present conflict zones.

2 THEORETICAL FRAMEWORK

2.1. Legal Foundations of Humanitarian Intervention and Responsibility to Protect (R2P)

Modern international law established after the Treaty of Westphalia (1648) recognised several principles that mainly centred around the notions of sovereignty and territorial integrity.[17] As time progressed, political power became accompanied by writings made by agreements and treaties, conventions, or organisations like the United Nations, which formalised and widely expanded the scope of international law in the 20th century. In 1947, the United Nations General Assembly (UNGA) established the International Law Commission to advance the "progressive development of international law and its codification" in accordance with provisions of the UN Charter.[18] Under the UN Charter, the United Nations Security Council (UNSC) has the authority to make decisions against any

16 Charap (n 4) 37-8.

17 John Dugard, *Recognition and the United Nations* (Grotius Publ 1987) 104.

18 Charter of the United Nations (UN Charter) (24 October 1945) 1 UNTS XVI, art 2 <https://www.un.org/en/about-us/un-charter> accessed 27 September 2024.

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

state whose actions are considered a "threat to the peace, breach of the peace, or act of aggression". These decisions include military or nonmilitary measures.[19]

Humanitarian intervention is this practice that involves the use or threat of military power by one state in another's territory, often without the consent of the affected state, to put an end to gross and systematic violations of human rights. It is considered justifiable only when the state in question is "unwilling or unable to protect" its people.[20] Humanitarian intervention has become one of the most effective performances to stop extreme abuse of human rights, like genocide.[21] It is defined as "the threat or use of force by a State, group of States, or international organisation primarily for the purpose of protecting the nationals of the target State from widespread deprivations of internationally recognised human rights".[22]

Humanitarian intervention can be of two types. The first, non-forcible intervention, does not involve kinetic force and includes measures like economic sanctions, diplomatic pressures, and other peaceful efforts. For example, during the apartheid era, sanctions were imposed on South Africa to end systemic racial discrimination. The second type, forcible interventions, involves military action, often considered a last resort to protect civilians from immediate harm.[23] A notable example of forcible intervention occurred In 1999 when NATO conducted airstrikes against Serbian forces in Kosovo to protect civilians.

Indeed, humanitarian intervention is not mentioned verbatim as a legal act in international law.[24] However, it is an exemption to the "general prohibition in international law and pact of all forms of intervention in the domestic affairs of a sovereign State".[25] This exemption, nevertheless, is explained to be made specifically on the basis of its humanitarian aims.[26] Although international law protects the sovereignty of States, Article 41 of the UN Charter allows the UNSC to take any measures to stop any act that could be a "threat to the peace".[27] Article 42 of the UN Charter further permits the use of force to stop the threat if necessary.[28]

19 ibid, art 41.

20 Jack Rabin (ed), *Encyclopedia of Public Administration and Public Policy* (1st update suppl, Taylor & Francis 2005) 144.

21 Melissa Labonte, *Human Rights and Humanitarian Norms, Strategic Framing, and Intervention: Lessons for the Responsibility to Protect* (Global Institutions, Routledge 2013) 15.

22 Sean D Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Procedural Aspects of International Law Series 21, University of Pennsylvania Press 1996) 11-2.

23 Robert Kolb, 'Note on Humanitarian Intervention' (2003) 85(849) International Review of the Red Cross 119, doi:10.1017/S0035336100103557.

24 Ashley Deeks, 'The NATO Intervention in Libya – 2011' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 749, doi:10.1093/law/9780198784357.003.0056.

25 David A Reidy and Mortimer NS Sellers, *Universal Human Rights: Moral Order in a Divided World* (Rowman & Littlefield 2005) 142-3.

26 Jennifer Szende, 'Selective Humanitarian Intervention: Moral Reason and Collective Agents' (2012) 8(1) Journal of Global Ethics 63, doi:10.1080/17449626.2011.635679.

27 UN Charter (n 18) art 41.

28 ibid, art 42.

However, the doctrine of humanitarian intervention remains contentious, particularly in relation to state sovereignty. Scholars, such as *E. S. Creasy*,[29] and *T. J. Lawrence*,[30] have supported humanitarian intervention, often invoking natural law principles. They argued that states have a moral responsibility to act in matters of widespread human suffering and violations of basic rights, even if it means intervening in the affairs of another state.

In contrast, some authors, including *A. W. Heffter*,[31] and *T. Funck Brentano and A. Sorel*,[32] viewed humanitarian intervention as inconsistent with the principles of positive international law and state equality. For them, intervention undermines the sovereignty and legal equality of states[33] – principles that are foundational to the international legal system. They contend that allowing states to intervene in one another's affairs would destabilise international order.

Some scholars adopt a middle ground, recognising that while humanitarian intervention might not be "legally right," it could be "morally justifiable". This perspective frames intervention as an act of policy driven by ethics rather than strict legal principles. *E. Arntz* proposed that intervention should only occur collectively, in the name of humanity, and with the broadest possible consensus among states – excluding the offending state.[34] This approach aims to balance the need for humanitarian action with the preservation of international law's legitimacy.

Proponents like *A. Cassese*[35] and *L. Henkin*,[36] however, suggest that humanitarian intervention, when conducted under strict conditions, reflects an emergent norm in customary international law. For instance, *Bernard Kouchner* and *Mario Bettati* introduced the idea of "*devoir d'ingérence*" ("duty to intervene"),[37] emphasising the moral obligation of the global community to act when atrocities occur,[38] even in the absence of UNSC approval. These perspectives highlight the ongoing tension between the moral imperative to prevent atrocities and the legal principles of state sovereignty and non-intervention. They also underline the challenges of ensuring that humanitarian intervention is not used as a tool for political or strategic gain.

29 Edward S Creasy, *First Platform Of International Law (1876)* (Kessinger Publ 2010) 297.
30 TJ Lawrence, *Principles of Public International Law* (5th edn, DC Heath 1913).
31 August Wilhelm Heffter, *Le droit international de l'Europe* (HW Müller 1883) 113.
32 Th Funck-Brentano et Albert Sorel, *Précis Du Droit Des Gens* (E Plon et Cie 1877) 223.
33 Kolb (n 23) 119.
34 William Edward Hall, *A Treatise on International Law* (A Pearce Higgins ed, OUP 1924) 344.
35 Antonio Cassese, 'Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10(1) European Journal of International Law 23, doi:10.1093/ejil/10.1.23.
36 Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93(4) The American Journal of International Law 824, doi:10.2307/2555346.
37 Kolb (n 23) 125.
38 Mario Bettati et Bernard Kouchner, *Le Devoir d'ingérence: Peut-on les laisser mourir?* (Denoël 1987).

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

Although using force in humanitarian intervention has become a challenge in the global community, it has been a successful method in many international cases, like in 1999 when the US and NATO intervened in Kosovo and protected many Kosovar people from Serbia's attack, which created "more than a million Kosovar Albanian refugees".[39] As a consequence of these actions, the ICC indicted Serbian President Milosevic for crimes against humanity.[40]

More recently, in 2011, NATO's humanitarian intervention in Libya protected many civilians from the conflict that was caused by President Moammar al-Gadhafi, who sought to suppress protesters. This intervention by NATO successfully helped the protesters overthrow the "corrupt leader" al-Gadhafi while limiting the scope of conflict in the state.[41]

It is important to anatomise the Libyan case and compare it with the Syrian case, particularly concerning the reaction of the international community in both situations. As mentioned above, Libya's revolution was aimed at removing al-Gadhafi, who had ruled for over 40 years.[42] Rejecting the idea of leaving power and stepping down, al-Gadhafi decided to suppress the protesters using the Libyan army.[43] This response led to the deaths of many Libyan civilians, while others fled to neighbouring Tunisia and Egypt, creating a refugee crisis on Libya's borders.[44] Therefore, on 22 February 2011, when conflicts between the al-Gaddafi regime and the protesters escalated, the UNSC called on the government of the UNSC to "meet its responsibility to protect its populations".[45]

2.2. The Role of IR in the Responsibility to Protect (R2P)

The Responsibility to Protect (R2P) and humanitarian intervention are concepts championed by the international community for the prevention of crimes such as genocide. However, these concepts differ with respect to the area of intervention, the authority to intervene, and the type or structure of intervention. This practice earned its place amongst ambitious concepts of preventing atrocities, such as genocide or ethnic cleansing.[46]

R2P was adopted during the 2005 World Summit at the United Nations, positioning formally as a new doctrine with broader multilateral support.[47] R2P highlights state

39 Jon Western and Joshua S Goldstein, 'Humanitarian Intervention Comes of Age: Lessons from Somalia to Libya' (2011) 90(6) Foreign Affairs 48.

40 ibid.

41 ibid.

42 Ronald Bruce St John, 'The Ideology of Mu'ammar Al-Qadhdhafi: Theory and Practice' (1983) 15(4) International Journal of Middle East Studies 475.

43 Filiu (n 2) 85.

44 Human Rights Watch, 'Libya: Events of 2023: World Report 2024' (*Human Rights Watch*, 2024) <https://www.hrw.org/world-report/2024/country-chapters/libya> accessed 7 October 2024.

45 Michael Goodhart (ed), *Human Rights: Politics and Practice* (3rd edn, OUP 2016) 53.

46 Sara E Davies and Luke Glanville (eds), *Protecting the Displaced: Deepening the Responsibility to Protect* (Brill 2010) 2, doi:10.1163/ej.9789004184039.i-210.

47 'More than 40 Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (*United Nations: Meetings Coverage and Press Releases*, 24 July 2009) <https://press.un.org/en/2009/ga10849.doc.htm> accessed 15 November 2024.

sovereignty as a responsibility; that is, in case one state fails to protect its people from mass atrocities, the rest of the world is obligated to act.[48]

The term humanitarian intervention is usually defined as the intrusion of external forces with the objective of "preventing genocide, war crimes, crimes against humanity, and ethnic cleansing".[49] Its justification and legal grounds are less often upheld, especially since it is executed in the absence of the mandatory approval of the UNSC. The R2P doctrine addresses the criticisms of humanitarian intervention as it requires multilateral action and UNSC authorisation. For instance, on 26 February 2011, the UNSC agreed to the imposition of an arms prohibition against the whole of Libya and targeted sanctions against al-Gadhafi and his supporters in the form of an assets freeze and travel ban under Resolution 1970.[50] As al-Gaddafi's forces were about to enter Benghazi, where the revolution began, the UK, France, the US, and Lebanon requested the UNSC to authorise military action.[51] This request was based on Chapter VII of the UN charter, which allows states to take "all necessary measures to protect civilians."

The UNSC responded by authorising military action in Resolution 1973 on 17 March 2011. Subsequently, many states and organisations, like NATO, participated.[52] This humanitarian intervention was one of the successful interventions that led to the withdrawal of al-Gadhafi in record time.

The Second Gulf War (1991) is another example of the successful application of intervention under international law. In response to the invasion of Kuwait by Iraq, the UNSC authorised a coalition of states to use "all necessary means" (Resolution 678) to restore Kuwait's sovereignty, a significant post-Cold War instance of collective action taken to defend territorial integrity.[53] Similarly, the interventions in the former Yugoslavia in the 1990s demonstrate how international relations can support the enforcement of international law. NATO's military action in Kosovo (1999), for example, served the objectives of preventing "ethnic cleansing and genocide", while the establishment of the

48 B Welling Hall and Nadira Khudayberdieva, 'International Law and the Responsibility to Protect' (*Oxford Research Encyclopedia of International Studies*, 28 August 2019) <https://oxfordre.com/internationalstudies/internationalstudies/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-231> accessed 17 November 2024.

49 ibid.

50 UN Security Council resolution 1970 (2011) S/RES/1970/2011 (26 February 2011) <https://digitallibrary.un.org/record/698927> accessed 27 September 2024.

51 Giacomina De Bona, *Human Rights in Libya: The Impact of International Society Since 1969* (Routledge Studies in Middle Eastern Politics, Routledge 2012) 156.

52 Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' in Michael N Schmitt, *Essays on Law and War at the Fault Lines* (TMC Asser Press 2011) 142, doi:10.1007/978-90-6704-740-1_3.

53 UN Security Council resolution 678 (1990) [Iraq-Kuwait] S/RES/678/1990 (29 November 1990) <https://www.refworld.org/legal/resolution/unsc/1990/en/8997> accessed 27 September 2024.

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

International Criminal Tribunal for the former Yugoslavia (ICTY) advanced accountability for "crimes against humanity".[54]

However, it is argued that R2P operates within the same limitations as humanitarian intervention, as it relies heavily on UNSC consensus. The veto power of the five permanent members (China, France, Russia, the UK, and the US) often blocks decisive action, as seen in Syria.[55]

The debate surrounding these doctrines has centred on the tension between the poles of legality and legitimacy. Legality calls for strict observation of international law,[56] specifically the UNSC authorisation under Chapter VII for military interventions. Yet, geopolitical deadlocks in the UNSC, however, prevent many of these from becoming operationally legal. Legitimacy is anchored on moral imperatives and principles of humanity, even when a procedure bypasses the requirements of law.[57] For example, NATO's intervention in Kosovo (1999) lacked explicit UNSC authorisation but was widely justified as a legitimate response to prevent ethnic cleansing. In Libya (2011), the UNSC authorised military intervention under R2P to protect civilians. However, the mission eventually expanded into regime change, raising questions about its legitimacy and adherence to its original mandate.

2.3. The Role of International Relations in Shaping Legal Doctrines

International relations has profoundly affected how humanitarian intervention and R2P evolve and apply. When geopolitical interests align with humanitarian goals, such as in Libya, R2P can be executed effectively. In this case, the legitimised NATO-led military intervention successfully prevented large-scale massacres of civilians. Yet, the intervention has been criticised for exceeding its mandate,[58] highlighting the role of IR in defining both scope and perception.

In contrast, the Syrian conflict manifests the failures of these doctrines of IR. Despite the widespread recognition of atrocities, UNSC resolutions have been blocked by Russia and China, revealing their strategic interest in standing by Bashar al-Assad's regime. This political deadlock reveals the failure of R2P in the face of geopolitical rivalry.[59] On the other hand, the influence of major powers' political will has exposed the limitations of international law.

IR has significantly shaped the practice of humanitarian intervention and the adoption of R2P. NATO's intervention in Kosovo (1999), carried out without the UNSC's approval, spurred calls for a more multilateral approach, culminating in the development of R2P. However, the

54 Henkin (n 36).
55 Halliyadde (n 14).
56 Kolb (n 23) 134.
57 ibid 132.
58 Deeks (n 24).
59 Halliyadde (n 14).

selective use of R2P – such as in Libya but not in Syria – has attracted allegations of double standards and even raised concerns over its validity as a universal norm.

The interventions in Somalia (1992) and East Timor (1999) exemplify how IR can support collective humanitarian action under legal frameworks.[60] UNSC-authorized operations in Somalia tackled a humanitarian crisis compounded by the collapse of the State, while in East Timor, multilateral intervention restored stability following a referendum on independence. These cases starkly contrast with the paralysis evident in Syria and Ukraine, where the dynamics of geopolitical rivalry have obstructed effective action.

3 INTERNATIONAL RELATIONS AND THE SYRIAN CONFLICT

Going back to the issue of Syria, it would be useful to explain the reasons for the conflict. The conflict can be traced back to the broader wave of unrest across the Middle East, known as the Arab Spring in 2010. The revolution in Syria began on 25 March 2011 in Daraa, a small city south of Damascus.[61] The protesters initially called for President Bashar al-Assad to step down. However, al-Assad's response was to suppress the revolution using military force, the exact same reaction as Libyan leader al-Gaddafi.[62]

As the conflict escalated, peaceful protests turned into violent clashes between the protesters and al-Assad's army, resulting in many deaths.[63] Al-Assad began to breach many international treaties and violate widespread human rights, including the genocide of the Syrian people, a breach of Article III of the Genocide Convention. This treaty is intended "to prevent and punish genocide."[64] In addition, the use of chemical weapons by al-Assad's regime, notably between 2014 and 2018, significantly breached the Chemical Weapons Convention (CWC).[65] During this period, around 106 chemical attacks were carried out against Syrian people,[66] leading to many civilians fleeing to other neighbouring countries, like Jordan and Turkey.

The reactions of al-Gadhafi in Libya and al-Assad in Syria to the protesters that arose in the wake of the Arab Spring share striking similarities. The only difference between the two revolutions lies in the international response.

60 Kolb (n 23) 125.

61 Benjamin MacQueen, *An Introduction to Middle East Politics* (2nd edn, SAGE Publ Ltd 2018) 388.

62 Filiu (n 2) 85.

63 Robert J Lieber, *Power and Willpower in the American Future: Why the United States Is Not Destined to Decline* (CUP 2012) 66.

64 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) UNTS 78/277, art 3.

65 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (adopted 3 September 1992) UNTS 1974/45.

66 Nawal al-Maghafi, 'How Chemical Weapons Have Helped Bring Assad Close to Victory' (*BBC*, 15 October 2018) <https://www.bbc.com/news/world-middle-east-45586903> accessed 4 October 2024.

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

Libyan protesters were protected by the UN and other international organisations like NATO under Chapter VII of the UN Charter, which authorises states to take "all necessary measures to protect civilians." This intervention was further justified under the international principle of the R2P. In contrast, Syrian protesters have not been afforded the same level of protection.[67] Despite widespread reports of the atrocities committed by al-Assad's regime, there has been no similar intervention by the international community to protect Syrian protesters. This lack of protection has contributed to the transformation of the Syrian revolution into a sectarian war between Sunnis (the majority of the protesters) and Shiites (most of al-Assad's army).[68]

Dealing with cases at the international level is not only based on international law; international relations also play a key role in shaping how states respond.[69] States' attitudes in matters like humanitarian intervention can be understood through the lens of theoretical traditions of international relations, which explain why states act differently than others.[70] IR theories like realism and liberalism offer distinct principles for dealing with international issues.

The realist tradition, which emerged in Europe in the middle of the 19th century, reflects the European realpolitik of that time.[71] It is thought to be the richest theory due to its six principles that include many areas, like morality, power, politics, interests, human nature, and objective laws.[72] However, realism is primarily based on self-interest, meaning states applying this theory are less likely to intervene in any international issues if there is no self-interest.[73]

In contrast, the liberal tradition, which began in the 17th and 18th centuries, is seen as the most important theory in Western states, centred around the protection of human rights; thus, states applying liberal tradition are willing to intervene in any of the international issues if there is any major violation of human rights.[74] NATO justified its intervention in Libya by citing the protection of human rights, but it remains unclear why a similar approach was not taken in Syria. One possible explanation lies in the complicity of IR – the NATO States do not want to damage their relations with states like Russia or China, who support al-Assad's regime.

67 Schmitt (n 52) 214.

68 Radwan Ziadeh and others, 'Crisis in Syria: What Are the US Options?' (2012) 19(3) Middle East Policy 12, doi:10.1111/j.1475-4967.2012.00544.x.

69 AJR Groom, Andre Barrinha and William C Olson, *International Relations Then and Now: Origins and Trends in Interpretation* (2nd edn, Routledge 2019) 63-4, doi:10.4324/9780429061066.

70 Mervyn Frost, 'The Role of Normative Theory in IR' (1994) 23(1) Millennium 115, doi:10.1177/03058298940230010701.

71 Heather M Campbell (ed), *Advances in Democracy: From the French Revolution to the Present-Day EU* (Britannica Educational Pub 2011) 74.

72 Knud Erik Jørgensen, *International Relations Theory: A New Introduction* (Palgrave Macmillan 2010) 87.

73 Mark R Amstutz, *International Ethics: Concepts, Theories, and Cases in Global Politics* (5th edn, Rowman & Littlefield 2018) 48.

74 L Ali Khan, *A Theory of Universal Democracy: Beyond the End of History* (Martinus Nijhoff Publ 2003) 16.

To understand how states choose to interact with international legal institutions like the International Court of Justice (ICJ) and the International Criminal Court (ICC), IR theories offer valuable insights. From a realist perspective, states are likely to engage with these institutions only when their strategic interests are secured,[75] such as reinforcing territorial claims or countering adversaries. For example, Russia's actions in Syria demonstrate realist priorities, supporting Assad to maintain regional influence while actively avoiding the ICC or the ICJ involvement that could undermine these goals.

In the case of Syria, IR dynamics are evident, with key allies of the al-Assad regime – China, Russia, and Iran – playing pivotal roles in shielding it from international accountability. Russia and China, as permanent members of the UNSC with veto power, are the strongest allies of al-Assad and have the ability "to prevent action that they viewed as being antithetical to their national interest".[76] Despite strong evidence of violations of human rights in Syria presented in the UNSC, China and Russia used their right of veto in October 2011 to block a resolution that was moved by Western States. This resolution called for a Syrian-led political process and condemned the "grave and systematic human rights violations" in Syria'.[77]

In February 2013, China and Russia used the veto right against another resolution in the UNSC to "end violence in Syria and called for a peaceful resolution".[78] Iran, on the other hand, has supported al-Assad by sending weapons to his army.[79] The relationship between Syria and Iran goes back many years and is built on shared political interests, especially concerning Middle Eastern issues, such as in the Palestinian case in which they support Hezbollah and Hamas against Israel.[80]

China and Russia, furthermore, have strong political and economic motivations for supporting al-Assad and opposing any international humanitarian intervention in Syria. For China, economic interests play a significant role in supporting the al-Assad regime. It is important to mention that when al-Assad visited China in 2014, he became the first president of Syria to visit China since the establishment of their diplomatic ties in 1956.[81] In addition, Syria was the "largest trading partner in 2011, with Syrian exports to that State

75 Emily Tripp, 'Realism: The Domination of Security Studies' (*E-International Relations*, 14 June 2013) <http://www.e-ir.info/2013/06/14/realism-the-domination-of-security-studies/> accessed 16 November 2024.

76 Jussi M Hanhimaki, *The United Nations: A Very Short Introduction* (2nd edn, OUP 2008) 3, doi:10.1093/actrade/9780190222703.001.0001.

77 Roy Allison, *Russia, the West, and Military Intervention* (OUP 2013) 200, doi:10.1093/acprof:oso/9780199590636.001.0001.

78 Muhamad S Olimat, *China and the Middle East: From Silk Road to Arab Spring* (Routledge 2012) 108.

79 Patrick E Thomas, *Cobra Strike* (iUniverse 2012) 68.

80 Adam C Seitz and Anthony H Cordesman, *Iranian Weapons of Mass Destruction: The Birth of a Regional Nuclear Arms Race?* (Praeger Security International, Praeger 2009) 84-7.

81 'Syria's Assad in China, Seeks Exit from Diplomatic Isolation' (*Voice of America (VOA)*, 21 September 2023) <https://www.voanews.com/a/syrian-president-in-china-on-first-visit-since-beginning-of-war-in-syria-/7277603.html> accessed 7 October 2024.

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

totalling more than $2.4 billion".[82] China is also a "major participant in the oil industry of Syria, which until the onset of fighting was in an uptrend".[83] Having faced major economic losses in states affected by the revolutions, China is taking significant steps to protect its interests in Syria.[84] Syria not only represents a key economic partner but is among China's strongest allies in the Middle East.[85]

Russia's relationship with Syria is even deeper, both economically and politically. Syria is one of Russia's most important clients for arms,[86] importing about $4 billion worth of weapons per year. Russian companies have also invested heavily in Syira's infrastructure and energy sectors, with investments worth more than $18 billion as of 2009. After losing $4 billion in Libyan arms and other contracts, Russia is not willing to lose the same amount in Syria.[87] Politically, Syria is Russia's stronger ally in the Middle East,[88] and Russia seeks to protect this alliance to maintain its influence in the region through Syria.[89] This reflects a clear application of realist thinking.

Both Russia and China are driven by strategic interests, using their veto power to protect the Assad regime, ensuring their influence in the Middle East remains intact. This behaviour contrasts with liberalism, which advocates for intervention to uphold human rights. In this case, the failure to act highlights the dominance of realpolitik. For Iran, its support for Al-Assad serves as part of a broader regional strategy aimed at countering Western and Israeli influence. The strategic alliances between these states emphasise how realist principles can overpower humanitarian concerns and international legal standards. It demonstrates the politicisation of international law, where legal decisions are often subordinated to geopolitical concerns.

4 AGGRESSION AGAINST UKRAINE FROM AN IR PERSPECTIVE

From the current conflict in Ukraine, two instances carry critical importance. The first is Russia's annexation of Crimea in 2014, and the second is the full-scale invasion of Ukraine in 2022.

In 2014, following the "Euromaidan protests and the ousting of pro-Russian president" in Ukraine, Russia moved swiftly to annex Crimea, citing the protection of ethnic Russians as

82 Ted Galen Carpenter, 'Tangled Web: The Syrian Civil War and Its Implications' (2013) 24(1) Mediterranean Quarterly 7, doi:10.1215/10474552-2018988.
83 ibid.
84 Olimat (n 78) 193.
85 Yan Xuetong, *Ancient Chinese Thought, Modern Chinese Power* (Daniel A Bell and Sun Zhe eds, Princeton UP 2013) 140.
86 John OB Agbaje, *Prophetic Force: A Demystification of Eschatology* (Authorhouse 2012) 334.
87 ibid.
88 Talal Nizameddin, *Russia and the Middle East: Towards a New Foreign Policy* (Hurst 1999) 167.
89 Jimmy Carter, *The Blood of Abraham: Insights into the Middle East* (University of Arkansas Press 2007) 88, doi:10.2307/j.ctvb1hr61.

a justification.[90] Crimea voted in a contentious referendum to become a part of Russia. This referendum paved the way for Russia to formalise its hold over the region.[91]

The situation escalated dramatically in 2022 when Russia carried out attacks across Ukraine. This invasion has been seen as a serious violation of international law, resulting in the "largest conflict in Europe since World War II".[92] Beyond the immense loss of human lives and displacement of millions of people, the invasion undermines fundamental principles of state sovereignty and territorial integrity, indicating a "clear violation of international law".[93] Specifically, Russia's annexation of Crimea violates Article 2(4) of the UN Charter, which "prohibits the use of force against the territorial integrity or political independence of any State".[94]

Similarly, the recent full-scale invasion by Russia further violates the Geneva Conventions and international humanitarian law as it keeps on targeting civilians and vital infrastructure. No matter what self-described designations or claims of sovereignty are declared by local authorities of the self-named "Luhansk People's Republic (LNR)" or "Donetsk People's Republic (DNR)," Russian forces in Ukraine constitute an occupying force under international law.[95] Despite Russia's recognition of these areas, the Fourth Geneva Convention (1949) still applies, outlining the obligations of occupying states, especially with regard to safeguarding civilians and civilian infrastructure. Russia's recognition of these areas does not absolve it of its legal responsibilities under international law.

According to the occupation principle, Russia has a duty to ensure the safety and well-being of the civilian population under its control, a responsibility it has consistently failed to uphold. These violations not only threaten Ukraine's sovereignty but also undermine the fundamental principles of international legal standards designed to safeguard civilians in war areas.[96] Besides this human rights violation, Russia is also accused of deliberate misuse of legal systems and frameworks by state or non-state actors to achieve political, strategic, or military objectives. Such actions exploit legal processes or instruments to give a veneer

90 Eleanor Knott, 'Existential Nationalism: Russia's War against Ukraine' (2023) 29(1) Nations and Nationalism 46, doi:10.1111/nana.12878.

91 'Crimea Referendum: Voters "Back Russia Union"' (*BBC*, 16 March 2014) <https://www.bbc.com/news/world-europe-26606097> accessed 5 October 2024.

92 Scott Neuman and Alyson Hurt, 'The Ripple Effects of Russia's War in Ukraine Continue to Change the World' (*NPR*, 22 February 2023) <https://www.npr.org/2023/02/22/1157106172/ukraine-russia-war-refugees-food-prices> accessed 5 October 2024.

93 Edinger (n 7).

94 UN Charter (n 18) art 2(4).

95 'Russia, Ukraine & International Law: On Occupation, Armed Conflict and Human Rights' (*Human Rights Watch*, 23 February 2022) <https://www.hrw.org/news/2022/02/23/russia-ukraine-international-law-occupation-armed-conflict-and-human-rights> accessed 15 September 2024.

96 Hryhorii Berchenko, Tetiana Slinko and Oleh Horai, 'Unamendable Provisions of the Constitution and the Territorial Integrity of Ukraine' (2022) 5(Spec) Access to Justice in Eastern Europe 113, doi:10.33327/AJEE-18-5.4-n000447.

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

of legitimacy to actions that are otherwise coercive, aggressive, or unlawful, further eroding the rule of law, justice and human rights.[97]

Over 28,000 people have already lost their lives, and "about 1.5 million have been displaced" as a result of the armed war in eastern Ukraine.[98] Although it is prohibited for an occupying force to target civilians or civilian infrastructure under the Geneva Conventions, the extensive damage to houses, hospitals, and schools on both sides of the conflict line points to blatant violations.[99] The prohibition of attacking civilians, injured individuals, and non-combatants is further reinforced by the Hague Conventions (1907)[100] and Protocol I of the Geneva Conventions,[101] which further regulate methods of warfare. These acts have led to widespread condemnation and legal actions in international courts, although Russia's influence and UNSC veto power have hindered more direct intervention.

The international legal response to the actions of Russia in Ukraine has involved the ICJ and the ICC. The ICJ has addressed the situation following the application of Ukraine accusing Russia of falsely justifying its invasion under the Genocide Convention. In March 2022, the ICJ ordered, with a 13-2 decision, "that Russia must suspend its military operations in Ukraine".[102] Despite this, Russia has ignored the judgment. The ICC, meanwhile, has opened investigations into potential "war crimes and crimes against humanity" committed during the invasion, including indiscriminate attacks on civilian populations and infrastructure and the forced deportation of Ukrainian civilians, particularly children.[103] However, as Russia is not a signatory[104] to the Rome Statute, which governs the ICC, the jurisdiction and ability of the court to enforce its rulings are limited.[105] These limitations outline the challenges faced by international legal institutions in their relation to powerful, non-cooperative states like Russia.

97 Brad Fisher, 'Russia's Invasion of Ukraine and the Doctrine of Malign Legal Operations' (2022) 5(Spec) Access to Justice in Eastern Europe 27, doi:10.33327/AJEE-18-5.4-a000456.

98 Mohamad Almohawes, 'The Obstacles to the Right to a Fair Trial under the International Law: A Case Study of Al-Anfal and Srebrenica Genocide Trials' (2024) 7(4) Access to Justice in Eastern Europe 71, doi:10.33327/AJEE-18-7.4-a000105.

99 Fisher (n 97).

100 Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907) CTS 205/277.

101 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) UNTS 1125/3.

102 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Provisional Measures* (ICJ, 16 March 2022) para 82 <https://www.icj-cij.org/case/182> accessed 13 September 2024.

103 Ayesha Malik, 'The Russian Invasion of Ukraine and International Law' (*Research Society of International Law (RSIL)*, 28 March 2022) <https://rsilpak.org/2022/the-russian-invasion-of-ukraine-and-international-law/> accessed 13 September 2024.

104 ibid.

105 Rome Statute of the International Criminal Court (adopted 17 July 1998) UNTS 2187/90.

Global responses have come in the form of economic sanctions, also by diplomatic means, and military assistance. Western powers, including the US, the EU, and NATO members, have issued a round of sanctions targeting Russia's financial system and energy sector. These were set to weaken the economy of Russia and reduce its ability to sustain its war effort. Nonetheless, Russia's allies, such as China, have played a negative role by continuing trade with Russia despite Western sanctions. This has even lessened the effectiveness of the objectives of these sanctions.[106] To illustrate, China and other states maintained trade relations despite the sanctions placed on Western financial institutions like the SWIFT system, which was imposed to choke the Russian economy. They have, therefore, weakened the effect of the sanctions as far as the Russian economy is concerned.[107]

Diplomatic efforts have sought to isolate Russia on the international stage. There have been several rounds of peace talks, though they have failed due to Russia's unwillingness to compromise on its demands.[108] Meanwhile, military aid to Ukraine has been significant, with Western powers providing advanced weapons systems and financial assistance. This aid has been crucial in helping Ukraine defend against Russian aggression and reclaim some territories occupied by Russian forces.

The Ukrainian conflict has intensified existing geopolitical tensions between Western alliances, principally NATO and the EU, and Russia. For NATO, the conflict represents a direct challenge to European security and the stability of its eastern borders.[109] Russia, however, views Ukraine as within its sphere of influence, seeing it as a buffer against the expansion of Russia. Its geopolitical interests in Ukraine stem from historical, cultural, and strategic concerns.[110] Russia aims to prevent Ukraine from joining Western alliances, maintaining control over energy resources and transit routes, and asserting dominance in Eastern Europe.[111] This struggle for control, shaped by a complex interplay of geopolitical interests, has contributed to the conflict lasting longer.

From an IR viewpoint, the conflict in Ukraine highlights the clash between the realist and liberal traditions. Both theories underpin the strategies of the major global actors involved.

106 'What Are the Sanctions on Russia and Have They Affected Its Economy?' (*BBC*, 23 February 2024) <https://www.bbc.com/news/world-europe-60125659> accessed 17 November 2024.

107 Bonnie S Glaser and Yanmei Xie, 'China-Russia Trade Relations and the Limits of Western Sanctions' (*German Marshall Fund of the United States (GMF)*, 11 June 2024) <https://www.gmfus.org/news/china-russia-trade-relations-and-limits-western-sanctions> accessed 16 October 2024.

108 Samuel Charap and Sergey Radchenko, 'The Talks That Could Have Ended the War in Ukraine' (*Foreign Affairs*, 16 April 2024) <https://www.foreignaffairs.com/ukraine/talks-could-have-ended-war-ukraine> accessed 15 September 2024.

109 'Deterrence and Defence' (*NATO*, 1 July 2024) <https://www.nato.int/cps/en/natohq/topics_133127.htm> accessed 17 November 2024.

110 Bong-koo Kang, 'Understanding the Ukrainian Conflict from the Perspective of Post-Soviet Decolonization' (2020) 9(2) Region 1.

111 Denys Yurchenko, 'Russian Strategic Culture and the War in Ukraine' (*Foreign Policy Research Institute*, 2 July 2024) <https://www.fpri.org/article/2024/07/russian-strategic-culture-and-the-war-in-ukraine/> accessed 15 September 2024.

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

The realist perspective, emphasising state self-interest, power politics, and security concerns, can be clearly seen in the actions of Russia, which views Ukraine as a buffer zone against NATO. In this context, the invasion of Ukraine can be seen as a move to prevent the encroachment of Western military alliances into its sphere of influence.[112] The geopolitical positioning of Ukraine is vital to Russia's security doctrine. This aligns with realist ideas of balancing power to maintain regional security and dominance. This approach also supports Russia's action in avoiding the ICC and ICJ.

Russia has a variety of strategic objectives in Ukraine. One of the key factors is the role of Ukraine as a transit state for Russian gas supplies to Europe. Control over Ukraine allows Russia to exert influence over European energy markets, which has historically been a cornerstone of its foreign policy. Ukraine also holds significant natural resources, including coal, iron ore, and fertile agricultural land, which are economically important to Russia.[113]

Russia's interest in Ukraine, from a geopolitical viewpoint, is closely tied to maintaining its dominance over energy resources and transit routes. Ukraine serves as a critical transit state for Russia's gas exports to Europe, making it an integral part of Russia's economic and strategic interests.[114] This reliance on energy transit aligns closely with a realist perspective, where state behaviour is driven by material interest and achieving necessary resources. The strategic interest of Russia in Ukraine as a transit state for its gas exports to Europe is the best proof of how power and economic leverage feature its foreign policy. From a realist perspective, Russia's focus on exploiting economic benefits, even in the face of harsh sanctions, underscores the importance of regional dominance in securing national interests.

Conversely, the liberal tradition gives a clear insight into the reactions of the Western powers, including the US, NATO, and the EU. The liberal worldview that supports international institutions, human rights, and collaboration serves as the foundation for the coordinated Western reaction to Russian aggression. From this angle, sanctions, military aid, and diplomatic measures to support Ukraine align with the liberal view that intervention is necessary by the international community when there is a violation of human rights.[115] In short, these actions of the West thus display their commitment to liberal principles: upholding international law and promoting democratic governance in Ukraine.

112 Felix Rösch, 'Realism, the War in the Ukraine, and the Limits of Diplomacy' (2022) 44(2) Analyse & Kritik 201, doi:10.1515/auk-2022-2030.

113 Elias Götz and Jørgen Staun, 'Why Russia Attacked Ukraine: Strategic Culture and Radicalized Narratives' (2022) 43(3) Contemporary Security Policy 487, doi:10.1080/13523260.2022.2082633.

114 Morena Skalamera, 'The Geopolitics of Energy after the Invasion of Ukraine' (2023) 46(1) The Washington Quarterly 13-6, doi:10.1080/0163660X.2023.2190632.

115 David L Sloss and Laura A Dickinson, 'The Russia-Ukraine War and the Seeds of a New Liberal Plurilateral Order' (2022) 116(4) American Journal of International Law 798.

Moreover, Ukraine's legal actions in the ICJ and collaboration with ICC investigations reflect the liberal commitment to defending sovereignty and dealing with war crimes, which are supported by liberal Western allies. This is not the case for Syria, where the fractured governance coupled with realist calculations through external factors such as the UNSC vetoes undertaken by Russia have prevented legal accountability.

It is not only an issue of the territorial integrity of Ukraine *per se*, but also a continuous struggle to impose liberal values such as self-determination and international cooperation on the part of the US and its allies.[116] The US has led in providing military aid, committing billions of dollars worth of advanced weapons. This is aside from the major diplomatic role played by the Biden administration in gathering global support for Ukraine and the aligning of Western allies in their stance against Russia.[117]. The liberal tradition speaks for human rights. Military aid and sanctions will be delivered to protect a sovereign state against external aggression.

Apart from imposing sanctions, the EU has provided economic aid towards the stabilisation of the Ukrainian economy, which has taken a heavy toll in this war. Additionally, EU States have opened their borders to millions of Ukrainian refugees by offering asylum and humanitarian aid.[118] NATO, though not directly involved militarily, has expanded its presence in Eastern Europe and provided Ukraine with critical military equipment, training, and intelligence support. Collectively, these efforts have significantly enhanced Ukraine's ability to resist Russian aggression. These kinds of assistance all align with the liberal commitment to collective security and multilateralism, key tenets of the liberal worldview.

Furthermore, the involvement of NATO, even indirectly, can be understood through the liberal lens of collective security and the defence of a rules-based international order. Such actions, aimed at deterring further Russian aggression, reflect the alliance's commitment to maintaining peace and stability in Europe through cooperative measures. Liberalism also explains the economic sanctions imposed by the EU,[119] which are intended not only to weaken the war machine of Russia but also to encourage diplomatic solutions through international institutions.

116 Kang (n 110) 20.

117 Ashley Parker, Tyler Pager and Marianna Sotomayor, 'Biden at War: Inside a Deliberate yet Impulsive Ukraine Strategy', *Washington Post* (Washington, 7 April 2022) <https://www.washingtonpost.com/politics/2022/04/07/biden-war-ukraine/> accessed 5 October 2024.

118 Elżbieta Ociepa-Kicińska and Małgorzata Gorzałczyńska-Koczkodaj, 'Forms of Aid Provided to Refugees of the 2022 Russia–Ukraine War: The Case of Poland' (2022) 19(12) International Journal of Environmental Research and Public Health 7085, doi:10.3390/ijerph19127085.

119 Christine Nissen and Jakob Dreyer, 'From Optimist to Sceptical Liberalism: Reforging EU Foreign Policy amid Crises' (2024) 100(2) International Affairs 675, doi:10.1093/ia/iiae013.

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

In both the Syrian and Ukrainian conflicts, IR has significantly influenced the enforcement of international law.

5.1. Enhancing the Effectiveness of International Law

In some cases, IR can strengthen international law enforcement. The case of Ukraine is a clear example where the recognition of a legitimate government and collective international action have allowed relatively strong legal and diplomatic steps. The democratic government in Ukraine has exercised its sovereignty under international law to require military assistance, sanctions and legal action against Russia. This was coupled with Western alliances, which provided support in the response towards territorial integrity and sovereignty as international law.

Similarly, in Libya, international consensus led to decisive action under the R2P framework. The UNSC authorised military intervention. This marked one of the few instances where the geopolitical alignment of international powers effectively enforced international law. Despite the controversy that surrounded it, the intervention by NATO proved that when the interests of great powers align, international legal mechanisms can be implemented to prevent mass atrocities.

5.2. Undermining the Effectiveness of International Law

Despite clear legal frameworks aimed at preventing human rights abuses and protecting state sovereignty, the geopolitical interests of powerful states have hindered the consistent application of these laws.[120]

When analysing the conflicts in Syria and Ukraine, both reveal how powerful external actors – Russia being a dominant player in both – have undermined the legal mechanisms designed to hold perpetrators accountable. In fact, both conflicts are characterised by flagrant international law violations. Moreover, when looking at other issues in the world, like the war in Libya, the powerful actor involved was NATO, which intervened under the framework of R2P. In each of the cases, geopolitical interests decided the response.

The strategic investments Russia made in Syria and its military presence at the Tartus naval base speak to its interest in maintaining influence and power in the region. In Ukraine, geopolitical interests for Russia involve holding onto Crimea and preventing Ukraine from joining NATO and the EU. Libya, on the other hand, presents its own set of geopolitical

120 Anne Orford, 'Regional Orders, Geopolitics, and the Future of International Law' (2021) 74(1) Current Legal Problems 149, doi:10.1093/clp/cuab005.

stakes for Western powers, who sought to stabilise the region, prevent humanitarian catastrophes, and protect their economic and strategic interests, especially in terms of oil.[121]

Upon further analysis of the cases of Syria and Ukraine, the paralysis of international institutions can be seen. For instance, in Syria, Russia and China, as veto-wielding members, have rendered the implementation of international law ineffective. This is true of the situation in Ukraine, where the UNSC was equally restricted from imposing binding resolutions on Russia due to its permanent status and veto power. This leaves a precedent to explain the structural shortcomings in the UNSC, whereby the geopolitical rivalry of the five permanent members tends to bar the enforcement of international law itself, and it is based on a coalition-based action. Moreover, both conflicts also highlight the failure to prevent civilian suffering despite the existence of robust international legal frameworks. In each case, the protection afforded by international humanitarian law has proven insufficient in the face of geopolitical interests, illustrating a common weakness in enforcement mechanisms.

Besides some notable similarities between the case of Syria and Ukraine, the differences between them provide insight into how to understand how IR undermines the role of international law. The divergences in international intervention that took place during those two conflicts are fundamental to understanding IR's varying impact on the enforcement of legal norms. Ukraine has witnessed a more robust international response, though it, too, is shaped by geopolitics and the nature of government. As a sovereign State with a democratic form of government, Ukraine has been able to exercise the rights provided under international law to demand cooperation in repelling aggression. In response, it has been provided with military aid, sanctions against Russia, and legal proceedings in international forums such as the ICJ. Such clear legitimacy has facilitated smooth coordination on the international stage, especially among Western allies in NATO and the EU.

On the other hand, while the international community has documented many violations in Syria, the response has been characterised by mere diplomatic deadlock with no intervention at all. From a geopolitical perspective, the Russian interest is to keep its presence in Syria to protect Assad's government and its foothold in the Middle East. Russia and China have repeatedly used their veto in the UNSC. Through this, they have successfully blocked the resolutions that would have likely led to more severe measures by the international community, including humanitarian intervention or accountability against Bashar al-Assad. This, therefore, demonstrates how IR, particularly in the strategic alliances of the powerful states, can render law enforcement ineffective.

In addition, the absence of a global consensus on the legitimacy of the Syrian regime[122] has further delayed decisive international action. Many states consider Assad's government

121 Deeks (n 24).

122 Zaki Mehchy, 'Back in Control, Syria's Regime Tries to Build Its Legitimacy' (*Chatham House*, 14 October 2020) <https://www.chathamhouse.org/2018/12/back-control-syrias-regime-tries-build-its-legitimacy> accessed 17 November 2024.

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as the legitimate authority, which limits the effectiveness of international law and the legal basis for humanitarian intervention. Besides that, the fragmented opposition in Syria has been another key obstacle to delaying actions. Lacking a united opposition makes the ruling party manage affairs on its own,[123] blocking international intervention to advance a viable plan for government, which has discouraged intervention on an international level. In contrast, Ukraine benefits from a clear and recognised government that has formally requested assistance, unlike the fractured political dynamics in Syria, which hindered international actors from taking action.

The geopolitical stakes in each conflict also differ, influencing the nature and intensity of international responses. Western alliances of NATO and the EU have provided military, economic, and legal support to Ukraine, driven by concerns over European security and the defence of international legal principles. Russia's actions – such as the annexation of Crimea and the occupation of sovereign Ukrainian territory – have come to be interpreted as a challenge to the foundational principles of territorial integrity and State sovereignty. Such violations have galvanised Western states to respond decisively, not only to protect Ukraine but also to deter similar actions by other states. Contrarily, despite the Syrian conflict being a humanitarian crisis, it has been largely framed as a regional issue with minimal implications for global stability. This divergence in geopolitical priorities has determined the level of international law intervention, with Ukraine's strategic significance drawing more attention and response from the international community than the situation in Syria.

Another significant factor that has accelerated support is the economic interdependence between Ukraine and its Western allies. This conflict is of utmost interest to Western states, particularly in relation to sanctions, energy policy, and the role of Ukraine in global energy markets. In contrast to Syria, where the stakes are lower and essentially regional, international responses have been more fragmented. This disparity in geopolitical and economic significance has contributed to the heightened priority given to resolving the Ukraine conflict by Western states.

Additionally, while both conflicts share the point of showing the inefficiency of international law, they differ in the legal challenges they present. In Syria, it is the violation of humanitarian law that comes into focus, but its enforcement is highly limited because of the lack of consensus in jurisdiction. In Ukraine, legal challenges are centred on sovereignty and territorial integrity. Notably, the ICJ and the European Court of Human Rights have taken an active role in supporting Ukraine's case.[124] This difference underscores how and when responses to international law violations differ from one case to another.

123 Bassam Haddad and Ella Wind, 'The Fragmented State of the Syrian Opposition' in Mehran Kamrava (ed), *Beyond the Arab Spring: The Evolving Ruling Bargain in the Middle East* (OUP 2014) 397, doi:10.1093/acprof:oso/9780199384419.003.0015.

124 Diane Desierto, 'Human Rights Reparations and Fact-Finding Quandaries in the 2024 ICJ Judgments in Ukraine v Russian Federation' (*EJIL: Talk!*, 11 March 2024) <https://www.ejiltalk.org/human-rights-reparations-and-fact-finding-quandaries-in-the-2024-icj-judgments-in-ukraine-v-russian-federation/> accessed 17 November 2024.

It is also important to note that a closer comparison between Syria and Ukraine brings up not just the differences in the application of international law but also the deficiencies of any international legal framework when challenged by a powerful state. Events in Syria, nonetheless, have shown how geopolitical interests have hindered the application of international law. Al-Assad, with strategic support from Russia, has held on with impunity from either legal action or military intervention. This depicts that international law, *per se*, cannot often work as its enforcement depends upon the will of powerful states. The reaction in Ukraine has been more coordinated, with an emphasis on adherence to the principles of international law. Yet, the inadequacies of this reaction also tend to expose the broader challenges that international law faces in conflicts involving major powers. From sanctions to legal processes, in fact, the geopolitical leveraging by Russia through its position in energy markets and military capability has kept international law significantly ineffective in stopping the aggression. In this situation, the international legal framework applied still cannot fully mitigate or prevent state-driven violations when those violations are backed by significant political and economic power.

These two cases represent a broader implication of this research: the effectiveness of international law on any single state depends entirely on the power and political will of the other states involved. In conflicts like Syria or Ukraine, where clearly defined strategic interests are featured on the part of global powers, the legal norms are often compromised to accommodate the interests. The erosion of international legal frameworks, as seen in the humanitarian crisis in Syria and the territorial breach in Ukraine, underscores the sensitivity of the international legal system when powerful states can obstruct legal processes. This points to the existence of basic flaws in the prevailing international legal architecture, where geopolitical interest often prevails over legal obligation.

The comparison between Syria and Ukraine does, however, address the main research question: international law remains subservient to IR when geopolitical stakes are high. Powerful states have used their influence either to block enforcement mechanisms, as in Syria or to mitigate the consequences of legal actions, as in Ukraine. While international law is supposed to be impartial and universal, it is inconsistently applied because it depends upon the unity of the international community, which is usually fractured by the competing interests of major global powers.

6 CONCLUSIONS

From the foregoing discussion, the research reveals that even as international law attempts to provide a framework through which gross human rights violations and acts of aggression should be addressed, its application is nonetheless severely constrained by political dynamics in IR. The case studies of Syria and Ukraine illustrate that powerful states can undermine the enforcement of international law when their strategic interests are at stake. This thereby weakens the overall efficacy of international legal mechanisms.

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The issue of Syria has become one of the most complex and unresolved issues in the world, with the international community struggling to take significant action to stop the bloodshed. In this case, IR played a pivotal role in preventing an international resolution at the UNSC, which called for a Syrian-led political process that "condemned graves and systematic human rights violations" in Syria.[125] China and Russia were the two states that vetoed the resolution primarily to protect their economic and political interests.[126]

Similarly, in the current conflict in Ukraine, international law has been challenged by Russia's violation of Ukrainian sovereignty, yet the response has been different from that in Syria. While Western powers, through NATO and the EU, have taken retaliatory actions, Russia's geopolitical influence and control over energy resources have limited the full enforcement of international law. For instance, some of Russia's allies, like China, have played a negative role by continuing to conduct trade with Russia despite sanctions from the West. While international legal principles have been more strongly invoked in Ukraine compared to Syria, the core issue remains the same: when major states have an interest at stake, political strategy and self-interests often take precedence over international law. Although international legal principles have been invoked more strongly in Ukraine, the conflict underscores the same issue in Syria: when powerful states have vested interests, international law becomes secondary to geopolitical strategy.

In such cases, deeper structural issues are revealed through this interplay between IR and international law. IR not only influences the enforcement of international law but also questions doctrines like humanitarian intervention and the Responsibility to Protect (R2P). The inability to reach an agreement on recognising an alternative for al-Assad's rule in Syria, for instance, speaks of the fragility of R2P as a doctrine because its implementation still hinges on political agreement among the major powers. Aggression from Russia has strained the state sovereignty of Ukraine, meaning there are gaps in international legal frameworks in addressing violations from powerful states. This research concludes that international law is highly contingent upon the balance of power within IR. International law was intended to be an independent system, but it is frequently subordinated to geopolitical considerations. This underscores the critical need for reforms that can safeguard legal mechanisms from such pressures.

To overcome the obstacles in the enforcement of international law, several suggestions can be proposed. First, reforms should be made towards the UNSC to place some limits on the utility of the veto power during humanitarian crises. This prevents powerful states from blocking key actions from being taken. Further, more members should join the UNSC to be more representative, with a lesser influence on the power of veto over the enforcement of actions. Additionally, regional organisations like the European Union and Arab League

125 Allison (n 77) 200.

126 Gillian Duncan and others (eds), *State Terrorism and Human Rights: International Responses since the End of the Cold War* (Routledge 2013) 67.

should be more involved in implementing international law within their regions. Powerful states must comply by following the rule of law even if it goes against their interests. Furthermore, sanctions must be imposed collectively and strategically to become effective. Last but not least, awareness through education and diplomacy could minimise future violations and make nations respect legal rules. These steps would contribute to strengthening and improving the effectiveness of international law.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

МІЖНАРОДНІ ВІДНОСИНИ ТА ЇХ ВПЛИВ НА ДОТРИМАННЯ МІЖНАРОДНОГО ПРАВА: ПРИКЛАДИ УКРАЇНИ ТА СИРІЇ

Могамад Альмогавес

АНОТАЦІЯ

Вступ. *Цілями міжнародного права є підтримка глобального миру, захист прав людини та притягнення держав до відповідальності у разі порушення міжнародного права. Проте на практиці його реалізація та ефективність неоднакові через динаміку міжнародних відносин (МВ). У Сирії світовій спільноті було важко притягнути режим до відповідальності за порушення прав людини, головним чином через його могутніх союзників, таких як Росія. Подібним чином український конфлікт піднімає серйозні питання щодо ефективності міжнародного права в боротьбі з порушенням Росією суверенітету та територіальної цілісності України. Це дослідження має на меті проаналізувати роль МВ у формуванні застосування міжнародного права в цих двох зонах конфлікту, зосередившись на тому, як зовнішня підтримка дозволила агресорам вистояти, незважаючи на правові виклики.*

Методи. *У цій статті використовується методологія якісного дослідження. Вона спирається на кабінетне дослідження для збору даних за допомогою первинних і вторинних джерел. Основними джерелами є договори, резолюції ООН, а також міжнародно-правові джерела. Сюди також входять заяви важливих учасників сирійського та українського конфліктів, які дають змогу зрозуміти правові джерела, що регулюють міжнародне право. До вторинних належать наукові статті, звіти міжнародних організацій та експертні аналізи. Це дає змогу зрозуміти, як міжнародне право було застосоване або проігнороване в обох випадках.*

За допомогою порівняльно-аналітичного підходу у дослідженні розглядаються сфери подібності та відмінності в імплементації міжнародного права в Сирії та Україні. У ньому висвітлюються спільні чинники, такі як залучення потужних державних суб'єктів, зокрема Росії, і роль геополітичних інтересів у перешкоджанні ефективному правозастосуванню. У статті водночас вказується на деякі відмінності, такі як міжнародне визнання українського уряду проти фрагментарного визнання сирійських опозиційних груп, і те, як такі відмінності вплинули на реакцію щодо обох криз.

У цій роботі підкреслюється роль геополітичних інтересів і зовнішніх державних суб'єктів – Росії, Китаю та західних держав – у формуванні міжнародної реакції. У дослідженні також розглядаються теми суверенітету, гуманітарного втручання та права вето в ООН. Підкреслює, як МВ впливають на дотримання міжнародного права.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

Використовуючи приклад України та Сирії, дослідження допомагає зрозуміти перетин міжнародного права та міжнародних відносин, зокрема тих викликів, які виникають через геополітичні інтереси.

Результати та висновки. *У дослідженні було зроблено висновок, що міжнародні відносини суттєво впливають на дотримання міжнародного права як у Сирії, так і в Україні, хоча й з різними результатами. У Сирії режим Асада зберігся завдяки постійній військовій, економічній і політичній підтримці Росії, Китаю та Ірану. Ці держави використовували свій вплив, зокрема в Раді Безпеки ООН, щоб блокувати іноземне втручання. Це демонструє, як геополітичні інтереси можуть паралізувати міжнародно-правові механізми. В Україні більш єдина міжнародна реакція призвела до економічних санкцій, військової підтримки та судових позовів проти Росії. Однак геополітичні важелі впливу Росії, зокрема в енергетиці та військовій силі, обмежили ефективність цих заходів. Альянс Росії з Китаєм ще більше ускладнює ситуацію, оскільки Китай чітко не засудив або не проголосував проти війни Росії проти України в Раді Безпеки ООН. Крім того, Китай та інші союзники Росії підірвали санкції, продовжуючи торговельні та економічні відносини з Росією, тим самим послабили колективний вплив міжнародних санкцій Заходу.*

У висновках підкреслено, що хоча на міжнародне право впливає глобальна політика, ступінь і тип впливу залежать від залучених геополітичних ставок, що свідчить про вразливість системи, яка намагається протистояти могутнім державам. Стаття закликає до реформ, спрямованих на зміцнення міжнародної правової бази, які будуть гарантувати, що вона не буде підірвана геополітичними інтересами ключових глобальних гравців.

Ключові слова: *міжнародне право, міжнародні відносини, гуманітарна інтервенція, геополітика, вирішення конфліктів, Рада Безпеки ООН, сирійський конфлікт, агресія проти України.*

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Research Article

THE DOCTRINE OF LIMITED GOVERNMENT IN THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

Tetiana Slin'ko, Yevhenii Tkachenko*, Liubomyr Letnianchyn and Serhii Fedchyshyn

ABSTRACT

Background: *The essence of a constitutional system lies in two key aspects: limiting state power and ensuring the supremacy of rights, particularly the protection of human rights and freedoms. Without mechanisms to limit state power, the state inevitably encroaches on society and the private lives of individuals, threatening their rights and freedoms. The evolution of constitutional systems in liberal-democratic countries has been closely tied to strengthening civil society and developing tools for controlling state power. Historically, this evolution has moved from an absolute state, where the state was the sole owner and source of power, to a liberal-democratic state, where the state serves the people and civil society.*

Alongside this historical shift, there has been a transformation of individuals from being mere cogs in the machinery of state power to becoming citizens of a constitutional state, demanding that the state exercise restraint to safeguard individual freedom. One of the central ideas of constitutionalism is the principle of limited government. This article aims to analyse the legal positions of the Constitutional Court of Ukraine concerning the doctrine of limited government. In particular, it explores how the Court interprets key elements of this doctrine, such as the rule of law, the separation of powers, the rights of individuals and citizens, and the doctrine of constituent power. These and other related issues form the core of the research presented in this article.

Methods: *The study employed several methods to examine the doctrine of limited government, its elements, and the legal positions related to this issue. The system-structural method was used to characterise the concept and content of the doctrine of limited government and its key elements, including the principle of the rule of law, the principle of separation of powers, the rights of individuals and citizens, and the doctrine of constituent power. The logical-legal method facilitated an understanding of the perspectives of scholars on the formation and development of the doctrine of limited government, as well as their*

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views on the content of its elements. Additionally, legal methods such as examining constitutional texts, primary legislation, and case law were employed to analyse the legal positions of the Constitutional Court of Ukraine.

Results and Conclusions: *The study examines the historical development and current state of the concept of limited government, exploring its connections with the doctrine of constituent power, the principle of the rule of law, the concept of human rights and freedoms, and the principle of the separation of powers. The primary conclusion is that the legal positions of the Constitutional Court of Ukraine regarding the doctrine of limited government, a key pillar of modern Ukrainian constitutionalism, have been systematically reviewed. It has been established that the Constitutional Court of Ukraine has consistently affirmed the essential elements of the doctrine of limited government from its inception. These elements form the doctrine of constituent power and the fundamental principle of constitutionalism, emphasising the necessity of limiting state power to safeguard human rights and freedoms. Furthermore, the Court upholds the view that the organisation and exercise of state power based on the division into legislative, executive, and judicial branches is not an end in itself but is intended to ensure the protection of individual rights and freedoms.*

1 INTRODUCTION

In the context of creating the foundation of a legal state in Ukraine, it is very important to draw constitutional scholars' attention to a multifaceted analysis of the limits of state intervention in the affairs of society and a specific individual. After all, one of the main ideas of constitutionalism is the idea that state power should act only within the limits defined and allowed to it by free citizens. As V. Rechytsky rightly observes, in the conditions of constitutionalism, it is not the state that should teach citizens proper behaviour, but citizens should indicate to the state the direction of its activity that is useful for them. Otherwise, under the guise of a constitution, citizens would risk receiving only a means of lowering the standards of their civil, political and personal freedom.[1]

The key principle of a liberal-democratic government is the idea of limiting power, as this is the most important principle for the functioning of a democratic legal state. It involves the exercise of the constituent power of the Ukrainian people, separating powers into legislative, executive, and judicial branches, and the principle of the rule of law. Additionally, it establishes the limits of state activity to protect the rights and freedoms of individuals and citizens. The practical implementation of this principle is essential for preventing the

1 Vsevolod Rechytskyi, 'Political and Legal Commentary on the Decision of the Constitutional Court of Ukraine in the Case of the Constitutional Submission of the Zhashkiv District Council of the Cherkasy Region Regarding the Official Interpretation of the Provisions of the First and Second Parts of Article 32, the Second and Third Parts of Article 34 of the Constitution of Ukraine' (*Human Rights in Ukraine: Information Portal of the Kharkiv Human Rights Protection Group*, 3 February 2012) <http://khpg.org/index.php?id=1328294578> accessed 25 June 2024.

concentration of power and its abuse, ultimately guaranteeing the recognition, observance, and protection of human rights and freedoms.

The principle of limiting state power is applicable where the rule of law prevails; the constitution is recognised as the supreme law of the state and society and holds the highest legal authority. The law is enacted by the legislative (representative) body, while the executive branch primarily implements it within the boundaries set by the Constitution and the law. Judicial bodies operate independently and autonomously within their competence, and a system of checks and balances exists among the branches of government. Human rights are upheld and protected.

The Constitutional Court of Ukraine plays a crucial role in defining the content of the doctrine of limited government and ensuring its implementation in state practice as the body responsible for constitutional oversight and the official interpretation of the Basic Law of Ukraine.

2 THEORETICAL FOUNDATIONS OF THE DOCTRINE OF LIMITED GOVERNMENT

The idea of limited government, or very close to it, the idea of the rule of law,[2] from which modern constitutionalism grew, arose in the Middle Ages under the influence of several factors. By the twelfth century, the law of the Catholic Church significantly influenced the principle of the rule of law and limited government since it was the autonomy of the church from the state that helped to establish a legal system based on the principles of reason. Initially, the law had to be embodied in real institutions, which were "by the nature of things" endowed with autonomy from the state and, therefore, capable of limiting its arbitrariness. In 12th-century Europe, the Catholic Church was just such an institution.[3]

Later, the English philosopher J. Locke, in his fundamental work "Two Treatises on Government," specifically points out the limits of the state, in particular, the legislative power of any state in any form of government.[4] First, these are published established laws that should not be changed on a case-by-case basis. The law must exist for everyone: the rich and the poor, the favourite at court and the peasant at the plough. Second, the goal of laws should be to achieve the common good. Power is limited by the public good. Third, property taxes cannot be raised without the consent of the people themselves or through

2 Tetiana Slinko and others, 'The Rule of Law in the Legal Positions of the Constitutional Court of Ukraine' (2022) 5(1) Access to Justice in Eastern Europe 165, doi:10.33327/AJEE-18-5.1-n000099.

3 Vsevolod Rechytskyi, 'The idea of limited government as a political and legal doctrine' (*Human Rights in Ukraine: Information Portal of the Kharkiv Human Rights Protection Group*, 25 January 2013) <https://khpg.org/1359118799> accessed 25 June 2024.

4 John Locke, *Two Treatises on Government* (Socium 2014).

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

their representatives. Fourth, the legislative body must not and cannot transfer legislative power to anyone else or delegate it to anyone other than those to whom it has been entrusted by the people.

Permanent laws, which must be known to all and be the same for all, act as a tool for limiting the supreme power and the implementation of justice. According to J. Locke, the material limit of the activity of the supreme power is property for the sake of preserving and protecting people united in the state.[5]

The work of W. Humbolt, a representative of German classical humanism, "The Limits of State Action,"[6] is specially devoted to the problem of the limits of the spread of state power. It contains opinions about "the most favourable position for a person in the state" and the scope of state activity, which means "everything that it (the state) is able to do for the good of society." Notably, the ideas of von Humboldt became the basis for the emergence of the theories of the minimal state and negative freedom. He distinguishes between the public and private spheres (civil society activity), focusing on the system of national public institutions (created "from below" by individuals themselves) and state bodies, as well as the concepts of natural and positive law and the legal status of a person and a citizen.

According to Humboldt, the rule of limiting state activity is "...any desire of the state to interfere in the private affairs of citizens, if these affairs do not directly violate the rights of others, is unacceptable."[7] This conclusion follows from the goals of the state, which can be twofold: the state "may seek to promote the happiness of citizens or only to prevent evil that can be inflicted on citizens by nature or people."[8] The means that are allowed or not allowed to be used by the state are determined by its goals.

Humboldt is a firm supporter of the "minimum state" concept. He is utterly irreconcilable to the idea and fact of state care for the positive welfare of citizens. Such intervention in "private life," according to Humboldt, distorts the natural foundations of man. State-imposed uniformity turns people into machines, "weakens the strength of the nation," deprives a person of the opportunity to feel a surge of feelings and energy from his/her own actions. What is imposed from outside by the state is perceived by a person as something mechanical and foreign, fostering the growth of arbitrary among civil servants and the emergence of bureaucracy. For Humboldt, the state serves merely as a means of achieving the goal for which a person enters society. Since the state system is "always connected with the limitation of freedom, it cannot be looked upon otherwise than as an

5 Jean-Fabien Spitz, 'Locke's Contribution to the Intellectual Foundations of Modern Constitutionalism' in Denis Galligan (ed), *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (OUP 2014) 163, doi:10.1093/acprof:oso/9780198714989.003.0006.

6 Wilhelm von Humboldt, *The Limits of State Activity* (Socium 2009).

7 ibid 138.

8 ibid 152.

'evil', even if it is a necessary one."[9] Civil society, in contrast, is an alternative to the state. Therefore, the latter should in every way contribute to the formation of communities that could somehow replace state activity.

The well-known English sociologist and philosopher of the 19th century, H. Spencer, was also a supporter of the minimal state. In his opinion, the state cannot have other duties except to maintain justice. Any other activity of the state will inevitably lead to a direct or indirect restriction of the freedom of the individual greater than it is required by justice. The sociologist stressed that state paternalism has a negative effect on the development of the character of citizens, educating everyone according to the same model, whereas the diversity of characters is one of the main conditions for progress and development of passive behaviour in citizens. Furthermore, he argued that an individual's adaptation to life's demands is an important condition for the development and improvement of both an individual and society as a whole.[10]

Spencer believed that all achievements of material and spiritual culture stem from private activity and that government intervention not only fails to bring any benefit but is often harmful. For him, civil society represents both the goal and means of limiting power.

A similar perspective was held by the renowned French researcher of democracy, A. Tocqueville, who, in his work "Democracy in America", drew attention to the danger of monopolisation of power – whether by the state and civil society. In his opinion, the state almost always shows a tendency to self-growth and expansion of its sphere of influence by the very fact of a long stay in power. Such a state absorbs civil society, treating it not as an end in itself but as a means to its own goals.

In the interests of the development of civil society, the state should impose limits on itself, not allowing arbitrariness and excessive interference in the private sphere. A. Tocqueville noted two mechanisms of restraining state despotism: the implementation of the principle of separation of powers in the political sphere and the development of public associations – scientific, literary, educational, religious, and others – which should not be controlled by state power. These associations, he argued, act as insurmountable barriers to despotism, representing an "independent public eye" that exercises control over the state.[11]

That is, the concept of limited government stems from the fact that individuals living in a freedom-loving and democratic society do not recognise that the state alone has the right to define and formulate their subjective rights.

In the 20th century, most constitutionalist scholars (supporters of liberalism) pointed out that under the conditions of a constitutional state, power (state) should perform only three functions: as an arbitrator, i.e. resolve conflicts between citizens in accordance with

9 ibid 185.

10 Herbert Spencer, *Synthetic Philosophy* (Nika-Center 1997) 278.

11 Alexis de Tocqueville, *On Democracy in America* (Vsesvit 1999) 356.

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

objective laws; as police, i.e. protect citizens from criminals; and as the army, i.e. protect citizens from external enemies.[12] R. Nozick calls such a state a "night watchman,"[13] while A. Rand defines the state as a mechanism to place the repressive use of physical force under objective control – namely, the control of objectively defined laws.[14]

K. Popper also expresses an interesting opinion on the constitutional functions of the state: "I demand that the state protect not only me, but also others. I demand that it protects my freedom and that of all the people around me. I do not want to live at the mercy of those who have heavier fists and who are better armed. I want to distinguish between aggression and defence, and I want defence to be supported by the organised power of the state. I am quite ready for the state to limit my freedom of action to some extent, provided that I am guaranteed some of the remaining freedom, because I know that some limitation of freedom is necessary for me. However, I demand that they do not forget about the main goal of the state - the freedom of only those citizens who do not harm others should be protected."[15]

L. Mises similarly warns of the inadmissibility of broad authorities: "If we abandon the principle according to which the state should not interfere in matters concerning the lifestyle of an individual, we ultimately come to the point that we begin to regulate his/her life in detail. The personal freedom of the individual is abolished."[16]

An important condition for implementing the constitutional idea of limited government and preventing the abuse of power is the integration of the principle of separation of powers (system of checks and balances) within the state mechanism. Effective control over power is equally important for safeguarding individual freedom. The broader the sphere of influence of state power, the narrower the sphere of individual freedoms, and vice versa. Under the conditions of constitutionalism, each member of civil society must be free in his/her own political choice, which implies respecting the freedom of others and ensuring everyone has the right to control the policy of the state, the president, the government, all other authorities and officials, both at the centre and at the places.[17]

It is important to highlight that scholars generally regard limited government as a core aspect of constitutionalism. In the context of continental European countries, the notion of limiting state power consists of two key components. The first is the requirement for public authorities to act within the bounds of the law, though they may also have the capacity to amend these laws. The second involves imposing constraints on legislative power, which throughout history has been influenced by natural law, customary law, and human rights,

12 Milton Friedman, *Capitalism and Freedom* (Dukh i Litera 2010) 153.
13 Robert Nozick, *Anarchy, State and Utopia* (Wiley-Blackwell 2013) 49.
14 Ayn Rand, Nathaniel Branden and Alan Greenspan, *Capitalism: The Unknown Ideal* (Al'pina 2011).
15 Karl R Popper, *The Open Society and its Enemies,* vol 1: The spell of Plato (Osnovy 1994) 148.
16 Ludwig von Mises, *Liberalism: The Classical Tradition* (Bibliotech Press 2005) 56.
17 Vsevolod Rechytskyi, *Freedom and state* (Folio 1998) 106.

among other factors.[18] In democratic societies, the concept of the rule of law is closely tied to the idea of a lawful state, aiming to ensure that the supremacy of law and the constitution is both realised and applied. The organisation of state power shifts from centralisation and concentration towards a model based on the separation and balance of powers. Furthermore, pluralism in its various forms is institutionalised and protected.[19]

3 KEY ELEMENTS OF THE DOCTRINE OF LIMITED GOVERNMENT

The modern understanding of the doctrine of limiting power in European constitutional law suggests that constraints can, in fact, enable more effective governance. This perspective, central to liberal constitutionalism, argues that by limiting the arbitrary authority of government officials, a constitution can increase the state's capacity to address specific issues and mobilise resources for the common good. Rather than merely preventing tyranny, constitutions play a constructive role by directing state power toward socially beneficial goals, preventing issues such as social disorder, unaccountability, political instability, and the misuse of power. Constitutions are multifunctional instruments, and it would be an oversimplification to reduce their role solely to prevent tyranny. Like an athlete who hones techniques to harness raw energy, a state's ability to concentrate its efforts where necessary is enhanced by constitutional constraints, which also prevent the dispersion of power where it is not needed.[20]

The main substantive principles of the modern doctrine of limitation of power are:

First, one of the key elements of the doctrine is the constitutional consolidation and practical implementation of the principle of people's rule. After all, we cannot talk about a constitutional system and a democratic regime in a country in which the country's population has not turned into a nation and cannot exercise control over state power. Indeed, if we turn to the history of the origin of the idea of limiting power, it arose as the most effective means of protecting human rights from state power. This idea manifested itself precisely through the constitutional recognition of the people's sovereignty.[21]

18 O Boryslavska, 'The Essence of Constitutionalism: Constitutionalism as an Ideology, Doctrine and Practice of Limited Government' (2015) 61 Bulletin of Lviv University. Legal series 247.

19 Marius Andreescu, 'The Limits of State Power in a Democratic Society' (2016) 5(6) Journal of Civil and Legal Sciences 213, doi:10.4172/2169-0170.1000213.

20 Jon Elster, *Ulysses Unbound* (CUP 2000) doi:10.1017/CBO9780511625008; Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (The University of Chicago Press 1997); Martin Krygier, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) ch 9; Martin Loughlin, *The Idea of Public Law* (OUP 2003) doi:10.1093/acprof:oso/9780199274727.001.0001; David Stark, Laszlo Bruszt and Peter Lange, *Postsocialist Pathways:Transforming Politics and Property in East Central Europe* (CUP 1998).

21 Dmytro Filipskyi, 'The Forms of Restriction of State Power' (2022) 1 Visegrad Journal on Human Rights 24.

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

Constituent power first finds its manifestation through the decision of a community of people to create a new state. Later, the adoption of the constitution and the introduction of amendments – either through meetings or direct voting – became the forms of its implementation. It should be emphasised that the concept of constituent power has a long history and was built on relevant concepts that owe their appearance to the emergence of constitutionalism in the world, such as the U.S. Declaration of Independence in 1776 and the revolutionary events, primarily in France in the 18th century. These events were connected primarily with the process of adopting the constitution and making amendments to it. Today, the concept of constituent power is defined as the organisational and procedural process by which a constitution is adopted or revised through democratic and open procedures.[22]

Second, an important element of the doctrine of limitation of power is the principle of the rule of law, that is, the limitation of state power by law. If we start with Albert Dicey's classic work "Introduction to the Study of Constitutional Law" and turn to the modern understanding of the principle of the rule of law, its key element is the prohibition of state arbitrariness.[23] It found its embodiment through the constitutional rules of legality, according to which the authority of public authorities must be determined by the prescriptions of the law. In the constitutional system of Ukraine, this rule was implemented through the provision of Art. 6 of the Constitution, in which it is established that the bodies of legislative, executive and judicial power exercise their powers within the limits established by the Basic Law and in accordance with the laws of Ukraine. Additionally, Art. 19 extends this provision to include local self-government bodies.

Third, the principle of separation of powers is an important constitutional tool for limiting state power. After all, the concentration of power creates a lack of control in the activities of state authorities and their irresponsibility to society. In the Basic Law of Ukraine, this principle is enshrined in Art. 6. The essence of the principle of separation of powers presupposes the existence of relatively independent and independent branches (directions)

22 HV Berchenko, 'Constituent Power and Entry into Force of the Constitution of Ukraine' (2020) 4 Bulletin of Zaporizhzhya National University, Legal Sciences 20; HV Berchenko, 'Constituent Power: Evolution and Modern Interpretations' (2020) 45 Scientific Bulletin of the International Humanitarian University 26; Hryhorii Berchenko, 'Judicial Interpretation as Informal Constitutional Changes: Questions of Legitimacy in the Aspect of the Doctrine of Constituent Power' (2024) 7(2) Access to Justice in Eastern Europe 39, doi:10.33327/AJEE-18-7.2-a000203; HV Berchenko, 'The Concept of "Institutional Power" in Modern Ukrainian Scientific Discourse' (2020) 31(6) Academic notes of VI Vernadsky Taurida National University, Series: Legal Sciences 13, doi:10.32838/TNU-2707-0581/2020.6/03; Hryhorii Berchenko and others, 'Preliminary Judicial Control of Amendments to the Constitution: Comparative Study' (2022) 5(4) Access to Justice in Eastern Europe 159, doi:10.33327/AJEE-18-5.4-n000435.

23 Iurii Barabash and Bohdan Mokhonchuk, 'The Principle of The Law-Governed State in the Constitutional Doctrine of Ukraine' in AO Selivanov (ed), *A New Way to Law* (Logos 2021) 49; Slinko and others (n 2).

of power – legislative, executive and judicial – and the establishment of such relationships between them that would make it impossible to usurp all or most of the state power in the hands of one state body, and even more so, in the hands of one person.

The first official recognition of this principle is associated with the French Declaration of the Rights of Man and Citizen of 1789, Art. 16 of which proclaimed: "Any society in which the guarantee of rights and the separation of powers is not ensured has no constitution."

Proponents of the separation of powers theory, the founding fathers of the United States – O. Hamilton, D. Madison, and J. Jay – in "The Federalist," confidently proved that "the powers possessed by one department should not be directly or indirectly exercised by one of the other two" and that "it is inordinate the all-encompassing prerogative of the hereditary executive power, and also supported by the hereditary legislative power, represents a huge danger to the freedom and independence of the people".[24] The usurpation of all power by the legislature leads to the same tyranny as the usurpation of rule by the executive. As such, it is not surprising that, for the first time at the constitutional level, these ideas were embodied in the first three articles of the U.S. Constitution of 1787.[25]

As M.Tsvyk rightly observes, the main requirements of the separation of powers are the separation and independence of separate types of state bodies, each with its own functional characteristics, a clear definition of its special powers and legal forms of activity, and mutual influence, mutual balancing, mutual deterrence and mutual control.[26] But the personification of the branches of power does not mean their complete isolation. To ensure their balance, each branch of government is given special powers to influence the activities of other branches. The existence of a system of so-called checks and balances is connected with the implementation of these powers. With its help, the mutual influence of all branches of government is carried out, and the balance between them is maintained.

Fourth, an important means of limiting state power is its limitation by human rights. A human right is the demand of a subject (its bearer) directed at public authorities or other institutions endowed with similar functions and powers to ensure the protection of their free choice in matters related to access to material and spiritual benefits in order to satisfy certain needs and interests.[27] The idea that human rights as a universal and liberal idea essentially determines the content of the entire system of state authorities has become particularly important and is enshrined in Art. 3 of the Constitution of Ukraine. The axiom here is that state power comes from human rights and freedoms, and their main purpose is to limit the state. As A. Chaillot and R. Uitz rightly note in this regard, "the original purpose of fundamental rights is to limit the actions of the authorities. Rights are constitutionally

24 Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Penguin Books 1987) 349.
25 Filipskyi (n 21) 26; András Sajó, *Self-Limitation of Power: (Short Course of Constitutionalism)* (Jurist 2001).
26 MV Tsvyk, 'Actual Problems of the Organization of Power in Ukraine' (1995) 30 Problems of Legality 23.
27 Mykhaylo Savchyn, *Constitution: People and Institutions: (SWOT-Comment)* (Yurinkom Inter 2024) 445.

Access to Justice in Eastern Europe
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enshrined inalienable freedoms backed by a negative guarantee in the form of a ban on state intervention... Fundamental rights protect society from the whims of the dominant majority, that is, from its prejudices and authoritarianism."[28]

That is, from the point of view of the Western concept of liberalism, human rights are a kind of requirement for the state to take or refrain from certain actions. Human rights are a means of combating the abuse of state power. If the institution of self-limitation of state power through the application of the principle of separation of powers works "from the inside," then human rights are a necessary external factor that ensures control over the activities of state power "from the outside". Human rights are fundamental to the effectiveness of public administration. As S. Maksymov rightly points out, human rights, though not absolute or unlimited, arise independently of legal institutions and are only recognised in legislation (in a broad sense) as an expression of a person's moral dignity. They are aimed at maintaining the most important values of human life and establishing a person as the most important social value.[29]

The notion that human rights are a means of limiting state power was embodied in Art. 22 of the Constitution of Ukraine, which states that constitutional rights and freedoms are guaranteed and cannot be revoked. This provision, on the one hand, establishes the state's obligation to guarantee constitutional rights and freedoms, primarily the right to life, and on the other hand, to refrain from adopting any acts that would lead to the cancellation of constitutional rights and freedoms, and therefore human right to life.[30]

4 THE DOCTRINE OF LIMITED GOVERNMENT IN THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

The Constitutional Court of Ukraine has consistently referred to the principle of limiting state power. In its Decision No. 5-r/2019 dated 13 June 2019, the Court emphasised that the Constitution of Ukraine contains several key provisions regarding the exercise of state power. These provisions establish that human rights and freedoms, along with their guarantees, shape the content and direction of state activity. The state is accountable to individuals for its actions, and its primary duty is to affirm and protect human rights (Art. 3). Additionally, state power cannot be usurped (Art. 5), and it is exercised through the division of legislative, executive, and judicial powers, with each branch functioning within the limits prescribed by the Constitution and laws of Ukraine (Art. 6). The Constitution, as the supreme legal authority, ensures that laws and other legal acts align with its norms, and it

28 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 459.

29 S Maksymov, 'Universality of Human Rights' (2013) 1 Philosophy of Law and General Theory of Law 116.

30 *Case no 1-33/99 (Death Penalty Case)* Decision no 11-rp/99 (Constitutional Court of Ukraine, 29 December 1999) [2000] Official Gazette of Ukraine 4/126.

has direct effect (Art. 8). Furthermore, state bodies and local governments, as well as their officials, are required to act strictly within the scope of their constitutional powers and responsibilities (Art. 19). These interconnected constitutional provisions reflect the fundamental idea of constitutionalism, namely, the necessity to limit state power to safeguard human rights. They also oblige state authorities to operate exclusively within the constitutional goals set forth by Ukraine's Constitution. The exercise of state power, particularly through its division into legislative, executive, and judicial branches, along with a system of checks and balances, ensures the stability of the constitutional system and prevents the usurpation of power by any one branch or group, thereby safeguarding the people's right to shape the constitutional framework (subpara. 3.1 of the para.5 of the reasoning section).[31]

In another decision, No. 6-r/2019, dated 20 June 2019, the Court reaffirmed that under Art. 19 of the Constitution, state authorities and local government bodies, along with their officials, must act within the limits of their constitutional powers. This principle ensures that the rule of law prevails in the exercise of state power and reinforces the separation of powers. The division of state functions into legislative, executive, and judicial branches, along with the system of checks and balances, is designed to uphold the stability of the constitutional system and prevent any form of power usurpation, thereby safeguarding the exclusive right of the people to define and modify the constitutional order in Ukraine (para. 5 of the motivational part).[32]

Since its inception, the Constitutional Court of Ukraine has consistently supported the doctrine of constituent power, a key concept in Western constitutionalism. This doctrine holds that the Ukrainian people are the creators of the Constitution. For instance, in Decision No. 4-zp dated 3 October 1997 (concerning the entry into force of the Constitution), the Court highlighted that the Constitution, as the state's Basic Law, is an expression of the constituent power vested in the people.[33] This constituent power is superior to established powers, such as legislative authority, and the Constitution itself recognises the principle of separation of powers and defines the structure of established governmental powers. The adoption of the Constitution by the Verkhovna Rada of Ukraine reflected the exercise of constituent power by the parliament on behalf of the people. In Decision No. 5-r/2019, dated 13 June 2019, the Court reiterated that the Constitution

31 *Case no 1-17/2018(5133/16) (case of the National Commission for State Regulation in the Fields of Energy and Utilities)* Decision no 5-r/2019 (Constitutional Court of Ukraine, 13 June 2019) [2019] Official Gazette of Ukraine 56/1949.

32 *Case no 1-152/2019(3426/19) (regarding the constitutionality of the Decree of the President of Ukraine "On the Early Termination of the Powers of the Verkhovna Rada of Ukraine and the Appointment of Extraordinary Elections")* Decision no 6-r/2019 (Constitutional Court of Ukraine, 20 June 2019) [2019] Official Gazette of Ukraine 57/984.

33 *Case no 18/183-97 (concerning the Entry Into Force of the Constitution of Ukraine)* Decision no 4-zp (Constitutional Court of Ukraine, 3 October 1997) [1997] Official Gazette of Ukraine 42/59.

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

represents the sovereign will of the Ukrainian people, who are the true source of power. The Constitution, as an act of constituent power, outlines the principles of the state system, defines the scope and limits of state authority, and establishes the mechanisms for exercising state power (subpara. 3.1 of the motivational part).[34]

Moreover, the Court emphasised that one of the Constitution's essential functions is to limit state power, a secondary derivative of the constituent power of the people. By stating that people exercise power through state authorities, the Constitution establishes that only the people can determine which state bodies are authorised to act on their behalf.

One of the key functions of the Constitution of Ukraine is its role in restricting state power. The Constitution limits the state's ability to unjustifiably interfere in individuals' private lives and the activities of civil society institutions, as well as restraining the usurpation and monopolisation of power. This is achieved primarily through the principle of the separation of powers among the legislative, executive, and judicial branches, ensuring that each branch operates within the constitutional and legal boundaries established by the Constitution of Ukraine (Art. 6, pt. 2 of Art. 19).[35] These provisions, in conjunction with other parts of the Constitution, reflect the fundamental principle of constitutionalism, which aims to limit state power to safeguard human rights and freedoms. They also obligate those in power to act solely in accordance with the purposes outlined in the Constitution.[36] The Constitutional Court of Ukraine has consistently upheld the legal stance that the powers of the President and the Verkhovna Rada (Ukraine's highest political authorities) are exclusively defined by the Constitution, prohibiting the creation of laws that would grant them additional powers.[37]

34 *Case no 1-17/2018(5133/16)* (n 31).

35 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (amended 1 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 25 June 2024.

36 See: *Case no 1-17/2018(5133/16)* (n 31) subpara 3.1(6), motivational pt; *Case no 2-249/2019(5581/19) (on the compliance of the Draft Law on Amendments to Article 106 of the Constitution of Ukraine (on consolidating the powers of the President of Ukraine to establish independent regulatory bodies, the National Anti-Corruption Bureau of Ukraine, appoint and dismiss the Director of the National Anti-Corruption Bureau of Ukraine and the Director of the State Bureau of Investigation) (reg no 1014) with the requirements of Articles 157 and 158 of the Constitution of Ukraine)* Conclusion no 7-v/2019 (Constitutional Court of Ukraine, 16 December 2019) [2020] Official Gazet of Ukraine 4(2)/226, para 9(2), motivational pt.

37 See: *Case no 1-14/2003 (case of Activity Guarantees of a People's Deputy of Ukraine)* Decision no 7-рп/2003 (Constitutional Court of Ukraine, 10 April 2003) [2003] Official Gazette of Ukraine 17/789; *Case no 1-15/2004 (case of the Coordination Committee)* Decision no 9-rp/2004 (Constitutional Court of Ukraine, 7 April 2004) [2004] Official Gazette of Ukraine 16/1122; *Case no 1-6/2007 (case of Dismissal of a Judge from an Administrative Position)* Decision no 1-rp/2007 (Constitutional Court of Ukraine, 16 May 2007) [2007] Official Gazette of Ukraine 40/1589, 48/1992; *Case no 1-35/2009 (regarding the Constitutionally Established Procedure for Entry into Force of the Law)* Decision no 17-rp/2009 (Constitutional Court of Ukraine, 7 July 2009) [2009] Official Gazette of Ukraine 55/1921; *Case no 3-234/2018(3058/18) (regarding the Constitutionality of clause 13 of the first part of Article 17 of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine")*

Furthermore, the doctrine of limited government includes the Court's conclusion that the separation of state power into legislative, executive, and judicial branches is not an end in itself but is intended to protect the rights and freedoms of citizens.[38] The principle of separation involves not only a division of powers but also their interaction through a system of checks and balances, ensuring cooperation as a unified state authority. This principle only holds meaning when all branches act within a unified legal framework. Strict adherence to the Constitution and laws by all branches guarantees the proper functioning of the separation of powers, fostering unity and serving as a vital condition for stability and peace within the state (subpara. 4.1(2–4) of the motivational part).[39] Each branch of state power must belong to one of the three categories—legislative, executive, or judicial—or have a special status defined by the Constitution (subpara. 3.2 of the motivational part).[40]

At the same time, a democratic constitution also serves to limit the power of the people. The Constitutional Court has noted that while the people possess the sovereign right to exercise constituent power, they must do so within the constitutional framework (para. 20 of the motivational part).[41] For example, the procedure for adopting a new version of the Constitution or making amendments through popular initiative, as outlined in the 2012 Law on the All-Ukrainian Referendum, was declared unconstitutional.

The doctrine of inherent powers, closely linked to the principle of limiting authority, is often applied by constitutional justice bodies concerning presidential powers in presidential or mixed republics. In Ukraine, as in most developed countries, there is no explicit normative provision for so-called "inherent powers."[42] Art. 106 (31) of the Constitution states that the President exercises powers defined by the Constitution of Ukraine. Therefore, the President

Decision no 4-p (II)/2019 (Constitutional Court of Ukraine (Second Senate), 5 June 2019) [2019] Official Gazette of Ukraine 53/1850; *Case no 1-9/2020(197/20) (regarding the constitutionality of the Decree of the President of Ukraine "On the appointment of A Sytnyk as the Director of the National Anti-Corruption Bureau of Ukraine")* Decision no 9-r/2020 (Constitutional Court of Ukraine, 28 August 2020) [2020] Official Gazette of Ukraine 75/2410; *Case no 1-19/2020(345/20) (regarding the constitutionality of certain provisions of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine")* Decision no 11-r/2020 (Constitutional Court of Ukraine, 16 September 2020) [2020] Official Gazette of Ukraine 81/2633.

38 *Case no 1-40/2003 (case of amendments to Articles 29, 59, 78 and others of the Constitution of Ukraine)* Conclusion no 1-v/2003 (Constitutional Court of Ukraine, 30 October 2003) [2003] Official Gazette of Ukraine 48/2535.

39 *Case no 1-8/2008 (case of the Rules of Procedure of the Verkhovna Rada of Ukraine)* Decision no 4-rp/2008 (Constitutional Court of Ukraine, 1 April 2008) [2008] Official Gazette of Ukraine 28/904.

40 *Case no 1-17/2018(5133/16)* (n 31).

41 *Case no 1-1/2018(2556/14) (regarding the constitutionality of the Law of Ukraine "On All-Ukrainian Referendum")* Decision no 4-r/2018 (Constitutional Court of Ukraine, 26 April 2018) [2018] Official Gazette of Ukraine 41/1460.

42 Tetiana Slinko and others, *Public Law: Modern Doctrines in Judicial and Law Enforcement Practice: Educational Manual for Master's Degree Students of Higher Education (2nd [Master's] Level), Field of Knowledge 08 "Law", Specialization 081 "Law"* (Pravo 2023) 58-9.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

cannot possess powers not specified in the Constitution. This position has been repeatedly affirmed by the Constitutional Court of Ukraine, emphasising that the President's powers are exhaustively defined by the Constitution, precluding the adoption of laws that establish additional powers, rights or duties. Notable rulings include the Constitutional Court's decisions on 10 April 2003 (No. 7-rp, concerning guarantees for the activities of Members of Parliament), 7 April 2004 (No. 9-rp, regarding the Coordination Committee), 16 May 2007 (No. 1-rp, concerning the dismissal of judges from administrative positions), 7 July 2009 (No. 17-rp/2009, on the constitutional procedure for laws coming into effect), and 15 September 2009, (No. 21-rp/2009, regarding the constitutionality of certain provisions of the Law of Ukraine on Television and Radio Broadcasting).

In the areas of foreign policy leadership, national security, and defence, the situation is somewhat different. In a decision dated 15 January 2009, No. 2-rp/2009, the Constitutional Court recognised the President's right, based on the Constitution's provision on the direct effect of its norms, to apply measures influencing the activities of entities engaged in foreign policy to safeguard Ukraine's national interests and security. Specifically, the Court upheld the constitutionality of a procedure requiring prior approval of candidates for positions specified in the Presidential Act as a means of executing the President's constitutional authority over foreign policy leadership.

A similar ruling was issued concerning the defence sector. According to the Constitutional Court, the President of Ukraine, endowed with constitutional powers over national security and defence, may approve a list of positions requiring coordination with the President. The Court explicitly stated that "the head of state not only determines the general direction of the country's foreign policy according to the principles set by the Verkhovna Rada of Ukraine but also applies appropriate measures to influence the activities of foreign policy actors to ensure Ukraine's national interests and security" (subpara. 3.1 (6) of the motivational part).[43] Consequently, the Constitutional Court deemed constitutional a Presidential Decree on prior approval of appointments to positions in the Ministry of Foreign Affairs. Similarly, the Court validated the requirement for Presidential approval of personnel appointments, as well as plans and schedules for military exercises and training, as stipulated in a Presidential Decree, as such actions fall within the President's constitutional powers (subpara. 2.4 of the motivational part).[44]

The doctrine of inherent powers was also addressed in a separate opinion by Justice V.V. Lemak concerning the Constitutional Court's decision of 16 September 2020, No. 11-r/2020. Justice Lemak argued that, under the "inherent powers" doctrine, the President of Ukraine

43 *Case no 1-2/2009 (regarding the constitutionality of the Decree of the President of Ukraine "On Some Issues of Managing the State's Foreign Policy Activities")* Decision no 2-rp/2009 (Constitutional Court of Ukraine, 15 January 2009) [2009] Official Gazette of Ukraine 5/139.

44 *Case no 1-3/2009 (regarding the constitutionality of the Decree of the President of Ukraine "On Some Issues of Implementing Leadership in the Spheres of National Security and Defense")* Decision no 5-rp/2009 (Constitutional Court of Ukraine, 25 February 2009) [2009] Official Gazette of Ukraine 17/534.

may exercise other powers derived from the President's constitutional role, provided these powers are lawful and do not contradict constitutional principles such as the separation of powers, democracy, and respect for human rights. He cautioned, however, that the "inherent powers" doctrine must not be interpreted too broadly or arbitrarily, as this could lead to manipulation of constitutional norms, posing a threat to the Constitution's essence.[45]

At the same time, in matters of personnel appointments, the Constitutional Court chose not to formulate a doctrine of inherent presidential powers, instead taking a formal and textual approach to constitutional interpretation. The Court underscored the unconstitutionality of granting the President the authority to appoint or dismiss the Director of the National Anti-Corruption Bureau of Ukraine. This stance is reflected in the Constitutional Court's decision regarding the constitutional submission of 50 Members of Parliament on the constitutionality of certain provisions of the Law on the National Anti-Corruption Bureau of Ukraine (16 September 2020, No. 11-r/2020)[46] and in the decision on the constitutional submission of 51 Members of Parliament regarding the constitutionality of the Presidential Decree appointing A. Sytnyk as Director of the National Anti-Corruption Bureau of Ukraine (28 August 2020, No. 9-r/2020).[47]

5 CONCLUSIONS

One of the main ideas of modern constitutionalism is the principle of limited government. In a legal democratic state, it is not the government that should dictate to civil society how to act or teach citizens proper behaviour. Instead, society and each citizen should direct the state toward actions that are beneficial to them. Otherwise, society and citizens might find themselves with an absolute state masquerading as a constitution, encroaching on the sphere of society and private life, and undermining standards of civil freedom.

The modern concept of the doctrine of limited government involves several key elements. First, it requires the obligation of public authorities to act in accordance with the law, which does not preclude these authorities from changing the law. Second, it imposes limitations on legislative power, which, in different historical periods, have been based on natural law, customary law, and human rights.

According to this concept, the main elements of constitutional limitation of state power are as follows. First, there is the constitutional enshrinement and practical implementation of

45 Separate Opinion by Justice VV Lemak regarding Decision no 11-r/2020, Case no 1-19/2020(345/20) (Constitutional Court of Ukraine, 16 September 2020) [2020] Official Gazette of Ukraine 81/2633.

46 *Case no 1-19/2020(345/20)* (n 37).

47 *Case no 1-9/2020(197/20) (regarding the constitutionality of the Decree of the President of Ukraine "On the Appointment of A Sytnyk as Director of the National Anti-Corruption Bureau of Ukraine")* Decision no 9-r/2020 (Constitutional Court of Ukraine, 28 August 2020) [2020] Official Gazette of Ukraine 75/2410.

Access to Justice in Eastern Europe
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the principle of popular sovereignty, particularly the implementation of the doctrine of constituent power in the context of adopting and amending the Constitution. Second, the principle of the rule of law, meaning the limitation of state power by law, is central. This component is realised through constitutional rules of legality, according to which the powers of public authorities must be defined by the Constitution and laws. Third, the principle of separation of powers entails the existence of relatively independent and separate branches of power – legislative, executive, and judicial – and the establishment of relationships between them that prevent the usurpation of all or most of the state power by a single state organ, let alone a single person. Lastly, the limitation of power by human rights is fundamental. State power derives from human rights and freedoms, and its main purpose is to limit the state. Human rights are a kind of demand for the state to act or refrain from certain actions and thus serve as a means of combating the abuse of state power.

A key role in defining the content of the doctrine of limited government and ensuring its implementation in state practice is played by the Constitutional Court of Ukraine as the body of constitutional control and the official interpreter of the Basic Law of Ukraine. From the very beginning, this constitutional jurisdiction body has consistently upheld the doctrine of constituent power, a principle known in Western constitutionalism, which asserts the creator of the Constitution of Ukraine is the people. It also emphasises that "an important function of the Constitution of Ukraine is to limit state power as secondary and derivative from the constituent power of the people."

Furthermore, the rules of constitutional legality reflect the fundamental constitutionalism principle of the necessity to limit state power to ensure human rights and freedoms and obligate subjects endowed with state power to act solely in accordance with the objectives established by the Constitution of Ukraine and so forth.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ДОКТРИНА ОБМЕЖЕНОГО ПРАВЛІННЯ У ПРАВОВИХ ПОЗИЦІЯХ КОНСТИТУЦІЙНОГО СУДУ УКРАЇНИ

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АНОТАЦІЯ

Вступ. *Сутність конституційного ладу полягає у двох основних аспектах: обмеження державної влади та забезпечення верховенства прав, зокрема захисту прав і свобод людини. Без механізмів обмеження державної влади держава неминуче втручається в життя суспільства і приватне життя людини, загрожуючи її правам і свободам. Еволюція конституційних систем у ліберально-демократичних країнах була тісно пов'язана зі зміцненням громадянського суспільства та розвитком інструментів контролю над державною владою. Історично ця еволюція пройшла шлях від абсолютної*

держави, де держава була єдиним власником і джерелом влади, до ліберально-демократичної держави, де держава служить народу та громадянському суспільству.

Разом із цим історичним зрушенням відбулася трансформація індивідів із простих гвинтиків у механізмі державної влади в громадян правової держави, які вимагають від держави стриманості для захисту індивідуальної свободи. Однією з центральних ідей конституціоналізму є принцип обмеженості правління. Метою статті є аналіз правових позицій Конституційного Суду України щодо доктрини обмеженого правління. Зокрема, досліджується, як Суд тлумачить ключові елементи цієї доктрини, такі як верховенство права, поділ влади, права людини і громадянина, а також доктрина установчої влади. Ці та інші пов'язані з ними питання становлять основу дослідження в цій статті.

Методи. *Для вивчення доктрини обмеженого правління та її елементів, а також для аналізу правових позицій, пов'язаних із цим питанням, було використано низку методів. За допомогою системно-структурного методу охарактеризовано поняття і зміст доктрини обмеженого державного правління та її ключові елементи, зокрема принцип верховенства права, принцип поділу влади, права людини і громадянина, доктрину правової держави, установчу владу. Логіко-правовий метод сприяв усвідомленню поглядів науковців на становлення та розвиток вчення про обмежене державне правління, а також їхні погляди на зміст його елементів. Крім того, для аналізу правових позицій Конституційного Суду України були використані правові методи, такі як дослідження конституційних текстів, первинного законодавства та судової практики.*

Результати та висновки. *У статті було розглянуто історичний розвиток і сучасний стан концепції обмеженого правління, досліджено її зв'язки з доктриною установчої влади, принципом верховенства права, концепцією прав і свобод людини та принципом поділу влади. Результатом дослідження є систематизований розгляд правових позицій Конституційного Суду України щодо доктрини обмеженого правління, яка є ключовою опорою сучасного українського конституціоналізму. Встановлено, що Конституційний Суд України з самого початку послідовно підтверджував істотні елементи доктрини обмеженого державного правління. Ці елементи утворюють доктрину установчої влади та фундаментальний принцип конституціоналізму, який підкреслює необхідність обмеження державної влади для захисту прав і свобод людини. Крім того, Суд дотримується думки, що організація та здійснення державної влади на основі поділу на законодавчу, виконавчу та судову гілки влади не є самоціллю, а має на меті забезпечити захист прав і свобод особи.*

Ключові слова: *Конституційний суд, обмежене правління, конституціоналізм, обмеження державної влади, права людини, установча влада, верховенство права, поділ влади.*

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Research Article

ON MANOEUVRING KAZAKHSTAN'S CRIMINAL LAW IN DEFINING TORTURE AND OTHER CRUEL, INHUMANE, AND DEGRADING TREATMENT AND PUNISHMENT

Elena Mitskaya*, Kurmangaly Sarykulov and Kanat Utarov

ABSTRACT

Background: *The issue of violence remains highly relevant in Kazakhstan today. Despite legal protections against violence and defence for individual rights, to date, there has been no resolution to the issue of torture by or on behalf of the state. The foundations of Kazakhstan as a rule-of-law state are undermined by violence. The state's efforts to address the current situation appear to be ineffective, fostering an environment where future violations of the rights, liberties, and legitimate interests of individuals, as protected by the Republic of Kazakhstan's Constitution, are encouraged. There is a trend towards governmental illegal violence being tolerated. It is unacceptable for law enforcement and prison personnel to conduct torture as a standard practice. Systemic measures, including criminal law measures, have a specific position in the fight against torture. This study's objectives are to analyse how torture and other cruel, inhumane treatment are criminalised under Kazakhstani criminal law, pinpoint issues with how these laws are applied, offer recommendations for addressing them, and contribute to the ongoing conversation surrounding these issues.*

Methods: *The method of normative-legal research was used in the analysis of Kazakhstani criminal legislation on the qualification of torture. The method of conceptual analysis was used in the study of a new conceptual apparatus in the disclosure of understanding of ill-treatment and torture. The comparative-legal method allowed the analysis of the history of the development of Kazakhstan's criminal legislation on the criminalisation of torture and ill-treatment to be subject to critical analysis of the current norms of criminal law in comparison with international legal acts. The qualitative method was used to analyse the situation with torture according to official data of the Committee on Legal Statistics and Special Records of the General Prosecutor's Office of the Republic of Kazakhstan, appeals of Kazakhstani citizens to the Commissioner for Human Rights in the Republic of Kazakhstan with complaints of torture.*

Results and conclusions: *Based on the analysis of the provisions of the current Kazakhstani criminal and international legislation and relevant scientific literature, the authors come to a scientifically justified conclusion on the need to actualise the attention of the state to focus more actively on addressing torture and cruel, inhumane treatment. The authors make proposals for further development of criminal-legal measures to counter torture and cruel, inhumane treatment. One such recommendation is to remove the narrow definition of an official in relation to torture within the health care, education and medical and social spheres. Furthermore, the authors argue for the adjustment of Article 146 of the Criminal Code to more clearly differentiate between ill-treatment and torture.*

1 INTRODUCTION

The criminalisation and prevention of torture, as well as cruel, inhumane or degrading treatment, serve as a kind of indicator of a state's real attitude to the observance and protection of fundamental human rights.[1] Following the recognition in international law that it is inadmissible to suppress a person in this way, Kazakhstan constitutionally enshrined the prohibition of torture: "No one shall be subjected to torture, violence, other cruel or degrading treatment or punishment".[2] The Constitution established a preventive legislative framework to combat torture and ill-treatment in accordance with international standards.

Despite the Republic of Kazakhstan's ratification of the UN Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (hereinafter: the UN Convention against Torture), torture was not criminalised as an independent *corpus delicti*. Torture was added to the Criminal Code of the Republic of Kazakhstan (hereinafter: the Criminal Code) as a separate *corpus delicti* in 2002.[3] Individual complaints against Kazakhstan[4] to the United Nations Committee Against Torture became possible following Kazakhstan's ratification of the International Covenant on Civil and Political Rights.[5] Ten

1 Malcolm D Evans, 'The Criminalisation of Torture as a Part of the Human Right Framework' (2014) 2 Crimen 137.

2 Constitution of the Republic of Kazakhstan of 30 August 1995 (amended 19 April 2024) <https://adilet.zan.kz/eng/docs/K950001000_> accessed 20 March 2024.

3 Law of the Republic of Kazakhstan no 363 of 21 December 2002 'On amendments and additions to the Criminal Code, the Code of Criminal Procedure and the Code of Criminal Enforcement of the Republic of Kazakhstan' <https://adilet.zan.kz/rus/docs/Z020000363_> accessed 20 March 2024.

4 RK Sarpekov (ed), *Implementation of Norms of International Treaties in the Field of Human Rights (Civil and Political Rights) in the Legislation of the Republic of Kazakhstan: Analytical Report on the Topic of Fundamental and Applied Scientific Research 2018* (Institute of Legislation of the Republic of Kazakhstan 2018) 19 <https://zan.kz/kk/Journal/View?id=da78d4cc-fafc-4ffb-a700-da569b050372> accessed 20 March 2024.

5 Law of the Republic of Kazakhstan no 91 of 16 December 1966 'On Ratification of the International Covenant on Civil and Political Rights' <https://adilet.zan.kz/eng/docs/Z050000091_> accessed 20 March 2024.

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years after ratifying the UN Convention against Torture, Kazakhstan ratified the Optional Protocol to the Convention,[6] which establishes the National Preventive Mechanism for Combating Torture[7] as a public institution whose members are entitled to free, unannounced, and regular access to closed institutions to monitor compliance with human rights, torture prevention, and other issues. In addition to these major international documents on preventing torture, Kazakhstan abides by a number of other international regulations and standards.[8] Among these are the Standard Minimum Rules for the Treatment of Prisoners, the principal rules and concepts of which are incorporated into the Republic of Kazakhstan's current Penal Enforcement Code,[9] Principles for Effective Investigation and Documentation of Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment.[10]

As a result, Kazakhstan has established robust foundations for a torture prevention framework. However, torture cannot be considered a turning point in the country's societal progress. The existing situation regarding torture is far from ideal, as certain principles of criminal law, among other things, make it easier to avoid responsibility for such acts. In our opinion, the most recent reform in criminal law is not a balanced response to the legislative challenges of defining torture and distinguishing it from other forms of abuse against a person. The possibility of convicting someone for torture rather than ill-treatment – a less severe crime – clearly demonstrates the existence of systemic uncertainty in the legislative definition of torture, reducing overall measures to combat torture as an extremely dangerous phenomenon in modern Kazakhstan.

Based on the achievements of Kazakhstani legal research, international legislation on torture, and its practical implementation, this paper attempts to demonstrate the

6 Law of the Republic of Kazakhstan no 48-IV of 26 June 2008 'On ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' <https://adilet.zan.kz/eng/docs/Z080000048_> accessed 20 March 2024.

7 Law of the Republic of Kazakhstan no 111-V of 2 July 2013 'On Introducing Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Creation of a National Preventive Mechanism Aimed at Preventing Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' <https://adilet.zan.kz/rus/docs/Z1300000111> accessed 20 March 2024.

8 Nurlan Agibaev, *Analysis of the Legislation of the Republic of Kazakhstan for Compliance with International Standards of Effective Investigation of Torture* (Public Association "Kadir-Kasiet" 2022) <https://online.zakon.kz/Document/?doc_id=32876848> accessed 20 March 2024.

9 Aidarkan B Skakov, 'Implementation of the Norms of the Standard Minimum Rules for the Treatment of Prisoners in the Novelties of the Criminal Executive Code of Kazakhstan' in *Information and Analytical Materials on Modernisation of Criminal, Criminal Procedure and Criminal Executive Legislation of the Republic of Kazakhstan,* pt 3 (Mazhilis of the Parliament of the Republic of Kazakhstan 2016) 185 <https://www.parlam.kz/mazhilis/download/13641> accessed 20 March 2024.

10 OHCHR, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Professional Training Series no 8/Re v2, UN 2022) <https://www.ohchr.org/en/publications/policy-and-methodological-publications/istanbul-protocol-manual-effective-0> accessed 20 March 2024.

problematic nature of the criminal law provisions on torture, which hinder the discovery of torture and other ill-treatment. The author's approach to resolving these issues will hopefully add to the inevitability of torture punishment. There are no significant studies in this context by Kazakhstani scientists, despite the fact that the high level of human rights breaches in torture and ill-treatment should prompt a broad scientific debate. This study is the only one in Kazakhstan that reveals the difficulties in separating torture from cruel, inhumane, or degrading treatment or punishment. Addressing these challenges requires the engagement of a broad spectrum of interested parties to foster meaningful progress in combating torture.

2 METHODOLOGY OF THE STUDY

A methodology of normative-legal research was used to conduct this research, based on normative-legal, conceptual, and comparative-legal approaches. It drew on international legal acts establishing the absolute prohibition of torture and intolerance to other acts of cruel, inhumane or degrading treatment or punishment. Additionally, the study examined analytical materials, recommendations and reports on the situation with torture in Europe and Kazakhstan, alongside current Kazakhstani criminal legislation and special legal literature to better understand the qualification of torture and ill-treatment. This study used a qualitative method of analysing official data on registered facts of torture in the register of pre-trial investigation to achieve clarity in the essence of the issue under discussion.

3 RESULTS AND DISCUSSION

3.1. Situation on torture in Kazakhstan

Torture is always evil[11] because it contradicts the entire concept of human rights.[12] It is used to place a person in a condition of extreme helplessness produced by the violation of cognitive, emotional, and physiological processes, as well as to restrict human will and humiliate one's dignity.[13] Despite being a widely known form of human rights violation, torture persists even in states with high living standards.[14] Kazakhstan is no exception.

11 Rebecca Evans, 'The Ethics of Torture' (2007) 7(1) *Human Rights & Human Welfare* 53.

12 Joseph S Nye, *Understanding International Conflicts: An Introduction to Theory and History* (Longman Classics in Political Science, 5th edn, Pearson 2005) 21.

13 I Gilyazetdinova and A Sydykov, *Criminal Liability for Torture: Textbook* (Supreme Court of the Kyrgyz Republic 2021) 31.

14 Amnesty International, *Report 2001* (Amnesty International Publ 2001) <https://www.amnesty.org/en/documents/pol10/0001/2001/en/> accessed 20 March 2024.

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Several public organisations, such as the Kazakhstan International Bureau of Human Rights and Rule of Law, are engaged in extensive human rights activities to combat torture including the Kazakhstan International Bureau for Human Rights and Rule of Law, the Coalition against Torture, the Coalition "New Generation of Human Rights Defenders," the Coalition for the Safety of Human Rights Defenders, NGO "For the Protection of Children's Rights," as well as several organisations, including journalistic "Ədil sөz", "Kadyr-kasiet", "Erkindik kanaty", the Youth Information Network of Kazakhstan, the Liberty Foundation, and "Ar.Rukh.Hak". There is a call at the state level to adhere to zero tolerance of torture.

However, until January 2022, torture was not officially recognised as a systemic phenomenon in Kazakhstan but was dismissed as an isolated case, an exception. This perspective shifted after the tragic Bloody January events, where mass riots over rising gas prices escalated into nationwide unrest. In his address to the nation after the January events, the President of the Republic of Kazakhstan officially recognised the widespread use of torture against detainees,[15] marking a shift in public discourse. With this confession, the President highlighted the entrenched problem of torture within the criminal justice system, breaking previous silences on the issue.

Nevertheless, despite the absolute nature of the right to freedom from torture, there has been no large-scale condemnation of police officers who tortured people. Today, civil society lacks a comprehensive understanding of the scope of torture detection and criminalisation. According to official statistics for 2022, the number of victims of January torture has decreased. The Committee on Statistics and Special Records of Kazakhstan's General Prosecutor's Office counts the number of victims of torture in open cases, and if the case is closed without identifying the perpetrator of torture, the victim is not officially recognised as a victim of torture. This can be clearly demonstrated in the following Figure 1.[16]

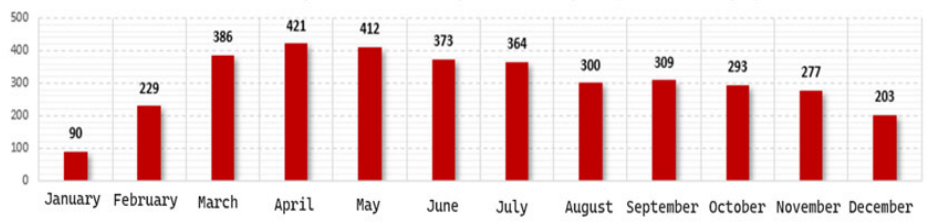

Figure 1. Number of victims of torture by criminal cases registered during the period. Monthly dynamics

15 Kassym-Jomart Tokayev, 'New Kazakhstan: The Path of Renewal and Modernization: State of the Nation Address by President of the Republic of Kazakhstan' (*President of the Republic of Kazakhstan: Website*, 16 March 2022) <https://www.akorda.kz/en/state-of-the-nation-address-by-president-of-the-republic-of-kazakhstan-kassym-jomart-tokayev-17293> accessed 20 March 2024.

16 Statistical reports of the Committee on Legal Statistics and Special Accounts of the General Prosecutor's Office of the Republic of Kazakhstan see: *Portal of Legal Statistics and Special Accounts* <https://qamqor.gov.kz/crimestat/statistics> accessed 20 March 2024.

As can be observed, there was an increase in the number of registered cases of torture from January to April 2022, with April recording the largest number of registered torture allegations at 421. By the end of 2022, less than half of these were still being investigated for torture. As a result, the official figure for torture victims in 2022 is 203. The practice of considering torture cases demonstrates a lack of disclosure of this crime, with many cases being fragmented due to an inability to prove the occurrence of torture. At the same time, when analysing the reports of the Ombudsman of Kazakhstan, 447 complaints of torture were submitted in 2022, including those from correctional institutions. The number of complaints to the Ombudsman and the Coalition of NGOs of Kazakhstan against Torture is growing annually, with 2022 showing the highest number of complaints, as presented in Figure 2[17] and Figure 3.[18]

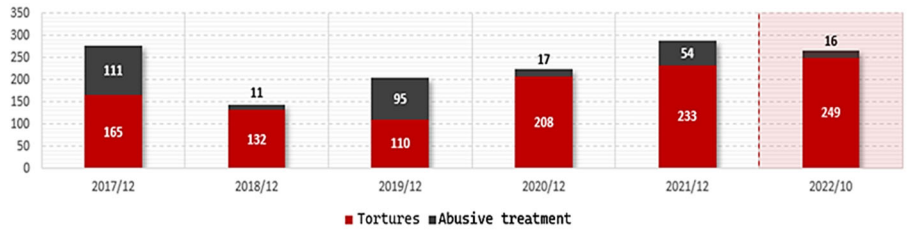

Figure 2. Number of appeals to the Coalition of Non-Governmental Organizations of Kazakhstan against torture

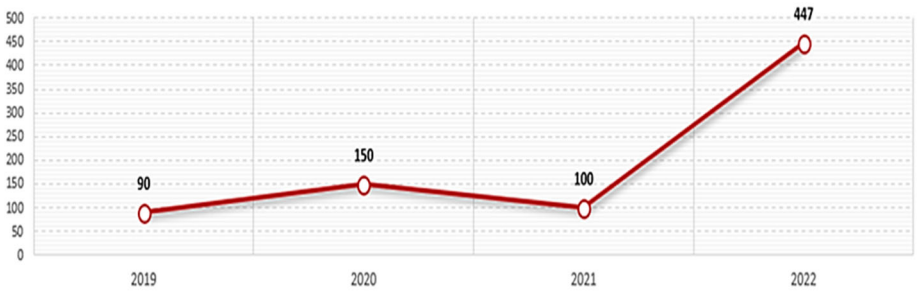

Figure 3. Number of complaints from Kazakhstanis to the Human Rights Ombudsman of the Republic of Kazakhstan in regard to torture

For the last five years, official data from the Committee on Statistics and Special Records under the General Prosecutor's Office of Kazakhstan show that 95% of cases are terminated on rehabilitative grounds: for the absence of the event of a criminal offence, for the absence

17 *KIBHR - Kazakhstan International Bureau for Human Rights and Rule of Law: Website* <https://bureau.kz/en/> accessed 20 March 2024.

18 *Human Rights Ombudsman in the Republic of Kazakhstan: Website* <https://www.gov.kz/memleket/entities/ombudsman/activities/52856?lang=en> accessed 20 March 2024.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

of *corpus delicti* of a criminal offence. It turns out that these are almost all criminal torture cases. Indeed, analysing data from the General Prosecutor's Office reveals a major difference between registered and terminated cases, as well as an incomparable disparity in the number of cases submitted to court (Figure 4).[19]

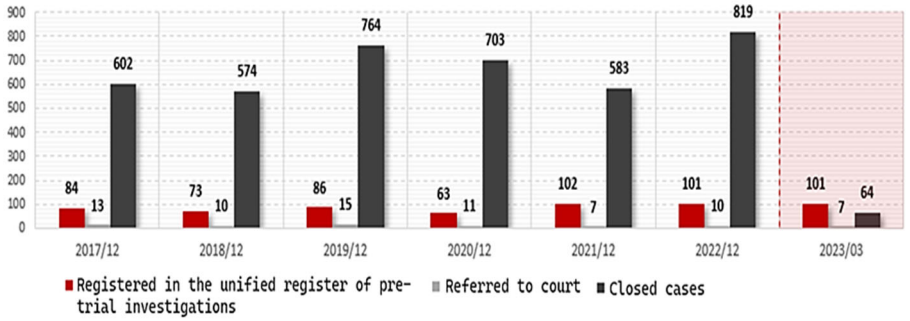

Figure 4. Information on criminal offences under Article 146 of the Criminal Code of the Republic of Kazakhstan "Torture". During the reporting period

The data reveals a concerning reality: the number of torture cases brought to court is exceedingly low. The closure of cases for reasons other than exoneration raises critical questions about the systemic challenges in proving acts of torture and what needs to be done to address the problem.

In 2023 and 2024, the situation changed in a number of ways: the number of allegations of torture decreased, while the number of criminal cases brought to court increased compared to previous years. For example, in 2023, the number of allegations of torture nearly halved in comparison with the previous year, dropping from 791 to 417. Similarly, during the first half of 2024, the number of allegations decreased by one-third compared to the same period in 2023 (from 221 to 139).[20]

Despite these improvements, concerns remain about how deeply the state intends to engage in the prevention of torture. For instance, in 2019, 24 people were convicted of torture, followed by 13 in 2020, seven in 2021, and two in 2022, even taking into account the January events.[21] However, progress can be observed. Out of 148 criminal cases registered in 2023, 22 were sent to court (compared to 10 in 2022), resulting in 40 convictions – nearly four times the 12 convictions in 2022.

19 *Portal of Legal Statistics and Special Accounts* (n 16).

20 The work of the prosecutor's office in combating torture see: *The Prosecutor General's Office of the Republic of Kazakhstan*: *Website* <https://www.gov.kz/memleket/entities/prokuror/press/news/details/810114?lang=en> accessed 20 March 2024.

21 Global Affairs Canada, 'Human Rights Report [Kazakhstan], January 2022 - December 2022 : Full Report' (*Public Association Dignity*, 31 January 2023) <https://kkassiyet.wordpress.com/reports/> accessed 20 March 2024.

In the first six months of 2024, out of 99 criminal cases registered, 12 cases were sent to court against 33 public officials, resulting in the conviction of six of them. However, from 2017 to date, the number of reported cases of torture exceeds the number of cases sent to court and the number of people convicted of torture. This is a severe issue. Torture destroys the state's constitutional foundations, diminishing the rule of law, degrading the administration of justice, and, as a result, people's faith in justice in society.[22] One cannot help but conclude that the appearance of proper opposition to torture creates a culture of torture and that it has become a widespread practice among law enforcement agents.[23]

It is necessary to acknowledge the significant state already taken by the state to prevent torture. In Kazakhstan, there are 63 penitentiary institutions housing approximately 29,000 people, along with 17 pre-trial detention centres where about 6,000 people are held.

In 2013, the National Preventive Mechanism against Torture was established for public control over these institutions. The NPM's Coordination Council, consisting of 27 people, has the right to conduct inspections of premises and interview persons held in pre-trial detention centres and places of deprivation of liberty, as well as receive complaints regarding torture.

Prosecutors play a significant role in oversight, including opening mailboxes in penitentiary institutions on a weekly basis to address complaints about staff misconduct. Since 2019, it has been obligatory for a prosecutor to be present at the examination of torture crime scenes, ensuring special control of the prosecutor's office. Additionally, as of January 2023, cases of torture have been investigated exclusively by prosecutors.

To enhance accountability, correctional and prosecution facilities are gradually being equipped with video cameras to provide continuous video surveillance of all blind spots in the facilities. Additionally, the medical staff of penitentiary facilities has been transferred from the jurisdiction of the Ministry of Internal Affairs of the Republic of Kazakhstan to the Ministry of Health. This move aims to eliminate medical staff's dependency on managing these facilities as employees and employers.

Kazakhstan's criminal law has been repeatedly amended to increase liability for torture. In 2014, with the adoption of the new Criminal Code, the punishment for torture resulting in the death of the victim by negligence was increased from 10 to 12 years of imprisonment. In 2023, the punishment for group torture, torture of pregnant women and children, and repeated acts of torture, as well as those causing harm of medium severity, was increased from a minimum term of three years to a maximum of seven years, with the minimum term increased from four years to a maximum of ten years. The lower amount of punishment for

22 Dan Claudiu Danisor and Madalina Cristina Danisor, 'Totalitarianisms and the Establishment of Objective Legal Order' (2020) 10(1) Juridical Tribune 46.

23 Satnam Singh Deol and Rayees Ahmad Ganai, 'Custodial Violence in Kashmir by the Indian Security Forces: A Spontaneous Consequence or a Deliberate Counter-Insurgency Policy?' (2018) 13(2) International Journal of Criminal Justice Sciences 373, doi:110.5281/zenodo.2657636; James Welsh and Mary Rayner, 'The "Acceptable Enemy": Torture in Non-Political Cases' (1997) 7(1) Torture 10.

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causing serious harm to health and causing the death of a victim by negligence as a result of torture was changed to imprisonment for a term of five to twelve years; now, it is imprisonment for a term of seven to twelve years.

In addition, the criminal law introduces a restriction on the exemption from criminal liability of persons who have committed torture, on amnesty, expiration of the statute of limitations, for active repentance, and reconciliation of the parties.

The latest amendment to criminal law introduced a new version of the article criminalising torture and ill-treatment. However, this revision raises concerns as it is unlikely to contribute to improving the effectiveness of the practical implementation of the criminal law prohibition of torture and other forms of violence. This necessitates discussion on the challenges associated with the qualification of torture and ill-treatment under Kazakhstani criminal law, particularly in light of these recent amendments.

3.2. Changing the legislative definition of "torture" and its inconsistency with the Convention definition of "torture"

While torture is a fundamental violation of fundamental human rights,[24] it was not immediately introduced into criminal law. Partly, this is due to the long refusal of the state to recognise the fact of its existence. Even now, law enforcement officials try not to use the word "torture", correctly replacing it with "unauthorised methods of investigation".

Torture was first recognised as a separate *corpus delicti* in criminal law in 2002. Torture was once classified as a crime against justice and the order of execution of punishment. However, it was later moved to the category of crimes against constitutional and other human and citizen rights and freedoms. As a result, legislators prioritised the protection of human health and dignity, as well as the right to privacy.

However, the definition of torture was transferred from the old Criminal Code to the new one despite being appropriately criticised for its partial incompatibility with the UN Convention against Torture.[25] Finally, the definition of torture was formally altered in March 2023[26] to align with the definition of the UN Convention against Torture. The article "Torture" has had its legislative framework totally altered.

24 Uliana Koruts, Roman Maksymovych and Olha Shtykun, 'Legal Grounds for Restrictions of Human Rights in the European Court of Human Rights Case-Law' (2021) 4(4) Access to Justice in Eastern Europe 137, doi:10.33327/AJEE-18-4.4-n000089.

25 Daniyar Kanafin, *Procedural guarantees of protection from torture in criminal proceedings of the Republic of Kazakhstan*: *Expert judgement* (OSCE Programme Office in Astana 2017) 6; Nikolai N Turetsky, 'Application of Comprehensive Measures in the Fight against Torture in the Republic of Kazakhstan' (2022) 3 Law and State 117, doi:10.51634/2307-5201_2022_3_109.

26 Law of the Republic of Kazakhstan no 212-VII of 17 March 2023 'On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Human Rights in Criminal Proceedings, Execution of Punishment, and Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' <https://adilet.zan.kz/rus/docs/Z2300000212> accessed 20 March 2024.

The article was renamed "Cruel, inhumane or degrading treatment, torture" to reflect a significant development: for the first time in Kazakhstan's criminal legislation, acts of cruel, inhumane or degrading treatment were criminalised alongside torture. This revised article is divided into various sections. The first section establishes accountability for torture, whereas the second part provides liability for cruel, inhumane, or degrading treatment. The third and fourth sections are aggravated offences that apply to both ill-treatment and torture.

Due to recent changes in the criminal law, the subject of torture has significantly expanded. Previously, major emphasis was placed on the subject of torture as a specific subject, such as an official employee of the criminal-executive system, equipped with particular powers to ensure the application of criminal sanctions and other measures of criminal-legal influence. It could be the concept of a person functioning in an official capacity is now introduced alongside officials, particularly those who carry out criminal prosecution.

The note to Article 146 of the Criminal Code clarifies this broad definition. It encompasses individuals who, while not formally classified as officials or representatives of authority under the Criminal Code, possess dispositive powers over persons in their care or custody. This includes those kept, treated, trained, or brought up on a permanent, temporary, or periodic basis in an organisation with which the person has an employment relationship, such as an employee of an educational, treatment, medical, or social institution.

Indeed, there are problem students at special educational institutions for juvenile offenders who, by failing to follow the set standards of behaviour, may experience the use of violence.[27] Cases of torture have also been documented in Kazakhstani boarding schools for orphans and children who have been abandoned by their parents, resulting in speech impairment and psychoneurological anomalies. As a result of the legislator's expanded understanding of who qualifies as a perpetrator of torture, such acts are not excluded from these settings. Under the amended language of the criminal code rule, perpetrators of torture may include both private and public authorities, including anyone acting in an official capacity.

However, this idea of a person acting in an official capacity is, in our opinion, presented in an overly narrow manner. According to the International Covenant on Civil and Political Rights, a perpetrator of torture may include any individual acting either within or beyond his or her official role or in a private capacity.[28] As a result, anyone can be subjected to torture. The understanding of a person acting in an official capacity, according to the note

27 Yaacov Reuven, 'Organizational Climate in Juvenile Correctional Institutions in Israel: A Study on Violence by Educational Instructors towards Inmates during Discipline Encounters' (2018) 13(1) International Journal of Criminal Justice Sciences 77, doi:10.5281/zenodo.1403393.

28 CCPR General Comment no 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (adopted 10 March 1992) para 2 <https://www.refworld.org/legal/general/hrc/1992/en/11086> accessed 20 March 2024.

Access to Justice in Eastern Europe
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to Article 146 of the Criminal Code, is limited to the spheres of health care, education, and medical and social spheres, which narrows not only the circle of subjects of torture but also the circle of potential victims of torture.

Torture is defined by the requirement that it causes significant physical and (or) mental pain. As a result, the Convention's definition of torture separates it from other forms of ill-treatment by the severity of bodily and (or) mental anguish. In this regard, the new definition of torture in the Criminal Code differs from the traditional one in that it does not associate torture with the infliction of severe physical and (or) mental pain. This makes prosecuting somebody for torture difficult because the real behaviours indicative of torture in Kazakh criminal law are difficult to separate from ill-treatment. Using this, law enforcement agencies can legally classify torture as ill-treatment with a less severe punishment than torture.

Currently, we and other Kazakhstani scientists are confronted with the challenge of investigating the extent of pain experienced during torture, as this phenomenon remains entirely uncharted territory.

3.3. Problems of distinguishing torture from cruel, inhumane or degrading treatment and other forms of violence

Torture should be defined as both action and possibly inactivity (tacit agreement) under the new definition in Section 2 of Article 146 of the Criminal Code. According to the Supreme Court of the Republic of Kazakhstan's normative resolution, inaction should include silent approval, such as nodding, gesturing, or otherwise signalling consent, and failure to intervene when aware of others' illegal actions. It should also encompass unlawful allowance of individuals to access those who are then subjected to torture, resulting in physical and (or) mental suffering.[29]

Torture, by its nature, is always an intentional and purposeful act.[30] It is critical to pay close attention to the definition of torture's purposes. It may be committed for the following reasons:

- to coerce the tortured person or another person to testify or perform other acts;
- to punish the tortured person for an act committed by the person or another person;

29 Normative resolution of the Supreme Court of the Republic of Kazakhstan no 7 of 28 December 2009 'On Application of Norms of Criminal and Criminal Procedural Legislation on Issues of Observance of Personal Freedom and Inviolability of Human Dignity, Counteraction to Torture, Violence, other Cruel or Degrading Treatment and Punishment' <https://adilet.zan.kz/rus/docs/P09000007S_> accessed 20 March 2024.

30 Jayantha C Herath and Michael S Pollanen, 'Clinical Examination and Reporting of a Victim of Torture' (2017) 7(3) Academic Forensic Pathology 330, doi:10.23907/2017.030.

- to intimidate the tortured person or, through that person, another person;
- any other reason based on discrimination of any kind (e.g., gender, age - older people, minors; based on different religious beliefs, nationality, non-traditional sexual orientation).

The presence of intent and purpose distinguishes torture from cruel, inhumane, or humiliating treatment, which has been criminalised as an independent *corpus delicti* under Part 1 of Article 146 of the Republic of Kazakhstan's Criminal Code. While the partition of Article 146 of Kazakhstan's Criminal Code into two *corpus delicti* appears progressive, it is clear that the objective signs of both crimes are identical. Cruel, inhumane, or humiliating treatment is defined as the intentional inflicting of bodily and (or) mental suffering in the absence of symptoms of torture.[31] Torture is similarly recognised as the intentional infliction of physical and (or) mental anguish but is committed for specific purposes including – but limited to – those outlined above.

The distinction between ill-treatment devoid of qualifying qualities and torture devoid of qualifying characteristics is thus based on the presence of purpose. For an act to qualify as torture, the purpose must be established in a mandatory manner. In contrast, purpose is not a necessary element for qualifying the *corpus delicti* of ill-treatment without qualifying features. This distinction becomes challenging in cases where cruel, inhumane, or degrading treatment is motivated by factors such as religious hatred or revenge – both of which could also align with discriminatory motivates that qualify as torture. Consequently, the question of how to differentiate between the two offences remains unanswered.

Given the disparity in sentencing, it is likely that many cases will be classified as ill-treatment, which carries a lower sentence than torture. The UN Committee against Torture has previously expressed concern about this issue, noting that law enforcement officials accused of torture are frequently prosecuted under other articles with less severe penalties than torture. The Committee has emphasised that torture should be recognised as a more serious crime.[32]

Torture, as defined by the Convention, is distinguished from other forms of ill-treatment by the severity of physical and (or) mental anguish. At first glance, this distinction may appear insignificant and meaningless in distinguishing torture from related offences. However, such qualification is given in the convention definition deliberately to highlight the essence of torture and its separation from other forms of ill-treatment.

31 Law of the Republic of Kazakhstan no no 226-V of 3 July 2014 'Criminal Code of the Republic of Kazakhstan' art 146 <https://adilet.zan.kz/eng/docs/K1400000226> accessed 20 March 2024.

32 Concluding observations of the Committee against Torture of 12 December 2014 'Concluding observations on the third periodic report of Kazakhstan (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)' <https://adilet.zan.kz/eng/docs/O1400000002> accessed 20 March 2024.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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In contrast to the UN Convention against Torture, the absence of the condition of "severe suffering" in the description of torture in the Criminal Code indicates a broader understanding of suffering. Under Part 2 of Article 146 of the Republic of Kazakhstan's Criminal Code, even a minor degree of inflicted suffering is already encompassed. This broader scope appears to be a positive step.

Nevertheless, the difficulty arises when attempting to distinguish between ill-treatment and torture, especially in cases where both involve violence motivated by discrimination, punishment for an act committed by the victim or another person, or intimidation directed at the victim. Some argue that "given that cruel and inhumane treatment is itself also contrary to international law, attempting to set clear borders between the two is probably a futile and potentially misleading task".[33] This raises a critical question: how can ill-treatment from torture be effectively distinguished from torture when their motives and actions overlap significantly?

The challenge becomes even more pronounced when distinguishing torture from ill-treatment that causes only minimal health injuries. In most cases, the defining element is whether law enforcement agents or individuals acting with their cooperation inflicted harm with the intent of extracting relevant evidence.

Under Kazakhstan's Criminal Code, torture is classified as a form of cruel treatment and violence against a person carries varying degrees of penalties. For lesser forms of torture, punishments include a fine of up to 1000 minimum calculation index (MCI), correctional labour in the same amount, community service for up to 600 hours, restriction of freedom for up to 2 years, or imprisonment for the same period. In Kazakhstan, one MCI is worth 3,692 tenge (about $7.76 USD). For the fundamental *corpus delicti* of torture, more severe penalties apply. These include a fine of up to 5,000 MCI, correctional labour in the same amount, restriction of freedom for up to six years, or imprisonment for the same period. Additionally, offenders face mandatory deprivation of the right to hold certain positions or engage in certain activities for up to three years.

When comparing the punishment for ill-treatment (the basic *corpus delicti* causing minor harm to health) and torture, the differences in severity become evident. For ill-treatment, the penalties include a fine of up to 2,000 MCI, correctional labour in the same amount, involvement in community service for up to 600 hours, restriction of freedom for up to 2 years, or imprisonment for the same period, with or without deprivation of the right to hold certain positions or engage in certain activities for up to two years.

As we can see, the primary *corpus delicti* of ill-treatment differs from the main *corpus delicti* of torture by the imposition of more mild punishments. Differences are evident in the amount of the fine, correctional labour, and the necessary supplementary punishment for ill-treatment compared to torture. However, other fundamental forms of punishment, such

33 Welsh and Rayner (n 23) 9.

as imprisonment or restriction of freedom, remain the same for both offences. This reflects the legislator's acknowledgement of the overlapping nature of the fundamental ingredients of torture and ill-treatment.

This overlap creates difficulties in determining which criminal law provisions should apply when establishing facts of violence against a person. We will not examine why there are differing amounts of fines or correctional work in the Criminal Code for cases involving minor harm to health, whether classified as torture or cruel treatment, despite the fact that torture is inherently a form of cruel treatment. Ultimately, this topic of systematic punishments and their proportionality under the Republic of Kazakhstan's Criminal Code remains unresolved.[34]

International experts have noted that the punishments under Part 1 of Art. 141-1 "Torture" of the Criminal Code 1997 – ranging from "a fine of 200 to 500 of minimum calculation index or in the amount of wages or other income of the convicted person for a period of two to five months, or deprivation of the right to hold certain positions for up to three years, or restriction of freedom for up to five years, or imprisonment for the same period of time" – do not correspond to the gravity of such a crime as torture. This is inconsistent with Article 4 of the UN Convention against Torture, which categorises torture as a serious crime.[35]

Experts have suggested extending the scope of Part 1 of Article 146-1 "Torture" to include other forms of violence against a person, including ill-treatment, thereby criminalising such acts as distinct from torture and prescribing less severe punishment for them. Although nearly 9 years have passed since this advice was given, it remains relevant regarding the current construction of Article 146 of the Criminal Code. The inclusion of infliction of slight harm to health in "Torture" does not conform to the UN Convention against Torture's interpretation of torture, which equates torture with ill-treatment. In this regard, we agree that "if an excessively broad definition is used, the severity of the trauma suffered by survivors of torture can be minimised".[36]

Part 2 of Article 146 of the Criminal Code covers the imposition of small injury to health as a result of torture, Part 3 addresses medium severity harm to health, and Part 4 addresses significant harm to health. Similarly, in terms of ill-treatment, Part 1 of Article 146 covers mild health harm, Part 3 with medium severity, and Part 4 with substantial health harm. It turns out that ill-treatment has been designated as a separate *corpus delicti*, but in terms

34 Ramazan Sarpekov and Sattar Rakhmetov, 'Problems of Building the System of Punishment in the Criminal Code of the Republic of Kazakhstan' (2022) 1(68) Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan 48, doi:10.52026/2788-5291_2022_68_1_43.

35 Tatiana Chernobil, 'Independent Report of the Republic of Kazakhstan to the UN Committee against Torture' (*Center for Legal Policy Research*, September 2013) <https://online.zakon.kz/Document/?doc_id=39720417> accessed 20 March 2024.

36 Richard M Duffy and Brendan D Kelly, 'Psychiatric Assessment and Treatment of Survivors of Torture' (2015) 21(2) BJPsych Advances 106, doi:10.1192/apt.bp.113.012005.

Access to Justice in Eastern Europe
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of the degree of infliction of moderate to serious bodily harm, aggravating factors, and penalty, this *corpus delicti* is identical to torture.

In addition, the introduction of cruel treatment into a separate *corpus delicti* has created overlaps with other offences, such as the intentional infliction of serious harm to health with particular cruelty (Paragraph 4, Part 2, Article 106 of the Criminal Code) and the intentional infliction of moderate harm to health with particular cruelty (Paragraph 3, Part 2, Article 107 of the Criminal Code). This has led to potential conflicts in interpretation, and it is possible that the Supreme Court of the Republic of Kazakhstan may give certain clarifications on this matter in the future.

At present, the penalty for the offence outlined in Paragraph 4 of Part 2 of Article 106 of the Criminal Code ranges from 6 to 10 years of imprisonment, while the punishment under Part 4 of Article 146 of the Criminal Code is from seven to twelve years. In the instance of death by negligence as a result of causing substantial harm to health, the criminal risks eight to twelve years in jail. Meanwhile, torture or ill-treatment that causes substantial harm to the victim's health or death due to negligence is punishable by jail for seven to twelve years.

As we can see, the lower limit of the sanction for torture and ill-treatment is milder, starting from 7 years of imprisonment, whereas the lower limit of the sanction for infliction of serious harm to health resulting in the victim's death by negligence begins at eight years. As we may see, the desire to end impunity, noble as that aim might be, must not be at the expense of respect for "the principle of legal certainty".[37] Moreover, the Criminal Code and the Criminal Procedure Code that implements it already have enough ambiguities and problematic provisions.[38]

It must be stated that international legal principles cannot provide a comprehensive and precise solution to the relationship between torture and ill-treatment. Torture can encompass acts such as the failure to provide food, water, or medical treatment. For example, the lack of medical attention and unwillingness to hospitalise a critically ill complainant were classified as the intentional infliction of extreme pain and suffering by an official to extract a confession.[39]

Researchers engaged in torture research also draw attention to the expanding understanding of acts that may have been recognised as torture. Clare McGlynn raises the issue of considering rape as "a form of torture is recognised in a wider range of situations

37 Tatyana Eatwell and Steven Powles QC, 'Quasi-Governors' and Questions Relating to Impunity and Legal Certainty' (2021) 19(2) *Journal of International Criminal Justice* 399, doi:10.1093/jicj/mqab020.

38 Elena Mitskaya, 'Fighting Corruption in Kazakhstan by Force of Criminal Law' (2023) 15(2) Cosmopolitan Civil Societies 1, doi:10.5130/ccs.v15.i2.8346; Elena Mitskaya, 'Theoretical Thoughts on Legal Regulation of Mediation in Criminal Process in Kazakhstan' (2020) 15(1) International Journal of Criminal Justice Sciences 91, doi:10.5281/zenodo.3822110.

39 *Ashim Rakishev and Dmitry Rakishev v Kazakhstan* no 661/2015 (CAT, 31 July 2017) para 8.2 <https://atlas-of-torture.org/en/entity/h8cz5xhyq1x8mh3ohk273nmi> accessed 20 March 2024.

and circumstances than is currently the case".[40] The distinction between torture and ill-treatment remains challenging,[41] and, as experts point out, just as ill-treatment can include features of torture, so can torture.[42] International human rights bodies consider the following factors when determining whether torture or ill-treatment has occurred:

1) the nature of the act or acts in question;
2) the severity of the physical and/or mental harm caused as a result of these actions;
3) the purpose of the subject;
4) the official status and/or individual responsibility of the subject;
5) whether the harm resulted from a lawful sanction;[43]
6) the setting in which the act or acts were carried out.[44]

To establish severity, the victim's susceptibility – such as disability or old age – must be considered as a component of judging the degree of pain and suffering.[45] It is obvious that, unlike physical pain and suffering, defining the degree of intensity, the strength of moral anguish in both ill-treatment and torture is inherently difficult. Non-physical or psychological abuse is frequently difficult to establish in practice.[46] Torture, on the other hand, is an extreme form of cruelty,[47] whereas ill-treatment is not considered torture if the harm inflicted is mild.[48]

The UN Convention against Torture does not specify what constitutes extreme pain or physical/moral suffering to distinguish torture from ill-treatment. In this regard, the European Court's practice has been developed, which is instructive for Kazakhstan as a model for combating both torture and ill-treatment.

For instance, in Ireland, compared to the United Kingdom (1978, paras. 167,168), the Court recognised certain actions as inhumane treatment because they inflicted a sense of

40 Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58(03) International and Comparative Law Quarterly 565.

41 David Weissbrodt and Cheryl Heilman, 'Defining Torture and Cruel, Inhuman, and Degrading Treatment' (2011) 29 Law and Inequality 380.

42 ibid 373.

43 ibid 376-7.

44 European Court of Human Rights, *Guide on Article 3 of the European Convention of Human Rights: Prohibition of torture* (CoE ECtHR 2024).

45 Juan E Mendez, '*How International Law Can Eradicate Torture: A Response to Cynics*' (2016) 22(2) Southwestern Journal of International Law 254.

46 A Dardiri Hasyim, Mufrod Teguh Mulyo and Darsinah, 'Harmonization of Cairo's Declaration of Human Rights in the Criminal Act of Sexual Violence Law' (2021) 16(2) International Journal of Criminal Justice Sciences 402, doi:10.5281/zenodo.4756084.

47 John D Bessler, 'The Gross Injustices of Capital Punishment: A Torturous Practice and Justice Thurgood Marshall's Astute Appraisal of the Death Penalty's Cruelty, Discriminatory Use, and Unconstitutionality' (2023) 29(2) Washington and Lee Journal of Civil Rights and Social Justice 67; Nigel S Rodley, 'The Definition(s) of Torture in International Law' (2002) 55 Current Legal Problems 468.

48 Mendez (n 45) 255.

inferiority, oppression, and degrading treatment on the victim. The assessment generally depends on the case's circumstances, including the acts' duration and their impact on the victim's condition. However, the Court did not classify ill-treatment as torture since it lacked the depth of misery and cruelty that characterises torture.[49]

Torture has been distinguished from ill-treatment by the severity of the treatment and the intent behind it. Torture, as a severe form of ill-treatment, is typically carried out to obtain information, force a confession, or punish an individual, while ill-treatment is defined as a person's unreasonable behaviour in a certain context, characterised by excessive humiliation of a person's dignity and intentionality in causing the individual physical/mental agony.[50]

Given this distinction, it might be necessary to amend the definition of ill-treatment and torture in the Criminal Code. Torture should be reserved for extreme infliction of bodily injury characterised by significant pain and suffering and resulting in death as a result of negligence. Consequently, inflicting moderately severe impairment on one's health should fall under the category of ill-treatment.

Cases involving severe injury to one's health by cruel treatment should be evaluated under Paragraph 4, Part 2, Article 106 of the Criminal Code, addressing the purposeful infliction of severe harm to one's health with specific cruelty. Meanwhile, torture involving less severe harm to health should continue to be addressed as just as it is now. In the future, torture could be established as a separate component of Article 146 of the Criminal Code.

At the same time, further consideration is needed to refine the qualified composition of torture and ill-treatment. When assessing the punishment for torture, the provisions of the UN Convention against Torture and the gravity of the crime must be considered.

4 CONCLUSIONS

Kazakhstan declares its commitment to the rule of law and human rights. Torture, along with other forms of cruel, inhumane or degrading treatment or punishment, is recognised as a gross violation of fundamental human rights and must not go unpunished. To ensure accountability, such acts must be properly criminalised. Failure to do so adequately hinders the possibility of holding individuals accountable. Although recent amendments to the criminal law have partially implemented the recommendations of the UN Committee

49 *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 20 March 2018) <https://hudoc.echr.coe.int/fre?i=001-181585> accessed 20 March 2024.

50 *The Greek Case, 1969: Denmark v Greece, Norway v Greece, Sweden v Greece, Netherlands v Greece* App nos 3321/67, 3322/67, 3323/67 and 3344/67 [1972] 12 Yearbook of the European Convention on Human Rights <https://70.coe.int/pdf/denmark_norway_sweden_netherlands_v_greece_i.pdf> accessed 20 March 2024.

against Torture by recognising a person acting in an official capacity as a subject of torture, this has not yet aligned the definition of torture consistent with international norms.

The understanding of persons acting in an official capacity, given in the note to Article 146 of the Criminal Code, is limited to the sphere of healthcare, education, and medical-social spheres. This approach contradicts international norms and narrows not only the range of subjects of torture but also the range of potential victims of torture. Furthermore, the new definition of torture in Article 146, which characterises it as a less severe act (i.e. when causing minor harm to health), does not correspond to the understanding of torture in the UN Convention against Torture, which, in our opinion, requires correction.

Cruel, inhumane or degrading treatment is singled out as a separate crime due to its increased public danger. This shows the state's commitment to combating any form of violence against a person. However, in terms of object, objective side, subject, and subjective side (except to force the tortured or another person to testify), ill-treatment has no differences from torture. The qualifying characteristics and punishment for qualified *corpus delicti* in the Criminal Code are the same. In international legal terms, torture is an aggravated form of cruelty or an extreme form of expression. As such, it is difficult to distinguish between torture and the basic elements of ill-treatment and torture.

In light of this, we believe it is necessary to make a legislative distinction between ill-treatment, torture and cruel treatment. Clarifications of the Supreme Court are needed not only to address the overlap between norms related to ill-treatment and the deliberate infliction of serious harm to health with particular cruelty (Paragraph 4, Part 2, Article 106 of the Criminal Code) and the deliberate infliction of moderate harm to health with particular cruelty (Paragraph 3, Part 2, Article 107) but also to clarify the broader differentiation between ill-treatment and torture from other crimes.

There is, therefore, an urgent need to revise the legal qualification of torture and other forms of ill-treatment in the criminal legislation of Kazakhstan to effectively counteract the violation of fundamental human rights.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРО ЗМІНИ В КРИМІНАЛЬНОМУ ЗАКОНОДАВСТВІ КАЗАХСТАНУ ЩОДО ВИЗНАЧЕННЯ КАТУВАННЯ ТА ІНШИХ ЖОРСТКИХ, НЕЛЮДСЬКИХ І ТАКИХ, ЩО ПРИНИЖУЮТЬ ГІДНІСТЬ, ВИДІВ ПОВОДЖЕННЯ І ПОКАРАННЯ

Олена Мицькая*, Курмангали Сарикулов та Канат Утаров

АНОТАЦІЯ

Вступ. *Проблема насильства залишається зараз актуальною в Казахстані. Незважаючи на правовий захист від насильства і захист прав особистості, на сьогоднішній день є не вирішеним питання катування з боку держави або від її імені. Насильство підриває основи Казахстану як правової держави. Зусилля держави, спрямовані на вирішення цієї ситуації, видаються неефективними, що сприяє створенню середовища, в якому заохочуються майбутні порушення прав, свобод і законних інтересів громадян, які охороняються Конституцією Республіки Казахстан. Спостерігається тенденція толерантного ставлення до насильства з боку держави. Неприпустимим є застосування катування*

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співробітниками правоохоронних органів та пенітенціарної системи як стандартної практики. Особливе місце в боротьбі з тортурами займають системні заходи, зокрема кримінально-правові. Мета цього дослідження полягає у тому, щоб проаналізувати, як катування та інші види жорстокого, нелюдського поводження криміналізуються згідно з кримінальним законодавством Казахстану, визначити проблеми, пов'язані із застосуванням цих законів, запропонувати рекомендації щодо їх вирішення та зробити внесок у дискусію навколо цих питань.

Методи. *Метод нормативно-правового дослідження було використано під час аналізу кримінального законодавства Казахстану щодо кваліфікації катування. Концептуальний аналіз було застосовано під час вивчення нового понятійного апарату в розкритті розуміння жорстокого поводження та катування. Порівняльно-правовий метод дозволив зіставити історію розвитку кримінального законодавства Казахстану щодо криміналізації катування і жорстокого поводження, а також критичний аналіз чинних норм кримінального права у порівнянні з міжнародно-правовими актами. За допомогою якісного методу було проаналізовано ситуацію з катуваннями за офіційними даними Комітету правової статистики та спеціального обліку Генеральної прокуратури Республіки Казахстан, за зверненнями зі скаргами на катування громадян Казахстану до Уповноваженого з прав людини в Республіці Казахстан.*

Результати та висновки. *На основі аналізу положень чинного казахстанського кримінального та міжнародного законодавства та відповідної наукової літератури автори приходять до науково обґрунтованого висновку про необхідність звернення уваги держави з метою більш активного зосередження на боротьбі з катуваннями та жорстоким, нелюдським поводженням. Автори роблять пропозиції щодо подальшого розвитку кримінально-правових заходів протидії катуванню та жорстокому, нелюдському поводженню. Однією з таких рекомендацій є скасування вузького визначення посадової особи щодо катування у сфері охорони здоров'я, освіти, медицини та соціальної сфери. Крім того, автори виступають за коригування статті 146 Кримінального кодексу для більш чіткого розмежування між жорстоким поводженням і катуванням.*

Ключові слова: *Кримінальний кодекс; катування; жорстоке, нелюдське або таке, що принижує гідність, поводження; кваліфікація злочинів.*

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Research Article

PREEMPTIVE SELF-DEFENCE IN PUBLIC INTERNATIONAL LAW: AN ANALYSIS THROUGH THE LENS OF INTERNATIONAL COURT OF JUSTICE JURISPRUDENCE

Zaid Ali Elgawari

ABSTRACT

Background: *The right to self-defence is one of the fundamental principles of international law, explicitly sanctioned by Article 51 of the Charter of the United Nations. However, the practice of this right, especially on anticipatory or preemptive force, continues to be a contentious issue. Thus, it is questionable to what extent and under what circumstances self-defence can be applied when dealing with non-state actors and potential threats in the future. This paper seeks to address these worrying issues through primary historical references and legal systems focusing on the guidelines of necessity and proportionality measures.*

Methods: *This study systematically analyses case law, international treaties, and the United Nations Charter 51 to explore how self-defence is perceived in different contexts. It also uses a comparative legal research method, informed by the International Court of Justice (ICJ) decision and subsequent literature. Cases like Nicaragua v. United States, the Iranian Oil Platforms case, and those involving Israel, the United States, and the United Kingdom were consulted to understand the issues of necessity, proportionality, and preventive self-defence. By adopting a case analysis method, this research explores the preliminary concept of self-defence in the legal system of public international law regarding the state practice and as interpreted by the International Court of Justice. The choice of examples, such as the conflict in Ukraine and the armed aggression of Russia and Turkey, Syria, and Iraq, was planned and chosen based on their significance in modern international law. Secondary data sourced from scholarly articles and legal publications complemented this study.*

Results and Conclusions: *According to the data, the right to self-defence is the most significant and one of the most contentious issues in international law. For instance, events like the Six-Day War of 1967 demonstrate how states leverage self-defence purposes to carry out military actions. However, findings made by the International Court of Justice in cases such as*

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Nicaragua v. United States emphasise and uphold the principle of proportionality and reasonability in self-defence arguments. Anticipatory self-defence is still debated, with the Caroline case for defining particular conditions under which anticipatory self-defence is permissible. However, preemptive self-defence continues to spark debate in public international law, with considerable theoretical and practical implications. Russia's invasion of Ukraine and the tensions between Turkey, Syria, and Iraq contribute to the relativity of the issue in today's politics and law. For example, the Russian-Ukraine War illustrates adjustments that come with embracing old self-defence theories when the global security environment is metamorphosing. It has brought to the foreground issues related to aggression, deterrence, and the legal use of force in dealing with threats that are perceived to be existential. This case allows for consideration of the role played by the ICJ in establishing the parameters of state conduct, as well as an analysis of the realities of legitimate force.

Similarly, the conflicts involving Turkey, Syria, and Iraq show there is a modern trend of utilising anticipatory self-defence as a justification for military actions against non-state actors. They are significant in illustrating how states can maintain their security and simultaneously recognise and uphold the sovereignty of other nations. Additionally, the determination by the ICJ of any such claims assists in understanding the evolving legal regime for these processes. The analysis shows that Article 51 outlines the formal possibility of employing force in self-defence, but at the same time, the interpretation of the given article is often questionable. The international community still faces many challenges defining the differences between preemptive and preventive strikes. The proposal is that nations must be careful while employing self-defence and ensure that what they do is reasonable and necessary concerning the threat. In addition, the United Nations Security Council should actively resolve disputes to reduce the risk of the self-defence doctrine's misuse.

1 INTRODUCTION

The right of nations to self-protection is recognised under the United Nations (UN) Charter.[1] Yet, it remains one of the most contested privileges in contemporary international law. Most importantly, customary international law permits countries to exercise the freedom of self-defence within certain limits. This principle is enshrined in Article 51 of the UN Charter,[2] drafted by UN members, which allows for the use of force in self-defence under specific conditions.

However, Article 2(4) contained in the UN Charter prohibits the usage of power by one nation against another, thereby safeguarding territorial and political autonomy.[3] Deterrence under Article 2(4) aims to settle inter-state conflicts peacefully and prevent wars.

1 UN, *Charter of the United Nations and Statute of the International Court of Justice* (UN Publ 1945) 2-20 <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> accessed 25 September 2024.

2 ibid 10, art 51.

3 ibid 3, art 2(4).

Nevertheless, in exceptional situations, when a fortified attack endangers a country, Article 51 permits the application of power for self-defence.

The legitimate utilisation of power in self-defence is a temporary process with limitations and should comply with the philosophies of international law. Such constraints include the ideals of necessity and proportionality of power, according to which power can be applied only for self-defence and must be relative to the threat faced. Owing to its temporal nature, the right to apply force for self-defence ceases once the UN Security Council intervenes and assumes the obligatory evaluations to sustain peace.

The UN recognises that the Security Council can sanction proactive or anticipatory self-defence if a country reports the matter. However, the non-intervention principle prohibits nations from acting preemptively in anticipation of an attack. Power is allowed only in case of an impending danger of an armed assault, and such force has to be proportionate to the threat.

If the Security Council considers peace is at risk or anticipates hostility, it recommends measures to uphold or reinstate security and stability. The Security Council can determine which protocols must be undertaken to preserve global peace. If the techniques highlighted in Article 41,[4] contained under the UN Charter are insufficient to maintain global tranquillity, then the Security Council may advise on military actions. The freedom to self-defence, as highlighted in Article 51, means that the UN affiliates and non-members can assist a non-member state imperilled by a weaponised event. Article 51 also states that nothing shall harm the intrinsic freedom to self-defence if an armed incident occurs on a member of the UN until the Security Council introduces measures critical for the upkeep of global concord and safety.

A member state can exercise the freedom to utilise power solely in defensive circumstances, specifically in response to a weaponised attack. Additionally, it stands the weight of proof. Member states must account for the measures undertaken in exercising self-protection to the UN Security Council, which holds the authority to arbitrate.[5] Once the Security Council takes the essential procedures to address a dispute and uphold international concord and safety, the state must cease its self-defence actions.

Through customary international law, adopted following the 1837 Caroline event, certain aspects must be confirmed when governing the right to self-defence. The case took place in 1837 when a band of rebels fighting for the independence of Canada from Britain relied on an American ship, Caroline, to ferry supplies from the U.S. into Canada.[6] It involved bringing British forces into U.S. territory, seizing the Caroline, setting the vessel on fire,

4 ibid 9, art 41.

5 ibid 8, art 33.

6 The Open University, 'The Use of Force in International Law: Course' (*The Open University OpenLearn*, 2 September 2017) <https://www.open.edu/openlearn/society-politics-law/the-use-force-international-law/content-section-1.3> accessed 25 September 2024.

Access to Justice in Eastern Europe
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and then floating her into Niagara Falls, where she exploded, killing an American civilian on board. They include the necessity to use force, its proportionality, and the prompt nature of the response.

Under the current legal environment, governments cannot interfere in sovereign state integrity. The intervention of the military forces in an independent nation's affairs violates the global standard of non-engagement and utilisation of force deterrence under the UN Charter.

Thesis Statement

Article 51 of the UN Charter clearly states the intrinsic freedom of countries to practice self-defence in an armed conflict. The standards of certainty and proportionality illustrate how this freedom should be approached, mainly when a nation uses proactive self-defence.

2 METHODOLOGY

This study employed a systematic approach to analysing case law, international decisions, and the scholarly analysis of the right of self-defence under Public International Law. International treaties and the UN Charter, mainly Article 51, as well as advisory opinions and decisions of the International Court of Justice (ICJ), such as the Nicaragua case and the legitimacy of the threat or use of nuclear weapons. Secondary data was obtained from articles and legal studies carried out by various scholars. The research compared case laws and legal judgments to determine patterns and challenges in self-defence and underlying difficulties such as proportionality, necessity, and preemptive defence. This method allowed for shaping current discourses regarding legal aspects of self-defence.

Numerous references from Moore's Digest accompany the Caroline case, along with extensive House and Senate reports, providing a thorough account of the events and legal debate. The methodology relied heavily on historical documents in sources, means, and legislative records to comprehensively analyse the facts, interpretations, and subsequent reporting of legal responses. This research places the events that led to the sinking of the Caroline in a broader perspective of international law and neutrality.

The historical facts appear in Moore's Digest and many documents of the Congress; the complete story is linked to the given legal notions of "self-defence" and "sovereignty of states". However, the manuscript may require a more detailed specification of the criteria for selecting these sources and a more precise explanation of the interpretive framework used to arrive at these precedents.

When analysing the Oil Platforms case, the approach shifts to a comparative examination of the processes and outcomes of the International Court of Justice. It focuses on the legal premises arising from Iran and the United States Treaty of Amity, organising the arguments, counterarguments, and procedural decisions successively in the research. The ICJ adopted

this approach in dealing with jurisdictional objections and counterclaims, demonstrating a keen sense of legal analysis to establish treaty breaches. The work relied on ICJ records, pleadings, and decisions as sources, offering a detailed account of the legal positions articulated by the parties.

This study's methodology is case-based, emphasising two primary contexts: Russia's invasion of Ukraine and the conflicts in and around Turkey, Syria, and Iraq. These instances were selected to examine the different uses of anticipatory self-defence under public international law. The Russia-Ukraine conflict is significant in understanding the capacity of the self-defence provision under Article 51 of the United Nations Charter, particularly the criteria of imminence and collective security apparatuses. However, experiences from the conflicts in Turkey, Syria, and Iraq offer lessons on pre-emptive self-defence against non-state actors and the issues of sovereignty, transboundary operations, and the rule of proportionality. Thus, comparing these cases, the study gives a comprehensive insight into how states employ anticipatory self-defence in conventional and unconventional conflicts and enables the assessment of legal understandings and consequences for global peace and security. This methodology properly balances the depth of theory and practical application.

To minimise such biases, different perspectives were obtained by sampling examples involving other states, such as the United States and the United Kingdom, particularly their self-defence claims. Thus, by adopting multiple countries' policies and the specific interpretations of the courts, the study did not have a bias analysis. The choice of methodologies, systematic approach, and a comparison of case studies was appropriate because it reflects the nature of the legal theories involved in international law and gives an idea of how self-defence is implemented in specific situations. This method proved effective in addressing theoretical issues while linking them to actual legal contexts. Integrating ICJ decisions and cases ensured the study was comprehensive and grounded in law.

3 THE RIGHT TO SELF-DEFENCE: ARTICLE 51 OF THE UN CHARTER

Article 51 states that nations have the integral freedom to practice self-defence in case of a weaponised attack. A country must be subject to an armed event and can respond collectively or individually.[7] Despite the wide acceptance of Article 51, there are considerable disagreements among affiliate nations on different ideas of the article. Some questions emanating from such disagreements are: What constitutes an armed attack? Should a nation under the threat of nuclear weaponry attack wait until it is launched and not act proactively? What can governments do if non-state actors, such as criminals, assault them?

7 UN Charter (n 1) 10, art 51.

Access to Justice in Eastern Europe
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One point that remains clear is that a member state can invoke Article 51 and utilise force in self-defence,[8] provided it is a crucial protective action against an assault event or has been endorsed by the UN Security Council to uphold global peace and safety.

Article 2(4) contained within the UN Charter is widely regarded as the principle within customary universal rule valid to all nations globally. It should be realised that the orientation to use force rather than war is crucial. It encompasses events where ferocity is utilised but has the drawback of the notion of war's procedural necessities. Nevertheless, although military power is limited under Article 2(4), the UN states that economic authorisations are not permissible when utilised to force nations.[9] Therefore, these limitations have to be observed in the use of self-defence.

Countries' use of power and intervention in an independent country's local affairs are different. Thus, involvement in the affairs of a monarch nation is banned under international law. The non-intervention standard is a segment of customary global law and is founded on the idea of respect for nations' border sovereignty.[10] Article 51 grants states the legal right to use force in self-defence without seeking approval from the UN Security Council so long as such use is proportional and necessary. However, there are ongoing debates about what constitutes an armed attack, particularly regarding non-state actors or the preemptory of self-defence.[11]

These debates have led to discussions about expanding the scope of self-defence to include preemptive actions, reflecting the emerging nature of conflicts. The New Haven School and the analysis of legal pluralism concerning Article 51 are most relevant in understanding the fluid interaction between international, national, and non-state normative systems regulating self-defence. Legal pluralism asserts the existence of many legal orders, suggesting that cultural, regional, and legal differences may influence how self-defence is understood under Article 51.[12] The New Haven School focuses mainly on the norm-generation process, with the participation of actors other than the state, including international-level actors and non-state actors. This approach also effectively questions existing conventional practices of Article 51 based on state-oriented structures and understandings.

As a result, the law on self-defence, like many other international laws, evolves relative to the competing legal orders' interferences and evolutions of the global legal norms, indicative of the pluralist and fragmented international legal system.[13]

8 ibid 12.
9 ibid 13.
10 ibid, 14.
11 Elif Durmuş, 'A Typology of Local Governments' Engagement with Human Rights: Legal Pluralist Contributions to International Law and Human Rights' (2020) 38(1) Netherlands Quarterly of Human Rights 30, doi:10.1177/0924051920903241.
12 ibid 36.
13 ibid.

The International Court of Justice (ICJ) ruled in *Nicaragua v. United States* that a nation has the authority to make judgments about its political, economic, social, and cultural models and to create external choices. In this regard, intervention is deemed ineffective when it entails coercion.[14] Even if meddling in another country's affairs does not include the use of force, it violates universal norms. Additionally, although the Charter prohibits military force intervention, the regulation cannot be deemed absolute.[15] Nevertheless, it acknowledges specific events that may demand force utilisation across nations.

While Article 2(4) of the Charter tends to refrain member nations from threatening or utilising power against any country's national integrity or political autonomy or in any other unpredictable way with a focus on the UN, it forbids states from waging war. Article 51 grants the freedom to individual and joint self-defence against any aggression.[16] Both Articles provide diametrical procedures concerning the application of force. Nevertheless, there is an agreement regarding the idea of aggression. Both articles prohibit aggressive war.[17] Even though armed self-defence is a peremptory right of a nation and is linked with the freedom of existence, it is not deemed an unconditional privilege. It can only be seen as the last resort for existence, perhaps the freedom to fight a battle. It is evident that war does exist as a legal affirmation within the UN Charter, but with certain restrictions.[18] As a result, the liberty of defensive tactics can be used to safeguard the state's everlasting right to exist. The practice of self-defence is justified not only under customary global law but also under the UN Charter.

The ICJ holds that grave violations against Article 2(4) tend to trigger the freedom of self-defence under Article 51. According to the ICJ, the gravest kinds of utilisation of power constitute an offensive attack.[19] The appeal to this perception is quite evident as force and an armed attack are associated with the same subject matter, yet they presumptively encompass unique meanings. Force and armed attack share similar violent characteristics, meaning they can differ only in magnitude and gravity.[20] However, insufficiently grave power usage does not constitute a weaponised attack and does not, in other words, activate the freedom to self-defence.

Moreover, Article 51 also does not permit the utilisation of power against non-state players on the territory of another nation without consent. Non-state players cannot invoke Article 2(4), meaning they cannot launch an armed attack within the framework of Article 51.[21]

14 Yishai Beer, 'Regulating Armed Reprisals: Revisiting the Scope of Lawful Self-Defense' (2021) 59(1) Columbia Journal of Transnational Law 117.
15 Eric Talbot Jensen, 'Right of Self-Defense' (2002) 12 Computer 208.
16 UN Charter (n 1) 15.
17 Beer (n 14) 117.
18 ibid 117.
19 ibid.
20 Jensen (n 15) 209.
21 ibid 210.

Access to Justice in Eastern Europe
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If the Security Council fails to discourage any nation from attacking a member nation, that member state has an inherent right to take necessary defensive measures. The right to use self-defence measures for an armed individual should include provisions similar to those outlined in the Chapultepec Act. In this aspect, all members of a group of states agree that a killing against another country is an assault on all of them.

The Six-Day War (1967) is one event that demonstrates states' rights under international law. Israel declared that its attack against Egypt was an act of self-defence because Egypt closed the Straits of Tiran and was threatening to attack.[22] Under Article 51 of the UN Charter, a state is entitled to self-defence if subjected to an armed attack. This approach is based on the 1837 Caroline's case, which set the doctrine for legal self-defence as an instantaneous, unavoidable action and left no choice of method.

The International Court of Justice, in its 1986 Nicaragua case decision, pointed out that self-defence must be necessary and reasonable.[23] As was the case with Israel's military triumph, which transformed the map of the Middle East, this also gave rise to legal discussions on the notion of preemptive defence in international law, especially in territorial and regional conflicts.

This right, especially in the case of occupation due to armed conflict, has raised controversy, especially given UNGA Res. 2625, which banned the recourse to force to settle such issues.[24] The resolution particularly asserts that force shall not be applied to alter borders or even solve existing disputes, including the issue of occupation.

Key elements used to invoke the right to self-defence include the occurrence of an armed attack, the necessity of a defensive response, and the proportionality of that response. In cases where an armed attack persists beyond the initial unlawful attack and the state remains in control of the disputed territory, these criteria are met. In addition, the UN General Assembly also defines aggression, and it is evident that any act of invasion followed by military occupation is considered ongoing aggression. Thus, even if Article 2(4) of the UNGA Res. 2625 prohibits using force in the dispute over territories, the principles of self-defence according to Article 51 of the Charter remain valid in situations where occupation is connected to an armed attack.[25]

Nations sometimes justify intrusion to safeguard nationals overseas as a way of self-defence. This justification often involves broadening the understanding of the phrasing of "an armed

22 PBS, 'The Six Day War' (*American Experience*, 2023) <https://www.pbs.org/wgbh/americanexperience/features/hijacked-wars-threats-responses/> accessed 25 September 2024.

23 The Open University (n 6).

24 Nidaa Iqbal, 'Lawfully Exercising the Right to Self-Defence under Article 51 of the UN Charter to Recover Occupied Territory' (*Diplomacy, Law, and Policy Forum*, 15 April 2023) <https://www.dlpforum.org/2023/04/15/lawfully-exercising-the-right-to-self-defence-under-article-51-of-the-un-charter-to-recover-occupied-territory/> accessed 25 September 2024.

25 ibid.

war" under Article 51 to encompass an attack against a member state.[26] While customary international law fails to provide a steady gridlock, certain leading scholars back up the notion.[27] When invoking self-defence through intervention, nations should abide by three general principles: necessity, proportionality, and absence of any other means. Additionally, nations must abide by certain conditions to comply with international law. First, the intervention should not be a castigatory measure or reprisal. Second, the domestic sovereign must fail or be unable to provide protection. Third, the intervention must be restrained in time and space, meaning a nation should not extend its existence on an overseas border.[28] Fourth, violence against the civilians of the attacked nation has to be arbitrary, which means it has to be unjustified and against the regulation of the least typical applicable to strangers. The other condition is that there has to be no way to liberate the people through less hostility. Finally, a nation cannot resort to armed intervention while an international judicial process is underway for a nonviolent resolution of the dispute.

4 CONSTRAINTS/LIMITATIONS OF THE RIGHT TO SELF-DEFENCE

Necessity and proportionality are significant principles of the freedom of security under global law aimed at deterring excessive power utilisation by member nations. The principle of immediacy, while important, is less emphasised, as responses may be delayed due to the need to collect evidence of the armed attack, identify the aggressor, and collect other forms of intelligence. This time is often required to craft a focused approach and articulate the facts to the UN Security Council, which determines the legitimacy of the practice of self-defence.[29]

Under the concept of obligation, a member state should substantiate the inference that power must be applied against a weaponised matter based on realistic facts available at that time. Any power used for defensive tactics would be considered illegal if not deemed necessary by the UN Security Council.[30] Appropriateness has two major components: the appropriateness of the response to the attack and the respect for ethical standards of warfare in that response.

It might be challenging to ensure that the response to an attack is proportionate. For example, in the case of the Iranian Oil Platform, the ICJ found that it was critical to assess the scope of the mission, which included the deconstruction of two Iranian oil routes and

26 UN Charter (n 1) 15.

27 Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106(4) American Journal of International Law 770, doi:10.5305/amerjintelaw.106.4.0769.

28 Zhang Naigen, 'The Principle of Non-Interference and Its Application in Practices of Contemporary International Law' (2016) 9(3) Fudan Journal of the Humanities and Social Sciences 449, doi:10.1007/s40647-016-0126-y.

29 Bethlehem (n 27) 771.

30 ibid 772.

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

many aeroplanes, although there were no civilian casualties.[31] In this situation, it was determined that the magnitude of the retaliation was inappropriate to the impending risk. The kind of weapons used in self-defence is a proportionate approach. The proportionality test does not explicitly prohibit the use of nuclear firearms, but such retaliation has to comply strictly with the reasonableness requirements. The matter in integrating the principle is that the nation conducting such an action would have to introduce an initiative that would be later discussed through international courts or the UN Security Council.

In protecting humanitarian regulations of war in the response, a member nation's practice of self-defence ought to comply with the mandates under humanitarian law. In this regard, the principle does not derogate the human right to self-defence.[32] It was contentious to not exclusively prohibit the use of atomic bombs in the Defensive Purposes Act. Nevertheless, the ICJ conversed on member nations' disregard for environmental regulations when utilising nuclear weapons. The Court does not ban a state from practising self-defence due to its mandate towards ecological regulations. Nevertheless, nations are advised to consider the environmental effect when evaluating the proportional employment of force in protecting themselves.[33] Environmental effects can be considered when assessing the action regarding the proportionality standard.

Evaluating the restrictions of the right to self-defence in Public International Law (PIL) can be understood both theoretically and practically. One example of such operation is the 1981 Israel's Operation Opera, during which Israeli fighter planes targeted and destroyed Iraq's Osirak nuclear facility. Despite Israeli authorities' claiming the attack in question as an act of self-defence, the UN Security Council condemned the act of terrorism, underlining that the right of self-defence does not extend to responding to potential future threats,[34] highlighting the problems of proactive self-defence, especially regarding proportionality and need.

The ICJ found that it is self-defence when there is an actual armed attack and not when assistance to military forces preparing for one is given. The Legality of the Threat or Use of Nuclear Weapons (1996) advisory judgment of the International Court of Justice reiterated that utilising atomic weapons would ordinarily be unlawful as it violates the principles of international humanitarian law under which even recourse to force in protection can only be proportionate and necessary.[35] These examples show that the right of self-defence is

31 Naigen (n 28) 450.
32 UN Charter (n 1) 12.
33 Naigen (n 28) 451.
34 Debanish Achom, 'In 1981, Israel Bombed Nuclear Reactor in Iraq. Why It's Relevant Today' (*NDTV*, 11 October 2023) <https://www.ndtv.com/world-news/operation-opera-daring-1981-airstrike-on-nuclear-reactor-in-focus-as-israel-faces-multi-front-war-4471744> accessed 25 September 2024.
35 Women's International League for Peace and Freedom, 'International Court of Justice and Its 1996 Advisory Opinion' (*Reaching Critical Will*, 2002) <https://www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/4744-international-court-of-justice-and-its-1996-advisory-opinion> accessed 25 September 2024.

circumscribed by narrow circumstances that do not allow for handling multifaceted international security problems, including preemptive actions or anticipatory threats.

Most importantly, there is no accord in global legal doctrine when the protection measures in response to an armed assault may be executed. Some who understand Article 51 argue that the intrinsic right to self-defence by the state justifies anticipatory self-defence if circumstances similar to those in the Caroline case exist.[36] Such a recourse to conventional law expands the right of self-defence stipulated under Article 51.[37] The right to proactive self-defence would be against the phrasing of Article 51. Since the supposed proximity of an armed event cannot be evaluated objectively, any choice at this juncture would be to the will of the nation concerned.[38] The manifested threat of opposition to such discretion would de facto understate the constraint to one particular case of the freedom to self-defence. In this regard, Article 51 has to be understood narrowly as a ban on anticipatory self-defence.

Self-defence is usually permitted only after the launch of a weaponised weapon. Only when one nation provides notice of a plausible armed attack against another nation would defence measures engaging the usage of power be well-matched with Article 51. Such understanding resembles the chief country practice as the standard freedom to anticipatory self-defence has not been induced within the UN Charter.[39] The ban on anticipatory self-defence encompassed under Article 51 is generally in line with the nuclear model of superpowers, only provided that nations are in a position to safeguard themselves against preventive strikes hurled against them. Moreover, Article 51 holds that if a country has recourse to a military attack in defensive tactics, its adopted events must be reported to the UN Security Council. Preventive self-defence against a latent attack that is predictable or believable is deemed illegitimate. Only interception actions executed against a forthcoming, unavoidable, and legitimate armed attack are deemed permissible.[40] Therefore, self-defence cannot be exercised based on assumptions, anticipation, or fear.

Traditional restrictionists assert that Article 51's language limits a nation's authority to use force in different ways. First, a nation can use power to oppose a weaponised war already in progress. Therefore, using energy to prevent future attacks is illegitimate. Second, not every use of strength constitutes a military assault.[41] Proponents of conventional restrictivism recognise that the restraints on applying force could deter states from safeguarding citizens from danger in different settings. While countries could repel critical actions of aggression, they would be deemed helpless in deterring sporadic small-scale attacks by other nations.

36 Bethlehem (n 27) 772.
37 Naigen (n 28) 452.
38 Bethlehem (n 27) 773.
39 Hanna Bourgeois and Patryk I Labuda, 'When May UN Peacekeepers Use Lethal Force to Protect Civilians? Reconciling Threats to Civilians, Imminence, and the Right to Life' (2023) 28(1) Journal of Conflict and Security Law 4, doi:10.1093/jcsl/krac027.
40 Naigen (n 28) 451.
41 Bethlehem (n 27) 773.

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

Hence, guaranteeing adequate safety for individuals is not the fundamental focus of Article 51. Conventional restrictionists highlight that the intrinsic freedom to self-defence is a constrained prerogative to ward off critical military attacks that are in progress.[42] They contend that limitations on the use of force advance the main objective of the UN Charter by preventing acts of threats of future assaults and low-level assaults from starting a significant worldwide disagreement that would cause many casualties and engulf the entire world in a local or worldwide dispute.

A more significant challenge to conventional restriction comes from elaborating on the rationale for why violence might be attributed to a country that could be considered an armed attack. Article 51's wording does not explicitly prohibit the use of force to thwart assaults by non-state actors, such as international terrorist organisations or private militias. On the other hand, traditional restrictionists are against using energy for self-defence against non-state actors abroad without an international territorial accord since it is unforeseeable and goes against the UN Charter.[43] They emphasise that cross-border military action without a territorial country's consent affects the legal relationship between two nations. Furthermore, they maintain that assigning the function to the geographical state must provide a unique rationale for those actions. Moreover, allowing martial law to intervene without a state's approval or accountability for an earlier act would jeopardise global order and security by increasing the likelihood of violent conflicts between the two countries.[44] The country where violent non-state players reside might perceive overseas intervention within its territories as an armed attack, thus justifying a military response. Conventional restrictionists argue that "armed attack" under Article 51 should be constructed narrowly to encompass only military actions attributable to nations rather than non-state actors to prevent such issues.

5 CONCEPTS AND TYPES OF ANTICIPATORY SELF-DEFENCE

Anticipatory self-defence refers to any application of defensive strength to mitigate the possibility of future armed attacks. It takes two forms: preventive self-defence and anticipatory self-protection. Preventive self-defence is the most expansive kind of anticipatory self-defence. It refers to countering probable future threats of attacks that have not yet materialised or might not.[45] A good instance is the probable acquisition of nuclear weapons by nations such as North Korea and Iran. Preventive self-defence is applying force to deter probable upcoming armed bouts that are not deemed imminent. The idea of preemptive self-defence is founded on conjecture, that is, the existence of uncertain threats at an unidentified point in a distant future. It lies in a pervasive understanding of Article 51,

42 ibid.
43 Bourgeois and Labuda (n 39) 5.
44 ibid 6.
45 ibid 7.

one that provides countries with great flexibility to perform unilaterally away from the communal security platform of the UN Charter. The effect of this understanding is the capacity of the powerful military nations to abuse their right to self-defence. It gives them the right to project military force across their borders in the broadest probable range of events while claiming to function within the confines of legality.[46] Considering the meaning of proximity and the need to construe it in slim or extensive terms, it is crucial to understand that even if the right to preventive self-defence is no longer referenced as it was, its core notion will exist as an idea of academic observation.

In contrast, pre-emptive self-defence is the defensive power utilised to deter armed bouts that are deemed imminent. This kind of anticipatory self-defence has been the target of many inquiries. The right of nations to act in this matter, even during the post-UN Charter period, emanates from the Caroline case. The right to pre-emptive self-defence is the right to apply power in reaction to a weaponised act anticipated to be introduced in the foreseeable future.[47] Therefore, pre-emptive self-defence has deemed the reaction to the sitting duck confusion, which means that Article 51 should not be understood inertly in a manner requiring a nation to agree to its fate before the attack. There is an expanding academic agreement that supports a constrained right to pre-emptive self-defence as a familiar premise, even though there is disagreement about the meaning and interpretation of imminence. The ICJ has not provided its view regarding the right to pre-emptive self-defence. Nevertheless, there are already indications in the jurisprudence of this court that point to the way it might handle such an issue in the future. The ICJ has reliably understood the right to self-defence in a conventional way. It holds that Article 51 may only defend a self-protective application of force within the limits of that article and does not permit the application of force by a nation to safeguard perceived safety and welfare beyond these thresholds.

Regardless of whether international law precisely acknowledges the right of proactive self-protection, the resultant analysis aims to depict that nations have had remedies to the right to preemptive practice to defend the application of force. In such events, the presence or lack of imminence determines the validity of other nations' putatively defensive actions.[48] Most importantly, a nation's compliance with international law can only be evaluated in the coming days. It is crucial to note that several states have backed up the freedom of preemptive self-defence, whereas others have opposed the doctrine of preemption. More recent national practice on this matter refers to combatting international terrorism. During the post-9/11 period, nations have had recourse to the right to defensive tactics used to justify risks posed by terrorist groups.[49] In doing so, they claim that such groups tend to

46 ibid.

47 Marthen Napang, 'The Effectiveness of the United Nation's Role in Responding to Wars of Aggression and Self-Defense' (2022) 5(1) International Journal of Global Community 3.

48 Todd F Buchwald, 'The Use of Force against "Rogue States"' (2019) 51(1) Case Western Reserve Journal of International Law 177.

49 Napang (n 47) 4.

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

position a pending threat to security. The context of deterring a tenacious terrorist danger has informed how certain nations now understand imminence. The events of national practice are critical to the current endeavours.

It is well-settled that a necessary and proportional response is sanctioned in reaction to the hostile practice or illustration of hostile intent. Nevertheless, self-defence has different forms, including unit, national, and individual self-defence. Most importantly, every category should be regarded separately when analysing the right to self-defence. In the case of preemptive protecting oneself, the goal of national defensive tactics is to react to evidence of aggressive intention.[50] However, an enemy could commit different acts illustrating hostile intent without provoking national authorities to apply anticipatory self-defence. Most importantly, the key to scrutinising the issue is the balance between the risk the adversary poses and the cost of taking action in reaction to the hostile intent.[51]

When considering the legitimacy of anticipatory self-defence, analysis should begin with acknowledging that there are two left and right restraints on the spectrum of the reaction of a country. Pre-emptive attacks are usually launched in retaliation to an instant and known threat, thus leaving no space for inaction. In contrast, preventive attacks occur without an immediate threat and are usually illegal under international law unless there is a belief that they were justified. In this case, the international community usually determines whether an attack was justified. In this regard, it is imperative to provide clear justification along with reasoning for carrying out a preventive attack to the UN Security Council.[52] Moreover, political and military frontrunners must comprehend the distinction between preemptive and preventive attacks to precisely communicate their nation's intentions.

The globally accepted consensus within the customary universal rule is that, despite the phrasing of the UN Charter, anticipatory self-defence is permissible when a threat is deemed imminent. In 2005, the UN Secretary-General identified that imminent threats are entirely covered under Article 51, which protects the intrinsic freedom of nations to defend themselves against military bouts.[53] Where dangers are considered latent but not imminent, the UN Charter provides complete power to the Security Council to apply military power.

Interpreting this, force is permitted under customary international law under the conditions of proximity and inevitability. In terms of imminence, force may be permitted if there is a belief that any delay in a pre-emptive attack would lead to a state's incapacity to defend itself against attacks or avert them.[54] The broader context between players has to be considered in the question of imminence. Force is also permitted if the evaluation is based on facts and in proper faith.

50 Buchwald (n 48) 177.
51 ibid 177.
52 ibid.
53 Napang (n 47) 5.
54 ibid 6.

Most evidently, anticipatory self-defence can be justified on a legitimate basis if the application of force by the threatening state is imminent, leaving no room for deliberation by the threatened nation.[55] Under the necessity principle, the threat has to be deemed instant and leave no choice of means. Additionally, pre-emptive self-defence must be proportional to the anticipated threat.

6 PRINCIPLES AND CONSTITUENTS OF AN ARMED ATTACK UNDER INTERNATIONAL LAW ON SELF-DEFENCE

The privilege to use force in response to ongoing aggression is not the sole aspect of the legislation on self-defence. Article 51 emphasises the right to self-defence until the Security Council takes the necessary action.[56] However, this right is restrained when a definite armed attack has been launched. The freedom to act in self-defence to avert the risk of an imminent attack is broadly recognised but not collectively allowed. Hence, self-defence in situations awaiting an attack depends on imminence and necessity. As established in the Caroline case, necessary measures stipulated may be undertaken as long as a threatened attack occurs.

Force can be used in self-defence only in an armed event that is imminent or in progress. This includes attacks on a nation's borders and armed forces. Force can also be used when an attack includes a threat to use force, when the attacker shows the intention and capacity to attack, or when the event is directed from the outside border coordinated by the state. In case of an endangered attack, self-defence is allowed where there is a definite danger of an attack against the defensive nation itself. In other words, the intrinsic freedom to self-protect in situations of an attack, as acknowledged in Article 51, excludes the overall ban on using force within Article 2(4).[57] Therefore, the use of power in self-defence is a complicated issue.

Under Article 51, an armed militia is not limited to events within a nation's borders but also those directed against its emanations, including embassies overseas. An armed militia may also encompass practices against private civilians or airlines located overseas. However, any deliberate involvement in another nation's territory without its agreement or ensuring compliance is not considered a legitimate act of self-defence.[58]

Most importantly, an armed event entails any utilisation of armed power and does not call for a certain degree of intensity. For an action to be termed an armed attack, the attacker must demonstrate a clear intent behind the attack. For instance, in the Oil Platforms Case, the International Court of Justice made references to the obligation when it queried the idea that the U.S. was capable of proving that specific actions by Iran were

55 ibid.

56 Salar Abbasi, 'A Conceptual Incongruence between International Laws of Self-Defense and the International Core Crime of Aggression' (2018) 6(1) Penn State Journal of Law & International Affairs 179.

57 ibid 179.

58 ibid.

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

mainly targeted at it or Iran had the specific intention of damaging vessels belonging to the U.S.[59] Additionally, all the peaceful measures of terminating or averting an attack must be exhausted or unavailable. In this case, no real-world non-weaponized option to the planned practice should be appropriate to avoid treatment or terminate an attack.[60] Necessity is usually deemed an edge, and imminence can be considered one of its aspects. Necessity can also be seen as a restraint on the application of force in self-defence as it limits the reaction to the alleviation of an attack, which means it is associated with the standard of balance. In this case, the defensive action must be restrained to what is essential to anticipate or stop the progressive attack.

As previously mentioned, the principles of necessity and proportionality are central to the concept of an armed attack under international law, particularly in the context of self-defence. However, when these concepts are brought to real-life usage, they are often deemed impractical and unclear, specifically regarding justice and fairness in relations between nations. A practical example is Iran v. United States (Oil Platforms Case), ICJ Reports 2003. This case addressed whether the attacks by the United States on Iranian oil platforms in 1987 and 1988 were justified as a measure of self-defence under the 1955 Treaty of Amity between the two countries. Unfortunately, the Court held that the United States' conduct was unwarranted since it did not provide concrete evidence that Iran initiated an armed attack.[61] The International Court of Justice pointed out that using force in self-defence is only justified when it responds to a definite armed attack and is backed by proportionate force. Moreover, the United States had accused Iran of violating the same convention by attacking ships in the Persian Gulf. At the same time, the International Court of Justice could not identify any evidence that Iran's activities had interrupted trade or communication between the two nations. That is why this case clearly illustrates the challenges occurring when theoretical notions of self-defence start to be implemented. The International Court of Justice's leading judgment also indicates that stricter standards and better definitions must be adopted to accurately determine what constitutes an armed attack while ensuring that justice is served for governments making self-defence claims under international law.

A defending nation must identify the proximity of an attack in good faith based on an objective evaluation of available evidence. Facts should be provided in the public domain, provided this is reasonably achieved.[62] However, some categories of evidence may not be easily produced, either due to the source or nature of their existence or because they are the products of understanding many pieces of information. The more far-reaching external actions are, the more a nation ought to accept the mandate of showcasing the justifiability

59 *Oil Platforms (Islamic Republic of Iran v United States of America)* (ICJ, 6 November 2003) <https://www.icj-cij.org/case/90> accessed 25 September 2024.
60 Buchwald (n 48) 177.
61 *Oil Platforms* (n 59).
62 Buchwald (n 48) 177.

of its actions. There should also be effective internal processes for evaluating intelligence and applicable procedural safeguards.[63] The International Court of Justice has also contributed to shaping these distinctions, pointing out that mere use of force amounts to an armed attack only in cases of particularly grave aggression as opposed to border infringement, for instance.[64] For the state to employ self-defence, it must prove immediacy, necessity, and proportionality. The concept of immediacy suggests that the answer must follow the attack without any postponement or leaving room for retaliation. The attacked state must show that there was no option but to use force to counter the aggression.

Proportionality also proposes that force should only be used to counter the attack and prevent anything beyond the threat from being done. In addition, customary international law demands notification to the UN Security Council within the shortest time possible after exercising the right to self-defence further to consider the necessity and proportionality of the action.[65] Even if controversial, The principle of self-defence allows nations to act proactively when eminent aggression is apparent, as opposed to the one in this case. However, such preemptive interventions remain an issue, so they need a high standard of proof to prevent misuse.[66] It is important to note that the force applied should not be excessive due to the need to prevent or stop an attack. Additionally, the Force's physical and economic consequences should not outweigh the collateral expected from an attack.[67] However, some claim that inferring the imminence of an attack is more of an effort to forecast the future than to establish a particular fact. In divergent circumstances, there can be some uncertainty regarding the perfection of obtained information concerning an attacker's plans.

The principle of immediacy has to be considered when undertaking proactive self-defence. It stands for the idea that the action in self-defence has to be taken immediately after the beginning of an attack. However, a separate attack with weapons may not be the primary cause for initiating self-defence. If the time between a weaponised assault and self-defence is long, the latter may still be valid if the wait is justifiable. There is an association of the criteria of immediacy with that of necessity. They argue that an armed attack does not unavoidably have to be followed by the act of self-defence immediately. The understanding of closeness in time between the two actions depends on the setting of every situation. The key disputable issue is when or at what point in time the actions of self-defence are deemed legitimate. There is a view that anticipatory self-defence is justified if it adheres to the

63 ibid 177.

64 Durmuş (n 11) 45.

65 ibid 47.

66 ibid 48.

67 Atul Alexander and Swargodeep Sarkar, 'Shifting Interpretation in International Court of Justice's Decision in the Islamic Republic of Iran v United States of America: A Deliberate Step?' (2022) 43(1) Liverpool Law Review 99, doi:10.1007/s10991-021-09292-1; Fasilat Abimbola Olalere, 'Review of the Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)' (2021) 1(1) Redeemer's University Journal of Jurisprudence and International Law 169.

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

requirements under the Caroline case. Moreover, there is a lack of a unified understanding of the problem of the lawfulness of the application of force for self-defence when the weapon is already introduced toward the victim nation.

7 PROACTIVE SELF-DEFENCE AGAINST TERRORISM IN INTERNATIONAL LAW

Article 51 provides nations with the right to self-defence against armed attacks and terrorism, specifically when governments support it. Most importantly, reprisals involve the penalty of those who have conducted an illegitimate act for which there is no peaceful redress. For reprisals to be legal under international law, they must comply with particular conditions and limitations.[68] Furthermore, preemption entails striking to deter a planned hostile activity to avoid damage. Any state executing a preventative action has to do so based on the undoubted indication of the scheduled event not to be perceived as an aggressor. Additionally, preemptive action ought to be undertaken when no other means could deter a terrorist attack. There is also retribution, which entails trailing down and gruelling terrorists for the actions that they have done. The U.S. has to have a proactive reaction against terror by creating a civilian-oriented paramilitary department to conduct special functions.[69] However, some believe that retaliation and reprisals are illegitimate under the UN Charter. Articles 2(4) and 51 encompass a minimum order as they safeguard only the central freedom for self-defence in case of armed aggression.

Contrary to the meanings of the UN Charter developers, the communal safety model has been significant, and state hostility is determined through nations' unilateral usage of power. There is an argument that since the routine freedom to self-defence entails actions beyond an armed attack, armed forces may be legally present as an alternative against terrorists.[70]

Though Article 51 refers to the freedom to self-defence as a reaction "if an armed attack occurs," the U.K. and the U.S. have progressively upheld that the liberty of self-defence applies even when such a fortified attack has not yet happened but is imminent. The United States has cited tremendous support for anticipatory self-defence, especially with the 1837 Caroline affair. This argument argues that using force in self-defence is lawful if the danger is immediate and unavoidable, and it leaves no room for an opportunity to select a mode of response and time.[71]

68 Alexander and Sarkar (n 67) 100.
69 ibid 101.
70 Dumitrița Florea, 'The Right to Individual or Collective Self-Defense. Preventive Attack according to the Provisions of the UN Charter' (2021) 16(3-4) Jurnalul de Studii Juridice 15, doi:10.18662/jls/16.3-4/89.
71 The Open University (n 6).

This was further developed after 9/11, with the U.S. advancing anticipatory self-defence against groups like liberations, not states but groups of people. For example, terrorist groups argue that it is only reasonable to respond to threats of attack.

Likewise, the United Kingdom acknowledges the right to pre-emptive self-defence where an armed attack is seemingly imminent but has not occurred yet. For instance, before the 2003 Iraq War, the United Kingdom justified preemptive strikes because Iraq had weapons of mass devastation and thus posed an impending threat.[72] In essence, the presence of an armed man remains one of the necessities for executing the freedom of self-defence instead of the exclusive foundation. Some significant nations also showcase similar sentiments.

In backing up the interpretation of an armed attack, there is a prevailing belief that state backing and sustenance of international terrorists constitute the utilisation of force as stipulated by Article 2(4). Indeed, it is not a wholly idle argument, especially considering that the ban on the utilisation of force in modern international rules cannot be determined by just interpreting Article 2(4).[73] For context, consider the provisions of Articles 39, 51, and 53 of the UN Charter, each containing several terms that differ significantly in meaning. State practice appears to back up the notion that bombings executed by terrorists may constitute an armed conflict, thus justifying proactive self-defence under Article 51.

In recent years, the Security Council has taken decisive action in handling international terrorism, whether state-sponsored or not, due to its threat to global peace. In this regard, even preceding 9/11, the Security Council had categorised Libya's support of terrorism as a danger to worldwide concord and security.[74] As early as 9/11, the UN Security Council described Libya's support of international terrorism as a threat to global peace. This observation would be necessary in shaping the international community's perception regarding state terrorism.

In this case, the question arises: how did the 9/11 attack affect the understanding of weaponised threats under the UN Charter? The issue is whether terrorist attacks qualify as armed attacks which largely depend on interpretation.[75] Even if the freedom to self-defence under international law goes beyond the armed attack notion as seen under the UN Charter, critical hurdles should be overcome before a conventional theory of self-defence is applied in the justification of attacks against terrorists and related facilities situated in another nation.[76]

If the expected practice terrorist attack is not imminent, the use of weapons is not permitted for intimidation. Even if the right to self-defence tends to be above weaponised prerequisites under Article 51 of the UN Charter, using power to punish an attacker following a threat is

72 Florea (n 70) 15.
73 ibid 15.
74 ibid.
75 Alexander and Sarkar (n 67) 102.
76 ibid 103.

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

not permitted.[77] The UN Charter would also not allow the application of force to deter a less-than-imminent threat.

Additionally, if the previous terrorist activities are too distant in time, responding with force is likely to be categorised as an illegitimate reprisal. It seems that if the right to use force in protection applies in the absence of a violent assault, it encompasses a narrow window of opportunities.[78] Indeed, such opportunities under the conventional criteria for self-defence would rarely be granted in the era of terrorist attacks. Most evidently, the conventional requisites for self-defence are too limited to react suitably to the threat modelled by global terrorism.

Advocates of the progressive customary freedom to preventive self-defence have indicated the impossibility of the verbatim comprehension of Article 51 in the era characterised by the use of lethal weapons, delivery models, and increasing global terrorist activity. They find it absurd that a nation has to refrain from taking measures to protect itself when a different country is preparing for an attack.[79] Considering the devastating capability of contemporary weapons and the speed of their delivery to a target, denying a nation the right to react proactively to a pending attack infringes on its right to self-defence.

A similar rationale applies to nations that have been threatened with impending terrorist attacks on their property or citizenry. Respect for state sovereignty does not imply that a country can anchor the most unconcealed preparation for an assault on another's independent state within its territories with impunity.[80] Adherents to this position maintain that there is no literal stipulation under Article 51 of the UN Charter that an overseas government must conduct an attack for a nation to react. In such scenarios, harbouring terrorism may result in the legal justification of anticipatory military action.

In the nuclear era, banning self-defence unless an armed attack has happened can have a potentially devastating impact; therefore, states prefer the understanding of allowing anticipatory self-defence. Nevertheless, such a claim refers to using power in self-protection and is still constrained by threshold principles.

Even with the appeal of the standard of prudent self-protection, there is minimal foundation for such a leeway in the freedom of self-preservation under the UN Charter. In justifying its attacks on Iraq, the U.S. depended on the idea of preventive self-defence while still seeking to alleviate the ban with customary global law. The concept of preemption, which grants the authority to respond to possible dangers in future decades, needs to be supported by world law.[81]

77 Hazhar Jabar Qadir, 'Humanitarian Intervention versus United Nations Charter: A Critical Appraisal' (2018) 3(1) Qalaai Zanist Journal 1051, doi:10.25212/lfu.qzj.3.1.42.
78 Alexander and Sarkar (n 67) 103.
79 Qadir (n 77) 1052.
80 ibid 1053.
81 Florea (n 70) 15.

The right to anticipatory self-defence founded on a novel principle of emerging threat would lead to considerable uncertainties about determining potential threats that justify pre-emptive action. If such a determination is national-based, opportunistic actions might be justified as anticipatory self-defence. As a result, only nations with the military capacity would be able to utilise the channel, and national interests would inevitably cover unilateral response.[82]

Expanding such rights would likely prompt potential targets to launch attacks first. There is still a debate about whether Operations Enduring Freedom fulfilled the requirement for proportionality. The U.S. case is further complicated by its calls for regime change in rogue nations striving to hold weapons of mass destruction, which the U.S. is eager to eliminate.

From a unilateral point of view, the U.S. articulated its freedom to respond proactively to eliminate the threat posed by nuclear-armed Iraq. Nevertheless, since the availability of a forthcoming danger could not be proved, the President reintroduced the conventional anticipatory self-defence notion and thus alleviated the threshold by replacing it with the depiction of an emerging threat. Most evidently, there not being an association between Iraq and Al Qaeda, the U.S. sought a doctrine that would legalise an attack on Baghdad.[83] The doctrine that fitted best, albeit imperfectly, was the notion of anticipatory self-defence.

The U.S. argues that the conventional regulations on applying force must be reinterpreted or updated to fit the present global settings. The U.S. relies on three arguments of the present international model to justify the need for reinterpretation. The first one is the progress and propagation of weapons of mass obliteration. The second one is the idea of rogue states and non-state terrorists.[84] The third one is the ineffectiveness of conventional prevention methods when applied to such groups.[85] These arguments have become considered to generate more lethal and complicated security settings than ever before. As can be seen, the U.S. proposal to update the Caroline formula to reflect the novel reality is premised on reinterpreting the idea of an imminent attack. A standard comprehension of the concept indicates that a pending attack is about to occur.[86] It depicts the urgency and immediacy rather than just the circumstances of an impending attack. Although such a definition has been deemed imprecise, it contains the central feature: the temporal link between the danger of an about and its commencement shortly. Traditionally, a pending attack was illustrated through the availability of troops on the territory of a country preparing for an attack. Nevertheless, notable signs of preparation for an armed invasion are usually minimal in the contemporary era.

82 ibid.
83 Qadir(n 77) 1052.
84 ibid 1053.
85 ibid.
86 ibid.

Access to Justice in Eastern Europe
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8 JUSTIFICATIONS FOR PROACTIVE SELF-DEFENCE

The U.S. asserts that the 9/11 attack changed everything, necessitating countries to revise their doctrines to face novel and divergent threats. Two critical questions arise from this claim. The first one is whether the 9/11 attack has indeed changed everything or is just a reflection of people's perception of a changing world.[87] The second is whether existing regulations and systems controlling the application of power are incapable of addressing risks posed by rogue countries and non-state players.

Contrary to the claims of the Bush regime, the global system did not change in response to the 9/11 attack. International terrorism executed by non-nation players is not a novel subject.[88] Indeed, the international community started handling this issue many years before the attack during the General Assembly's Declaration of Friendly Relations. What set the 9/11 attack apart from others was the magnitude of the damage it caused and the fact that it happened on the territory of the U.S.

According to the National Security Strategy (NSS), conventional notions of deterrence are ineffective against terrorist adversaries whose avowed techniques are wanton damage and targeting innocent individuals.[89] NSS further adds that dissuasion is unlikely to work effectively against the frontrunners of rogue nations.[90] However, recent encounters indicate that deterrence and containment work in association with these nations. Therefore, it is dubious if the U.S.'s thoughts can be extended to non-state terrorism and rogue nations.

Another critical question is whether the available rules and systems on the application of force are sufficient. Although the Security Council is an imperfect radical system, it offers adequate ways of handling terrorist threats. Where a rogue nation or non-nation players are deemed an open threat, and the measures are ineffective or unavailable, the Security Council has the authority to sanction the use of force to handle the threat. Considering the requirement to use proactive force as self-defence, the view of one of the member states practising its veto authority is minimised. Therefore, there is no need to move away from the available mechanisms and establish comprehensive and probably destabilising freedom to preventative self-defence.[91]

The Security Council has the capacity to endorse proactive military action. Once the Security Council establishes the presence of a threat to peace, it has the alternative of sanctioning martial power as stipulated under Article 42 of the UN Charter. Under Article 39, which addresses threats to concord, the Security Council is not restrained from

87 Alexander Gilder, 'The Effect of 'Stabilization' In the Mandates and Practice of UN Peace Operations' (2019) 66(1) Netherlands International Law Review 48, doi:10.25212/lfu.qzj.3.1.42.
88 ibid 49.
89 Qadir(n 77) 1053.
90 Gilder (n 87) 50.
91 Qadir (n 77) 1054.

responding to events that have already happened. However, proactive action to avert such a threat initially targets the collective safety command.[92]

Unlike the notion of anticipatory self-defence – which remains contested – the Security Council's capacity to sanction activity needs to be more restrained in reacting to an imminent threat. Ideally, the Security Council's power is broader and more comprehensive than any other possible freedom a nation might claim under preventive self-protection.

For practical purposes, it is essential to shift the balance towards synthesising theoretical and practical aspects to enhance the justification of proactive self-defence under public international law. The following are examples of practical applications, pertinent court cases, and the International Court of Justice's (ICJ) positions on proactive legitimate defence:

Protection of other states from non-state actors has been a critical aspect of proactive self-defence under international law. If a state cannot control the terrorists living in its territory, another state will launch attacks for self-defence purposes. For instance, following the 11 September attacks in 2001, the United States invaded Afghanistan, asserting that the Taliban was harbouring al-Qaeda. This form of proactive self-defence is meant to avert subsequent attacks.

The 1837 Caroline case remains a classic case in customary international law on self-defence. Preemptive self-defence was invented after the British forces blew up an American ship called Caroline because it was allegedly supplying the Canadian rebels. The United States government later acknowledged the British necessity claim, noting that pre-emptive self-defence can be warranted when the need "is to the extent of necessity which leaves no choice as to time, or means, and is such that anyone refusing to avail himself of it incurs all the perils of defenceless innocence." For this reason, this case remains pertinent in altering the rules regarding the right to act preemptively under international law in self-defence.

In Nicaragua v. United States (1986), the International Court of Justice dismissed the United States' assertion that it was involved in collective self-defence by supporting the Contras against the Nicaraguan authorities. The Court pointed out that self-defence must be reasonable and necessary for the danger identified. This case underscores the importance of identifying an actual and present danger when invoking self-defence as a justification for force.[93]

The International Court of Justice has expressed the view that exercising the right of self-defence enshrined in Article 51 of the UN Charter occurs only in the case of an actual armed attack or where such an attack is threatened. Preemptive self-defence, or the

92 ibid 1055.

93 Samuel Asiimwe, 'Analysis of Public International Law Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America, International)' (*SSRN*, 23 February 2024) <http://dx.doi.org/10.2139/ssrn.4736798> accessed 25 September 2024.

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anticipation of self-defence, is still debatable today. The International Court of Justice has generally been reluctant to expand Article 51 to cover anticipation of pre-emptive measures, stressing that this would require clear evidence of an imminent and unavoidable danger.

Additionally, the International Court of Justice has consistently employed the ideas of proportionality and necessity to self-defence claims. Any proactive engagement must be kept to the minimum required to meet the threat and used sparingly.

By incorporating these examples, including the historical cases and the ICJ judgments and interpretations, the discussion on proactive self-defence under public international law gains a more practical and comprehensive perspective.

As discussed throughout, the Security Council also has the authority to respond to threats posed by non-state actors. While non-state actors complicate the application of the law on self-defence, there are no facts that the integrative mechanism cannot address the challenge. The Security Council has the power to initiate actions against the threat of non-state terrorism and state terrorism.[94] However, the actual matter is the willingness of the Security Council to sanction proactive action.[95] Despite the recent dispute over Iraq, the Security Council can handle the danger of the use of weapons of massive destruction. Such potential should translate into rigid practice when the Security Council is approached to handle pressures from non-nation players. The matter will be straightforward, considering that substitutes to the use of power, such as dissuasion, are improbable to influence non-state players. It would be correct to indicate that the only noticeable complicating aspect is the breach of the host nation's border sovereignty, which happens when military force is applied to target a non-state actor within the country.[96]

A more challenging situation is that of a rogue nation. The Security Council would be less persuaded to sanction proactive martial practice to alleviate such dangers than in circumstances engaging non-state terrorism. The main reason is that the force applied against a nation is more likely to be of greater magnitude and have critical effects on the global model compared to a more constrained attack on non-nation players.[97] However, this does not mean a proactive force would never be needed to eradicate threats from rogue nations. If substantial facts of a threat from a scoundrel nation and optional measures have not worked, then the Security Council would sanction the application of proactive force as self-defence.

There is a danger in introducing the right to proactive self-defence as it could return nations to a state of near lawlessness akin to the 19th century. By extending the scope for autonomous

94 Qadir (n 77) 1055.
95 Gilder (n 87) 51.
96 ibid 52
97 Annie Himes and Brian J Kim, 'Self-Defense on Behalf of Non-State Actors' (2021) 43(1) University of Pennsylvania Journal of International Law 241.

practice, proactive self-defence would weaken the general ban imposed by international law on applying force to the level of showcasing the UN Charter as virtually worthless.[98] It would blur the line between self-protective and aggressive force, granting nations the freedom to utilise power unilaterally against other countries or non-state players based on their view of a threat. Unlike self-defence as defined under Article 51 of the UN Charter, which permits the utilisation of power if a weaponised act is in progress, proactive self-defence carries no objectively assessing the presence of an alleged danger. In other words, there is a high possibility that nations can abuse such a right.[99]

Regardless of the aims of the U.S. to limit the validity of its preemption notion, once such a policy is introduced, other nations can seek to depend on it, significantly where it furthers their interests. Different factors, including the legality of actions, usually influence the choice to apply force in self-defence. Nevertheless, speculation about proactive defence can be potentially destabilising. The practice of nations appears to be multi-layered, and the interpretation raises challenging questions regarding how the subsequent practice of a treaty and regulations under customary international law is to be determined.[100] Most importantly, the practice has developed to the point where the right to collectively defend a population as the final resort in case of a government attack has consolidated.

9 CONCLUSIONS

This research demonstrates that the UN Charter should not be merely viewed as a deterrent to nations from utilising power for self-protection but rather as a framework that provides the legal basis for such actions. The Security Council determines the fundamental principles of political well-being for nations through voting. The freedom to self-protection primarily derives from the customary universal rule, particularly the principles established in the Caroline case and Article 51 of the UN Charter. Article 51 explicitly recognises the right of member states to engage in personal or integrative self-protection in response to an armed attack. This liberty permits the application of power under certain conditions, including a fortified attack on a nation and justification of using force as a necessary action by a victim state. However, the intensity of force applied in self-defence should be proportional to the nation's threat. The UN Security Council and the ICJ typically coordinate such actions.

The modern understanding of self-defence remains complex and ambiguous. While all UN member states acknowledge that the freedom to self-protection is contained under the UN Charter, disputes concerning the interpretation of its wording persist. The critical subject of discussion is whether proactive and preventive strikes are permitted under international

98 ibid 241.
99 ibid.
100 ibid.

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law. Additionally, there is an ongoing debate concerning whether the desire to safeguard nationals is a solid justification for self-defence.

The right of nations to act in self-defence in reaction to a threat of upcoming armed attacks remains a contentious issue. Although the idea of preventive self-defence has largely disappeared from the legal environment, proactive self-defence against imminent armed attacks is still a matter of discussion.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРЕВЕНТИВНИЙ САМОЗАХИСТ У МІЖНАРОДНОМУ ПУБЛІЧНОМУ ПРАВІ: АНАЛІЗ КРІЗЬ ПРИЗМУ ПРАКТИКИ МІЖНАРОДНОГО СУДУ ООН

Заїд Алі Елґаварі

АНОТАЦІЯ

Вступ. *Право на самозахист є одним із основоположних принципів міжнародного права, безпосередньо закріпленим у статті 51 Статуту Організації Об'єднаних Націй. Проте застосування цього права, особливо щодо превентивної сили, і надалі є спірним питанням. Таким чином, залишається сумнівним, якою мірою та за яких обставин можна застосовувати самозахист, коли маємо справу з недержавними суб'єктами та потенційними загрозами в майбутньому. Ця стаття намагається вирішити ці проблемні питання за допомогою первинних історичних посилань і правових систем, зосереджених на вказівках щодо необхідності та заходів пропорційності.*

Методи. *У цій роботі систематично аналізується прецедентне право, міжнародні договори та стаття 51 Статуту ООН, щоб дослідити, як самозахист сприймається в різних контекстах. Також використовується порівняльно-правовий метод дослідження, який ґрунтується на рішенні Міжнародного суду ООН (ICJ) і зазначеній літературі. Для розуміння питань необхідності, пропорційності та превентивного самозахисту було проаналізовано такі справи, як Нікарагуа проти Сполучених Штатів Америки, справа про іранські нафтові платформи та ті, що стосуються Ізраїлю, США і Сполученого Королівства. За допомогою методу аналізу конкретних справ було досліджено попередню концепцію самозахисту в правовій системі міжнародного публічного права щодо практики держав та її тлумачення Міжнародним Судом ООН. Вибір прикладів, таких як конфлікт в Україні та збройна агресія Росії та Туреччини, Сирії та Іраку, був спланований і обраний з огляду на значення в сучасному міжнародному праві. Вторинні дані, отримані з наукових статей і юридичних публікацій, доповнили це дослідження.*

Результати та висновки. *Згідно з отриманими даними, питання права на самозахист є найважливішим і одним із найбільш дискусійних у міжнародному праві. Наприклад, такі події, як Шестиденна війна 1967 року, демонструють, як держави використовують право на самозахист для проведення військових дій. Однак висновки, зроблені Міжнародним судом ООН у таких справах, як Нікарагуа проти Сполучених Штатів Америки, підкреслюють і підтримують принцип пропорційності та обґрунтованості щодо питання самозахисту. Превентивний самозахист все ще обговорюється, у випадку Керолайн щодо визначення конкретних умов, за яких він є допустимим. Проте превентивний самозахист продовжує викликати дискусію в міжнародному публічному праві, що має значні теоретичні та практичні наслідки. Вторгнення Росії в Україну та напруженість між Туреччиною, Сирією та Іраком сприяють умовності цього питання в*

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сучасній політиці та праві. Наприклад, російсько-українська війна ілюструє необхідність коректив, яка виникає із прийняттям старих теорій самозахисту, коли глобальне середовище безпеки зазнає метаморфоз. Це зумовило появу на першому плані питання, пов'язані з агресією, стримуванням і законним застосуванням сили у боротьбі із загрозами, які сприймаються як екзистенційні. Ця справа дозволяє розглянути роль, яку відіграє Міжнародний суд у встановленні параметрів поведінки держави, а також проаналізувати реалії законної сили.

Так само конфлікти за участю Туреччини, Сирії та Іраку показують, що існує сучасна тенденція використання превентивного самозахисту як виправдання військових дій проти недержавних «гравців». Вони є важливими для ілюстрації того, як держави можуть сприяти своїй безпеці та водночас визнавати та підтримувати суверенітет інших націй. Крім того, рішення Міжнародного суду ООН щодо таких позовів допомагають зрозуміти еволюцію правового режиму цих процесів. Аналіз показує, що стаття 51 окреслює формальну можливість застосування сили для необхідної оборони, але в той же час тлумачення цієї статті часто викликає сумніви. Міжнародне співтовариство все ще стикається з багатьма викликами, що визначають відмінності між застережними та превентивними ударами. Пропозиція полягає в тому, що країни повинні бути обережними, застосовуючи засоби самозахисту, і переконатися, що те, що вони роблять, є розумним і необхідним щодо загрози. Крім того, Рада Безпеки ООН повинна активно вирішувати суперечки, щоб зменшити ризик неправильного використання доктрини самозахисту.

Ключові слова: *активний, самозахист, випередження, міжнародне право, превентивний, неминучий, збройний напад, обмеження, стаття 51, Статут ООН, Рада Безпеки та Міжнародний Суд ООН.*

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Research Article

INTERPLAY OF CRISES: MAPPING THE SCIENTIFIC LANDSCAPE OF INTERSECTING THEMES IN THE COVID-19 PANDEMIC AND THE RUSSIAN-UKRAINE WAR

Kamil Maciuk*, Paulina Lewińska, Artur Krawczyk, Piotr Trojański, Michal Apollo and David C. Geary

ABSTRACT

Background: *In February 2022, Russian Federation troops attacked Ukraine on several fronts, thereby starting a war that continues to this day. The invasion garnered worldwide opposition, leading to sanctions imposed on politicians and corporations in the Russian Federation. The war has also left its mark on art, culture, and science.*

Methods: *In this study, we analyse the war in Ukraine and how scholars around the world have examined it. The analysis is divided into three parts: (1) a comprehensive review of the number of articles and conference proceedings related to the Russia-Ukraine war in the Web of Science (WoS) disciplines/categories; (2) the main topics and directions chosen by the authors; and (3) a summary of studies focused on COVID-19 during the war. The latter topic is particularly important, as the COVID-19 situation in Ukraine was already complex before the 2022 invasion, and the ongoing military actions have further exacerbated it. For the above analyses, we utilised a WoS database from 2014 (covering the first Russian attack on Crimea, Donetsk and Luhansk regions) through December 2022.*

Results and Conclusions: For academics, *the war in Ukraine has become a significant subject of study. As it proliferated, culminating in a direct mass attack in February 2022, research efforts involved more and more scientific fields. These fields range from political science and sociology research to psychology and marketing to engineering science or supply chains.*

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1 INTRODUCTION

The academic study of war, particularly in the humanities, such as history or sociology, includes assessments of their causes and consequences.[1] War is a phenomenon that occurs when two or more states or groups of people engage in armed action to achieve their political, economic, or military objectives.[2] Wars can be waged at different levels of intensity and scale, from local conflicts to global world wars.[3] Historians and sociologists study the causes of wars, such as ideological, economic, religious, or ethnic conflicts, and the different social and political groups play in this. They also investigate the effects of wars on societies and states, including demographic changes, economic changes, and political and cultural changes.[4] In the natural sciences, such as biology or ecology, wars are studied in terms of how they affect the environment and ecosystems.[5] This can include the effects of wars on biodiversity and animal population structure, as well as on the health of humans and other living beings.[6] In general, science describes wars as complex phenomena that affect many aspects of social and natural life.

The war in Ukraine began in 2014 with the Russian annexation of Crimea and the support of pro-Russian separatists in the Donbas in eastern Ukraine.[7] The initial conflict took the form of a guerrilla war and continues to this day.[8] The war has left thousands of people dead and forced millions from their homes. The conflict is also an ongoing source of tension between Russia and the West.[9] The war has evidently hurt Ukraine's economy.

1 Laura Eras, 'War, Identity Politics, and Attitudes toward a Linguistic Minority: Prejudice against Russian-Speaking Ukrainians in Ukraine between 1995 and 2018' [2022] Nationalities Papers doi:10.1017/nps.2021.100.

2 Antonello Zanfei, 'How Exogenous Is War? The Links between Economic, Military, Trade and Industrial Policies in the Upsurge of Russia-Ukraine Conflict' (2022) 49 Journal of Industrial and Business Economics 759; Vu M Ngo and others, 'Public Sentiment towards Economic Sanctions in the Russia-Ukraine War' (2022) 69 Scottish Journal of Political Economy 564.

3 Orysia Kulick, 'Gender and Violence in Ukraine: Changing How We Bear Witness to War' (2022) 64(2-3) Canadian Slavonic Papers 190.

4 Polina Verbytska and Roman Kuzmyn, 'Between Amnesia and the "War of Memories": Politics of Memory in the Museum Narratives of Ukraine' (2019) 7(2) Muzeologia a Kulturne Dedicstvo-Museology and Cultural Heritage 23.

5 Giovanni Tortorici and Francesco Fiorito, 'Building in Post-War Environments' (2017) 180 Procedia Engineering 1093.

6 Joshua H Daskin, Marc Stalmans and Robert M Pringle, 'Ecological Legacies of Civil War: 35-year Increase in Savanna Tree Cover Following Wholesale Large-mammal Declines' (2016) 104 Journal of Ecology 79.

7 Ilya Nuzov, 'The Dynamics of Collective Memory in the Ukraine Crisis: A Transitional Justice Perspective' (2017) 11 International Journal of Transitional Justice 132.

8 Anna Matveeva, 'No Moscow Stooges: Identity Polarization and Guerrilla Movements in Donbass' (2016) 16 Southeast European and Black Sea Studies 25; Alex Marshall, 'From Civil War to Proxy War: Past History and Current Dilemmas' (2016) 27 Small Wars & Insurgencies 183.

9 Theodor Tudoroiu, 'Unfreezing Failed Frozen Conflicts: A Post-Soviet Case Study' (2016) 24 Journal of Contemporary European Studies 375; Morena Skalamera, 'Sino-Russian Energy Relations Reversed: A New Little Brother' (2016) 13-14 Energy Strategy Reviews 97 doi:10.1016/j.esr.2016.08.005.

Many regions, factories, and human dwellings have been destroyed, and the conflict has discouraged economic investment in the country. The war in Ukraine is still ongoing and remains one of the most serious armed conflicts in the world. In 2022, it escalated to other areas of Ukraine.[10]

Also, the already limited success in vaccinating the population of Ukraine against COVID-19 has slowed and, in some areas, paused. Also, the rapid internal and external migration of people has made the COVID-19 pandemic analysis even more difficult to track and control.[11]

The current research on the COVID-19 pandemic and the Russian-Ukrainian War using bibliometric analysis is limited due to the recency of the conflict and the dynamically changing research environment. Nevertheless, existing works on the COVID-19 pandemic in the social sciences, such as mapping the research landscape of COVID-19 from a social sciences perspective: a bibliometric analysis, may lay the groundwork for future studies analysing this intersection of topics.[12] Such an analysis is timely because the war is expected to have significant, reciprocal impacts with the pandemic, affecting global health, food security, and economic stability, and bibliometric methods can help to understand research and public health trends and identify gaps in knowledge.[13]

This paper aims to analyse eight years of war (2014-2022) - including ten months and the COVID-19 pandemic (February-December 2022) in Ukraine in the light of scientific papers and to illustrate how researchers from around the world have seen the reality, analysed and described it. In the bibliographic analysis, we focused on three elements: the Russian-Ukrainian War in Web of Science disciplines (categories) (section 3.1), the description of disciplines and topics subjectively chosen by authors (section 3.2), and research focusing on COVID-19 during the war (section 3.3). Such an in-depth analysis will provide insight into trends and reveal research gaps.

10 Eliot A Cohen, 'Ukraine Is Winning the War...: And the West Doesn't Want to Recognize it' (2022) 72(1-3) Osteuropa 179; Kai-Olaf Lang, 'In Turbulenzen' (2022) 72(4-5) Osteuropa 117.

11 Shubhajeet Roy, Vivek Bhat and Ahmad Ozair, ''Overseas Medical Students in Ukraine and War-Related Interruption in Education: Global Health Considerations from India' (2022) 88(1) Annals of Global Health 98; Ubydul Haque and others, 'The Human Toll and Humanitarian Crisis of the Russia-Ukraine War: The First 162 Days' (2022) 7(9) BMJ Global Health e009550; Andriy Haydabrus and others, 'C Current War in Ukraine: Lessons from the Impact of War on Combatants' Mental Health during the Last Decade' (2022) 19(17) International Journal of Environmental Research and Public Health 10536; Elzbieta Ociepa-Kicinska and Malgorzata Gorzalczynska-Koczkodaj, 'Forms of Aid Provided to Refugees of the 2022 Russia-Ukraine War: The Case of Poland' (2022) 19(12) International Journal of Environmental Research and Public Health 7085; Rita Rubin, 'Physicians in Ukraine: Caring for Patients in the Middle of a War' (2022) 327 Jama-Journal of the American Medical Association 1318.

12 Ashish Chandra, Nida and Ruchi Shukla, 'A Bibliometric Analysis of COVID-19 Across Economics and Business Research Landscape' (2021) 9 Transnational Marketing Journal 667.

13 Koel Roychowdhury, Radhika Bhanja and Sushmita Biswas, 'Mapping the Research Landscape of Covid-19 from Social Sciences Perspective: A Bibliometric Analysis' (2022) 127 Scientometrics 4547.

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Considering the novelty of the conflict and the need to conduct, publish, and index research in databases, future studies in this area are highly probable. Documenting the latest publications in relevant academic databases is important to stay informed about emerging research in this field.

2 METHODS

In this section, we describe the "mapping" methodology, clearly defining the criteria used to identify trends highlighted by the authors.

The "mapping" methodology employs advanced bibliometric analysis techniques to identify and visualise the main research areas, trends, and the interconnections between different scientific disciplines (referred to as 'categories' in Web of Science - WoS), especially in the context of the war in Ukraine and the COVID-19 pandemic. The publication selection criteria included searching for keywords "war" and "Ukraine," as well as "COVID-19" in titles, abstracts, keywords, and additional keywords (keywords plus) in the WoS database, starting from the year 2014. The goal was to include works that analyse the impact of the 2022 conflict and the pandemic on science and research within a broader historical context of the region. Our analysis workflow is presented in Figure 1.

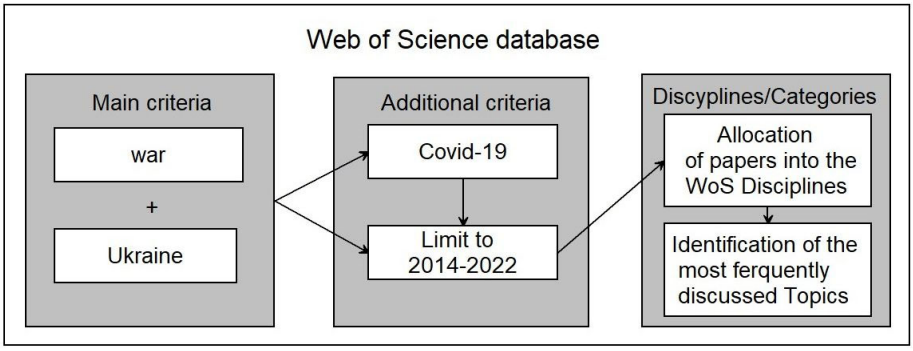

Figure 1. Workflow diagram presenting the processing pipeline

To determine the impact of the war in Ukraine on scientific and scholarly output, articles containing specific wording in the title were analysed from the WoS database starting from 2014. The search included the keywords "war" and "Ukraine." Papers published since 2014 have been incorporating a broader historical context of the region, particularly in relation to the 2022 conflict. Additionally, from these papers, topics (including abstracts, titles, keywords, and keywords plus) that include the term "COVID-19" were analysed. We categorised the 641 identified titles as of 21 December 2022 on three dimensions: the disciplines covered by the authors, the main topics related to the Russia-Ukraine War, and the problems/research related to COVID-19.

3 RESULTS

Below, the analyses of the war in Ukraine were divided into discipline topics and COVID-19-related articles.

3.1. Disciplines dealing with the Russian-Ukrainian War

Among the 641 articles, the authors were from 1-3 related disciplines, resulting in 914 discipline entries across 82 disciplines. As shown in Figure 2, 28 disciplines had at least seven appearances, while the remaining 54 disciplines accounted for only 125 entries and thus are not represented in Figure 2. The top disciplines focusing on the war in Ukraine are *Government and Law*, *History*, and *International Relations,* which cover more than half of the topics related to the war.

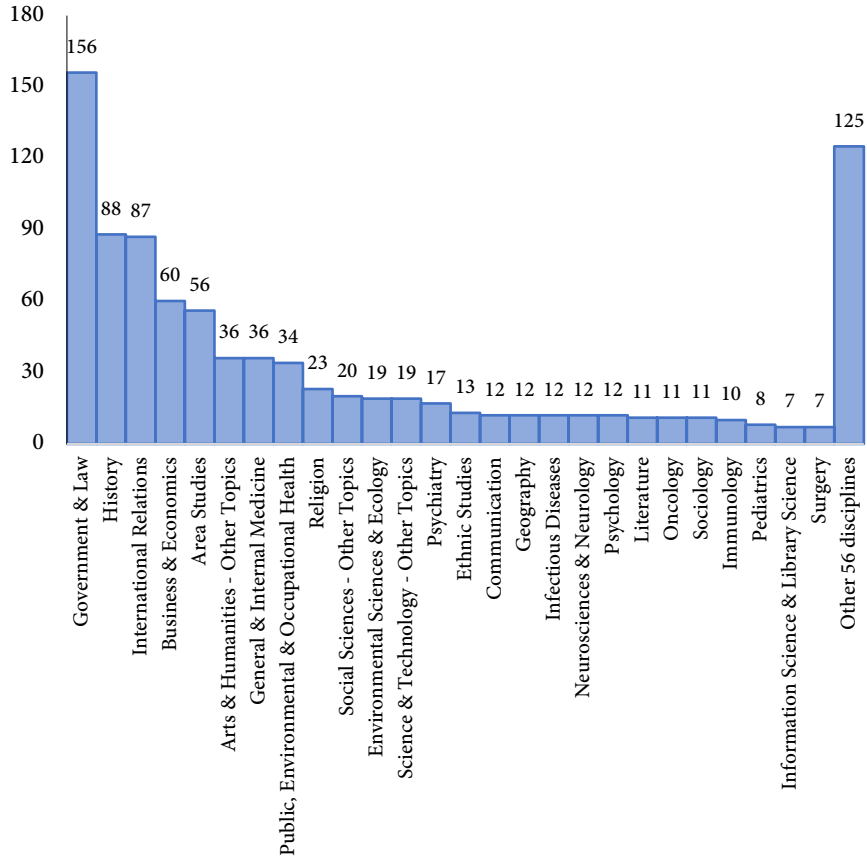

Figure 2. Distribution of the WoS disciplines of war in Ukraine articles

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To better interpret the results, Figure 3 presents a tree map illustrating the distribution of publications across different disciplines related to war. The figure highlights the top 10 disciplines among the remaining 72. These top disciplines account for 65% of all war-related articles.

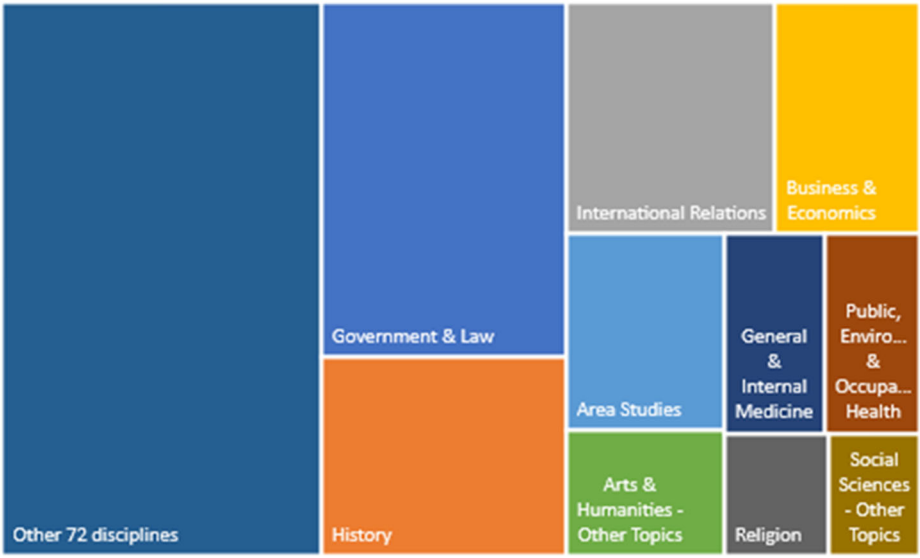

Figure 3. Distribution of the WoS disciplines of war-related articles

The most frequent themes included aspects of national identity in Ukraine during Euromaidan,[14] war and identity during the conflict in Donbas,[15] war and Memory in Russia, Ukraine and Belarus,[16] and the role of war in the spread of HIV in Ukraine.[17]

In addition to the top disciplines noted above, there were a significant number of economic studies related to one of these disciplines, which is evident from the war's significant impact on Ukraine's economy and development. Armed conflict destroys infrastructure, hindering the production and distribution of goods and services. It can also lead to a decline in foreign investment and reduce trade with other countries, negatively affecting the country's economy. The war in Ukraine has implications for unemployment rates, wage levels, and the overall living standards of the population. Additionally, it may cause population displacement, further impacting the labour market and mobility.

14 Volodymyr Kulyk, 'National Identity in Ukraine: Impact of Euromaidan and the War' (2016) 68(4) Europe-Asia Studies 588.

15 Gwendolyn Sasse and Alice Lackner, 'War and Identity: The Case of the Donbas in Ukraine' (2018) 34 Post-Soviet Affairs 139.

16 Julie Fedor and others (eds), *War and Memory in Russia, Ukraine and Belarus* (Palgrave 2017).

17 Tetyana I Vasylyeva and others, 'Molecular Epidemiology Reveals the Role of War in the Spread of HIV in Ukraine' (2018) 115 Proceedings of the National Academy of Sciences of the United States of America 1051.

Armed conflict can also lead to inflation and disruptions in the financial system. Economic research focused on the war in Ukraine can assist scientists and politicians in gaining a better understanding of the effects of armed conflict on a country's economy and its impact on the living standards of the population and, eventually, its recovery.[18]

As noted, there are also many war-related papers in the field of government and law. In areas controlled by the Ukrainian government, Ukrainian law applies, and the authorities are trying to ensure its enforcement. However, in separatist-controlled areas and areas actively under attack, the situation becomes more complicated. Frequent human rights violations and a lack of respect for basic legal standards exist. The war in Ukraine also has implications for international relations and the application of international law. The conflict has escalated tensions between states and international organisations, which may impact the implementation of international law and adherence to international treaties and agreements. Research on law and war in Ukraine encompasses all of these aspects and can provide insights into how the conflict affects the application of law and the protection of human rights in conflict areas. Furthermore, it serves as a case study for understanding the consequences of law violations in armed conflicts, making it a significant contribution to studying 21st-century European conflicts.[19]

18 Eras (n 1) ; Martin Larys, 'Failing to Fight for the ``Russian World'': Pre-War Social Origins of the Pro-Russian Secessionist Organizations in Ukraine' [2022] Nationalities Papers doi:10.1017/nps.2022.76.; Nataliia Stepaniuk, 'Wartime Civilian Mobilization: Demographic Profile, Motivations, and Pathways to Volunteer Engagement Amidst the Donbas War in Ukraine' [2022] Nationalities Papers doi:10.1017/nps.2021.82; Yuliya Yurchuk, 'Historians as Activists: History Writing in Times of War: The Case of Ukraine in 2014-2018' (2021) 49 Nationalities Papers 691

19 Kulyk (n 14); Taras Kuzio, 'Ukraine Over the Edge: Russia, the West and the New `Cold War'' (2019) 71(7) Europe-Asia Studies 1245; Taras Kuzio, 'Armies of Russia's War in Ukraine' (2020) 72(8) Europe-Asia Studies 1436; Vlad Mykhnenko, 'Causes and Consequences of the War in Eastern Ukraine: An Economic Geography Perspective' (2020) 72(3) Europe-Asia Studies 528; Gwendolyn Sasse, 'War and Displacement: The Case of Ukraine' (2020) 72(3) Europe-Asia Studies 347; Gwendolyn Sasse, 'Russia's War against Ukraine: A Trio of Virtual Special Issues' [2022] Europe-Asia Studies doi:10.1080/09668136.2022.2072142; Sasse and Lackner (n 15); Ghasem Torabi, 'Imperial Gamble: Putin, Ukraine, and the New Cold War' (2017) 69(1) Europe-Asia Studies 188; Ghasem Torabi, 'Revolution and War in Contemporary Ukraine: The Challenge of Change' (2018) 70(2) Europe-Asia Studies 303; Jefferson Adams, 'Red Famine: Stalin's War on Ukraine' (2018) 31(4) International Journal of Intelligence and Counterintelligence 805; Daria Platonova, 'Putin's War Against Ukraine: Revolution, Nationalism, and Crime' (2018) 70(3) Europe-Asia Studies 488; Serhy Yekelchyk, 'Total Wars and the Making of Modern Ukraine, 1914-1954' (2018) 87 University of Toronto Quarterly 278; Kees van der Pijl, *Flight MH17, Ukraine and the New Cold War Prism of Disaster* (Manchester Univ Press 2018); Derek Averre and Kataryna Wolczuk, 'Introduction: The Ukraine Crisis and Post-Post-Cold War Europe' (2016) 68(4) Europe-Asia Studies 551; Zerrin Torun, 'From War to Peace in the Balkans, the Middle East and Ukraine' (2019) 71(10) Europe-Asia Studies 1774; Mychailo Wynnyckyj, *Ukraine's Maidan, Russia's War: A Chronicle and Analysis of the Revolution of Dignity* (Ibidem Verlag 2019); Paul D'Anieri, 'Conclusion: Ukraine, Russia, and the West' in P D'Anieri, *Cold War to Cold War', Ukraine and Russia: from Civilized Divorce to Uncivil War* (CUP 2019) 253; Emily D Johnson, 'A War of Songs: Popular Music and Recent Russia-Ukraine Relations' (2020) 79 Russian Review 156; Christopher Gilley, 'Remaking Ukraine after World War II: The Clash of Local and Central Soviet Power' (2022) 74(3) Europe-Asia Studies 513.

Access to Justice in Eastern Europe
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3.2. Selected topics and research directions related to the Russian-Ukrainian

As noted, the war in Ukraine began in 2014 and continues to this day. The conflict started in eastern Ukraine, where pro-Russian separatists are fighting against Ukrainian government forces. The war is also part of a broader dispute between Russia and Ukraine, which has deep historical and political roots. Internally, the conflict revolves around disagreements regarding the relationships between various regions and ethnic groups within Ukraine and their ties with Russia. Externally, the conflict is intertwined with broader tensions between Russia and the West and is widely seen as a manifestation of Russia's disregard for Ukraine's sovereignty and territorial integrity.

When the conflict initially began in 2014, Russian propaganda worked to reassure its citizens and the world that it was not related to the pro-Russian separatists in Ukraine. Instead, the propaganda framed the conflict in terms of pro-Russia people who felt betrayed by the corrupt Ukrainian government and were fighting to return to their "motherland," Russia. When parts of Ukraine declared independence and expressed a desire to join Russia, the propaganda presented this as a justification for wider conflict to "save the Russian people." This propaganda was primarily circulated within the territory of the Russian Federation. However, the propaganda spread and was not widely accepted in most Eastern countries. Reports about money, weapons, and hired military personnel quickly circulated, and it is now generally acknowledged that the 2014 conflict was inspired and funded by the Russian government.[20] All these topics are reflected in scholarly and scientific publications since 2014.

The 2022 conflict, in contrast to the 2014 guerrilla war, is a full-blown war between two sovereign states. Russian propaganda continues to employ the narrative from 2014, claiming that some Ukrainians wish to join Russia but are being hindered by a corrupt Ukrainian government or a dangerous Western bloc. However, this aspect of the conflict has become more transparent, resulting in widespread support for Ukraine. The war has also prompted international action, including peacekeeping missions and mediation efforts conducted by various international organisations such as the United Nations and the European Union. Ukraine has received assistance in acquiring weapons, uniforms, and other necessary resources. Neighbouring countries, particularly Poland, have provided a haven for temporary or permanent immigrants fleeing the conflict.[21] Again, these topics have been covered in the literature since 2014.

Given the history and nature of the conflict, it is not surprising that a significant number of associated studies are in political science, as shown in Table 1 and Table 2. This is

20 Adams (n 19); Averre and Wolczuk (n 19); D'Anieri (n 19); Kulyk (n 14); Kuzio (n 19); Mykhnenko (n 19); Platonova (n 19); Sasse (n 19); Sasse and Lackner (n 15); Torabi (n 19); Torun (n 19); Yekelchyk (n 19); van der Pijl (n 19); Wynnyckyj (n 19); Johnson (n 19); Gilley (n 19).

21 Emil Edenborg, *Politics of Visibility and Belonging: From Russia's ``Homosexual Propaganda'' Laws to the Ukraine War* (Routledge 2017); ibid, Introduction; ibid, 'Ukraine Spectacles and Specters of War', ch 5; Vladimir Ninkovic, 'The War in Ukraine's Donbass: Origins, Context, and the Future' (2022) 30 Journal of Contemporary European Studies 590; Domitilla Sagramoso, 'The annexation of Crimea and the war in Ukraine's Donbass: Russia's Neo-Empire expands' in D Sagramoso, *Russian Imperialism Revisited: From Disengagement to Hegemony* (Routledge 2020) ch 14.

understandable, as political science encompasses the study of political mechanisms, processes, and institutions, as well as their impact on individuals and societies. The war in Ukraine holds great relevance for political science due to its implications for international relations, foreign policy, national security, and matters concerning European integration and state sovereignty.[22] Research in political science plays a crucial role in enhancing our understanding of the underlying mechanisms driving the conflict in Ukraine and its broader implications for international relations and foreign policy. By delving into the motivations and objectives of the involved parties, political science research provides valuable insights into the dynamics of the conflict and its wider ramifications. Furthermore, such research contributes to identifying effective strategies for conflict resolution and establishing sustainable peace. By studying war and its consequences, political scientists can contribute to the development of policies and approaches that promote peace and stability on both local and global scales.[23]

***Table* 1. Summary of Government & Law research area in the literature**

WoS category	Topic	Number of papers	Citations
Area Studies	Economics; Political Science	19	[24]
	Ethnic Studies; History; Political Science	4	[25]
	International Relations; Political Science	5	[26]
	Political Science	5	[27]
	Political Science	34	[28]

22 David L Sloss and Laura A Dickinson, 'The Russia-Ukraine War and the Seeds of a New Liberal Plurilateral Order' (2022) 116 American Journal of International Law 798; Jeffrey Mankoff, 'The War in Ukraine and Eurasia's New Imperial Moment' (2022) 45 Washington Quarterly 127.

23 Mariana Budjeryn, 'Distressing a System in Distress: Global Nuclear Order and Russia's War against Ukraine' (2022) 78 Bulletin of the Atomic Scientists 339; James E Doyle, 'Building a Nuclear Off-Ramp Following the War in Ukraine' (2022) 78 Bulletin of the Atomic Scientists 218.

24 Adams (n 19); Averre and Wolczuk (n 19); D'Anieri (n 19); Kulyk (n 14); Kuzio (n 19); Mykhnenko (n 19); Sasse (n 19); Sasse and Lackner (n 15); Platonova (n 19); Torabi (n 19); Torun (n 19); Yekelchyk (n 19); Van der Pijl (n 19); Wynnyckyj (n 19); Johnson (n 19); Gilley (n 19).

25 Eras (n 1); Larys (n 18); Stepaniuk (n 18); Yurchuk (n 18).

26 Edenborg (n 21); ibid, Introduction; ibid, ch 5; Ninkovic (n 21); Sagramoso (n 21).

27 Tornike Metreveli, ``We Are Now the Orthodox!": Religion in Times of War in Ukraine The Competing Discourses of Identity' in T Metreveli, Orthodox Christianity Andthe Politics of Transition: Ukraine, Serbia and Georgia (Routledge 2021) ch 5; Anna Wylegala, 'The Void Communities: Towards a New Approach to the Early Post-War in Poland and Ukraine' (2021) 35 East European Politics and Societies 407; Jennifer J Carroll, 'Putin's War Against Ukraine: Revolution, Nationalism, and Crime' (2018) 34 East European Politics 507; Martin Larys, 'Pre-War Government and Party Networks in the Rebel Political Institutions: Individual Co-Optation in Eastern Ukraine' [2022] East European Politics And Societies doi:10.1177/08883254221131; Anna Fournier, 'From Frozen Conflict to Mobile Boundary: Youth Perceptions of Territoriality in War-Time Ukraine' (2018) 32 East European Politics And Societies 23.

28 Robert Dalsjo and others, 'A Brutal Examination: Russian Military Capability in Light of the Ukraine War' (2022) 64 Survival 7; Anke Schmidt-Felzmann, 'After the War in Ukraine: Peace Building and Reconciliation in Spite of the External Aggressor' in S Goda, O Tytarchuk and M Khylko (eds), *International Crisis Management: NATO, EU, OSCE and Civil Society: Collected Essays on Best Practices and Lessons Learned* (IOS Press 2016) 151; Nigel Gould-Davies, 'Belarus, Russia, Ukraine:

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International Relations	Law	2	[29]

Three Lessons for a Post-War Order' (2022) 64 Survival 39; Vytautas Isoda, 'Can Small States Wage Proxy Wars? A Closer Look at Lithuania's Military Aid to Ukraine' [2022] Cooperation And Conflict doi:10.1177/00108367221116532; Aly Verjee, 'Ceasefire Monitoring under Fire: The OSCE, Technology, and the 2022 War in Ukraine' (2022) 13 Global Policy 808; Robert Legvold, 'Conflict in Ukraine: The Unwinding of the Post-Cold War Order' (2015) 94 Foreign Affairs 193; Jeffrey Mankoff, 'Conflict in Ukraine: The Unwinding of the Post-Cold War International Order' (2016) 30 Ethics & International Affairs 139; Nicolai N Petro, 'Conflict in Ukraine: The Unwinding of the Post-Cold War Order' (2017) 15 Perspectives on Politics 611; Irina Malai, 'Crisis in Ukraine: A Platform for the Expansion of ``Hybrid War'' or Another ``Frozen Conflict''' in N Iancu and others (eds), *Countering Hybrid Threats: Lessons Learned from Ukraine* (IOS Press 2016) 141; Vasile Rotaru, 'Crossing the Red Line: The EU and Russia within the Contexts of the Georgian War and Ukraine Crisis' in V Rotaru, *Russia, the EU, and the Eastern Partnership: Building Bridges or Digging Trenches?* (Ibidem Verlag 2018) 65; Chester A Crocker, 'Endings and Surprises of the Russia-Ukraine War' (2022) 64 Survival 183; Greta Uehling, 'Everyday Life in Ukraine's War Zone' (2017) 116 Current History 264; Sergei Konoplyov and Alexander Urbanskiy, 'Hybrid War in Ukraine: What Is Next?' in N Iancu and others (eds), *Countering Hybrid Threats: Lessons Learned from Ukraine* (IOS Press 2016) 96; Huw Dylan and Thomas J Maguire, 'Secret Intelligence and Public Diplomacy in the Ukraine War' (2022) 64 Survival 33; Roxana Bratu, 'Living on the Edge: Ukraine's Ambiguous War on Corruption' in R Kesek, M Boroda and Z Jozwik (eds), *Addressing Security Risks at the Ukrainian Border Through Best Practices on Good Governance* (IOS Press 2016) 57; Jochen Kleinschmidt, 'Offensive Realism, Differentiation Theory, and the War in Ukraine' (2019) 56 International Politics 427; Zachary Irwin, 'Roots of Russia's War in Ukraine' (2016) 141 Library Journal 125; Angela Stent, 'Roots of Russia's War in Ukraine' (2016) 58 Survival 205; Jesse Dillon Savage, 'Submission, Resistance, and War National Politics and Russian Hierarchy in Georgia and Ukraine since Independence' in JD Savage, *Political Survival and Sovereignty in International Relations* (CUP 2020) 49; Richard Higgott and Simon Reich, 'The Age of Fuzzy Bifurcation: Lessons from the Pandemic and the Ukraine War' (2022) 13 Global Policy 627; Pablo Telman Sanchez Ramirez, 'The Conflict in Ukraine: Russia's First Serious Confrontation with the West during the Post-Cold War Era' (2016) 56 Foro Internacional 470; Marcus Willett, 'The Cyber Dimension of the Russia-Ukraine War' (2022) 64 Survival 7; Maximilian Kranich, 'The Great Patriotic War 2.0 An Analysis of Collective Violence in Eastern Ukraine after the Euromaidan Revolution' in J Hauter (ed), *Civil War? Interstate War? Hybrid War? Dimensions and Interpretations of the Donbas Conflict in 2014-2020* (Ibidem Verlag 2021); Marco Siddi, 'The Partnership That Failed: EU-Russia Relations and the War in Ukraine' (2022) 44 Journal of European Integration 893; Budjeryn (n 23); Alexander K Bollfrass and Stephen Herzog, 'The War in Ukraine and Global Nuclear Order' (2022) 64 Survival 7; Erik Jones, 'The War in Ukraine and the European Central Bank' (2022) 64 Survival 111; Lawrence Freedman, 'Ukraine and the Art of Limited War' (2014) 56 Survival 7; Giselle Bosse, 'Values, Rights, and Changing Interests: The EU's Response to the War against Ukraine and the Responsibility to Protect Europeans' (2022) 43 Contemporary Security Policy 531 doi:10.1080/13523260.2022.2099713; Gwendolyn Sasse and Alice Lackner, 'War and State-Making in Ukraine: Forging a Civic Identity from Below?' in M Minakov, G Sasse and D Isachenko (eds), *Post-Soviet Secessionism: Nation-Building and State-Failure after Communism* (Ibidem Verlag 2021) 161; Nadiya Kostyuk and Aaron Brantly, 'War in the Borderland through Cyberspace: Limits of Defending Ukraine through Interstate Cooperation' (2022) 43 Contemporary Security Policy 498; Ali Nedim Karabulut, 'Eski Savaş, Yeni Strateji: Rusya'nın Yirmibirinci Yüzyıldaki Hibrit Savaş Doktrini ve Ukrayna Krizi'ndeki Uygulaması' (2016) 13 Uluslararası İlişkiler Dergisi 25; Hylke Dijkstra and others, 'War in Ukraine' (2022) 43 Contemporary Security Policy 464.

29 Sloss and Dickinson (n 22); Mankoff (n 22).

Law	-	7	[30]
Political Science	-	58	[31]

30 Ivan Monolati, 'Between Autonomy and Statehood: Attempts at Institutionalizing Representative and Executive Structures in Ukraine after the First World War' (2019) 1 Przeglad Sejmowy 137; Daniel Sarmiento, 'The War in Ukraine and the European Constitutional Moment' (2022) 57 Revista General de Derecho Europeo 1; Julia Geneuss and Florian Jessberger, 'Russian Aggression and the War in Ukraine An Introduction' (2022) 20(4) Journal of International Criminal Justice 783; Bohdan Karnaukh, 'Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity With Regard to Tort Claims Brought by the Victims of the Russia-Ukraine War' (2022) 5(3) Access to Justice in Eastern Europe 165 doi:10.33327/AJEE-18-5.2-n000321; Xavier Pons Rafols, 'The War in Ukraine, The United Nations and International Law: Some Unsustainable Systemic Certainties' (2022) 43 Revista Electronica De Estudios Internacionales doi:10.17103/reei.43.08; Natividad Fernandez Sola, 'Ukraine: From the Maidan Revolution to the Donbass War' (2016) 32 Revista Electronica De Estudios Internacionales doi:10.17103/reei.32.26; Andrea Cioffi and Camilla Cecannecchia, 'Role of Forensic Medicine in Addressing the War Crimes: Perspective from Russia-Ukraine Conflict during the COVID-19 Pandemic' [2022] Medicine, Science and the Law doi:10.1177/00258024221125135

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the Putin Era to the War in Ukraine (2000-2018)' in J Holzer, M Larys and M Mares, *Militant Right-Wing Extremism in Putin's Russia: Legacies, Forms and Threats* (Routledge 2019) ch 3; Martin Malek, 'Moscow's Battle Plan Background on Russia's War in Ukraine' (2014) 64(9-10) Osteuropa 97; Olga Gulina, 'No More War Refugees from Eastern Ukraine' (2015) 65(4) Osteuropa 131; Magnus Nordenman, 'On the Transatlantic Edge Nordic Security After the Afghan War And the Ukraine Crisis' (2014) 159 Rusi Journal 46; Arkadiusz Luba, 'Putler, Putinna, and Death Russia's War in Ukraine in Caricature' (2022) 72(9-10) Osteuropa 277; Christian Freudlsperger and Frank Schimmelfennig, 'Rebordering Europe in the Ukraine War: Community Building without Capacity Building' [2022] West European Politics doi:10.1080/01402382.2022.2145542; Ville Sinkkonen, 'A Fleeting Glimpse of Hegemony? The War in Ukraine and the Future of the International Leadership of the United States' (2022) 21 Turkish Policy Quarterly 121; Sophie Pinkham, 'Red Famine: Stalin's War on Ukraine' (2018) 306 Nation 27; Hanna Bazhenova, 'Representations of the First World War in the Politics of Memory in Russia and Ukraine' (2021) 68 Problems of Post-Communism 368; Lavinia Stan, 'Roots of Russia's War in Ukraine' (2017) 22 European Legacy-Toward New Paradigms 630; Dina R Spechler and Martin C Spechler, 'Russia's Assault on Ukraine: Fallout From the War' (2022) 21 Turkish Policy Quarterly 71; Christian Tomuschat, 'Russia's Invasion of Ukraine the War and Basic Questions of Law' (2022) 72(1-3) Osteuropa 33; Manfred Sapper and Volker Weichsel, 'Russia's War Against Ukraine Propaganda, Crime, Resistance War as a Caesura' (2022) 72(1-3) Osteuropa 5; Maxim Bulyk and Irina Gridina, 'Shades of Gray in the War in Eastern Ukraine: `Neither War nor Peace' Existence Zones, `Neither Truth nor Lie' Silence Zones' (2019) 9 Baltic Journal of European Studies 166; Philipp Chapkovski and Max Schaub, 'Solid Support or Secret Dissent? A List Experiment on Preference Falsification during the Russian War against Ukraine' (2022) 9(2) Research & Politics doi:10.1177/20531680221108328; Guido Hausmann, 'The Culture of Defeat the First World War and Ukraine' (2014) 64(2-4) Osteuropa 127; Joern Leonhard, 'The Limits of Analogies: The War in Ukraine as Historical Turning Point' (2022) 72(4-5) Osteuropa 3; Maria Malksoo, 'The Postcolonial Moment in Russia's War Against Ukraine' [2022] Journal of Genocide Research doi:10.1080/14623528.2022.2074947; Carlos Lopes, 'The Untamed Impact of a Faraway Shock: Africa and the War in Ukraine' (2022) 44 Strategic Review for Southern Africa 9; Greg Yudin, 'The War in Ukraine: Do Russians Support Putin?' (2022) 33 Journal of Democracy 31; Sofia Tipaldou and Philipp Casula, 'Populist Justifications for War? The Russian Intervention in Eastern Ukraine' (2018) 119 Revista CIDOB d'Afers Internationals 135; Lidet Tadesse Shiferaw and Volker Hauck, 'The War in Ukraine: Implications for the Africa-Europe Peace and Security Partnership' (2022) 44 Strategic Review for Southern Africa 93; Ivan Gomza, 'The War in Ukraine: Putin's Inevitable Invasion' (2022) 33 Journal of Democracy 23; Andrei Kozyrev, 'The War in Ukraine: Why Putin Must Be Defeated' (2022) 33 Journal of Democracy 13; Thomas Bremer, 'Time of Troubles The Churches and the War on Ukraine' (2022) 72(1-3) Osteuropa 185; Michael Hudson, 'Ukraine and the New Economic Cold War' (2016) 6 International Critical Thought 556; Alexander Buzgalin, 'Ukraine: Anatomy of a Civil War' (2015) 5 International Critical Thought 327; Tarak Barkawi, 'War and Decolonization in Ukraine' (2022) 30 New Perspectives 317; Andrij Portnoy, 'War and Peace the ``Euro-Revolution'' in Ukraine' (2014) 64(1) Osteuropa 7; Vittorio Bufacchi, 'War Crimes in Ukraine: Is Putin Responsible?' [2022] Journal of Political Power doi:10.1080/2158379X.2022.2105495; Andras Racz, 'War, Change of Course, Continuity Hungary's Ukraine and Russia Policy' (2022) 72(4-5) Osteuropa 155; Lang (n 10); Petro (n 28); Platonova (n 19); Cohen (n 10).

32 Philipp Genschel, 'Bellicist Integration? The War in Ukraine, the European Union and Core State Powers' (2022) 29(12) Journal of European Public Policy 1885; Veronica Anghel and Erik Jones, 'Is Europe Really Forged through Crisis? Pandemic EU and the Russia-Ukraine War' [2022] Journal of European Public Policy doi:10.1080/13501763.2022.2140820.

	Social Sciences	2	[33]
Other	Business; Law; Communication; Political Science; Economics; International Relations; Ethics; History; Sociology; Geography	18	[34]

In summary, research on the war in Ukraine involves multiple academic disciplines and approaches, including international relations, national security, foreign policy, sociology, and history, among others. Scholars from these fields are dedicated to examining the root causes and far-reaching consequences of the conflict, as well as the roles played by various states and international organisations in the ongoing crisis. By drawing on diverse perspectives and methodologies, researchers strive to provide a comprehensive

33 Taras Bilous, 'Self-Determination and the War in Ukraine' (2022) 69(3) Dissent 44; Taras Kuzio, 'Three Revolutions, One War and Ukraine's West Moves East' in P Kowal, G Mink and I Reichardt (eds), *Three Revolutions: Mobilization and Change in Contemporary Ukraine I: Theoretical Aspects and Analyses on Religion, Memory, and Identity* (Ibidem Verlag 2019) 91.

34 Henry E Hale, Oxana Shevel and Olga Onuch, 'Believing Facts in the Fog of War: Identity, Media and Hot Cognition in Ukraine's 2014 Odesa Tragedy' (2018) 23 Geopolitics 851; Rebecca DeWinter-Schmitt, Samuel Jones and Richard Stazinski, 'Missing in Action? Investor Responses to the War in Ukraine' (2022) 7(3) Business and Human Rights Journal 487; Anatoliy Gruzd and Ksenia Tsyganova, 'Information Wars and Online Activism During the 2013/2014 Crisis in Ukraine: Examining the Social Structures of Pro- and Anti-Maidan Groups' (2015) 7 Policy And Internet 121; Joanna Szostek, 'Nothing Is True? The Credibility of News and Conflicting Narratives during ``Information War'' in Ukraine' (2018) 23 International Journal of Press-Politics 116; Peter AG van Bergeijk, 'Sanctions Against the Russian War on Ukraine: Lessons from History and Current Prospects' (2022) 56(4) Journal of World Trade 571; Kyle Wilson, 'Flight MH17, Ukraine and the New Cold War: Prism of Disaster' (2020) 79 Russian Review 344; Jennifer G Mathers, 'Women, War and Austerity: IFIs and the Construction of Gendered Economic Insecurities in Ukraine' (2020) 27 Review of International Political Economy 1235; Lina Klymenko, 'Understanding the Donbas War in Terms of World War II: A Metaphor Analysis of the Armed Conflict in Eastern Ukraine' (2020) 19 Ethnopolitics 483; Mikhail A Molchanov, 'Media Uses in Ukraine's War with Itself' in SF KrishnaHensel (ed), *Media in Process: Transformation and Democratic Transition* (Routledge 2017) 31; Christopher Lizotte, 'The War in Ukraine, the American Far-Right and the ``other'' Critique of Geopolitics' (2022) 98 Political Geography 102687; Alexander Vorbrugg and Jevgeniy Bluwstein, 'Making Sense of (the Russian War in) Ukraine: On the Politics of Knowledge and Expertise' (2022) 98 Political Geography doi:10.1016/j.polgeo.2022.102700; William H Hill, 'Confrontation in Ukraine: War in Europe Again' in WH Hill, *No Place for Russia: European Security Institutions Since 1989* (Columbia Univ Press 2018) 341; Paul D'Anieri, 'Greetings from Novorossiya: Eyewitness to the War in Ukraine' (2018) 77 Russian Review 523; Francis King, 'Greetings from Novorossiya: Eyewitness to the War in Ukraine' (2018) 48 European History Quarterly 583; Oleh Kozachuk, 'Putin's War Against Ukraine: Revolution, Nationalism, and Crime' (2019) 25 Nations and Nationalism 746; Eleanor Knott, 'Existential Nationalism: Russia's War against Ukraine' [2022] Nations and Nationalism doi:10.1111/nana.12878; Ngo and others (n 2).

Access to Justice in Eastern Europe
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understanding of the conflict and contribute to the development of effective strategies for peacebuilding and conflict resolution.[35]

Additionally, researchers delve into the effects of the war on the civilian population, as well as the repercussions on Ukraine's economy and infrastructure. They explore the role of media in shaping narratives and public opinion during the conflict while examining its impact on Ukrainian and Russian societies. Moreover, considerable research is dedicated to analysing the involvement of international peacekeeping and mediation organisations in efforts to bring about a resolution to the conflict. These studies aim to shed light on the potential avenues for achieving lasting peace in Ukraine and mitigating the long-term consequences of the war on all aspects of society.[36]

Indeed, the scholarly research on the war in Ukraine is multifaceted and spans various disciplines. The ongoing efforts of researchers reflect a commitment to comprehend the underlying factors and ramifications of the conflict. Furthermore, their work is driven by the shared objective of finding viable solutions to end the hostilities and establish sustainable peace in the region. As the situation evolves, scholars remain dedicated to their pursuit of knowledge, aiming to contribute to the understanding and resolving this complex and consequential conflict.[37]

35 DeWinter-Schmitt, Jones and Stazinski (n 34); Molchanov (n 34); Gruzd and Tsyganova (n 34); Szostek (n 34); Van Bergeijk (n 34); Wilson (n 34); Mathers (n 34); Ngo and others (n 2); Klymenko (n 34); Hale, Shevel and Onuch (n 34); Lizotte (n 34); Vorbrugg and Bluwstein (n 34); Hill (n 34); D'Anieri (n 34); King (n 34); Kozachuk (n 34); Knott (n 34).

36 Sloss and Dickinson (n 22); Mankoff (n 22).

37 V Adadurov, 'Specific Features of Interpretation of 1812 War in Contemporary Ukraine: Historiographical and Source Study Side-Notes on the Translation of the Book of VE Von Gebler' (2014) 5(9) Istoriya-Elektronnyi Nauchno-Obrazovatelnyi Zhurnal; Tomasz Braun, 'Ukraine and Russia: From Civilized Divorce to Uncivil War' (2020) 72 Europe-Asia Studies 1599; George O Liber, 'Unbridled Discordance: World War II and Social and Political Attitudes in Ukraine' (2014) 73 Russian Review 145; Anna Wylegala, 'Child Migrants and Deportees from Poland and Ukraine after the Second World War: Experience and Memory' (2015) 22 European Review of History-Revue Europeenne D Histoire 292; Kim Christian Priemel, 'Occupying Ukraine: Great Expectations, Failed Opportunities, and the Spoils of War, 1941-1943' (2015) 48 Central European History 31; Eric Aunoble, ``Communists, To Arms'': The Special Purpose Units (TchON) by the End of the Civil War In Ukraine (1920-1924)' (2015) 13 Hispania Nova 232; Thomas Chopard, 'Repatriated and Deporte: The Return of Jewish War Refugees in Soviet Ukraine, between State Demands and Humanitarian Emergencies (1919-1924)' (2015) 56 Cahiers Du Monde Russe 175; Thomas Chopard, 'The Wars of Independence of Ukraine, 1917-1921' (2017) 58 Cahiers Du Monde Russe 703; Thomas Chopard, 'The Era of the Atamans: Politics, Civil War and Peasant Uprisings in Ukraine (1917-1923)' [2019] 20 & 21 Revue d'histoire 55; Thomas Ambrosio, 'Roots of Russia's War in Ukraine' (2016) 75(3) Russian Review 545; AY Bakhturina, 'Review of the Book ``The Great War of 1914-1918 and the Ukraine'' (Vol 1, 2014; Vol 2, 2015)' (2016) 44 Rusin 245; Alexander Etkind, 'Foreword' in J Fedor and others (eds), *War and Memory In Russia, Ukraine and Belarus* (Palgrave 2017) V; Serhii Plokhy, 'When Stalin Lost His Head: World War II and Memory Wars in Contemporary Ukraine' in J Fedor and others (eds), *War and Memory in Russia, Ukraine and Belarus* (Palgrave 2017) 171; Jaroslaw Wasyluk, 'Total Wars and the Making of Modern Ukraine, 1914-1954' (2018) 70(3) Europe-Asia Studies 485; VS Kul'chyts'kyi, 'Interwar and Post-War History of Soviet Ukraine on the Pages of the ``Ukrainian

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Table 2. Summary of History research area in the literature

WoS category	Topic	Number of articles	Citations
Area Studies	Ethnic Studies; Political Science	5	[38]
Cultural Studies	-	3	[39]

European Review 355; Andrij Kharuk and Ihor Soliar, 'The Slovak Troops in Ukraine Propagandist Ideological Support at the Initial Stage of the German-Soviet War' (2020) 15 East European Historical Bulletin 149; John W Steinberg, 'The Finnish SS-Volunteers and Atrocities 1941-43 against Jews, Civilians and Prisoners of War in Ukraine and the Caucasus Region 1941-1943 An Archival Survey' (2020) 61 Cahiers Du Monde Russe 540; Jakob Hauter, 'How the War Began: Conceptualizing Conflict Escalation in Ukraine's Donbas' (2021) 48 Soviet and Post Soviet Review 135; Tanja Penter, 'Independence, Revolution, War, and the Renaissance of National History in Ukraine' in NF May and T Maissen (eds), *National History and New Nationalism in the Twenty-First Century: A Global Comparison* (Routledge 2021) ch 12; Martin Lutz and Kim Christian Priemel, 'Powering Conquest: How German Corporations Sustained Occupation in World War II Ukraine' (2021) 93 Journal of Modern History 636; Vardan E Bagdasaryan, Anatoly A Bakaev and Sergey I Resnyansky, 'In the Crucible of Revolutions and Wars: Ukraine in 1917-1920: Historical and Historiographic Essays' (2021) 20 Rudn Journal of Russian History 321; Egor A Fedosov, '``Comrade Pepper!": The Specific Of Visual Satire of the Soviet Ukraine in Conditions of the Cold War (1954-1964)' (2021) 69 Tomsk State University Journal of History 149; Nataliya Kashevarova, 'Analytical Note of FJ Starke in Context of Nazi Library Policy in Ukraine during World War II' (2021) 27 Manuscript and Book Heritage of Ukraine 285; Vasiliy Khristoforov, 'The Finnish SS-Volunteers and Atrocities against Jews, Civilians and Prisoners of War in Ukraine and the Caucasus Region 1941-1943: An Archival Survey' (2021) 3 Rossiiskaya Istoriya 235; Efim Pivovar I and Elena A Kosovan, 'Documentary On-Line Exhibitions of the Central State Archives of Ukraine as a Way to Commemorate the Great Patriotic War of 1941-45' (2021) 1 Herald of an Archivist 118; Filip Slaveski, *Remaking Ukraine After World War II: The Clash of Local and Central Soviet Power* (CUP 2021); Filip Slaveski, 'Then and Now: The Shaping of Contemporary Ukraine in the Post-War Crises' in F Slaveski, *Remaking Ukraine After World War II: The Clash of Local and Central Soviet Power* (CUP 2021) ch 5; Roland Benedikter, 'The New Global Direction: From ``One Globalization" to ``Two Globalizations"? Russia's War in Ukraine in Global Perspective' [2022] New Global Studies doi:10.1515/ngs-2022-0038; Halyna Hordiyenko and Vyacheslav Hordiyenko, 'State Policy on Social Protection for the Patriotic War Invalids in Post-War Ukraine In 1945-1950' (2022) 22 East European Historical Bulletin 141; Jens Ebert, 'Ukraine 1943/44: Loyalties and Violence in the Context of the Turning Point in the War' (2022) 81 Militargeschichtliche Zeitschrift 676; Adolfo Calatrava, 'The Transformation of the European Security System After the Cold War: from 1991 to the Ukraine Crisis' (2022) 59 Historia Actual Online 155; Vasyl Ilnytskyi and Mykola Haliv, 'From World War II to the Collapse of the Soviet Union: A New Vision of Recent History of Ukraine' (2022) 24 East European Historical Bulletin 254; Garry Kasparov and Leonid Volkov, 'Debate: The War in Ukraine, Sanctions Against Russia, and the Russian Opposition, June 26, 2022' (2022) 2 Ab Imperio 267; Anne Lounsbery, 'Introduction to the Forum: How Will Our Scholarship on Nineteenth-Century Russian Culture Change in Response to Russia's War on Ukraine?' (2022) 2 Ab Imperio 58; D'Anieri and Wise (n 31); Fedor and others (n 16); Yekelchyk (n 19); D'Anieri (n 19); D'Anieri (n 34); van der Pijl and VanderPijl (n 19); Johnson (n 19).

38 Eras (n 1); Larys (n 18); Schmidt-Felzmann (n 28); Stepaniuk (n 18); Yurchuk (n 18).

39 Emil Edenborg, 'Creativity, Geopolitics and Ontological Security: Satire on Russia and the War in Ukraine' (2017) 20 Postcolonial Studies 294; Jade McGlynn, 'Historical Framing of the Ukraine Crisis through the Great Patriotic War: Performativity, Cultural Consciousness and Shared Remembering' (2020) 13 Memory Studies 1058; Mykola Makhortykh, 'Remediating the Past: YouTube and Second World War Memory in Ukraine and Russia' (2020) 13 Memory Studies 146.

Ethnic Studies	Political Science; Sociology	2	[40]
History	-	71	[41]
International Relations	Sociology	7	[42]

International relations play a crucial role in the conflict in Ukraine. The actions and responses of states and international organisations significantly impact the trajectory of the conflict and the potential for its resolution. The decisions made by governments, such as imposing sanctions, providing military support, or engaging in diplomatic negotiations, have direct implications for the parties involved and the overall dynamics of the conflict. International organisations, such as the United Nations, the European Union, and the Organization for Security and Cooperation in Europe, also play a vital role in mediating and facilitating dialogue among the conflicting parties. Understanding and analysing the dynamics of international relations is essential for comprehending the broader context in which the conflict unfolds and exploring avenues for conflict resolution and peacebuilding.[43] Many states and international organisations have been involved in trying to secure peace in Ukraine, for example, by conducting peacekeeping and mediation missions and supporting the actions of the Ukrainian government and international peace organisations. International relations have also played an important role in the conflict in Ukraine through their impact on the relations between and interests of individual states. The conflict in Ukraine has also become part of the broader tensions between Russia and the West and is considered by many commentators to be an expression of Russia's

40 Knott (n 34); Kozachuk (n 34).

41 Vushko (n 37); Hauter (n 37); Calatrava (n 37); Behrends (n 37); Adadurov (n 37); Liber (n 37); Wylegala (n 37); Priemel (n 37); Aunoble (n 37); Chopard (n 37); Ambrosio (n 37); D'Anieri and Wise (n 31); Bakhturina (n 37); Fedor and others (n 16); Plokhy (n 37); Wasyluk (n 37); Etkind and others (n 37); Kul'chyts'kyi V (n 37); Nikolaiets (n 37); Zayarnyuk (n 37); Yekelchyk (n 19); Fedoruk (n 37); D'Anieri (n 34); Kovalchuk (n 37); Hrynevych (n 37); Mick (n 37); Amar (n 37); Kul'chyts'kyi (n 37); Maievs'kyi and Pastushenko (n 37); Sinyavska (n 37); Mark (n 37); Ganev (n 37); Lysenko (n 37); Hausmann (n 37); Viola (n 37); Gilley (n 37); Lami (n 37); Urry (n 37); Hecker (n 37); Felder (n 37); D'Anieri (n 19); Braun (n 37); Flikke (n 37); Sudyn (n 37); Solchanyk (n 37); DAnieri (n 37); Boeckh (n 37); van der Pijl and VanderPijl (n 19); Gorodnia (n 37); Hrytsiuk, Lysenko and Pokotylo (n 37); Raykoff (n 37); Johnson (n 19); Baker (n 37); Shuvalova (n 37); Kharuk and Soliar (n 37); Steinberg (n 37); Penter (n 37); Lutz and Priemel (n 37); Bagdasaryan, Bakaev and Resnyansky (n 37); Fedosov (n 37); Kashevarova (n 37); Khristoforov (n 37); Pivovar and Kosovan (n 37); Slaveski (n 37); ibid, ch 5; Benedikter (n 37); Hordiyenko and Hordiyenko (n 37); Ebert (n 37); Ilnytskyi and Haliv (n 37); Kasparov and Volkov (n 37); Lounsbery (n 37).

42 Robert Bernheim, 'Portraits from a Conjoined War: The German 100th Light Infantry Division and First Contact with the Jews of Zinkiv, Ukraine-July 1941' (2022) 36(3) Holocaust and Genocide Studies 386; Thomas Lorman, 'Statement by the Editorial Board on the War in Ukraine' (2022) 20 Central Europe 67; Jorg Requate, 'The War against Ukraine, the Problem of Communication Strategies, and its Challenges for European Historiography' (2022) 1 Ab Imperio 85; Hill (n 34); Wynnyckyj (n 19); D'Anieri (n 34); King (n 34).

43 Knott (n 34); Kozachuk (n 34).

Access to Justice in Eastern Europe
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disrespect for Ukraine's sovereignty and territorial integrity. As such, international relations play an important role in the conflict in Ukraine by influencing how states and international organisations respond to the conflict and what actions they take to end it.[44] Thus, it is not surprising that much of the recent research on the Ukrainian war is related to international relations, spanning the fields of law, political science, and general social issues (see Table 3).

***Table* 3. Summary of International Relations research area in the literature**

WoS category	Citation topic	Number of papers	Citations
Area Studies	-	3	[45]
	Political Science	5	[46]
Business, Finance	Economics	2	[47]
Economics	-	2	[48]
	Political Science	5	[49]
History	Sociology	5	[50]
International Relations	-	27	[51]

44 Yurchuk (n 18); Eras (n 1); Larys (n 18); Stepaniuk (n 18); Schmidt-Felzmann (n 28).

45 D'Anieri (n 19); Schmidt-Felzmann (n 28).

46 Edenborg (n 21); Ninkovic (n 21); Sagramoso (n 21).

47 Christopher Aitken and Erkal Ersoy, 'War in Ukraine: The Options for Europe's Energy Supply' [2022] World Economy doi:10.1111/twec.13354; Iana Liadze and others, 'Economic Costs of the Russia-Ukraine War' [2022] World Economy doi:10.1111/twec.13336.

48 Frantisek Skvrnda, 'War of Ukraine in the Context of the Establishment Arrangements Multipolar Power in the World' in D Adaskova (ed), *International Relations 2014: Contemporary Issues of World Economics and Politics* (Ekonom 2014); Van Bergeijk (n 34).

49 Taras Kuzio, 'Flight MH17, Ukraine and the New Cold War: Prism of Disaster' (2019) 71(7) Europe-Asia Studies 1245; van der Pijl (n 19); Mathers (n 34); Mankoff (n 28); Hill (n 34).

50 George O Liber, 'Ukraine's Maidan, Russia's War: A Chronicle and Analysis of the Revolution of Dignity' (2020) 72(10) Europe-Asia Studies 1762; Lavinia Stan, 'Conflict in Ukraine: The Unwinding of the Post-Cold War Order' (2017) 22 European Legacy-Toward New Paradigms 118; Wynnyckyj (n 19); Hill (n 34); Mathers (n 34).

51 Woo Pyung-Kyun, 'The Russian Hybrid War in the Ukraine Crisis: Some Characteristics and Implications' (2015) 27 Korean Journal of Defense Analysis 383; Louis Andrieu, 'Red Famine: Stalin's War on Ukraine' [2019] ESPRIT 163; Amanda Paul, 'The EU in the South Caucasus and the Impact of the Russia-Ukraine War' (2015) 50 International Spectator 30; Michael Rywkin, 'Conflict in Ukraine: The Unwinding of the Post-Cold War Order' (2015) 37 American Foreign Policy Interests 177; Francesc Serra Massansalvador, 'Ukraine: From the Revolution of the Maidan to the War of Donbass' (2016) 32 Relaciones Internacionales 261; Robert Legvold, 'Imperial Gamble: Putin, Ukraine, and the New Cold War' (2016) 95 Foreign Affairs 184; Angela Gramada, 'The Impact of Russia-Ukrainian War on Internal Public Debate About Foreign Policy in Ukraine' in P Bator and R Ondrejcsak (eds), *Panorama of Global Security Environment 2015-2016* (Stratpol 2016); Ali Nedim Karabulut, 'Old War, New Strategy: Russian Doctrine of Hybrid Warfare for the Twenty First Century and Its Implementation during the Crisis in Ukraine' (2016) 13 Uluslararasi Iliskiler-International Relations 25; Andriy Tyushka, 'From a `Hybrid War' to a `Hybrid Peace'? Implications of Russian

Law	2	[52]
Political Science	34	[53]
Social Issues	2	[54]

Irregular Warfare in Ukraine for International Security' in P Bator and R Ondrejcsak (eds), *Panorama of Global Security Environment 2015-2016* (Stratpol 2016) 5; Yevhen Pysmenskyy, 'The Phenomenon of Journalism-Related Crimes Under the Circumstances of Hybrid War in Ukraine' (2017) 23 Croatian International Relations Review 155; Montana Hunter, 'Crowdsourced War: The Political and Military Implications of Ukraine's Volunteer Battalions 2014-2015' (2018) 18 Journal of Military and Strategic Studies 78; Andres Kasekamp and Eoin Micheal McNamara, 'From the Cold War's End to the Ukraine Crisis: NATO's Enduring Value for Estonia's Security Policy' in AH Kammel and B Zyla (eds), *Peacebuilding at Home: NATO and its 'new' Member States after Crimea*, vol 5 (Nomos 2018) 43; Tipaldou and Casula (n 31); Robert Ondrejcsak, "US Policies Towards Russia in the Light of War in Ukraine: From Engaging a ``Cooperative Power'' to Defensive Containment of Regional ``Challenger''" in P Bator and R Ondrejcsak (eds), *Panorama of Global Security Environment 2014* (CENAA 2014); Valery Dzutsati, 'Geographies of Hybrid War: Rebellion and Foreign Intervention in Ukraine' (2021) 32 Small Wars and Insurgencies 441; Anna Reid, 'Putin's War on History The Thousand-Year Struggle Over Ukraine' (2022) 101 Foreign Affairs 54; Andrew Lichterman, 'The Peace Movement and the Ukraine War: Where to Now?' (2022) 5 Journal for Peace and Nuclear Disarmament 185; Lawrence Freedman, 'Why War Fails Russia's Invasion of Ukraine and the Limits of Military Power' (2022) 101 Foreign Affairs 10; Harald Edinger, 'Offensive Ideas: Structural Realism, Classical Realism and Putin's War on Ukraine' (2022) 98 International Affairs 1873; Timothy Snyder, 'Ukraine Holds the Future The War Between Democracy and Nihilism' (2022) 101 Foreign Affairs 124; Oana-Antonia Colibasanu, 'The Geopolitical Power of EU in the Making (?): A Question of the War in Ukraine' (2022) 22 Romanian Journal of European Affairs 24; Kawashima Shin, 'War in Ukraine from China's Perspective: Limited Options for State That Cannot Reject Existing Policies' (2022) 29 Asia-Pacific Review 35; Jan Mericka, 'The Information War in Ukraine as a Part of the Military Strategy' (2022) 31 Vojenske Rozhledy-Czech Military Review 21; Mohammad Eslami, 'Iran's Drone Supply to Russia and Changing Dynamics of the Ukraine War' (2022) 5 Journal for Peace and Nuclear Disarmament 507; Legvold (n 28); Carroll (n 27); Rotaru (n 28).

52 Sloss and Dickinson (n 22); Mankoff (n 22).

53 Dalsjo and others (n 28); Rajan Menon and Eugene Rumer, *Conflict in Ukraine: The Unwinding of the Post-Cold War Order* (MIT Press 2015); Yuriy Matsiyevsky, 'Internal Conflict or Hidden Aggression Competing Accounts and Expert Assessments of the War in Ukraine's Donbas' in J Hauter (ed), *Civil War? Interstate War? Hybrid War? Dimensions and Interpretations of the Donbas Conflict in 2014-2020* (Ibidem Verlag 2021); Willett (n 28); Siddi (n 28); Bollfrass and Herzog (n 28); Jones (n 28); Bosse (n 28); Dijkstra and others (n 28); Elizabeth Pond, 'War in Ukraine: Is This the Way it Ends?' (2017) 59 Survival 143; Trine Flockhart and Elena A Korosteleva, 'War in Ukraine: Putin and the Multi-Order World' (2022) 43 Contemporary Security Policy 466; Mykhailo Gonchar and Andrii Chubyk, 'War of Hybrid Type ``Made In Russia'' (The Example of Aggression Against Ukraine)' in R Ondrejcsak and others (eds), *Panorama of Global Security Environment: The Central European Perspective 2017-2018* (Stratpol 2018) 236; Schmidt-Felzmann (n 28); Gould-Davies (n 28); Isoda (n 28); Verjee (n 28); Stan (n 50); D'Anieri and Wise (n 31); Crocker (n 28); Rotaru (n 28); Uehling (n 28); Konoplyov and Urbanskiy (n 28); Bratu (n 28); Kleinschmidt (n 28); Stent (n 28); Dylan and Maguire (n 28); Savage (n 28); Higgott and Reich (n 28); Sanchez Ramirez (n 28); Kranich (n 28); Freedman (n 28); Sasse and Lackner (n 28); Kostyuk and Brantly (n 28).

54 Budjeryn (n 23); Doyle (n 23).

Access to Justice in Eastern Europe
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3.3. COVID-19 pandemic during the Russian-Ukrainian War

As mentioned, through 2022, the COVID-19 pandemic further aggravated the situation in areas of Ukraine where there was already a lack of access to basic health services and other needed goods. It is also worth mentioning that, according to the WHO, as of 9 January 2022, when the current phase of the war started, only 34% of Ukrainian citizens had been fully vaccinated, and less than 2% had received a third dose. This is, unfortunately, similar to a comparatively low level of vaccination for diseases such as measles, diphtheria, tetanus, and whooping cough, with only 80% of children vaccinated compared to almost 100% in Western Europe. This is because many of those vaccines are not obligatory. Furthermore, before the war, Ukraine was highly economically diversified, with prominent differences between urban and rural areas. The latter, which are not as densely populated, still suffer from lingering issues connected with collective farming and related economic challenges. As a result, these areas lack hospitals and other medical establishments in close proximity to the settlements.

Armed conflict and political instability are hindering the implementation of effective measures to prevent the spread of COVID-19, including vaccination campaigns and border traffic control. The lack of immunity to other diseases, poorly functioning hospitals, and the priority given to the wounded further exacerbate an already fragile situation. As illustrated in Figure 4, COVID-19 cases in Ukraine were spiking at the time of the Russian invasion and have seemingly declined since then. However, it is important to note that this decline is likely a result of the disruption of efforts to track and address the spread of COVID-19 rather than an actual decrease in cases.

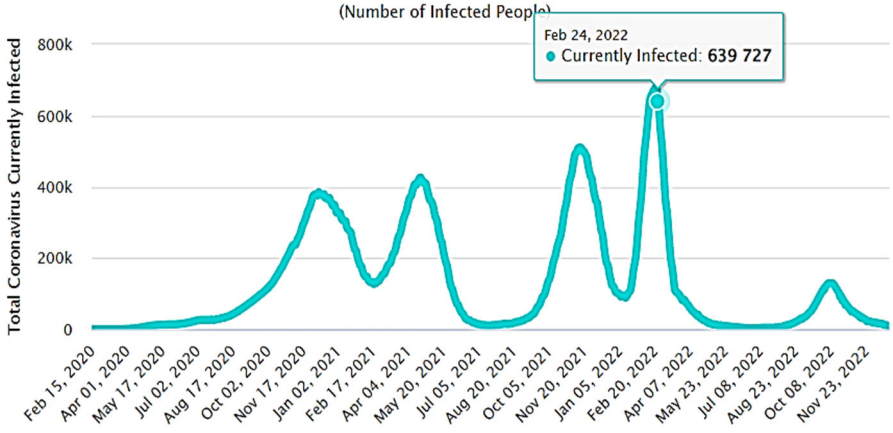

Figure 4. Active COVID-19 cases in Ukraine [55]

55 'Ukraine: COVID - Coronavirus Statistics' (*Worldometer*, 2022) <https://www.worldometers.info/coronavirus/country/ukraine/> accessed 29 February 2024.

More specifically, in areas under the control of the Ukrainian government before the onset of the war in 2022, efforts were being made to mount an effective response to the pandemic, albeit with varying degrees of success. The government implemented various restrictions and limitations to curb the spread of the virus, and initiatives were undertaken to ensure testing and vaccination access for the population. As a result, the number of COVID-19-related deaths in Ukraine remained low compared to other countries (as shown in Figure 4). However, it is important to note that the accuracy of this data may be compromised due to insufficient testing, which could lead to the misattribution of deaths to causes other than COVID-19.

However, the situation in the separatist-controlled areas is more complex. Many residents in these regions face challenges accessing healthcare and medications, making it difficult to track and treat COVID-19 cases. In the initial stages of the vaccination program, Ukraine faced supply shortages, and the separatist-held territories, lacking their own supply chain, relied on donations from Ukraine or Russia. The ongoing conflict and challenging circumstances make it difficult to accurately estimate the vaccination coverage in these regions and the types of vaccines administered. Therefore, caution is advised when interpreting the patterns depicted in Figures 4 and 5, as gathering precise statistical data during times of war is a challenging task. Consequently, COVID-19 poses an additional challenge to the conflict-affected regions in Ukraine and may result in an increase in fatalities among the population in these areas. The lack of a robust diagnostic system and limited access to adequate medical supplies exacerbate the situation, making it difficult to effectively diagnose and treat COVID-19 cases.

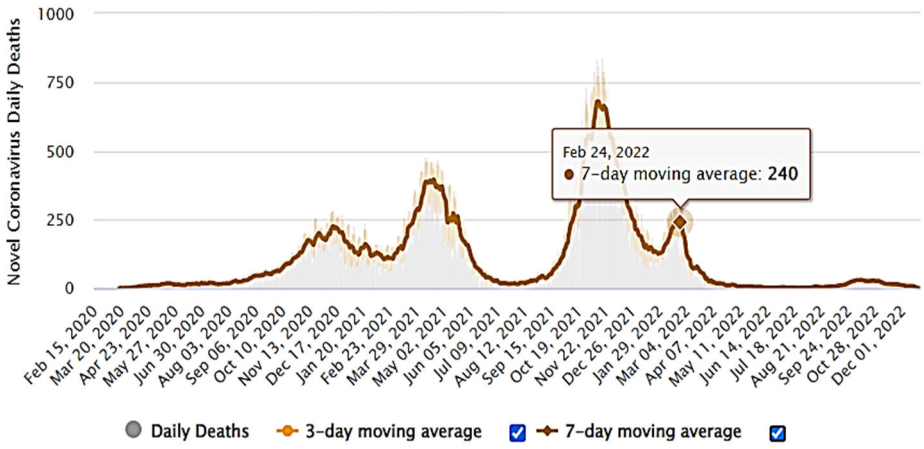

Figure 5. Daily COVID-19 deaths in Ukraine[56]

56 ibid.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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COVID-19, an infectious disease caused by the SARS-CoV-2 coronavirus, is a global challenge. As a result, scientists worldwide are conducting intensive research on the virus to understand the mechanisms of the disease, find effective treatments, and prevent its spread (see Table 4). It covers the period since the beginning of COVID-19 in Ukraine's territory in general, including the period after the start of the 2022 war. Among other things, scientists are investigating the mechanisms of action of the virus, searching for effective drugs and vaccines, understanding the causes and risk factors of the disease, and developing effective methods to prevent its spread.

This research spans a wide range of scientific fields, such as medicine, molecular biology, epidemiology, genetics, biomedical engineering, and many others. Research on COVID-19 is being conducted by scientists from all over the world, including academics, scientists from research institutes, and employees of pharmaceutical and biotechnology companies. Many academic and research institutions, as well as governments around the world, are committing significant funding to COVID-19 research to find effective treatments and prevent the spread of the disease.

***Table* 4. Summary of COVID-19-related papers**

WoS category	Citation topic	Number of papers	Citations
Clinical & Life Sciences	Healthcare Policy	5	[57]
	Nerve Disorders	1	[58]
	Antibiotics & Antimicrobials	1	[59]
	Trauma & Emergency Surgery	1	[60]
	Bacteriology	2	[61]
	History of Medicine	1	[62]

57 Roy, Bhat and Ozair (n 11); Haque and others (n 11); Haydabrus and others (n 11); Rubin (n 11); Ociepa-Kicinska and Gorzalczynska-Koczkodaj (n 11).

58 Natalia Stepanova and others, 'Lifesaving Care for Patients with Kidney Failure during the War in Ukraine 2022' (2022) 17(7) Clinical Journal of the American Society of Nephrology 1079.

59 Jaroslava Polonova and others, 'Unexpectedly Low Incidence of COVID-19 among Refugees of War from Ukraine to Slovakia in First Month of Conflict (Original Research)' (2022) 13 Clinical Social Work and Health Intervention 17.

60 Ravinder Kumar and others, 'Response to: "Immunization in State of Siege: The Importance of Thermostable Vaccines for Ukraine and Other War-Torn Countries and Territories"' (2022) 21(7) Expert Review of Vaccines 1009.

61 David Archard, Alena Buyx and Jean François Delfraissy, 'Responding to the Humanitarian Crisis of the War in Ukraine with Lessons from COVID-19' (2022) 399 The Lancet 1776; Mohamed Behnassi and Mahjoub El Haiba, 'Implications of the Russia-Ukraine War for Global Food Security' (2022) 6 Nature Human Behaviour 754.

62 Adamson S Muula, 'The Role of a Medical Doctor in War-Thoughts over Russian Soldiers and Ukraine' (2022) 34(1) Malawi Med J 1.

	Nursing	3	[63]
	Bacterial Toxins & Diseases	1	[64]
	Vascular, Cardiac & Thoracic Surgery	1	[65]
	Virology - general	1	[66]
	Rheumatology	1	[67]
Social Sciences	Risk Assessment	1	[68]
	Political Science	7	[69]
	Education & Educational Research	3	[70]
	Homelessness & Human Trafficking	1	[71]
	Psychiatry & Psychology	3	[72]

63 Douglas Jacobs and others, 'Expanding Accountable Care's Reach among Medicare Beneficiaries' (2022) 387 New England Journal of Medicine 99; Nicholas J Cull, 'The War for Ukraine: Reputational Security and Media Disruption' (2022) 19 Place Branding and Public Diplomacy 195; Cioffi and Cecannecchia (n 30).

64 Joost Butenop and others, 'Health Situation in Ukraine Before Onset of War and Its Relevance for Health Care for Ukrainian Refugees in Germany: Literature Review, Risk Analysis, and Priority Setting' (2022) 84 Gesundheitswesen 679.

65 Celeo Ramirez and Reyna M Duron, 'The Russia-Ukraine War Could Bring Catastrophic Public-Health Challenges beyond COVID-19' (2022) 120 International Journal of Infectious Diseases 44.

66 K Lewtak and others, 'Ukraine War Refugees - Threats and New Challenges for Healthcare in Poland' (2022) 125 Journal of Hospital Infection 37.

67 Natalia Stepanova, 'War in Ukraine: The Price of Dialysis Patients' Survival' (2022) 35(3) J Nephrol 717.

68 Antoni Tajduś and Stanisław Tokarski, 'Generation Capacity of National Power System in View of Commodity Crisis and War in Ukraine in 2022: Diagnosis, Risk Assessment and Recommendations' (2022) 67 Archives of Mining Sciences 545.

69 Boris Kagarlitsky, Janina Puder and Stefan Schmalz, '"The Whole World Is Becoming More like Russia" A Conversation on Deglobalization in the Wake of the War in Ukraine' (2022) 32 Berliner Journal fur Soziologie 489; John M Quinn and others, 'COVID-19 at War: The Joint Forces Operation in Ukraine' (2022) 16 Disaster Medicine and Public Health Preparedness 1753; Hong Bo, 'Implications of the Ukraine War for China: Can China Survive Secondary Sanctions?' (2022) 21(2) Journal of Chinese Economic and Business Studies 311; Bollfrass and Herzog (n 28); Jones (n 28); Higgott and Reich (n 28); Anghel and Jones (n 32).

70 Roy, Bhat and Ozair (n 11); Richard Armitage and Mariia Pavlenko, 'Medical Education and War in Ukraine' (2022) 72 British Journal of General Practice 944; Richard Armitage and Armitage Richard, 'War in Ukraine: The Impacts on Child Health' (2022) 72 British Journal of General Practice 272.

71 Armitage and Richard (n 70).

72 Jucier Gonçalves Júnior and others, 'The Impact of "The War that Drags on" in Ukraine for the Health of Children and Adolescents: Old Problems in a New Conflict?' (2022) 128 Child Abuse & Neglect 105602; Michele Poletti, Antonio Preti and Andrea Raballo, 'From Economic Crisis and Climate Change through COVID-19 Pandemic to Ukraine War: A Cumulative Hit-Wave on Adolescent Future Thinking and Mental Well-Being' [2022] Eur Child Adolesc Psychiatry doi:10.1007/s00787-022-01984-x; Lluis Oviedo and others, 'Coping and Resilience Strategies among Ukraine War Refugees' (2022) 19(20) International Journal of Environmental Research and Public Health 13094.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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	Agricultural Policy	2	[73]
	Economics	2	[74]
	Law	1	[75]
	Management	2	[76]
Public, Environmental & Occupational Health		3	[77]
General & Internal Medicine		4	[78]
Psychiatry		2	[79]
International Relations		1	[80]

73 Tarek Ben Hassen and Hamid El Bilali, 'Impacts of the Russia-Ukraine War on Global Food Security: Towards More Sustainable and Resilient Food Systems?' (2022) 11(15) Foods 2301; Natalia Mamonova, 'Food Sovereignty and Solidarity Initiatives in Rural Ukraine during the War' (2022) 50 Journal of Peasant Studies 47.

74 Anatolijs Prohorovs, 'Russia's War in Ukraine: Consequences for European Countries' Businesses and Economies' (2022) 15 Journal of Risk and Financial Management; Kornelia Piech, 'Health Care Financing and Economic Performance during the Coronavirus Pandemic, the War in Ukraine and the Energy Transition Attempt' (2022) 14 Sustainability 10601.

75 F Ramón Villaplana Jiménez and Adrián Megías Collado, 'La percepción de inseguridad en la sociedad española ante situaciones excepcionales: el COVID-19 y la guerra en Ucrania' (2022) 10(2) Methaodos Revista De Ciencias Sociales 259.

76 Giuseppe Grossi and Veronika Vakulenko, 'New Development: Accounting for Human-Made Disasters –Comparative Analysis of the Support to Ukraine in Times of War' (2022) 42 Public Money and Management 467; Zaheer Allam, Simon Elias Bibri and Samantha A Sharpe, 'The Rising Impacts of the COVID-19 Pandemic and the Russia-Ukraine War: Energy Transition, Climate Justice, Global Inequality, and Supply Chain Disruption' (2022) 11 Resources 99.

77 Dmytro Chumachenko and Tetyana Chumachenko, 'Impact of War on the Dynamics of COVID-19 in Ukraine' (2022) 7(4) BMJ Global Health e009173; Kouji H Harada and others, 'Conflict-Related Environmental Damages on Health: Lessons Learned from the Past Wars and Ongoing Russian Invasion of Ukraine' (2022) 27 Environmental Health and Preventive Medicine doi:10.1265/ehpm.22-00122; Le Thanh Ha, 'Dynamic Interlinkages between the Crude Oil and Gold and Stock during Russia-Ukraine War: Evidence from an Extended TVP-VAR Analysis' (2022) 30 Environmental Science and Pollution Research 23110.

78 Paul Dinsdale, 'Covid-19: Funding for Pandemic Preparedness Being "Sucked Away" by War in Ukraine' (2022) 379 BMJ o2748; Mateusz Babicki and Agnieszka Mastalerz-Migas, 'Providing Care for Those Fleeing War: Challenges and Solutions for Polish Doctors Looking after Refugees from Ukraine' (2022) 377 BMJ o1440; Alicia Chen, '"Doctors Ask Me to Feed My Kids-but How?" The Russia-Ukraine War Hits Syrian Refugees in Lebanon' (2022) 377 BMJ o1185; Sonia Sarkar, 'Medical Students Escape War Torn Ukraine but Face Limbo' (2022) 377 BMJ o908.

79 Pierpaolo Limone, Giusi Antonia Toto and Giovanni Messina, 'Impact of the COVID-19 Pandemic and the Russia-Ukraine War on Stress and Anxiety in Students: A Systematic Review' (2022) 13 Frontiers in Psychiatry doi:10.3389/fpsyt.2022.1081013; Uta Meyding-Lamadé and Kathrin Keeren, 'War in Ukraine-Possible Endangerment of Refugees through Poliomyelitis: Information of the National Committee for Polio Eradication in Germany (NCC)' (2022) 93(6) Nervenarzt 618.

80 Eslami (n 51).

Psychology	1	[81]
Mathematics	1	[82]
Science & Technology - Other Topics	3	[83]
Emergency Medicine	1	[84]
Government & Law	1	[85]

It is difficult to predict what the future of COVID-19 will look like in Ukraine. The COVID-19 pandemic is a global challenge that is still ongoing and has a significant impact on many countries worldwide, including Ukraine. The situation in Ukraine is influenced by various factors, such as vaccination rates, the emergence of new variants of the virus, adherence to preventive measures, and the effectiveness of public health strategies. Efforts are being made to improve vaccination coverage and access to healthcare services, but challenges persist.

Ongoing research and analysis of the pandemic's impact on Ukraine, along with global trends, can provide valuable insights into potential future scenarios. International collaboration and the prioritisation of public health measures, combined with leveraging scientific expertise, can help in managing and overcoming the challenges posed by COVID-19.

4 DISCUSSION

The war in Ukraine has been ongoing since 2014, primarily involving areas in the east of the country where pro-Russian separatists are fighting against Ukrainian government forces. The conflict has had a huge and growing impact on the political, economic, and social situation in Ukraine and the broader region, making it the subject of study for many academic disciplines.

81 Argyroula E Kalaitzaki, Alexandra Tamiolaki and Mona Vintila, 'The Compounding Effect of COVID-19 and War in Ukraine on Mental Health: A Global Time Bomb Soon to Explode?' (2022) Journal of Loss and Trauma doi:10.1080/15325024.2022.2114654.

82 Hadi Jahanshahi and others, 'Artificial Intelligence-Based Prediction of Crude Oil Prices Using Multiple Features under the Effect of Russia-Ukraine War and COVID-19 Pandemic' (2022) 10 Mathematics 4361 doi:10.3390/math10224361.

83 Leslie Roberts, 'Surge of HIV, Tuberculosis and COVID Feared amid War in Ukraine' (2022) 603 Nature 557; Nisha Gaind and others, 'Seven Ways the War in Ukraine Is Changing Global Science' (2022) 607 Nature 440; Seow Ting Lee, 'A Battle for Foreign Perceptions: Ukraine's Country Image in the 2022 War with Russia' (2022) 19(3) Place Branding and Public Diplomacy 1.

84 Muhammad Mainuddin Patwary, Matthew HEM Browning and Alfonso J Rodriguez-Morales, 'War in the Time of COVID-19 Crisis: A Public Health Emergency in Ukraine' (2022) 37(4) Prehosp Disaster Med 568.

85 Freudlsperger and Schimmelfennig (n 31).

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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Publications in the humanities and social sciences focus on the conflict from the perspective of its causes and effects on the country's society and culture. Research in the natural sciences, such as medicine, has focused on the effects of armed conflict on the health of the population and the development of effective methods to treat and prevent conflict-related diseases. Research in technical sciences, such as engineering or computer science, has centred its research on the effects of the conflict on infrastructure and considerations for post-conflict reconstruction. Overall, research on the war in Ukraine can help understand the causes and effects of the conflict, develop ways to resolve it, and ensure lasting peace in the area.

The journal articles on the Ukrainian war can be divided into two main categories: those that describe the 2014 conflict and those that describe the situation after the 2022 attack. The first group of papers often focuses on local politics and attempts to understand the causes of the conflict. Many of these articles also describe possible scenarios for the future, including the possibility of an open war, but generally express scepticism about its likelihood. After the attack in 2022, the topics of the articles have shifted, with a greater emphasis on geopolitical changes and less concern about local ethnic conflicts within Ukraine.

The COVID-19 pandemic has posed unique challenges in post-2014 Ukraine, primarily due to the ongoing conflict in the country. The conflict has resulted in the loss of government control in certain areas, leading to disruptions in the supply of medications, including those needed for COVID-19. As a result, the rebel-held territories faced difficulties accessing vaccines and had to rely on alternative sources. Moreover, research papers on the COVID-19 situation in Ukraine highlight pre-existing healthcare access disparities between urban and rural areas. These disparities extend to vaccines for infectious diseases, further complicating the evaluation of statistics. Therefore, caution is advised when interpreting the data, and continuous revision is necessary. The 2022 conflict has added further uncertainty to the statistics as millions of people have either left the country or been displaced internally. Scholars emphasise in their papers that assessing the progress of the pandemic in many areas of Ukraine has become almost impossible. Additionally, the movement of people affected by the war may have implications for developing the pandemic in neighbouring countries. Consequently, it is widely recognised that evaluating the impact of the COVID-19 pandemic during the war in Ukraine and its effects on the population of neighbouring countries will require assessment once the conflict is over.

5 CONCLUSIONS

Academics worldwide are actively engaged in research related to the war in Ukraine, aiming to gain a comprehensive understanding of its causes, progression, and consequences. One crucial area of investigation focuses on analysing the root causes of the conflict. Many studies have centred on examining Russia's role in initiating and escalating the conflict that

commenced in 2014, as well as exploring internal political and social factors that may have contributed to the outbreak of war. Furthermore, researchers have delved into the international dimensions of the conflict, examining the responses of other states and international organisations and assessing their impact on the course of events, particularly concerning the 2022 conflict.

Another significant area of research has emerged, focusing on the ongoing course of the war and its anticipated aftermath. Scholars have extensively studied the effects of the conflict on civilians, encompassing aspects such as casualties, injuries, population displacement, limited access to healthcare and education, and the destruction of critical infrastructure. Additionally, considerable attention has been devoted to examining the potential reconfiguration of Ukrainian borders once the conflict concludes, exploring prospects for Ukraine's integration into NATO and the EU, and analysing the broader geopolitical implications such moves may have for central and Eastern Europe.

Research efforts have also addressed the impact of the war on international relations, including changes in the security landscape and the influence on the foreign policies of the countries involved in the conflict. Furthermore, academics have conducted research on the effectiveness of various approaches to conflict management and resolution, such as mediation, negotiation, and international intervention.

Overall, the research conducted on the war in Ukraine and its relationship with the COVID-19 pandemic has provided valuable insights into the complex dynamics at play. It is widely acknowledged that Ukraine faced significant challenges in combating the pandemic even prior to the 2022 war. Factors such as the 2014 conflict, corruption, financial constraints within the healthcare system, territorial disparities in access to medical facilities, and political instability have all contributed to a challenging healthcare landscape. The sudden and open attack by Russian troops in 2022 further disrupted efforts to track and address the COVID-19 pandemic, as highlighted in studies summarised in Table 4. These studies shed light on the impact of the conflict on the pandemic response, making it more difficult to implement effective measures to mitigate the spread of the virus.

The analysis of research publications indicates a significant number of multidisciplinary studies and scholarly articles on the Ukrainian War, as depicted in Figure 3. The disciplines of Government and Law, International Relations, and History have particularly explored the origins of the conflict and potential geopolitical and local outcomes. Additionally, a considerable number of articles in the field of medicine have focused on the COVID-19 pandemic and its interaction with the war, specifically regarding the challenges in tracking and addressing the virus. It is worth noting that the authors acknowledge the difficulty of their work due to the rapidly evolving nature of the conflict and anticipate that a comprehensive evaluation will be necessary once the conflict is resolved.

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In conclusion, the collective body of research on the war in Ukraine and its relationship with the COVID-19 pandemic has provided valuable insights into the conflict's multifaceted nature and its impact on public health. These findings can contribute to the development of strategies for conflict resolution, long-term stability, and effective pandemic response in the region.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ВЗАЄМОДІЯ КРИЗ: МЕППІНГ НАУКОВОГО ЛАНДШАФТУ ЩОДО ПЕРЕХРЕЩЕННЯ ТЕМ ПАНДЕМІЇ COVID-19 ТА РОСІЙСЬКО-УКРАЇНСЬКОЇ ВІЙНИ

Каміль Мацюк*, Павліна Левінська, Артур Кравчик, Пьотр Троянський, Мішель Аполло та Девід С. Гірі

АНОТАЦІЯ

Вступ. *У лютому 2022 року війська Російської Федерації атакували Україну на кількох фронтах, тим самим розпочавши війну, яка триває досі. Вторгнення викликало спротив у всьому світі, що призвело до санкцій, накладених на політиків і корпорації в Російській Федерації. Війна також залишила свій слід і в мистецтві, культурі, науці.*

Методи. *У цій статті ми аналізуємо війну в Україні та те, як її досліджують вчені з усього світу. Аналіз складається з трьох частин: (1) комплексний огляд кількості статей і матеріалів конференцій, пов'язаних із російсько-українською війною, у дисциплінах/категоріях, визначених у Web of Science (WoS); (2) основні теми та напрямки, обрані авторами; і (3) підсумок досліджень, які зосереджують увагу на питаннях, що стосуються COVID-19 під час війни. Остання тема особливо важлива, оскільки ситуація з COVID-19 в Україні була складною ще до вторгнення 2022 року, а воєнні дії, що тривають і зараз, ще більше її загострили. Для вищезазначеного аналізу ми використовували базу даних WoS з 2014 року (що охоплює першу російську атаку на Крим, Донецьку і Луганську області) до грудня 2022 року.*

Результати та висновки. *Війна в Україні стала важливим предметом вивчення для науковців. У міру її розгортання, кульмінацією якого стала пряма масована атака в лютому 2022 року, дослідницькі зусилля охоплювали все більше наукових галузей. Ці царини варіюються від політології та соціологічних досліджень до психології та маркетингу, а також інженерних наук і ланцюгів постачання.*

Ключові слова: *COVID-19, війна, Україна, Росія, Web of Science, бібліометрія.*

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Research Article

DEVELOPING A LEGAL FRAMEWORK FOR ELECTRONIC CONTRACTS IN THE CONTEXT OF TRADITIONAL CONTRACT THEORY: AN ANALYTICAL STUDY

Mohamed Salem Abou El Farag*, Tarek Gomaa Rashed and Ahmed Qatami

ABSTRACT

Background: *The role of digital communication means has become significant in our daily lives. These means have become the pulsating heart in achieving instant and rapid communication among people and concluding numerous contracts via the Internet. Therefore, this paper aims to shed light on the concept of electronically concluded contracts, which the Qatari legislator overlooked regulating in Civil Law No. 22 of 2004 and Law by Decree No. 16 of 2010 by issuing the Electronic Transactions and Commerce Law, merely contenting with the provision in Article 4 of this latter law, stating that it is permissible to express offer or acceptance using an electronic means of communication.*

Regarding the research problem, the term "electronic contract" has become prevalent in many jurisprudential writings, although there is, in fact, no contract concluded entirely electronically; instead, there exists a contract concluded using an electronic means. Consequently, questions have arisen about the nature of the session of this type of contract in which the contracting parties do not convene in one place but synchronise in time. Do we apply the same rules that govern traditional contract sessions, or do we need new legal rules that are compatible with this technological advancement in communication and interaction between contract parties?

This research aims to highlight the problem of not regulating electronic contracts under the Qatari Civil Code. It also aims to propose legal solutions to reorganise these contracts in general, with a focus on the contract session to improve the regulation of all forms of this type of contract. In this regard, the authors attempt to describe the determinants of the electronic contract and explain its privilege.

Methods: *In this research, the analytical approach is adopted by studying the texts of the articles regulating the contract session in the Qatari Civil Code and those regulating the offer and acceptance using an electronic means in Qatari Decree-Law No. 16 of 2010, which promulgates the Electronic Transactions and Commerce Law. By analysing these legal texts, the research aims to highlight the nature of the legal system for electronic contracts in Qatari legislation, ultimately providing legal protection to remote contracting parties and achieving contractual security. This, in turn, upholds the principles of contractual justice sought by legal systems regardless of their historical sources. Moreover, it serves as one of the most important means to attract investment due to its close association with transactional security and respect for legitimate expectations upon which investors rely in forming the visions they seek to achieve.*

Results and Conclusions: *In this paper, the authors conclude with some of the most important results, including the lack of specialised studies and Qatari judicial applications addressing the problems arising from these contracts. Moreover, the electronic contract scarcely differs in its substantive provisions from the traditional contract except for the electronic means used in its conclusion. Furthermore, there is a clear discrepancy in the electronic methods of offer and acceptance due to the various methods and aspects used.*

1 INTRODUCTION

In contemporary times, electronic transactions have assumed paramount significance globally, primarily attributable to rapid technological advancements. These accelerated technological developments have effectively transformed the world into a closely connected global community, largely driven by the substantial growth and proliferation of electronic transactions. In the past decade, we have witnessed a rapid entry of technologies into our lives. Businesses, consumers and governments have begun to perform their usual tasks with the help of computers and many new, previously unknown fields of human interaction.

Technology, once an object of interest exclusively to software engineers and a small IT community, is now a powerful tool changing the world daily. More and more people are pursuing a career in the IT sector, while those whose work has never involved any interaction with computers are now intensively trying to catch up with modern technological trends. It is hard to imagine an area that has not recently moved online – banking, insurance, consulting, education, commerce, consumer shopping, entertainment and even certain public services provided by governments and municipalities have all embraced the digital world.[1]

1 Ofir Turel, Yufei Yuan and Joe Rose, 'Antecedents of Attitude towards Online Mediation' (2007) 16(6) Group Decision and Negotiation 539, doi:10.1007/s10726-007-9085-7.

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At the same time, many new sectors and industries are emerging, such as trading in domain names, web hosting, online gaming, cloud storage of data,[2] blockchain and cryptocurrencies, and smart contracts, with more to come in the foreseeable future.[3] This surge, particularly witnessed in the past two decades, has prompted numerous nations to promulgate a corpus of laws and regulations pertinent to electronic transactions to keep pace with the ever-evolving technological landscape and the expanding domain of electronic commerce.[4]

The efforts of the State of Qatar in this regard are increasing through legislative interest and judicial jurisprudence due to the acceleration of the volume of transactions concluded by electronic means. Law No. 16 of 2010 governs transactions and commerce concluded by electronic means, in addition to judicial jurisprudence.[5] There is also an increase in the volume of transactions concluded electronically, including commercial ones.

According to the Qatar Chamber of Commerce and Industry's latest official statistics issued in September 2021, comprehensive insights into the emergence of electronic commerce were provided, elucidating its underlying concepts, advantages, features, and supporting infrastructure in Qatar. The study discerned a noteworthy upswing in electronic commerce in the State of Qatar in recent years, with the transactional value surging to approximately $2.2 billion in 2020 from $1.5 billion in 2019, reflecting a remarkable 47% growth. Furthermore, it prognosticated that the electronic commerce volume in Qatar for 2021 would reach approximately $2.3 billion. Globally, the study pointed out that electronic commerce amounted to an estimated $25 trillion in sales in 2018, concurrently marking a milestone with 1.66 billion individuals engaging in electronic transactions, constituting approximately 9% of the international retail market.[6]

Digitisation processes have transformed the economic, social and political conditions of modern society, presenting new challenges to studies of civil law and law enforcement authorities. They have also widely affected many legal relationships in the field of contracts

2 Marcelo Corrales, Mark Fenwick and Nikolaus Forgó, 'Disruptive Technologies Shaping the Law of the Future' in Marcelo Corrales, Mark Fenwick and Nikolaus Forgó (eds), *New Technology, Big Data and the Law* (Springer 2017) 2.

3 Reggie O'Shields, 'Smart Contracts: Legal Agreements for the Blockchain' (2017) 21(1) North Carolina Banking Institute 179.

4 Even disputes can be resolved by online methods, such as mediation, for more details, see: Victor Terekhov, 'Online Mediation: A Game Changer or Much Ado about Nothing? (2019) 2(3) Access to Justice in Eastern Europe 33, doi:10.33327/AJEE-18-2.4-a000018.

5 Decree Law of the State of Qatar no 16 of 2010 'On the Promulgation of the Electronic Commerce and Transactions Law' <https://www.cra.gov.qa/en/document/electronic-commerce-and-transactions-law-no-16--of-2010> accessed 30 September 2023.

6 Qatar Chamber, *Report on E-Commerce in the State of Qatar "Challenges & Solutions"* (Research and Studies Department 2021) <https://www.qatarchamber.com/economic-research/> accessed 30 September 2023.

concluded remotely, whose forms are rapidly increasing and becoming more complex, creating new problems.[7]

Despite the acceleration of digital transaction processes and the ongoing development in the State of Qatar, Civil Law No. 22 of 2004 was completely devoid of any legal regulation of electronic contracts.[8] Consequently, there was no regulation of the session of electronic contracts, which resulted in a legislative vacuum with a significant impact on civil and commercial transactions. These transactions have become a key feature in people's lives, marking an era of contractual digitisation.

In contrast to French legislation, which recently regulated electronic contracts in Articles 1125 to 1127 of the New French Law of Contract 131/2016,[9] there is no comprehensive study to regulate the civil law of electronic contracts in Qatar or any other GCC country.

It should be noted that highlighting the nature of the legal system for electronic contracts in Qatari legislation would provide legal protection for remote contracting parties, ultimately achieving contractual security. This, in turn, upholds the principles of contractual justice sought by legal systems regardless of their historical sources. Moreover, such regulation serves as one of the most important means to attract investment due to its close association with transactional security and respect for legitimate expectations upon which investors rely when formulating their visions.[10]

The goal of establishing legal regulations for electronic contracts is to keep pace with the economic and social changes. It is based on the principle of maintaining a certain level of relative stability in contractual relationships. As contractual security is a part of legal security, it relies on a set of principles and rights that must be respected, such as the principle of the binding force of the contract, executing the contract in good faith, and finally, respecting the parties' legal positions arising from the contract and maintaining the contract whenever possible.[11]

7 Karima Karim, 'The Impact of Using Information Technology in Achieving Legal Security' (2017) 2 Faculty of Law Journal for Legal and Economic Research, Alexandria University 297.

8 Law of the State of Qatar no 22 of 2004 'Promulgating the Civil Code' <https://www.icnl.org/wp-content/uploads/Qatar_29_Qatar_CivilCode_2004.pdf> accessed 30 September 2023.

9 Ordonnance du Département de la Justice n 2016-131 du 10 février 2016 'Portant réforme du droit des contrats, du régime général et de la preuve des obligations' [2016] Journal officiel de la République Française 35/26.

10 In this context, refer to: Ibrahim Dawood, 'The Risk of Legal Insecurity and the Necessity of Activating the Legislative Role: A Comparative Analytical Study' (2021) 10(3) International Review of Law 16, doi:10.29117/irl.2021.0188.

11 For more detailed information on this topic, please refer to: Rajaa Issawi and Sanaa Sheikh, 'Contractual Security and its Requirements' (2021) 13(1) Journal of Judicial Jurisprudence 499 <https://www.asjp.cerist.dz/en/article/142703> accessed 10 March 2024.

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2 DETERMINANTS OF THE ELECTRONIC CONTRACT SESSION

Recognising the determinants of the electronic contract session requires, first, determining the nature of the contract concluded by electronic means to identify the unique features of the Electronic Contract Session. Second, it involves discussing the offer and acceptance in the electronic contract and the extent of development in electronic means other than the traditional contract.

2.1. The Nature of the Electronic Contract

The electronic contract is the main entry point for the electronic contract session.[12] When searching for references, there is a lack of information, studies, and judicial rulings that address the issue of the electronic contract in all its manifestations.[13]

It is not possible, in any way, to discuss the electronic contract session without addressing its determinants and features, the most important of which is the electronic contract. It represents the core for dealing with the electronic contract session. The electronic contract has become of utmost importance as it passes through the gate of electronic civil and commercial transactions. Therefore, electronic contracts have become the main legal instrument for electronic transactions of both types.

With the modernity and development of electronic transactions and the acceleration of their operations, electronic contracts have become a relatively modern concept in comparative legal studies. In terms of its content, this contract can also be any regular contract concluded by mutual consent between the parties involved. It may require certain formalities in compliance with the rule of law.[14] E-contracts refer to the various types of agreements formed during the course of conducting commerce through electronic means and correspondence. This occurs between two or more individuals, one of which is an electronic agent, or between two electronic agents, such as software systems that are programmed to recognise the legality of contracts. An e-contract comprises two main parties, namely an

12 Shujaa Al-Otaibi and Abdullah Al-Azmi, 'Electronic Contract (Fact and Judgement)' (2023) 35(102) Spirit of Laws Journal 1650, doi:10.21608/las.2023.199028.1136.

13 This was expressed by a researcher as "The absence of judicial rulings represents a difficulty that stands in the way of the researcher who wants to explore the practical reality of electronic transactions, which raises the question of the reason for this. Are electronic transactions free of disputes? Or do disputes arise in this field, but they are not presented to the judiciary and are settled by another parallel means?" Dr. Mahmoud Abdel-Rahman Muhammad has already reached a similar result in the comparative study he prepared on Law no 20 of 2014 on the Kuwaiti electronic transactions. See, Mahmoud Abdel-Rahman Muhammad, 'The Extent of the Authority of Electronic Means in Proving Civil, Commercial and Administrative Transactions According to the Kuwaiti Electronic Transactions Law: A Comparative Study' (2018) 21(1) Kuwait International Law School Journal 144.

14 Al-Yamamah Al-Harbi, 'Regulation of the Electronic Contract in the Kuwaiti Electronic Transactions Law no 20 of 2014' (2020) 8(Spec) Kuwait International Law School Journal 27.

originator and the addressee; the originator refers to the person who develops and sends an electronic message, while the addressee is the recipient of the message.[15]

At the legislative level, some legislations viewed contracting by electronic means as conventional contracting, but in an electronic form. From here, the term "electronic contract" was used. These legislations include the Palestinian Decree-Law No. 15 of 2017 of electronic transactions, which defines an electronic contract as "*an agreement between two persons or more by electronic means or mediums*."[16] The Tunisian legislation followed this approach as it stated in Chapter 1 of the Transactions and E-Commerce Law that "*electronic contracts are governed by the system of written contracts insofar as they do not conflict with the provisions of this law*."[17] The Jordanian legislation defined the electronic contract in Article 2 of the Electronic Transactions Law as "*an agreement concluded by electronic means, wholly or partially*."[18]

On the other hand, other legislations did not limit the scope of electronic contracts to an agreement concluded between two or more parties to create a legal effect by electronic means. However, they defined it broadly and comprehensively, including any transaction, contract, or agreement concluded or implemented electronically. Among these legislations is the Qatari Decree-Law No. 16 of 2010, which promulgates the Electronic Transactions and Commerce Law. Article 1 of this law defines electronic transaction as "any transaction, contract, or agreement concluded or implemented, partially or completely, by means of electronic communications."[19]

The same situation applies to Kuwaiti legislation, as it does not specify any definition for electronic contracts. In contrast, Article 1 of the Kuwaiti Law No. 20 of 2014 regarding electronic transactions defined the term "*electronic transaction*" as "*any transaction or agreement concluded or implemented wholly or partially by electronic means of communication*."[20]

The definition of the electronic contract, at the level of international trade rules, through the UNCITRAL Model Law on Electronic Commerce (1996) for international trade law, has no reference, in this regard, to the definition of the electronic contract.

15 Benita Ezeigbo, *E-contracts: Essentials, Variety and Legal Issues* (GRIN Verlag 2017).

16 Decree Law of the State of Palestine no 15 of 2017 'Concerning Electronic Transaction' <https://maqam.najah.edu/legislation/14/> accessed 30 September 2023.

17 Tunisian Law no 83/2000 of 9 August 2000 'Concerning Electronic Trade and Commerce' (ch 1–4) (2001) 16(4) Arab Law Quarterly 414.

18 Jordanian Law no 15 of 2015 'Electronic Transactions Law' <https://www.cbj.gov.jo/EchoBusV3.0/SystemAssets/bec70415-2845-42df-bc47-5e0ee4b859b7.pdf> accessed 30 September 2023.

19 Decree Law of the State of Qatar no 16 of 2010 (n 5).

20 Law of the State of Kuwait no 20 of 2014 'Concerning Electronic Transactions' <https://cyrilla.org/en/entity/doplobfh504wtlwnilhht1emi?page=5> accessed 30 September 2023.

Access to Justice in Eastern Europe
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However, Article 2 of this Model Law defines the term "data messages" as "*information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.*"[21]

Many countries tend to adopt the United Nations law as a legislative reference when setting their legislation related to electronic transactions and commerce. However, there is a direct discrepancy in the term "electronic contract," with some legal frameworks failing to explicitly address it.

So, it can be said that the definition of electronic transaction includes all concluded transactions related to electronic contracts, as they are performed in cyberspace through various means of electronic communication, data messages, and other new media.

Others define an electronic contract as an exchange of offer and acceptance via electronic means to create a certain legal effect.[22] This definition is correct, provided that the electronic contract is the same as the conventional contract, with the fundamental difference being the means of conclusion reflected through the contracting parties' transactions in terms of the contract's place and time.

At the level of legal jurisprudence, an aspect of jurisprudence has defined "electronic contract" as "*a contract that is concluded by electronic means, in whole or in part, by any electrical, magnetic, optical, electromagnetic means, or any other similar means suitable for exchanging information between contracting parties.*"[23]

After presenting these legal and jurisprudential definitions of an electronic contract, it can be defined as "*the agreement of two or more wills to create, amend, or terminate a legal relation by electronic means, in whole or in part.*" [24]

The peculiarity of this definition is that it differs from the traditional contract concluded between parties without the use of electronic means to convey the offer and acceptance between the two parties, as is the case with an electronic contract. The agreement, or convergence of the wills of the parties, is what gives the contract its binding force, from its establishment through to its termination or amendment.[25]

21 UNCITRAL Model Law on Electronic Commerce (1996, with additional article 5 bis as adopted in 1998) <https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce> accessed 30 September 2023.

22 Tariq Jumaa Al-Sayyid Rashid and Abdullah Afas Al-Merri, 'The Electronic Contract between Bargaining and Adhesion: A Comparative Analytical Study' (2022) 10 Journal of Jurisprudential and Legal Studies 18.

23 Ibrahim Al-Desouki Abul-Lail, *Legal Aspects of Electronic Transactions: A Study of the Legal Aspects of Transactions Through Modern Communication Devices "Electronic Messaging"* (Kuwait University 2003) 71.

24 Majid Suleiman Aba Al-Khail, *The Electronic Contract* (Al-Rushd Library 2009) 20.

25 In the same sense, see: Abdul-Razzaq al-Sanhouri, *The Theory of the Contract* (Arab-Islamic Scientific Academy 1934) 8; Yasser Ahmed Kamel Al-Sirafi, *Abolition of Legal Disposition* (Dar Al-Nahda Al-Arabiya 1995) 8; Gaber Mahjoub Ali, *The General Theory of Obligation*, pt 1: Sources of Obligation in Qatari Law (Qatar University Press 2022) 27.

This was reflected in the French legislator's definition of the traditional contract in Article 1101 of the Civil Code: "A contract is an agreement whereby one or more people commit themselves towards one or more other people to give, do, or abstain from doing something."[26]

In this regard, it is worth noting the Qatari jurisprudence, which establishes the principle of the authenticity of electronic documents in evidence.[27] It includes recognising what is done via an e-mail as constituting a contract concluded through electronic means under the umbrella of Law No. 16 of 2010, which promulgates Electronic Transactions and Commerce Law.

Such a ruling of the Qatari Court of Cassation resolves any controversy over the definition of the electronic contract when the legislation does not provide an explicit definition. It provides flexible interpretation as long as it lies within the scope of "electronic transactions", making the definition broader and more comprehensive to include the electronic contract.

Kuwaiti legislation followed the footsteps of Qatar in adopting the term "electronic transaction". It considers the contract to be the basic legal tool for all transactions, whether commercial, civil, or even administrative. So, they both share the same reason for legalising the term "electronic transaction" instead of "electronic contract". This is because "transaction" has a broader definition and suggests all means, including electronic ones.

It is worth noting that there is a similarity between an "electronic contract" and a "smart contract" in light of the confusion between them. Smart contracts, as an innovative technology, have the potential to revolutionise traditional contractual relationships by transferring the authority to execute and enforce contracts from individuals to smart robots.[28] Accordingly, some have defined it as "the self-execution of the traditional contract

26 Code civil des Français (version en vigueur du 21 mars 1804 au 01 octobre 2016) art 1101 <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006436086/2004-06-22> accede 30 septembre 2023. Arab jurisprudents selected the term concurrence of two or more wills to create a legal effect rather than the term "Agreement" which was used by the French legislators, see: Abd al-Razzaq Al-Sanhouri, *Al Wasit in Explaining Civil Law, 1 Obligation Theory in General: Sources of Obligation*, vol 1: The Contract (Counselor Mustafa Muhamed Al-Fiqi and Abdel Basset Jamie eds, 3rd edn, Dar Al-Nahda Al-Arabiyya 1981) para 27, 173; Suleiman Murkus, *Al-Wafi in Explanation of Civil Law,* pt 2: Obligations: The Theory of Contract and Individual Will (4th edn, sp 1978) para 30, 57. The French legislation's definition of the contract in Art. 1101 means that the agreement is more general and comprehensive than the contract, which is considered a type of agreement. For details, see: Faouzi Belknani, 'Contract Theory in the Amended French Civil Code and in Qatari Civil Code: A Comparative Study' (2020) 9(2) International Review of Law 24, doi:10.29117/irl.2020.0105. This distinction was not supported by Egyptian jurisprudence, see: Hamdi Abdel Rahman, *Al Wasit in the General Theory of Obligations: Voluntary Sources of Obligation, Contract and Individual Will* (Dar Al-Nahda Al-Arabiyya 1999) 76.

27 Appeal no 275/2016 (Qatari Court of Cassation, Civil and Commercial, 15 November 2016) <https://www.almeezan.qa/RulingPage.aspx?id=1487&language=ar> accessed 30 September 2023.

28 Mateja Durovic and Chris Willett, 'A Legal Framework for Using Smart Contracts in Consumer Contracts: Machines as Servants, Not Masters' (2023) 86(6) Modern Law Review 1390, doi:10.1111/1468-2230.12817.

Access to Justice in Eastern Europe
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written in the natural language of humans and specifically formulated in a language that can be translated by a computer"[29] or as "a program that contains the data of the written agreement between the parties in the traditional form and executes it automatically."[30]

The key distinction between "smart contracts" and "electronic contracts" lies in their execution. Electronic contracts are carried out by modern electronic means, such as computers, smartphones, or various means of communication, either audio-visual methods or messaging. As for smart contracts, a special feature called "Blockchain" is used. It works automatically through specific programming and according to certain conditions.[31] For example, when someone wishes to purchase real estate through a smart contract, they would save a lot of time and effort and avoid complicated procedures. With a smart real estate purchase contract, the transfer of ownership from the seller to the buyer does not occur until agreement on the price and all contract conditions are reached and detailed in the smart contract. As a result, the contract is executed autonomously and automatically once the payment is transferred in virtual currency, and in return, ownership automatically transfers to the buyer. In this case, the property is recorded in the buyer's name, and all participants in blockchain technology can access this ownership in the central ledger, thus serving as witnesses to the property transfer process.[32]

It is worth noting that electronic contracts and smart contracts converge in the necessity of fulfilling the three elements of a contract (capacity, subject matter and cause). However, they differ in the method of contract execution. While electronic contracts are concluded through electronic means, they still adhere to the rules and general principles of contract formation and execution, such as capacity, susceptibility to rescission and nullity, application of the theories of force majeure and coercion, as well as adherence to certain flexible principles and standards governing contracts, such as the application of the public policy doctrine, good faith principle in contract execution, binding force of the contract principle, and fair price principle.[33]

In contrast, smart contracts challenge these rules and principles governing contracts and tend towards a special method of contract formation and execution that does not rely on the traditional or even electronic contract theory. Instead, they are concluded and executed automatically, without human intervention, focusing solely on the subject matter and object

29 Samuel Bourque and Sara Fung Ling Tsui, 'A Lawyer's Introduction to Smart Contracts' in *Scientia Nobilitat: Reviewed Legal Studies* (Scientia Nobilitat Platform for Exchange of Scientific Ideas 2014) 4.

30 Abdel-Razek Wahba Sayed Ahmed Mohamed, 'The Concept of the Smart Contract from the Perspective of Civil Law: An Analytical Study' (2021) 5(8) Journal of Economic, Administrative and Legal Sciences 86, doi:10.26389/AJSRP.R270920.

31 Muhammad Bouzidi Sheiter, 'Integrating smart Contracts into the Traditional Contract System: A Fact or just an Assumption?' (2022) 7(2) Journal of Research in Contracts and Business Law 137.

32 Ghassan Saleh Saleh Al-Taleb, 'Digital Currencies and Their Relationship with Smart Contracts' (Islamic Fiqh Assembly Conference, 24th ses, Dubai, 2019) 41.

33 Hussam Al-Din Mahmoud Muhammad Hassan, 'Smart Contracts Executed via Blockchain Technology' (2023) 16(1) Legal Journal 42-3, doi:10.21608/JLAW.2023.297185.

of the contract. These contracts operate independently of the contracting parties' capacity, goodwill or the surrounding circumstances accompanying their conclusion. As such, it can be said that smart contracts are emotionless contracts, where trust in individuals has been replaced by trust in the programming code.

Thus, it can be concluded that electronic contracts are the preferred option for contract formation to keep up with technological advancements. Currently, full reliance on smart contracts (i.e., contracts written in programming language and executed autonomously without human intervention) seems unfeasible in most Arab legislation. However, it can be said that one can rely on hybrid smart contracts, where the contract is concluded electronically, obligations are determined, and terms are written traditionally or digitally, with execution being partially or fully automated or smart. In this format, there is a written contract executed through smart technology. In this latter case, the smart contract serves merely as a mechanism of contract execution rather than a contract itself.[34]

2.2. Offer and Acceptance via Electronic Means

In light of the major revolution caused by the electronic contract with the new technological developments and what this raises regarding the difference between traditional and electronic contracting methods, the general rules of mutual consent have become unable to accommodate these developments.[35] This prompted many legislators, including the Qataris, to develop legal solutions appropriate to the nature of electronic contracting. As a result, Law No. 16 of 2010 on Electronic Commerce and Transactions was enacted.[36] Every step of entering an e-contract is governed by law; therefore, any form of violation is punishable in a court of law. For example, Article 9 of Kuwait Law No. 20 of 2014 outlines the requirements that should be fulfilled for an electronic document to be legal. The document should be saved in the same form it was created, the information should be easily retrievable, the creator and the sender should be identified, and the document should be saved in an electronic form.[37]

The electronic contract and, by extension, the electronic contract session cannot be discussed without being familiar with the general rules governing the contract and its conclusion. This is according to Article 64 of the Qatari Civil Law No. 22 of 2004, which states that "*Without prejudice to any special formalities that may be required by law for the*

34 Enas M Qutaishat, Bassam Al-Tarawneh and Osamah Al-Naimat, 'The Legal Status of Smart Contracts According to the Jordanian Civil Law: Theory of Contracts' (2022) 14(4) Jordanian Journal of Law and Political Science 89, doi:10.35682/jjlps.v14i4.354.

35 Jaber Mahjoub and Tariq Rashid, 'The Specifics of Contracting Via Electronic Means of Communication: An Analytical Study in Light of Qatari Decree-Law no 16 of 2010 on the Promulgation of the Electronic Commerce and Transactions Law' (Proceedings of the Law and the Digital Age Conference, 19-20 February 2018, Colleges of Law and Engineering, State of Qatar) 5.

36 Decree Law of the State of Qatar no 16 of 2010 (n 5).

37 Law of the State of Kuwait no 20 of 2014 (n 20) art 9.

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

conclusion of certain contracts, a contract shall be concluded from the moment an offer and its subsequent acceptance have been exchanged if the subject-matter and cause of such contract are deemed legal."[38]

Therefore, some jurisprudents defined electronic offer as "an expression of the will of the person wishing to contract remotely, as it takes place through an international communications network by audio-visual means. It also includes all the elements necessary to conclude the contract, so that the person to whom it is directed can accept the contract directly."[39] While electronic acceptance can be defined as "the definitive expression of the will of the person to whom the offer is made and his consent to this offer, but it is conveyed through an electronic medium."[40]

According to this definition, an electronic offer and acceptance are nothing more than a formal description of the means through which this offer and acceptance are transmitted between the two parties without an objective difference in terms of the legal effect of creating, modifying or terminating the obligation.[41]

Electronic contracts are inseparable from traditional contracts. Therefore, an electronic contract is required to meet the general rules for conclusion, the most important of which is the exchange between offer and acceptance. It is regulated by the Qatari Civil Code, where Article 75 stipulates: "*Where the offer is made during the contract session without a time limit for acceptance, both parties shall retain the option until the session ends. Where the offeror retracts his offer or the session ends without acceptance, the offer shall be considered terminated*". [42]

Article 76 also regulates the exchange between offer and acceptance, stipulating: "*Save as otherwise agreed or required by law or customary usage, the contract shall be deemed to have been concluded if the offer is accepted.*" Article 77 stipulates: *"A contract concluded by correspondence shall be deemed to have been made at the time and place when and where acceptance reaches the offeror's notice unless otherwise agreed or required by law or usage."* Article 78 stipulates: *"A contract made by telephone, over the internet, or by any other similar means shall, in respect of time, be regarded as having been concluded between present contracting parties. In respect of place, such contract shall be regarded as having been concluded between absent contracting parties.*"[43]

38 Law of the State of Qatar no 22 of 2004 (n 8) art 64.

39 Samir Hamid Abdel-Aziz Al-Gammal, *Contracting through Modern Communication Technologies* (Dar Al-Nahda Al-Arabiyya 2006) 104.

40 Mahjoub and Rashid (n 35) 23.

41 Nazih Muhammad Al-Sadiq Al-Mahdi, 'Concluding the Electronic Contract' (17th Scientific Conference on Electronic Transactions "Electronic Commerce - Electronic Government", College of Law United Arab Emirates University, Abu Dhabi, 19-20 May 2009) vol 1, 220.

42 Law of the State of Qatar no 22 of 2004 (n 8) art 75.

43 ibid, arts 76, 77, 78.

Given the summation of these texts mentioned above, and by applying these rules, contracts, generally, and electronic contracts, in particular, are deemed concluded according to Article 78, which states that *"A contract made by telephone or any similar method shall be regarded as having been concluded between present contracting parties, in respect of time, and as having been concluded between absent contracting parties, in respect of place."*[44]

Due to the similarities between conventional and electronic contracts, the general rules that govern the former relatively govern the latter. However, it is impossible to ignore the explicit discrepancies between the methods of offer and acceptance from one means to another, as these differ in several ways and aspects.

It is known that the technological scale imposes new and innovative methods for parties to engage in transactions via several electronic means which govern electronic contracts. As a result, the offer and acceptance forms differ as the methods of offer and acceptance are electronic versus conventional.

The connection between the offer and acceptance also varies according to the type of electronic means used. This includes personal emails through which offers are received, methods employed by websites and applications for accessing and receiving offers, and links that can be accessed after accepting related terms and conditions.

In this regard, the regulation of the Qatari legislation should be recognised through Article 4 of the Electronic Commerce and Transactions Law No. 16 of 2010, which stipulates the following: *"In the context of contract formation or conducting transactions, an offer or acceptance of an offer may be expressed, in whole or in part, using electronic communications. A contract or transaction shall not be denied validity or enforceability solely because one or more electronic communications were used in its formation."*[45]

On the other hand, the provisions of Article 5 of the Kuwaiti Electronic Transactions Law No. 20 of 2014 state:"*The approval, acceptance and all matters related to contracting, including any amendment or recantation in approval or acceptance, may be expressed wholly or partially via electronic transactions. The expression shall not lose its validity, effect or enforceability just because it has been carried out via one electronic correspondence or more."*[46]

The law explicitly stipulates that the expression of will through electronic correspondence does not lose its validity, effect, or enforceability. It is worth noting that the law does not require that this be done through a single correspondence, as the expression of will is valid even if it is done through more than one correspondence until the agreement is finalised.[47]

44 Abdullah Abdul Karim Abdullah, 'The Impact of Techno-Legal Changes on Concluding a Contract, a study in Qatari Law and Some Model Contracts' (2018) 23(3) Journal of the Kuwait International Law School 174.

45 Decree Law of the State of Qatar no 16 of 2010 (n 5) art 4.

46 Law of the State of Kuwait no 20 of 2014 (n 20) art 5.

47 Al-Harbi (n 14) 30.

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

This is confirmed by Article 1125 of the New French Contract Law, which stipulates that "*the electronic means may be used to make available contractual stipulations or information regarding property or services*."[48]

On the other hand, Article 11 of the UNCITRAL Model Law on Electronic Commerce stipulates: *"In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in forming a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose."*[49]

This provision establishes the concept of offer and acceptance being expressed through electronic means, recognising the exchange of intentions as an expression of will when conducted electronically.

Based on these data, it should be noted that traditional paper electronic contracts and electronic contracts are not identical. Unlike a conventional contract, an electronic contract occurs during a virtual contract session in which the contracting parties do not meet. This is why the consent or expression of will may be tainted with a defect that affects the integrity of the consent or the validity of the will. Also, one of the contracting parties may deny expressing their will, or this expression may be understood in a way that is not intended.[50]

3 PECULIARITY OF ELECTRONIC CONTRACT

The electronic contract session is peculiarly derived from being held between two contracting parties. Unlike conventional contracting, this raises the issue that contracting may involve either absent or present parties. Therefore, in discussing the electronic contracts session, it was necessary to introduce the electronic contract in the first section of this study and then apply the general rules of electronic contracts in terms of offer and acceptance.

From the above, it is clear that the idea of the electronic contract session is based on two tracks. The first is an actual session where the two contracting parties gather in one place and are in direct contact so that each hears the other directly without being distracted. It begins with an offer and ends with acceptance, rejection, or dismissal without response. The second track, called constructive, is unlike the actual session, as one of the contracting parties is absent.[51]

48 Ordonnance du Département de la Justice n 2016-131 (n 9) art 1125. See also, Belknani (n 26) 21.

49 UNCITRAL (n 21) art 11.

50 Abdullah Ahmed Al-Sulaiti, 'Guarantees for the Protection of Electronic Contracting in the Qatari Law' (master's thesis, College of Law, Qatar University 2021) 29.

51 Lama Abdullah Sadiq, 'Electronic Contract Session' (Master's thesis, College of Graduate Studies, An-Najah National University 2008) 12.

3.1. Forms of Electronic Contract Session

The idea of the electronic contract session is based on the idea that the contract is concluded through mutual consent between the two parties, as consent is the essence of the contract. This mutual consent is only achieved when an offer accompanies acceptance. Hence, the offer must remain valid and not be voided. Should it become voided for one reason or another, the acceptance is not accompanied by the offer. Consequently, the contract shall be invalid. This leads to the question of whether the contract session should be regarded as actual or constructive.[52]

Amidst a jurisprudential disagreement[53] over the forms of the electronic contract session, it can be represented in two forms: the first, in which the contract session takes place through modern means of communication, such as contracts via various websites, instant chat and messaging programs, and the second, in which the contract is between absent parties, such as contracting via e-mail and similar modern means of communication.[54]

In light of the above, both forms are addressed as follows.

3.1.1. The Actual Electronic Contract Session

The actual electronic contract session can be defined as "the session in which the contracting parties are present together." Others define it as "where contracting parties come together, having direct contact, which allows one to hear the other's words while they are engaged in the contract without being occupied by anything else."[55]

Moreover, in an actual contract session, the problem of determining the time for concluding the contract does not arise, given the assumption that the contracting parties are in direct contact, whether via electronic or non-electronic communication means. Each party hears the other's words as soon as they are uttered. Therefore, the contract is concluded the moment the acceptance is issued by the person to whom the offer is made since such acceptance is connected to the offeror's knowledge immediately after issuance.[56]

Through the definitions provided, a clear mental image of the controls or conditions that govern the convening of the actual contract session takes shape, the essence of which lies in connection with the actual offer. Therefore, the actual contract session is held only under two conditions: first, the presence of the two parties or their representatives, and second, the knowledge of the offer at the moment of its issuance.

52 Muhammad Siddiq Muhammad Abdullah, *The Contract Session: A Comparative Study* (Legal Books House 2009) 113.

53 Sharif Majid Muhammad Gawish, 'Electronic Contract Session in Civil Law: A Comparative Study' (2029) 6(2) Legal Journal 85.

54 Mahjoub and Rashid (n 35) 42.

55 Mustafa Ahmed Abu Amr, *Contract Session within the Framework of Online Contracting: A Comparative Study* (New University House Alexandria 2008) 82.

56 Mahjoub and Rashid (n 35) 28.

Access to Justice in Eastern Europe
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The first condition of the actual contract session is fulfilled through the presence of the two parties or their representatives. This requires both parties to be present during the session. In other words, the spatial scope of the session must allow each of them to see and hear the other without any obstacles. The purpose of the contracting parties meeting in one place is to enable one party to see, hear, and understand the other party's expression of will. Hearing and knowing the other party's will are the basis of communication between the two parties' wills to achieve agreement.[57]

The second condition of the actual contract session implies knowledge of the offer being made at its issuance, as it is the essence of fulfilling the contract according to the traditional system. If acceptance accompanies the offer, the contract is concluded unless otherwise agreed upon or the law or custom requires otherwise, as stated in the Qatari Civil Code.[58]

3.1.2. The Virtual Electronic Contracts Session

In contrast to the actual electronic contract session, there is another different form, the constructive electronic contract session, in which the two contracting parties are not present simultaneously. The result is that all means of expressing will, whether via modern means of communication or in writing, are valid as long as the offer is accompanied by acceptance per the general rules, constituting a constructive contract session.

In light of this concept, the idea of a constructive electronic contract session takes shape when the contracting parties are absent. The methods for absent contracting parties to communicate also evolve according to the means of communication or electronic means used, such as in contracts via email or other electronic means. In this regard, Article 1126 of the new French Contract Law stipulates that *"Information requested with the view to the conclusion of a contract or provided during its performance may be sent by electronic mail if the recipient has agreed that this means may be used."*[59]

Therefore, as with the actual electronic contract, the constructive electronic contract session requires controls or conditions. The first condition is the existence of an offer and acceptance, as well as a means through which the other party becomes aware of the offer and acceptance. The second condition involves the two contracting parties being occupied with the contract.

57 Abu Amr (n 55).

58 Since the parties to the traditional contract session are in direct contact without a time interval, actual or virtual, See, for the same meaning: Abdel-Fattah Abdel-Baqi, *The Theory of the Contract and the Single Will: An In-Depth Study and Comparison with Islamic Jurisprudence* (sn 1984) para 69, 145; Abdel-Moneim Faraj Al-Sadda, *Sources of Obligation* (Dar Al-Nahda Al-Arabiyya 1969) para 98, 121-2; Mahmoud Abdel-Rahman Muhammad, *The General Theory of Obligation*, pt 1: Sources of Obligation (Dar Al-Nahda Al-Arabiyya 2011) 71-2; Saeed Jabr, *Sources of Obligation* (Dar Al-Nahda Al-Arabiyya 2009) 90.

59 Ordonnance du Département de la Justice n 2016-131 (n 9) art 1126.

Regarding the first condition, the presence of an offer and acceptance is the basis for applying the rules governing the contract between the two parties. According to legal principles, acceptance must accompany the offer to create a valid agreement. However, in the case of a constructive electronic contract, which involves absent and virtual parties, it becomes necessary to have a reliable means through which the other party can be informed of the offer and acceptance. Such means depend on electronic communication between the two parties, such as exchanging emails. This is a clear example of a constructive electronic contract, where the two parties are in different countries and separated by thousands of miles.

Concerning the second condition, the contracting parties must remain preoccupied with the contract. The offeror must remain committed to their offer without doing anything that suggests retraction. Similarly, the offeree must express interest in the offer without declaring refusal. Thus, both parties are limited to dealing with the offer made by the first party. In contrast, the second party must remain preoccupied with the offer and not be distracted by another issue.

Article 1127, Paragraph I, of the new French Contract Law confirmed this as "*A person who, in a business or professional capacity, makes a proposal by electronic means for the supply of property or services must make available the applicable contractual stipulations in a way which permits their storage and reproduction. A person issuing an offer remains bound by it as long as it is made accessible by him by electronic means.*"[60]

3.2. Legislative and Judicial Guarantees Regarding the Electronic Contract Session

Legislative and judicial guarantees of the electronic contract session represent one of the most important factors for the sustainability of transactions concluded by electronic means and a source of stability for the legal status in such transactions with the various electronic means.

The legislation and jurisprudence in the State of Qatar were not far behind in establishing guarantees according to the developments of the electronic space, especially with the rapid development of various types and technology methods. Therefore, many rulings were issued by the Qatari Court of Cassation, which undoubtedly represent important guarantees for the electronic contract session in several aspects.

The role of the Qatari legislator appears through the relevant laws, starting from various texts in the Qatari Civil Code that regulate the traditional theory of the contract and the application of those texts to the electronic contract, as well as Law No. 16 of 2010, which promulgates the electronic transactions and commerce law.

60 ibid, art 1127-1.

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

3.2.1. At the Legislative Level

3.2.1.1. Recognising the Legal Validity of the Information Contained in Data Messages

Article 20 of the Decree-Law of Electronic Transactions and Commerce states that "*Information in the data message shall not lose its legal effect, validity or enforceability solely on the grounds that it is in the form of a data message. Information in the data message shall also not lose its legal effect, validity or enforceability solely on the grounds that it is merely referred to in that data message without details, where the data message clearly identifies how to access the details of this information. The information is accessible to be used for subsequent reference by every person who has a right to access and use the information, and the method for accessing the information is clearly identified in the data message and does not place an unreasonable burden on any person that has a right to access the information.*"[61]

The legislator has recognised the full legal validity of the information in data messages through which the offer and acceptance are exchanged between the parties to the electronic transaction. Accordingly, a judge can determine that the offer and acceptance occurred via these electronic means without requiring a clear physical paper-based document signed by both parties. The reliability of these electronic messages depends primarily on the fact that their origin is stored in the computer system from which they were issued or within the Internet, in the case of email. Additionally, these messages must be easy to view and accessible by every person who has the right to access and use them. This is confirmed by Article 21 in its statement: "*Where the law stipulates that an instrument, document or transaction be drawn up in writing or otherwise identifies certain consequences for non-abidance, the instrument, document or transaction shall be deemed to have fulfilled this condition, where the instrument, document or transaction are in the form of an accessible data message.*"[62]

3.2.1.2. Providing Some Procedures to Verify the Sender and Receiver of Data Messages

Article 26 of Decree-Law No 16 of 2010, which promulgates the Electronic Transactions and Commerce Law, has established some controls to verify the sender and receiver of data messages. These controls are designed to prevent human interference, manipulation and illusive authenticity.

Article 26 of the Decree Law No 16 of 2010, which promulgates the Electronic Transactions and Commerce Law, stipulates that "*When assessing the evidential weight of information, instrument or a document in the form of a data message, regard shall be given to the following*:

1. *The processes and circumstances under which the data message was generated, stored or communicated;*
2. *The processes and circumstances under which the integrity of the instrument, document or information contained in the data message was maintained;*

61 Decree Law of the State of Qatar no 16 of 2010 (n 5) art 20.
62 ibid, art 21.

3. *The processes and circumstances under which the originator of the data message was identified;*
4. *Any other relevant process or circumstances."*[63]

In this context, it becomes challenging for the opposing party to deny their extracts. There must be adherence to providing the original, as long as the extract is nothing but a transcript of what was contained in the electronic medium being dealt with. However, it is no secret that these processes require specialised technical expertise in this field. If these conditions and controls are met, automated data messages acquire authority in proof equal to those written on paper and accompanied by a written signature. It is, therefore, difficult for the opposing party to deny these instruments and adhere to presenting the original, as the electronic copy is nothing but a transcript of what was contained in the electronic medium.

3.2.2. At the Level of Judicial Application

Despite the small number of, or rather, the scarcity, of applications by the Qatari judiciary in the field of completing electronic transactions, the Qatari Court of Cassation has enshrined some judicial principles when applying the texts of the Decree Law on Electronic Transactions and Commerce as follows.

3.2.2.1. Recognising the Legal Value of Expressing Will in Electronic Contracts

One of the most prominent things addressed by Qatari jurisprudence through a judicial ruling issued by the Court of Cassation was the recognition of the legal value of the expression of will stated in an electronic contract (which falls within the scope of the electronic contracts session). This issue arose through an appeal where a contractor sent an electronic message to the other party expressing their will to terminate the contractual relationship between them, specifically regarding their will to stop renewing a lease contract. The Court of Cassation ruled that "it was clear from the papers that the appellant had maintained a defence based on the fact that appellant had agreed with the company under appeal to partially cancel a number of (...) rooms out of (...) rented under the lease contract dated ../../2015 and appellant delivered those aforementioned rooms after clearing what was in it. It was in accordance with what was proven by the e-mail exchanged between them, which was not denied by the appellant company, which submitted to the court in support of that. However, the contested ruling ignored the significance of those electronic correspondences, examined them, and based its ruling on the fact that the appellant did not deliver the aforementioned rooms that are the subject of the dispute to the company being appealed against except after the expiration of the term of the rental contract agreed upon therein, as a deficiency taints it in the justification."[64]

63 ibid, art 26.

64 Appeal no 483/2018 (Qatari Court of Cassation, Civil and Commercial, 1 January 2019) Technical Office 5/9.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

3.2.2.2. Equality between Electronic Documents and Traditional Documents as Proof

Among the most prominent appeals that were decided by the Qatari judiciary was when the Court of Cassation established the principle of authenticity of electronic documents as evidence. The court affirmed that their value is equal to conventional documents by recognising an email exchanged between the contracting parties, where offer and acceptance were extracted as part of the appeal.

The Court of Cassation based its decision on the appeal, confirming the authenticity of an electronic document through a means of communication represented by an email. This decision was supported by the texts of the concluded Electronic Commerce and Transactions Law, as the subject of the appeal involved an electronic means of communication.[65]

4 CONCLUSIONS

In this study, the electronic contract session was discussed, tracing its emergence and development in accordance with its determinants. The nature of the electronic contract was also discussed as an entry point to the electronic contract session. The offer and acceptance via electronic means were explained as a starting point for determining the nature of the electronic contract, according to the Qatari legislation and some comparative laws. The privilege of the electronic contract was also discussed through its forms and the judicial and legislative guarantees established by the Qatari legislation and concluded by jurisprudence in the State of Qatar.

5 RESEARCH RESULTS

In the conclusion, a set of results and recommendations were concluded as follows:

- There is a lack of information, studies and judicial rulings addressing the issue of electronic contracts, which remains one of the key determinants of the electronic contract session.
- There is a discrepancy between a number of legislations and the UNCITRAL Model Law, the full title of the Model Law, in dealing with an explicit concept of electronic contracts.
- An electronic contract is a contract that is subject in its formation to the general rules and provisions set by the general theory of the contract. However, it is distinguished by being a contract concluded remotely between not parties who are not physically present, utilising electronic means of communication.

65 Appeal no 275/2016 (n 27).

- There is a clear discrepancy in the electronic methods of offer and acceptance due to the various methods and aspects used.
- The electronic contract session does not differ from the regular contract session except in two ways: the electronic means through which the session takes place and the spatial scope.
- The actual and constructive forms of the electronic contract can be inferred based on the electronic means used between the parties.
- The Qatari legislation and jurisprudence have addressed the legal guarantees with regard to the specifications of the electronic contract session through the Electronic Commerce and Transactions Law.
- The electronic contract and the smart contract are distinct from each other. The former is concluded through modern electronic devices, such as computers and smartphones, relying on audio-visual communication or sometimes messaging. However, in the smart contract, there is privacy as it is based on blockchain technology. Blockchain works automatically through specific programming and under certain conditions.

6 RECOMMENDATIONS

The Qatari legislator should consider the following recommendations into consideration:

- Formulate simplified legal texts for electronic contracts to suit the different categories of contracting parties.
- Identify the problems that consumers face when dealing with electronic contracts. The most vital corporate sector can be used in electronic transactions at the level of region countries.
- Amend the provisions related to offer and acceptance in the Electronic Commerce and Transactions Law by developing detailed and explicit texts that address both concepts.
- Amend the Electronic Commerce and Transactions Law by establishing a special provision that deals with the concept of the electronic contract since it has become one of the determinants of the electronic contract session, especially given the growing variety of electronic transaction types.
- Establish a special text relating to the forms of the electronic contract session, whether a constructive or actual session.

Access to Justice in Eastern Europe
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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЗРОБКА ПРАВОВОГО РЕГУЛЮВАННЯ ДЛЯ ЕЛЕКТРОННИХ ДОГОВОРІВ У КОНТЕКСТІ ТРАДИЦІЙНОЇ ТЕОРІЇ ДОГОВОРІВ: АНАЛІТИЧНЕ ДОСЛІДЖЕННЯ

Могамед Салем Абу Ель Фараґ*, Тарик Гома Рашид та Ахмед Катамі

АНОТАЦІЯ

Вступ. *Роль цифрових засобів зв'язку стала значною у нашому повсякденному житті. Ці засоби стали, ніби серце, що пульсує, у досягненні миттєвої та швидкої комунікації між людьми та в укладенні численних договорів через Інтернет. Таким чином, метою цієї статті є з'ясування концепції електронних договорів, яку катарський законодавець оминув увагою, адже, регулюючи в Цивільному кодексі закон №22 від 2004 р. та закон, затверджений Указом № 16 від 2010 року, видав Закон про електронні транзакції та комерцію, просто задовольняючись положенням статті 4 цього останнього закону, вказавши, що дозволено здійснювати оферту або акцепт за допомогою електронних засобів зв'язку.*

Що стосується проблеми дослідження, то термін «електронний договір» став домінувати у багатьох юридичних працях, хоча фактично не існує жодного договору, укладеного повністю в електронному вигляді; натомість існує договір, укладений за допомогою електронних засобів. Отже, виникають питання щодо характеру сесії цього типу договору, в якому сторони не збираються в одному місці, а синхронізуються в часі. Чи застосовуємо ми ті самі правила, які регулюють традиційні договірні сесії, чи нам потрібні нові правові норми, сумісні з цим технологічним прогресом у спілкуванні та взаємодії між сторонами договору?

Це дослідження має на меті висвітлити проблему регулювання електронних договорів у Цивільному кодексі Катару. Ще однією ціллю є запропонувати правові рішення щодо реорганізації цих договорів загалом і договірної сесії, зокрема, для вдосконалення регулювання всіх форм цього виду договору. У зв'язку з цим автори намагаються описати детермінанти електронного договору та пояснити його привілеї.

Методи. *У цьому дослідженні аналітичний підхід застосовано для вивчення текстів статей, що регулюють договірну сесію в Цивільному кодексі Катару, і статей, які регулюють оферту та акцепт за допомогою електронних засобів у катарському законі, затвердженому Указом № 16 від 2010 року, який оприлюднює Закон про електронні транзакції та торгівлю. Висвітлення природи правової системи для електронних договорів у законодавстві Катару забезпечить правовий захист віддалених договірних сторін, що зрештою гарантує договірну безпеку. Це, у свою чергу, підтримує принципи договірної справедливості, до яких прагнуть правові системи незалежно від їхніх*

Access to Justice in Eastern Europe
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історичних джерел. Крім того, він є одним із найважливіших засобів залучення інвестицій через тісний зв'язок із безпекою транзакцій і повагою до законних очікувань, на які інвестори покладаються, формуючи своє бачення, якого вони прагнуть досягти.

Результати та висновки. *У цій статті автори підсумовують деякі з найважливіших результатів, зокрема відсутність у Катарі спеціалізованих досліджень і звернень до суду щодо вирішення проблем, що виникають у зв'язку з цими договорами. Крім того, електронний договір мало чим відрізняється за своїми основними положеннями від традиційного договору, за винятком електронних засобів, які використовуються для його укладення. Крім того, існує очевидна розбіжність в електронних методах оферти та акцепту через різні методи та аспекти, що використовуються.*

Ключові слова: *електронні транзакції, електронні контракти, договірна сесія, захист конфіденційності, оферта та акцепт.*

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Research Article

THE RIGHT TO SAFE DRINKING WATER AS A CONDITION FOR ENSURING HUMAN HEALTH AND LIFE: LEGAL REGULATION AND JUDICIAL PROTECTION IN UKRAINE AND OTHER COUNTRIES

Maryna Cherkashyna*, Alla Sokolova and Robert C. Brears

ABSTRACT

Background: *The global shortage of safe drinking water combined with urgent challenges regarding the safeguarding and sustainable management of this vital natural resource underscores the need to secure the human right to clean water access. This article explores legal water protection and examines the regulatory framework ensuring the right to safe drinking water as a critical condition for health and survival, both in Ukraine and globally. It defines the challenges of judicial protection of this right at national and global levels. Drawing on the European Union's experience, the article suggests incorporating provisions highlighting the essential role of water resources and their direct impact on human health and well-being. Accordingly, the authors recommend improving the Constitution of Ukraine by making some amendments and revisions to environmental and healthcare legislation.*

Methods: *This study employs a multidisciplinary methodology that combines general philosophical, scientific, specialised, and legal approaches to thoroughly examine the legal frameworks governing the human right to safe drinking water. These frameworks are crucial for protecting human health and life in Ukraine and beyond. The authors employed descriptive and analytical methods of inquiry, along with techniques for interpreting legal norms. The challenges of legal regulation were examined through the study of both international and national legal frameworks. Consequently, different methods were used for the research, such as dialectical, formal-logical, analytic and synthetic, system-structural, formal-legal, comparative legal, legal norm interpretation, prognostic, legal modelling, and logical-legal methods.*

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Results and Conclusions: *This study explores the legal regulation of the human right to safe drinking water as an essential part of health and life in Ukraine and in every country around the world. It also analyses the judicial protection of this right at both global and national levels. A key finding is that ensuring legal support for the right to safe drinking water is a fundamental environmental human right by making it recognised in the Constitution of Ukraine, the Fundamentals of Health Legislation, the Law of Ukraine "On Environmental Protection," and the Water Code of Ukraine. This would significantly enhance access to clean water and sanitation, aligning with Ukraine's Water Strategy, targeted for completion by 2050. Without equitable access to safe water, fulfilling essential rights such as health, well-being, an adequate standard of living, and even civil and political rights is unattainable. The application of the European Court of Human Rights (ECHR) case law on environmental violations is crucial for improving judicial practice in Ukraine. It strengthens citizens' rights through the European Convention on Human Rights and helps address legal gaps, particularly in safeguarding access to water. National courts must integrate ECHR jurisprudence when addressing issues related to water rights. Codifying the human right to safe drinking water in Ukrainian law will empower national courts to enforce this norm, laying the groundwork for a comprehensive protection system.*

1 INTRODUCTION

Water is a priceless treasure on planet Earth. It is vital for human health and overall survival, directly related to the realisation of human rights[1] and defined as the source of life and all living beings.[2] Access to safe drinking water and sanitary conditions is important for maintaining the health and dignity of all people.[3]

The right to clean water is ''considered a derivative, meaning an adequate standard of living and is linked to the highest attainable standard of physical and mental health, as well as to life and human dignity."[4] Human rights scholars and experts promote the enshrining of the right to safe water, arguing that other basic rights cannot be realised without this right.[5] For example, inadequate water quality in Ukraine hinders citizens

1 'Global Issues: Water' (*United Nations*, 2018) <https://www.un.org/en/global-issues/water> accessed 3 October 2024.

2 Ban Ki-Moon, 'Secretary-General's Message on World Water Day' (*United Nations*, 22 March 2010) <https://www.un.org/sg/en/content/sg/statement/2010-03-22/secretary-generals-message-world-water-day> accessed 3 October 2024.

3 OHCHR, UN-HABITAT, WHO. *The Right to Water* (Hunan Rights no 35, UN 2010).

4 UN Human Rights Council Resolution 15/9 'Human Rights and Access to Safe Drinking Water and Sanitation' (30 September 2010) para 3 <https://digitallibrary.un.org/record/691661?ln=en> accessed 3 October 2024.

5 Nora Hansén, 'The Human Right to Water and its Status in International Law' (Independent thesis, Faculty of Law Stockholm University 2018).

from exercising their rights, including the general use of water, in a manner that does not jeopardise their health and well-being.[6]

Ukrainian legal scholars have conducted research highlighting the challenges associated with ensuring the human right to safe drinking water.[7] Their research addresses issues such as the quality of safe drinking water in rural areas,[8] current trends and problems of international legal regulation of relations between states on such issues as the right to clean water and sanitary conditions,[9] and the protection and quality of groundwater both nationally and internationally.[10] Moreover, they have analysed environmental and legal concepts such as "pollution" and "pollutants" within the context of Ukrainian and European water legislation. Their studies have also focused on aligning the Ukrainian environmental and legal institute of water quality with

6 Maryna Trotska, Maryna Cherkashyna and Alla Sokolova, 'Implementation and Protection of the Right to General Water Use in Ukraine: Main Theoretical Problems and Certain Aspects of Judicial Dispute Resolution' (2023) 6(1) Access to Justice in Eastern Europe 84, doi:10.33327/AJEE-18-6.1-a000103.

7 NM Obijuh, 'The Human Right to Drinking Water: Development Trends and Guarantees of Implementation' (2013) 26(2-2) Scientific notes of Taurida National VI Vernadsky University, Series: Juridical Sciences 174; NM Obijuh, 'Peculiarities of Legal Regulation of Relations in the Sphere of Use of Sources of Drinking Water Supply in Ukraine' (2014) 3 Bulletin of the Ministry of Justice of Ukraine 135; Nataliya M Obijuh, 'Legal Support for the Use of Sources of Drinking Water Supply in Ukraine' (PhD thesis, National University of Life and Environmental Sciences of Ukraine 2015); NM Obijuh, 'Ensuring the Right to Drinking Water in International Legal Doctrine' (2022) 8 Juridical Scientific and Electronic Journal 571, doi:10.32782/2524-0374/2022-8/130; KD Yanishevskaya and AD Skoryk, 'The Right to Drinking Water as an Axiom in Human Rights' (2018) 10 Young Scientist 699; SS Jatcenko, 'Meaningful Fulfillment of the Right to Drinking Water' (2014) 3 Forum Prava 456 <http://nbuv.gov.ua/UJRN/FP_index.htm_2014_3_77> accessed 3 October 2024; AS Yevstigneyev, 'Legal Regulation of Drinkable Water Supply Priority in Ukraine' (2011) 1 Forum Prava 335 <http://nbuv.gov.ua/UJRN/FP_index.htm_2011_1_56> accessed 3 October 2024.

8 Volodymyr Yermolenko and others, 'Quality of Drinking Water in Rural Areas: Problems of Legal Environment' (2021) 280 E3S Web of Conferences 0902, doi:10.1051/e3sconf/202128009022.

9 Andriy V Kulko, *International Legal Regulation of the Use and Protection of Transboundary Freshwaters* (Stilos 2018).

10 Maryna Cherkashyna, 'Transboundary Aquifers: Legal Problems of Ukraine and other Countries of the World' in O Jaremko and others (eds), *Actual Researches of Legal and Historical Science: International Scientific Internet Conference, Ternopil, Ukraine - Perevorsk, Poland, 8-9 February 2023* (FOP Shpak VB 2023) vol 47, 91; Maryna Cherkashyna, Alla Sokolova and Valeriy Yakovlev, 'Legal Problems of Ensuring the Quality of Underground Drinking Water in Ukraine' (2024) 1 Theory and Practice of Jurisprudence 74, doi:10.21564/2225-6555.2024.1(25).300682; Iryna Iefremova, Iryna Lomakina and Nataliia Obiiukh, 'Groundwater Protection as an Essential Component of Water Management in the European Union in the Light of Modern Integration Processes: Legal Aspects of the Problem' (2019) 8(3) European Journal of Sustainable Development 354, doi: 10.14207/ejsd.2019.v8n3p354; OV Serdjuk, 'Groundwater in the System of Objects of Water Legal Relations' (2012) 1034 The Journal of VN Karazin Kharkiv National University, Series Law 369; Oleg V Serdjuk, 'Legal Principles of Groundwater Use' (PhD thesis, Yaroslav Mudryi National Law University 2014).

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European Union standards,[11] addressing environmental rights as a prerequisite for citizens' right to healthcare, as well as ensuring the sustainable use of natural resources to uphold the human right to health care.[12]

Scholars from other countries have focused on issues related to the human right to clean water. Their research encompasses several areas, including the status of the right to safe water accessibility stated in international law,[13] water quality problems,[14] access to groundwater through the prism of human rights,[15] groundwater management in the context of its depletion and deterioration due to climate change,[16] and harmonisation of international water law with the right to safe water and sanitary standards.[17] Comparative analyses of water rights regulations in countries like Indonesia and South Africa have also been conducted.[18] Scholars from different countries also show interest in the effects of armed conflict on water resources,[19] with ongoing challenges in ensuring the protection of the right to drinking water during times of war and conflict.

11 Volodymyr Uberman and Liudmyla Vaskovets, 'Step-by-step Approximation of the Ukrainian Ecological and Legal Institute of Water Quality and its Regulation to the Legislation of the European Union' in J von Blumenthal and others (eds), *Legislation of EU Countries: History, Shortcomings and Prospects for the Development* (Baltija Publ 2019) 334; Volodymyr Uberman and Liudmyla Vaskovets, 'The Concept of "Pollution" in Water Legislation of Ukraine and the EU and the Requirements of Post-War Environmental Security' (2023) 2 Law, State, Technology 16, doi:10.32782/LST/2023-2-3.

12 Alla K Sokolova, Tetyana B Vilchyk and Maryna K Cherkashyna, 'Ensuring the Environmental Rights as a Prerequisite for the Rights to Health in Ukraine and the European Union' (2019) 72(12-2) Wiadomości Lekarskie 2489, doi:10.36740/WLek201912216; Alla K Sokolova and Maryna K Cherkashyna, 'Legal Aspects of Using Natural Resources for Health and Recreational Purposes to Ensure Human Right to Health Care' (2021) 74(11-2) Wiadomości Lekarskie 3077, doi:10.36740/WLek202111237.

13 Nehaluddin Ahmad, 'Human Right to Water under International Law Regime: An Overview' (2020) 46(3) Commonwealth Law Bulletin 415, doi:10.1080/03050718.2020.1770618; Hansén (n 5); Vasilka Sancin and Miha Juhart, 'The Right to Safe Drinking Water in International Law and in Slovenia's Legal Framework and Implementation' (2023) 18(34) Journal of Agricultural and Environmental Law 106, doi:10.21029/JAEL.2023.34.106.

14 Martina Zeleňáková, Katarzyna Kubiak-Wójcicka and Abdelazim M Negm (eds), *Quality of Water Resources in Poland* (Springer Cham 2021) doi:10.1007/978-3-030-64892-3.

15 Jenny Grönwall and Kerstin Danert, 'Regarding Groundwater and Drinking Water Access through A Human Rights Lens: Self-Supply as A Norm' (2020) *12(2) Water* 419, doi:10.3390/w12020419.

16 Eric L Garner, 'Adapting Water Laws to Increasing Demand and a Changing Climate' (2016) 41(6) Water International 883, doi:10.1080/02508060.2016.1214775.

17 Imad Antoine Ibrahim, *International Water Law and the Human Right to Water: The Case of Transboundary Aquifers* (Routledge 2024) doi:10.4324/9781003537724.

18 Riswandha Imawan, 'The Right to Water: A Comparative Study of Law in Indonesia and South Africa' (2023) 6(2) Jambe Law Journal 103, doi:10.22437/jlj.6.2.103-124.

19 *M* Braijie, 'Water as an Object of International Legal Protection in the Case of Armed Conflict' (2017) 97(8) Man in India 217; Juliane Schillinger and others, 'Water in War: Understanding the Impacts of Armed Conflict on Water Resources and their Management' (2020) 7(6) WIREs Water e1480, doi:10.1002/wat2.1480; Gül Özerol and Juliane Schillinger, 'Water Management and Armed Conflict' in *Elgar Encyclopedia of Water Policy, Economics and Management* (Edward Elgar Publ 2024) 340.

At the global level, the current chronic shortage of safe and sufficient drinking water and the degradation of its quality poses a significant risk to humanity's sustainable development and the stability of many modern states. For example, in its 11 March 2024 Climate Risk Assessment, the European Environment Agency identified the main current and future impacts, ranging from large-scale floods observed in the EU in recent years to prolonged drought.[20] Extreme precipitation, heat, large-scale floods, and prolonged droughts contribute to water shortages and directly affect human health.

Thus, due to the growing need for drinking water, legal support for its proper quality, quantity, availability and legal issues related to realising and protecting access to clean and safe water remain relevant and increasingly important in the current environment.

The purpose of this article is threefold: 1) to analyse the legal framework governing the human right to drinking water as a critical condition for health and life in Ukraine and in the world; 2) to examine the legal challenges associated with the realisation and protection of the right to drinking water; and 3) to develop and substantiate proposals for enhancing the legal framework in this area, considering the experience of the European Union.

2 INTERNATIONAL LEGAL SOURCE WATER PROTECTION

Protecting water bodies is essential for ensuring safe, high-quality drinking water for the population. This involves various measures, such as regulating land use near water sources, promoting best management practices (BMPs) in agriculture, safeguarding wetlands and forests, and monitoring pollution sources. The primary goal is to prevent contamination and make water bodies suitable for drinking, recreation, and other purposes. By safeguarding these ecosystems, communities can enhance the health and well-being of their residents.

Effective source protection involves several strategies, including regulatory measures, land use planning BMPs, public awareness, and technological solutions.

Regulatory measures are crucial for protecting water sources. Governments and regulatory bodies establish standards and guidelines to control pollutants and safeguard water quality. Key strategies include setting pollutant discharge limits and restricting the amount of pollutants that industries, agriculture, and municipalities can release into water bodies. Regular monitoring and reporting ensure compliance, minimising contamination risks. Water quality standards are tailored for specific uses—such as drinking, recreation, agriculture, and industrial processes—and are grounded in scientific research, with periodic reviews to reflect new findings. Additionally, permitting systems for wastewater

20 European Environment Agency, *European Climate Risk Assessment: Executive Summary* (EEA Report no 01/2024, Publ Office of the EU 2024).

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discharges and other activities that affect water sources are designed to control pollutants effectively, often incorporating conditions to minimise environmental impact.[21]

Vienna, Austria, became the first city in the world to legally safeguard drinking water by adopting the Vienna Water Charter. This innovative approach establishes high standards for water body protection, serving as a model for other cities. The city's forests also play a crucial role in this protection by filtering and storing rainwater, maintaining soil quality and shielding water sources from pollutants.[22]

Land use planning significantly protects water sources by controlling activities that could lead to contamination. Effective strategies include establishing buffer zones around water bodies that filter out pollutants before reaching the water. These zones typically contain vegetation that traps sediments and absorbs nutrients and contaminants. Protecting and restoring wetlands is vital as they act as natural filters, trapping pollutants and sediments and providing wildlife habitats. Wetlands also play a role in flood control and groundwater recharge. Implementing zoning regulations restricting high-risk activities, such as industrial operations and intensive agriculture, near water bodies can significantly reduce contamination risks.[23]

The Massachusetts Drinking Water Source Protection Grant Program provides funds for land acquisition to protect existing and planned future drinking water sources, as well as groundwater recharge.[24]

BMPs are practical, cost-effective solutions designed to reduce pollution and protect water sources. They are widely used in agriculture, urban development, and other sectors. Key BMPs include agricultural practices such as contour farming, cover cropping, and conservation tillage, which help reduce soil erosion and runoff, thereby minimising nutrient and pesticide transport into water bodies. Nutrient management plans ensure fertilisers are applied to minimise leaching and runoff.

Implementing green infrastructure in urban areas, such as vegetative swales, rain gardens, and permeable pavements, helps manage stormwater runoff and reduce pollutants entering water sources. The proper design and maintenance of stormwater systems are equally

21 Renata Buriti, 'Water Quality and Protection at Source' in Walter Leal Filho and others (eds), *Clean Water and Sanitation* (Encyclopedia of the UN Sustainable Development Goals, Springer 2020) 840, doi:10.1007/978-3-319-95846-0_110; Teemu Viinikainen, 'Regulatory Measures in Water Legislation that can support Sustainable Soil Management' (2023) 13 Soil Security 100111, doi:10.1016/j.soisec.2023.100111.

22 Robert C Brears, 'Safeguarding Our Sources: Innovative Approaches to Water Source Protection' (*Mark and Focus*, 21 February 2024) <https://medium.com/mark-and-focus/safeguarding-our-sources-innovative-approaches-to-water-source-protection-5b4b10330eb0> accessed 3 October 2024.

23 Robert C Brears, *Nature-Based Solutions to 21st Century Challenges* (Routledge 2020); Robert C Brears, *Regional Water Security* (Wiley-Blackwell 2021).

24 Brears (n 22).

important. Sustainable forestry practices—such as selective logging, maintaining riparian buffers, and controlling road construction—are vital in reducing sedimentation and nutrient runoff into water bodies.[25]

The New York City Department of Environmental Conservation proposes a watershed protection programme providing an approach for controlling pollution from agricultural activities while supporting the agricultural economy of the watershed.[26]

Raising public awareness and educating communities about the importance of water source protection is essential for successful implementation. Public involvement leads to better compliance and stewardship. Educational campaigns inform the public about sources of water pollution and prevention steps. Schools, community groups, and media are effective platforms for disseminating this information. Engaging local communities in watershed management fosters ownership and responsibility, with community-based monitoring and clean-up initiatives delivering meaningful impacts. Additionally, training and workshops for farmers, urban planners, and industry stakeholders on BMPs and sustainable practices ensure these methods are understood and implemented effectively.[27]

The Philadelphia Water Department exemplifies an integrated, watershed-wide approach to protecting water bodies and drinking water quality in its programme.[28]

Technological advancements provide innovative solutions for protecting water sources by enhancing the ability to monitor, treat, and manage water resources efficiently. Real-time water quality monitoring systems enable continuous assessment of water parameters, allowing for the immediate detection of contamination and swift response. Advanced treatment technologies, such as membrane filtration, advanced oxidation processes, and biological treatment, effectively eliminate contaminants, ensuring that water meets quality standards. Furthermore, pollution control methods like biofilters, constructed wetlands, and sediment control devices help minimise the entry of pollutants into water bodies.[29]

25 Karen Solari, 'Forestry Best Management Practices in Watersheds: Web-based Training Module of the EPA's Watershed Academy Web' (*US Environmental Protection Agency (EPA)*, 2024) <https://www.epa.gov/watershedacademy/online-training-watershed-management> accessed 3 October 2024; Watershed Academy, 'Agricultural Management Practices for Water Quality Protection: Web-based Training Module EPA's Watershed Academy Web' (*US Environmental Protection Agency (EPA)*, 2024) <https://www.epa.gov/watershedacademy/online-training-watershed-management> accessed 3 October 2024.

26 Brears (n 22).

27 Brears (n 23).

28 Brears (n 22).

29 Robert C Brears, *Water Resources Management: Innovative and Green Solutions* (De Gruyter 2024) doi:10.1515/9783111028101.

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

3 LEGAL SUPPORT FOR THE RIGHT TO SAFE DRINKING WATER IN UKRAINE AND GLOBALLY

In July 2010, the UN General Assembly adopted a historic resolution recognising "the right to safe and clean drinking water and sanitation as a human right indispensable for the full enjoyment of life and all human rights."[30] Subsequently, in September 2010, the Human Rights Council reaffirmed this recognition and explained that "this right is derived from the right to an adequate standard of living and is inextricably linked to the right to the enjoyment of the highest attainable standard of physical and mental health, as well as to the right to life and human dignity."[31]

Since 2015, the General Assembly and the Human Rights Council have recognised "the right to safe drinking water and the right to sanitation as closely related but distinct human rights."[32] Given their crucial importance to human life, water and sanitation cannot be viewed in isolation. Together, they are vital in reducing the global disease burden and enhancing health, education, and economic productivity.[33]

In December 2016, the UN General Assembly adopted a resolution designating 2018-2028 as the International Decade for Action "Water for Sustainable Development". The resolution highlights that "water is critical for sustainable development and the eradication of poverty and hunger, that there is an inextricable link between water, energy, food security and nutrition, and that water is essential for human development and human health and well-being, and is vital for achieving the Sustainable Development Goals and other relevant social, environmental and economic goals."[34]

Furthermore, the UN World Water Development Report 2019 affirms that "safe drinking water and sanitation are recognised as fundamental human rights, as they are essential for a healthy life and fundamental to the dignity of everyone."[35]

Many national constitutions contain this principle by including provisions that link environmental protection to quality of life[36] and explicitly enshrine the right to water as a fundamental entitlement for all citizens of the state.[37]

30 UNGA Resolution 64/292 'The Human Right to Water and Sanitation' (28 July 2010) <https://digitallibrary.un.org/record/687002?ln=en> accessed 3 October 2024.

31 UN Human Rights Council Resolution 15/9 (n 4) para 3.

32 UNGA Resolution 70/169 'The Human Rights to Safe Drinking Water and Sanitation' (17 December 2015) <https://digitallibrary.un.org/record/822012?ln=en> accessed 3 October 2024.

33 Global Issues (n 1).

34 UNGA Resolution 71/222 'International Decade for Action, "Water for Sustainable Development", 2018–2028' (21 December 2016) <https://digitallibrary.un.org/record/859143?ln=en> accessed 3 October 2024.

35 Richard Connor, Stefan Uhlenbrook and Engin Koncagül, *Leaving no One Behind: The United Nations World Water Development Report 2019, Executive Summary* (UNESCO 2019) <https://unesdoc.unesco.org/ark:/48223/pf0000367303> accessed 3 October 2024.

36 Constitution of the Portuguese Republic of 2 April 1976 (7th Rev 2005) <https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf> accessed 3 October 2024.

37 Ustava Republike Slovenij (sprejeto 23 decembra 1991) <https://pisrs.si/pregledPredpisa?id=USTA1> dostopan 30 septembra 2024; Ustavni zakon Republike Slovenije št 001-02/15-4/173 dne 17 novembra 2016 'O dopolnitvi III poglavja Ustave Republike Slovenije (UZ70a)' [2016] Uradni list Republike Slovenije 75/3208.

In Ukraine, environmental law should ensure human security in the natural environment, the protection of human environmental rights and interests, and the protection of the natural environment.[38] The state is committed to protecting citizens' health and lives from unfavourable environmental conditions. Among citizens' environmental rights, the right to an environment safe for life and health is of great importance, ensuring that citizens exercise the right to healthcare.[39]

The Constitution of Ukraine guarantees the right to an environment that is safe for life and health (Article 50), a provision further reinforced by environmental legislation (Article 9 of the Law of Ukraine "On Environmental Protection"). Additionally, Article 48 of the Constitution ensures the right of every individual to an adequate standard of living for themselves and their family, which includes sufficient food, clothing, and housing. Moreover, every individual is entitled to free access to information about the state of the environment, the quality of food products, and household goods, as well as the right to disseminate such information. This information cannot be classified under any circumstances (Article 50 of the Constitution of Ukraine).

However, the right to access drinking water is not explicitly recognised in the Constitution of Ukraine or other legislative acts. Considering this, we propose enshrining the right to safe drinking water as one of the fundamental human rights in the Constitution. Given that water resources and atmospheric air are vital for sustaining life and directly impacting human health and well-being, we recommend amending Article 48 of the Constitution to include the right to safe drinking water and clean air. The revised article would read as follows: *"Everyone has the right to an adequate standard of living for themselves and their family, including sufficient food, clothing, housing, safe drinking water and clean air."*

The constitutional right to healthcare (Article 49 of the Constitution of Ukraine) cannot be fully realised without a fundamental prerequisite—the right to drinking water of adequate quality and sufficient quantity to meet personal and household needs. This right must be established at the legislative level. We propose enshrining such a provision in the Law of Ukraine "Fundamentals of Ukrainian Health Legislation" or incorporating it into the future Medical Code of Ukraine.

The human right to drinking water is proposed to be considered as: 1) *a condition for ensuring the human right to health and life* (Law of Ukraine "Fundamentals of the

38 Anatolii P Getman, 'Human Life and Health as an Object of Environmental Law in the Globalised World' (2020) 27(1) Journal of the National Academy of Legal Sciences of Ukraine 189, doi:10.37635/jnalsu.27(1).2020.189-200.

39 Vitalii M Pashkov and Maryna V Trotska, '*Natural Environment* as *Component* of *Public Health: Some Aspects* of *its Legal Regulation*' (2019) 72(2) Wiadomości Lekarskie 261; Sokolova, Vilchyk and Cherkashyna (n 12).

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

Legislation of Ukraine on Health Care" (Arts. 6(b) and 26)[40] 2) *an integral element of the human right to a safe environment for health and life* (Art. 50 of the Constitution of Ukraine; Arts. 1 and 9 of the Law of Ukraine 'On Environmental Protection');[41] 3) *a separate environmental human right*, enshrined in the Constitution of Ukraine, the Fundamentals of Healthcare Legislation, and environmental laws, will help ensure access to safe drinking water and sanitation in Ukraine.

Ukraine's environmental policy is designed to achieve key strategic objectives, including a safe state of the environment and water resources for human health. A safe state of water resources for human health is achieved, in particular, by:

1) predominantly ensuring compliance with sanitary and hygienic requirements for the quality of water used for drinking water supply by 2030 (The Law of Ukraine "On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period up to 2030");[42]
2) improving water quality, completely phasing out the discharge of untreated and insufficiently treated wastewater into water bodies and ensuring that the degree of wastewater treatment meets established norms and standards, as well as preventing groundwater pollution, etc. (Decision of the National Security and Defence Council of Ukraine "On Challenges and Threats to the National Security of Ukraine in the Environmental Sphere and Priority Measures to Neutralise Them", National Environmental Action Plan for the period up to 2025);[43]
3) complying with other environmental legislation in the field of water relations, in particular: The Water Code of Ukraine, the Law of Ukraine "On Water Disposal and Wastewater Treatment", the Concept of Water Industry Development of Ukraine, the Decree of the President of Ukraine "On the Decision of the National Security and Defence Council of Ukraine" dated 30 July 2021 "On the State of Water Resources of Ukraine", the Law of Ukraine "On the National Targeted Social Programme

40 Law of Ukraine no 2801-XII of 19 November 1992 'Fundamentals of the Legislation of Ukraine on Health Care' [1992] Vidomosti of the Verkhovna Rada of Ukraine 4/19.

41 Constitution of Ukraine of 28 June 1996 (amended 1 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 3 October 2024; Law of Ukraine no 1264-XII of 25 June 1991 'On Environmental Protection' [1991] Vidomosti of the Verkhovna Rada of Ukraine 41/546.

42 Law of Ukraine no 2697-VIII of 28 February 2019 'On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period up to 2030' [2019] Official Gazette of Ukraine 28/980.

43 Decree of the President of Ukraine no 111/2021 of 23 March 2021 'On the decision of the National Security and Defense Council of Ukraine of 23 March 2021 "On Challenges and Threats to the National Security of Ukraine in the Environmental Sphere and Priority Measures to Neutralise Them"' [2021] Official Gazette of Ukraine 26/1249; Order of the Cabinet of Ministers of Ukraine no 443-p of 21 April 2021 'On the approval of the National Environmental Action Plan for the period up to 2025' [2021] Official Gazette of Ukraine 42/2557.

'Drinking Water of Ukraine' for 2022–2026", and the Water Strategy of Ukraine until 2050 and the operational plan for its implementation.[44]

To ensure the right to free access to information regarding drinking water quality, national reports on the quality of drinking water and the state of drinking water supply in Ukraine have been published.[45] Based on the Association Agreement between Ukraine and the European Union,[46] the provisions of the Directives regulating water relations have been introduced into national legislation.[47]

According to the Law of Ukraine, "On the Public Health System", everyone has the right to safe drinking water essential for health and life and the right to compensation for damages caused to their health due to violations of sanitary legislation.[48] Individuals have the right to receive accurate and timely information about their health status, as well as any existing or potential health risk factors and their severity (Art. 15). The law also establishes medical and sanitary requirements for the safety of water bodies and drinking water critical to human health and life (Pt. 1 of Art. 26). It specifies criteria for the safety of water bodies, including maximum permissible concentrations of chemical and biological substances, pathogenic and opportunistic microorganisms, and levels of

44 Water Code of Ukraine no 213/95-BP of 6 June 1995 [1995] Vidomosti of the Verkhovna Rada of Ukraine 24/189; Law of Ukraine no 2887-IX of 12 January 2023 'On Water Disposal and Wastewater Treatment' [2023] Official Gazette of Ukraine 19/1056; Resolution of the Verkhovna Rada of Ukraine no 1390-XIV of 14 January 2000 'On the Concept of Water Industry Development of Ukraine' [2000] Official Gazette of Ukraine 5/146; Decree of the President of Ukraine no 357/2021 of 13 August 2021 'On the Decision of the National Security and Defence Council of Ukraine' dated 30 July 2021 'On the State of Water Resources of Ukraine' [2021] Official Gazette of Ukraine 66/4155; Law of Ukraine no 2045-IX 'On the National Targeted Social Programme "Drinking Water of Ukraine" for 2022–2026' (15 February 2022) <https://itd.rada.gov.ua/billinfo/Bills/pubFile/1233914> accessed 3 October 2024; Order of the Cabinet of Ministers of Ukraine no 1134-p of 9 December 2022 'On the approval of the Water Strategy of Ukraine until 2050 and the operational plan for its implementation' [2022] Official Gazette of Ukraine 99/6244.

45 Resolution of the Cabinet of Ministers of Ukraine no 576 of 29 April 2004 'On the Approval of the Procedure for Preparing and Publicizing the National Report on the Quality of Drinking Water and the Status of Drinking Water Supply in Ukraine' [2004] Official Gazette of Ukraine 18/1286; Ministry of Development of Communities and Territories of Ukraine, *National Report on the Quality of Drinking Water and the State of Drinking Water Supply in Ukraine in 2020* (Mininfrastruktury 2021); Ministry of Development of Communities and Territories of Ukraine, *National Report on the Quality of Drinking Water and the State of Drinking Water Supply in Ukraine in 2021* (Mininfrastruktury 2022).

46 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (signature 27 June 2014) [2014] OJ L 161/3.

47 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 'Establishing a Framework for Community Action in the Field of Water Policy' [2000] OJ L 327/1; Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 'On the Protection of Groundwater against Pollution and Deterioration' [2006] OJ L 372/19.

48 Law of Ukraine no 2573-IX of 6 September 2022 'On the Public Health System' [2022] Official Gazette of Ukraine 80/4809.

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

radiation background, all determined by sanitary legislation and state medical and sanitary rules and regulations (Pt. 2 of Art. 26).

The Law of Ukraine "On Drinking Water and Drinking Water Supply"[49] enshrines the right to provide consumers with drinking water, the quality of which meets state sanitary norms and rules, the quantity and mode of supply of which are determined on a contractual basis in an amount not less than the drinking water supply standards (Art. 22). However, legal scholars have determined that individuals who utilise water for personal and household needs—specifically, by extracting water from natural sources without the use of structures or technical devices, such as wells (Art. 47 of the Water Code of Ukraine)—are not classified as drinking water consumers under the Law of Ukraine "On Drinking Water and Drinking Water Supply". Unfortunately, the right to drinking water for these users is not recognised in Ukraine's environmental legislation, leading to challenges in protecting this right in court.[50]

It should be noted that the Law of Ukraine "On Drinking Water and Drinking Water Supply" defines the drinking water supply system as a set of technical means, including networks, facilities and equipment (devices) used for centralised and non-centralised drinking water supply (Art. 1). It also establishes the rights of consumers of drinking water and water supply services to access water that meets state sanitary standards and regulations with the quantity and supply schedule determined on a contractual basis ensuring volumes not less than the normative standards for drinking water supply (Art. 22). The Law defines non-centralised drinking water supply as the provision of drinking water to individual consumers from drinking water supply sources using water distribution points (including mobile points), water treatment installations (devices), or the delivery of packaged drinking water (Art. 1). At the same time, the Water Code of Ukraine specifies in Article 60 that when water is used for drinking and domestic purposes through non-centralised supply systems, legal and natural persons may draw water directly from surface or underground water bodies under the terms of general or special water use.

Thus, based on the mentioned legislative provisions, it can be concluded that individuals engaging in general water use to meet their needs, like drawing water from water bodies without the use of structures or technical devices, as well as from wells (Art. 47 of the Water Code of Ukraine) are not considered consumers of drinking water. Consequently, the right to drinking water for such users is, unfortunately, not recognised in environmental legislation. Therefore, the Water Code of Ukraine requires certain amendments to explicitly establish citizens' rights to drinking water of adequate quality

49 Law of Ukraine no 2918-III of 10 January 2002 'On Drinking Water and Drinking Water Supply' [2002] Official Gazette of Ukraine 6/223.

50 Maryna K Cherkashyna, 'The Human Right to Drinking Water in Ukraine: Some Issues Legal Regulation' (2024) 2(84) Uzhhorod National University Herald: Series Law 263, doi:10.24144/2307-3322.2024.84.2.36.

and sufficient quantity to meet personal and domestic needs. This should include provisions for general water use, such as drawing water from water bodies without the use of structures or technical devices, as well as from wells.

4 DRINKING WATER QUALITY AT THE INTERNATIONAL LEVEL AND IN UKRAINE: LEGAL SUPPORT AND RELATIONSHIP WITH HUMAN HEALTH AND LIFE

The main international documents (recommendations or requirements) that are widely accepted as foundational in shaping national regulations on drinking water quality in most countries are as follows: the World Health Organization's recommendations on drinking water quality;[51] Directive 2020/2184 of the European Parliament and the Council of the European Union, dated 16 December 2020 regarding the quality of water intended for human consumption (new version effective from January 2021);[52] the Water Framework Directive 2000/60/EC, which establishes, inter alia, the obligation of Member States "to provide the necessary protection for designated water bodies in order to prevent deterioration of their quality to reduce the level of treatment required for the production of drinking water";[53] Directive 91/271/EEC on the treatment of urban wastewater;[54] and Directive 2006/118/EC of the European Parliament and of the Council on the protection of groundwater from pollution and depletion stipulates that "groundwater is a valuable natural resource, the most sensitive and largest source of clean water in the European Union, and the main source of drinking water in many regions."[55]

In Ukraine, the legal framework supporting the quality of drinking water is based on the following regulations: State Sanitary Norms and Rules (DSanPiN 2.2.4-171-10) outlining hygienic requirements for drinking water intended for human consumption;[56] State Standards of Ukraine - DSTU 4808:2007, which sets hygienic and environmental requirements for water quality and rules of selection for sources of centralised drinking

51 World Health Organization, *Guidelines for Drinking-Water Quality: Fourth Edition Incorporating the First and Second Addenda* (WHO 2022); World Health Organization, *Guidelines for Drinking-Water Quality: Small Water Supplies* (WHO 2023).

52 Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 'On the Quality of Water Intended for Human Consumption (Recast) (Text with EEA relevance) [2020] OJ L 435/1.

53 Directive 2000/60/EC (n 47) art 7, para 3.

54 Council Directive 91/271/EEC of 21 May 1991 Concerning Urban Waste-Water Treatment (consolidated version 1 January 2014) <http://data.europa.eu/eli/dir/1991/271/oj> accessed 3 October 2024.

55 Directive 2006/118/EC (n 47) cl (3).

56 Order of the Ministry of Health of Ukraine no 400 of 12 May 2010 'On approval of State Sanitary Norms and Rules (DSanPiN 2.2.4-171-10) "Hygienic Requirements for Drinking Water Intended for Human Consumption"' [2010] Official Gazette of Ukraine 51/1717.

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

water supply, dated 5 July 2007 (No. 144);[57] DSTU 7525:2014, which establishes requirements and methods of quality control, dated 23 October 2014 (No.1257);[58] the Order of the Ministry of Health of Ukraine No. 683, dated 22 April 2022, "On approval of the State Sanitary Norms and Rules 'Safety Indicators and Certain Indicators of Drinking Water Quality in Martial Law and Other Emergency Situations'".[59]

Drinking water quality regulation systems vary across countries due to differences in water supply conditions and national peculiarities of natural and socio-economic factors in each region. It is essential to analyse these systems to tailor general approaches to local and regional conditions, particularly in Ukraine.[60]

Environmental law plays an important role in regulating health care as a natural right of citizens, despite the fact that it is regulated by practically all branches of the national law of Ukraine. Criteria for a safe environment are determined by environmental standards and norms as well as technical, sanitary, hygienic, construction, and other norms and rules containing requirements for environmental protection.[61]

Regulation in the fields of water use, protection, and reproduction plays a critical role in ensuring the environmental and sanitary-hygienic safety of water by establishing requirements for objects subject to regulation. Water legislation establishes the relevant standards (Arts. 33 and 35 of the Water Code of Ukraine).

Scientific literature underscores the necessity of enhancing the regulatory framework for water use and water protection policy in the country. Water protection practices of other countries demonstrate the effectiveness of combining maximum permissible concentrations with environmental classifications of natural resources, technological restrictions, economic standards, and other measures. The realism and flexibility of regulatory systems abroad also contribute to the significant effectiveness of water protection initiatives.[62]

57 DSTU 4808:2007, 'Sources of Centralised Drinking Water Supply: Hygienic and Environmental Requirements for Water Quality and Rules of Selection' (Derzhspozhyvstandart of Ukraine 2007).

58 DSTU 7525:2014, 'Drinking Water: Requirements and Methods of Quality Control' (Minekonomrozvytku of Ukraine 2014).

59 Order of the Ministry of Health of Ukraine no 683 of 22 April 2022 'On approval of the State Sanitary Norms and Rules "Safety Indicators and Certain Indicators of Drinking Water Quality in Martial Law and Other Emergency Situations"' [2022] Official Gazette of Ukraine 44/2423.

60 VM Prybylova, 'Problems and Ways to Improve the Standardization of Drinking Water Quality Indicators' (2015) 41 The Journal of VN Karazin Kharkiv National University, Series Geology, Geograph, Ecology 57.

61 NR Malysheva and MI Yerofeiev, *Scientific and Practical Commentary on the Law of Ukraine "On Environmental Protection"* (Pravo 2017) 55.

62 VK Khilchevskyi (ed), *Fundamental Principles of Water Resource Quality Management and Protection: Educational Guide* (Kyiv University 2015).

5 JUDICIAL PRACTICE IN DISPUTES ON ENSURING THE RIGHT TO SAFE DRINKING WATER ACCESS IN UKRAINE AND THE EU

It is crucial for the judicial system to operate effectively to uphold the rule of law and provide sufficient protection for the environmental rights of citizens.

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, stated by the Council of Europe, proclaims the right to a fair trial. According to this article, "everyone has the right to a fair and public hearing of their case within a reasonable time by an independent and impartial tribunal established by law, which will resolve disputes regarding their rights and obligations."[63] This is why an effective judiciary is so important for protecting environmental rights.[64]

In Ukraine, judicial practice has a mandatory status at the legislative level and has become a source of law. According to Article 17 of the Law of Ukraine, "On the Execution of Decisions and the Application of the Practice of the European Court of Human Rights", dated 23 February 2006, it is explicitly stated that "courts use the case law of the European Court of Human Rights (ECtHR) as a source of law when considering cases".

ECtHR has considered several cases against Ukraine related to environmental protection. Although there are not many such decisions, they hold significant value. Such cases include *Dubetska and others v. Ukraine* (App. No. 30499/03), *Dzemiuk v. Ukraine* (App. No. 42488/02), *Kononov and others v. Ukraine* (App. Nos. 39108/18 and 3 others), *Petruk and others v. Ukraine* (App. Nos. 1343/19 and 5 others),[65] etc. Despite the fact that all ECtHR decisions (including those involving other states) serve as sources of law in Ukraine, the rulings concerning Ukraine are particularly valuable because the ECtHR analyses Ukrainian legislation and its application, highlighting specific shortcomings. Consequently, applying the ECtHR's decisions in cases against Ukraine to similar or analogous cases within Ukraine becomes easier. This is crucial for ensuring that environmental rights and protections are adequately enforced.[66]

63 OV Petryshyn (ed), *General Theory of Law: Textbook* (Pravo 2020) 511.

64 Law of Ukraine no 3477-IV of 23 February 2006 'On the Execution of Judgments and the Application of the Practice of the European Court of Human Rights' [2006] Official Gazette of Ukraine 12/792.

65 *Dubetska and others v Ukraine* App no 30499/03 (ECtHR, 10 February 2011) <https://hudoc.echr.coe.int/fre?i=001-103273> accessed 3 October 2024; *Dzemiuk v Ukraine* App no 42488/02 (ECtHR, 4 September 2014) <https://hudoc.echr.coe.int/fre?i=001-146357> accessed 3 October 2024; *Kononov and others v Ukraine* App nos 39108/18 and 3 other (ECtHR, 10 February 2022) <https://laweuro.com/?p=18034> accessed 3 October 2024; *Petruk and others v Ukraine* App nos 1343/19 and 5 others (ECtHR, 14 November 2019) <https://hudoc.echr.coe.int/eng?i=001-198469> accessed 3 October 2024.

66 OV Kravchenko (ed), *Human Rights and Environmental Protection: Educational and Methodological Manual for Trainers (Judges-Teachers)* (Manuskrypt 2016) 68-70.

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

Considering the case of *Dzemiuk v. Ukraine* (App. No. 42488/02), the applicant alleged a violation of Article 8 of the European Convention on Human Rights. Specifically, he argued that establishing a cemetery near his home led to the contamination of sources supplying drinking water and water used for private gardening. This, as he claimed, interfered with his ability to enjoy his home and property, particularly the soil of his land plot, in the usual manner and negatively impacted the physical and psychological health of himself and his family (para. 73).

A similarly illustrative case is *Dubetska and others v. Ukraine* (App. No. 30499/03), in which the applicants complained that the state authorities had failed to protect their homes and private and family lives from excessive pollution caused by two state-owned industrial enterprises. They referred to Article 8 of the Convention, arguing that they constantly suffered from a lack of drinking water due to pollution, as they did not have access to the centralised water supply. They relied on water from a local well and stream for washing clothes and cooking, but this water caused itching and intestinal infections. The applicants claimed they were forced to organise the delivery of drinking water to their homes at their own expense, using a truck and a tractor. However, the water was not supplied sufficiently, and its delivery was not always regular. Some applicants developed chronic illnesses attributed to the factory`s activities, and environmental factors also strained family relationships, including difficulties in marital relations caused by the lack of clean water for washing. The Court unanimously found a violation of Article 8 of the Convention in this case.

Experts in legal theory identify the main directions of judicial practice influence. These influences include eliminating inconsistencies where the same categories of cases are treated differently by the courts. They also specify provisions in normative acts when their abstract nature permits multiple regulatory options. Judicial practice forms a uniform understanding of legal prescriptions that are vaguely formulated or outdated and do not align with current societal values, thus requiring dynamic interpretation. Moreover, it establishes consistent rules of conduct in similar factual situations, ensuring uniform judicial practices. Judicial practice fills gaps in legal regulation while also offering behavioural models for situations where the legislator has intentionally left room for autonomous legal regulation. Due to the recurrence of disputes arising from these situations, there is a pressing need to develop established behavioural models.[67]

Scientists reasonably emphasise that in Ukraine, the status of judicial practice as a mandatory source includes the conclusions presented in specific ECtHR cases, decisions by the Supreme Court regarding various applications of substantive and procedural law, as well as rulings by the Constitutional Court of Ukraine on official interpretations.[68] An analysis of the judicial practice of the Commercial Cassation Court in disputes arising

67 Petryshyn (n 63) 125.
68 ibid 129.

from issues of preservation, use and protection of water resources demonstrates that individuals whose rights are being violated—either directly or indirectly—practically do not appeal to the relevant authorities. As a result, the rights of citizens that have been violated cannot be restored.[69]

In Ukraine, the violated rights of citizens in the field of environmental protection must be restored, and their protection is carried out in court in accordance with the legislation of Ukraine (Art. 11 of the Law of Ukraine "On Environmental Protection").[70]

The state guarantees consumer rights protection in the area of drinking water and supply by ensuring everyone has access to drinking water of standard quality based on scientifically established supply standards tailored to regional and living conditions (Arts. 1, 4, 7 of the Law of Ukraine "On Drinking Water and Drinking Water Supply").[71] The Law also grants the right to file lawsuits for compensation for damages resulting from the provision of substandard drinking water that fails to meet state sanitary standards, as well as for other legal violations in this sector (Art. 22).[72] Consequently, cases involving various legal personalities may be adjudicated in administrative, civil, commercial, or criminal proceedings.

When studying judicial practice in the context of environmental rights, it is important to focus on existing court cases related to decisions that resulted in violations of citizens' rights to engage in general water use[73] or the removal of obstacles to such use.[74]

Today, courts play a significant role in enforcing environmental legislation and safeguarding ecological rights and interests, particularly for individuals. Judicial practices regarding specific case categories are reflected in the resolutions of the Plenary Session of the Supreme Court of Ukraine. A well-functioning judicial system is a vital component of a society governed by the rule of law and a prerequisite for democracy.[75]

69 Case no 815/875/16 (Administrative Cassation Court of the Supreme Court of Ukraine, 23 July 2019) <http://reyestr.court.gov.ua/Review/83243861> accessed 3 October 2024; Case no 908/581/19 (Commercial Cassation Court of the Supreme Court of Ukraine, 25 February 2020) <http://reyestr.court.gov.ua/Review/87838416> accessed 3 October 2024; Case no 920/739/19 (5021/2509/2011) (Commercial Cassation Court of the Supreme Court of Ukraine, 11 August 2021) <https://reyestr.court.gov.ua/Review/99123175> accessed 3 October 2024; Case no 904/4941/20 (Commercial Cassation Court of the Supreme Court of Ukraine, 09 September 2021) <https://reyestr.court.gov.ua/Review/99818456> accessed 3 October 2024.

70 Law of Ukraine no 1264-XII (n 41).

71 Law of Ukraine no 2918-III (n 49).

72 ibid, art 22.

73 Case no 310/4071/16-a (Berdyansk City District Court of Zaporizhzhya Region, 11 October 2016) <https://reyestr.court.gov.ua/Review/62770733> accessed 3 October 2024.

74 Case no 160/5771/20 (Dnipropetrovsk District Administrative Court, 19 February 2021) <https://reyestr.court.gov.ua/Review/95271667> accessed 3 October 2024.

75 Petryshyn (n 63) 124.

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

The analysis of scientific studies, international documents, and national legislation reveals that recognising the right to clean water as a fundamental human right is crucial for addressing the provision of this essential resource to the population. Establishing legal support for the right to drinking water at the national level—specifically, by enshrining it in the Constitution of Ukraine, the Fundamentals of Healthcare Legislation, and the Water Code of Ukraine—will facilitate access to safe drinking water and sanitation. This aligns with one of the strategic goals outlined in Ukraine's Water Strategy until 2050. Without equitable access to safe drinking water, upholding other human rights, such as the right to an adequate standard of living and the right to health and well-being, becomes impossible, as do civil and political rights. The state must prioritise drinking water use across all water utilisation forms and maintain adequate reserves of safe drinking water to ensure healthy living conditions.

Given that the Law of Ukraine "On Environmental Protection" defines the legal, economic, and social framework for organising environmental protection in the interests of both present and future generations, it emphasises that "protecting the environment, rationally utilising natural resources and ensuring the environmental safety of human life are essential conditions for the sustainable economic and social development of Ukraine (preamble)". Regarding the relevance of the issue under study, namely the human right to drinking water, it would be advisable to introduce appropriate amendments, proposing a revision of Art. 9 "Environmental Rights of Citizens" to include the formulation of this right.

Taking the above into account, we propose the following:

1) Amend Article 48 of the Constitution of Ukraine by revising it as follows: "Everyone has the right to an adequate standard of living for themselves and their family, including sufficient food, clothing, housing, safe drinking water and clean air."
2) Strengthen the constitutional right to healthcare (Article 49 of the Constitution of Ukraine) by recognising that it cannot be fully realised without one of its most essential components—the right to drinking water of adequate quality and sufficient quantity to meet personal and domestic needs. Relevant legal provisions should be added to the Law of Ukraine "Fundamentals of Ukrainian Health Legislation" or the future Medical Code of Ukraine.
3) Amend the Water Code of Ukraine to include the right of citizens to drinking water of normative quality and sufficient quantity for personal and domestic needs, even in cases of general water use—specifically, when drawing water from water bodies without the use of structures or technical devices, as well as from wells.

The application of the European Court of Human Rights (ECtHR) case law regarding environmental norm violations is critical for judicial practice in Ukraine. It expands the means of protecting citizens' rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, addressing existing gaps in environmental law.

Crucially, non-compliance with drinking water quality standards undermines the ability to use water without risking harm to health and lives. Given the unsatisfactory state of drinking water quality and quantity in Ukraine, one would expect a rise in citizens' appeals to the courts. However, the actual number of judicial cases remains relatively low.

Therefore, it is essential to emphasise that judicial practice serves as a mandatory source of law in our country. This includes conclusions presented in specific ECtHR cases, decisions by the Supreme Court regarding the application of various norms of substantive and procedural law, and rulings by the Constitutional Court on official interpretations. In light of this role of judicial practice, it would be appropriate to undertake several initiatives: the preparation and publication of collections and reference materials regarding judicial practice and the establishment and operation of electronic search systems for judicial practice specifically related to the categories of cases examined in this work.

The issues raised are critical, particularly as they pertain to realising the essential ecological right to quality drinking water, which is vital for health and human life. Ensuring access to safe drinking water is fundamental to public health and well-being and remains a pressing concern in many countries, including Ukraine.

The significance of human rights is rooted in their effective implementation. By incorporating the right to drinking water into Ukrainian legislation, national courts would be empowered to directly enforce this norm, thereby strengthening the overall protection system.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВО НА БЕЗПЕЧНУ ПИТНУ ВОДУ ЯК УМОВА ЗАБЕЗПЕЧЕННЯ ЗДОРОВ'Я ТА ЖИТТЯ ЛЮДИНИ: ПРАВОВЕ РЕГУЛЮВАННЯ ТА СУДОВИЙ ЗАХИСТ В УКРАЇНІ ТА ІНШИХ КРАЇНАХ

Марина Черкашина*, Алла Соколова та Роберт С. Брірс

АНОТАЦІЯ

Вступ. *Глобальна нестача безпечної питної води в поєднанні з нагальними проблемами щодо охорони та сталого управління цим життєво важливим природним ресурсом підкреслює необхідність забезпечити право людини на доступ до чистої води. У цій статті досліджується правова охорона водних ресурсів та аналізується нормативно-правова база, що гарантує право на безпечну питну воду як критично важливу умову для здоров'я та виживання, як в Україні, так і в усьому світі. Також було визначено*

проблеми судового захисту цього права на національному та глобальному рівнях. З огляду на досвід Європейського Союзу, у статті пропонується внести положення, які підкреслюють важливу роль водних ресурсів та їх прямий вплив на здоров'я та добробут людей. У зв'язку з цим автори рекомендують удосконалити Конституцію України за допомогою внесення змін і доповнень до законодавства у сфері охорони навколишнього середовища та охорони здоров'я.

Методи. *У цьому дослідженні використовується мультидисциплінарна методологія, яка поєднує загальні філософські, наукові, спеціалізовані та юридичні підходи для ретельного вивчення правових меж, що регулюють право людини на безпечну питну воду. Це має вирішальне значення для захисту здоров'я та життя людей в Україні та за її межами. Автори використовували описовий та аналітичний методи дослідження, а також методи тлумачення правових норм. Проблеми правового регулювання розглядалися через дослідження як міжнародної, так і національної правової бази. Отже, у статті використовувалися різні методи, такі як діалектичний, формально-логічний, аналітико-синтетичний, системно-структурний, формально-юридичний, порівняльно-правовий, прогностичний, логіко-правовий, метод тлумачення правової норми та юридичного моделювання.*

Результати та висновки. *У статті досліджується регулювання права людини на безпечну питну воду як невід'ємну частину здоров'я та життя в Україні та в кожній країні світу. Також аналізується судовий захист цього права як на глобальному, так і на національному рівнях. Головний висновок полягає в тому, що гарантування права на безпечну питну воду є основним екологічним правом людини через визнання його в Конституції України, Основах законодавства про охорону здоров'я, Законі України «Про охорону навколишнього природного середовища», а також у Водному кодексі України. Це значно покращить доступ до чистої води та санітарні умови, згідно з Водною стратегією України, яку планується завершити до 2050 року. Без рівного доступу до безпечної води неможливо реалізувати такі основні права, як право на здоров'я, добробут, достатній рівень життя і навіть громадянські та політичні права. Застосування практики Європейського суду з прав людини (ЄСПЛ) щодо екологічних правопорушень має вирішальне значення для вдосконалення судової практики в Україні. Це зміцнює права громадян через Європейську конвенцію про захист прав людини і основоположних свобод та допомагає усунути юридичні прогалини, зокрема щодо захисту доступу до води. Національні суди повинні враховувати судову практику ЄСПЛ при розгляді питань, пов'язаних з правами на воду. Кодифікація права людини на безпечну питну воду в українському законодавстві дасть можливість національним судам забезпечувати виконання цієї норми, закладаючи основу для комплексної системи захисту.*

Ключові слова: *природні ресурси, водні ресурси, питна вода, екологічні права, право на доступ до безпечної питної води, охорона здоров'я та судовий захист.*

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Research Article

HARMONISATION OF THE CRIMINAL LAW OF THE SLOVAK REPUBLIC WITH THE LAW OF THE EUROPEAN UNION IN THE FIELD OF INTERNATIONAL CRIMINAL OFFENCES

Adrián Vaško*, Jaroslav Klátik and Róbert Čuha

ABSTRACT

Background: *This paper addresses key issues related to the tools used to approximate the definitions of selected crimes within specific areas of the fight against organised crime. Despite the pursuit of communitarisation, some legal constitutions have remained rooted in an intergovernmental approach. Accordingly, this article examines individual international documents that served as the basis for selected international criminal offences incorporated into the Slovak Criminal Code. As with any process of harmonisation involving the legal regulations of individual states, aligning European Union law with Slovak Criminal Law was not easy, and many application problems arose. In this article, we focus on these challenges and explore possible solutions.*

Methods: *In this contribution, standard methods commonly employed in the processing of scientific and professional texts focused on "European" criminal law were applied. The dominant method was the so-called analytical method, mainly used to examine current legislation related to the discussed issue. Additionally, a content and functional analysis of the most important institutes, which were contained in relevant international documents and important court decisions, was carried out. In the case of comparisons between Slovak and European legislation, a comparative method was used. Subsequently, conclusions were formulated using the synthetic method, the aim of which was to present proposals to eliminate shortcomings and improve the current legislation.*

Results and Conclusions: *Through the analysis and comparison of relevant legal frameworks, several findings emerged. Specifically, we have found that the Slovak Criminal Code understands the concept of "organised criminal group" significantly more broadly than the relevant Framework Decision. This fact could cause problems in the recognition of decisions by other states. Additionally, the absence of a uniform definition of the concept of "terrorism" within the European Union is problematic as it may lead to inconsistencies that interfere with fundamental human rights and freedoms. In the field of drug trafficking, while no significant application problems were found in connection with the application of European Union law and the Criminal Code, disparities across the entire European Union, particularly in the criminalisation/decriminalisation of selected types of drugs and the varying severity of sanctions imposed by Member States. For arms trafficking, flaws were identified in the implementation of the relevant protocol into Slovak law, particularly in the definition and treatment of firearms parts and components. In cases of trafficking in human beings committed by a legal entity, the Criminal Code fails to meet the requirements of the relevant directive regarding the punishment of legal entities. Finally, the directive on environmental crimes contains vague terms which may cause application problems when approximating the provisions of the directive in relation to other states.*

1 INTRODUCTION

International organised crime represents the highest form of criminal activity within the entire European Union. The commission of international crimes can be considered an unprecedented threat to the fundamental principles and values of the European community, jeopardising its security, financial stability, and integrity of both its external and internal markets. Members of organised, criminal or terrorist groups commit a large number of the most serious crimes such as terrorism, drug smuggling, illegal arms and arms trafficking, human trafficking and sexual abuse of women and children, corruption, cybercrime, hybrid crimes, chemical, biological and nuclear threats, as well as environmental crimes.

This contribution focuses on the most critical areas of concern highlighted above. To combat these serious crimes, the European Union must provide its Member States with the necessary financial, personnel and technical means and tools to enhance the detection, clarification and investigation of such offences.[1] In other words, addressing these challenges requires legislative action not only at the national level but also at the supranational or European level. This calls for the Europeanization of criminal law or the harmonisation of the legal systems of individual Member States.

1 *František Čakrt*, 'Nástin komunitarizace v rámci III pilíře' (2007) 1 Trestněprávní revue 4.

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However, in this case, we are faced with the fragmentation and inconsistency of national legal regulations. These inconsistencies arise from variations in social values, traditions, ethnic, cultural, historical or religious differences of individual Member States. The Europeanization of criminal law is a long-term process grounded in substantive and procedural aspects of the European Union's foundational criminal law principles.[2]

Overall, it is not a question of eliminating differences in criminal law provisions but only of minimising them and trying to approximate some agreed factual bases. The primary anchoring of harmonisation tendencies can be found in primary law. The EU Treaty refers to Art. 31(1e), while the Treaty establishing the European Community[3] (hereinafter referred to as the EC Treaty) includes relevant provisions such as Art. 280, as amended by the Treaty of Nice.[4] The primary instruments used to approximate the laws of the Member States, particularly in defining elements of selected criminal offences, were Framework Decisions. These instruments, similar to directives adopted under the first pillar of the EU, bind Member States only as so-called to the result to be achieved. However, Framework Decisions are not supranational but intergovernmental legal acts.[5]

However, the Lisbon Treaty does not provide for their adoption or existence in its appendix.[6] Therefore, regulations regarding the adoption of Framework Decisions are no longer included in the consolidated version of the EU Treaty.[7] With the adoption of the Lisbon Treaty, this duality no longer applies, and all measures fall under the ordinary legislative procedure and are adopted in the form of secondary community acts.[8]

The new legal regulation, therefore, provides for the adoption of EU legal acts to approximate national substantive criminal laws. Some scholars regard the substantive nature of certain criminal offences as an essential instrument for achieving the objectives set by the EC. The general regulation in the field of approximation of substantive criminal law can be found in Art. 83(1) and (2) of the Treaty on the Functioning of the European Union[9] (hereinafter referred to as the TFEU), where in para. 1, the ten categories of

2 Stanislav Šišulák and Lýdia Gladišová, *Europeanisation of Criminal Law in the Slovak Republic as a Necessity to Ensure Effective Fight Against International Organised Crime* (Právnická fakulta Univerzity Komenského v Bratislave 2024) 68-70.

3 Treaty Establishing the European Economic Community (signed 25 March 1957) <http://data.europa.eu/eli/treaty/teec/sign> accessed 10 July 2024.

4 Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [2001] OJ C 80/1.

5 Jindřiška Syllová, Lenka Pítrová, Helena Paldusová a col, *Lisabonská smlouva: Komentář* (CH Beck 2010) 934-50.

6 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (signed 13 December 2007) [2007] OJ C 306/1.

7 Treaty Establishing the European Community (consolidated version) [2002] OJ C 325/33.

8 Bohumil Pikna, *Evropský prostor svobody, bezpečnosti a práva: Prizmatem Lisabonské smlouvy* (2 vyd, Linde 2010) 62-75.

9 Treaty on the Functioning of the European Union (consolidated versions) [2016] OJ C 202/47.

particularly serious criminal offences with a cross-border dimension. These offences are exhaustively defined based on their nature or impact or specific requirements, and they are addressed on a common basis. Furthermore, minimum rules for determining these criminal offences and sanctions may be established.[10]

In the Slovak Republic, harmonisation efforts to at least minimally specify the factual nature of criminal offences and criminal sanctions in defined areas have been continuously reflected in the legal order of the Slovak Republic after the recodification of substantive law in Act No. 300/2005 Coll. of the Criminal Code.[11] The aim of the EU is to harmonise internationally protected interests and their protection at the European level. Most of the effects of communitarisation have been taking place gradually within the framework of gradual development at the European level and have been reflected in the current amendments to the Slovak legal order, given that they respond to current requirements. The entry of the Slovak Republic into the EU was influenced by the need to harmonise and unify the factual basis of certain criminal offences, which was also reflected in the amendment to the new Criminal Code adopted on 1 January 2006.

2 RESEARCH METHODOLOGY

In this study, we adopted an in-depth analytical approach to examining the legal texts governing "European" criminal law. As inferred, the European Union does not have a separate criminal branch that is common to all Member States. For this reason, our analysis focused on individual legal acts, especially international treaties, agreements, regulations, and directives.

The analytical method served as a primary tool, enabling us to accurately and clearly define the foundational elements of the regulatory "criminal policy" applied by the European Union. Complementing this, we employed the comparative method to juxtapose criminal acts addressed in international conventions or legal acts of the European Union with those outlined in the Slovak Criminal Code. It should be noted that we focused only on specific crimes that have an international scope and a high degree of seriousness, such as crimes committed within an organised criminal group, terrorism, arms and drug trafficking, human trafficking, and environmental crimes.

Lastly, the synthetic method was applied to "select" the most important but also different elements embedded in "European" and Slovak criminal law. Proposals and recommendations were subsequently submitted to eliminate the identified shortcomings and to improve the current wording of the relevant legal regulations.

10 It is important to note that with the adoption of the Lisbon Treaty, the pillar structure ceased to exist and the concept of community law also ceased to exist, being replaced by the concept of European Union law.

11 Act no 300/2005 coll of 20 May 2005 Criminal Code 'Trestný zákon' (amended 2024) <https://www.zakonypreludi.sk/zz/2005-300> accessed 10 July 2024; Jozef Čentéš a jiní, *Trestné právo procesné: Osobitná časť* (2 vyd, Heureka 2022) 358.

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

3 THE FIGHT AGAINST ORGANISED CRIME – PARTICIPATION IN A CRIMINAL ORGANISATION

The basic framework for approximating criminal law regulations in the field of judicial cooperation in criminal matters was outlined in the Treaty on European Union[12] (hereinafter referred to as TEU). It emphasised the gradual adoption of measures to approximate the facts of certain criminal offences. A notable area of focus was organised crime, given its particularly dangerous nature. Criminal organisations represent one of the most severe forms of criminal activity, often involving several people, e.g. due to its conspiratorial criminal activity or a branched structure involving a large number of people, whether directly involved in committing the crime or only affiliated and cooperating intermediaries.[13] This form of crime, often transcending the borders of one state, necessitated the creation of a clear legal framework that would classify and address such conduct as a criminal offence.[14]

Earlier Slovak legislation referred to the activity of such a group as "criminal organisations". However, the recodified Criminal Code redefined them as "organised criminal groups," reflecting the serious threat. The Criminal Code also introduced detailed regulations regarding perpetrators of crimes committed for the benefit of organised criminal groups. It established three forms of crime for the benefit of a given group and specified the imposition of criminal sanctions by these perpetrators, taking into account the increased criminal danger posed by organised crime, including increasing the upper limit of penalties and ensuring sentencing is within the upper half of the range. Another modification clarifies the concept of organised criminal groups, regulating participation and stipulating effective damages for crimes committed by these entities, as regulated in Section 125 of the Criminal Code.

The EU instrument to harmonise the merits of the offence of participation in an organised criminal group is the Council Framework Decision of 24 October 2008.[15] However, the specifics of organised crime have been included in the Slovak legal order since the adoption of the recodified Criminal Code of 2006, when some of the aforementioned provisions on

12 Treaty on European Union (signed 7 February 1992) (consolidated versions) [2016] OJ C 202/13.

13 They can cooperate, for example, to perform certain tasks and activities ensuring the operation of the organization, such as logistical or financial support, obtaining information or, conversely, covering and concealing the activities of the organization. In addition, this activity is very crucial for the functioning of the criminal organization. Michal Tomášek a jiní, *Europeizace trestního práva* (Linde 2008) 219.

14 We will clarify the division of crimes into offences and crimes in Section 14 of the Criminal Code, the defined crime then in para. 3 of the provision, see: Act no 300/2005 coll (n 11); Pavel Šámal a jiní, *Trestní zákoník I § 1–139: Komentář* (2 vyd, CH Beck 2012) 187.

15 Council Framework Decision 2008/841/JHA of 24 October 2008 on the Fight Against Organised Crime [2008] OJ L 300/42.

participation in a criminal organisation were incorporated into the Slovak law. Yet, the later amendment responded to the gradual development of EU efforts and transposed the Council's joint action.

In addition to addressing organised crime, the Council Framework Decision on Combating Terrorism was also implemented.[16] This Decision distinguished two types of criminal organisations (now essentially organised criminal groups): those aimed at committing general crimes and those committing a terrorist attack or terror on the other. The UN plays an important role in harmonising factual sub-states in this area, which helped specify national criminal laws by approving the UN Convention against International Organized Crime of 15 November 2000, referred to as the so-called Palermo Convention.[17]

Even after the implementation of the harmonisation provisions resulting from Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism,[18] no uniform arrangement has been achieved, and there are still differences in the definition of the merits of the crime in question in the individual EU Member States according to the adoption of a concept based on the principles of common law or the continental principle of law.[19]

Minor problems may arise in the mutual recognition of decisions between EU Member States because the Slovak legal system is regulated by organised criminal groups in a broader sense than provided for in the above-mentioned Framework Decision on the fight against organised crime. In other words, the provisions set out in the Criminal Code do not require the targeted crime of an organised criminal group to reach a particular threshold of danger, which, on the contrary, is foreseen by the Framework Decision above. The Slovak criminal law regulation could thus be an obstacle to the recognition of a decision by another state, which could invoke the general principles of *nullum crimen sine lege*, provided that, according to the law of that state, it has a regulation different from the Czech legislation.[20] In addition, the Government of the Slovak Republic is currently developing a concept for

16 Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism [2002] OJ L 164/3.

17 *United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN Office on Drugs and Crime 2004). The Palermo Convention is followed by three additional protocols, which are: Protocol for the Prevention, Suppression and Punishment of Trafficking in Persons, Especially Women and Children; Protocol against the Smuggling of Immigrants by Land, Sea and Air and Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts, Works and Shooting.

18 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L 88/6.

19 Tomášek a jiní (n 13) 219-38.

20 Jaroslav Fenyk, Ladislav Smejkal a Irena Bílá, *Zákon o trestní odpovědnosti právnických osob a řízení proti nim: Komentár* (3 vyd, Wolters Kluwer ČR 2024) 100-10.

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

the fight against organised crime. The measures contained in the concept follow other strategic materials such as Government Strategies in the Fight against Corruption, the National Strategy on Drug Policy, and the National Strategy on Counter-Terrorism.[21]

4 COMBATING TERRORISM

The fight against terrorism is crucial and remains one of the fundamental areas of international policy in which the EU is actively involved. Since the early efforts to harmonise legislation in this criminal domain, several problems have emerged, including the lack of a consistent general definition of terrorism or the absence of legislation altogether. Until 2002, only six EU Member States had laws addressing terrorism, and these laws were based on different political and legal traditions resulting mainly from the definition of the facts and criminal rates.

Before the EU responded to the need for counterterrorism treaties, the Council had adopted the European Convention on the Suppression of Terrorism.[22] However, this convention provided only a general definition of terrorism, listing specific forms of terrorist acts and stating that for the purpose of extradition between Contracting States, a terrorist act would not be considered a political crime, although Contracting States could make reservations against it.

At the EU level, the initial regulation of the joint fight against terrorism was enshrined in Art. K.1 of the TEU, as amended by the Maastricht Treaties, as one of the objectives of cooperation in criminal matters falling under the competence of the third pillar of the EU, specified as a matter of common interest of police cooperation for the purpose of prevention.[23] Similar to the fight against organised crime, the fight against terrorism was further addressed by primary legislation, specifically Art. 31 para. 1(e) of the TEU, as amended by the Treaty of Amsterdam.[24]

A general definition recognised at the international level was not given to the EU until the Framework Decision was adopted in 2002. This definition, based on the 2001 Common Position, identifies three key elements: how they are used or the threat of using violence, whether by groups or individuals, against the country, its institutions, population or individuals; the so-called specific motivational moments, which are further specified as "separatist goals, extremist ideological beliefs, religious fanaticism or the desire for material

21 For more information, see the website of the Office of the Government of the Slovak Republic: *Úrad vlády Slovenskej Republiky* <https://www.vlada.gov.sk> accessed 10 July 2024.

22 European Convention on the Suppression of Terrorism (adopted 27 January 1977) ETS 90.

23 Jiří Kmec, *Evropské trestní právo: Mechanizmy evropeizace trestního práva a vytváření skutečného evropského práva* (CHBeck 2006) 65-80.

24 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (signed 2 October 1997) [1997] OJ C 340/1.

gain"; and the intention to evoke a sense of fear, which may occur among the general public, individuals, groups or official representatives of the state. It must also involve an intentional act that may seriously harm a country or an international organisation, unlawfully compel a government or an international organisation to act in a certain way or to refrain from acting, or seriously destabilise or destroy the basic political, constitutional, economic or social structure of countries or an international organisation.[25]

In relation to terrorism, the Council adopted resolutions concerning the protection of victims' rights,[26] in particular in criminal proceedings, and the compensation of crime victims.[27] The latest act regulating the issue of terrorism is Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.[28] Namely, the main objective of the 2017 Directive was to prevent terrorist attacks, in the form of various activities, not only by committing a terrorist attack. In other words, Member States, including the Slovak Republic, had to incorporate forms of conduct into their criminal codes, such as training and travel for terrorism, organising or facilitating such travel, and financing terrorism. The Directive also strengthens the exchange of information gathered in ongoing criminal proceedings between Member States relating to terrorism. However, the fact remains that this Directive does not further define terrorism.[29]

In Slovak law, the concept of a terrorist attack was derived from the previous Act No. 140/1961 Coll. of the Criminal Code, effective until 31 December 2005.[30] This Act had to be recodified after the accession of the Slovak Republic to the EU to fulfil the obligations it had assumed upon joining. As part of this process, the existing legislation had to be harmonised, incorporating the definition of terrorism outlined in Art. 1 of the Framework Decision into Slovak law. The criminal rates for the offence of a terrorist attack (and other forms of "supporting" terrorism) are designed in a way that allows the possibility of imposing a special punishment on the offender under specified conditions.

25 Council Framework Decision of 13 June 2002 on Combating Terrorism [2002] OJ L 164/3, art 1. This article also defines eight specifics for a terrorist act directed against human life and freedom, the physical integrity of persons, public authorities or public security (transport systems, infrastructure, information systems, etc.).

26 Pavel Šámal a jiní, *Trestní zákoník I § 140–421: Komentář* (2 vyd, CH Beck 2012) 3049-67.

27 Resolution of the Council of 10 June 2011 on a Roadmap for Strengthening the Rights and Protection of Victims, in Particular in Criminal Proceedings [2011] OJ C 187/1, measure E; Council Directive 2004/80/EC of 29 April 2004 Relating to Compensation to Crime Victims [2004] OJ C 261/15.

28 Directive (EU) 2017/541 (n 18).

29 Ivan Šimovček a Adrián Jalč, 'Financovanie terorizmu – trestnoprávne a kriminalistické aspekty' in Marek Fryšták e Eva Brucknerová (eds), *Nové jevy v ekonomické kriminalitě: sborník příspěvků z mezinárodní konference* (Masarykova univerzita 2020) 69-70.

30 Act no 140/1961 Coll of 29 November 1961 Criminal Code 'Trestný zákon' (repealed) <https://www.zakonyprolidi.cz/cs/1961-140> accessed 10 July 2024.

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

Thus, in the field of terrorism, Slovak criminal law was harmonised with EU legislation adoption under the Third Pillar. However, we are of the opinion that the non-existent uniform definition enshrined in the European Union may have an undesirable impact on various areas of life. In other words, the individual documents regulating and generally defining the term "terrorism" provide a certain degree of legal protection, but greater emphasis is placed on national legal norms. In the case of the Slovak Republic, this primarily refers to the Criminal Code.

We find this "reliance" on national law undesirable, as it provides greater scope for interference with fundamental human rights and freedoms. We are aware of the complexity of this task, but it would be appropriate to introduce a uniform definition that would apply equally to all Member States.

5 ILLICIT DRUG TRAFFICKING

Along with the creation of the Single Market in Europe, illicit trade in all its forms has also grown. The protection of citizens in the EU area is a socially important priority also, including the fight against drug and arms trafficking, which threatens the European Union's protected interests. In addition, drug trafficking is one of the most widespread forms of organised crime in the EU.

The high importance attached to this area is also reflected in the TEU, where illicit drug trafficking is set out in Art. 29 TEU as one of the EU's objectives in the context of ensuring an area of freedom, security and justice. Given the already outlined importance of the above-mentioned area of drug trafficking, a large amount of legislation regulating the issue has been adopted. To name just a few key examples, even before the creation of the EU, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, the so-called Vienna Convention, and the European Parliament resolution on drug trafficking of 27 February 1989[31] recommended that states comply to basic principles of cooperation, such as issuing regulations, combating money laundering and forfeiture of revenues or monitoring banking systems.

At the EU level, one of the fundamental legal acts is the European Parliament and the Council Regulation (EC)[32] on drug precursors, which sets the rules for monitoring the trade in precursors between the EC and third countries. The Council Framework Decisions also established minimum provisions concerning the constituent elements of criminal offences and penalties in the field of illicit drug trafficking.[33] These decisions

31 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (signed 20 December 1988) [2001] UNTS 1582/95.

32 Jaroslav Ivor, Peter Polák a Jozef Záhora, *Trestné právo hmotné II Osobitá časť* (2 vyd, Wolters Kluwer SK 2021) 85; Regulation (EC) no 273/2004 of the European Parliament and of the Council of 11 February 2004 on Drug Precursors (Text with EEA relevance) [2004] OJ L 47/1.

33 In the Criminal Code No. 300/2005 Coll., drug crime is enshrined in Ss. 171 to 173.

specify in more detail which intentional offences are punishable and impose effective, proportionate and dissuasive penalties.[34]

The international provisions in question are designed in accordance with international obligations and are based on conventions, in particular, the Single Convention on Narcotic Drugs,[35] the Convention on Psychotropic Substances,[36] and the aforementioned Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. An extensive amendment of the Criminal Code separated hemp from other drugs and made slight changes in the regulation of the basic facts under Sections 171(1) and 172(1) of the Criminal Code, focusing on different methods of handling substances (offers, mediates, supplies) and the objects of such handling (preparations containing a narcotic or psychotropic substance). Therefore, the biggest change involved distinguishing between ″cannabis″ and ″ other drugs″, considering their health and social severity, and creating a further division of the determination of the number of drugs possessed for own use into ″more than small″.[37]

EU agencies, such as the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) and Europol, play a crucial role in addressing drug trafficking. Europol's original task was to exchange information between Member States on illicit drug trafficking, and over time, its powers were extended.

We must state that the harmonisation of European Union law with the Slovak Criminal Code has occurred consistently and without major problems. However, problems arise in harmonising European Union law with other member states for various reasons.[38] For example, some states have decriminalised specific types of drugs. This means they cannot be considered illegal in a given country. Another problem we see is a relatively different approach to imposing sanctions in the case of drug crimes. Some Member States punish drug crime with relatively high prison sentences, while other states, on the contrary, perceive drug offenders as a ″disease″ that needs to be cured and impose milder types of punishment on them.

While there are many contentious areas, for the purposes of this contribution, we consider the above calculation to be sufficient. Based on this, we conclude that the European Union, or rather its competent authorities, could promote a more uniform approach to the perception of drug crime. It would be necessary to establish basic principles for the

34 Council Framework Decision 2004/757/JHA of 25 October 2004 stipulating n minimum provisions on the facts of criminal offences and sanctions in the field of illicit drug trafficking [2004] OJ L 335/8.

35 Single Convention on Narcotic Drugs (31 March 1961) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-15&chapter=6> accessed 10 July 2024.

36 Convention on Psychotropic Substances (21 February 1971) [1976] UNTS 1019/175.

37 Šámal a jiní (n 26) 2860-906; or Tomášek a jiní (n 13) 269-87.

38 Jindřiška Syllová, Lenka Pítrová, Magdaléna Svobodová a kol, *Ústava pro Evropu: Komentář* (CH Beck 2005) 526-40.

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

perception and punishment of drug crime, which would have to be accepted by all Member States without exception. In our opinion, this would at least partially unify the legal regulation of drug offences among EU Member States.

6 ARMS TRAFFICKING

The arms trade is governed by a considerable body of conventions and legal acts at the international and European level, spanning both the I and III pillars of the EU. The basic document is the UN Arms Trade Treaty,[39] which aims to establish global control over the international arms trade. The United Nations held a conference in New York in 2013 that resulted in the adoption of the Arms Trade Treaty. Its purpose is to establish clear and binding provisions on the transfer of arms between states; it is in the interest of the EU to promote its effectiveness at the global level. This is illustrated, inter alia, by Council Decisions on EU activities in support of Arms Trade Treaties in the Framework of the European Security Strategy.[40]

Key EU acts related to the arms trade include, in chronological order, the Council Directive 91/477/EEC of 18 June 1991,[41] on control of the acquisition and possession of weapons. This Directive explicitly states that it does not affect the right of Member States to take measures to prevent illicit trafficking in arms. Later, Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008,[42] amending the previous Directive, includes in its amendments the definition of "illicit trade" in Art. 1 para. 2(b). Furthermore, the Common Position 2003/468/CFSP of the Council on 23 June 2003,[43] addresses the control of arms trafficking. The last document we want to mention is the Regulation of the European Parliament and Council 258/2012/EU of 14 March 2012.[44]

39 The Arms Trade Treaty (signed 2 April 2013) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26> accessed 10 July 2024.

40 Council Decision 2013/768/CFSP of 16 December 2013 on EU Activities in Support of the Implementation of the Arms Trade Treaty, in the Framework of the European Security Strategy [2013] OJ L 341/56.

41 Council Directive 91/477/EEC of 18 June 1991 on Control of the Acquisition and Possession of Weapons [1991] OJ L 256/51.

42 Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 Amending Council Directive 91/477/EEC on Control of the Acquisition and Possession of Weapons [2008] OJ L 179/5.

43 Council Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering [2003] OJ L 156/79.

44 Regulation (EU) no 258/2012 of the European Parliament and of the Council of 14 March 2012 Implementing Article 10 of the United Nations' Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organised Crime (UN Firearms Protocol), and Establishing Export Authorisation, and Import and Transit Measures for Firearms, their Parts and Components and Ammunition [2012] OJ L 94/1.

The Protocol on Firearms (i.e. the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition)[45] is one of three protocols that are part of the United Nations Convention against Transnational Organized Crime.[46] This protocol complements the Convention, alongside other protocols concerning trafficking in human beings (in particular women and children) and smuggling of migrants.[47]

In response to the adoption of the above protocol, Slovak legislation, namely Act No. 300/2005 Coll. on the Criminal Code, introduced Section 294. This provision is drafted relatively broadly in the Criminal Code, which, in our opinion, contributes to the punishment of a wide range of perpetrators' actions. However, attention must be drawn to the definitions related to the criminal offence under Section 294. Specifically, the special Act No. 190/2003 Coll. on Firearms and Ammunition provides a definition of a firearm, which can subsequently be applied to Section 294 of the Criminal Code.

However, in our opinion, the problem arises in the case of punishment for the trafficking of firearm components and parts, as Section 294 of the Criminal Code also punishes this offence. The Protocol on the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition deals with both concepts, but neither the Criminal Code nor the Firearms and Ammunition Act nor any other Slovak law regulates these two specific concepts. In our opinion, it would be appropriate to incorporate concepts such as ″components″ and ″parts of a firearm″ into the Firearms and Ammunition Act. This would reduce the risk of future ambiguities and problems in application practice.

7 HUMAN TRAFFICKING AND SEXUAL EXPLOITATION OF WOMEN AND CHILDREN

There is no doubt that society seeks to protect not only interests such as the trafficking of arms and drug trafficking but also the highly dangerous phenomenon of human trafficking, particularly the exploitation of women and children, who are among the most vulnerable beings in society. Some of the relevant legislation has been mentioned in the previous subchapters. The UN Convention against Transnational Organized Crime is also a key document, along with its additional protocols, to which the Council has also acceded.

45 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Components and Arms and Ammunition UN Convention against Transnational Organized Crime (31 May 2001) <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xviii-12-c&chapter=18&clang=_en> accessed 10 July 2024.

46 United Nations Convention against Transnational Organized Crime (n 17).

47 Miroslav Scheinost (ed), *Dokumenty OSN ke korupci a organizovanému zločinu* (Institut pro kriminologii a sociální prevenci 2008) 4-5.

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

However, from the point of view of harmonising the facts of trafficking in human beings, the earlier Council Decision supplementing the definition of the form of crime, "trafficking in human beings", is more important.[48] Art. 1 defines the trafficking of human beings as the subjection of a person to real and illegal captivity using violence, winning or abusing power, in particular for the purpose of exploitation in the form of prostitution or sexual abuse and violence against minors, trafficking in abandoned children or the production and distribution of child pornography.

Additional legal acts that regulate measures for combating trafficking in human beings include the Council Decision on the conclusion of the Protocol to Prevent, Suppress and Punish Trafficking in Human Beings, in particular women and children.[49] Under this Protocol, the EC has competence in relevant matters.

Also significant is the Directive on preventing and combating trafficking in human beings and protecting its victims,[50] which establishes the minimum rules for defining criminal offences and determining sanctions for their commission in the field of trafficking in human beings.

Other UN conventions on human trafficking must not be forgotten, namely the Slavery Convention,[51] the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[52] and the Convention on the Rights of the Child.[53]

In addition to the above, the Council's Framework Decision on the fight against sexual abuse,[54] which repeals the Council's Framework Decision 2004/68/CFSP on the fight against the sexual exploitation of children and child pornography, is also important for the fight against the exploitation of people. Together, these legal instruments outline the purpose and methods to combat illegal human trading.

48 Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA {SEC(2009) 358} {SEC(2009) 359} (25 March 2009) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52009PC0136> accessed 10 July 2024.

49 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000) [2005] UNTS 2237/319.

50 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1.

51 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (7 September 1956) [1957] UNTS 266/3.

52 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (2 December 1949) [1951] UNTS 96/271.

53 Convention on the Rights of the Child (20 November 1989) [1990] UNTS 1577/3.

54 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA [2011] OJ L 335/1.

From case law, the judgment of the ECtHR of 7 January 2010 in *Rantsev v. Cyprus and Russia*[55] is notable. The Court ruled that trafficking in human beings falls under Art. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits slavery and forced labour. The judgement imposes positive obligations on states to protect victims of exploitation and take appropriate measures to protect potential victims.

Trafficking in human beings can be described as a "very serious crime" as well as a "serious crime" of a non-political nature. The anchoring of the area of trafficking in human beings can be found in the recodified Criminal Code No. 300/2005 Coll, which implements not only the obligations arising from the above-mentioned international treaties but also the obligations of EU law.

Specifically, we can talk about Section 179, which states that "*whoever, by using fraudulent conduct, deceit, restriction of personal freedom, kidnapping, violence, threat of violence, threat of other serious harm or other forms of coercion, acceptance or provision of monetary payment or other benefits to achieve the consent of a person on whom another person is dependent, or abuse of his position or abuse of a defenseless or otherwise vulnerable position, lures, transports, harbors, transfers or takes over another person, even with his consent, for the purpose of his prostitution or other form of sexual exploitation, including pornography, forced labor or forced service, including begging, slavery or practices similar to slavery, servitude, forced marriage, exploitation for the commission of a crime, removal of organs, tissues or cells or other forms of exploitation, shall be punished by imprisonment for four to ten years. years.*"[56]

Furthermore, the Criminal Code extends the definition of trafficking in human beings to act involving children. It specifies that an offender who "*lures, transports, harbors, transfers or receives a child, even with his or her consent, for the purpose of child prostitution or other forms of sexual exploitation, including child pornography, forced labour or forced service, including begging, slavery or practices similar to slavery, servitude, forced marriage, exploitation for the purpose of committing a crime, illegal adoption, removal of organs, tissues or cells or other forms of exploitation.*"[57]

Both cited provisions represent basic facts that ultimately differ only in the material object of the attack (i.e. the object on which the offender directly acts when committing the crime). Paragraph 1 applies when the material object of the attack is an adult, while paragraph 2 pertains to cases where the material object of the attack is a child, i.e. a person under the age of 18.

Turning to Art. 6 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting

55 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) <https://hudoc.echr.coe.int/eng?i=001-96549> accessed 10 July 2024.

56 Act no 300/2005 coll (n 11) s 179, para 1.

57 ibid, s 179, para 2.

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

its victims, we note that it obliges Member States to adopt measures that affect exclusively legal persons committing the crime of trafficking in human beings. At this point, we must draw attention to a specific legal regulation, namely Act No. 91/2016 Coll. on the criminal liability of legal persons, which, in the conditions of the Slovak Republic, regulates the punishment and sanctions imposed exclusively on legal persons).

Art. 6 of the Directive further states that Member States impose effective, proportionate and dissuasive criminal sanctions, as well as sanctions of a non-criminal nature. This is a demonstrative list of sanctions such as exclusion from entitlement to public benefits or assistance, temporary or permanent ban on business activities, judicial supervision, court-ordered dissolution of a legal person, and temporary or permanent closure of establishments used to commit a crime.[58]

Under Slovak law, Act No. 91/2016 Coll. on the Criminal Liability of Legal Entities outlines a wide range of penalties for legal entities found guilty of human trafficking. These include the penalty of dissolution of the legal entity, forfeiture of property, a fine, prohibition of activity, prohibition of receiving subsidies or subsidies, prohibition of receiving assistance and support provided from EU funds, prohibition of participation in public procurement, and publication of a conviction.

Based on the above, we can conclude that the penalty of temporary or permanent closure of establishments used to commit a crime cannot currently be imposed in the conditions of the Slovak Republic since it is not included in the exhaustive list of Act No. 91/2016 Coll. on the Criminal Liability of Legal Entities.

Therefore, it is worth considering an amendment to the relevant provision of this special law, which would complete the process of harmonisation in this area.

8 ENVIRONMENTAL CRIME

With the development of civilisation and the increasing population in individual countries, environmental pollution has risen significantly. Perpetrators of environmental crimes have often tried to exploit the shortcomings of a particular Member State's legal regulation to cover up their illegal actions.[59] The European Union and its competent authorities have long been aware of these facts.

The first legal document adopted on the territory of the European Union was the Council Framework Decision Responding to Environmental Crimes,[60] which aimed to define

58 Directive 2011/36/EU (n 50) art 6.

59 Jaroslav Fenyk a Ján Svák, *Europeizácia trestného práva* (Bratislavská vysoká škola práva 2008) 12-20.

60 Council Framework Decision 2003/80/JHA of 27 January 2003 on the Protection of the Environment Through Criminal Law [2003] OJ L 29/55.

certain environmental crimes warranting criminal sanctions. However, the European Court of Justice annulled this Framework Decision, ruling that it interferes with the area of environmental competence conferred on the EC by the EC Treaty. This interference distorted the reciprocal position between the TEU and the TEC, as no provisions of the TEU affect the founding Treaties and the Treaties amending them.[61]

Currently, the criminal law protection of the environment is regulated by a directive of the European Parliament and the Council.[62]

This Directive replaced the annulled Council Framework Decision on environmental crime with Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on protecting the environment through criminal law. This Directive is now the most significant legal instrument protecting the environment within the European Union. It contains an exhaustive list of actions that Member States must consider as criminal offences in their national legislation. Due to their large number, it is not necessary to list them all in this contribution, but some examples can be given. Thus, according to the Directive, an environmental crime must be considered an unlawful act of the perpetrator (whether a natural person or a legal person) that is caused intentionally or is caused by at least gross negligence and represents "*the discharge, emission or introduction of a quantity of substances or ionizing radiation into the air, soil or water which causes or is likely to cause death or serious injury to health, or substantial damage to air quality, soil quality, water quality or animals or plants; the collection, transport, recovery or disposal of waste, including the supervision of such operations and the subsequent care of waste disposal facilities and including action carried out by traders or intermediaries (waste management), which causes or is likely to cause death or serious injury to health, or substantial damage to air quality, soil quality, water quality or animals or plants.*"[63] and others.

From the above, it can be concluded that the subjective side of the above-mentioned actions requires intentional fault or fault consisting in so-called gross negligence. However, the legal system of the Slovak Republic does not recognise the concept of gross negligence. Other Member States facing this issue have addressed this fact by introducing and defining this concept as a completely new type of fault into their legal system or drawing the definition of gross negligence from the case law of the Court of Justice of the European Union.

61 *Commission of the European Communities v Council of the European Union* Case C-440/05, Opion of advocate general Mazák delivered (Court of Justice, 28 June 2007) [2007] ECR I-9100.

62 Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the Protection of the Environment Through Criminal Law and Replacing Directives 2008/99/EC and 2009/123/EC [2024] OJ L 1203/1.

63 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the Protection of the Environment Through Criminal Law (Text with EEA relevance) [2008] OJ L 328/28, art 3, paras (a), (b).

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However, the Slovak Republic has not followed either of the above paths. Instead, it subsumes the concept of gross negligence under the broader term "negligence", which Slovak law recognises and uses in several places.

As regards the legal order of the Slovak Republic, the Criminal Code includes environmental crimes in the sixth chapter of the special part entitled General Dangerous and Environmental Crimes. It is necessary to note that environmental protection does not only follow from Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law but also from the Constitution of the Slovak Republic, which is located at the imaginary summit of the legal order.

Environmental crimes are exclusively regulated in the Criminal Code, specifically from Sections 300 to 310. We must state that the actions listed in Art. 3, a) to i) can also be found in the relevant provisions of the Criminal Code relatively precisely and clearly incorporated. However, we see a problem in the Directive's reliance on vague terms,[64] which may cause certain application problems when it is incorporated into national legislation.

For example, the terms "substantial damage" (mentioned in Art. 3, a) and b) of the Directive), "not insignificant amount" (referred to in Art. 3, c)) and "dangerous activity" (noted in Art. 3, d)) are not defined in the Criminal Code or in any other legal regulation. These ambiguities may lead to inconsistencies in interpretation.

In our opinion, when approximating the provisions in question, the terms mentioned in the Directives must also include the interpretation itself. Providing clear guidelines would facilitate the process of approximation and harmonisation in this area across Member States.

9 CONCLUSION

There is no doubt that the Europeanization of substantive—procedural—criminal law plays a significant role in detecting and clarifying serious criminal activity with an international element. In practice, perpetrators of criminal acts often try to camouflage their illegal actions through cross-border action, exploiting the diversity of legal regulations of individual Member States. Recognising this growing issue, the European Union was obliged to act. The only possible and effective solution was to harmonise (i.e. approximate) the legal systems of the Member States in the criminal field. In other words, the competent authorities approximate/harmonise the legal regulations governing criminal law exclusively by issuing directives that are intended for individual Member States. These directives can regulate both substantive and procedural aspects of criminal law.

64 Branislav Cepek, 'Implementácia smernice o ochrane životného prostredia prostriedkami trestného práva do právneho poriadku Slovenskej Republiky' (2015) 61(1) Acta Universitatis Carolinae Iuridica 100-1.

Given the focus and title of this contribution, we have drawn attention to the substantive aspects. Using analysis, comparison and synthesis, we identified challenges that arise in implementing and transposing directives into the Slovak Criminal Code. Specifically, we observed discrepancies in the very definition of an organised group between an EU directive addressing organised criminal activity and the Slovak Criminal Code. At first glance, this difference may seem insignificant to a legal layman. However, definitions are important for lawyers, and even such a small difference can cause significant complications in application practice due to the application of the *ne bis in idem* principle.

In the case of terrorism and terrorist crimes, we reviewed relevant documents regulating this issue and found that neither the European Union nor its Member States have adopted an official, uniform definition of terrorism. Each directive or other legal regulation defines this concept similarly, but not in the same way. This fact is, in our opinion, also undesirable. Namely, with such a serious criminal activity as terrorism, it is necessary— and even desirable— that all Member States adopt a uniform definition of this concept to ensure uniform protection of fundamental human rights and freedoms across the European Union.

In examining the acts of the European Union and their subsequent transposition into the Criminal Code, our research did not identify significant differences or shortcomings. However, we observed inconsistencies in how some states classify certain substances as narcotic and psychotropic. For example, substances deemed narcotic and psychotropic in one state may not be classified as such in another, resulting in varying sanctions. In one country, possession might be treated as a criminal offence, while in another, it could be penalised "only" with a financial fine. For this reason, we appeal to the European Union authorities to be "tougher" and more resolute in the case of harmonisation of drug crimes. Greater consistencies in this area would have a positive impact on both the commission and punishment of drug crime.

Regarding arms trafficking, we identified issues with the Slovak legal system's implementation of the relevant directive. While the Slovak Criminal Code undoubtedly punishes trafficking in weapons, parts and components (as mandated by the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition), its definition of ″firearms″ is missing. The definition of a firearm is provided for in Act No. 190/2003 Coll. on Firearms and Ammunition, but it does not extend to ″parts of a firearm″ or ″components of a firearm″. We therefore propose that these two important concepts be incorporated into the Criminal Code or the Act on Firearms and Ammunition to address this gap.

Another serious crime with international implications, to which we have drawn attention, is trafficking in human beings. The relevant EU directive, which regulates this type of crime and was intended for the Slovak Republic, lists in its provisions a calculation of sanctions that can be imposed on a legal entity, such as the temporary or permanent closure of

Access to Justice in Eastern Europe
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establishments used for criminal activity. However, this penalty is not included in the special Act No. 91/2016 Coll. on the Criminal Liability of Legal Entities. This omission is, in our opinion, erroneous, as such a penalty could significantly enhance the effectiveness of sanctions against legal entities involved in human trafficking.

Lastly, we examined environmental crime, i.e. criminal activity based on environmental damage, with reference to Directive 2008/99/EC of the European Parliament and the Council of 19 November 2008 on protecting the environment through criminal law. While this directive was transposed into the Slovak Criminal Code without major shortcomings, it contains several vague terms that lack clear definitions within the Slovak legal system. For example, terms such as "dangerous activity" or "non-negligible quantity" are particularly problematic. In our view, the use of such imprecise language should be avoided, as this may cause significant application problems in the future transposition of another directive.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ГАРМОНІЗАЦІЯ КРИМІНАЛЬНОГО ЗАКОНОДАВСТВА СЛОВАЦЬКОЇ РЕСПУБЛІКИ ІЗ ЗАКОНОДАВСТВОМ ЄВРОПЕЙСЬКОГО СОЮЗУ У СФЕРІ МІЖНАРОДНИХ КРИМІНАЛЬНИХ ПРАВОПОРУШЕНЬ

Адріан Вашко*, Ярослав Клатік та Роберт Чуха

АНОТАЦІЯ

Вступ. *У цій статті розглядаються ключові питання, пов'язані з інструментами, які використовуються для наближення визначень окремих злочинів у конкретних сферах боротьби з організованою злочинністю. Незважаючи на прагнення до комунітаризації, деякі правові конституції залишилися вкорінені в міжурядовому підході. Відповідно, у цій статті розглядаються окремі міжнародні документи, які стали основою для окремих міжнародних кримінальних правопорушень, що містяться в Кримінальному кодексі Словаччини. Як і в будь-якому процесі гармонізації правових норм окремих держав, узгодження законодавства Європейського Союзу з кримінальним правом Словаччини було непростим, і викликало багато питань щодо його застосування. У цій статті ми зосередимося на цих проблемах і дослідимо можливі рішення.*

Методи. *У цьому дослідженні застосовано стандартні методи, які зазвичай задіюються під час обробки наукових і професійних текстів, присвячених «європейському» кримінальному праву. Домінуючим методом став аналітичний, який використовувався переважно для вивчення чинного законодавства, що стосується обговорюваного питання. Крім того, було здійснено змістовний та функціональний аналіз найважливіших інститутів, які містяться у відповідних міжнародних документах та важливих судових рішеннях. У випадку зіставлення словацького та європейського законодавства використовувався порівняльний метод. У подальшому синтетичним методом були сформульовані висновки, метою яких було внести пропозиції щодо усунення недоліків та вдосконалення чинного законодавства.*

Результати та висновки. *Завдяки аналізу та порівнянню відповідної правової бази було зроблено декілька висновків. Зокрема, ми виявили, що в Кримінальному кодексі Словаччини поняття «організована злочинна група» трактується значно ширше, ніж у відповідному Рамковому рішенні. Цей факт може спричинити проблеми з визнанням рішень іншими державами. Крім того, відсутність єдиного визначення поняття «тероризм» у Європейському Союзі є проблематичною, оскільки це може призвести до неузгодженостей, які порушують основні права та свободи людини. У сфері незаконного обігу наркотиків, незважаючи на те, що не було виявлено значних проблем із застосуванням законодавства Європейського Союзу та Кримінального кодексу, існують розбіжності в межах усього Європейського Союзу, зокрема, щодо криміналізації/декриміналізації окремих видів*

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наркотиків та різного ступеня покарання, що накладаються державами-членами ЄС. Що стосується торгівлі зброєю, були виявлені недоліки в імплементації відповідного протоколу до словацького законодавства, зокрема у визначенні та поводженні з частинами та компонентами вогнепальної зброї. У справах про торгівлю людьми, вчинену юридичною особою, Кримінальний кодекс не узгоджується з вимогами відповідної директиви щодо покарання юридичних осіб. Нарешті, директива про екологічні злочини містить нечіткі терміни, які можуть викликати проблеми під час застосування положень директиви в інших державах.

Ключові слова: *комунітаризація, Європейський Союз, організована злочинність, екологічні злочини, торгівля людьми, сексуальна експлуатація жінок і дітей, незаконна торгівля зброєю.*

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Research Article

INNOVATIONS OF ARTIFICIAL INTELLIGENCE IN LIGHT OF THE APPLICABLE COPYRIGHT LAW: REALISTIC SOLUTIONS AND FUTURE PROSPECTS. A COMPARATIVE STUDY OF UAE, EGYPTIAN, AND FRENCH LAWS

Abed Fayed, Aliaa Zakaria and Alaa Abouahmed*

ABSTRACT

Background: *This paper focuses on the works and innovations accomplished by artificial intelligence (AI) and how current laws and regulations address these innovations within the framework of copyright law. It examines the challenges faced by legal systems in the UAE, Egypt, and France concerning the copyrights of intellectual works produced through AI systems, such as ChatGPT. The study highlights the issue of defining "author" in copyright law, particularly given that AI lacks the personal characteristics associated with human creators.*

Methods: *The paper employs a comparative legal analysis, focusing on the legal frameworks of the UAE, Egypt, and France. It examines how each jurisdiction currently addresses AI-generated intellectual property and whether existing laws adequately account for AI's role in creative processes. The study also explores the possibility of granting AI systems "legal capacity" and the need for a specific Code of Ethics to regulate AI use in a manner consistent with human and ethical values.*

Results and Conclusions: *The study concludes an urgent need to review and amend existing laws to create a legal framework that effectively addresses copyrights related to AI-generated innovations. This framework should balance the promotion of innovation with the protection of legal rights, ensuring that AI developments are ethically regulated and legally recognised.*

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1 INTRODUCTION

1.1. Research Subject

Artificial intelligence (**AI**) replicates human intelligence by simulating human thinking, bringing both advantages and challenges. Hence, certain measures and precautions must be taken to benefit from the positive aspects of artificial intelligence while avoiding its potential risks. Furthermore, recent developments in AI have contributed significantly to reframing the concept of copyright, given AI's capacity to generate creative content. Therefore, there is an urgent need to establish new legislative controls that regulate the use of AI across various fields of innovation.

In other words, in light of the applicable copyright laws and provisions, the issue of innovations in artificial intelligence represents a highly important matter that may require a comprehensive review of current laws and regulations. Therefore, this research paper examines several innovations introduced by AI systems and their impact on copyright and neighbouring rights protection laws. By doing so, it identifies the current status of protection, as well as any relevant shortcomings that could be addressed through the introduction of new regulations to meet all future challenges.

1.2. Research Problem

Recently, numerous artificial intelligence applications with increasingly advanced creative abilities have been introduced, raising several legal questions regarding copyright. For instance, some systems, such as ChatGPT, can now generate complete literary and artistic content that not only simulates human creativity but, in some cases, surpasses it in producing independent intellectual content. This rapid development has raised an essential legal problem concerning the protection of those new innovations in light of the currently applicable legal framework of intellectual property rights.

In other words, can the output of artificial intelligence systems be considered an innovation that is eligible for legal protection? If so, who is eligible for copyright protection—the AI system itself, the owning company, or the user operating the machine?

Naturally, addressing these questions requires an in-depth study that examines the current legal status of AI-generated intellectual works under existing copyright laws. It also necessitates considering future prospects to establish a comprehensive legal framework for the copyright protection of these non-human innovations.

1.3. Research Methodology

This paper adopts an analytical inductive comparative approach. It begins with an analysis of key legal provisions within existing applicable copyright protection laws, followed by an examination of relevant facts to identify potential solutions for any shortcomings in the legal

framework governing AI-generate innovations. Finally, the results will be subject to a comparative examination in light of UAE, Egyptian, and French law. Particular attention will be given to practical applications, considering the legal principles stated by competent courts within these jurisdictions.

1.4. Research Scope

In light of the subject of this current study—artificial intelligence vs. copyright protection law—two possible courses of action may be considered for determining the legal status of works created by AI systems:

First Course of Action

Copyright protection law (or intellectual property rights protection law) could entirely exclude the notion of providing any legal protection for works created by AI systems or smart applications, particularly those lacking human intervention or involving limited partial human intervention. However, this approach does not imply that all relevant disputes remain unsettled. If a case involving AI-generated content is brought before a competent court, it would be heard and adjudicated pursuant to existing laws. In the absence of relevant legal provisions, judges would rely on prevailing customs, general legal principles, or fundamental rules of justice to resolve the dispute.

As a matter of fact, this approach was historically quite common in intellectual property rights protection before the introduction of specialised copyright legislation and other similar rights concerning the outcomes of the human mind. During that period, the judiciary relied on general principles of law and justice to protect those rights.

Second Course of Action

Alternatively, intellectual property rights law could grant legal protection to works created by artificial intelligence by treating them as human-generated or as outcomes involving human intervention—such as the contributions of the software developer or designer of the AI system. However, this approach also presents challenges, as it does not stipulate specific solutions for all perceived problems. For example, a software developer is not the only human contributing to the work in question; AI-generated works often result from the collective efforts of several other participants.

1.5. Research Plan

In light of the above, it is imperative to address the issue of providing legal protection for works created by AI pursuant to the applicable laws and regulations. In other words, this study will examine the current legal situation, including any objections against granting AI-generated works the same legal protection afforded to human-created works under intellectual property protection laws. One key objection is the notion that such works are

Access to Justice in Eastern Europe
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the fruit or outcome of a machine. For instance, if AI applications are not recognised as authors, to whom should works generated by AI systems be attributed?

In addition, while the current solution to this dilemma represents the only realistic option in light of the applicable laws, this does not necessarily mean that future prospects will not demand alternative, forward-looking visions. Questions that arise include: What are the necessary requirements for recognising AI applications as authors? Will the proposed solution have significant legal benefits, or will it impose an unnecessary burden on the legal system?

2 INNOVATIONS OF ARTIFICIAL INTELLIGENCE IN LIGHT OF THE APPLICABLE LEGAL RULES

2.1. The Author as an Innovative Person

By virtue of intellectual property law, any intellectual work is entitled to legal protection as long as it involves an innovation introduced by its author. This principle has been acknowledged globally by all laws and conventions governing copyright protection.[1] For example, pursuant to Article 2(6) of the Berne Convention for the Protection of Literary and Artistic Works 1886,[2] legal protection is provided to the author, a stance reflected in UAE, Egyptian and French law, as well as many other comparative legal systems. That is to say, legal protection is provided for an innovative work that can be attributed to a specific author.

In this sense, the property rights of an intellectual work are granted to the author based on their creativity and innovation.[3] From this personal perspective, the legal capacity of an author can only be granted to the person who created the work. For example, Article 1 of the UAE Federal Decree-Law No.38 2021 on Copyrights and Neighboring Rights[4] and Article 138 of the Egyptian Law No.82 2002 on Intellectual Property Rights Protection[5] both

1 Michel Vivant et Jean-Michel Bruguière, *Droit d'Auteur et Droits Voisins* (2e éd, Précis, Dalloz 2013) 265, n 274.

2 Berne Convention for the Protection of Literary and Artistic Works [1972] UNTS 828/11850.

3 Article L.111-1 of the French Intellectual Property Code (CPI) provides:
"The author of a work of the mind enjoys, by the mere fact of its creation, a property right over that work." See: Loi de la République Française no 92-597 du 1992 'Code de la propriété intellectuelle' <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069414/2024-11-25> consulté le 25 novembre 2024.

4 Federal Decree-Law of the United Arab Emirates no (38) of 2021 'On Copyright and Neighboring Rights' [2021] Official Gazette 712.

5 Law of the Arab Republic of Egypt no (82) of 2002 'On the Protection of Intellectual Property Rights' (amended 2020) <https://www.wipo.int/wipolex/en/legislation/details/22066> accessed 25 November 2024.

define the term "author" as a person who creates a work.[6] Similarly, under the 1976 Copyright Act in the United States,[7] an author is defined as the creator or originator of an original work of authorship, encompassing individuals such as writers, composers, and visual artists who contribute to the creation of such works.[8]

In this context, pursuant to the Egyptian judiciary, a work eligible for legal protection is an innovative work of literature, art or practice that presents a distinctive expression, importance or purpose. Innovation is the key element on which legal protection is granted. Here, the term "innovation" refers to the mental effort of the author and their mind, which reflects their distinctive personality and is clearly visible in his work. This innovation can be seen in the subject matter, the presentation style, or the subject processing method (i.e. its arrangement and organisation). In this sense, the author's personality is evident in the work; hence, innovation becomes the cornerstone on which legal protection is based. It is the price for such protection. Therefore, a minimal limit of independent intellectual effort will always be required to qualify for copyright protection.[9]

Based on this premise, under the UAE, Egyptian and French laws, and other Latin-oriented laws, an intellectual work must reflect the personal character of its author; i.e. the author plays a pivotal role in ensuring the legal protection of his works. In contrast, AI systems lack this personal character that could be reflected and detected in the outcome of their work. That is to say, those systems depend entirely on electronic processes, as well as data and information provided by humans, without the ability to make innovative decisions or independent choices spontaneously.

Hence, AI systems' outputs may not be considered innovations or original works, pursuant to the legal standards set by the Latin school of thought. Consequently, AI-generated creations would naturally fall outside the scope of copyright protection, at least for the time being.

2.2. The Author as a Natural Person

By virtue of law, "author" is defined as a person, and in law, "person" is currently still limited to either a natural person or a legal entity. Indeed, when intellectual property law was enacted, the concept for the author was limited to natural persons; however, this concept

6 Even if the Berne Convention and French Law has not provided specific definitions for the term "Author", this does not change the fact that the said legal protection is meant for the author's innovations; and no other innovators may limit the scope of this protection; for instance, the holders of neighboring rights (especially performers) may not limit the legal protection stipulated for copyrights.

7 Copyright Act of the United States <https://www.copyright.gov/title17> accessed 25 November 2024.

8 Veronica Acevedo, 'Original Works of "Authorship": Artificial Intelligence as Authors of Copyright' (*Seton Hall University eRepository*, 2022) Student Works 1272 <https://scholarship.shu.edu/student_scholarship/1272/> accessed 25 November 2024.

9 Court Ruling no (69) Judicial Year 24 (Economic Courts, Misdemeanors Circuit – Economic (Arab Republic of Egypt), 30 January 2024).

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

was later broadened to include legal entities along with natural persons in the provisions of intellectual property protection law.

It is legally established that the author of an intellectual work is typically a natural person, with each work being attributed to the individual who created it upon its publication. Egyptian jurisprudence confirms that an author is the person who creates the work, and the work should bear the name of its author or be appropriately attributed to them unless evidence to the contrary is provided.

In addition, it is permissible for an author to publish their work anonymously or under a pseudonym, as long as there are no doubts about their true identity. That is to say, if there are any doubts concerning the author's identity, the work's publisher or producer—whether a natural person or a legal entity—may act as the representative for the author, handling their rights and affairs until the author's identity is clarified.[10]

In contrast, under French intellectual property law, a joint work is defined as a work resulting from the collaboration of a group of natural persons,[11] as is common with audiovisual and audio works. Thus, by virtue of law, the author of such works is the natural person or persons who contribute to the process of intellectual innovation. In the case of collective works, where several natural persons are involved in the work upon the guidance and instruction of a natural person or a legal entity, the latter entity may be entitled to the relevant intellectual property rights. However, this entity may not be considered as an author. This distinction is not only drawn from explicit legal provisions but also highly imperative pursuant to what is known as the "Spirit of Law" (*L'Esprit de la Loi*).[12]

Furthermore, while the provisions of the law—both in text and spirit—reflect the legislator's goals and objectives, the judiciary has consistently supported the confirmation and application of these legislative principles. Along with jurisprudence, the judiciary plays a major role in the establishment and interpretation of all relevant principles and ideas concerning the Copyrights Protection Law.[13]

When addressing the relationship between innovation and the natural person, the judiciary has always defended this connection, in spite of all relevant difficulties resulting from the surrounding environment of an industrial nature with some works of applied art.[14] For instance, the First Civil Circuit of the French Court of Cassation has ruled previously that a legal entity may not be considered an author. While a legal entity may hold original

10 ibid.

11 Article L.113-2, paragraph 1 of the French Intellectual Property Code (CPI) states:
"A collaborative work is one that has been created through the contributions of several natural persons." See: Loi de la République Française no 92-597 du 1992 (n 3).

12 Vivant and Bruguière (n 1) 270, n°282.

13 Alexandra Bensamoun, *Essai sur le Dialogue entre le Législateur et le Juge en Droit d'Auteur* (Préface de Pierre Sirinelli, PU Aix-Marseille 2008).

14 Vivant and Bruguière (n 1) 271, n°283.

copyright investments in collective works, these works are generally achieved and completed upon the instruction of the entity and published in its name.[15]

Interestingly, the ruling of the French Court of Cassation is not unique or isolated; other similar rulings have supported the same principle. The ruling by the Paris Court of Appeal on 18 April 1991 marks a significant shift concerning intellectual property rights, particularly regarding the moral rights of legal entities. The Court's decision indicated that copyright protection law has never stipulated any provisions that exclude the recognition of moral rights for legal entities that create works.

This ruling represents a departure from the earlier interpretation[16] that copyright protection, in relation to moral rights, should be attributed only to natural persons. This was previously reflected in the ruling requiring Apple to fulfil the personal fingerprint requirement for their computer software (*Logiciels*). However, with this ruling, the Court appeared to abandon the personal requirement of copyrights. Moreover, this ruling was further reinforced by similar rulings, suggesting that French courts, including the French Court of Cassation, have acknowledged and upheld this more flexible interpretation of authorship.[17] However, the question remains whether these developments mean that a legal entity could be granted the legal capacity of an author.

2.3. Legal Entity and Copyrights

If the French judiciary has partially abandoned the personal nature of copyrights, does this mean that a legal entity could be acknowledged as an author? Or, at least, could this legal entity acquire the features and traits of an author? While there have been instances where legal entities have been granted certain rights associated with works they have created, this does not necessarily equate to full recognition of their status as authors. In fact, while a few rulings have relaxed the personal nature of copyrights, there are several other rulings stating that, according to the case of collective works, a legal entity may have an investment in the work's copyrights. As such, the judiciary could grant the legal entity the capacity to enjoy those rights.

15 In this regard, Egyptian Judiciary has differentiated between Collective Works and Joint Works. That is to say, "Collective Works" are defined as follows: "It is a work that is created by a group of authors working under the guidance, instructions and supervision of a Natural Person or a Legal Entity, who develops their work plan, supervises its execution and publishes the work for his own interest, not for that of the authors". On the other hand, "Joint Works" are defined as follows: "It is a work in which the share of each participant could be distinguished and separated from the shares of all other contributors". Hence, the major difference between Collective Works and Joint Works is represented in the fact that with Collective Works, the authors work under the supervision and instructions of a Natural Person or a Legal Entity who is entitled to publish this work for his own interest; however, with Joint Works, the work is usually published by its co-authors and for their interest. See: Court Ruling no (7017) Judicial Year 70 (Administrative Judiciary (United Arab Emirates), 23 December 2020).

16 Vivant and Bruguière (n 1) 271, n°283.

17 Michel Vivant et Jean-Michel Bruguière, *Droit d'Auteur et Droits Voisins* (3e éd, Précis, Dalloz 2015).

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

The first significant attempt to raise this issue is recorded in a decision issued on 21 November 1972 by the French State Council on the property rights (*La Titularité*) of works performed by an employee of a public facility.[18] That is to say, contrary to the applicable legal provisions issued on 11 March 1957, the State Council, as well as the Court of Cassation, granted copyrights to public legal entities, even though these works fell outside the scope of collective works as defined by law.

In this sense, some jurists argue that the significance of this solution cannot be underestimated, particularly in light of the necessities that have dictated this new development—namely, the needs of public institutions.[19] In fact, those necessities may also justify a similar approach adopted by the First Civil Circuit of the French Court of Cassation on 24 March 1993, which confirmed that the economic utilisation of certain works entitles the legal entity to full property rights related to those works.[20]

In light of the above, some jurists believe that the aforementioned rulings and solutions do not imply that the judiciary is seeking to formally acknowledge legal entities, whether public or private, as authors. Instead, those actions and decisions reflect a convenient point of view that could be closely linked to the judicial approach that prefers to define originality objectively.[21] This approach aligns closely with the "Work Made for Hire" doctrine in American jurisprudence.[22] That is to say, under American Jurisprudence, the owner company is considered the author.[23] This perspective is grounded in a utilitarian view, where all involved facts are taken into consideration, including any potential disputes that could be raised in relation to the returns, rather than being concerned with the legal capacity of an author.

3 INNOVATIONS OF ARTIFICIAL INTELLIGENCE APPLICATIONS AND LEGAL SOLUTIONS

It is conceivable that several concerned parties could be involved jointly in the innovations of artificial intelligence. For instance, the innovation process might include the person who designs the AI software or application, the person who provides the application with data and information, the person who uses or manages the application, and the AI system itself,

18 Avis du Conseil d'Etat (France) n 309.721 du 21 novembre 1972 'Propriete intellectuelle et personnes publiques: Propriété littéraire et artistique' <https://www.dgdr.cnrs.fr/bo/2004/special10-04/avis-conseildetat211172.htm> consulté le 25 novembre 2024.

19 Vivant and Bruguière (n 1) 273, n°284.

20 De pourvoi no 91-16.543 (Cour de Cassation, Chambre civile 1 (République Française), 24 mars 1993) [1993] Bulletin I 126/84.

21 According to this objective view, "Originality" is no longer represented in the author's personal character; hence opening the door for the legal protection of innovations of legal entities.

22 'Work Made for Hire', *Wex* (LII 2024) <https://www.law.cornell.edu/wex/work_made_for_hire> accessed 25 November 2024.

23 See: Copyright Act (n 7) art 201.

which could be operating independently. Hence, if a single individual performs all these roles, that person would be considered the author and entitled to all relevant copyrights concerning the innovations resulting from AI.[24] However, when those roles are distributed to several persons, naturally, some problems may emerge. In other words, if the designer, data provider, and user are separate entities, a major question emerges regarding how to determine and distribute the creative copyrights among them and how these copyrights should be addressed legally.[25]

3.1. Artificial Intelligence Innovations as Public Property

According to this solution, innovations of AI could be considered works of public property, making them freely available for public and free use. However, it is well known that works of public property are typically those whose term of legal protection has expired, meaning they are no longer protected from material use.[26] This is not the case with works created by artificial intelligence, as they are novel works whose term of legal protection has not yet expired.

Based on this, this solution could address AI-generated works as public property due to their lack of authorship, which would be problematic. It contradicts most legal provisions that define works of public property[27] and the notion that AI innovations lack authorship or an innovator.

Another approach could be to treat works created by AI as works excluded from legal protection "to begin with", as stipulated in Egyptian or UAE law. But what is meant by works excluded from legal protection "to begin with", and do those AI-generated works fall under this category?

24 Ali Al-Obeidi and Shuq Hussein, 'The Legal Nature of Contracts Concluded by Artificial Intelligence According to The Uae Electronic Transactions and E-Commerce Law No (46) of 2021' (2023 International Arab Conference on Information Technology (ACIT), Ajman University, IEEE, UAE, 6-8 December 2023) doi:10.1109/ACIT58888.2023.10453892.

25 Ahmed Eldakak, 'How Can Lower-Income Countries Access COVID-19 Medicines Without Destroying the Patent System? The National Exhaustion Solution' (2022) 27(3) Journal of Intellectual Property Rights (JIPR) 181, doi:10.56042/jipr.v27i3.57951.

26 Abdelrashid Maamoun and Mohamed Abdelsadek, *Copyrights and Neighboring Rights in Light of the New Intellectual Property Rights Protection Law no (82) of 2002* (Dar Al Nahda Al Arabia 2007) 498; Ashraf Gaber, 'Blockchain and Digital Verification in the Field of Copyrights' (2020) 1 International Journal of Doctrine, Judiciary and Legislation (IJDJL) 32, doi:10.21608/ijdjl.2020.49876.1038.

27 In this regard, Clause (8) of Article (138) of the Law of the Arab Republic of Egypt no (82) of 2002 (n 5) has defined "Public Property" as follows: "It is the property, to which all non-eligible works are attributed, whether they are works excluded from legal protection to begin with, or works whose term of legal and financial protection is expired; and that is pursuant to the provisions of this part (Part III: Copyrights and Neighboring Rights)".
In addition, the Federal Decree-Law of the United Arab Emirates no (38) of 2021 (n 4) has defined works that are considered as Public Property or are attributed to Public Property as follows: "They are all works excluded from protection in the first place, or works whose term of legal and financial protection is expired".

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

Works excluded from legal protection refer to intellectual works that do not fulfil the legal requirements for protection as stated by virtue of law, namely the requirements of form (innovation) and originality (subjective or objective in character). Additionally, works that violate public order or threaten social security may also be excluded from protection.

In fact, while laws of intellectual property rights clearly define works that have been transformed into public property after the expiration of their protection period, works excluded from legal protection from the outset are addressed implicitly, based on applicable legal and judicial frameworks. In other words, any intellectual work that does not fulfil legal protection requirements is excluded from this legally stated protection, pursuant to the copyright protection laws. Nonetheless, this does not imply that such works are completely unprotected, as legal grounds may still protect against any infringements, even though they are merely not subject to copyright protection laws.

3.2. Artificial Intelligence Innovations as Creative Commons or Open-Source Works

According to this point of view, innovations of AI could be considered as Creative Commons. However, neither Egyptian nor UAE law has defined the term "Creative Commons". In general, Creative Commons refer to works that are covered by the legal protection of intellectual property protection laws but are available for use by others under certain conditions. For instance, an author may forfeit the financial rights of his work. Hence, those works would not be considered public property in the traditional sense but would remain legally protected works with full copyrights, albeit with more flexible terms.

That said, innovations created by artificial intelligence cannot be considered Creative Commons or open-source works. While no legal obstacles prevent them from becoming Creative Commons, they would still need to fulfil all the requirements and license terms. In such cases, the author (or those claiming to be the authors) could still retain full copyrights over the works.[28]

However, this assumption does not provide an adequate solution for the issue. That is to say, while the concept of Creative Commons or open-source works settles the issue of copyright assignment, it does not provide a clear solution to the following questions: Who is the author of these works? Who is entitled to the rights? These are critical questions that cannot be adequately answered by the premise of Creative Commons.

28 Abdelhadi Al-Awadi, *Free Software in Egyptian Law: A Comparative Study* (Dar Al Nahda Al Arabia 2012).

3.3. Comparing Innovations of Artificial Intelligence to Prior Innovations of Workers

From this perspective, innovations produced by artificial intelligence should be compared to those previously created by workers in the course of their work or as part of their employment. In such cases, the employer typically holds the financial rights associated with this work in exchange for paying the worker a compensatory reimbursement or proper fee. In this sense, for AI-generated innovations, the employer—whether a designer, programmer or user—would be entitled to the financial rights of those works, provided they compensate the relevant human contributors appropriately.

However, this approach could be described as dodging or avoiding the problem without providing the appropriate solution. That is to say, under certain laws—including those laws subject to this current comparative study—this premise presupposes the existence of an employer-employee relationship. In such a relationship, when a work is created, the copyrights of this work are granted to the employer.[29]

4 CONCEIVABLE LEGAL SOLUTIONS

In this regard, two potential solutions could be proposed: a) to grant the capacity of an author to all involved parties (i.e., the designer of the AI application, the provider of data and information, and the user); or b) to grant the capacity of an author to one individual only, reimbursing other contributors to the intellectual work pursuant to the rules of justice (i.e. Accession of Movables).

4.1. Artificial Intelligence Innovations as Joint Works

One perspective on addressing authorship of works created by AI is to consider them joint works. The term "joint works" here refers to creations produced by multiple contributors, distinct from collective works. A joint work may be one in which the contributions of each creator can either be identified and separated or remain inseparable.

Under Article (138/5) of the Egyptian copyright law and Article (1) of the UAE copyright law, a joint works refers to a collaborative creation in which each contributor holds

29 For example, see: Osama Ahmed Badr, 'Intellectual Works in the Provisions of Labor Law: A Comparative Study' (2008) 2 Journal of Law for Legal and Economic Research, Faculty of Law, Alexandria University 1, doi:10.21608/lalexu.2008.272800; Fréderic Pollaud-Dulian, 'Ombre et Lumière sur le Droit d'Auteur des Salariés Doctrine' (2019) 150 La Semaine Juridique - Edition Générale (JCP G) 1283.

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

copyright either to a specific, distinguishable part or to the entire work if it is not possible to specify and separate the share of each person in the work.[30]

Under this model, all involved parties—designer, data provider and user—are all considered co-authors of the AI-generated work. Each one of them would be entitled to the copyrights of their contribution or the copyrights of the entirety of the work, depending on whether it is possible to separate each share.[31]

4.2. Applying the Rules of Accession of Movables to Artificial Intelligence Works

One possible solution to the authorship and ownership challenges surrounding AI-generated works is the application of the rules of **accession of movables**. Under this approach, the competent court of law would have judicial authority in settling disputes regarding the ownership rights of the work pursuant to the rules of justice.

The concept of **accession of movables** traditionally applies when two separately owned movables become merged in such a way that separating them would cause damage. In such cases, pursuant to the rules of justice, the competent judge determines the rightful owner of the movable and provides appropriate compensation to the other party. However, in a ruling by the Paris Court of Appeal in 1993, it was held that the rules of **accession** could only be applied to tangible property, not intangible assets such as intellectual works.[32]

Nonetheless, some French jurists have challenged the notion that rules of accession should never apply to funds or intangible things. In fact, similar principles have been applied in the financial system of spouses, particularly when a jointly acquired business is later awarded to one spouse based on financial solvency.

On this basis, the exclusion of applying the principle of accession of movables to the field of copyrights is not attributed to the difficulty of such application or to the assumption that this principle requires special adaptation to be suitable to each dispute; this exclusion is attributed to other reasons. In this sense, the adoption of a legal regulation (whether it is legislative, common or customary) that prohibits applying the principle of accession of movables to derivative works should rest on the presence of an applicable legal regulation that is stipulated and specified for those works; hence, the application of this principle could be excluded with any work that is already covered by a legal or customary regulation.

30 Mohamed Abdelsadek, *Copyrights of Joint Works* (Dar Al Nahda Al Arabia 2002); Mohamad Arfam ElKhatib, 'Artificial Intelligence: Towards a Legal Definition an In-Depth: Study of the Philosophical Framework of Artificial Intelligence from a Comparative Legal Perspective' (2022) 2021 BAU Journal: Journal of Legal Studies 35, doi:10.54729/ERKF2181.

31 Ali Hadi Al-Obeidi and Muaath Sulaiman Al-Mulla, 'The Legal Basis of the Right to Explanation for Artificial Intelligence Decisions in UAE Law' (2022 International Arab Conference on Information Technology (ACIT), IEEE, UAE, 22-24 November 2022).

32 Vivant and Bruguière (n 1) 273, n°284.

Unfortunately, no such legal regulation currently exists for AI-generated works. As a result, several concerned parties must either regulate ownership rights through contractual agreements or resort to competent courts of law to resolve disputes based on principles of justice—a solution already embedded in the same legal provisions concerning the accession of movables.

5 THE FUTURE OF LEGAL PROTECTION FOR PURE ARTIFICIAL INTELLIGENCE INNOVATIONS

5.1. Pure Artificial Intelligence Innovations and Human Intervention

With regard to intellectual works created by AI systems, the primary question is always whether the AI System created the work independently and autonomously or whether human intervention has played a role. In fact, this issue has been subject to wide debate, particularly in relation to satellite images.

According to jurisprudence, even when human intervention in producing such images—or any other computer-generated works—seems minimal, it nevertheless still exists. In other words, these images are merely the result of a sequence of processes initiated by a natural person or legal entity that uses or publishes them. Hence, such works are, by definition, deemed as collective works, with copyrights granted to the natural person or the legal entity who took the initial initiative.[33]

Similarly, the same reasoning applies to works of AI systems. That is to say, AI-generated outputs stem from several processes, including designing the application, entering and arranging the data, connecting the application to the information sources, and using the application to produce work. Since these steps are initiated by a natural person or legal entity, the resulting work is ultimately attributable to them, granting them copyright ownership.[34]

Crucially, this issue here is around the assignment of financial rights of some work that has been created by a computer application or an AI system to a natural person or a legal entity; thus, although the AI system itself is not an author in the legal sense, the natural person directing the AI's operations has the author's capacity and moral authority. This person is the one performing all sequential processes of designing, arranging, and giving orders, hence accomplishing the work in its final form through the use of an electronic tool.

In this context, the European Court of Justice has reaffirmed the necessity of human authorship in copyright protection on multiple occasions, particularly in the *Infopaq* case. The court held that "Copyright law may only be applied with original works, whose originality manages to reflect the author's intellectual creativity." This ruling underscores

33 André R Bertrand, *Droit d'Auteur* 2011/2012 (3e éd, Dalloz-Action, Dalloz 2010) 105, n°103-21.

34 ibid 110, no°103-27.

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

the judiciary's consistent position that human intervention is essential for any work to be eligible for the legal protection of copyright law.[35]

Similarly, the United States Copyright Office has asserted that it will decline to register works "produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author."[36]

This principle was highlighted in a related case, where the plaintiff asserted that they had developed and owned computer programs equipped with artificial intelligence capable of generating original visual art akin to that of a human artist. One such AI system, known as the "Creativity Machine," created the work in question, titled "A Recent Entrance to Paradise". After the work's creation, the plaintiff sought to register it with the Copyright Office. However, the Copyright Office rejected the application, stating that the work "lack[ed] the human authorship necessary to support a copyright claim," emphasising that copyright law only covers works created by human authors.[37] The court rejected the lawsuit, affirming that copyright protection is a human endeavour. The ruling relied on several judicial precedents, including *Kelley v. Chicago Park District*, where the Seventh Circuit refused to recognise copyright in a cultivated garden, emphasizing that copyright protection applies only to works created by humans.[38]

English intellectual property law (Copyright, Designs and Patents Act of 1988) provides a special legal provision addressing the issue of "works accomplished by a computer system, without any human author". Article (9/3) states: "In case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken."[39]

In the same vein, the Dubai Court of Cassation has held that; "The legislator has defined a work as any innovative creation in the fields of literature, arts, or sciences, regardless of its type, the method of its expression, its significance, or its purpose. The author is the person who creates the work. A person is considered the author of a work if their name appears on it or it is attributed to them upon publication as the author, unless proven otherwise."[40]

35 *Infopaq International A/S v Danske Dagblades Forening* Case C-302/10 (CJUE (Third Chamber), 17 January 2012) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CO0302> accessed 25 November 2024; Clara Sultan, 'Droit d'Auteur et IA: L'Exemple ChatGPT' (*linkedIn - Clara Sultan*, 14 Février 2023) <https://fr.linkedin.com/pulse/droit-dauteur-et-ia-lexemple-chatgpt-clara-sultan> consulté le 25 novembre 2024.

36 Kalin Hristov, 'Artificial Intelligence and the Copyright Dilemma' (2017) 57(3) Idea: The IP Law Review 431.

37 *Thaler v Perlmutter* no 22-CV-384-1564-BAH (US District Court for the District of Columbia, 18 August 2023) <https://casetext.com/case/thaler-v-perlmutter> accessed 25 November 2024.

38 ibid.

39 Copyright, Designs and Patents Act 1988 (UK), art 9(3) <https://www.legislation.gov.uk/ukpga/1988/48/contents> accessed 25 November 2024.

40 Appeal no 683 of the Judicial Year 2023 (Court of Cassation, Commercial (Emirate of Dubai), 18 September 2024).

English courts had already applied this principle in earlier cases involving computer-generated innovations under the Intellectual Property Rights Law 1956. A notable case in 1985 involved the Daily Express newspaper, which had published a number of issues containing a computer-generated lottery. When a competing newspaper replicated the same lottery numbers, the Daily Express initiated a plagiarism claim. In their defence, the respondents argued that those lottery numbers could not be covered by the legal protection of the copyright law, as they were works not created by a human author. However, this plea was rejected on the legal grounds that the computer was merely a tool, much like a pen in a human hand.[41]

In France, Egypt, and the UAE, copyright laws provide legal protection for intellectual works involving human innovation. Hence, a work must result from human intervention to qualify for copyright protection. Authors (i.e., the natural person) may use any tangible means or tools, including computer systems or smart applications, to complete their intellectual works.

Reflecting this principle, the Bordeaux Court of Appeal ruled that copyright protection extends to intellectual works even when their initial origin is an information system, provided there is a minimal limit of originality intended by the designer.[42] Likewise, the Paris Court of First Instance ruled that: "Upon fulfilling the requirement of a human intervention, a computer-generated musical piece shall be considered as an innovation of an original work, hence being eligible for legal protection; and that is regardless to the quality of this musical piece."[43]

Interestingly, in all of the above examples, artificial intelligence is considered an auxiliary tool used in the process of human innovation; hence, the copyrights of the resulting innovation are granted to a natural person or legal entity that holds the legal personality. For example, OpenAI is considered the owner company of all contents generated by its famous application, Chat-GPT, in accordance with its General Conditions of Use (CGU).[44] That is to say, these terms and conditions define both the legal liability for publication and exploitation and the parties entitled to the copyrights of works created by ChatGPT.

Under these terms and conditions of use, an innovator may publish content written for the first time with the aid of ChatGPT (e.g., a book or any other publications), provided they acknowledge the role of AI in its creation and refrain from publishing any content that could incite hatred or serves political campaigns. Users are also permitted to reuse ChatGPT-generated content, subject to compliance with the mentioned terms and conditions.

41 *Express Newspapers v Liverpool Daily Post & Echo PLC* (Chancery Division of the High Court (UK), 28 February 1985) [1985] 3 All ER 680; Bertrand (n 33) 105, n°103-22, note de bas n°2.

42 RG n 03/05512 (Cour d'appel de Bordeaux, 31 janvier 2005).

43 Anne-Emmanuelle Kahn, 'Objet du droit d'auteur: Notion d'oeuvre musicale (CPI, art L 112-2)' dans *Juris-Classeur Propriété littéraire et artistique* (LexisNexis 2013) fasc 1138.

44 OpenAI, 'Terms of Use' (*OpenAI*, 11 December 2024) <https://openai.com/policies/row-terms-of-use/> accessed 12 December 2024.

Access to Justice in Eastern Europe
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At the same time, OpenAI retains ownership of all content and its copyrights, as the company bears legal accountability in case of any violations of the CGU in publishing or use of such content. In addition, if a user has tangibly modified AI-generated content, this user may acquire the capacity of an author of the resulting derivative work and be entitled to some copyrights. However, at the same time, OpenAI continues to hold the original content's copyrights.

Based on the above, copyrights for works created by artificial intelligence are always granted to a natural person or legal entity—that is, an entity with legal personality. This raises the question: If, one day, the legal personality of AI systems is acknowledged by law, would they then be eligible for the capacity of an author and eligible for the relevant copyrights?

5.2. The Legal Personality of Artificial Intelligence and Copyrights

As previously mentioned, copyright law is mainly concerned with providing the required legal protection for intellectual works by granting authors exclusive intangible property rights against all potential claims, i.e. an entitlement which involves both moral rights and financial rights.[45] Under copyright law, as well as French jurisprudence and judicial precedent, originality is a fundamental requirement for legal protection, which inherently means the author must be a natural person.[46]

Likewise, copyright protection laws in both Egypt and the UAE stipulate that the author must be a natural person. Article (1) of the UAE Federal Decree-Law No. (38) 2021 defines the author as a person who creates a work,[47] a definition echoed in Article (138) of the Egyptian Law No. (82) 2002. These laws explicitly state that a collective work may be created by natural persons or a legal entity, while joint works are several persons as creators.[48]

In this sense, the author must be a person, specifically, a natural person. Despite not being a natural person, a legal entity is acknowledged by intellectual property laws as it holds the legal capacity as an owner, entitling it to financial rights over some works. However, it cannot be considered the author of intellectual works.

In light of the above, even if AI were to be granted legal personality in the future, this would not necessarily confer authorship status. At most, it would extend only to financial rights over works generated by AI systems without human intervention rather than acknowledging them as authors under copyright law.

45 Loi de la République Française no 92-597 du 1992 (n 3) art L.111-1.
46 Bensamoun (n 13).
47 Federal Decree-Law of the United Arab Emirates no (38) of 2021 (n 4).
48 Law of the Arab Republic of Egypt no (82) of 2002 (n 5).

5.3. Difficulties of Acknowledging the Legal Personality of Artificial Intelligence

By virtue of law and jurisprudence, a natural person is fundamentally the only person who may be legally entitled to certain rights (*Sujet de Droits*). However, legal entities may be exceptionally entitled to such rights, depending on their recognised function. Under Egyptian Civil Law, the UAE Civil Transactions Acts 1985, and French Civil Law, legal personality is granted to some legal entities, including both public and private legal entities. These legal entities must fulfil the legal capacity required for taking any legal actions, even charitable ones, and are represented by a legal representative. In this way, a legal entity assumes legal responsibility while also acquiring legal protection against any infringements.

Despite advancements in AI and progressive legal reforms—such as French law's recognition of animals as living beings with feelings[49]—animals nor AI currently possess legal personality. While AI remains without legal status under existing laws, it is worth mentioning that several scientific attempts have been submitted to acknowledge legal personality for AI applications in the future.[50]

5.4. Feasibility of Acknowledging the Legal Personality of Artificial Intelligence Systems

Currently, French, Egyptian, and UAE laws are still highly hesitant about granting legal personality to AI systems, though there is potential for new developments in the coming years. For instance, acknowledging the legal personality of robots is an issue that is still subject to much debate; however, some countries have already taken the initiative and assumed a pioneering role in the field. Notably, in 2017, the Kingdom of Saudi Arabia granted citizenship to "Sofia," a smart robot powered by artificial intelligence.

This unprecedented move sparked significant commentary in French jurisprudence. French legal experts argue that the adoption of any similar measures in their country could cause dire consequences and endless problems, especially regarding civil rights and legal responsibility. They argue that AI should always remain, in all cases, a tool that is meant to serve man, not to replace him.[51]

49 Gwendoline Lardeux, 'Humanité, Personnalité et Animalité' (2021) 3 RTD Civ 573; Jean-Pierre Marguenaud, 'L'Animal Sujet de Droit ou la Modernité d'une Vieille Idée de René Demogue' (2021) 3 RTD Civ 591.

50 Hamdy Saad, 'The Legal Nature of Artificial Intelligence' (2021) 36(5s) Journal of the Faculty of Sharia and Law in Tanta 248, doi:10.21608/mksq.2021.269724; Hebatallah Mansour, 'Copyrights Protection for Works Published via the Internet: A Comparative Study in the French and Egyptian Laws' (DPhil thesis, Cairo University, Faculty of Law 2022).

51 Sultan (n 35): "A mon sens, adopter une solution similaire dans notre pays risquerait d'entrainer de lourdes conséquences et d'innombrables problématiques notamment en termes d'octroi de droits civiques et de responsabilité. L'IA devrait rester, en tout état de cause, un outil au service de l'homme et non un outil tendant à le remplacer …"

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6 CONCLUSIONS

This study has addressed innovations in artificial intelligence in light of the applicable copyright protection laws in the UAE, Egypt and France. The analysis has led to several conclusions that could be used to inform legal considerations. Below are the research results:

6.1. Research Results

1) The human creator remains the author: When there is a human element behind any of the processes of designing, providing data, or utilising AI software, the AI remains a technological tool rather than the author of the work. The human creator retains authorship as long as the work reflects their personal creative input and fulfils the terms stated for intellectual work protection.

2) Ultra-smart AI is not the author: In spite of their human-like abilities to act, create and make decisions, smart robots and advanced applications cannot be considered authors. Current legal frameworks require the author to be a natural person with a distinctive personal character that reflects their innovation. Even if AI systems evolve to be capable of creating intellectual works, they cannot be granted authorship until legal personality is recognised, thereby reconsidering their entitlement to the relevant copyrights.

3) There are no legal grounds for AI to have legal personality: Presently, there are no legal provisions within the applicable laws of the UAE, Egypt, or France that acknowledge AI systems or smart robots as possessing legal personality. In other words, pursuant to all applicable legal provisions, legal personality is recognised for natural persons by default and for legal entities based on their function.

4) No legal system has ever acknowledged legal personality for robots or AI: To date, no legal system has granted legal personality to robots or AI. The European Parliament has failed to find any real-life application or adoption by the legal systems of European States.[52] Even if legal personality is granted to AI systems in the future, it is unlikely that those systems would acquire the capacity of an author. The most probable achievement in this regard would be AI systems being designated as holders of rights, not authors, as legal entities are the only entities currently recognised as holders of rights under the law.

52 In this regard, we believe that it is somehow strange and unusual for the European Union to make this recommendation based on legal procedures taken with regard to the issue of Robotics by the United States of America and other countries adopting the legal system of Common Law; however, to the best of our knowledge, the mentioned legal systems have not made any decision or passed any laws that acknowledge or grant any legal personality to robots.

6.2. Recommendations

Rather than recognising AI systems as independent legal persons (*Sujets de Droit*), it is recommended that they be granted a **special legal status** (*Statut Légal)*. That is to say, in the meantime, complete recognition of their legal personality is not necessary, especially given the lack of any urgent practical need to do so. Instead, these systems could be granted some rights that reflect their advanced nature rather than treating them as mere tangible things. This approach would be akin to how some legal systems treat living beings with feelings.

A **special legal framework** should be developed to protect the copyrights of innovations created by AI systems. Legislators should investigate ways to address intellectual innovations generated by AI in light of the existing laws, thereby identifying all relevant rights and obligations concerning these innovations. The objective of this legal framework should be to strike a balance between protecting traditional copyrights and paving the way for new innovations that could emerge from artificial intelligence technologies, ultimately contributing to the enhancement of creativity and innovation in the future.

A **code of ethics** should be developed and approved for AI systems to specify all permissible and impermissible matters concerning their use and operation. In fact, it seems the world is already moving in this direction, as demonstrated by the United Nations World Organization initiative in announcing a Code of Ethics for artificial intelligence, with various legal systems— including those of the United Nations, Europe, Egypt, the UAE— working toward its adoption. To ensure responsible AI development and application, ethical principles should guide both the processes of AI-driven searches and their results, reinforcing the notion that there is no knowledge without ethics, a principle commonly agreed upon and adopted in light of the rapid development of AI technology.

The legal value of the adopted Code of Ethics for AI should be enhanced and emphasised, particularly in addressing potential infringements by AI on the rights of other parties— namely, authors and right holders whose works represent the raw material for AI-generated outputs. This is a highly significant point that requires further in-depth study.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ІННОВАЦІЇ ШТУЧНОГО ІНТЕЛЕКТУ У СВІТЛІ ЧИННОГО ЗАКОНУ ПРО АВТОРСЬКЕ ПРАВО: РЕАЛІСТИЧНІ РІШЕННЯ ТА ПЕРСПЕКТИВИ НА МАЙБУТНЄ. ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ ЗАКОНОДАВСТВА ОАЕ, ЄГИПТУ ТА ФРАНЦІЇ

Абед Фаєд, Аліа Закаріа та Ала Абуахмед*

АНОТАЦІЯ

Вступ. *У цій статті увагу зосереджено на роботах та інноваціях, здійснених штучним інтелектом (ШІ), а також на тому, як чинні закони та нормативні акти розглядають ці інновації в межах закону про авторське право. Також вивчаються проблеми, з якими стикаються правові системи в ОАЕ, Єгипті та Франції щодо авторських прав на інтелектуальні твори, створені за допомогою систем ШІ, таких як ChatGPT. Дослідження висвітлює проблему визначення «автора» у законі про авторське право, особливо з огляду на те, що ШІ не має особистих характеристик, пов'язаних з людьми-творцями.*

Методи. *У статті використовується порівняльно-правовий аналіз, у якому увагу було зосереджено на правовій системі ОАЕ, Єгипту та Франції. У роботі з'ясовується, як кожна юрисдикція наразі вирішує питання інтелектуальної власності, створеної ШІ, і чи чинні закони зважають на роль штучного інтелекту в творчих процесах у належний спосіб. Також було досліджено можливість надання системам ШІ «правової спроможності» та потребу в спеціальному етичному кодексі для того, щоб врегулювати використання штучного інтелекту відповідно до людських та етичних цінностей.*

Результати та висновки. *У результаті дослідження було зроблено висновок про нагальну необхідність переглянути та змінити чинні закони, щоб створити правову базу, яка ефективно врегульовуватиме авторські права, пов'язані з інноваціями, створеними за допомогою ШІ. Ця система має збалансувати просування інновацій та захист законних прав, забезпечивши етичне регулювання та юридичне визнання розробок ШІ.*

Ключові слова: *закон про авторське право та ШІ, права інтелектуальної власності на ШІ, проблеми авторського права в інноваціях у сфері ШІ, закон ОАЕ про авторське право, закон Франції про авторське право, моделі Chat-GPT і штучного інтелекту.*

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Research Article

LEGAL FRAMEWORKS FOR COMBATING VIOLENCE AGAINST WOMEN IN KAZAKHSTAN: ANALYSING EFFECTIVENESS AND IMPLEMENTATION GAPS

Akmaral Turarbekova, Aiman Mytalyapova, Serik Sabitov, Nagima Kala, Venera Balmagambetova and Bakhyt Altynbassov*

ABSTRACT

Background: *The legislative framework pertaining to violence against women (VAW) in Kazakhstan has undergone significant modifications in recent years, reflecting a growing recognition of the significance of comprehensive approaches to address this widespread issue. Although legal frameworks have been established to protect victims and prevent violence, challenges remain in their implementation and effectiveness. This study aims to analyse VAW legislation in Kazakhstan, examining its strengths and weaknesses, as well as its impact on victim protection and the wider social context.*

Methods: *The study employs documentary analysis to analyse key legislation and policy documents, including the Law on the Prevention of Domestic Violence and the Concept of Family and Gender Policy until 2030. Recurring themes, legislative gaps, and obstacles in their implementation were uncovered through a systematic content analysis approach.*

Results and Conclusions: *The results reveal that, though the legal instruments in Kazakhstan provide the necessary protection for victims, there are still significant challenges regarding inconsistent enforcement, limited access to support services, and deep-rooted cultural attitudes toward VAW. Access to justice for survivors of VAW remains a key issue in Kazakhstan due to significant gaps in legal protections and resources, especially in rural areas, which hinder the effective pursuit of justice. The analysis highlights the need for a more victim-centred approach, addressing the causes of VAW, and stresses that public awareness and education have a considerable impact on changing society's perception. The study concludes that despite positive developments in legislation, the application of laws against VAW in Kazakhstan suffers from improper mechanisms for implementation and support mechanisms. Therefore, there is a pressing need for increased enforcement, funding for support services, and dedication to cultural transformation. By addressing these issues, Kazakhstan can foster a safer environment.*

1 INTRODUCTION

VAW is a pervasive and deeply rooted issue globally that affects millions of people's lives worldwide.[1] It can take many forms, including physical, sexual, emotional, and economic violence, non-partner sexual assault, intimate partner violence, and female genital mutilation.[2] Beyond the direct injury to victims, VAW has an impact on the social, cultural, and economic spheres and influences public health and financial stability.[3]

In Kazakhstan, VAW has become a pressing issue that requires immediate response.[4] Kazakhstan has made significant progress in protecting human rights and addressing VAW over the past few decades.[5] These efforts are evident in the development and enforcement of numerous legislative and policy measures, including the adoption of the Concept of Family and Gender Policy in the Republic of Kazakhstan until 2030,[6] the creation of the Concept of Ensuring Public Safety in partnership

1 Sesha Kethineni, Murugesan Srinivasan and Suman Kakar, 'Combating Violence against Women in India: Nari Adalats and Gender-Based Justice' (2016) 26(4) Women and Criminal Justice 281, doi:10.1080/08974454.2015.1121850; Selver B Sahin, 'Combatting Violence against Women in Turkey: Structural Obstacles' (2022) 28(2) Contemporary Politics 204, doi:10.1080/13569775.2021.1992131; Margarita Garfias Royo and others, 'Violence against Women in Corregidora, Mexico: The Disconnect between Women's Experiences and Stakeholders' Views' (2024) 34(1) Development in Practice 49, doi:10.1080/09614524.2023.2265586.

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5 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.

6 Decree of the President of the Republic of Kazakhstan no 384 of 06 December 2016 'The Concept of Family and Gender Policies in the Republic of Kazakhstan until 2030' <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC192054/> accessed 5 October 2024.

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with society for 2024-2028,[7] and the enactment of the Law on the Prevention of Domestic Violence.[8]

A significant turning point in the legal response to VAW was the passage of the Law on the Prevention of Domestic Violence in 2009, designed to provide a thorough framework for victim support and protection. However, the effectiveness of this legal framework remains uncertain. International human rights organisations and independent observers often document the pervasiveness of VAW in Kazakhstan.[9]

Although significant legal measures, such as the Law on Domestic Violence and ratification of international human rights treaties like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[10] have been introduced, enforcement challenges persist.[11] Many women still face barriers to accessing justice due to societal stigma, limited awareness of their legal rights, and inadequate support from law enforcement authorities.[12]

Given the legislative advancements and the commitment to international human rights standards, it is crucial to analyse the current legal frameworks addressing VAW in Kazakhstan. This examination can offer valuable insights into the effectiveness of current laws while identifying implementation gaps that impede their practical application. This article seeks to contribute to the ongoing discussion on enhancing policies and practices to tackle VAW in Kazakhstan by examining these dimensions.

7 Resolution of the Government of the Republic of Kazakhstan no 1233 of 29 December 2023 'The Concept of Ensuring Public Safety in Partnership with Society for 2024-2028 (in the field of crime prevention)' <https://adilet.zan.kz/kaz/docs/P2300001233> accessed 5 October 2024.

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11 Statistical Committee of the Ministry of National Economy of the Republic of Kazakhstan, *Sample Survey Violence Against Women in Kazakhstan* (Ministry of National Economy of the Republic of Kazakhstan 2017) <https://eca.unwomen.org/en/digital-library/publications/2018/08/sample-survey-on-violence-against-women-in-kazakhstan> accessed 5 October 2024.

12 Dalmatov and others (n 5); Joshi and Childress (n 4).

2 LITERATURE REVIEW

VAW is a widespread violation of human rights that affects both individual victims and societal cohesion. It highlights the urgent need for effective identification of victims and perpetrators, as well as the implementation of comprehensive rehabilitation programs, particularly in low and middle-income countries.[13] VAW is often caused by gender inequality, cultural norms that encourage male dominance, economic dependency, and a lack of legal protections and support systems for victims.[14].

Recent global studies indicate that resolving these problems is essential to enhancing the efficacy of legal frameworks and guaranteeing that victims receive sufficient protection and assistance. According to Qazi Zada,[15] women in Afghanistan will continue to experience extreme discrimination and violence if structural problems are not addressed. These include conflicts between Islamic law and customs, ambiguous authority in constitutional interpretation, and inadequate implementation of VAW laws. The author emphasises how Afghanistan's legal and constitutional framework has numerous inconsistencies and gaps that compromise women's rights and perpetuate VAW. The analysis revealed that significant reforms are required, including strengthening current legislation, such as the Elimination of Violence Against Women statute, and amending the constitution.

Similarly, Mitali Jahan's study[16] found that despite the enactment of the Domestic Violence Act in 2010, domestic violence in Bangladesh is widespread due to poor implementation, cultural barriers, and lack of comprehensive support services. The findings highlight the need for a multifaceted approach to tackle the problem effectively.

Several studies emphasise that education enhances individuals' ability to acquire and process new information, leading to better decision-making, including increased legal awareness of new laws and services related to gender equality and VAW.[17] Education is

13 Gokdemir and others (n 3).

14 Rebecca L Heron, Maarten Eisma and Kevin Browne, 'Why Do Female Domestic Violence Victims Remain in or Leave Abusive Relationships? A Qualitative Study' (2022) 31(5) Journal of Aggression, Maltreatment and Trauma 677, doi:10.1080/10926771.2021.2019154; Washington Muzavazi and others, 'A Comparative Analysis of the Causes of Gender-Based Violence Against Women Between Low and High-Income Households in Manicaland Province of Zimbabwe' (2022) 8(1) Cogent Social Sciences 2138104, doi:10.1080/23311886.2022.2138104.

15 Sebghatullah Qazi Zada, 'Breach of Afghanistan's International Obligations Using the Due Diligence Standard to Combat Violence against Women' (2021) 25(10) International Journal of Human Rights 1857, doi:10.1080/13642987.2021.1895764.

16 Mitali Jahan, 'How Legal Change Happened through Effective Policy Advocacy in Bangladesh: Adoption of the Domestic Violence Law' (2017) 23(3) Asian Journal of Women's Studies 401, doi:10.1080/12259276.2017.1351590.

17 Bilge Erten and Pinar Keskin, 'Does Knowledge Empower? Education, Legal Awareness, and Intimate Partner Violence' (2022) 28(4) Feminist Economics 29, doi:10.1080/13545701.2022.2061029.

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

instrumental in tackling VAW by addressing its root causes, changing society's attitudes, and empowering individuals.[18]

Meanwhile, some authors stress the effectiveness of grassroots advocacy and informal women's courts in empowering women, particularly in rural areas, through legal literacy and offering prelitigation alternatives to formal courts.[19] Others argue that the implementation of independent legal representation for victims of intimate partner violence in family violence court proceedings can help protect their rights, ensure safety, and provide support during complex legal processes, but there are concerns about potential imbalances in adversarial systems.[20]

Effectively preventing domestic violence in low and middle-income countries necessitates a deep understanding of the sociopolitical, economic, and cultural contexts, along with coordinated efforts and collaboration among various stakeholders at multiple levels.[21] Alongside these measures, the importance of robust national legislation on VAW cannot be overstated. Effective legislation provides clear definitions of violence, outlines the rights of victims, and establishes the duties of authorities in preventing and addressing VAW.[22] Such legislation forms the cornerstone of individual protection and creates a legal framework to ensure accountability for offenders. Analysing national legislation on VAW is crucial for several reasons, as it serves to identify gaps, enhance legal protections, and promote accountability.

3 METHODS

This study employs a qualitative research design to explore the effectiveness of legal frameworks addressing VAW in Kazakhstan and to identify the implementation gaps. A qualitative approach is deemed appropriate for understanding the complex interplay of legal, social, and cultural factors and the efficacy of existing laws. Documentary analysis is conducted to examine key legal and policy documents concerning VAW in Kazakhstan, such as the Law on Prevention of Domestic Violence, its subsequent amendments, and the

18 Leah Okenwa-Emgwa and Eva von Strauss, 'Higher Education as a Platform for Capacity Building to Address Violence against Women and Promote Gender Equality: The Swedish Example' (2018) 39 Public Health Reviews 31, doi:10.1186/s40985-018-0108-5.

19 Kethineni, Srinivasan and Kakar (n 1).

20 Mary Iliadis, Kate Fitz-Gibbon and Sandra Walklate, 'Improving Justice Responses for Victims of Intimate Partner Violence: Examining the Merits of the Provision of Independent Legal Representation' (2021) 45(1) International Journal of Comparative and Applied Criminal Justice 105, doi:10.1080/01924036.2019.1695639.

21 Erminia Colucci and Ghayda Hassan, 'Prevention of Domestic Violence against Women and Children in Low-Income and Middle-Income Countries' (2014) 27(5) Current opinion in psychiatry 350, doi:10.1097/YCO.0000000000000088.

22 Fei Qi, Yuqi Wu and Qi Wang, 'Anti-Domestic Violence Law: The Fight for Women's Legal Rights in China' (2020) 26(3) Asian Journal of Women's Studies 383, doi:10.1080/12259276.2020.1798069.

Concept of Family and Gender Policy until 2030. While this study provides valuable insights into the legal frameworks and implementation gaps regarding VAW in Kazakhstan, it is important to acknowledge some limitations. The availability of documentation can potentially affect the comprehensiveness of the data collected.

4 FINDINGS AND DISCUSSION

The findings reveal significant advancements in Kazakhstan's legislative and policy frameworks to address VAW and promote family welfare. Adopting the Concept of Family and Gender Policy until 2030 on 6 December 2016,[23] demonstrates a long-term commitment to integrating gender considerations into national development strategies. Additionally, the Concept of Ensuring Public Safety for 2024-2028, adopted on 29 December 2023,[24] emphasises a collaborative approach between government entities and civil society, highlighting the importance of community engagement in enhancing public safety.

The enactment of the Law on the Prevention of Domestic Violence on 4 December 2009,[25] marks a critical milestone in providing legal protections for victims, reflecting a shift towards more robust mechanisms for addressing domestic abuse and VAW. These efforts show a thorough strategy for addressing VAW and highlight Kazakhstan's dedication to building a more secure and just society.

4.1. Key Legislative Frameworks

4.1.1. Law on the Prevention of Domestic Violence (2009)

The Law of the Republic of Kazakhstan, "On the Prevention of Domestic Violence," establishes the legal, economic, social, and organisational foundations for preventing and combating VAW in Kazakhstan. It defines various forms of violence, including economic, sexual, psychological, and physical violence. The law incorporates clauses from international treaties that Kazakhstan has ratified and is based on the country's constitution. It also defines the competencies of various state bodies, including the government, local authorities and commissions on women's affairs, as well as healthcare bodies. The law provides a well-rounded framework addressing various forms of domestic violence, including physical, psychological, sexual, and economic abuse.

The law references international treaties that Kazakhstan has ratified, ensuring that the domestic legislation aligns with global human rights standards, including the Convention on the Elimination of All Forms of Discrimination Against Women. Moreover, the law

23 Decree of the President of the Republic of Kazakhstan no 384 (n 6).

24 Resolution of the Government of the Republic of Kazakhstan no 1233 (n 7).

25 Law of the Republic of Kazakhstan no 214-IV ZRK (n 8).

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

stresses the importance of confidentiality and a personalised approach, guaranteeing victims' privacy and unique circumstances. Preventive measures such as protective orders and individualised prevention strategies have been prioritised, significantly shifting from a reactive stance to proactive measures. Early intervention is crucial to prevent the escalation of violence.[26]

The law stipulates the duties of various government entities, such as the Ministry of Internal Affairs, healthcare agencies, and local authorities. To develop a comprehensive response to VAW, it is crucial to have interagency cooperation.[27] The introduction of various preventive measures (Article 17) includes protective orders, administrative penalties, and mandatory medical treatments. Through a diverse range of options, authorities can tackle VAW from multiple angles and address different levels of abuse while also ensuring victim protection.

To prevent repeat offences, the law targets offender's behaviour through interventions such as counselling and protective orders. Article 20 establishes protective orders as a key measure for ensuring victim safety, taking direct action to prevent further harm by preventing the perpetrator from contacting or approaching the victim. The urgency to protect victims is increased by the requirement to enforce protective orders within 24 hours.

Additionally, the law specifies that preventive measures should be tailored to the specific circumstances of the perpetrator (Article 17, Clause 3), ensuring that the responses are proportionate and effective, thereby minimising the risk of excessive or ineffective punishment. Additionally, the law enforces administrative detention (Article 21) and imposes further behavioural restrictions on the perpetrator, such as limitations on communication and movement (Article 22). This approach guarantees a robust response to domestic violence while also providing avenues for legal and social rehabilitation.

A significant criticism of the law is the insufficient enforcement mechanisms. While the law sets out preventative measures, such as protective orders, there are concerns about their effectiveness and the capacity of law enforcement agencies to respond promptly. Instances of non-compliance or violation of protective orders may go unpunished, diminishing their deterrent effect. Nevertheless, some studies stress that when the victim and the offender live 25 miles or more apart, regardless of any in-person, phone, or online interactions, the likelihood of a protective order violation is almost zero.[28] The effectiveness of protective orders and victim protection tactics may, therefore, be improved by addressing the enforcement gap and using geographic distance as a mitigating factor.

26 Maria M Raguz, 'Lessons Learned from Research, Prevention, and Intervention in Gender Violence' (2021) 49(4) Journal of Prevention and Intervention in the Community 311, doi: 10.1080/10852352.2019.1664714.

27 Jahan (n 16); Qazi Zada (n 15).

28 Lawrence L Bench, Terry Allen and Emily Douglas, 'Spatial and Temporal Distance Between the Victim and Offender as a Factor in Protective Order Violations: How Much Distance Is Enough?' (2022) 28(10) Violence Against Women 2359, doi:10.1177/10778012211032709.

VAW remains heavily stigmatised in Kazakhstan, resulting in substantial underreporting of incidents.[29] The law fails to adequately tackle the entrenched cultural norms and societal pressures that often inhibit victims, especially women, from speaking out. In traditional communities, concerns about family honour and social pressure can outweigh the legal protections provided, resulting in the silencing of victims.[30] Although the law is gender-neutral, women in Kazakhstan disproportionately experience domestic violence. The absence of a clear recognition of the gendered nature of domestic violence may restrict the law's effectiveness in confronting the systemic challenges women encounter. Implementing gender-sensitive legal frameworks is crucial to acknowledge and address these power dynamics.[31]

While the law addresses various forms of domestic violence, some definitions, especially those related to economic and psychological violence, are vague and subject to interpretation. This ambiguity can result in inconsistent enforcement and judicial rulings, thereby limiting the protection afforded to victims.[32] Although the law refers to special social services, the availability and quality of these services can vary significantly between regions. Rural areas, in particular, often lack adequate shelters, counselling, and legal aid for victims, which exacerbates the vulnerability of women in these communities.[33] The sanctions imposed on perpetrators, such as administrative detention, may not be sufficient as a deterrent. In many cases, incidents of domestic violence are classified as minor administrative offences rather than serious criminal acts, which diminishes the severity of the response. Furthermore, there is a lack of rehabilitation programs for perpetrators, which could help address the underlying causes of violence.[34]

One of the law's shortcomings is its lack of specificity regarding implementing preventive measures. For example, while Article 17 presents a wide array of individual prevention strategies, it fails to provide clear guidelines on when or how these measures should be prioritised or combined, leading to inconsistent application across different regions.

29 Human Rights Watch (n 9).

30 Naila Sohrat Tasbiha and Arshia U Zaidi, 'The Psycho-Social Factors That Escalate Intimate Partner Violence (IPV) among South Asian Women in North America: An Intersectional Approach and Analysis' [2023] Journal of Human Behavior in the Social Environment 1, doi:10.1080/10911359.2023.2291436.

31 Maria Mousmouti, 'Gender-Sensitive Law-Making: Concept and Process' (2022) 10(3) Theory and Practice of Legislation 223, doi:10.1080/20508840.2022.2125704.

32 Sheetal Ranjan, 'Domestic Violence Legislation in Greece: Analysis of Penal Mediation' (2020) 30(1) Women and Criminal Justice 42, doi:10.1080/08974454.2019.1646192.

33 Linda Murray and others, 'Between "Here" and "There": Family Violence against Immigrant and Refugee Women in Urban and Rural Southern Australia' (2019) 26(1) Gender, Place and Culture 21, doi:10.1080/0966369X.2018.1553862.

34 Jessica Bouchard and Jennifer S Wong, 'Disparate Approaches to Intimate Partner Violence Intervention: A Preliminary Investigation of Participant Outcomes across Two Community-Based Programs' (2021) 42(11) Deviant Behavior 1396, doi.org/10.1080/01639625.2020.1750569; Gokdemir and others (n 3).

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

Although the law establishes procedures for victim protection, it lacks comprehensive support measures, such as psychological counselling or legal aid, which are vital for victims' long-term recovery. The law would benefit from adopting a stronger victim-centred approach that emphasises not only prevention but also healing and support.

The involvement of multiple agencies in administering individual preventive measures (Article 17, Clause 3-1) presents another challenge, as it can result in bureaucratic delays that may jeopardise victims' safety. Streamlining processes and enhancing inter-agency coordination would ensure faster and more efficient responses to reported incidents. Furthermore, while the law focuses on preventive measures for perpetrators, it does not include sufficient provisions to support victims, such as housing, financial assistance, or long-term social services. This gap may hinder victims from escaping abusive situations due to their economic dependence on the perpetrator.

Additionally, the penalties stipulated by the law, such as administrative fines or restrictions on contact, may not provide adequate deterrence for repeat offenders. The lack of severe criminal penalties for domestic violence offences could undermine the law's effectiveness in preventing future abuse. Although Article 25 mandates confidentiality for victims' personal information, which is essential for protecting their privacy, it does not specify clear mechanisms for enforcement or penalties for breaches of confidentiality, leaving victims exposed to further risks.

Cultural factors also hinder the law's implementation. Traditional gender roles and patriarchal structures in Kazakh society often prioritise family privacy over individual safety, perpetuating domestic violence. The law fails to adequately address these social norms, significantly impacting enforcement. This mirrors challenges highlighted by Qazi Zada in Afghanistan, where traditional cultural norms contribute to ongoing violence and discrimination against women.[35]

Moreover, the law's effectiveness is further limited by a general lack of public awareness regarding VAW and victims' rights. While comprehensive educational campaigns are vital for shifting public attitudes toward domestic violence, the law does not sufficiently mandate outreach efforts.[36] Most importantly, the judiciary's interpretation and enforcement are the most crucial factors in whether the law succeeds. The present framework currently lacks the emphasis on continuous training for law enforcement and judicial authorities, which is crucial for effective implementation.[37]

35 Qazi Zada (n 15).

36 Julette N Anderson, 'Effects of Education on Victims of Domestic Violence' (Walden Dissertations and Doctoral Studies, Walden University 2015) 345 <https://scholarworks.waldenu.edu/dissertations/345> accessed 5 October 2024.

37 Kai Lin and others, 'Chinese Police Officers' Attitudes toward Domestic Violence Interventions: Do Training and Knowledge of the Anti-Domestic Violence Law Matter?' (2021) 31(7) Policing and Society 8786 doi:10.1080/10439463.2020.1797027.

To eradicate VAW and fortify Kazakhstan's legal system, the legislation should impose more severe penalties for violating protective orders and guarantee that law enforcement organisations have the tools and training they need to handle domestic abuse cases in a timely and efficient manner. Moreover, acknowledging the gendered nature of domestic violence could help develop more focused interventions that address the unique needs of women and girls, who are the primary victims.[38] Policy decisions could be informed by the collection and utilisation of gender-disaggregated data. Moreover, the government should mandate awareness campaigns that aim to educate the public on domestic violence, victims' rights, and available legal resources. These campaigns should focus particularly on rural and conservative areas, where awareness is often limited. Furthermore, the law could benefit from providing clearer guidance on enforcing protective orders and preventive measures, including specifying timelines for implementation and outlining consequences for delays.

Overall, the Law "On the Prevention of Domestic Violence" offers a strong framework for addressing VAW. However, its effectiveness is hindered by enforcement challenges, cultural norms, and a lack of clarity in implementation. Reforms should place a high priority on bolstering enforcement mechanisms, raising public awareness, specifically addressing gender-based violence, and improving victim support services.[39] Addressing these gaps could improve the law's effectiveness in combating VAW in Kazakhstan.

4.1.2. Concept of Family and Gender Policy until 2030

Another significant policy document, the Concept of Family and Gender Policy in the Republic of Kazakhstan until 2030 (the Concept), seeks to address domestic and gender-based violence by using a strategic framework to advance gender equality and improve family dynamics. The Concept stresses that 26.5% of Kazakhstan's population has witnessed cases of domestic violence, and 32.4% believe the situation has deteriorated over the past five years. According to the Concept, domestic violence is caused by internal factors, such as alcoholism, drug abuse, and mental illnesses, and external factors, such as low income, unemployment, and lack of education. Furthermore, the Concept indicates that individuals in rural areas are more hesitant to acknowledge domestic violence as a problem (11.6%) than their urban counterparts (4%). This emphasises the significance of awareness campaigns and interventions in rural areas to address the lack of knowledge and potential underreporting of domestic violence. Several studies found that in rural areas, addressing

38 Mary Ellsberg and others, 'Prevention of Violence against Women and Girls: What Does the Evidence Say?' (2015) 385 Lancet 1555, doi:10.1016/S0140-6736(14)61703-7.

39 Cyndirela Chadambuka and Ajwang' Warria, 'Examining Support Systems Available for Victims of Intimate Partner Violence in Rural Areas in Zimbabwe' (2020) 32(5) Practice 381, doi:10.1080/09503153.2020.1750579; Carina Gallo and Kerstin Svensson, 'An Influential Child of Its Time: Victim Support Sweden and the Changing Discourse on Violence against Women' (2021) 22(1) Nordic Journal of Criminology 90, doi:10.1080/2578983X.2021.1898754.

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

the lack of knowledge about support systems and reducing underreporting of domestic violence requires awareness campaigns and community-based interventions, such as informal support networks and women's advocacy groups.[40]

The Concept appropriately identifies unemployment (55.9%) and harmful behaviours such as alcoholism and drug addiction (52.8%) as significant contributors to domestic violence. However, it neglects to address deeper cultural and systemic issues, such as patriarchal attitudes, that perpetuate gender-based violence. Effectively tackling gender inequality at its root requires challenging cultural norms that reinforce male dominance and female subordination within families.[41]

While the Concept prioritises victim assistance, it lacks effective measures to deal with perpetrator behaviour. Economic considerations are important, but more focus should be placed on rehabilitating violent offenders, enforcing harsher laws, and encouraging non-violent masculinity. This can entail making counselling and anger management courses mandatory. According to the survey results, 15.1% of respondents view the lack of criminal responsibility for domestic violence as a major concern. Yet, the document does not suggest any specific legislative reforms to address this gap.

Although the Concept acknowledges gender stereotypes as a contributing factor (22.7%), it fails to propose specific educational or media campaigns to change public perceptions. Comprehensive public education initiatives, starting in schools, are essential to challenge harmful norms and promote gender equality. Such efforts are necessary to address deeply rooted gender stereotypes.[42]

Despite its ambitious goals, the Concept lacks detailed timelines, accountability mechanisms, and specific resource allocations, making it difficult to implement. Without precise standards and frequent reviews, the strategy risks remaining aspirational rather than practical. Transparency should be increased through external assessments by impartial parties, including non-governmental organisations, and regular public reporting on project progress.

The policy would also benefit from incorporating global best practices for combating gender-based violence. For instance, adopting a human rights-based approach, similar to the Istanbul Convention, could promote a more victim-centred and comprehensive strategy. Although economic dependence is identified as a contributing factor to domestic violence (15.8%), there is limited discussion on empowering women economically to escape abusive situations. Prioritising initiatives that enhance women's access to

40 Kethineni, Srinivasan and Kakar (n 1); Chadambuka and Warria (n 39).

41 Rebecca Helman and Kopano Ratele, 'Everyday (in)Equality at Home: Complex Constructions of Gender in South African Families' (2016) 9(1) Global Health Action 31122, doi:10.3402/gha.v9.31122.

42 Endah Ratnawaty Chotim, 'Implementation of Gender Equality in Schools' (2022) 4(2) International Journal of Science and Society (IJSOC) 399, doi:10.54783/ijsoc.v4i2.454.

education, job training, and financial independence, as economic empowerment can dramatically lower gender-based violence.[43]

In summary, the Concept demonstrates strengths in its emphasis on interagency cooperation and improving data collection. However, its effectiveness may be limited without strong legal mechanisms and proactive educational campaigns. To succeed, the policy requires a more comprehensive approach that includes legislative reforms, rehabilitation for perpetrators, challenging societal norms, and ensuring accountability.

4.1.3. Law on Amendments and Additions to Certain Legislative Acts (2024)

The Law "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Ensuring the Rights of Women and the Safety of Children"[44] adopted on 15 April 2024, has significantly enhanced the legal framework concerning family policy, women's rights, and child protection in Kazakhstan. Among its notable contributions is the introduction of key definitions, including the "authorised body in the field of state family policy" and the "contact centre '111'" for family-related issues. By officially recognising these entities, the law establishes a clearer framework for handling family legal matters, potentially enhancing coordination among different government agencies. Furthermore, the establishment of family support centres reflects a proactive approach to dealing with social issues. These centres are tasked with implementing state family policy measures, coordinating assistance for families in challenging situations, and offering legal and psychological support.

The law emphasises the protection and promotion of traditional family values, as well as the moral upbringing of children. Although this emphasis may resonate with certain parts of society, it risks excluding non-traditional family structures and marginalising groups such as single-parent families or those who do not conform to traditional norms. Another significant provision is represented by the inclusion of temporary accommodation for individuals experiencing domestic violence. Furthermore, the law's requirement to monitor and analyse trends in family policy ensures the adaptability of measures over time.

Significant amendments to the Criminal Code are also included, particularly regarding violence against minors. The law aims to enhance the protection of vulnerable

43 Suelen Cipriano Milhomem Dantas and others, 'Proposal to Combat Violence against Women from Women's Social and Financial Emancipation' (2022) 9(5) International Journal of Advanced Engineering Research and Science (IJAERS) 157, doi:10.22161/ijaers.95.14; Isabel Eggers del Campo and Janina Isabel Steinert, 'The Effect of Female Economic Empowerment Interventions on the Risk of Intimate Partner Violence: A Systematic Review and Meta-Analysis' (2022) 23 (3) Trauma, Violence, & Abuse 810, doi:10.1177/15248380209760

44 Law of the Republic of Kazakhstan no 72-VIII ZRK of 15 April 2024 'On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Ensuring the Rights of Women and the Safety of Children' <https://adilet.zan.kz/kaz/docs/Z2400000072> accessed 5 October 2024.

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

populations by defining specific crimes related to child violence and imposing stricter penalties. However, proper implementation and enforcement are crucial for the effectiveness of these measures. A progressive approach to rehabilitation and prevention is reflected in the introduction of special behavioural requirements for those convicted of crimes against minors, such as mandatory counselling and restrictions on contact with victims. To achieve their intended impact, the law must ensure that these measures are effectively enforced and monitored. Updated definitions of offences related to suicide and assault are vital for addressing contemporary social issues, while differentiated penalties for crimes against minors indicate a heightened sensitivity to the needs of society's most vulnerable members.

Despite its strengths, the law's effectiveness will rely heavily on substantial resources, training, and commitment from local authorities. The effectiveness of the family support centres and the contact centre '111' depends on their operational preparedness and inter-agency collaboration. Moreover, the emphasis on traditional family values could unintentionally overlook the needs of various family structures. Policies must remain flexible and inclusive to guarantee that rights are protected for all children and women, regardless of their family circumstances.

Continuous monitoring and evaluation mechanisms are necessary to assess the effectiveness of newly implemented policies. Such mechanisms will help identify challenges and enable timely adjustments to the legal framework.

To sum up, while this study highlights notable progress in Kazakhstan's legislative and policy measures to combat violence against women, the success of these initiatives ultimately depends on effective implementation.

4.2. Access to Justice for Victims of Violence Against Women in Kazakhstan

Effective addressing VAW requires access to justice, ensuring survivors receive the protection and remedies they need.[45] Over the past decade, Kazakhstan has made significant progress in enhancing its legal and institutional frameworks to combat VAW. In 2023, a total of 60,852 administrative cases related to domestic violence were reviewed in Kazakhstan, of which 58,311 were handled by the courts and 2,541 by authorised bodies.[46]

Domestic violence cases have a new investigative approach to administrative procedures introduced by the Administrative Offenses Code of the Republic of Kazakhstan

45 Graeme Blair and Nirvikar Jassal, 'Accessing Justice for Survivors of Violence against Women' (2022) 377(6602) Science 150, doi:10.1126/science.abp9.

46 Human Rights Commissioner in the Republic of Kazakhstan, *About Combating Family and Domestic Violence: Special report* (National Center for Human Rights 2024) <https://www.gov.kz/memleket/entities/ombudsman/documents/details/619960?lang=en> accessed 5 October 2024.

on 1 July 2023. Furthermore, the possibility of reconciliation between the parties has been eliminated; only one reconciliation is allowed during the judicial proceeding stage, which minimises the harmful practice of psychological pressure on victims.[47]

Despite these efforts, the practical realisation of justice for victims remains a challenge. Human Rights Watch notes that while the Law on Prevention of Domestic Violence has been implemented in Kazakhstan, there are still significant gaps that prevent women from effectively protecting themselves from VAW.[48] The lack of access to specialised social services and inadequate implementation of existing laws hinder access to justice for survivors. Many women are unable to seek help or legal recourse because of their financial dependence on their abusers, leading to their continued involvement in abusive relationships.

The establishment of specialised police units and crisis centres marks a crucial step forward. These units provide victims with immediate support and guidance through legal procedures, assist in filing complaints, obtain protective orders, and navigate the judicial system. In all regions of Kazakhstan, the government has organised shelters for domestic violence victims, with 39 out of 49 crisis centres offering shelter amenities.[49]

Despite these developments, numerous victims are still confronted with systemic barriers, which include limited awareness of their rights and fear of retaliation. Additionally, rural areas often lack the necessary resources, such as trained personnel and shelters, making it harder for victims to seek justice.[50]

To sum up, Kazakhstan has made significant advances in enhancing its legal and institutional frameworks to combat VAW, including amending the legislation and creating support services, but substantial challenges remain. Persistent gaps in the legal framework, ineffective implementation, and inadequate access to justice hinder the protection of victims. Addressing systemic barriers—such as financial dependence, lack of specialised resources, and disparities between urban and rural areas—is crucial to ensuring that survivors can fully access justice.

47 ibid.

48 'Kazakhstan: Little Help for Domestic Violence Survivors Ensure Protection, Access to Justice, Needed Services' (*Human Rights Watch*, 17 October 2019) <https://www.hrw.org/news/2019/10/17/kazakhstan-little-help-domestic-violence-survivors> accessed 5 October 2024.

49 Bureau of Democracy, Human Rights, and Labor, '2022 Country Reports on Human Rights Practices: Kazakhstan' (*US Department of State*, 20 March 2023) <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/kazakhstan/> accessed 5 October 2024.

50 ibid; Human Rights Watch (n 9).

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

5 CONCLUSION

In conclusion, Kazakhstan has achieved significant progress in establishing a legal framework to combat VAW, indicating a strong commitment to tackling this critical issue. Implementing the Law on the Prevention of Domestic Violence and policy documents such as the Concept of Family and Gender Policy until 2030 demonstrates the nation's commitment to establishing gender-sensitive policies and adopting a more comprehensive strategy to eliminate VAW. These legislative and regulatory initiatives are crucial steps in tackling the sociocultural and structural causes of VAW.

Nevertheless, to make meaningful progress against VAW, Kazakhstan must strengthen the implementation of existing legislation, increase funding for support services, and launch public awareness programs. The effectiveness of these measures depends on several interrelated factors, as highlighted by the findings of this study.

First, improving the enforcement mechanisms of existing laws is essential. This requires training law enforcement officials, judiciary representatives, and social workers to handle VAW cases with sensitivity and efficiency. Second, the protection and recovery of survivors must be prioritised by ensuring sufficient funding and resources for support services, such as shelters, counselling centres, and rehabilitation programs. Finally, public awareness campaigns are critical in educating communities on women's rights and dignity, challenging patriarchal attitudes, and promoting equality. These findings underscore the need for coordinated action by policymakers, law enforcement and civil society to ensure that existing legal protections translate into tangible improvements.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАКОНОДАВЧІ ОСНОВИ БОРОТЬБИ З НАСИЛЬСТВОМ ЩОДО ЖІНОК У КАЗАХСТАНІ: АНАЛІЗ ЕФЕКТИВНОСТІ ТА ПРОГАЛИНИ В РЕАЛІЗАЦІЇ

Акмарал Турарбекова, Айман Миталяпова, Серік Сабітов, Наґіма Кала, Венера Балмаґамбетова та Бахит Алтинбасов*

АНОТАЦІЯ

Вступ. *Законодавчі основи, що стосуються насильства щодо жінок (VAW) у Казахстані, зазнали значних змін за останні роки, що відображає зріст визнання важливості комплексних підходів до вирішення цієї поширеної проблеми. Незважаючи на те, що була створена нормативно-правова база для захисту жертв і запобігання насильству, залишаються проблеми з її впровадженням та ефективністю. Це дослідження спрямоване на аналіз законодавства про насильство щодо жінок у Казахстані, вивчення його сильних і слабких сторін, а також його впливу на захист жертв і ширший соціальний контекст.*

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Методи. *У статті використовується метод аналізу для дослідження ключових законодавчих та політичних документів, зокрема закону «Про профілактику побутового насильства» та Концепції сімейної та гендерної політики до 2030 року. Теми, що повторюються, законодавчі прогалини та перешкоди в їх реалізації були виявлені за допомогою системного контент-аналізу.*

Результати та висновки. *Результати показують, що, хоча правові інструменти в Казахстані забезпечують необхідний захист постраждалих, все ще існують значні проблеми пов'язані з непослідовним правозастосуванням, обмеженим доступом до служб підтримки та глибоко вкоріненим культурним ставленням до насильства щодо жінок. Доступ до правосуддя для жінок, постраждалих від насильства, залишається ключовою проблемою в Казахстані через значні прогалини в правовому захисті та ресурсах, особливо в сільській місцевості, які перешкоджають ефективному здійсненню правосуддя. Аналіз підкреслює необхідність підходу, який більш орієнтований на жертву та спрямований на усунення причин насильства щодо жінок, і підтверджує, що обізнаність і освіта громадськості мають значний вплив на зміну сприйняття проблеми в суспільстві. У дослідженні було зроблено висновок, що, незважаючи на позитивні зміни в законодавстві, застосування законів проти насильства щодо жінок у Казахстані потерпає від неналежних механізмів реалізації та підтримки. Таким чином, існує нагальна потреба у посиленні правозастосування, фінансуванні служб підтримки і прихильності до культурних перетворень. Вирішивши ці проблеми, Казахстан може створити більш безпечне середовище.*

Ключові слова: *насильство щодо жінок, законодавчі основи, законодавство, гендерна рівність, Казахстан.*

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Research Article

COMPENSATION FOR CRIMES OF ENFORCED DISAPPEARANCE: A COMPARATIVE ANALYTICAL STUDY IN LIGHT OF INTERNATIONAL AND EMIRATI LAW

Mahmood Alblooshi and Jamal Barafi*

ABSTRACT

Background: *The crime of enforced disappearance is one of the most serious human rights violations, as it causes severe suffering to victims and their families. This crime involves depriving a person of their freedom and fundamental rights in secret, without any official recognition, leaving victims living in a constant state of isolation and anxiety. Addressing this crime has become not only a legal obligation but also a moral obligation for states and the international community to protect victims and ensure justice. Modern criminal policies attach special importance to victims of the crime, not only by punishing the perpetrator but also by seeking to achieve justice through fair compensation for victims and their families. This approach is reflected in international and national legislation and the trends of international human rights courts. The importance of this study lies in analysing the legal framework for compensation for crimes of enforced disappearance from a comparative perspective between international law, UAE legislation and other comparative legislation, with the aim of assessing the adequacy of these laws in protecting victims and ensuring their compensation.*

Methods: *This study uses descriptive, analytical, and comparative methods to define compensation for enforced disappearance crimes, identify eligible recipients, and explore various compensation forms. Additionally, it analyses international court rulings on compensation for the crime of enforced disappearance, examines relevant provisions in Emirati law, and compares these with corresponding legal frameworks from other jurisdictions. The comparison of the legislations of Spain, the Philippines, Yemen, Qatar, and Venezuela with that of the UAE highlights the progress and gaps in the UAE's approach to compensating victims of enforced disappearance crimes. This method provides a legal model that the UAE legislator can benefit from in developing and expanding the legal foundations for compensation for the aforementioned crimes.*

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Results and Conclusions: *The research concluded with several findings, the most significant being the insufficiency of current Emirati legislation to comprehensively compensate victims of enforced disappearance, unlike other comparative legislations. Human rights courts, such as the Inter-American and European Courts of Human Rights, have played a crucial role in establishing principles related to comprehensive compensation for enforced disappearance crimes. The study recommends removing the statute of limitations on compensation claims, allowing victims or their families to seek justice regardless of when the crime occurred. It also suggests benefiting from international judicial trends and successful global experiences in drafting national punitive legislation related to the criminalisation of enforced disappearance.*

1 INTRODUCTION

Enforced disappearance has its roots in World War II when it was systematically implemented by Adolf Hitler. On 7 December 1941, Hitler issued the Night and Fog Decree, which authorised the arrest of individuals deemed a threat to German security in occupied territories. These people were secretly transported to Germany, where they were made to disappear. The goal was to spread fear among the occupied populations.[1] Wilhelm Keitel, the German military commander, was convicted of enforced disappearance and sentenced to death at the Nuremberg Trials, even though enforced disappearance was not yet a crime against humanity.[2]

In the 1970s and 1980s, enforced disappearances were widely used in Latin America to suppress political dissent. This prompted strong reactions from human rights organisations such as the Inter-American Commission on Human Rights, which coined the term "enforced disappearance." International interest increased after the 1973 coup in Chile and as the phenomenon spread to authoritarian states.[3] This led to efforts to criminalise the act and multiple definitions of enforced disappearances, which, while differing in detail, agreed on the basic elements of the crime.

Modern criminal policy prioritises victims, focusing on improving their access to suitable compensation for the harm suffered. This victim-centred approach is evident in many international conventions and has been practically reflected in the adoption of legislative policies in some countries, including measures to protect victims of enforced disappearance. Compensation is understood as a comprehensive term for different forms of reparation, such as restitution of rights, rehabilitation, and satisfaction. It is crucial to

1 Maher Jamil Abu Khawat, 'Protection from Enforced Disappearance in Light of International Law Rules' (2017) 73 Egyptian Journal of International Law 68, doi:10.21608/ejil.2017.297630.

2 Hamid Mohammed Ali Al-Baldawi, 'International and National Protection from Enforced Disappearance for Children' (2020) 46 (1) Journal of the Iraqi University 425.

3 Abu Khawat (n 1) 69-70.

note that these forms can be combined. Compensation can be provided when rights restitution is unfeasible, and moral damage can be compensated.

The importance of addressing compensation for the crime of enforced disappearance lies in its role as a fundamental right that seeks to restore balance for those affected. Victims often face considerable suffering due to their enforced disappearance. In many cases, the perpetrator may be unknown or a fugitive, leaving the victim without compensation. Under these circumstances, it is critical to decide what constitutes adequate compensation and explore possible alternatives, especially as some affected individuals may succumb to prolonged suffering or continue to endure deep psychological effects.

The study problem lies in the complex legal and regulatory aspects of compensation for enforced disappearance. Legislators face challenges in defining compensation, such as restitution, material compensation, rehabilitation, satisfaction, and guarantees of non-repetition. There are also questions concerning the adequacy of the UAE's legal framework compared to other nations and its alignment with international standards. The role of international courts, like the Inter-American and European Courts of Human Rights, in advancing judicial practices to protect victims' rights and ensure fair compensation is also explored. It analyses these courts' approaches and evidence standards in enforced disappearance cases to understand how they facilitate victims to secure just compensation.

The legal framework of the study encompasses key international treaties and declarations addressing enforced disappearance. These include the Inter-American Convention on Forced Disappearance of Persons (1994), the International Convention for the Protection of All Persons from Enforced Disappearance (2006), the Rome Statute of the International Criminal Court (1998), and the Geneva Conventions with their Additional Protocols (1949). It also includes national laws, such as the UAE's Federal Decree-Law on International Crimes (2017), the Federal Civil Transactions Law (1985), and the Federal Law on Crimes and Penalties (2021), alongside laws from Qatar and the Philippines. Relevant constitutions include those of the UAE (1971), Qatar (2004), Yemen (1991), Argentina (1994), and Venezuela (1999). Judicial bodies considered are the International Criminal Court, the Inter-American and European Courts of Human Rights, and national courts of the States Parties.

This study explores reparations for crimes of enforced disappearance as addressed by international courts, particularly the Inter-American Court of Human Rights and the European Court of Human Rights. These courts played an important role in ensuring justice for victims by granting comprehensive reparations to victims and their families. The study and analysis of the applications of these two courts hold significant importance in clarifying the role of human rights courts in compensating for this crime.

The need to research compensation for enforced disappearance arises from multiple considerations. First, there is increasing international concern over enforced disappearance as a grave violation of human dignity and fundamental rights, necessitating an examination

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of legal mechanisms for victim compensation. Second, there is a lack of comprehensive research comparing Emirati legislation with other national legal systems, underscoring the need to fill this gap. Third, the study seeks to address legislative imperfections in certain legal systems regarding compensation for victims. Lastly, it aims to promote the development and implementation of legal frameworks to ensure justice for victims and enhance compliance with international obligations.

The study plan involves a thorough examination of the legal framework determining compensation for enforced disappearance, approached from a comparative standpoint that contrasts international law with national legislation. It is structured into three sections. The first section addresses the nature of compensation, its definition, the categories of eligible recipients, and the various types of compensation, including restitution, financial compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The second section examines the provisions related to compensation for enforced disappearance crimes within the UAE's federal legislation, highlighting relevant regulations and drawing comparisons with other national legal frameworks. The final section evaluates the treatment of compensation for enforced disappearance in the rulings of international courts, with particular focus on the Inter-American Court of Human Rights and the European Court of Human Rights.

2 LITERATURE REVIEW

Al-Shammari's study (2020), *Limits of Compensation for Damage Arising from the Crime of Enforced Disappearance: A Comparative Study*,[4] examines compensation and reparations, focusing on criminal policy to enhance victims' rights and access to fair compensation under international obligations. The study emphasises the need for fair compensation and highlights the failings of local legislation in providing comprehensive reparation. While Al-Shammari's work focuses on Iraqi and international legislation—addressing issues such as statutes of limitations and proof of disappearance—this research focuses on Emirati legislation and practical mechanisms for creating compensation systems. Al-Shammari's work is a valuable reference for identifying legislative omissions, inspiring the current study to propose more comprehensive mechanisms tailored to the Emirati context.

Hajij et al.'s study (2015), *Compensation for the Crime of Enforced Disappearance: A Comparative Study*,[5] explores compensation for enforced disappearance, emphasising financial restitution proportional to the physical or psychological harm suffered. It

4 Mazin Khalaf Naser Al-Shammari, 'Limits of Compensation for Damage Arising from the Crime of Enforced Disappearance: A Comparative Study' (2020) 10 Journal of Comparative Studies Generation 47, doi:10.33685/1565-000-010-003.

5 Hassoun Obaid Hajij and Mohammed Hassoun Obaid, 'Compensation for the Crime of Enforced Disappearance: A Comparative Study' (2015) 1(36) Islamic University College Journal 37.

highlights victims' and their families' rights to material and moral compensation based on international judicial criteria for evaluating damage. It also stresses the importance of restoring rights, providing physical and psychological rehabilitation, and ensuring satisfaction—through acknowledging responsibility and revealing the truth—as crucial elements for achieving justice and rebuilding community trust. The study recommends expanding state legislation, especially in Iraq, to include indirect damages and ensure comprehensive remuneration for victims while criticising the absence of guarantees, such as provisions for non-repetition, in international texts like the Rome Statute.

Similarities with Hajij et al.'s study include a focus on victims' rights to material and moral compensation, the inclusion of families in reparations, and addressing legislative gaps to ensure comprehensive redress. However, while Hajij et al.'s research centres on Iraqi legislation and its specific challenges, the current study examines Emirati legislation with a broader international comparison. Additionally, although Hajij et al. critique the Rome Statute's limitations on compensation, such as non-repetition guarantees, this aspect is not a major focus of the present study.

Ashley Needham's article, *Putting the Victim's Families First: The Comparative Analysis of the Inter-American Court of Human Rights and the European Court of Human Rights on the Right to be Free from Torture in Cases of Enforced Disappearances*,[6] examines how these courts tackle cases of enforced disappearances. The Inter-American Court of Human Rights (IACtHR) employs a more adaptable standard of proof, allowing the use of circumstantial and presumptive evidence, which provides greater support to victims' families. In contrast, the European Court of Human Rights (ECtHR) follows a more stringent "beyond a reasonable doubt" standard, frequently necessitating direct evidence, which can constitute a considerable obstacle. Needham contends that the IACtHR's methodology is more progressive and effective in addressing the intricacies of enforced disappearances, thereby providing more effective protection and justice for victims and their families.

Likewise, this study, which examines reparations for enforced disappearances within international and Emirati law, highlights the necessity for comprehensive compensation mechanisms, pointing out the inadequacies of current Emirati legislation compared to other legal systems. Both studies emphasise the need to adapt legal frameworks to ensure justice and sufficient remuneration for victims of enforced disappearances.

6 Ashley Needham, 'Putting the Victim's Families First: The Comparative Analysis of the Inter-American Court of Human Rights and the European Court of Human Rights on the Right to be Free from Torture in Cases of Enforced Disappearances' (2015) 3(1) IALS Student Law Review 33, doi:10.14296/islr.v3i1.2248.

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3 METHODOLOGY

This study adopts a descriptive, analytical, and comparative approach to examine the legal framework regarding reparations for crimes of disappearance at both international and national levels. This methodology can illuminate theoretical and practical aspects of victims' compensation and provide suggestions to develop national legal systems in general, with a specific focus on improving the UAE's legal framework.

A descriptive approach is used to summarise the fundamental concepts and principles of compensation for crimes of enforced disappearance. This includes determining the scope of compensation, beneficiary identification, and the classification of compensation. This study provides a comprehensive framework for understanding compensation mechanisms in the UAE and other legal systems.

The analytical method involves examining the provisions of international conventions and treaties, such as the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. This approach assesses the rulings of international human rights courts such as the Inter-American and European Courts of Human Rights and provisions within the UAE's legal system, including Federal Law Decree No. 12 of 2017 and other relevant legislative measures. Through this analysis, the study identifies gaps, ambiguities, and areas of potential improvement in the UAE's current legal framework and other legal systems.

Comparative analysis juxtaposes the laws and judicial practices relating to compensation for enforced disappearances of the UAE with those of other jurisdictions, including Spain, the Philippines, Yemen, Qatar, and Venezuela. These jurisdictions were chosen based on several criteria: their relevance to the topic through established frameworks addressing enforced disappearance, their diversity in legal systems, and their historical and practical significance. For instance, Spain and the Philippines have developed comprehensive procedures for addressing enforced disappearance. Regional relevance was also considered, with Qatar and Yemen reflecting shared cultural and legal contexts with the UAE. By comparing these jurisdictions, the analysis determines the best national practices and shortcomings, providing a legal model for UAE legislators to consider when developing and expanding the laws guaranteeing compensation.

Furthermore, the comparative approach in this study analyses the case law of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR), comparing their evidentiary standards, procedural practices, and reparative measures to assess how these courts address the complexities of enforced disappearance.

4 THE NATURE OF COMPENSATION FOR VICTIMS OF ENFORCED DISAPPEARANCE AND ITS FORMS

Criminal law defines committing a crime as fundamentally requiring an assault, either a direct assault causing actual harm or a threat to a right or interest protected by law. Harm is defined as a tangible assault that targets a legal right or interest, causing damage to it or placing it at risk.[7] Adequate and effective compensation in cases of enforced disappearance aims to enhance criminal justice and mitigate the impact of this crime, thereby contributing to social peace. This subject will be addressed as follows:

4.1. The Concept of Compensation for the Crime of Enforced Disappearance

Compensation for the crime of enforced disappearance is a core aspect of achieving justice for victims and their families, aimed at addressing the physical and psychological harm they have endured. This process also seeks to counter the social and legal repercussions of this serious crime.

Compensation for enforced disappearance involves providing financial sums to victims in reparation for the physical, psychological, or other harm resulting from this crime. The amount of compensation is determined based on an economic evaluation that considers the severity of the violation and the circumstances of each case, ensuring it aligns with the gravity of the harm the victim endured.[8] Compensable damages include physical or psychological harm, such as loss of employment or educational opportunities, deprivation of social benefits, and material losses, such as loss of income or potential future resources. Compensation also covers moral damages, including costs related to legal assistance, specialised consultations, medications, and medical, psychological, and social services. Given that some of these damages may be impossible to fully repair or return to their original state, compensation can be estimated based on principles of justice and equity when sufficient data is unavailable to determine the harm precisely.[9] This mechanism often serves as the only way to assess damages caused by pain, mental suffering, anxiety, and harm to the reputation and dignity of those affected by enforced disappearance.

At the national level, reparation for damages is an integral part of the civil system in the United Arab Emirates. The Civil Transactions Law of 1985, as amended, regulates compensation as a means of redressing damages resulting from harmful acts. Article 282 of this law stipulates that anyone who harms another must completely compensate them for

7 Ramadan Abdullah Al-Sawy, *Compensation for Victims of Individual Crimes by the State and Funding Sources for Compensation* (New University Publishing House 2006) 45.

8 Nasreddine Bousmaha, *The Rights of Victims of International Crimes in Light of International Law Provisions* (2nd edn, University Thought House 2017) 50.

9 Ahmed Abdel Latif El-Feki, *Protecting Humans from Becoming Victims of Crime* (Dar Al-Fajr 2003) 388.

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

the damage.[10] This principle falls within the general framework of civil liability, which is the legal basis for addressing damages resulting from unlawful acts, including enforced disappearance. Compensation in UAE laws is linked to other concepts, such as blood money and payment priorities, reflecting the comprehensive nature of the UAE legal system in addressing damages and compensating victims.

Federal Decree-Law No. 12 of 2017 on International Crimes addresses the legal framework for compensating victims of international crimes, with Article 43 being a fundamental source. The article states that "national courts in the United Arab Emirates may rule on appropriate compensation for damages suffered by victims as a result of international crimes."[11] This reflects the state's commitment to standards of corrective justice, not only through criminal penalties but also by ensuring that victims receive just compensation for harm.

International treaties, such as the Rome Statute of 1998,[12] emphasise the need to compensate victims of international crimes, including enforced disappearance. Notably, the reparations regime under Articles 75 and 85 of the Rome Statute provides a comprehensive, victim-centred approach to redressing damages resulting from international crimes under the Statute. Article 75 ensures that victims are provided with reparations through restitution, compensation, and rehabilitation, through direct orders against convicted individuals or through the Trust Fund for Victims, which provides support even when perpetrators are indigent. Article 85 affirms the right to compensation for wrongfully detained individuals and the obligation of the State to provide reparations in cases of procedural or judicial errors.

Notably, the Trust Fund's provision of reparations when perpetrators are unable to do so confirms the ICC's commitment to justice. At the national level, claims for reparations for such crimes are usually made through separate civil actions and are subject to the burden of proof. However, most national systems generally lack mechanisms such as the Trust Fund, which ensures compensation in cases where individual perpetrators are indigent.

However, the ICC's reparations mechanisms often fall short of meeting victims' expectations due to limited resources and insufficient implementation procedures. Compensation is frequently symbolic or collective, leading to resentment among victims and their families. Additionally, victims face cultural, logistical, and procedural barriers when participating in international court trials.[13] To address these issues, clear guidelines should be established to define fair compensation standards, and mechanisms should be developed to assist States Parties in implementing reparations decisions effectively.

10 Federal Decree Law no (5) of 1985 'Concerning the Issuance of the Civil Transactions Law of the United Arab Emirates' [1985] Official Gazette 158.

11 Federal Decree-Law no (12) of 2017 'On International Crimes' [2017] Official Gazette 622.

12 Rome Statute of the International Criminal Court (adopted 17 July 1998) [2004] UNTS 2187/3.

13 Yidou Yang, 'The Gap between the International Criminal Court and Victims: Criminal Trial Reparations as a Case Study' (2023) 12(4) Laws 72, doi:10.3390/laws12040072.

International law obliges states to compensate for damages resulting from their breach of international obligations. International responsibility arises when there is a breach of obligations stipulated in the Geneva Conventions of 1949 or any of its protocols, necessitating compensation, reparation, or restitution. The Permanent Court of International Justice affirmed this in the Chorzow Factory Case in 1927, stating: "It is a principle of international law that the violation of a state's commitment entails an obligation to make reparation in an adequate manner and that the obligation to repair the harm is the necessary complement of failure to apply an agreement, even if not expressly stated within the agreement itself."[14]

The four Geneva Conventions also affirm international responsibility in cases of breaches of their provisions,[15] as do the principles of Article 1 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission. Consequently, compensation is an essential consequence of established responsibility aimed at compensating the victim and removing the harm's effects. If feasible, it is preferred to restore the victim to their original state before the harm occurred. When that is not possible, financial compensation equivalent to the harm is provided, and the legal system ensures that compensation does not exceed the actual damage, covering all types of compensable damages.

When comparing the national and international frameworks, there are important points of convergence. Compensation is considered a basic means of achieving restorative justice in both systems, whether through financial remuneration or the victim's return to their previous status. However, the Emirati system is notable for its integration of compensation with traditional concepts such as blood money and payment priorities, which gives a unique character to the treatment of damage. The international system focuses on redress within the context of international criminal justice, with institutions like the International Criminal Court playing a prominent role in ensuring reparations.

In international law, corrective justice reflects an all-encompassing mechanism for redress, rehabilitation and satisfaction. In the UAE, this is embodied by the combination of financial compensation and blood money, which highlights the harmonious relationship between traditional values and modern legal frameworks. UAE laws, such as the Civil Transactions Law and the Decree Law on International Crimes, safeguard this balance between justice and impartiality.

Compensation for enforced disappearance requires integration between the national and international systems to ensure justice for victims. Such integration allows for leveraging the strengths of both systems, making compensation an effective tool for remedying harm and restoring victims' rights. By implementing a comprehensive system to care for those affected by enforced disappearance, UAE legislators can ensure a more just system for the years to come.

14 *Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (PCIJ, 26 July 1927) Series A no 9 <https://www.worldcourts.com/pcij> accessed 25 November 2024.

15 Ahmed Abdel Latif El-Feki, *The Criminal Protection of the Rights of Crime Victims* (Dar Al-Fajr 2001) 369.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

4.2. Persons Entitled to Compensation

International conventions related to enforced disappearance underscore the right of victims and their families to receive fair and equitable compensation for the harm they have suffered. This right is enshrined in Article 19 of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance, as well as Article 49 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).[16]

Understanding victims' rights is essential, and the Rome Statute of the International Criminal Court distinguishes between two opposing concepts: the injured party and the victim. Article 75 addresses the concept of the injured party, while Article 85 deals with the concept of the victim.[17] The term "victim" is broader than "injured party". While the injured party is directly harmed by the crime, the victim encompasses anyone impacted by the harm, even if they were not the direct target of the crime.[18] For example, compensation beneficiaries include immediate family members of the disappeared person, such as the spouse, children, mother, father, and siblings. The categories of individuals eligible for compensation are addressed as follows:

4.2.1. The Disappeared Person as a Direct Victim of Enforced Disappearance

The term "disappeared person" refers to the direct victim of the crime of enforced disappearance, the individual targeted by the perpetrator and whose existence caused the crime to occur.[19] This person was subject to arrest, abduction, detention, or any other form of deprivation of liberty by state officials or individuals or groups acting with the state's consent or support. This often involves a formal denial of their deprivation of liberty and concealing their fate or whereabouts, depriving them of legal protection.[20]

In this regard, reports from the Working Group on Enforced or Involuntary Disappearances established by the United Nations Human Rights Commission in 1980, aimed at investigating cases of enforced disappearances, clarified the impact of these practices on human rights. They affirmed that the secret detention of individuals after their arrest constitutes a severe and ongoing violation of several fundamental rights and

16 Declaration on the Protection of All Persons from Enforced Disappearance (adopted 18 December 1992 UNGA Res 47/133) <https://digitallibrary.un.org/record/158456?ln=en> accessed 25 November 2024; International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) (adopted 20 December 2006 UNGA Res 61/177) UNTS 2716/3 <https://digitallibrary.un.org/record/589467?ln=en> accessed 25 November 2024.

17 Rome Statute (n 12).

18 Tayeb Smati, *Protection of Crime Victim Rights During Criminal Proceedings* (Al-Badi Publishing and Media Services 2008) 87.

19 Ibrahim Suleiman Alqatawneh, 'Compensation for Victims of Terrorist Crimes Comparative Study' (2022) 6(1) *AAU Journal of Business and Law* 150, doi:10.51958/AAUJBL2022V6I1P7.

20 Mohamed Abdel Latif Farag, *Confronting Enforced Disappearance in International Instruments and Egyptian Legislation* (3rd edn, Police Press 2020) 13.

freedoms guaranteed by international conventions. These include the right to liberty and personal security, the right of anyone deprived of their liberty to humane treatment that respects their dignity, the right not to be subjected to torture or any inhuman or degrading treatment, and the right to be recognised as a person before the law.[21]

The International Human Rights Committee issued opinions on 29 March 1982 regarding cases of enforced disappearance in Uruguay, specifically the disappearance of Eduardo Bleier. In October 1975, he was secretly detained by security forces and placed in an unknown detention camp. His fate remains unknown due to the Uruguayan authorities' denial of the incident. The committee declared that these events constituted a violation of several provisions of the International Covenant on Civil and Political Rights, urging the Uruguayan government to reconsider its stance, take effective steps to determine Bleier's fate and prevent similar violations in the future.[22]

Based on the above, enforced disappearance is not limited to the violation of the civil and political rights of the disappeared person but also extends to the violation of their economic, social and cultural rights. In addition to being deprived of their liberty, the disappeared person is deprived of their right to work, health and education. Under this deprivation of liberty, it becomes impossible for the person to enjoy basic rights that guarantee a decent life and human dignity.[23]

4.2.2. The Indirect Victim of Enforced Disappearance

According to Principle 5 of the United Nations Principles on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2005, the term "victim" extends to include indirect victims. This principle clarifies that the term "victim" may include, where applicable and in accordance with national laws, immediate family members of affected persons or those directly dependent on them. Additionally, it includes individuals who suffered harm as a result of intervening to assist victims in their distress or to prevent further harm.[24]

21 UN Commission on Human Rights, 'Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Question of Enforced or Involuntary Disappearances : Report of the Working Group on Enforced or Involuntary Disappearances' E/CN.4/1985/15 (23 January 1985) 9-10 <https://digitallibrary.un.org/record/83575> accessed 25 November 2024.

22 *Eduardo Bleier v Uruguay* Communication no R.7/30 (Human Rights Committee, 29 March 1982) UN Doc Supp no 40 (A/37/40) at 130 (1982) <https://juris.ohchr.org/casedetails/575/en-US> accessed 25 November 2024.

23 UN Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances, Addendum: Study on enforced or involuntary disappearances and economic, social and cultural rights' A/HRC/30/38/Add.5 (9 July 2015) 15 <https://digitallibrary.un.org/record/801312?ln=en> accessed 25 November 2024.

24 Nasreen Jenadin, 'International Protection for Persons from Enforced Disappearance' (DPhil thesis, University of Algiers 2018) 181.

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

The International Convention for the Protection of All Persons from Enforced Disappearance in Article 24(1) states: "For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered direct harm as a result of this enforced disappearance."[25] Notably, the term "victim" in the aforementioned article lacks precision, particularly regarding indirect harm. Direct harm affects individuals whose interests were directly impacted by the crime, while indirect harm extends to family members of the victim who are entitled to claim compensation and redress for the harm they suffered due to the disappearance.

For the effective implementation of this article, it is crucial for state parties to ensure that the definition of "victim" in their national laws includes any person directly affected by enforced disappearance, including the disappeared person and the family or friends impacted by this crime. This approach aligns with Principle 5 of the United Nations Principles on the Right to Remedy and Reparation, which recognises the right of both direct and indirect victims to obtain appropriate compensation and redress.

International provisions have emphasised that enforced disappearance causes severe suffering for both the disappeared persons and their families. Article 1/2 of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance states that any act of enforced disappearance causes profound suffering to those subjected to it and their families, underscoring the importance of addressing this crime seriously and ensuring the right of victims and their families to compensation and justice. Article 19 of the declaration further stresses the need for redress for harm caused to the victim and their family, emphasising the provision of fair and appropriate compensation to alleviate the suffering caused by this crime and restore the rights and dignity of those affected.[26]

In support of this, the United Nations Working Group on Enforced or Involuntary Disappearances states that "in addition to those who survive enforced disappearance, their families also have the right to compensation for the suffering they endured during the disappearance of their loved ones, and in the case of the victim's death, those who were dependent on them also have the right to reparation."[27]

The Human Rights Committee, in the 1983 case of *Almeida de Quinteros v. Uruguay*, held that the anxiety and distress experienced by a mother due to her daughter's disappearance, coupled with ongoing uncertainty about her fate and whereabouts, made her a victim of

25 ICPPED (n 16) art 24(1).

26 Declaration on the Protection of All Persons (n 16).

27 Manfred Nowak, 'Civil and Political Rights, Including Questions of: Disappearances and Summary Executions : Report submitted by independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission Resolution 2001/46' E/CN.4/2002/71 (8 January 2002) <https://digitallibrary.un.org/record/459055?ln=en> accessed 25 November 2024.

torture and cruel, inhuman treatment. This is prohibited under Article 7 of the International Covenant on Civil and Political Rights.[28]

The Inter-American Court has established standards to ensure that the family or other affected individuals receive fair compensation, as follows:[29]

1. Compensation should be based on actual and regular contributions made by the victim to the claimant, whether these contributions stem from a legal or non-legal obligation.
2. The relationship between the victim and the claimant should be such that it can be reasonably assumed that these contributions would have continued if not for the victim's death.
3. Compensation should be based on the living needs of the beneficiary.

The Inter-American Court considers that the parents and children of the victim meet these standards, allowing them to be regarded as indirect victims of enforced disappearance.[30]

In light of the above, the right to compensation extends to both direct and indirect victims, regardless of the type of harm—whether physical, psychological, or economic. A victim is not limited to the person who was directly assaulted but also includes those who suffered harm, either directly or indirectly, as a result of that assault. Therefore, the concept of the victim applies equally to individuals and groups.

4.3. Forms of Compensation for Harm from the Crime of Enforced Disappearance

The concept of reparation includes a range of measures, such as restitution, compensation, rehabilitation, and satisfaction. Although these measures may be implemented independently, they can sometimes be combined, as is the case with restoring rights and compensation. For example, restoring rights may include the return of property, while compensation may be allocated to offset moral damages.[31]

28 *María del Carmen Almeida de Quinteros et al v Uruguay* Communication no 107/1981 (Human Rights Committee, 21 July 1983) UN Doc CCPR/C/OP/2 at 138 (1990), paras 14, 16 <https://juris.ohchr.org/casedetails/339/en-US> accessed 25 November 2024.

29 Livio Zilli, Alex Conte and Ian Seiderman, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide* no 2 (ICJ 2018).

30 Al-Shammari (n 4) 53.

31 UN Secretariat, 'Civil and Political Rights, Including Questions of Disappearances and Summary Executions: Question of Enforced or Involuntary Disappearances' E/CN.4/2001/69 (21 December 2000) <https://digitallibrary.un.org/record/431296?ln=en> accessed 25 November 2024; Diane Orentlicher, 'Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity' E/CN.4/2004/88 (27 February 2004) paras 57, 60 <https://digitallibrary.un.org/record/517694?ln=en> accessed 25 November 2024.

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

International conventions outlined such forms of reparation in relation to enforced disappearance, including restitution, financial compensation, and rehabilitation. Additionally, the mechanism of reparation should also include satisfaction and non-repetition as important elements for fully restoring victims' rights.

4.3.1. Restitution

The term "restitution" refers to a series of actions to return the victim to the state they were in before the crime. This includes regaining their freedom and property and returning to their original place of residence, as well as returning to their previous job or profession. Essentially, it seeks to restore the situation to what it would have been had the enforced disappearance not occurred.[32]

The United Nations General Assembly's 1985 Declaration supports this, stating in Paragraph 8 that: "Where appropriate, offenders or those otherwise responsible should provide fair compensation to victims or their families or dependents, which should include the restitution of property, a fair amount to offset any harm or loss suffered, reimbursement for recurring expenses due to the harm, and services aimed at restoring rights."[33]

Under the Rome Statute of the International Criminal Court, restitution is one of the primary forms of reparation allocated to victims of international crimes, including enforced disappearance. Article 75(1-2) allows for various forms of reparation, including restitution, satisfaction, and compensation. Article 35 further imposes responsibility on states for acts deemed internationally unlawful, stating, "The responsible state must make restitution, provided it is not materially impossible or would not impose a burden disproportionate to the benefit derived from restitution instead of compensation."[34]

The release of detainees or victims of enforced disappearance and the return of arbitrarily seized property are among the simplest forms of restitution. The International Law Commission, in its commentary on Article 35 of the Draft Articles on State Responsibility for Internationally Wrongful Acts, affirmed that restitution is the primary form of reparation.[35]

However, international conventions on enforced disappearance do not universally include "restitution" as a form of reparation for this crime. For instance, Article 19 of the 1992

32 Al-Shammari (n 4) 54.

33 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted 29 November 1985 UNGA Res 40/34) para 8 <https://digitallibrary.un.org/record/280057?ln=en> accessed 25 November 2024.

34 Rome Statute (n 12) arts 35, 75(1-2).

35 Draft Articles on State Responsibility for Internationally Wrongful Acts, in: UN International Law Commission, 'Report of the International Law Commission, 53rd session (23 April - 1 June and 2 July - 10 August 2001)' A/56/10 (2001) art 35 <https://digitallibrary.un.org/record/449524?ln=en> accessed 25 November 2024.

International Declaration omits the concept of "restitution," focusing solely on compensation and rehabilitation.[36] Likewise, the American Convention on Enforced Disappearance does not refer to reparation measures, including restitution.[37]

Article 24(5)(a) of the ICPPED highlights the importance of restitution by mentioning various forms of reparation, including compensation, restitution, rehabilitation, satisfaction, and guarantees of non-repetition. In contrast, Article 75(1-2) of the Rome Statute excludes guarantees of non-repetition, focusing solely on three forms of reparation: restitution, compensation, and satisfaction. Therefore, to ensure a more comprehensive approach, those responsible for drafting the Rome Statute should include guarantees of non-repetition, considering their equal importance to the other forms of reparation.

4.3.2. Financial Compensation

The term "compensation" refers to the provision of financial reimbursement to the victim for physical, psychological, or other damages caused by the crime, assessed according to an economic valuation corresponding to the severity of the violation and the specifics of each case.[38] Such damages may include lost wages and potential income, moral damages, legal aid, expert assistance, medication, and medical, psychological, and social services.[39] In cases where precise information is unavailable to assess the damages, the principle of "equity" can be used for estimation. This is the most common method for valuing damages stemming from pain, suffering, anxiety, and harm to the victim's reputation and dignity due to enforced disappearance.[40]

The Human Rights Committee recommended compensating the families of the disappeared for the psychological pressures caused by enforced disappearance, based on Article 7 of the International Covenant on Civil and Political Rights. In *Coronel v. Colombia*, the committee did not find a direct violation of Article 7 concerning the victims' families, but it recommended compensation based on the implicit assumption that their psychological state was adversely affected.[41]

Furthermore, the Inter-American Court of Human Rights awarded compensation for moral damage in *Maritza Urrutia v. Guatemala*, based on the principle of social justice. The

36 Declaration on the Protection of All Persons (n 16) art 19.

37 Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994) ILM 33/1529 <https://www.oas.org/juridico/english/treaties/a-60.html> accessed 25 November 2024.

38 Bousmaha (n 8) 50.

39 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted 15 December 2005 UNGA Res 60/147) paras 8, 9 <https://digitallibrary.un.org/record/563157?ln=en> accessed 25 November 2024.

40 Al-Shammari (n 4) 56.

41 *José Antonio Coronel et al v Colombia* Communication no 778/1997 (Human Rights Committee, 24 October 2002) UN Doc CCPR/C/76/D/778/1997 (2002) para 10 <https://juris.ohchr.org/casedetails/1032/en-US> accessed 25 November 2024.

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

court held that family members of victims do not need to prove psychological damage due to the close relationship presumed to exist with the victim, which includes parents, children, spouses, and permanent partners.[42]

As for the statute of limitations on victims' right to claim compensation, the Inter-American Court of Human Rights ruled that civil actions for compensation related to severe human rights violations should not be subject to statutes of limitations, as this obstructs justice, accountability, and undermines victims' rights to compensation.[43]

4.3.3. Rehabilitation

Rehabilitation involves supporting victims to help them maintain a life as close to normal as possible, offering services and support across various aspects of life. This right is safeguarded by a set of international conventions related to enforced disappearance, with particular emphasis on Article 19 of the 1992 International Declaration, which states: "The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible." [44]

Likewise, Article 24(5)(b) of the 2006 Convention on Enforced Disappearance states, "The right to reparation referred to in paragraph (4) of this article... shall, where appropriate, include other forms of reparation, such as (b) Rehabilitation..."[45]

However, the American Convention on Enforced Disappearance (1994) and the Rome Statute of the International Criminal Court (1998) lack explicit references to rehabilitation measures in their texts.

Therefore, the rehabilitation process particularly requires "physical and psychological treatment for the victims, as well as rehabilitation services to address any physical or mental damage they may have sustained." In *Yakeque v. Peru*, the Inter-American Court of Human Rights recommended providing medical treatment as part of the reparations and ordered the reopening of a medical centre in one of the villages affected by severe human rights violations.[46] In the *Plan de Sánchez Massacre* case, the international court ordered the provision of medical treatment and medications for the victims and mandated the implementation of a free psychological treatment program.[47]

42 *Maritza Urrutia v Guatemala* (IACrtHR, 27 November 2003) paras 169 (a), (b), (c) <https://www.legal-tools.org/doc/8def48> accessed 25 November 2024.

43 *Barrios Altos v Peru* (Merits) (IACrtHR, 14 March 2001) Series C no 75, para 41 <https://www.legal-tools.org/doc/f1439e> accessed 25 November 2024.

44 Declaration on the Protection of All Persons (n 16) art 19.

45 ICPPED (n 16) art 24(5)(b).

46 *Aloeboetoe et al v Suriname* (Reparations) (IACrtHR, 10 September 1993) Series C no 15, para 96 <https://www.legal-tools.org/doc/e0b8e3> accessed 25 November 2024.

47 *Plan de Sánchez Massacre v Guatemala* (Reparations) (IACrtHR, 19 November 2004) Series C no 116, paras 106, 108, 117, 298 <https://www.legal-tools.org/doc/e8533d> accessed 25 November 2024.

4.3.4. Satisfaction

Compensation for non-material losses is considered a form of redress, where its exact value is difficult to determine and is often assessed through theoretical and approximate methods.[48] Such cases often pertain to moral damage, manifesting in various forms. International courts have recommended in numerous cases that a guilty verdict may constitute a form of "satisfaction," especially when an independent and impartial judiciary confirms that the victim has suffered human rights violations.[49]

According to the United Nations Principles on the Right to Remedy, satisfaction includes several important aspects aimed at achieving justice for victims. These aspects encompass fact-finding and public disclosure, ensuring that this disclosure avoids causing additional harm and guaranteeing the safety of the victim, witnesses, and other collaborators. Satisfaction also includes locating forcibly disappeared persons, identifying them, assisting in the retrieval of their remains, and providing for their reburial according to the wishes of their families. Additionally, it includes public apologies, acknowledgement of facts, and acceptance of responsibility for the violations that occurred. Satisfaction also involves integrating educational and training materials in international human rights and humanitarian law into educational curricula.[50] Such measures are crucial and as significant as imposing judicial and administrative sanctions on those responsible for the violations.

Public commemoration, carrying symbolic value, may also contribute to the redress process for present and future generations. This can include actions such as naming streets after certain individuals or erecting memorials to honour victims of past violations.

In light of this, satisfaction is essential for compensating moral damages related to dignity and reputation. It should involve restoring the legal and social standing of the victims, enabling them to regain their dignity and status within society. Article 24/5(c) of the ICPPED underscores this principle.

4.3.5. Non-Repetition

The UN Principles on the Right to Remedy emphasise the importance of preventing the continuation or recurrence of violations through several measures, including legislative and institutional reform, constitutional amendments, security sector reform, and enhanced civilian oversight of the military and security forces.[51]

48 Mohammed Ahmed Abdeen, *Compensation between Material and Moral Damages* (3rd edn, Manshat Al-Maaref 2020) 36.

49 Mohamed Adel Mohamed Saeed, *Ethnic Cleansing: A Study in Public International Law and Comparative Criminal Law* (2nd edn, Dar Al-Jameaa Al-Jadida 2019) 827.

50 Basic Principles and Guidelines on the Right to a Remedy (n 39) principle 22 (b), (c), (h), (e).

51 ibid, principles 22, 23.

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

The Inter-American Court of Human Rights has been at the forefront in supporting non-repetition measures. In the case of *Azul Rojas Marín v. Peru*, the victim was subjected to torture and sexual violence due to her sexual orientation while in arbitrary detention by police officers. Upon her release, she filed a criminal complaint, but the authorities did not act seriously and closed the investigation without prosecuting the perpetrators. As a result, the court ordered the adoption of a protocol for investigating and prosecuting cases of violence against the LGBTQ community and the education and training of state employees to prevent such crimes from recurring.[52] The court also stressed the necessity for states to join the Inter-American Convention on Forced Disappearance of Persons and to review their domestic laws in alignment with international obligations, particularly concerning fair trials and the death penalty.

In light of the above, human rights violations through enforced disappearance, murder, or torture constitute serious breaches of states' obligations under international law. If these violations persist, the state must cease them and implement measures to ensure they are not repeated. These steps may include enacting necessary legislative measures if the violations stem from domestic law and adopting policies and practices to protect groups at risk of enforced disappearance, murder, or torture.

5 LEGAL REGULATIONS OF COMPENSATION FOR ENFORCED DISAPPEARANCE IN THE UAE COMPARED TO OTHER NATIONAL LEGISLATIONS

Many national laws affirm the right of victims of enforced disappearance to obtain appropriate, effective, and prompt compensation, necessitating the enactment of suitable laws and the implementation of measures to facilitate the compensation of those affected by enforced disappearance, restoring their dignity, and holding those responsible accountable.

The United Arab Emirates (UAE), despite not joining the ICPPED, classifies enforced disappearance as an independent crime within crimes against humanity. Article 6, Paragraph 6, of Federal Law Decree No. 12 of 2017 on International Crimes states: "Enforced disappearance of persons through their arrest, detention, or abduction by the state or a political organisation, or with its authorisation, support, or acquiescence, and its refusal to acknowledge the deprivation of their liberty or to disclose their fate or whereabouts, intending to remove them from the protection of the law for a prolonged period."[53]

52 *Azul Rojas Marín et al. v. Peru* (IACrtHR, 12 March 2020) Series C no 402 <https://policehumanrightsresources.org/azul-rojas-marin-et-al-v-peru-series-c-402> accessed 25 November 2024.

53 Federal Decree-Law no (12) of 2017 (n 11) art 6, para 6.

Article 299 of the Federal Civil Transactions Law states that "compensation for harm to the person must be provided. However, in cases where blood money or reparation is due, neither may be combined with compensation unless the parties agree otherwise."[54] Article 25 of the Federal Code of Criminal Procedure states that "a civil lawsuit may be filed before criminal courts against the insured to compensate for the damage caused by the crime."[55]

Federal Law on Crimes and Penalties No. 31 of 2021 and Federal Law No. 38 of 2023 on Criminal Procedure do not contain specific legal provisions on compensation. Therefore, the study recommends adding the following provision to the Code of Criminal Procedure: "Victims and those affected may file a civil lawsuit before this court or any successor court against the accused for damages arising from acts constituting a crime under the provisions of this law."

The proposed text thus identifies the parties entitled to initiate civil lawsuits in the UAE's Code of Criminal Procedure, including anyone who has suffered direct harm, whether material or moral, from any crime. If the individual is not competent to litigate civilly, a legal representative may act on their behalf. This allows victims of enforced disappearance, such as the disappeared person, parents, children, spouse, and siblings, to seek compensation for the damage inflicted upon them. In line with the principles of solidarity and social integration, states should compensate crime victims for harms they could neither foresee nor protect themselves against. States cannot shirk from or neglect this obligatory right.

Turning to Qatari legislation, Qatar has not joined the ICPPED. However, it affirms its commitment to fundamental human rights in its domestic laws. The Qatari constitution stipulates that "citizens are equal in rights and public duties" and that "personal freedom is guaranteed."[56] Penal Code No. 11 of 2004 considers enforced disappearance a crime, with Article 163 punishing any public official who unlawfully detains a person.[57] Although Qatari legislation does not explicitly mention enforced disappearance, related acts such as kidnapping and unlawful detention are prohibited under Article 318 of the Penal Code, which prescribes imprisonment for up to ten years.

In Qatari law, individuals have the right to claim compensation for harm resulting from unlawful acts, including human rights violations such as enforced disappearance. Qatari Civil Code No. 22 of 2004 regulates compensation generally, with Article 201 stating that

54 Federal Decree Law no (5) of 1985 (n 10) art 299.

55 Federal Law no (35) of 1992 'Concerning the Criminal Procedure Law', art 25 <https://hzlegal.ae/federal-law-no-35-of-1992-concerning-the-criminal-procedural-law/> accessed 25 November 2024.

56 Constitution of the State of Qatar (2004) arts 34, 36 <https://www.refworld.org/legal/legislation/natlegbod/2004/en/101710> accessed 25 November 2024.

57 Mohamed Saleh Ali Jurhib Al-Marri, 'The Crime of Enforced Disappearance in International and National Criminal Law: An Analytical and Comparative Study' (College of Law, Qatar University 2024) 120-1 <https://qspace.qu.edu.qa/handle/10576/56318> accessed 25 November 2024.

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

"the damage for which the liable party must compensate is the loss incurred and the profit missed, as long as it is a natural result of the unlawful act."[58]

While there is a legal framework to enhance individuals' rights to claim compensation, the effectiveness of these compensations depends on the enforcement of laws. It is important for Qatari legislation to adopt clear and effective procedures related to compensating harm from enforced disappearance, ensuring justice for victims, and strengthening human rights protection.

Both Emirati and Qatari legislation affirm human rights principles and the necessity of protecting individuals from violations of freedoms. However, neither explicitly addresses crimes associated with enforced disappearance. While UAE legislation has a more explicit framework for criminalising enforced disappearance and includes compensation for victims, Qatari legislation lacks a clear definition of this crime. This legislative ambiguity in both countries reflects the need to strengthen legal frameworks to address human rights challenges, including providing clear and effective legal protection against enforced disappearance.

Focusing on Spanish legislation, the Spanish Penal Code No. 10 of 1995 classifies enforced disappearance as a crime against humanity under Article 607 bis, reflecting Spain's adherence to its international obligations after ratifying the International Convention for the Protection of All Persons from Enforced Disappearance in 2009. According to Paragraph 6 of this article, perpetrators who detain a person, deprive them of their liberty or refuse to provide information on their fate or whereabouts can face a prison sentence of 12 to 15 years. Paragraph 7 further stipulates a prison sentence of 8 and 12 years for those who detain and deprive someone of their liberty in a manner contrary to international rules, with a reduced sentence if the period of detention is less than 15 days.

Spanish criminal law allows victims to claim compensation for material and moral damages. This includes damages that directly affect the victim and also family members or third parties impacted by the crime. In essence, both the victim and family members or those directly affected by the crime can claim compensation for damages they have sustained.[59] This broad understanding of "victims"[60] aligns with international conventions, ensuring that individuals directly impacted by crimes such as illegal detention, abduction, or enforced disappearance can claim reparations.

Spain's history of enforced disappearances dates back to the Spanish Civil War (1936–1939) and the Franco dictatorship (1939–1975), during which an estimated 114,226 people

58 Qatar Law no (22) of 2004 'Regarding Promulgating the Civil Code', art 201 <https://www.almeezan.qa/LawPage.aspx?ID=2559&language=en> accessed 25 November 2024.

59 Spanish Law no 10/1995 'Criminal Code' (23 November 1995) [1995] BOE 281, arts 109, 110 <https://www.boe.es/eli/es/lo/1995/11/23/10/con> accessed 25 November 2024.

60 ICPPED (n 16) art 24(1).

disappeared permanently.[61] In 2008, Judge Baltasar Garzón, who worked at the National Supreme Court in Madrid, launched an investigation into these crimes based on his court's jurisdiction over gross human rights violations. Though this move was disputed and led to charges being brought against Garzón himself, it brought attention to the need for justice. Spain has been heavily criticised by international organisations for its failure to address the legacy of these crimes. In 2013, Amnesty International described Spain's failure to investigate and punish these crimes as "shameful". Similarly, the International Coalition Against Enforced Disappearances (ICAED) criticised the government for not acknowledging the abduction of children of political opponents during the Franco era, despite having ratified the ICPPED.[62]

Despite Spain's legal progress, enforced disappearances are not explicitly criminalised in its national legislation, prompting calls to bolster the legislative framework and intensifying efforts to ensure justice and address outstanding cases. To affirm victims' right to fair compensation, the Spanish Law on Assistance and Support for Crime Victims (No. 35 of 1995) established several measures to guarantee their rights.[63] The law requires police to keep victims informed on the investigation's progress, provided that doing so does not affect the outcome. It also mandates courts to notify victims of their right to claim compensation and to communicate significant developments in proceedings. These provisions aim to ensure victims stay informed and aware of their rights.

While Spain has faced criticism for its weak enforcement of enforced disappearances, the Philippines set a leading example with the signing of the Anti-Enforced Disappearances Act by President Benigno Aquino III on 21 December 2012.[64] The law was the first of its kind in Asia to punish perpetrators with life imprisonment and considers enforced disappearances a separate human rights violation. Human Rights Watch hailed it as a landmark achievement reflecting the struggle of victims of the Ferdinand Marcos dictatorship. Notably, it allows the prosecution of perpetrators of past crimes if they continue to conceal the fate or whereabouts of victims.

61 'Observaciones preliminares del Grupo de Trabajo sobre las Desapariciones Forzadas o Involuntarias de la ONU al concluir su visita a España' (*United Nations Human Rights: Office of the High Commissioner (OHCHR)*, 30 September 2013) <https://www.ohchr.org/es/statements/2013/09/default-title> accessed 20 December 2024.

62 International Coalition Against Enforced Disappearances, 'ICAED Statement on the Acquittal of Judge Baltasar Garzon' (*Asian Federation Against Involuntary Disappearances*, 17 March 2012) <https://disappeared-asia.org/whats-happening/10-statements/29-icaed-statement-on-the-acquittal-of-judge-baltasar-garzon> accessed 7 January 2025.

63 Spanish Law no 35/1995 'On Aid and Assistance to Victims of Violent Crimes' (11 December 1995) BOE 296 <https://www.boe.es/eli/es/l/1995/12/11/35/con> accessed 25 November 2024.

64 Republic of the Philippines Act no 10353 of 2012 'Anti-Enforced or Involuntary Disappearance Act' (21 December 2012) <https://issuances-library.senate.gov.ph/legislative-issuance/republic-act-no-10353> accessed 25 November 2024.

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

During the Marcos dictatorship (1972–1981), the Philippines experienced one of its worst periods of abuse. An estimated 1,500 people were killed, more than 800 abducted, and 159 forcibly disappeared, with their bodies never recovered, according to the human rights organisation Karapatan. More than 10,000 victims or their families filed individual lawsuits against Marcos, accusing his regime of enforced disappearances, torture, and executions.

In 1992, a group of victims filed a landmark lawsuit in the U.S. District Court for the District of Hawaii, titled *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, which resulted in a 1995 judgment ordering the Marcos family to pay $2 billion in damages.[65] However, enforcing this judgment proved challenging due to significant legal disputes over Marcos' assets, many of which were either hidden or tied to international lawsuits.

The Philippine Anti-Enforced Disappearance Law (No. 10353 of 2012) punishes the perpetrators and includes comprehensive compensation for the victims and their families. This includes both material and moral aspects, underscoring the importance of addressing the multi-faceted effects of this crime. The law requires financial support for victims and their families to cover expenses related to income loss, economic damage, or any other costs resulting from the incident. This financial support may also cover indirect losses families experience due to the deprivation of their breadwinner or the financial and psychological support the victim provided.[66]

The law ensures victims and their families receive rehabilitation, including healthcare, psychological therapy, and social services, to address the trauma and health impacts of enforced disappearance. It provides moral compensation, such as acknowledgement of harm and official apologies from authorities for violations that led to the enforced disappearance, alongside financial support. Additionally, the law guarantees their protection from threats or retaliation when exercising their rights.[67]

A comparison of the Spanish and Philippine legal systems shows a clear contrast in political will and commitment to addressing the legacy of enforced disappearances. While the Philippines has shown significant progress with a comprehensive law focused on justice and redress for victims, Spain continues to be widely criticised for its lack of adequate legislation and practical measures to achieve justice.

In Yemen, the legal framework clearly protects individuals from arbitrary detention. Although Yemen has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance, Article (48) of the 1991 Constitution provides legal guarantees for the freedom of individuals and prohibits arbitrary detention. The same article obliges authorities to compensate victims while allowing those arrested to inform

65 *In Re Estate of Marcos Human Rights Litigation* 910 F Supp 1460 (MDL 840) (US District Court, D Hawai`I, 30 November 1995) <https://law.justia.com/cases/federal/district-courts/FSupp/910/1460/1943938/> accessed 7 January 2025.

66 Al-Marri (n 57) 110-1.

67 ibid 118.

whomever they choose of the status of their detention. Furthermore, the UN Group of Experts on Yemen notes that Yemen's ratification of the International Covenant on Civil and Political Rights obliges it to refrain from enforced disappearance.[68]

Despite these legal safeguards, violations persist. According to Human Rights Watch, between 31 May and 12 June 2024, the Houthis launched a campaign targeting staff of international and local agencies in Sanaa, detaining 17 UN staff and more than 60 people. Their fates remain unknown.[69] These violations are part of a long history of enforced disappearances, such as the continued detention of members of the Baha'i community without charge. These incidents revealed the need for strengthening the rule of law and holding those responsible for these crimes accountable. In a positive and effective step, the Supreme Security Committee suspended the commander of the Counter-Terrorism Forces, Yusran al-Maqtari, and required him to investigate the disappearance of Lieutenant Colonel Ali Abdullah Ashal, with the formation of a joint investigation committee from the security, criminal investigation, security belt, intelligence, and counter-terrorism agencies.[70]

Turning to Venezuela, the country signed the International Convention for the Protection of All Persons from Enforced Disappearance in 2008 and ratified it in 2010. Article (30) of the Constitution obligates the state to provide comprehensive reparation to victims of human rights violations, including material compensation and reparations for damages resulting from public crimes.[71]

The case of Venezuelan naval officer Rafael Acosta Arévalo, who was abducted and tortured to death by security forces in 2019, stands as a stark example of enforced disappearance and systematic repression. His wife reported him missing on 22 June, and by 28 June, he was brought before a military court.[72] This case exposes a glaring disparity between Venezuela's international obligations and its actual practices. It underscores the urgent need for international intervention, justice for victims, and strengthened efforts to ensure accountability and address ongoing human rights violations.

68 Mohamed Al-Sayed Saeed, 'Invisible and Unheard: The Escalating Tragedy of Enforced Disappearances in Yemen' (*Cairo Institute for Human Rights Studies*, 30 August 2024) <https://cihrs.org/invisible-and-unheard> accessed 7 January 2025.

69 ibid.

70 'The Security Authorities in Aden Announce the Details of the Kidnapping of Sheikh Ali Ashal and Say that Yisran Al-Maqtari Fled the Country (names of the suspects)' (*Barran Press*, 1 August 2024) <https://barran.press/news/topic/4195> accessed 7 January 2025.

71 Al-Shammari (n 4) 12.

72 'Bachelet deeply concerned by death in custody of Captain Acosta Arévalo in Venezuela' (*United Nations Human Rights: Office of the High Commissioner (OHCHR)*, 1 July 2019) <https://www.ohchr.org/en/press-releases/2019/07/bachelet-deeply-concerned-death-custody-captain-acosta-arevalo-venezuela> accessed 7 January 2025.

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

UAE legislation currently lacks a specific provision addressing redress for victims of enforced disappearance, unlike other comparative laws. Currently, it only provides compensation for crimes identified by law, omitting other forms of redress like non-recurrence, satisfaction, or rehabilitation. To address this gap, it is recommended that UAE law be amended to include detailed provisions for victims of enforced disappearance, covering guarantees against repetition of violations, adequate satisfaction, and both psychological and physical rehabilitation. Additionally, victims and their legal representatives should have the right to access the judiciary and file complaints about human rights violations. This is in line with Article 41 of the Federal Constitution, which guarantees every individual their rights and freedoms, stipulating that "everyone has the right to submit a complaint to the competent authorities, including the judiciary, regarding the infringement of the rights and freedoms set forth in this chapter."

Comparative constitutions have also guaranteed every person harmed by actions taken by the state the right to file a lawsuit for compensation for the damage caused to them. Article 43 of the Argentine Constitution states that "any person may file a prompt and expeditious action for protection, in the absence of other appropriate judicial means, against any act or omission by public authorities or individuals that immediately or subsequently causes harm, restricts, alters, or threatens arbitrarily or illegally, clearly, the rights and guarantees recognised by this Constitution, by treaty, or by law as appropriate."

Similarly, the Yemeni legislator stipulates in Article (48) of the 1991 Constitution compensation for cases of arbitrary arrest or detention in places other than those subject to the Prisons Organization Law. It also grants the arrested person the right to notify someone of their arrest and mandates judicial oversight for any decision to continue detention. In the same context, Article 30 of the Venezuelan Constitution obliges the state to fully compensate victims of human rights violations. This includes ensuring appropriate compensation, including necessary reparations for damage caused by public crimes.[73]

The federal legislator could have drawn on the Yemeni and Venezuelan constitutions in this field, ensuring compensation for those harmed by cases of arbitrary arrest, detention, and imprisonment or by torture, cruel, inhuman, or degrading treatment, regardless of the state's circumstances, ordinary or exceptional. Accordingly, the study proposes the addition of a new article to the effective Federal Constitution, granting victims of crimes violating freedom, including enforced disappearance, the right to claim compensation. The proposed article is as follows: "The state guarantees just compensation to those harmed by cases of arbitrary arrest, detention, or imprisonment, and to their family members, as regulated by law."

73 Al-Shammari (n 4) 12.

Based on the above, compensation for victims is a constitutionally and legally protected right that must not be denied to any victim, regardless of their status. This right extends broadly to include not only direct victims but also their heirs and dependents, such as those who died due to acts by armed forces, security forces, or paramilitary groups. It further extends to individuals born while their mothers were deprived of liberty, as well as minors who were with their parents who disappeared or were detained for political reasons.

However, implementing legal reforms in the UAE presents several practical challenges that must be considered. These include the difficulty of amending the constitution, which is considered rigid, the need to ensure smooth cooperation between the federal authorities and the emirate-level authorities within the framework of the UAE's federal system, and the necessity to align proposed reforms and amendments with cultural and religious values to gain public support.

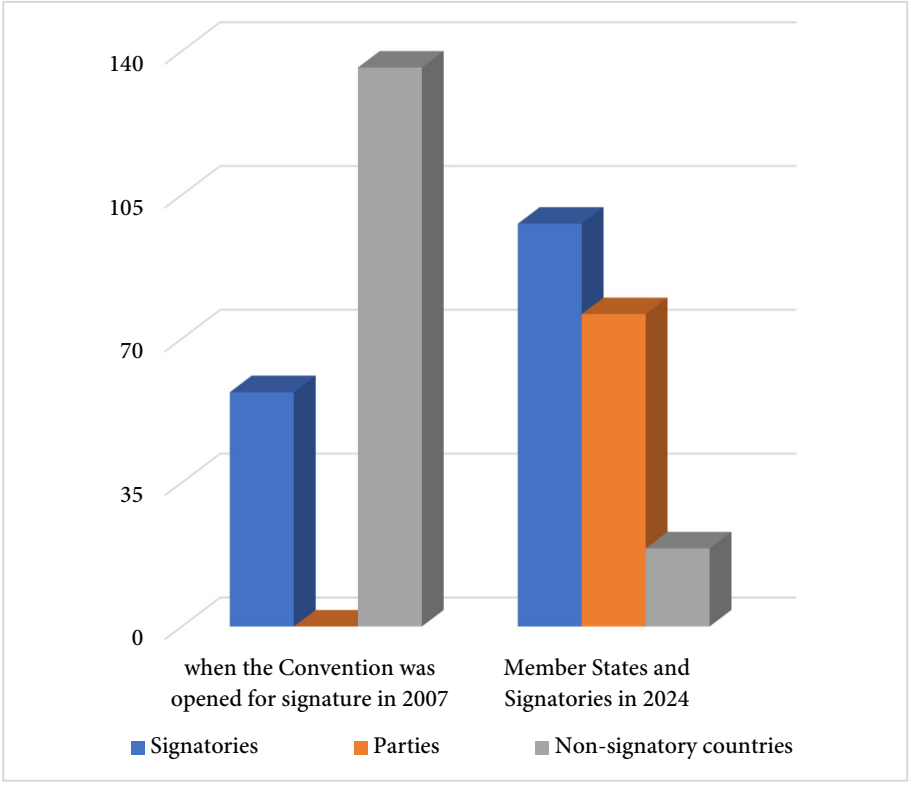

Figure 1. Breakdown of Signatories and Ratifications for the ICPPED (2007-2024)

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

The above figure illustrates the progress of international engagement with the ICPPED over a 17-year period. It highlights the increasing number of countries that have signed and ratified the Convention, demonstrating a growing international commitment and consensus on the importance of protecting individuals from enforced disappearance.[74]

6 COMPENSATIONS FOR CRIMES OF ENFORCED DISAPPEARANCE IN INTERNATIONAL COURT RULINGS

Compensation for crimes of enforced disappearance is a vital area in international law, with the Inter-American Court of Human Rights and the European Court of Human Rights playing a prominent role in delivering justice for victims. These courts strive to provide fair and adequate compensation to victims and their families, upholding international human rights standards and legal principles.

This section will outline compensation for crimes of enforced disappearance in international courts as follows:

6.1. Applications of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights demonstrated a strong commitment to providing comprehensive compensation for victims of enforced disappearance in *Barrios Altos v. Peru*. The court ruled that compensation for victims must cover a variety of forms aimed at redress, rehabilitation, and ensuring that such crimes are not repeated in the future.[75]

In its decision on 14 March 2001, the court ordered the Peruvian government to provide direct financial compensation to victims of enforced disappearance and their families. This compensation covers financial losses, including income loss and expenses incurred by families in searching for their loved ones. In addition to financial compensation, the court emphasised the importance of providing redress for victims. This includes medical and psychological support for the victims and their families to aid in their physical and mental recovery from the negative impacts of enforced disappearance.

The court also indicated the need for the state to restore victims' dignity through a formal, public apology. Such an apology is essential for acknowledging wrongdoing and rebuilding trust between the state and society. Regarding non-repetition, the court requested that the state conduct thorough and transparent investigations into cases of enforced disappearance

74 'International Convention for the Protection of All Persons from Enforced Disappearance, 2006: States Parties' (ICRC) <https://ihl-databases.icrc.org/en> accessed 7 January 2025; 'Working Group on Enforced or Involuntary Disappearances: About Enforced Disappearance' (*United Nations Human Rights: Office of the High Commissioner (OHCHR)*, 2025) <https://www.ohchr.org/en/special-procedures/wg-disappearances/about-enforced-disappearance> accessed 7 January 2025.

75 *Barrios Altos v Peru* (n 43).

and hold those responsible accountable. The state was mandated to provide specialised training for armed forces and correctional institutions on human rights and international humanitarian law. This decision highlighted the necessity of comprehensive compensation, extending beyond financial reparations to include corrective measures and preventive actions to prevent future violations.

The Inter-American Court of Human Rights also heard the *Velásquez Rodríguez v. Honduras* case between 1981 and 1984, one of the landmark cases in international law related to enforced disappearance. In September 1981, university student Mr Manfredo Velásquez Rodríguez was abducted by an armed group in civilian clothes under the direction of the armed forces without any arrest warrant or legal documents to justify it. He was severely tortured during interrogation at a military base and later transferred to another location, after which all news of him ceased until 1986.[76]

On 29 July 1988, the Inter-American Court of Human Rights ruled that the Honduran government had failed to provide compelling evidence to refute the allegations and did not protect the victims' rights. The court declared that enforced disappearance constitutes a continuing crime, violating a wide range of human rights guaranteed under the 1969 American Convention on Human Rights. Consequently, the court held the Honduran government responsible for providing financial compensation to Velásquez Rodríguez's family as part of its international obligations. It also pointed out that the state commits the crime of enforced disappearance either through action or omission, with omission occurring when the state fails to take the necessary care to prevent such violations.[77]

The court further ruled that the government had violated Rodríguez's fundamental rights guaranteed by the American Convention on Human Rights by failing to protect him and effectively investigate his enforced disappearance. The court emphasised that compensation extends beyond financial aspects to include acknowledgement of responsibility and the provision of psychological and moral support to the victim's family. It also stressed that the obligation to investigate must not be a mere formality but a binding legal duty,[39] independent of the victim's or family's initiative.

The IACtHR adopts a flexible and victim-focused approach, frequently allowing circumstantial or indirect evidence when direct evidence cannot be obtained. *Velásquez Rodríguez v. Honduras* highlighted the importance of using circumstantial or presumptive evidence, recognising the state's capacity to conceal its actions. This approach allows victims to provide evidence without adhering to an unreasonably strict standard. The court permitted the inclusion of newspaper articles as evidence. Despite the IACtHR's inability to regard the press clippings as documentary proof, the

76 *Velásquez Rodríguez v Honduras* (Merits) (IACrtHR, 29 July 1988) para 177 <https://edld.ehrac.org.uk/case/velasquez-rodriguez-v-honduras/> accessed 25 November 2024.

77 ibid, para 172.

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

circumstantial evidence strengthened the applicant's claim that the Honduran government was responsible for the disappearances.[78]

This ruling underscores the importance of compensation as a fundamental mechanism for achieving justice for victims and their families and reaffirms the necessity of holding states accountable for human rights violations they commit or allow. The European Court of Human cited the *Velásquez Rodríguez* decision in relation to situations where direct evidence of human rights violations is difficult to obtain, particularly when the state itself is accused of committing or permitting the violations.

In the case of *Blake v. Guatemala*, concerning the abduction and murder of American journalist Nicholas Blake in Guatemala in 1985, the journalist was considered missing until his fate was revealed in 1992. The court deemed enforced disappearance a continuous crime until the victim's fate or whereabouts were disclosed, ruling that the ongoing nature of the crime until 1992 brought it within its jurisdiction. The court ordered the Guatemalan government to provide financial compensation to Nicholas Blake's family as part of its international obligations. This compensation covered financial, psychological, and moral aspects, including financial reparations for material damages and expenses incurred by the family in searching for the victim, as well as psychological harm resulting from the loss of a family member under coercive and tragic circumstances.[79]

The court found Guatemala in violation of Article 8(1) (the right to a hearing within a reasonable time by a competent, independent court) for failing to investigate Mr Blake's disappearance and death effectively, prosecute the responsible parties, and impose appropriate penalties on the perpetrators. The court also found the state in violation of Article 5 (the right to humane treatment), as the enforced disappearance caused suffering for Mr Blake's family, especially his brother, who endured psychological harm due to the incineration of Mr Blake's remains.

The court based its decision on international legal principles concerning the protection of persons from enforced disappearance, viewing this crime as ongoing until the victim's fate is revealed. The court cited Article 17(1) of the 1992 United Nations Declaration on the Protection of All Persons from Enforced Disappearance and Article 3(1) of the 1994 Inter-American Convention on Forced Disappearance of Persons, which require states to take necessary measures to classify enforced disappearance as a crime, punish the perpetrators, and provide compensation to victims.

The court's ruling in the Blake case, a significant judicial precedent, has considerably impacted the development of criminal legislation and the applications of national criminal courts in cases of enforced disappearance in American states. This decision emphasised the

78 Needham (n 6) 36.

79 *Blake v Guatemala* (Reparations and Costs) (IACrtHR, 22 January 1999) <https://www.refworld.org/jurisprudence/caselaw/iacrthr/1998/en/89033> accessed 25 November 2024.

need to provide fair compensation to victims and their families as part of transitional justice, thus strengthening human rights protection at the international level.

The IACtHR employs a victim-centred methodology regarding the burden of proof, frequently transferring this responsibility to the state in cases involving human rights violations. In *Velásquez Rodríguez v. Honduras* and *Godínez Cruz v. Honduras*, the Court underscored the state's duty to present evidence and assist in revealing the truth due to its access to critical information. This strategy alleviates the burden on victims, promoting a more equitable process, especially in instances of enforced disappearances, where states may conceal or eliminate evidence.[80]

6.2. Applications of the European Court of Human Rights

The applications of the European Court of Human Rights (ECtHR) in cases of enforced disappearance hold particular significance, primarily relying on the European Convention on Human Rights of 1950. The ECtHR emphasised the importance of filing complaints concerning legal violations within six months of the final national decision. However, this rule does not apply to cases of ongoing enforced disappearance, where the state's obligation to investigate remains active until the victim's fate is known.

The ECtHR has similar rules for the admission of evidence as the IACtHR. The IACtHR allows indirect and circumstantial evidence, particularly when it comes to enforced disappearances. Likewise, the ECtHR can admit any type of evidence as long as it is relevant.[81] In *Ireland v. United Kingdom*, the ECtHR recognised that, like the IACtHR, it is not bound by inflexible rules of evidence under the European Convention or the theories governing international courts.[82] As a result, the Court can consider any evidence deemed relevant to the case.

In *Kurt v. Turkey*, a young man was forcibly disappeared by Turkish security forces on 25 November 1993.[83] The ECtHR found that the evidence provided by the victim's mother was insufficient to establish a violation of Article 2 of the European Convention on Human Rights, which protects the right to life. However, the court ruled that detaining an individual without acknowledgement constitutes a complete denial of the fundamental rights protected by Article 5, which requires states to conduct prompt and effective investigations into any claim of detention followed by disappearance. The court concluded that the relatives of a disappeared person might themselves be considered victims of torture or cruel and inhumane treatment, constituting a breach of Article 3 of the European

80 Needham (n 6) 41-2.

81 ibid 36.

82 *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) <https://hudoc.echr.coe.int/eng?i=001-57506> accessed 7 January 2025.

83 *Kurt v Turkey* App no 24276/94 (ECtHR, 25 May 1998) <https://hudoc.echr.coe.int/fre?i=001-58198> accessed 7 January 2025.

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

Convention on Human Rights. The court awarded the applicant compensation for the material damage suffered by both her and her son.

The ruling by the ECtHR in *Kurt v. Turkey* appears inconsistent. On the one hand, the ECtHR permitted a broader array of evidence to be accepted, recognising that the state may have suppressed direct evidence. However, it maintained strict standards of proof that circumstantial evidence alone could not satisfy. Judge Gölcüklü did not confirm that the applicant's son's disappearance met the definition of enforced disappearance by the state, as the facts were not established beyond a reasonable doubt. Nevertheless, the Court ruled in favour of the applicant regarding several violations, including the violation of the prohibition of torture under Article 3.[84] Judge Gülcüklü's dissent highlights concerns about the ECtHR's strictness in the standard of proof used in cases of enforced disappearance.

In a similar vein, the ECTHR in *Sakis v. Turkey* ruled that although no specific violation was found concerning the rights of the applicant whose relative disappeared, he still suffered rights violations that the court proved. Consequently, he could be considered an "injured party" entitled to compensation.[85] The ECTHR often grants compensation for non-material damages to claimants, considering the severity of the violations and other justice-related reasons.[86]

The ECTHR frequently stresses the need for the state to conduct an effective investigation in cases of enforced disappearance. In *Tahsin Acar v. Turkey*, Turkey expressed regret for what happened to the victim and committed to providing substantial financial compensation to the victim's family. However, the court ruled that "in cases of enforced disappearance with compelling evidence, where the perpetrators remain unidentified, and the state conducts an investigation that does not meet the minimum standards set by the Convention, a unilateral declaration of responsibility must also include a commitment to a thorough investigation in full compliance with the Convention, as established by previous rulings in similar cases."[87]

Before shifting the burden of proof to the state, the applicant must first present a *prima facie* case, meaning there is enough evidence to support their claim unless it is disproven. In *Togcu v. Turkey*, the Court explained that the applicant must meet this requirement before the government is required to provide an explanation. This shows that the ECtHR's approach to the burden of proof has similarities to the IACtHR, demonstrating the importance of enforced disappearances.[88]

84 Needham (n 6) 37.

85 *Çakici v Turkey* App no 23657/94 (ECtHR, 8 July 1999) para 130 <https://hudoc.echr.coe.int/eng?i=001-58282> accessed 7 January 2025.

86 Al-Shammari (n 4) 53.

87 *Tahsin Acar v Turkey* App no 26307/95) (ECtHR, 6 May 2003) para 84 <https://hudoc.echr.coe.int/eng?i=001-61076> accessed 7 January 2025.

88 Needham (n 6) 42.

The ECTHR's reliance on the standard of "beyond a reasonable doubt" to determine violations of Article 3 may not fully consider the suffering of the victim's family. This high standard of proof is often unattainable in enforced disappearance cases. This inadvertently gives perpetrators, such as governments, the opportunity to destroy direct evidence and avoid international accountability. In contrast, the Inter-American Court of Human Rights provides victims and their families a more accessible standard of evidence, enabling them to present persuasive proof that their loved ones were forcibly disappeared by the state.

It is evident that the ECTHR's jurisprudence in the realm of enforced disappearance is less developed than that of the Inter-American Court of Human Rights. Nevertheless, in several of its rulings, the ECTHR has moved away from the requirement of proof beyond a reasonable doubt to establish a violation of the right to life. In *Timurtaş v. Turkey*,[89] the ECTHR concluded that sufficient circumstantial evidence based on concrete elements could justify an assumption of the detainee's death while in custody. The ECTHR should consider reducing the evidentiary burden in cases of torture-related crimes to ease the process for families of enforced disappearance victims.

7 CONCLUSIONS

The study examined the concept and mechanisms of compensation for victims of enforced disappearance, focusing on how national legal systems and international courts have addressed this issue. It concluded with the following results and recommendations:

Although the UAE is committed to compensating victims, it does not provide specific provisions addressing redress for victims of enforced disappearance. Instead, it relies on general provisions that cover compensation for defined crimes under the law without extending to other forms of redress, such as guarantees of non-repetition, reparations, or rehabilitation programs. This reason, and the fact that it did not join the ICPPED, highlight a legislative gap that could impact the comprehensive protection of victims' rights and needs and make its experience lag behind other countries.

Comparative analysis revealed that international jurisprudence, particularly from the Inter-American and European Courts of Human Rights, offers valuable insights into crafting robust compensatory frameworks. While the European court maintains a stringent evidentiary standard, its reliance on American jurisprudence in several major cases highlights the American flexible, victim-centred approach, which is particularly effective in addressing the complexities of enforced disappearance. This interplay between the two systems could serve as a model for enhancing the UAE's judicial practices.

89 *Timurtaş v Turkey* App no 23531/94 (ECtHR, 13 June 2000) <https://hudoc.echr.coe.int/eng?i=001-58901> accessed 7 January 2025.

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

The study also highlighted the challenges of integrating international principles into UAE law. These include balancing cultural and religious values with global human rights standards and overcoming institutional and procedural barriers within a federal system. Addressing these challenges requires a tailored approach that respects local contexts while drawing from successful international practices.

The findings reaffirm the necessity for explicit legislative reforms in the UAE. These reforms should go beyond merely criminalising enforced disappearance in a general manner; they should also provide detailed mechanisms for compensation, rehabilitation, and prevention. Such reforms should ensure victims' right to legal recourse, in line with Article (41) of the Federal Constitution, and extend constitutional guarantees to victims of unlawful detention, torture, or cruel treatment. Additionally, amendments to Federal Law No. 38 of 2022 on criminal procedures are recommended to allow families of victims to file civil claims for damages resulting from enforced disappearance and other crimes.[90] To ensure justice, the study advocates removing statutes of limitations for such crimes, enabling victims and their families to seek redress without temporal restrictions.

The study strongly advocates for the UAE to join the ICPPED, a step that would significantly support the country's standing as a regional leader in human rights. By ratifying the convention, the UAE would demonstrate its commitment to international human rights standards, fostering greater trust and cooperation with global institutions. This would enhance the UAE's legal and institutional capacity to address the complex challenges associated with enforced disappearances by aligning national legislation with international principles. In doing so, the UAE would not only uphold human dignity but also set an example for other nations in the region, promoting collective progress in human rights protection.

Furthermore, the study recommends the UAE draw from the practices of the Inter-American and European Courts of Human Rights when crafting legislation to criminalise enforced disappearance. These courts provide well-established policies for defining and addressing this crime, which could help align Emirati law with international human rights standards. The study also highlights the importance of fostering international judicial cooperation between these courts, encouraging exchanges of case law, joint workshops, and conferences. Such initiatives could enhance the European Court's legal doctrine by leveraging the extensive experience of the American Court in handling enforced disappearance cases.

Finally, the study proposes the establishment of a national compensation fund, modelled after the ICC Fund for Victims, tailored to the UAE's economic and legal framework. This fund would provide financial and non-financial compensation to victims, including necessary medical and psychological support.

90 Federal Decree Law no (38) of 2022 'Promulgating the Criminal Procedures Law' [2022] Official Gazette 737.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

КОМПЕНСАЦІЯ ЗА ЗЛОЧИНИ НАСИЛЬНИЦЬКОГО ЗНИКНЕННЯ: ПОРІВНЯЛЬНЕ АНАЛІТИЧНЕ ДОСЛІДЖЕННЯ В КОНТЕКСТІ МІЖНАРОДНОГО ПРАВА ТА ПРАВА ЕМІРАТІВ

Махмуд Альблуші та Джамал Барафі*

АНОТАЦІЯ

Вступ. *Злочин насильницького зникнення є одним із найсерйозніших порушень прав людини, оскільки він завдає серйозних страждань жертвам та їхнім родинам. Цей злочин передбачає таємне позбавлення людини її свободи та основних прав без будь-якого офіційного визнання, залишаючи жертву жити в постійній ізоляції та тривозі. Боротьба з цим злочином стала не лише юридичним, але й моральним обов'язком держав і міжнародного співтовариства щодо захисту жертв і забезпечення справедливості. Сучасна кримінальна політика приділяє особливе значення жертвам злочинів, не лише караючи злочинця, але й прагнучи досягти правосуддя за допомогою справедливої компенсації жертвам та їхнім сім'ям. Такий підхід відображено в міжнародному та національному законодавстві, а також в тенденціях діяльності міжнародних судів з прав людини. Важливість цього дослідження полягає в аналізі правових засад компенсації за злочини насильницьких зникнень з погляду порівняння міжнародного права, законодавства ОАЕ та інших законодавств з метою оцінки адекватності цих законів для захисту жертв і забезпечення їхньої компенсації.*

Методи. *У цьому дослідженні використовуються описові, аналітичні та порівняльні методи для визначення компенсації за злочини, пов'язані з насильницьким зникненням, визначення осіб, які мають на неї право, та вивчення різних форм компенсації. Крім того, було здійснено аналіз рішення міжнародних судів щодо компенсації за злочин насильницького зникнення, вивчено відповідні положення законодавства Еміратів і зіставлено їх із відповідним правовим регулюванням інших юрисдикцій. Порівняння законодавства Іспанії, Філіппін, Ємену, Катару та Венесуели з законодавством ОАЕ*

підкреслює прогрес і прогалини в підході ОАЕ до компенсації жертвам злочинів насильницького зникнення. Цей метод забезпечує правову модель, яку законодавець ОАЕ може використовувати для розробки та розширення правових основ компенсації за вищезгадані злочини.

Результати та висновки. *У результаті дослідження було зроблено кілька висновків, найбільш значущим з яких є недостатність чинного законодавства ОАЕ для комплексної компенсації жертвам насильницького зникнення, на відміну від інших порівняльних законодавств. Суди з прав людини, такі як Міжамериканський та Європейський суди з прав людини, відіграли вирішальну роль у встановленні принципів повної компенсації за злочини, пов'язані з насильницькими зникненнями. Дослідження рекомендує скасувати термін давності для позовів про компенсацію, дозволяючи жертвам або їхнім родинам домагатися справедливості незалежно від того, коли стався злочин. У статті також було запропоновано використовувати міжнародні судові тенденції та успішний глобальний досвід у розробці національного кримінального законодавства, пов'язаного з криміналізацію насильницького зникнення.*

Ключові слова: *насильницьке зникнення, жертви насильницьких зникнень, компенсація, особи, які мають право на компенсацію, законодавство Еміратів.*

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Review Article

CONCLUSION ON THE CONSTITUTIONALITY OF THE ISTANBUL CONVENTION OF THE LITHUANIAN CONSTITUTIONAL COURT: CONTEXT, REASONING, AND LEGAL CONSEQUENCES

Dovilė Pūraitė-Andrikienė

ABSTRACT

Background: *On 14 March 2024, the Lithuanian Constitutional Court issued a conclusion on the constitutionality of certain provisions of the Istanbul Convention, becoming the fourth constitutional court in Eastern and Central Europe to rule on this issue. Thus, this conclusion reflects a broader trend in the region. This article aims to analyse this conclusion and reveal its similarities and differences with decisions made by other constitutional courts in the region on the same matter. To achieve this goal, the following objectives are addressed: 1) to reveal the context in which the Lithuanian Parliament submitted an inquiry to the Constitutional Court on the constitutionality of the Convention and the issues raised in this inquiry; 2) to analyse the arguments of the Lithuanian Constitutional Court in this conclusion; and 3) to reveal the legal consequences of this conclusion and the possible impact of this conclusion on the ratification of this treaty in Lithuania. These issues are examined in the broader context of the judgments of other constitutional courts in the region on the constitutionality of the Istanbul Convention.*

***Methods*:** *To explore the theoretical and practical dimensions of the issue at hand, this article utilises a variety of methods. The document content analysis method was employed to examine relevant normative and jurisprudential research sources, focusing on identifying key terms and phrases within the text and linking them to existing statements in specialised literature. The paper relied heavily on systemic and logical analysis to examine nearly all issues discussed in the article. Comparative analysis was employed to compare the decisions of the constitutional courts on the constitutionality of the Istanbul Convention of other Eastern and Central European countries and the conclusion on this issue adopted by the Lithuanian Constitutional Court. The linguistic and teleological analysis methods were employed to clarify the content of provisions of the legal acts examined in this article, uncovering the true intentions of the creators of these provisions and the meaning of the concepts within these provisions.*

Results and conclusions: *The article concludes that the Lithuanian Parliament's inquiry to the Lithuanian Constitutional Court regarding the constitutionality of the Istanbul Convention reflects a general trend in Eastern and Central Europe, as the Lithuanian Constitutional Court has been asked to address the constitutionality of essentially the same provisions of the Convention as other constitutional courts of the region. In assessing the constitutionality of the Convention's provisions, the Lithuanian Constitutional Court, like the constitutional courts of Latvia and Moldova, focused on the Convention's objective – eradicating violence against women and domestic violence by promoting gender equality. This approach has led to a similarity in the reasoning of these courts. The Lithuanian Constitutional Court became the third constitutional court in the region, which, like those in Latvia and Moldova, did not find the provisions of the Convention unconstitutional. The conclusion of the Lithuanian Constitutional Court has been met with mixed reactions in society, political, and academic circles; therefore, even after the conclusion regarding the constitutionality of the Istanbul Convention, this international treaty has still not been ratified in Lithuania. Nevertheless, the Constitutional Court is the only institution with the power to assess the compatibility of this international treaty with the constitutional provisions, so Parliament can no longer rely on the argument that this Convention is incompatible with the Constitution.*

1 INTRODUCTION

On 14 March 2024, the Lithuanian Constitutional Court (hereinafter: the Lithuanian CC) issued a conclusion[1] on the compatibility of some provisions of the Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter: the Istanbul Convention or the Convention)[2] with the Constitution of the Republic of Lithuania (hereinafter: the Constitution)[3] and became the fourth constitutional court in the Eastern and Central Europe to rule on this issue. The first in the region to examine the compatibility of the provisions of the Convention with the national constitution was the Bulgarian Constitutional Court (2018),[4] the second was the Latvian Constitutional Court (2021),[5] and the third was the Moldovan Constitutional Court (2022).[6] The Council of Europe's Commission for Democracy through Law (Venice Commission) has also issued opinions on the compatibility of the provisions of the Convention with national

1 Conclusion no KT24-I1/2024, case no 18/2023 (Constitutional Court of the Republic of Lithuania, 14 March 2024).

2 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (11 May 2011) CETS 210.

3 Constitution of the Republic of Lithuania [1992] Valstybės Žinios 33/1014.

4 Decision no 13, case no 3/2018 (Constitutional Court of the Republic of Bulgaria, 27 July 2018).

5 Judgment no 2020-39-02 (Constitutional Court of the Republic of Latvia, 4 June 2021).

6 Decision on inadmissibility of complaint no 219a/2021 (Constitutional Court of the Republic of Moldova, 18 January 2022).

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constitutions, often at the request of individual states.[7] The above-mentioned conclusion of the Lithuanian CC thus reflects a certain trend in Eastern and Central Europe. Unsurprisingly, the Convention has become a symbol of the cultural war in Central and Eastern Europe.[8] In these countries, those who support the Convention refer to gender equality, solidarity of Europe, and justice, while those who oppose it often invoke concerns about national identities and traditional lifestyles of these countries.[9] Thus, when society and politicians failed to agree on the ratification of the Convention, the impartial arbiters of this debate, the constitutional courts, had to bring a resolution to the debate.

This article aims to analyse the most recent example of this trend – the conclusion of the Lithuanian CC regarding the constitutionality of the Istanbul Convention – to reveal its similarities and differences with the judgments of other constitutional courts in the region on the same issue. To achieve this, the following objectives will be addressed: 1) to reveal the context in which the Lithuanian Parliament submitted an inquiry to the Lithuanian CC on the constitutionality of the Convention and the issues raised in this inquiry; 2) to analyse the arguments of the Lithuanian CC in its conclusion; and 3) to assess the legal consequences of this conclusion and its possible impact on the ratification of the Convention in Lithuania. These issues are examined in the broader context of judgments issued by other constitutional courts in the region regarding the constitutionality of the Istanbul Convention.

While some Lithuanian legal scholars have addressed issues of compatibility between the Istanbul Convention and the Lithuanian Constitution, their analyses were conducted prior to the adoption of the above-mentioned conclusion of the Lithuanian CC and/or focused mainly on the doubts raised about the constitutionality of the Convention rather than the assessment made by the Constitutional Court.[10] Some research works have also analysed the judgments of the constitutional courts of other states in the region

7 Venice Commission, Opinion no 961/2019 'Armenia - On the Constitutional Implications of the Ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)' (14 October 2019) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)018-e> accessed 10 September 2024; Venice Commission, Opinion no 1065/2021 'Republic of Moldova - Amicus curiae Brief for the Constitutional Court on the constitutional Implications of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)' (14 December 2021) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)044-e> accessed 10 September 2024.

8 Martin Dimitrov, 'The Convention of Discord' (*Friedrich Naumann Foundation*, 26 August 2022) <https://www.freiheit.org/east-and-southeast-europe/convention-discord> accessed 10 September 2024.

9 Elizabete Vizgunova and Elīna Graudiņa, 'The Trouble with "Gender" in Latvia: Europeanisation through the Prism of the Istanbul Convention' (2020) 13(1) Baltic Journal of Law & Politics 131, doi:10.2478/bjlp-2020-0005.

10 Jolita Miliuvienė, 'Konstitucinės dvejonės dėl Stambulo konvencijos ratifikavimo: audra vandens stiklinėje?' [2023] Viešoji teisė Lietuvos teisė: esminiai pokyčiai 43, doi:10.13165/LT-23-01-02; Dovilė Pūraitė-Andrikienė, 'Stambulo konvencijos konstitucingumo klausimas Lietuvoje' (2024) 35(2) Filosofija, Sociologija 13, doi:10.6001/fil-soc.2024.35.2Priedas.Special-Issue.2.

concerning the constitutionality of this document.[11] However, the conclusion of the Lithuanian CC on this issue, its arguments, and its consequences remain unexamined in legal scholarship. Furthermore, there are no scholarly works analysing this topic in the broader context of the judgments of other constitutional courts in the region on the constitutionality of this international treaty.[12]

To explore the theoretical and practical dimensions of the issue at hand, this article utilised a variety of methods. The document content analysis method was employed to examine relevant normative and jurisprudential research sources, focusing on identifying key terms and phrases within the text and linking them to existing statements in specialised literature. The paper relied heavily on systemic and logical analysis to examine nearly all issues discussed in the article. Comparative analysis was employed to compare the judgments of constitutional courts in other Eastern and Central European countries on the constitutionality of the Istanbul Convention with the conclusion on this issue adopted by the Lithuanian CC. The linguistic and teleological analysis methods were employed to clarify the content of provisions of the legal acts examinedin this article, uncovering the true intentions of the drafters and the underlying meaning of key concepts within these provisions.

2 CONTEXT AND ISSUES RAISED IN THE LITHUANIAN PARLIAMENT'S INQUIRY TO THE CONSTITUTIONAL COURT

In 2013, Lithuania signed the Convention. However, it has still not been ratified due to opposition from some groups of the population and politicians. Lithuania remains one of the few countries to have signed but not ratified the Convention.[13] The reasons for this opposition are varied, but in general, it can be stated that those who oppose the ratification

11 Miriana Ilcheva, 'Bulgaria and the Istanbul Convention – Law, Politics and Propaganda vs. the Rights of Victims of Gender-Based Violence' (2020) 3(1) Open Journal for Legal Studies 49, doi:10.32591/coas.ojls.0301.04049i; Dovilė Pūraitė-Andrikienė, 'The Istanbul Convention in the Constitutional Jurisprudence of Central and Eastern European States' in Agnė Limantė, Artūras Tereškinas and Rūta Vaičiūnienė (eds), *Gender-Based Violence and the Law Global Perspectives and Eastern European Practices* (Routledge 2023) 60; Ruzha Smilova, 'The Ideological Turn in Bulgarian Constitutional Discourse: The Rise Against "Genders"' in András Sajó and Renáta Uitz (eds), *Critical Essays on Human Rights Criticism* (Issues in Constitutional Law 10, Eleven Publishing International 2020) 177; Radosveta Vassileva, 'A Perfect Storm: The Extraordinary Constitutional Attack against the Istanbul Convention in Bulgaria' (2022) 68(1) OER Osteuropa Recht 78, doi:10.5771/0030-6444-2022-1-78.

12 It should also be noted that this paper will not present the objectives, achievements, and challenges of the Istanbul Convention. The article will also not present in detail the social context surrounding the Convention in Lithuania. These issues are covered in other academic works, see: Miliuviene (n 10); Pūraite-Andrikienė (n 10); Pūraitė-Andrikienė (n 11). The focus of this paper is exclusively on the Lithuanian CC's conclusion of 14 March 2024, its arguments, and legal consequences.

13 Lithuania is one of the five EU countries that have signed but not ratified the Convention, along with Bulgaria, the Czech Republic, Slovakia and Hungary. Lithuania is also the only Baltic State that has not yet ratified the Convention.

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of the Istanbul Convention in Lithuania are most often motivated by the following arguments: 1) the term "gender" enshrined in the Convention is alien to Lithuanian national law, allegedly eliminates differences between the sexes, and is incompatible with traditional values; 2) the Convention is seen as a legal act that would supposedly legalise same-sex marriage; 3) Lithuania's legal framework is supposedly sufficient to fight gender-based violence, and therefore ratification of the Convention is not necessary.[14]

Those in favour of ratifying the Convention argue that 1) Lithuania's legal framework is not sufficient to combat domestic violence; 2) ratification of this treaty would help to eliminate discrimination against women and would be a clear sign that this type of violence is not tolerated in Lithuania; 3) ratification of the Convention would also show Lithuania's solidarity with other EU countries against gender-based violence and would contribute to the improvement of the country's international reputation.[15] It is worth mentioning that similar arguments for and against ratification have been put forward by scholars from other countries in the region; for example, in Latvia, there was also a fierce debate in the run-up to the ratification of this treaty at the end of 2023.[16]

As in other countries in the region, controversies surrounding the Convention in Lithuania have led to doubts about its compatibility with the Lithuanian Constitution. Different opinions of Lithuanian constitutional law scholars have been presented on this issue until the Constitutional Court's conclusion on the constitutionality of the Convention. According to Žalimas, the Convention cannot be in conflict with the Constitution since it safeguards the same core values.[17] Similarly, Miliuvienė argued that the Lithuanian Constitution cannot be interpreted in such a way that it does not imply an obligation for the state to fight violence against women and domestic violence. The principle of equality between sexes and non-discrimination on any grounds, as emphasised in the Convention, is an important part of the constitutional principle of the rule of law, which underpins the entire legal system and the Constitution itself. There is no reason to believe that the principles of non-discrimination and equality protected by the Constitution and the Convention are different in scope or that they could conflict with one another.[18] However, Vaičaitis raised concerns about the Convention's alignment with constitutional provisions, specifically questioning its adherence to the principle of equality of individuals, the constitutional principle of

14 For more on this issue see: Pūraite-Andrikienė (n 10).
15 ibid.
16 Vizgunova and Graudiņa (n 9).
17 Dainius Žalimas, 'Venecijos komisijos sprendimas dėl Stambulo konvencijos, kuris svarbus ir Lietuvai' (*JARMO*, 10 December 2021) <https://www.jarmo.net/2021/12/dainius-zalimas-venecijos-komisijos.html> accessed 10 September 2024.
18 Miliuviene (n 10) 61.

proportionality, parents' rights to educate their children according to their beliefs, and the constitutional autonomy of religious organisations.[19]

These discussions culminated in the Lithuanian Parliament approving the inquiry initiated by the Speaker of Parliament, requesting the Lithuanian CC to examine the Istanbul Convention. In October 2023, the Constitutional Court formally accepted the Seimas's inquiry, seeking a conclusion on the constitutionality of certain provisions of the Convention. In essence, it can be stated that in Lithuania, the Constitutional Court has been asked to resolve doubts about the constitutionality of this treaty rather than expecting the Lithuanian CC to declare this international document unconstitutional.

In neighbouring Latvia, a similar situation unfolded, as the request for the Latvian Constitutional Court (hereinafter: the Latvian CC) to assess the Convention was also viewed as a step that could lead to the Convention's ratification.[20] Members of the Latvian Parliament sought to find out whether the use of the term "gender" in the text of the Convention, the obligation of the State in the Convention to take measures to change gender-based patterns of behaviour in society, and the Convention's provisions on changing educational programs to combat gender stereotypes as early as school age were compatible with the provisions of the Constitution of Latvia.[21] The Latvian CC was asked to assess whether Arts. 3(c), 4(3), 12(1), and 14 of this international treaty conflict with the Latvian Constitution.[22]

The situation was different in Bulgaria. In this country, the ratification of this document was met with opposition from political circles and the Orthodox Church. Therefore, in 2018, 75 members of Parliament requested a constitutional review of the Convention.[23] They cited concerns over deep societal divisions and fears regarding introducing same-sex marriages and a "third sex" as key arguments for bringing the matter before the Court, arguing that the concept of gender was not recognised within the Bulgarian laws.[24] Thus, in Bulgaria, the referral to the Constitutional Court was initiated by opponents of the Convention, who claimed that Arts. 3(c) and 4(3) of this treaty were unconstitutional.

The Moldovan case stands out as unique because, unlike in Lithuania, Latvia, and Bulgaria, the question of the Istanbul Convention's compatibility with constitutional provisions was addressed after its ratification. Moldova ratified the international document in 2021. However, it was met with strong resistance from the Orthodox Church,

19 Vaidotas A Vaičaitis, 'Kelios mintys dėl Stambulo konvencijos iš konstitucinės teisės perspektyvos' (*LRT*, 23 March 2021) <https://www.lrt.lt/naujienos/nuomones/3/1370719/vaidotas-a-vaicaitis-kelios-mintys-del-stambulo-konvencijos-is-konstitucines-teises-perspektyvos> accessed 10 September 2024.

20 Vizgunova and Graudiņa (n 9) 133.

21 Miliuviene (n 10) 49.

22 Judgment no 2020-39-02 (n 5).

23 See further: Smilova (n 11) 177.

24 ibid.

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

which holds significant influence in the country. [25] This situation mirrors that of Lithuania, where the Lithuanian Bishops' Conference issued a public statement after the President of the Republic's proposal to ratify the Convention, and has spoken out against the ratification of the Convention.[26]

In its appeal to the legislative and executive branches of government, the Orthodox Church of Moldova argued that the Convention "refutes the existence of a woman and a man." As a result, two parliament members requested the Moldovan Constitutional Court (hereinafter: the Moldovan CC) to review the constitutionality of the Law on the Ratification of this international treaty. [27] They claimed that Arts. 3(c), 14, 28, and 42 conflicted with Moldova's Constitution. The applicants argued that ratifying this treaty violated constitutional provisions that enshrine the freedom of conscience, the right to education, and the institution of the family. [28]

To return to the Lithuanian context, it should be noted that Parliament raised doubts regarding the compatibility with the Constitution of the term "gender" used in the Convention. The applicant's doubts as to the compatibility with the Constitution of the provisions of Arts. 3(c), (d), and 4(3) of the Convention were based on the fact that the aforementioned provisions of the Convention use the term "gender" to refer to socially constructed roles, behaviours, activities and traits which a particular society considers appropriate for women and men. The applicant argued that these provisions create a presumption of the elimination of the distinction between male and female genders, creating "legal presumptions that gender is a social construct," and threatens the Lithuanian language, as the provisions of the Convention imply a gender-neutral language in the public sphere, and the official Lithuanian language is not gender neutral. The applicant also contended that "the inherent differences between sexes are a given on which the family and society are based" and that the above-mentioned provisions of the Convention, including the terms used therein, therefore negate the concept of the family derived from Art. 38 of the Constitution, according to which family members are considered to be only men and/or women, and that marriage is only between a woman and a man in the biological, rather than the social, sense.[29]

Moreover, according to the applicant, the introduction of the "legal obligation to introduce education on non-stereotypical gender roles" in the curricula of all levels of formal education, as set out in Art.14 of the Convention, would deny a part of the population of Lithuania the right to be guided by the natural concept of sex and to educate their children

25 Venice Commission (n 7).
26 Miliuvienė (n 10) 52.
27 Irina Criveț, 'Moldova, Mic-Drop!: A Long-Awaited Ratification of the Istanbul Convention' (*IACL-AIDC Blog*, 12 May 2022) <https://blog-iacl-aidc.org/new-blog-3/2022/5/12/moldova-mic-drop-a-long-awaited-ratification-of-the-istanbul-convention> accessed 10 September 2024.
28 Decision on inadmissibility of complaint no 219a/2021 (n 6).
29 Conclusion no KT24-I1/2024 (n 1).

according to such a concept of sex, when education and training institutions, where education is compulsory according to the Constitution, would impart a different worldview from that according to which children are educated at home. The applicant also questioned whether the obligation under Art. 14 of the Convention to modify the curricula of education and training establishments to teach certain subjects would not infringe on the constitutional freedom of belief and restrict the autonomy of higher education institutions.[30]

The issues raised reflect a broader trend in the region, where opposition to the ratification of the Convention often centres around Arts. 3(c) and 4(3), which enshrine the concept of gender. There is also frequent criticism of Art. 12(1), which calls for measures to eliminate traditions and other practices based on stereotyped roles of different sexes. Additionally, Arts. 14(1) and (2) which address measures related to educational materials on non-stereotypical gender roles and equality between sexes, are also criticised.[31]

Thus, the constitutional courts in these countries have had to examine the constitutionality of basically the same provisions of the Convention, i.e. the concept of gender (Bulgaria, Latvia, Moldova, Lithuania), as well as the constitutionality of the Convention's provisions on the obligation to include in educational materials material on non-stereotypical gender roles and equality between sexes (Latvia, Moldova, Lithuania). It is worth mentioning that, unlike the constitutional courts of Latvia and Moldova, the Lithuanian CC has not been asked to examine Art. 12(1) of the Convention. It is also noteworthy that the Lithuanian Parliament's inquiry is distinguishable from the issues raised in other constitutional courts in the region in that, according to the applicant, the above-mentioned provisions of the Convention create conditions for the use of a sex-neutral language in the public sphere and violate Art. 14 of the Constitution, as the official Lithuanian language is not sex -neutral.[32]

In Lithuania, as in Latvia and Bulgaria, the compatibility with the constitutional provisions of this international treaty was addressed before the ratification of this document. In contrast, in Moldova, the CC was requested to review the law which ratified this international treaty. Notably, in Poland, the Constitutional Tribunal was called upon to review the compatibility of the Convention and the Polish Constitution five years after the treaty had been ratified. However, this Tribunal never resolved the issue, as the request was withdrawn following a change in political forces. In 2020, the head of government requested that the Constitutional Tribunal review this issue. However, in 2024, the new Prime Minister, Donald Tusk, firmly stated that "protecting women and children from violence was a matter above politics. He subsequently signed a document withdrawing the request from the Constitutional Tribunal". [33]

30 ibid.

31 Pūraitė-Andrikienė (n 11) 64.

32 Conclusion no KT24-I1/2024 (n 1).

33 'Prime Minister Donald Tusk: Istanbul Convention is to Protect Women and Children from Violence' (*Chancellery of the Prime Minister of Republic of Poland*, 30 January 2024) <https://www.gov.pl/web/primeminister/prime-minister-donald-tusk-istanbul-convention-is-to-protect-women-and-children-from-violence> accessed 10 September 2024.

Access to Justice in Eastern Europe
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3 THE ARGUMENTS OF THE CONCLUSION

Many of the answers to the questions raised by the Lithuanian Parliament were available in the above-mentioned judgments of the constitutional courts of Latvia and Moldova, the opinions of the Venice Commission, and the explanatory documents of the Istanbul Convention. However, to determine whether the provisions of the Istanbul Convention were compatible with the Constitution, the Lithuanian CC had to interpret the relevant provisions of the Constitution as well as the imperatives deriving from there.

In its conclusion dated 14 March 2024, to ascertain whether the provisions of the Convention invoked by the applicant are compatible with the Constitution, the Lithuanian CC first disclosed the purpose of the Convention and the object of its regulation. In its analysis of the meaning and content of the provisions of the Convention, the Lithuanian CC took into account the Explanatory Report on the Convention[34] (hereinafter: the Explanatory Report) adopted together with the Convention. The report states that the main purpose of the Convention is to protect women from all forms of violence, to prevent violence against women and domestic violence, and to prosecute perpetrators.[35]

Therefore, the Lithuanian CC highlighted the threefold impact of the Convention, which is sought by the ratifying countries: firstly, the prevention of violence against women and domestic violence; secondly, the protection of the victims of violence; and thirdly, the punishment of those responsible for the violence.

Before the Lithuanian CC began its review of the compatibility of the Convention's provisions with the Constitution, it emphasised the aspect of gender equality. The Lithuanian CC noted that the Convention also aims to eliminate all forms of discrimination against women and to promote substantive equality between women and men. The Explanatory Report points out that there is a direct link between gender equality and the elimination of violence against women. Thus, only real equality between women and men can make it possible to achieve the objectives of the Convention. The Lithuanian CC has also stressed that the provisions of the Convention imply that the States Parties to the Convention have the discretion to decide how the effective application of the provisions of the Convention will be ensured.

From a comparative perspective, it should be mentioned that equality between sexes was also highlighted in the decision of the Moldovan CC. In its analysis of the title and preamble of the Istanbul Convention, the Moldovan CC observed that the Convention

34 Committee of Ministers of the Council of Europe, *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence: Explanatory Report* (LSI library 2011) <https://documentation.lastradainternational.org/doc-center/2722/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence-explanatory-report> accessed 10 September 2024.

35 ibid.

aims to "fight violence against women and domestic violence. The preamble of this treaty highlights that achieving equal rights and gender equality is a crucial factor in preventing violence against women". [36] Similarly, the Latvian CC stressed the central purpose of this international treaty.[37]

Having clarified this, the Lithuanian CC concluded that all the provisions of the Convention, including those that raised concerns for the applicant, must be interpreted in light of the objectives pursued by the Convention. Thus, the Lithuanian CC, like its Latvian and Moldovan counterparts, addressed the question of the Convention's compatibility with the constitutional provisions in the context of the Convention's objectives. Contrary to the judgment of the Bulgarian Constitutional Court (hereinafter: the Bulgarian CC), in which the term "gender" was interpreted as the hidden "gender ideology,"[38] the Lithuanian CC, along with its Latvian and Moldovan counterparts, focused on the core purpose of this international treaty – combating violence against women and promoting general equality.

The Lithuanian CC then turned to the interpretation of the concept of gender enshrined in the Convention. It should be noted that the search for a suitable term in the Lithuanian language has led to many different official translations of the Istanbul Convention. Terms such as "social sex", "the social dimension of sex", or "sex in its social aspect" were suggested. However, the alternations of this concept have not led to more clarity; on the contrary, they appear to have fueled further debate.[39] It was even suggested to translate "gender" in the same way as "sex" to avoid communicating the misleading message that the Convention was supposedly changing the traditional understanding of sexes.[40]

The Lithuanian CC noted that gender refers to the socially constructed roles, behaviours, activities, and traits that a particular society deems appropriate for women and men. The Constitutional Court noted that this is one of the characteristics that may be used to describe, within the meaning of the provisions of the Convention, the root causes of violence that the Convention seeks to combat. Specifically, in para. (d) of this Art. 3, the term "gender-based violence against women" explains against whom such violence may be directed, namely against a woman simply because they are women, i.e. because of the behaviour, activities and traits normally associated with womanhood, as well as the socially constructed roles attributed to women.

36 Domnica Manole, 'Text of the Briefing given by the President of the Constitutional Court of Moldova Regarding the Istanbul Convention' (*Council of Europe Office in Ukraine*, 18 January 2022) <https://www.coe.int/en/web/kyiv/-/text-of-the-briefing-given-by-domnica-manole-the-president-of-the-constitutional-court-of-moldova-regarding-the-istanbul-convention> accessed 10 September 2024.

37 Judgment no 2020-39-02 (n 5).

38 Decision no 13, case no 3/2018 (n 4).

39 Miliuvienė (n 10) 54.

40 ibid.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

Thus, the Convention contains, *inter alia*, provisions in Art. 3(c) and (d) that aim to combat, *inter alia*, violence that may be provoked by roles, behaviour, activities, or characteristics normally attributed to women. According to the Lithuanian CC, these provisions do not negate the binary concept of sex (female and male), nor do they imply the possibility of choosing a sex other than one's biological sex.

Similarly, the Latvian[41] and Moldovan[42] constitutional courts also stressed that the introduction of the concept of gender in the Convention was intended to emphasise that violence against women and domestic violence stem from gender stereotypes. When interpreting the term "gender", both courts followed the Explanatory Report.

Thus, unlike the Bulgarian CC, which interpreted the term "gender" as the hidden "gender ideology" , according to which the individual choice of social roles is disconnected from biological sex,[43] the Lithuanian CC, along with its Latvian and Moldovan counterparts, referred to the Explanatory Report when interpreting the term. In this regard, similarly to these courts, the Lithuanian CC did not identify any "second layer" in the term "gender" or in the purpose of the Convention.

The Lithuanian CC has stated that the contested Art. 4 of the Convention is intended to ensure the principles of equality and non-discrimination when applying the Convention. The Court noted that this article establishes a non-exhaustive list of grounds for non-discrimination, thereby recognising that any person may be a victim of violence. Thus, according to Art. 4(3) of the Convention, States are required to give effect to the provisions of the Convention, particularly in protecting victims of violence, without discriminating against any person who has been or may be subjected to violence. This includes not discriminating on the basis of gender, the stereotypical roles, behaviours, activities and traits attributed to a particular gender by a section of the public, or on the grounds of gender identity.

In assessing the compatibility of Arts. 3(c), (d) and 4(3) of this treaty with the Constitution, the Lithuanian CC, recalling that the human rights and freedoms enshrined in the Constitution form an integral and coherent system, first interpreted the provisions of Art. 21 of the Constitution guaranteeing the inviolability of the person and the protection of human dignity.

The Lithuanian CC noted that the right to physical and mental integrity and dignity of the person, as enshrined in the Constitution, implies the State's obligation to ensure that no person is subjected to violence, coercion, or any interference with their mental and spiritual state and that their dignity is not violated. Physical, sexual, psychological or economic violence, or the threat of such violence, violates the physical and mental integrity of the

41 Judgment no 2020-39-02 (n 5).
42 Decision on inadmissibility of complaint no 219a/2021 (n 6).
43 Decision no 13, case no 3/2018 (n 4).

person, causing fear, insecurity, and distress and degrading their dignity. Therefore, in implementing the above-mentioned constitutional obligation, the State must take measures to reduce violence in society and ensure that violence is not tolerated.

The Lithuanian CC has stated that the constitutional protection of human dignity is inseparable from the principle of equality of all persons enshrined in the Constitution. The Lithuanian CC has repeatedly stated that all human beings are by nature equal in dignity and rights. When a person's rights are restricted on the basis of their sex, race, nationality, language, origin, social status, religion, beliefs or opinions, the dignity of the person being discriminated against is also degraded. The Lithuanian CC also recalled that the list of grounds for non-discrimination in Art. 29(2) of the Constitution is not exhaustive.

In this case, the Lithuanian CC noted that gender-based violence not only violates the inviolability and dignity of the person, as guaranteed by the Constitution but also constitutes a form of discrimination based on sex, prohibited under Art. 29 of the Constitution, as well as any other form of discrimination based on a person's gender, gender identity and/or sexual orientation. Any acts of gender-based violence, threats of such acts, whether committed in public or private life and regardless of whether such acts are motivated by a person's gender or by a particular attitude in society that a person's behaviour, activities or traits are appropriate for women, constitute discrimination on the grounds of sex prohibited by Art. 29 of the Constitution.

In assessing the compatibility of Arts. 3(c), (d) and 4(3) of the Convention with Art. 29 of the Constitution, the Lithuanian CC noted that women are significantly more likely to be victims of violence, including violence in the domestic environment. It is, therefore, the sex of the woman that determines the prevalence of violence against women. Consequently, the provisions of the Convention are designed to combat violence against women, including violence provoked by certain roles, behaviours, activities or characteristics attributed to or inherent in women. These provisions call for the abandonment of societal stereotypes of certain socially constructed roles, behaviours, activities and traits deemed appropriate for different sexes, contributes to the reduction and prevention of gender-based violence, which is a form of discrimination prohibited by the Constitution.

The Latvian CC made a similar assessment, holding that the differential treatment allowed by Art. 4 of the Convention has reasonable justification and aligns with the Constitution. The Latvian CC noted that the provision of this international treaty allows for special measures to prevent and protect women from gender-based violence, which does not constitute discrimination under the Convention's terms. Since gender-based violence remains an issue in Latvia and predominantly affects women, the Latvian CC emphasised that implementing such special measures is essential to achieving real equality between men and women.[44] Academic literature has pointed out that it would be unusual for the Latvian

44 Judgment no 2020-39-02 (n 5).

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

CC to conclude that the principle of equal treatment under the Latvian Constitution differs from the equal treatment guaranteed by the Istanbul Convention.[45]

In assessing the compatibility of the provisions of Arts. 3(c), (d) and 4(3) of the Convention with Art. 14 of the Constitution, which regulates the status of the official language, the Lithuanian CC noted that the Convention does not oblige the Lithuanian State to transpose into the national legal system concepts that would be incompatible with the Lithuanian language. The Convention also does not imply the need to establish new rules for the national language. The Convention defines a person only as "man" and "woman" and does not use any other form. Therefore, the Lithuanian CC concluded that the provisions of the Convention do not breach Art. 14 of the Constitution. As mentioned earlier, the assessment of the language issue is unique to the Lithuanian CC, as other constitutional courts in the region did not have to address this aspect.

In assessing the compatibility of these articles of the Convention with the provisions of Art. 38 of the Constitution, which enshrines the constitutional concept of the family, the Lithuanian CC noted that neither these nor any other provisions of the Convention regulate family or matrimonial legal relations. The Convention does not impose an obligation on the State to recognise families other than those provided for in the Constitution or to modify the constitutional concept of marriage in such a way that marriage is not freely agreed between a man and a woman. Ratification of the Convention and commitment to its international obligations would not entail any change in the constitutional concept of family or marriage.

The obligation of States under Art. 4(3) of the Convention to ensure equality between women and men, to prevent violence against women, and to combat societal stereotypes in society that assign certain roles, behaviours, and traits solely to women, in order to establish equality between women and men, precisely reflects and gives effect to the provision of Art. 38(5) of the Constitution. This provision states that the rights and duties of spouses in the family are equal. The Convention's objectives – promoting equality between women and men, mutual respect for each other and non-discrimination on any grounds – further reinforce the constitutional values, ensuring that the upbringing of children is based on the values enshrined in the Constitution. Accordingly, the provisions of Arts. 3(c), (d) and 4(3) of this international treaty are not in conflict with Article 38(1), (3), (5) and (6) of the Constitution either.

It is worth mentioning that the Moldovan CC also had to provide its own assessment of the compatibility of the provisions of the Convention with the family institution enshrined in the Constitution of that State. This Court stated that the "Istanbul Convention does not define the concept of family, address relationships between partners

45 Miliuvienė (n 10) 50.

or same-sex couples, nor does it promote such relationships in any particular way."[46] The Convention only mentions marriage in the context of forced marriage and does not require countries to introduce same-sex marriage. Thus, this Court concluded that the Convention does not conflict with the national constitution, which defines marriage as a union between a man and a woman.[47] Similarly, the Latvian CC provided a comparable interpretation, affirming that the Istanbul Convention does not mandate enshrining any forms of marriage or family.[48]

The Lithuanian CC was also tasked with determining whether Art. 14 of the Convention conflicts with several provisions of the Lithuanian Constitution: Art. 25(1), which guarantees the right of individuals to hold and freely express their own convictions; Art. 26(5), which affirms that parents and guardians shall take care of their children's and wards' religious and moral education in accordance with their own convictions, without restrictions; Art. 38(6), which establishes the right and duty of parents to educate their children to be decent human beings and loyal citizens; Art. 40(3), which grants autonomy to higher education institutions; and Art. 41(1), which mandates compulsory education for persons under the age of 16.

In interpreting the content of the freedom of belief enshrined in Art. 25 of the Constitution, the Constitutional Court noted that a person's beliefs regarding behaviours, traits and social roles considered masculine or feminine fall within the person's freedom of belief, thought, and conscience. However, while it is not possible in a democratic state governed by the rule of law for the State to impose a compulsory system of attitudes or to seek to impose a particular belief, thought or worldview on individuals, the State has a duty under the Constitution to take measures to reduce incidents of gender-based violence. Such measures taken to change the prevailing prejudices, customs and traditions which give rise to and justify gender-based violence cannot be regarded as an interference with a person's freedom of belief, conscience, thought or faith. This is because the Constitution cannot protect freedoms that conflict with other constitutional values, such as encouraging or condoning violence, including gender-based violence.

In neighbouring Latvia, the Constitutional Court also stressed that the state must implement broad measures to reduce societal tolerance for violence and raise awareness about its consequences. This includes the responsibility to provide information to the public about violence and its underlying causes, with the goal of preventing such violence from occurring.[49]

In assessing the compatibility of Art.14 of the Convention with Art. 25(1) of the Constitution, the Lithuanian CC noted that the provisions of the Convention, inter alia,

46 Manole (n 36).

47 Decision on inadmissibility of complaint no 219a/2021 (n 6).

48 Judgment no 2020-39-02 (n 5).

49 ibid.

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

Art. 14, enshrine the same values protected by the Constitution – namely, the equality of men and women, the inviolability of the person, and the protection of human dignity. Consequently, providing information on the upholding and promotion of these values cannot be regarded as interference with an individual's freedom of belief or an imposition of a particular ideology by the State. Whatever information on the subjects covered by the Convention is provided, *inter alia*, in educational and training institutions and adapted to the abilities of learners in formal and non-formal education, an individual's freedom to hold personal convictions and adopt their own worldview remains unimpaired.

In assessing the compatibility of the provisions of Art. 14 of the Convention with Art. 26(5), Art. 38(6) and Art. 41(1) of the Constitution, the Lithuanian CC noted that the right of parents to educate their children under their own beliefs, as a constitutional value, is to be interpreted in the context of other constitutional values. This right cannot be interpreted as granting parents the freedom to raise their children in a way that disregards the Constitution or ignores the values it protects, *inter alia*, by denying equality between women and men, encouraging or tolerating discrimination, and justifying or threatening gender-based violence.

Similarly, Moldovan CC also emphasised that this international document does not infringe upon the right of parents to educate their children according to their religious beliefs, as the Convention does not address this right. The Convention obliges incorporating educational materials promoting gender equality, non-stereotypical gender roles, mutual respect, and non-violent conflict resolution. It does not conflict with parents' rights to determine their children's education, as it allows states ample flexibility to uphold this right when implementing the relevant provisions.[50]

The Lithuanian CC also noted that the purpose of education and training institutions is to inculcate a worldview based on constitutional values, reduce society's tolerance of violence by educating learners from an early age about the consequences of violence, the factors contributing to the occurrence of violence against women and domestic violence, and ways to prevent it. The mere fact that under the Convention, education and training establishments must provide certain information to learners, which must be made available to all persons attending the establishments, does not mean that parents do not have the right to educate their children at home according to their convictions. Education in educational establishments is an integral part of the educational process, which is also strongly influenced by the family, society and family values, so education in public educational establishments based on an approved curriculum is not a substitute for parents' education in accordance with their convictions at home. Moreover, in implementing Art.14 of the Convention, Member States are not obliged to introduce specific curricula that are identical for all States Parties and that are incompatible with the culture and environment of a

50 Decision on inadmissibility of complaint no 219a/2021 (n 6).

particular State, but rather they have a broad discretion to decide at what age the most appropriate type of information is to be provided to pupils of a particular age.

In deciding on the compatibility of Art. 14 of the Convention with Art. 40(3) of the Constitution, the Lithuanian CC noted that the obligation under the Convention to raise public awareness regarding the equality between men and women and of changes in the socio-cultural patterns of behaviour of women and men could in no way be regarded as inconsistent with the constitutional right of institutions of higher education to autonomy or the right of freedom of research, study and teaching. On the contrary, under the Constitution, education and training institutions must contribute to the development of fully educated personalities and to the inculcation and promotion of the values protected by the Constitution in society, including the real equality of women and men, the real realisation of which is ensured by the rejection of the stereotypical attitudes prevailing in a certain section of the population to the role of women and men in society.

The Moldovan CC expressed similar views in analysing whether the Convention's provisions allegedly contradict the constitutional provisions on freedom of conscience and the right to education. It noted that the Convention does not prescribe specific methods for implementing education on its issues.[51]

Thus, the Lithuanian CC, like the Moldovan and Latvian courts, in assessing the constitutionality of the Convention's provisions, focused on the Convention's objective. This approach has led to similar reasoning in the decisions of these courts. In this context, only one of the region's constitutional courts - Bulgarian - chose the concept of gender as the main object of its decision and considered this concept in isolation from the objectives of the Convention.[52] It is pointed out in the academic works that, after reading this reasoning of the Bulgarian CC, one gets the impression that the judges who decided the case were not aware of or did not fully understand the Explanatory Report of the Convention, which was adopted together with the Convention (although mentioned in the text of this judgment), and which repeatedly and explicitly stresses that the Convention does not intend to deny the commonly known binary concept of gender, it does not seek to abolish the distinction between men and women, and it refers only to stereotypical gender roles or to certain patterns of behaviour, character traits or qualities commonly attributed to women which men may also possess, with a view to avoiding the use of violence on this basis and ensuring that victims are recognised as victims of violence in the absence of discrimination.[53]

51 ibid.

52 For more on this see: Pūraitė-Andrikienė (n 11).

53 Miliuvienė (n 10) 50.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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4 LEGAL CONSEQUENCES OF THE CONCLUSION

In the light of the above arguments, the Lithuanian CC concluded that Arts. 3(c), 3(d), 4(3), and 14 of the Istanbul Convention are not in conflict with the Lithuanian Constitution. This Court thus became the third court in the region not to find the provisions of this international treaty unconstitutional. In 2021, the Latvian CC concluded that the Convention's provisions regarding the implementation of special measures to protect women from violence were in compliance with the constitutional provisions of this country.[54] In 2022, the Moldovan CC adopted a decision that concluded that the complaint did not fulfil the admissibility criteria. Nevertheless, the Moldovan CC sought an *amicus curiae* opinion from the Venice Commission regarding the constitutional implications of ratifying the Convention.[55] Only the Bulgarian CC has ruled in the opposite direction and concluded that the concept of gender defined in this Convention contradicted the Bulgarian constitutional provisions.[56]

Meanwhile, the Lithuanian CC, as well as the courts of Latvia and Moldova, having evaluated the provisions of the Convention in the context of the objectives pursued by the Convention, as mentioned above, have stated that both the Convention, which is aimed at combating violence against women and domestic violence by promoting true equality between men and women as a precondition for the reduction of violence against women, as well as the Constitution pursue the same universally significant objectives. The Lithuanian CC stressed that the Convention does not contain any provisions that are contrary to the Constitution and that, therefore, the obligations arising from the Convention, in so far as they relate to the application of the contested provisions of the Convention, cannot be regarded as incompatible with the provisions of the Constitution. Consequently, the provisions of the Convention governing human rights and freedoms, which are based on the same constitutional values of equality, personal integrity and respect for the dignity of every human being, can be applied in conjunction with the provisions of the Constitution.[57]

Taking into account the very open and friendly jurisprudence of the Lithuanian CC regarding international law, as well as the fact that this Court cannot apply in its official constitutional doctrine standards lower than those set by the generally recognised norms of international law, it was possible to anticipate the verdict of the Lithuanian CC regarding the constitutionality of this international treaty even before this conclusion.[58] This verdict could also have been predicted from the previously formulated official constitutional

54 Judgment no 2020-39-02 (n 5).
55 Manole (n 36).
56 Decision no 13, case no 3/2018 (n 4).
57 Conclusion no KT24-I1/2024 (n 1).
58 Pūraitė-Andrikienė (n 10) 20.

doctrine in the interpretation of Arts. 38 and 29 of the Constitution and the other provisions and principles of the Constitution referred to in the Parliament's inquiry.[59]

It was also clear that, in assessing the compatibility of the Convention with the constitutional provisions, the Lithuanian CC would also take into account the aforementioned opinions of the Venice Commission on the constitutional implications of the ratification of the Convention, as well as the judgments of the constitutional courts discussed above. After all, those who question the constitutionality of the Convention make similar arguments in all the countries of the region. These assumptions led to the expectation that the Lithuanian CC (like the constitutional courts of Latvia and Moldova) would assess the constitutionality of the provisions of the Istanbul Convention in the context of the Convention's objective of eradicating violence against women through the promotion of gender equality, and would uphold the compatibility of the Convention with national constitutional provisions. The fact that the Lithuanian CC would make such a decision has been described in the works of Lithuanian constitutional lawyers, and the doubts raised about the constitutionality have been referred to as a "storm in a glass of water".[60]

In its decision, the Lithuanian CC referred to the above-mentioned opinions of the Venice Commission and briefly discussed the decisions of the Latvian CC and Moldovan CC. However, presumably to reinforce the consistency of its arguments, it did not mention the decision of the Bulgarian CC. [61] This is not surprising since this decision has been widely criticised by international institutions, the non-governmental sector, and academics. It should be noted that this Bulgarian CC judgment was accompanied by four dissenting opinions in which the judges stated that the Convention was compatible with the Bulgarian Constitution. However, the ruling of the Bulgarian CC led to the situation that now it is impossible to ratify the Istanbul Convention in Bulgaria. "The Council of Europe Human Rights Commissioner and the European Parliament expressed regret about the misinformation campaign surrounding the Istanbul Convention in Bulgaria."[62] In academic literature, this controversial judgment has also been heavily criticised.[63]

As regards the consequences of the decisions of the other constitutional courts in the region, it has been mentioned that the Moldovan CC, although it gave a rather detailed assessment of the treaty, refused to examine the applicant's request, which means that, formally, the decision did not make any difference, the Convention had already been ratified by the Moldovan State and therefore retained its legal force, but, beyond the formal aspect, it must be stated that this decision of the Moldovan CC was intended to dispel the doubts that had existed in Moldova as to the constitutionality of the treaty. The situation following the

59 ibid.
60 Miliuvienė (n 10).
61 Pūraitė-Andrikienė (n 10) 19.
62 Vassiljeva (n 11).
63 ibid; Smilova (n 11).

Access to Justice in Eastern Europe
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decision of the Latvian CC, which declared that the provisions of the Convention did not conflict with the Latvian Constitution in 2021, was different because this country did not ratify the Convention until 2023. It can, therefore, be assumed that the Latvian CC's decision was a strong factor contributing to the ratification of the Convention.

Turning to the Lithuanian context, it's worth mentioning that the conclusion of the Lithuanian CC has been widely discussed in society, political, and academic circles. For example, following the Constitutional Court's finding that the Istanbul Convention is not contrary to the Constitution, organisations working in the field of protection against violence have called for the Istanbul Convention to be ratified and for the problem of violence against women and children to be finally taken seriously.[64] However, despite the Constitutional Court's conclusion, the President of the State has expressed the opinion that 'the Istanbul Convention should not be ratified now, as it would change the education system'.[65] The Speaker of Parliament stated that Parliament should only return to ratifying the Convention when it is clear that the document will receive the necessary support from parliamentarians.[66] The opinion of a constitutional law scholar was also presented, disagreeing with the arguments and assessment presented in the conclusion of the Lithuanian CC,[67] as well as those who, on the contrary, supported the position of the Lithuanian CC.[68]

The Lithuanian Constitution provides that Parliament shall finally decide on the issues referred to in the third paragraph of Art. 105(3) of the Constitution on the basis of the conclusions of the Constitutional Court (*inter alia*, on the conformity of international treaties with the Constitution). Therefore, this conclusion does not oblige Parliament to ratify the Istanbul Convention. The Lithuanian Parliament took advantage of this opportunity and, despite the Constitutional Court's conclusion, did not include the issue of

64 'Apsaugos nuo smurto srityje dirbančios organizacijos: dėl Stambulo konvencijos Konstitucinis Teismas šiandien padėjo visus taškus ant"i"' (*Manoteisės*, 14 March 2024) <https://manoteises.lt/straipsnis/apsaugos-nuo-smurto-srityje-dirbancios-organizacijos-del-stambulo-konvencijos-konstitucinis-teismas-siandien-padejo-visus-taskus-ant-i/> accessed 10 September 2024.

65 'G Nausėda: Dabar nereikėtų ratifikuoti Stambulo konvencijos, ji keistų švietimo sistemą' (*BNS*, 15 March 2024) <https://www.15min.lt/naujiena/aktualu/lietuva/g-nauseda-dabar-nereiketu-ratifikuoti-stambulo-konvencijos-ji-keistu-svietimo-sistema-56-2208616> accessed 10 September 2024.

66 Gailė Jaruševičiūtė-Mockuvienė, 'V Čmilytė-Nielsen – apie KT išvadą dėl Stambulo konvencijos: sugrįšime prie šio klausimo, kai turėsime reikiamą palaikymą' (*Lrytas*, 14 March 2024) <https://www.lrytas.lt/lietuvosdiena/aktualijos/2024/03/14/news/seimo-pirmininke-apie-kt-isvada-del-stambulo-konvencijos-sugrisime-prie-sio-klausimo-kai-turesime-reikiama-palaikyma-30990711> accessed 10 September 2024.

67 Vaidotas A Vaičaitis, 'Komentaras dėl Stambulo konvencijos ir Konstitucinio Teismo 2024 m kovo 14 d išvados "Dėl Stambulo konvencijos nuostatų suderinamumo su Konstitucija"' *(TeisėPro*, 3 April 2024) <https://www.teise.pro/index.php/2024/04/03/v-a-vaicaitis-komentaras-del-stambulo-konvencijos-ir-konstitucinio-teismo-2024-m-kovo-14-d-isvados-del-stambulo-konvencijos-nuostatu-suderinamumo-su-konstitucija/> accessed 10 September 2024.

68 Pūraitė-Andrikienė (n 10).

ratification of the Istanbul Convention in the Spring and Autumn 2024 sessions. Thus, even after the conclusion of the Lithuanian CC regarding the constitutionality of this international treaty, Lithuania has still not ratified the Convention. This trend shows that the doubts about the need to ratify this international document in the region are not only due to legal but also to the historical context of gender power and social inequalities. These factors have made it difficult for post-Soviet states to overcome the normalisation of domestic violence and achieve gender equality.[69]

However, the Lithuanian CC is the only institution empowered to assess the constitutionality of this international treaty in the country. Thus, the Court's conclusion regarding the Convention's provisions will undoubtedly help dispel any doubts about its constitutionality. With the Lithuanian CC's finding that the Convention is compatible with the Constitution, Parliament can no longer rely on the argument that this international treaty is incompatible with the country's supreme law. If Parliament decides not to ratify the Convention after all, it would no longer be able to base its refusal to do so on the argument that certain provisions of the Istanbul Convention are unconstitutional. Whatever Parliament's decision on the future of the Istanbul Convention, the question of the compatibility of its provisions with the Constitution has been settled.[70] As mentioned above, the ratification of the Convention in Latvia did not take place immediately after the decision of the Latvian CC on its constitutionality, but almost two years later, therefore, the Lithuanian Parliament may also ratify the Convention in the near future.[71]

69 ibid 21.

70 Miliuvienė (n 10) 62.

71 In the context of this topic, it is also important to note that the Istanbul Convention was ratified by the European Union in June 2023. Researchers highlight what this ratification means for Lithuania: 1) once the EU has ratified the Istanbul Convention, it will apply to EU institutions and public administration structures. This means that the EU institutions will not only be able to take the Convention into account but will also be obliged to do so when considering any issues related to violence; 2) after ratification, the Istanbul Convention will apply to Member States in certain areas, even if they have not ratified the Convention. These are situations in which the EU has exclusive competence; 3) ratification constitutes a (further) invitation to Member States that have not yet done so to ratify the Istanbul Convention. Thus the Istanbul Convention is directly applicable in Lithuania only insofar as it concerns the EU institutions and in areas where the EU has exclusive competence. Therefore, it is still important for Lithuania to move towards comprehensive international human rights obligations. For more on this see: Laima Vaigė, 'Nuo spalio Stambulo Konvencija įsigalioja ES: ką tai reiškia Lietuvai?' (*TeisėPro*, 9 October 2023) <https://www.teise.pro/index.php/2023/10/09/l-vaige-nuo-spalio-stambulo-konvencija-isigalioja-es-ka-tai-reiskia-lietuvai/> accessed 10 September 2024.

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5 CONCLUSIONS

The Lithuanian Parliament's inquiry to the Lithuanian CC regarding the constitutionality of the Istanbul Convention reflects a broader trend in Eastern and Central Europe, as the Lithuanian CC has been asked to address the constitutionality of essentially the same provisions of the Convention as in other countries in the region: the constitutionality of the concept of gender (in Bulgaria, Latvia, Moldova), as well as of the Convention's provisions on the obligation to include material on issues such as gender equality, non-stereotypical gender roles in educational material (in Latvia, Moldova). In Lithuania, as in neighbouring Latvia, the Court has been addressed more with a desire to dispel doubts about the compatibility of the Convention with the Constitution than with the expectation that the Constitutional Court will declare it unconstitutional.

In assessing the constitutionality of this international treaty, the Lithuanian CC, like the constitutional courts of Latvia and Moldova, focused on the Convention's objective. This approach has also led to similarities in the reasoning across these courts. After assessing the provisions of the Convention in the context of its objectives, the Lithuanian CC found that both the Convention, which seeks to combat violence against women by promoting substantive gender equality as a prerequisite for the reduction of violence against women, and the Constitution pursue the same universally relevant objectives. The Lithuanian CC also stressed that the provisions of the Convention governing human rights and freedoms, which are based on the same constitutional values of equality, personal integrity and respect for the dignity of every human being, can be applied in conjunction with the Constitution. In its conclusion, the Lithuanian CC also briefly discussed the judgments of the constitutional courts of Latvia and Moldova on the same issue.

The Lithuanian CC became the third constitutional court in the region, which, like those in Latvia and Moldova, did not find the Istanbul Convention unconstitutional. However, the conclusion of the Lithuanian CC has been met with mixed reactions in society, political, and academic circles, and as a result, even after this conclusion, the Convention has still not been ratified in Lithuania. Nevertheless, the Constitutional Court is the only institution with the power to assess the compatibility of this international treaty with the constitutional provisions, meaning that Parliament can no longer rely on the argument that this international treaty is incompatible with the country's Constitution. It is therefore considered that this conclusion of the Lithuanian CC will be an important step on the road to ratification of this Convention.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ВИСНОВОК КОНСТИТУЦІЙНОГО СУДУ ЛИТВИ ЩОДО КОНСТИТУЦІЙНОСТІ СТАМБУЛЬСЬКОЇ КОНВЕНЦІЇ: КОНТЕКСТ, АРГУМЕНТАЦІЯ ТА ПРАВОВІ НАСЛІДКИ

Довілє Пурайтє-Андрікєнє

АНОТАЦІЯ

Вступ. *14 березня 2024 року Конституційний суд Литви видав висновок щодо конституційності деяких положень Стамбульської конвенції та став четвертим конституційним судом у Східній та Центральній Європі, який ухвалив рішення з цього питання. Таким чином, цей висновок відображає певну тенденцію в цьому регіоні. Стаття має на меті проаналізувати цей висновок, а також виявити його схожість та відмінність із рішеннями інших конституційних судів регіону з цього ж питання. Для*

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досягнення мети необхідно виконати такі завдання: 1) виявити контекст, у якому парламент Литви подав запит до Конституційного суду щодо конституційності Конвенції та питання, порушені в цьому запиті; 2) проаналізувати аргументи Конституційного суду Литви в цьому висновку; 3) розкрити правові наслідки та можливий вплив цього висновку на ратифікацію зазначеного договору в Литві. Ці питання розглядаються в ширшому контексті рішень інших конституційних судів регіону щодо конституційності Стамбульської конвенції.

Методи. *Для дослідження теоретичних і практичних аспектів розглянутого питання в цій статті використовуються різноманітні методи. Метод аналізу змісту документа, який був зосереджений на визначенні ключових термінів і фраз у тексті та їх зв'язку із наявними твердженнями у спеціальній літературі, використовувався для вивчення відповідних нормативних та юридичних джерел досліджень. У праці значною мірою автор покладався на системний і логічний аналіз, щоб розглянути майже всі питання, які обговорюються в статті. Порівняльний аналіз застосовувався для зіставлення рішень конституційних судів щодо конституційності Стамбульської конвенції інших країн Східної та Центральної Європи та висновку з цього питання Конституційного суду Литви. Методи лінгвістичного та телеологічного аналізу були використані для з'ясування змісту положень нормативно-правових актів, що розглядаються в цій статті, для виявлення справжніх намірів творців цих положень та значення понять, що містяться в них.*

Результати та висновки. *У статті зроблено висновок, що запит литовського парламенту до Конституційного суду Литви щодо конституційності Стамбульської конвенції відображає загальну тенденцію у Східній та Центральній Європі, оскільки Конституційний суд Литви попросили розглянути конституційність, по суті, тих самих положень Конвенції, що й інші конституційні суди регіону. Оцінюючи конституційність положень Конвенції, Конституційний суд Литви, як і конституційні суди Латвії та Молдови, зосередився на меті Конвенції – викоріненні насильства щодо жінок і домашнього насильства шляхом сприяння гендерній рівності. Такий підхід призвів до подібності в міркуваннях цих судів. Конституційний суд Литви став третім конституційним судом в регіоні, який, як і в Латвії та Молдові, не визнав неконституційними положення Конвенції. Висновок Конституційного суду Литви викликав неоднозначну реакцію в суспільстві, політичних та наукових колах, тому навіть після висновку щодо конституційності Стамбульської конвенції цей міжнародний договір досі не ратифікований Литвою. Тим не менш, Конституційний суд є єдиною інституцією, яка має повноваження оцінювати сумісність цього міжнародного договору з конституційними положеннями, тому парламент не зможе покладатися на аргумент про несумісність цієї Конвенції з Конституцією.*

Ключові слова: *Конституційний Суд, Стамбульська конвенція, конституційний контроль.*

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Review Article

THE PROCEDURE OF DISMISSAL OF A JUDGE UNDER THE DISCIPLINARY PROCEDURE IN THE SYSTEM OF GUARANTEES OF HIS/HER INDEPENDENCE: STANDARDS OF EUROPEAN JUDICIAL PRACTICE AND LEGAL REGULATION IN UKRAINE

Lidiia Moskvych*, Iryna Borodina, Olga Ovsiannikova and Oleksandr Dudchenko

ABSTRACT

Background: *The article focuses on the issues and gaps in the legal regulation and practice of applying procedures for terminating the status of Ukrainian judges as a result of disciplinary liability. The study employs a combination of general and specific research methods, grounded in a philosophical approach, to understand the essence, nature, and particularities of national practice in light of European judicial law standards. By analysing the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), the article demonstrates that European legal frameworks have established comprehensive standards for due process in disciplinary proceedings leading to the dismissal of judges. However, an analysis of the Ukrainian legal system for dismissing judges reveals significant inconsistencies with these European approaches.*

It is argued that Ukraine's current legal framework for judicial dismissal following disciplinary proceedings fails to enhance judicial transparency and does not fully align with the national constitution, European Union standards, or international legal norms. Considering Ukraine's ambition to further integrate into the European Union, the article stresses the importance of adopting best practices and reforming the legal framework governing judicial dismissals due to disciplinary offences that render judges unfit to remain in office.

Methods: *The authors utilised a range of scientific research methods, including dialectic reasoning, observation, synthesis, analogy, and both inductive and deductive analysis. Formal and formal-legal methods were employed to understand the structure, objectives, and nature of the dismissal procedure for judges. A systematic analysis method was applied to*

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search for and review relevant case law, especially from the ECtHR and CJEU. The study's conclusions are drawn from empirical material, providing a comprehensive understanding of both theoretical and practical aspects.

Results and Conclusions: *The research results provide scientifically grounded proposals for improving the legislative framework governing the dismissal of judges following disciplinary proceedings. These proposals are developed in line with the legal approaches of the European Court of Human Rights and the Court of Justice of the European Union, particularly concerning protecting judges' rights as public officials and ensuring the guarantees of judicial independence.*

The practical significance of the study is reflected in specific recommendations aimed at optimising the process of dismissing judges from office, clarifying the legitimate objectives behind such changes, and improving the functioning of the High Council of Justice in evaluating the grounds and procedures for dismissals resulting from disciplinary offences. A key recommendation is introducing the ***"beyond reasonable doubt"*** *standard of proof in disciplinary proceedings against judges, particularly in cases where their dismissal is being considered. This higher standard of proof would strengthen judicial independence by ensuring that dismissals are not the result of arbitrary or politically motivated decisions but are based on solid, substantiated evidence.*

The article emphasises the importance of these reforms for Ukraine's legal system, not only in aligning with European legal standards but also in enhancing the transparency, fairness, and independence of the judiciary in Ukraine.

1 INTRODUCTION

Modern democratic states have established numerous safeguards to guarantee both the independence of the judiciary and the competence of those who wield judicial authority. In this regard, both the conclusions of the Venice Commission and the jurisprudence of international courts highlight the adoption of two distinct standards concerning judicial accountability.[1] In the so-called "old democracies," the principle of judicial irremovability is nearly absolute, and disciplinary measures are viewed as a potential instrument of undue pressure on judges, posing a risk to judicial independence. European legal doctrine clearly recognises the importance of safeguarding against arbitrary dismissal and protecting the irremovability of judges as essential components in preserving judicial independence.

The European Court of Human Rights (ECtHR) has, on multiple occasions, adjudicated cases involving the independence and irremovability of judges. For instance, in *Baka v. Hungary* (2016), *Campbell and Fell v. the United Kingdom* (1984), and *Kleyn and Others v. the Netherlands* (2003), the Court unequivocally underscored the significance of judicial irremovability as a crucial factor in ensuring a fair trial, judicial independence, and

1 Piotr Mikuli and Grzegorz Kuca (eds), *Accountability and the Law: Rights, Authority and Transparency of Public Power* (Routledge 2021) doi:10.4324/9781003168331.

protection from unjustified dismissal.[2] Similarly, the Court of Justice of the European Union (CJEU) has taken an analogous stance. Notably, in the cases of *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* (2018) and *European Commission v. Republic of Poland* (2019), the CJEU emphasised that the dismissal of judges should not be used as a tool to exert influence over the judiciary.[3]

It appears that the prevailing consensus among legal scholars and judicial bodies is that the complex process involved in the removal of judges serves as an additional layer of protection for judicial independence.

In our view, the primary aim of guaranteeing judicial irremovability is to uphold the autonomy, independence, and unique status of judges while shielding them from arbitrary interpretations of dismissal grounds and any external interference in their professional careers. This approach appears particularly justified in societies where democratic values, legal culture, and the rule of law are deeply rooted. However, in emerging democracies, where a fully developed legal culture is still evolving, greater emphasis is placed on specific legal safeguards to protect the judiciary from individuals whose behaviour fails to meet reasonable expectations necessary for maintaining judicial authority and public trust.

For instance, the Constitution of Ukraine enshrines the principle of judicial irremovability.[4] Article 126 ensures the immutability of judges' powers and specifies exclusive grounds for dismissal, such as the commission of a serious disciplinary offence, gross or systematic neglect of duties incompatible with the judicial role, or behaviour that reveals an incompatibility with the office held. Article 126 further recognises that deviations from the principle of irremovability arise from the intrinsic nature of the judge's position as an independent arbiter in legal disputes. In line with international standards governing the legal status of judges, such deviations are permissible under certain conditions: (a) when the judge's conduct makes it untenable for them to remain in office or (b) when the judge is unable to perform their duties for various reasons.

If additional guarantees of judicial immunity are genuinely aimed at ensuring impartial justice, they are legitimate and constitutionally protected, just as other fundamental legal values are. Nonetheless, these same constitutional objectives may also provide grounds for

2 *Baka v Hungary* App no 20261/12 (ECtHR, 23 June 2016) <https://hudoc.echr.coe.int/fre?i=001-163113> accessed 10 September 2024; *Campbell and Fell v the United Kingdom* App nos 7819/77; 7878/77 (ECtHR, 28 June 1984) <https://hudoc.echr.coe.int/eng?i=001-57456> accessed 10 September 2024; *Kleyn and Others v the Netherlands* App nos 39343/98, 39651/98, 43147/98, 46664/99 (ECtHR, 6 May 2003) <https://hudoc.echr.coe.int/fre?i=001-61077> accessed 10 September 2024.

3 Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (CJEU, 27 February 2018) <https://curia.europa.eu/juris/liste.jsf?num=C-64/16> accessed 10 September 2024; Case C-619/18 *European Commission v Republic of Poland* (CJEU, 24 June 2019) <https://curia.europa.eu/juris/liste.jsf?num=C-619/18> accessed 10 September 2024.

4 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (amended 1 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 10 September 2024.

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

imposing stricter legal accountability on judges compared to other citizens. This trend reflects the current phase of Ukraine's state development.

On the one hand, judges are dismissed or have their powers terminated on more limited grounds compared to the broader conditions applied under labour law for other citizens, such as officials and employees. This indicates a level of immunity for judges within the sphere of labour relations. On the other hand, judges can be removed from office for violations of the Code of Professional Ethics,[5] which involves a more subjective evaluation of the grounds for dismissal, as outlined in pt. 6, para. 3 of Art. 126 of the Constitution of Ukraine. These examples suggest that the institution of judicial irremovability establishes a dual set of legal norms—some more lenient, others more stringent.

Therefore, the legal provisions governing judges' labour rights, or their right to professional activity, operate under a distinct framework tailored to the higher objective of ensuring independent, impartial, and competent judicial proceedings. However, the disciplinary practices among Ukrainian judges reveal inconsistencies in how identical misconduct—defined as "incompatible with continuing to hold judicial office"—is interpreted. This inconsistency arises due to the evaluative nature of disciplinary offences. While this approach is, to some extent, understandable, it also has significant shortcomings. Under the guise of "purging the judiciary of those unfit for office," it risks undermining standards crucial for safeguarding judicial independence.

Thus, for countries classified as "young democracies," such as Ukraine,[6] it is vital to strike the right balance between holding judges accountable through disciplinary measures and protecting their independence. This delicate balance ensures that judicial accountability does not become a means of exerting undue pressure on the judiciary, thereby preserving both the integrity of the legal system and public trust in it.

Undoubtedly, fostering respect for the tenets of independence, democracy, and the separation of powers necessitates a socio-political consensus surrounding these core principles.[7] This understanding aligns with conclusions drawn in European Union jurisprudence. For instance, the Court of Justice of the European Union, in the case of *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*,[8] established a connection between judges' disciplinary accountability and judicial independence. This ruling enabled the delineation of essential safeguards that disciplinary processes must encompass to uphold the independence principle. Specifically, it mandates procedures before an impartial entity

5 Code of Judicial Ethics (2013) 3 Bulletin of the Supreme Court of Ukraine 27.

6 Oksana Khotynska-Nor, 'Judicial Transparency: Towards Sustainable Development in Post-Soviet Civil Society' (2022) 5(2) Access to Justice in Eastern Europe 83, doi:10.33327/AJEE-18-5.2-n000212.

7 Piotr Mikuli and Maciej Pach, 'Disciplinary Liability of Judges: The Polish Case' in Piotr Mikuli and Grzegorz Kuca (eds), *Accountability and the Law: Rights, Authority and Transparency of Public Power* (Routledge 2021) ch 5, doi:10.4324/9781003168331-7.

8 Case C-64/16 (n 3).

that honour the rights of defence and the right to appeal, alongside a precise legal delineation of disciplinary infractions and corresponding sanctions. Additionally, pertinent interpretations are reflected in the European Court of Human Rights case law, which will be further elucidated later in this article.

2 EUROPEAN STANDARDS OF PROPER DISCIPLINARY PROCEDURE IN RELATION TO JUDGES

Ukraine is currently undertaking dynamic and comprehensive judicial reforms aimed at enhancing the quality of justice and strengthening judicial protection for the rights and legitimate interests of individuals and legal entities. The effectiveness of judicial proceedings is influenced by several factors, including the composition of the judiciary, judicial independence, a robust legal framework, and the proper implementation of guarantees ensuring that independence. However, there are notable shortcomings within the mechanism for terminating a judge's status, particularly through disciplinary proceedings, which in turn negatively impacts judicial independence in Ukraine.

International standards have repeatedly underscored that one of the key safeguards for ensuring judicial independence and irremovability is the existence of a distinct and specialised process for dismissing judges, especially in the context of disciplinary actions. The ***Basic Principles on the Independence of the Judiciary***, adopted by the United Nations General Assembly through Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,[9] state that judges should only be dismissed for failing to fulfil their duties or for conduct unbecoming of their role. Adherence to these principles ensures that the dismissal mechanism cannot be misused as a tool of pressure or undue influence over the judiciary.

Only under these conditions can we guarantee that the judicial dismissal process remains fair and not a means of compromising judicial independence, which is essential for the rule of law and the integrity of judicial systems.

The Council of Europe Recommendation 2010 (12)[10] underscores the necessity for disciplinary actions against judges to be managed by independent entities or tribunals, thereby ensuring adherence to the guarantees of a fair trial. Furthermore, judges must be afforded the right to appeal any decisions made by the disciplinary authority (para. 69, para. 12).

9 Basic Principles on the Independence of the Judiciary (1985) <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> accessed 10 September 2024.

10 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (adopted 17 November 2010) <https://rm.coe.int/16807096c1> accessed 10 September 2024.

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

Correspondingly, the European Charter on the Statute for Judges[11] outlines that disciplinary proceedings may be initiated by a competent authority, with sanctions imposed only upon the proposal, recommendation, or endorsement of a court or body comprising at least half elected judges. These proceedings must include a comprehensive hearing where the judge subject to the proceedings has the right to legal representation.

When considering various models for judges' disciplinary accountability, it is evident that certain types of disciplinary tribunals, often situated within general courts—such as those in Germany and Austria—are typically authorised to adjudicate such matters. Alternatively, the responsibilities may be assigned to higher councils of judges or their internal mechanisms. The council-based model is particularly appealing due to its diverse composition, potentially allowing lay members—individuals not directly associated with the judiciary—to participate in evaluating a judge's disciplinary misconduct, which might culminate in their dismissal. Moreover, judicial accountability may encompass various complaint procedures directed at judges. In this context, specialised offices associated with the judiciary (as seen in England and Wales) or ombudsmen (in Sweden and Finland) may fulfil a significant role.[12]

It is important to highlight that, in the case law of the European Court of Human Rights (ECtHR), judges are considered public officials in the broad sense, as they serve the public and, moreover, carry out specific functions on behalf of the state. The ECtHR generally respects the broad discretion of political authorities in personnel management matters. However, the unique status of judges lies not only in the fact that they represent state authority (and thus, to a certain extent, political power) but also in their role as apolitical and independent public servants.

A balance must be struck regarding which aspect of state power dominates the judiciary, particularly when it comes to issues such as the dismissal or career progression of judges. This raises the question of whether such matters should be classified under public or civil law. While performing state functions, the judiciary requires protection from undue political influence to ensure impartiality and independence.

According to the ECtHR's established jurisprudence, disciplinary proceedings related to a judge's right to continue exercising their profession are regarded as "disputes" concerning "civil rights" and, therefore, must be subject to judicial review.[13] This means that any disciplinary process which might result in a judge's dismissal falls under the

11 European Charter on the Statute for Judges and Explanatory Memorandum (1998) <https://rm.coe.int/090000168092934f> accessed 10 September 2024.

12 Mikuli and Pach (n 7).

13 *Pitkevich v Russia* App no 47936/99 (ECtHR, 8 February 2001) <https://hudoc.echr.coe.int/eng?i=001-5726> accessed 10 September 2024; *Harabin v Slovakia* App no 62584/00 (ECtHR, 9 July 2002) <https://hudoc.echr.coe.int/eng?i=001-24031> accessed 10 September 2024; *Vilho Eskelinen and Others v Finland* App 63235/00 (ECtHR, 19 April 2007) <https://hudoc.echr.coe.int/eng?i=001-80249> accessed 10 September 2024.

guarantees provided by Art. 6 of the European Convention on Human Rights (ECHR),[14] which protects the right to a fair trial. This principle was notably emphasised in the case of *Baka v. Hungary* (paras. 104-105), where the Court reiterated that such proceedings must be subject to the safeguards enshrined in the Convention to prevent any misuse of power and to uphold the integrity of the judiciary.[15]

The European Court of Human Rights (ECtHR) does not assert that the responsibility for addressing the disciplinary accountability of judges should rest solely with judicial bodies. It has consistently maintained that designating a professional disciplinary authority—rather than a court—to adjudicate misconduct claims and impose suitable penalties is not inherently incompatible with the stipulations of Art. 6(1) of the European Convention on Human Rights (ECHR). However, if member states of the Council of Europe adopt this model, the disciplinary entity must either fulfil the criteria of Art. 6(1) ECHR, meaning it must be an "independent and impartial tribunal established by law" (para. 67), or its decisions should be amenable to "adequate" judicial oversight by an independent and impartial body (para. 65).[16] Thus, two key factors are considered in evaluating the adequacy of this review: the breadth of the appeal and whether the competent court adheres to the standards of independence.

In the context of Ukrainian law, compliance with these standards is questionable, particularly regarding the role of the High Council of Justice (HCJ) in adjudicating a judge's dismissal as stipulated in Art. 126(3) of the Ukrainian Constitution. Here, the HCJ functions as a quasi-judicial entity that reviews decisions made by the disciplinary authority, known as the Disciplinary Chamber. Notably, the HCJ is not a disciplinary body itself (under Art. 131 of the Constitution); rather, it a) establishes such bodies and b) retains the authority to impose additional disciplinary measures during the dismissal process. The constitutional powers of the HCJ have been broadened under the Law of Ukraine "On the High Council of Justice, "[17] a move some consider permissible based on para. 9 of Art. 131, which states that the HCJ "shall exercise other powers established by the Constitution and laws of Ukraine." However, we contend that legislation should delineate the processes for exercising public authority functions rather than expanding them.

Another critical standard outlined by the ECtHR is that the entity reviewing disciplinary decisions must possess either full judicial authority or a sufficiently comprehensive review scope to evaluate the disciplinary findings. This standard was articulated in the

14 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols) (ECHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 10 September 2024.

15 *Baka v Hungary* (n 2).

16 *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018) <https://hudoc.echr.coe.int/eng?i=001-186216> accessed 10 September 2024.

17 Law of Ukraine no 1798-VIII of 21 December 2016 'On the High Council of Justice' (amended 15 April 2024) <https://zakon.rada.gov.ua/laws/show/1798-19#Text> accessed 10 September 2024.

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

case of Ramos Nunes de Carvalho, where the ECtHR underscored that a judicial body lacks full jurisdiction if it cannot assess whether the imposed sanction is proportional to the alleged misconduct (para. 202). In determining the adequacy of judicial review, the ECtHR highlighted three essential elements: (1) the subjects encompassed by the review conducted by the relevant national court; (2) the methodology employed by the national court in its review of the disciplinary body's decision regarding the right to a hearing; and (3) the powers of the competent court to finalise the proceedings and provide justifications for its decisions.[18]

We believe the conformity of a judge's dismissal after disciplinary proceedings with European standards is also questionable for several reasons. The legislation establishes the Disciplinary Chambers as the exclusive disciplinary authority regarding judges, while the High Council of Justice effectively acts as an appellate body, reviewing disciplinary cases with the authority to independently alter the sanctions imposed. In this context, the powers of the HCJ fulfil the criteria for "full jurisdiction." Thus, the national legislature has effectively created both a "disciplinary court" and a "disciplinary appellate court" within a single institution.

In this context, there is a risk of violating the standard of due process of law, such as "one court - one instance", and secondly, the standard of "court established by law". The Constitution of Ukraine assigns the High Council of Justice the function of "consideration of complaints against decisions of the disciplinary body" (Art. 131(1)(3)) and provides that "disciplinary bodies shall be established in the system of justice in accordance with the Law" (Art. 130(10)). However, the HCJ itself, according to the Law, is classified as a judicial governance body (Art. 1 of the Law of Ukraine "On the High Council of Justice").

A systematic analysis of the legislation on the judiciary reveals the existence of institutions with three different statuses of judicial governance, judicial self-government, and judicial body, all operating within the system of judicial support bodies. The lack of terminological uniformity in national legislation raises the question of whether the Law of Ukraine "On the High Council of Justice" complies with the Constitution of Ukraine in terms of empowering the HCJ to create within its structure bodies composed of its members, which are constitutionally empowered to consider complaints against decisions made by the same disciplinary bodies.

At the same time, both the number of disciplinary chambers and their composition are determined by the HCJ by its own decision, which is not a legislative act in its own right. In addition, although the Law of Ukraine "On the High Council of Justice" names the disciplinary chambers as the sole authority in relation to judges (pt. 1 of Art. 42), the HCJ

18 Lorena Bachmaier Winter, 'Disciplinary Sanctions against Judges: Punitive but not Criminal for the Strasbourg Court Pragmatism or another Twist towards Further Confusion in Applying the Engel Criteria?' (2022) 4 EUCRIM The European Criminal Law Associations' Forum 260.

may independently decide to change the disciplinary sanction when considering an appeal against a decision of a disciplinary body.

Moreover, the legislature has restricted a judge's access to the traditional judicial system, limiting their ability to protect their "civil right" to continue professional activities. The law outlines narrow and formal grounds for appealing the High Council of Justice's dismissal decision: 1) if the Council's composition lacked the necessary authority to make the decision; 2) if any participating Council member did not sign the decision; and 3) if the decision fails to specify the legal grounds for the judge's dismissal and the rationale behind the Council's conclusions.[19]

Moreover, it is the Law of Ukraine, "On the High Council of Justice," rather than the Code of Administrative Procedure, that outlines the grounds upon which a court may overturn a decision to dismiss a judge. This distinction means that judicial review of dismissal decisions is somewhat restricted. Such limited judicial oversight may be interpreted by the European Court of Human Rights (ECtHR) as a limitation on access to justice, potentially infringing on the right of dismissed judges to effectively protect their rights and interests.

At the same time, the Code of Administrative Procedure of Ukraine does not restrict the right of a judge to file a complaint against an HCJ decision. The analysis of the case law of the Administrative Court of Cassation of the Supreme Court shows that the rules of procedural law guide judges in these disputes and do not respond in court. However, this does not preclude the provision of Art. 52 of the Law "On the High Council of Justice" in terms of attempts to restrict access to court does not contradict Art. 6 of the ECHR and the case law of the ECtHR.

The ECtHR has repeatedly emphasised the importance of judicial review as a safeguard against arbitrary or politically motivated decisions. By limiting the scope of court involvement in reviewing dismissals, there is a risk of violating Art. 6 of the European Convention on Human Rights (ECHR), which guarantees the right to a fair hearing. From this perspective, the ECtHR could view the constrained judicial review process as an impediment to the dismissed judges' ability to seek redress, thus undermining the judicial independence that these protections are designed to uphold. Therefore, ensuring broader judicial review of dismissal decisions is crucial for safeguarding both judicial independence and the rights of judges to a fair and impartial legal process.

It is important to highlight that Art. 55 of the Ukrainian Constitution enshrines the fundamental right to judicial protection against unlawful actions, decisions, or omissions by authorities. It states, "Everyone shall be guaranteed the right to appeal to a court against decisions, acts, or omissions of state authorities, local self-government bodies, officials, and civil servants." The Constitutional Court of Ukraine's Decision No. 19-rp/2011, dated

19 Maryna O Materynko, 'Organisational and Legal Bases of Dismissal of a Judge from Office' (PhD (Law) thesis, Yaroslav Mudryi Ukrainian National Academy of Law 2021) 14.

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

14 December 2011,[20] interprets pt. 2 of Art. 55, asserting that human rights and their guarantees shape the content and direction of state activity (pt. 2 of Art. 3 of the Constitution).

State authorities and local self-government bodies, along with their officials, are endowed with public authority, enabling them to make decisions and perform actions based on powers defined by the Constitution and laws. Individuals affected by decisions or actions of public authorities are entitled to a defence.

According to Art. 5(1) of the Code of Administrative Procedure of Ukraine,[21] anyone who believes that a decision, action, or inaction by a public authority has infringed upon their rights, freedoms, or legitimate interests has the right to seek protection in an administrative court. Consequently, the right to judicial protection outlined in Art. 55 of the Constitution and further detailed in relevant laws allows individuals to petition the court for redress of violations. However, such violations must be substantiated and directly pertain to the rights or interests of the claimant.[22]

Furthermore, Art. 8 of the Universal Declaration of Human Rights asserts that everyone is entitled to an effective remedy through competent national tribunals for violations of the fundamental rights and freedoms guaranteed by the Constitution or by law.

The European Social Charter[23] enshrines the right of all workers to protection in cases of dismissal, as outlined in Art. 24(2), which mandates that any worker who believes they have been unfairly dismissed must have access to an independent and impartial body for appeal. In situations where the grounds for terminating a public official's employment are subjective and based on evaluative judgments, judicial oversight is crucial to ensure that the procedures for establishing such grounds are properly followed. This is essential to prevent any abuse of authority in the dismissal of judges by competent bodies. Therefore, we assert that dismissals based on para. 3 of pt. 6 of Art. 126 should be fully subject to judicial review without restrictions on judicial jurisdiction.

In this regard, it is useful to refer to the European Court of Human Rights' (ECtHR) decision in the case of *Oleksandr Volkov v. Ukraine*.[24] In that case, the Court reached a clear conclusion: the procedure for dismissing a judge must be safeguarded by "judicial guarantees," including independence, impartiality, transparency, competitiveness, the

20 Decision of the Constitutional Court of Ukraine of 14 December 2011, No. 19-rp/2011. URL: https://zakon.rada.gov.ua/laws/show/v019p710-11#Text.

21 Code of Administrative Procedure of Ukraine no 2747-IV of 6 July 2005 (adopted 15 November 2024) <https://zakon.rada.gov.ua/laws/show/2747-15#Text> accessed 10 September 2024.

22 Oksana Khotynska-Nor and Lidiia Moskvych, 'Limits of a Judge's Freedom of Expressing His/Her Own Opinion: The Ukrainian Context and ECtHR Practice' (2021) 4(3) Access to Justice in Eastern Europe 170, doi:10.33327/AJEE-18-4.3-n000077.

23 European Social Charter (2016) <https://edoc.coe.int/en/european-social-charter/7256-european-social-charter.html > accessed 10 September 2024.

24 *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) <https://hudoc.echr.coe.int/eng?i=001-115871> accessed 10 September 2024.

right to a defence, and the reasonableness of the duration of proceedings. The Court emphasised that all these procedural elements are necessary to ensure fairness and protect judicial independence.

However, the case of *Stanislav Shevchuk*, the former Chairman of the Constitutional Court of Ukraine, serves as a notable counterexample. Shevchuk was dismissed by the Constitutional Court, and when he attempted to appeal the decision, the Administrative Court of Cassation refused to hear the case. The dismissal was based on Art. 151-2 of the Constitution of Ukraine, which states that "Decisions and conclusions of the Constitutional Court of Ukraine shall be binding, final, and not subject to appeal." This situation raises concerns about the absence of judicial review in certain high-profile judicial dismissals, highlighting the potential for conflict between constitutional provisions and the broader principles of judicial oversight.

Thus, ensuring that all dismissal decisions, particularly those involving judges, are subject to comprehensive judicial scrutiny is critical to maintaining the balance between accountability and judicial independence. Without such oversight, there is a risk of undermining the very principles of fairness and justice that judicial systems are meant to uphold.[25]

In our view, restricting the right to judicial protection is only justifiable when the dismissal process adheres to the principles of due (fair) procedure. This includes ensuring impartiality, transparency, competitiveness, and other safeguards. However, the dismissal process of Judge Stanislav Shevchuk clearly did not meet these requirements. For instance, the fact that the judges who voted on his dismissal were the same individuals who had previously investigated his alleged disciplinary offence raises serious concerns regarding impartiality and fairness. Their prior involvement in the case that initiated the dismissal process compromised the neutrality of the proceedings, making it impossible to assert that the decision in Shevchuk's case was fair or impartial.

Additionally, the Administrative Court denied Judge Shevchuk's access to a proper and fair legal procedure to defend his right to work. This failure to provide due process undermines the core principles of fairness and judicial integrity. Unfortunately, this issue extends beyond Shevchuk's case; the dismissal procedures carried out by the High Council of Justice in disciplinary cases generally do not meet the standards of due (fair) process, as outlined in Art. 6(1) of the European Convention on Human Rights (ECHR).

Drawing on the jurisprudence of the European Court of Human Rights (ECtHR), Ukrainian courts are beginning to develop criteria for the "admissibility" of disputes over judges' labour rights, particularly in cases of dismissal. In this context, the Grand Chamber of the Supreme Court has referred to the legal position expressed by the ECtHR in the case of *Oleksandr Volkov v. Ukraine*. In this landmark case, the ECtHR held that even if the first-instance

25 Constitution of Ukraine (n 4).

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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judicial body fails to fully comply with the requirements of Art. 6(1) of the ECHR, there is no violation if the decision is subject to review by a higher judicial body with full jurisdiction that can provide the necessary safeguards under Art. 6(1).

The Grand Chamber of the Supreme Court cited ECtHR jurisprudence in several cases, including *Albert and Le Compte v. Belgium* (1983) and *Tzfayo v. the United Kingdom* (2006), to emphasise that a higher court must be able to conduct a comprehensive review of the decision-making process. This review must account for factors such as the subject matter, the manner in which the decision was made, and the grounds for appeal, as detailed in *Bryan v. the United Kingdom* (1995).[26]

The failure of Ukraine's current dismissal mechanism for judges, especially in the context of disciplinary proceedings, demonstrates that it does not fully align with European standards. Specifically, the lack of impartiality, limited judicial oversight, and restricted access to fair procedures weaken the overall integrity of the judiciary and undermine the protection of judges' labour rights. This discrepancy highlights the need for reform in line with European legal principles to ensure that disciplinary dismissals of judges are subject to sufficient legal safeguards and comprehensive judicial review.

The first step should be to change the wording of pt. 1 of Art. 52 of the Law of Ukraine "On the High Council of Justice" to explicitly define the exclusive grounds for appealing against an HCJ decision issued during the review of a disciplinary body's decision, specifically in terms of imposing a disciplinary sanction in the form of a motion to dismiss a judge from office.

In addition, a more strategic task for the Ukrainian authorities should be to separate three functions: disciplinary body, judicial (appellate) control and decision-making on the dismissal of a judge on the merits. The wording of the current Law of Ukraine, "On the High Council of Justice," consolidates all three functions in the powers of a single body, creating potential conflicts of interest and undermining procedural clarity.

Ideally, we would see this formula: The High Council of Justice, by analogy with its powers to form the composition of the High Qualification Commission of Judges, creates a Disciplinary Body that operates separately from the HCJ. The decisions of this body would then be subject to full judicial (procedural) control. Meanwhile, the HCJ would retain administrative control and be limited to making decisions on the dismissal of a judge on the merits.

However, implementing such a model would require changes to the existing judicial legislation and additional financial support. However, such a model would align more closely with the requirements of the Constitution of Ukraine (Art. 130(10)) and European standards, enhancing transparency, accountability, and compliance with the rule of law.

26 Case proceedings no 11-490sap19 (Grand Chamber of the Supreme Court of Ukraine, 14 November 2019) <https://reyestr.court.gov.ua/Review/86275965> accessed 10 September 2024.

3 STANDARDS OF PROVING A JUDGE'S GUILT IN DISCIPLINARY PROCEEDINGS

Decisions in disciplinary cases should be based on evidence of the judge's guilt in the disciplinary offence. However, the regime for establishing guilt and evaluating evidence significantly affects the guarantees of a judge's rights in disciplinary proceedings.

As shown above, modern judicial European standards of disciplinary proceedings have significantly reduced the level of protection of judicial independence in disciplinary proceedings precisely because of the qualification of judges' rights as "civil". However, it is worth recalling that the ECHR has long considered disciplinary sanctions against judges as criminal in nature and, therefore, recognised the need to extend criminal procedural guarantees (which are inherently broad) to disciplinary proceedings against judges. The logic was simple: by committing a disciplinary offence incompatible with the position of a judge, a person committed a criminal offence, as he or she damaged the reputation and authority of the state authorities. Accordingly, dismissal as a disciplinary sanction is a punishment which is an institution of criminal law.

That is, the ECtHR has long applied the Engel criteria[27] to disciplinary proceedings in which there is a potential possibility of dismissal of a judge precisely to extend criminal procedural guarantees. These included adjudication exclusively by a court, with the mandatory participation of a lawyer, a guarantee not to incriminate oneself, etc.[28] However, by introducing a standard for qualifying the rights of a dismissed judge as "civil" and abandoning Engel's criteria for assessing certain disciplinary proceedings as "quasi-criminal in nature," the ECtHR has formed an approach to the possibility of bringing this category of proceedings into the regime of alternative proceedings and the admissibility of quasi-judicial institutions.

While this approach has created a new challenge, it has also allowed for the possibility of reducing procedural guarantees for the protection of judges' rights, which has become a real threat to the guarantees of irremovability and judicial independence.[29]

In fact, it is the idea of "qualification" of the nature of a disciplinary offence that underlies the divergence of approaches to this issue in the practice of the ECtHR and the EU Court of Justice. The latter, in its judgment in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* 7 CJEU, linked the disciplinary liability of judges to the independence of the judiciary as defined in Art. 19(1) of the Treaty on the European Union and thus expanded

27 *Engel and Others v The Netherlands (Article 50)* App nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 23 November 1976) <https://hudoc.echr.coe.int/eng?i=001-57478> accessed 10 September 2024.

28 Tetiana Baranovska and other, 'Theoretical and Practical Dimensions of Legal Responsibility in Criminal Justice' (2024) 6 Multidisciplinary Science Journal e2024ss0737, doi:10.31893/multiscience.2024ss0737.

29 Bachmaier Winter (n 18).

the EU's competence to address these issues by broadly interpreting Art. 51(1) of the Charter of Fundamental Rights of the European Union. This allowed the Court of Justice to rule on the guarantees of independence of the judiciary in the Member States and led to the definition of certain guarantees that disciplinary proceedings should include respecting the said principle of independence. Thus, when it comes to the independence of the judiciary and its effective protection, the EU Court of Justice has expanded the traditional limitations set by substantive criteria that define the scope of EU and national law and formed its well-established case law on guarantees of judicial independence in Member States,[30] including enhanced guarantees of protection of judges from prosecution by disciplinary authorities,[31] in particular, in terms of the standard of proof of guilt in a disciplinary offence.

Unfortunately, Ukrainian legislation has adopted the approach of the ECtHR in this matter and has enshrined the standard of proof of "sufficient probability" (pt. 16 of Art. 49 of the Law of Ukraine "On the High Council of Justice"), which is typical for civil proceedings. The procedure of proof itself provides for the obligation to prove guilt or innocence of a disciplinary offence to be imposed on both the HCJ disciplinary inspector and the judge subject to disciplinary proceedings. At the same time, the standard of "sufficient probability" will not require the disciplinary body to fully analyse the arguments provided by the parties to the proceedings, but only "sufficient reasons" to understand the reasons for the decision.[32]

At the same time, it should be noted that the ECtHR also expresses the position that "the nature and severity of punishments may affect the procedural guarantees provided for in Art. 6 of the European Convention on Human Rights".[33] In this regard, the Grand Chamber of the Supreme Court, "taking into account the public law nature of the disciplinary liability of a judge', pointed out the need to use the standard of proof 'beyond reasonable doubt" in disciplinary proceedings, which will exclude any doubt about the guilt of a judge in a disciplinary offence that precludes the possibility of continuing his or her professional activity.[34]

30 Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the System of Justice)* (CJEU, 25 July 2018) <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-216/18%20PPU> accessed 10 September 2024; Case C-83/19 *Asociația "Forumul Judecătorilor din România"* (CJEU, 18 May 2021) <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-83/19&jur=C> accessed 10 September 2024; Case C-430/21 - RS *(Effet des arrêts d'une cour constitutionnelle)* (CJEU, 22 February 2022) <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-430/21&jur=C> accessed 10 September 2024.

31 Mikuli and Pach (n 7).

32 *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005) <https://hudoc.echr.coe.int/eng?i=001-70096> accessed 10 September 2024.

33 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.

34 Case no 9901/855/18 (Supreme Court of Ukraine, 8 October 2019) <https://reyestr.court.gov.ua/Review/84900516> accessed 10 September 2024.

However, the national disciplinary body (Disciplinary Chambers of the High Council of Justice) in its decisions refers to the standard of proof "beyond reasonable doubt",[35] on the "sufficiency of the evidence,"[36] substantiating that the "beyond reasonable doubt" standard is admissible only in criminal proceedings. This view aligns with the ECHR judgement in *Ringvold v. Norway*,[37] where it was determined that disciplinary proceedings against judges are not criminal in nature. The lack of uniformity in the national judicial and disciplinary system is likely due to the absence of a clear regulatory framework on this issue, which was only implemented in 2023.

However, we do not share the fairness of the approach chosen by the legislator regarding the standard of proof of a judge's guilt, which may result in his or her dismissal. In our opinion, the emphasis should not be on the gravity of the offence but on the need for increased guarantees in proving the judge's guilt in actions incompatible with the position held, i.e., we should be talking about increasing the guarantee of irremovability of a judge from office. In particular, this approach was also pointed out by the ECtHR in the case of *Oleksandr Volkov v. Ukraine*, where the court emphasised the importance of assessing the consequences of disciplinary sanctions for a judge's career (paras. 93-95).[38] That is why we support the position to change the wording of pt. 16 of Art. 49 of the Law of Ukraine "On the High Council of Justice" and to require that the decision of the disciplinary body be based on evidence that will eliminate any doubt about the judge's guilt in committing an offence incompatible with the judge's further stay in office.

In our opinion, judges, as holders of state power who enjoy the highest guarantees of independence and immutability, need increased protection in the procedures for bringing them to justice, including disciplinary proceedings, especially regarding the possibility of dismissal. In its judgments, the ECtHR has repeatedly emphasised that the choice of the standard of proof in cases should be influenced by the "seriousness of the consequences associated with the possible decision" (para. 481).[39] The procedure for proving the guilt of a judge should be based on respect for the independence of a judge and guarantees of irremovability from office. Given the introduction in Ukraine of the institution of a disciplinary inspector as a public official authorised to formulate "charges" against a judge for committing a disciplinary offence (i.e. the burden of proof

35 Decision no 1726/2dp/15-21 (High Council of Justice, 2 August 2021) <https://hcj.gov.ua/doc/doc/487> accessed 10 September 2024.

36 Andriy Khymchuk, 'Standards of Proof in Disciplinary Proceedings against Lawyers: What are They and What Should They Be?' (*Democracy, Justice, Reforms*, September 2021) <https://dejure.foundation/standarty-dokazuvannia/> accessed 10 September 2024.

37 *Ringvold v Norway* App no 34964/97 (ECtHR, 11 February 2003) <https://hudoc.echr.coe.int/eng?i=001-60933> accessed 10 September 2024.

38 *Oleksandr Volkov v Ukraine* (n 24).

39 *Abu Zubaydah v Lithuania* App no 46454/11 (ECtHR, 31 May 2018) <https://hudoc.echr.coe.int/eng?i=001-183687> accessed 10 September 2024.

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is shifted from the individual complainant to the public official), it is likely that the disciplinary procedure will acquire the features of a public process.

Since disciplinary proceedings against judges involve determining the guilt of a public official and may result in his or her dismissal, the introduction of the "beyond reasonable doubt" standard of proof in the disciplinary procedure should be a tool to balance the guarantees of judicial independence with the official nature of the proceedings.

We believe that until the updated procedure of disciplinary proceedings involving disciplinary inspectors becomes operational in Ukraine, the legislator should reconsider its approach to determining the acceptable standards of proof. In particular, we suggest a diversionary approach, whereby the strictest standard of proof is applied only in cases where the decision concerns the submission of a motion to dismiss a judge from office.

4 CONCLUSIONS

Establishing a special procedure for the dismissal of judges, characterised by exceptional grounds and unique processes, constitutes a fundamental aspect of their legal status. A key condition for implementing this specialised procedure is the assurance of judges' irremovability. The design of the dismissal procedure falls within the realm of state discretion. It serves as a reflection of the extent to which the principle of judicial independence is safeguarded for those who hold this position.

However, the disciplinary procedure to remove a judge from their official capacity as a civil servant introduces potential risks that may undermine their independence. Conversely, state authorities and their officials need to have sufficient oversight mechanisms in place to ensure the legality of their actions, thereby preventing any abuse or misuse of power. Consequently, the disciplinary process for removing a judge should strike a reasonable balance between upholding guarantees of irremovability and independence and providing fair oversight of the legality of judicial actions.

A primary requirement for conducting disciplinary proceedings against judges must be an objective approach to assessing misconduct allegations. Additionally, it is crucial to ensure impartiality and eliminate any discretionary interpretations regarding a judge's behaviour so that the framework of disciplinary accountability does not evolve into a tool that compromises judicial independence.

Disciplinary actions that could jeopardise a judge's career and infringe upon the constitutional guarantee of their irremovability—specifically the imposition of a dismissal sanction—should adhere to the highest standards of protection and evidentiary requirements, similar to those applied in criminal proceedings. This includes safeguarding against any unreasonable limitations on the right to appeal decisions made by disciplinary bodies.

Thus, decisions regarding the dismissal of a judge based on pt. 6, para. 3 of Art. 126 of the Constitution of Ukraine—related to committing serious disciplinary violations, gross or systematic neglect of duties inconsistent with judicial status, or demonstrating incompatibility with the role—must be subject to comprehensive judicial oversight. The jurisdiction of the courts should not be curtailed in these instances.

In cases where disciplinary proceedings serve a preventive function and do not pose a significant risk to the guarantee of a judge's irremovability—such as sanctions that do not involve removal from office—applying the guarantees and standards of proof typically used in civil law proceedings is permissible, primarily for reasons of procedural efficiency.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ПРОЦЕДУРА ЗВІЛЬНЕННЯ СУДДІ В ДИСЦИПЛІНАРНОМУ ПОРЯДКУ ТА СИСТЕМА ГАРАНТІЙ ЙОГО/ЇЇ НЕЗАЛЕЖНОСТІ: СТАНДАРТИ ЄВРОПЕЙСЬКОЇ СУДОВОЇ ПРАКТИКИ ТА ПРАВОВЕ РЕГУЛЮВАННЯ В УКРАЇНІ

Лідія Москвич*, Ірина Бородіна, Ольга Овсяннікова та Олександр Дудченко

АНОТАЦІЯ

Вступ. *У статті розглядаються проблеми та прогалини в правовому регулюванні та практиці застосування процедур припинення статусу суддів в Україні внаслідок притягнення до дисциплінарної відповідальності. У дослідженні використовується поєднання загальних та специфічних методів дослідження, заснованих на філософському підході, для розуміння сутності, природи та особливостей національної практики в контексті європейських стандартів судового права. На основі аналізу прецедентного права Європейського суду з прав людини (ЄСПЛ) і Суду Європейського Союзу (СЄС), стаття демонструє, що європейські правові межі встановили комплексні стандарти належної правової процедури в дисциплінарних провадженнях, які призводять до звільнення судді. Проте аналіз української правової системи щодо звільнення суддів виявляє значні невідповідності цим європейським підходам.*

Стверджується, що чинна законодавча база України щодо звільнення суддів після дисциплінарного провадження не сприяє підвищенню прозорості судочинства та не повністю відповідає національній Конституції, стандартам Європейського Союзу чи міжнародним правовим нормам. Враховуючи прагнення України щодо подальшої інтеграції до Європейського Союзу, у статті наголошується на важливості впровадження найкращих практик та реформування законодавчої бази, яка регулює звільнення суддів через дисциплінарні проступки, які роблять суддів неспроможними залишатися на посаді.

Методи. *Автори використовували низку наукових методів дослідження, зокрема діалектичне міркування, спостереження, синтез, аналогію, а також індуктивний і дедуктивний аналіз. За допомогою формальних та формально-юридичних методів було окреслено структуру, завдання та характер процедури звільнення суддів. Метод системного аналізу було застосовано для пошуку та перегляду відповідної прецедентної практики, особливо ЄСПЛ та Суду ЄС. Висновки дослідження зроблені на основі емпіричного матеріалу, що забезпечує комплексне розуміння як теоретичних, так і практичних аспектів.*

Результати та висновки. *Результати дослідження містять науково обґрунтовані пропозиції щодо вдосконалення законодавчої бази, яка регулює питання звільнення суддів у зв'язку з притягненням до дисциплінарної відповідальності. Ці пропозиції розроблено відповідно до правових підходів Європейського суду з прав людини та Суду Європейського*

Союзу, зокрема щодо захисту прав суддів як державних службовців та забезпечення гарантій незалежності судової влади.

Практичне значення дослідження відображено в конкретних рекомендаціях, спрямованих на оптимізацію процесу звільнення суддів з посад, з'ясування законних цілей таких змін та вдосконалення діяльності Вищої ради правосуддя щодо оцінки підстав і порядку звільнення суддів за дисциплінарні проступки. Ключовою рекомендацією є запровадження стандарту доказування «поза розумним сумнівом» у дисциплінарних провадженнях проти суддів, зокрема у випадках, коли розглядається питання про їх звільнення. Цей вищий стандарт доказування зміцнить незалежність судів та забезпечить звільнення, яке ґрунтуватиметься на надійних, аргументованих доказах, а не буде результатом свавільних чи політично вмотивованих рішень.

У статті наголошується на важливості цих реформ для правової системи України не лише для приведення у відповідність із європейськими правовими стандартами, а й для підвищення прозорості, справедливості та незалежності судової системи в Україні.

Ключові слова: *суддя, звільнення судді, дисциплінарний проступок, гарантії незалежності суддів, судова практика, стандарт доказування в дисциплінарних справах.*

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Review Article

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN UZBEKISTAN

Sherzodbek Masadikov

ABSTRACT

Background: *The recognition and enforcement of foreign arbitral awards reflect the business climate of a given country. Foreign investors and businesses closely monitor whether these processes align with established international standards, as they may affect their business. The business community prioritises effective dispute resolution and enforcement procedures. Thus, for Uzbekistan, addressing this matter is important not only to improve its business climate and attract foreign investment but also, from a wider perspective, to ensure access to justice.*

Methods: *This research is based on primary data collected from court decisions on the recognition and enforcement of foreign arbitral awards in Uzbekistan. It employs both qualitative and quantitative research methods. These decisions are then subjected to legal review and analysis to assess their compliance with international standards, utilising a comparative legal research approach. The research is also underpinned by relevant legal scholarship and international case law.*

Results and conclusions: *An analysis of Uzbek court decisions on the recognition and enforcement of foreign arbitral awards from December 2018 until June 2024 has led to key findings and conclusions. While minor oversights were observed at the first-instance court level, economic courts followed the international standards of a pro-enforcement approach and narrow interpretation of the grounds for refusal of the applications for recognition and enforcement. In most cases, the Supreme Court of Uzbekistan demonstrated a commitment to aligning with best international practices in this area. Additionally, economic courts interpret public policy narrowly, which is in line with international standards.*

1 INTRODUCTION

The adoption of the long-awaited law on International Commercial Arbitration on 16 February 2021 (the ICA Law) and its entry into force in August 2021 was a major event in the Uzbek arbitration community.[1] The ICA Law filled a critical gap in Uzbekistan's alternative dispute resolution framework, complementing existing mechanisms such as domestic arbitration and mediation.

This study starts with a short overview of the legal framework for the recognition and enforcement of foreign arbitral awards in Uzbekistan before analysing cases from December 2018 until June 2024 made public on the website of the Supreme Court of the Republic of Uzbekistan. According to statistics, a large share of cases has been considered by Tashkent City Court. As can be seen from the case analysis, Uzbek courts have generally adhered to international standards in this area, with only a few cases being rejected or partially enforced.

2 LEGAL FRAMEWORK

The legal framework governing international commercial arbitration consists of international and national legal acts. In Uzbekistan, domestic and international commercial arbitration are governed by distinct regimes. Domestic arbitration is regulated by the Law "On Arbitration Courts," enacted on 16 October 2006.[2]

2.1. The New York Convention

Uzbekistan joined the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958, "New York Convention") on 22 December 1995, becoming effective from 7 February 1996 without any reservations.[3] Since then, Uzbek courts have been considering applications for recognising and enforcing foreign arbitral awards.

1 Thomas R Snider, Sherzodbek Masadikov and Sergejs Dilevka, 'Uzbekistan Adopts Law on International Commercial Arbitration' (*Kluwer Arbitration Blog*, 24 March 2021) <https://arbitrationblog.kluwerarbitration.com/2021/03/24/uzbekistan-adopts-law-on-international-commercial-arbitration/> accessed 20 September 2024.

2 Law of the Republic of Uzbekistan no LRU-64 "On Arbitration Courts" of 16 October 2006 <https://lex.uz/docs/1072079> accessed 20 September 2024.

3 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (10 June 1958) <https://www.newyorkconvention.org/english> accessed 20 September 2024.

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2.2. Regional Conventions

Uzbekistan is a party to several regional conventions on legal assistance within the Commonwealth of Independent States (CIS) that deal with the issues of recognition and enforcement of court judgments.

Among them is the Kyiv Agreement on the Procedure for Resolution of Disputes Related to the Conduct of Economic Activity (Kyiv, 20 March 1992, "Kyiv Agreement")[4], which also deals with the recognition and enforcement of arbitral awards rendered on the territory of participant states. If a foreign arbitral award comes from the CIS, the economic courts may also apply the Kyiv Agreement. There are instances when the economic courts apply the Kyiv Agreement alone[5] or in conjunction with the New York Convention.[6]

The use of the Kyiv Agreement does not, in principle, go against the New York Convention as Article VII (1) of the latter provides that the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards.

Thus, a party applying for the recognition and enforcement of an arbitral award issued in the CIS can take advantage of both instruments—the New York Convention and the Kyiv Agreement.

2.3. The Law on International Commercial Arbitration

The Law of the Republic of Uzbekistan on International Commercial Arbitration was adopted on 16 February 2021 and entered into force in August 2021.[7] The ICA Law is based on the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 ("the Model Law").[8] Thus, Uzbekistan is placed among 87 States (in a total of 120 jurisdictions) whose legislation is based on or influenced by the

4 Agreement on the Procedure for Resolution of Disputes Related with the Conduct of Economic Activity (Kyiv, 20 March 1992) <https://zakon.rada.gov.ua/laws/show/997_076/#Text> accessed 20 September 2024.
Uzbekistan ratified this Agreement on 6 May 1993.
Termination of the international treaty for Ukraine from 05 February 2023 (based on the Law of Ukraine No. 2855-IX of 12 January 2023).

5 Case no 4-10-1918/35 (Economic Court of Tashkent, 26 March 2019).
All decisions of economic courts are published on the official website of the Supreme Court of the Republic of Uzbekistan, see: 'Decisions of Economic Courts' (*Supreme Court of the Republic of Uzbekistan*, 2024) <https://public.sud.uz/report/ECONOMIC> accessed 20 September 2024.

6 Case no 4-10-2016/60 (Economic Court of Tashkent, 29 May 2020).

7 Law of the Republic of Uzbekistan no ZRU-674 'On International Commercial Arbitration' of 16 February 2021 <https://lex.uz/docs/5698676> accessed 14 February 2024.

8 *UNCITRAL Model Law on International Commercial Arbitration 1985: With amendments as adopted in 2006* (UN 2008) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 20 September 2024.

Model Law.[9] Albeit, a lot should be done in terms of institutional development of arbitration and for Uzbekistan to become a favourable arbitration place internationally.[10]

2.4. Economic Procedure Code

With the adoption of the ICA Law, amendments were introduced to the current legislation of Uzbekistan, including the Economic Procedure Code of the Republic of Uzbekistan ("EPC").[11] Amendments were made to more than 10 articles of the EPC and a new "Chapter 29[1]. Proceedings in cases related to arbitration proceedings" was introduced.[12]

Chapter 33 of the EPC, which deals with the recognition and enforcement of foreign arbitral awards, remained unchanged and, in principle, is in line with the provisions of the ICA Law and the New York Convention. Additionally, this chapter also addresses the recognition and enforcement of foreign court judgments.

3 ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

3.1. International Standards

There is a strong pro-enforcement attitude in the recognition and enforcement of foreign arbitral awards internationally.[13] Article V of the New York Convention sets the grounds for non-enforcement of which Article V(1) grounds can be raised by the party resisting enforcement and Article V(2) grounds by the court itself.[14] These grounds of Article V are exhaustive, should be construed narrowly, and the court may not review the merits of the award.[15] Article V of the New York Convention has served as a

9 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' (*United Nations Commission on International Trade Law*, 2021) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 20 September 2024.

10 Sherzodbek Masadikov, 'Arbitration Legislation of Uzbekistan: Further Development' (2022) 1 Prospects of Development of International Commercial Arbitration in Uzbekistan 38, doi:10.47689/978-9943-7818-6-3/iss1-pp38-41.

11 Economic Procedure Code of the Republic of Uzbekistan no ZRU-461 of 24 January 2018 <https://lex.uz/docs/3523891> accessed 20 September 2024.

12 Law of the Republic of Uzbekistan no LRU-769 of 16 May 2022 'On Amendments and Additions to Certain Legislative Acts of the Republic of Uzbekistan in Connection with the Adoption of the Law of the Republic of Uzbekistan "On International Commercial Arbitration"' <https://lex.uz/docs/6017497> accessed 20 September 2024.

13 Gary B Born, *International Commercial Arbitration* (3rd eds, Kluwer Law International 2021) 5806.

14 New York Convention (n 3).

15 Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (TMC Asses Institute 1981) 269.

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benchmark in the development of Article 36 of the Model Law[16] and later for Article 52 of Uzbekistan's ICA Law.[17]

3.2. Applications

Articles 51-52 of the ICA Law are devoted to recognising and enforcing arbitral awards and largely follow the Model Law. According to Article 248 of the EPC, an arbitral award may be submitted to the economic court for recognition and enforcement within **three years** from the date of entry into force of the award.

According to Article 249, an application for the recognition and enforcement of an arbitral award must be submitted by the applicant to the regional or Tashkent City Court based on the debtor's location or place of residence, or if the debtor's location or place of residence is unknown, at the place of state registration of the debtor. In the past, the provisions of this article caused some problems in the recognition and enforcement of the arbitral awards against respondents whose place of business was neither located nor registered on the territory of Uzbekistan.[18]

Pursuant to Article 250 of the EPC, the application for recognition and enforcement of an arbitral award is submitted in writing and must be signed by the applicant or his representative. According to Article 254, the application is considered within 6 months, and the court is not entitled to reconsider the case on the merits.[19]

3.3. Grounds for Refusal

Article 256 of the EPC lists grounds for the refusal of the applications on recognition and enforcement, which are similar to that contained in Article 52 of the ICA Law and the New Convention, with two more additional grounds not provided in the latter documents.

Paragraph 6 of Part 1 of Article 256 of the EPC introduces one more ground for refusal, stating "if the dispute was resolved by noncompetent foreign arbitration court", meaning an arbitral tribunal that lacked the jurisdiction to do so. However, under Article 21 of the ICA Law, the arbitration court is entitled to decide on its jurisdiction. Such issue usually arises at the outset of the arbitration proceedings and not at the enforcement stage. Thus, this extra ground should be reconsidered and aligned with the provisions of the ICA Law in the future.

16 UNCITRAL Model Law (n 8).

17 Law of the Republic of Uzbekistan no ZRU-674 (n 7).

18 Yakub Sharipov, 'Enforcement of Arbitral Awards in Uzbekistan: Challenges and Uncertainties' (*Kluwer Arbitration Blog*, 11 November 2019) <https://arbitrationblog.kluwerarbitration.com/2019/11/11/enforcement-of-arbitral-awards-in-uzbekistan-challenges-and-uncertainties/> accessed 20 September 2024.

19 Economic Procedure Code (n 11).

Paragraph 3 of Part 2 of Article 256 of the EPC provides another ground for refusal if the statute of limitation has expired for the enforcement of foreign arbitration award fixed in Article 248 for the period of three years. On this ground, Tashkent City Court rejected an application for the recognition and enforcement of the ICC International Arbitration Court award dated 27 April 2020.[20]

A court ruling on the application of recognition and enforcement of the arbitral award may be appealed in accordance with Article 257 of the EPC.

Regarding the application of Article V of the New York Convention, the Supreme Court provides the following guidance to the courts:

> "refusal to recognise and enforce an arbitral award on the basis of paragraph 1 of Article V of the New York Convention is permissible only if there is evidence justifying the circumstances specified in this paragraph. Refusal to recognise and enforce an arbitral award on the basis of paragraph 2 of Article V of the New York Convention is permissible regardless of the presentation of any evidence to the court."[21]

3.4. Public Order

Uzbek Law does not provide a definition of "public order". However, Article 1164 of the Civil Code of the Republic of Uzbekistan refers to it in a slightly different context, stating that foreign law is not applied in cases where its application would contradict the fundamentals of law and order (public order) of the Republic of Uzbekistan. In these cases, the law of the Republic of Uzbekistan applies. The second part of this article provides some guidance on its application, stating that refusal to apply a foreign law cannot be based solely on the difference between the legal, political or economic system of the relevant foreign state and that of the Republic of Uzbekistan.[22]

As international best practice suggests, "the public policy defence should be applied only if the arbitral award fundamentally has offended the most basic and fundamental principles of justice and fairness in the enforcement State, or evidences intolerable ignorance or corruption on the part of the arbitral tribunal. To refuse to enforce an award on the ground that it violates public policy, the award must either be contrary to the essential morality of the State in question, or disclose errors that affect the fundamental principles of public and economic life."[23]

20 Case no 4-10-2316/655 (Tashkent City Court, 11 December 2023).

21 Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan no 27 of 20 November 2023 'On Some Issues of Application of Legislative Acts When Considering Cases Involving Foreign Persons by Economic Courts', para 66 <https://lex.uz/ru/docs/6686276> accessed 20 September 2024.

22 Civil Code of the Republic of Uzbekistan no 256-I of 29 August 1996 <https://lex.uz/docs/180552> accessed 20 September 2024.

23 UNCITRAL, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (UN 2012) 183.

Access to Justice in Eastern Europe
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The Economic Court follows the international standard of narrowly interpreting public policy at the enforcement stage. In Case No. 4-10-2225/540 dated 2 March 2023,[24] a debtor from Uzbekistan appealed to the Supreme Court against the Tashkent City Court's decision to grant a Russian company's application for the recognition and enforcement of an arbitral award. The award, issued by the Russian Arbitration Center (RAC) at the Russian Institute of Modern Arbitration dated 18 October 2022, ordered the debtor to pay 13,142,317,80 USD, interest of 375,832,21 USD for the use of funds, and an arbitration fee of 71,733,48 USD.

In support of its arguments, the debtor claimed that the applicant's application indicated Gazprombank—an entity subject to US sanctions—as a servicing bank, arguing that enforcing the arbitration award would be contrary to the public order of the Republic of Uzbekistan. However, the Supreme Court, guided by Article III of the New York Convention and Article 256 of the EPC, found that the debtor's argument that sanctions were applied to Gazprombank by the United States was not a basis for refusing recognition and enforcement of the RAC decision. The court determined that recognition and enforcement of the award neither contradicted nor threatened the public order of the Republic of Uzbekistan.[25]

3.5. Enforcement Procedure

The enforcement of an arbitral award is carried out based on a writ of execution issued by the court that rendered a ruling on recognition and enforcement and is subject to immediate execution. The writ of execution is issued to the applicant or, at his request, is sent for the execution to the state executor within five days after the judicial act enters into force.[26]

Pursuant to Article 338 of the EPC and Article 6 of the Law of the Republic of Uzbekistan "On the Execution of Judicial Acts and Acts of Other Bodies,"[27] such a writ of execution may be presented for enforcement within **three years** from the date the judicial act becomes final. As per the Resolution of the Supreme Court, it is stipulated that the writ of execution issued based on a ruling on the recognition and enforcement of an arbitral award must indicate the date of entry into force.[28] The writ of execution must be considered by the state executor within a period not exceeding two months.[29]

3.6. A Domestic Arbitral Award?

According to the provisions of laws discussed below, an arbitral award rendered on the territory of Uzbekistan is not considered a domestic arbitral award but an international arbitral award and, therefore, is recognised and enforced in the manner described above.

24 Case no 4-10-2225/540 (Supreme Court, 2 March 2023).
25 Case No. 4-14-2203/2 involving public policy issues is also considered below.
26 Economic Procedure Code (n 11) art 336.
27 Law of the Republic of Uzbekistan no 258-II of 29 August 2001 'On the Execution of Judicial Acts and Acts of Other Bodies' <https://lex.uz/docs/13896> accessed 20 September 2024.
28 Resolution of the Plenum of the Supreme Court no 27 (n 21) para 64.
29 Law of the Republic of Uzbekistan no 258-II (n 27) art 30.

3.7. Challenge of the Award

Article 50 of the ICA Law follows Article 34 of the Model Law with a **three-month time limit** for challenging an arbitral award from the date it is received by the parties. The article also expresses that the court is not entitled to reconsider the case on its merits. The grounds for refusal are similar to that of Article 52 of the ICA Law.

4 CASE ANALYSIS

This case analysis is based on the recognition and enforcement of foreign arbitral awards by the economic courts of the Republic of Uzbekistan, based on cases retrieved from the Supreme Court's database.[30] The retrieval of cases from the database has been complicated as cases under this category are mixed with other cases related to the recognition and enforcement of foreign court judgments. The case analysis covers the period from December 2018, when the courts started to report and upload cases, up until June 2024.

4.1. Case Statistics

Out of 259 cases reported under Chapter 33 of the EPC, 78 cases were on recognition and enforcement of foreign arbitral awards, of which six were rejected, 18 were appealed to the Supreme Court and consequently recognised and enforced, with 1 case partially enforced. Nearly half of the cases (33) were considered by the Tashkent City Court. As the case statistics above show, the economic courts, in most instances, recognise and enforce foreign arbitral awards unless any irregularities, provided in Article V of the New York Convention or the EPC, are detected.

4.2. Appealed Cases to the Supreme Court

The following cases demonstrate the Supreme Court's pro-enforcement approach and narrow interpretation of the grounds for non-enforcement as practised in the developed arbitration jurisdictions.

In four cases that involved the same parties—an applicant from Kazakhstan and a respondent—Uzbek company argued that the arbitration court violated substantive and procedural laws and that the dispute was resolved by an arbitration court which did not have jurisdiction.[31] The Supreme Court, applying Articles III, V and VII of the New York

30 *Supreme Court of the Republic of Uzbekistan* <https://public.sud.uz/report/ECONOMIC> accessed 20 September 2024.

31 Case no 4-10-1809/177 (Supreme Court, 28 June 2019); Case no 4-10-1816/123 (Supreme Court, 28 June 2019); Case no 4-10-1816/243 (Supreme Court, 28 June 2019); Case no 4-10-1818/237 (Supreme Court, 28 June 2019).

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Convention and Article 8 of the Kyiv Agreement, reaffirmed decisions of the appellate instance on the recognition and enforcement of the arbitral award of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC).

In Case No. 4-14-1906/9, dated 10 July 2019,[32] the debtor from Uzbekistan argued that he had not been properly notified about the appointment of an arbitrator or the arbitration proceedings and, therefore, could not submit his objections to the claim. However, the court stated that from the materials of the case, the debtor applied to the ICAC with a letter requesting that the arbitration proceedings be conducted via videoconferencing, which was not contested by the debtor's representative at the court hearing. Further, the court found that the notice of the time and place of the arbitration proceedings had been sent to the debtor by the DHL[33] postal service, and the notice indicated that the debtor had refused to accept it. The Supreme Court, applying Articles III and V of the New York Convention, reaffirmed decisions of the appellate instance on the recognition and enforcement of the arbitral award of the ICAC.

In Case No. 4-12-2105/13, dated 9 November 2021,[34] the Lithuanian applicant appealed the ruling of the regional economic court, which had suspended the case concerning the enforcement of the Vilnius Court of Commercial Arbitration's against the respondent located in Uzbekistan. The contract between the parties concluded in 2019, referred disputes to the Arbitration Court at the Chamber of Commerce and Industry of Lithuania, which in 2003 merged with the Vilnius International Commercial Arbitration to form the Vilnius Court of Commercial Arbitration (VCCA). The regional court sent a letter inquiring about this and suspended the case. Despite the applicant submitting information regarding this issue, the regional court disregarded it. The respondent argued that the dispute had been handled by an arbitration court that did not have jurisdiction and requested that the Supreme Court reject the appeal. The Supreme Court annulled the ruling of the regional court and affirmed the applicant's appeal.

In Case No. 4-17-2103/5, dated 9 December 2021,[35] the debtor from Uzbekistan argued that he had not been duly notified about the time and place of the arbitration hearing. The applicant's application to stay in the court proceedings to submit additional evidence was rejected, and the recognition and enforcement application was also denied. Subsequently, the applicant obtained evidence proving that the debtor had been duly notified and appealed the decision of the first instance court to the Supreme Court (appellate instance), which ruled in favour of the applicant on 10 June 2021. The debtor then filed the cassation complaint with the Supreme Court, which, on 9 December 2021, found that the debtor was duly notified. The court rejected the complaint and reaffirmed the appellate court's decision.

32 Case no 4-14-1906/9 (Supreme Court, 10 July 2019).
33 International courier service company.
34 Case no 4-12-2105/13 (Supreme Court, 9 November 2021).
35 Case no 4-17-2103/5 (Supreme Court, 9 December 2021).

In Case No. 4-10-2111/382, dated 25 January 2022,[36] a debtor from Uzbekistan appealed the decision of the regional economic court on the recognition and enforcement of the arbitral award of the Riga International Arbitration Court. The Supreme Court, applying provisions of the New York Convention and the EPC, rejected the appeal and reaffirmed the decision of the lower court. This case is important for several points as the Supreme Court reiterated: (a) the rule that an arbitral award should not be reviewed on its merits; (b) the competence-competence principle in combination with validation principle[37] of the arbitration agreement; (c) the narrow interpretation of public policy ground; and (d) the separability of the arbitration agreement.

In Case No. 4-10-2209/542, dated 20 July 2023,[38] the Supreme Court examined a cassation complaint filed by a debtor—a local pharmaceutical company—against the recognition and enforcement of the award from the Vienna International Arbitral Centre, rendered on 21 March 2022, in favour of a Czech company for the amount of €1,237,470,95 with interest. At the time the Czech company applied for the recognition and enforcement of the award at Tashkent City Court, the interest on the unpaid debt had reached €390,192,41.

The dispute arose from four contracts between the parties, three of which were for the sale of pharmaceutical products and one for services. The debtor raised several arguments, including:

a) the disputes and differences related to the contracts were not contemplated in the arbitration agreement, and therefore, the arbitral tribunal had considered matters beyond its competence;
b) the arbitral tribunal lacked jurisdiction to consider the claim related to the recovery of interest on the unpaid debt, as the contracts did not specify the payment of interest;
c) the debtor was deprived of its right to be heard;
d) there was bias from the side of the arbitral tribunal in examining witnesses, which the debtor argued was contrary to public order.

The Supreme Court dismissed the cassation complaint on all grounds and reinstated the decisions of lower instance courts. In doing so, the Supreme Court reconsidered the arbitral award extensively to substantiate its decision despite acknowledging that the court is not entitled to reconsider the arbitral award on its merits.

The Supreme Court noted that if there were doubts about the arbitrator's bias in considering the case, the debtor should have used his right to challenge the arbitrator. However, the debtor did not use this right or raise objections during the arbitration proceedings.

36 Case no 4-10-2111/382 (Supreme Court, 25 January 2022).

37 *Sulamérica Cia Nacional De Seguros and others v Enesa Engenharia and others* Case no A3/2012/0249 (England and Wales Court of Appeal (Civil Division), 16 May 2012) <http://www.bailii.org/ew/cases/EWCA/Civ/2012/638.html> accessed 20 September 2024.

38 Case no 4-10-2209/542 (Supreme Court, 20 July 2023).

Access to Justice in Eastern Europe
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Regarding the arguments on the interest, the Supreme Court cited the Procedural Order No. 2 of the arbitration court dated 23 April 2021, which specified that the Convention on Contracts for the International Sale of Goods (Vienna, 1980) would be the applicable law, as both the Republic of Uzbekistan and the Czech Republic were parties to the Convention. It further stated that matters not regulated by the Convention would be resolved by the legislation of the Czech Republic, and the Czech Republic would apply to the service contract. The Supreme Court also referred to Article 78 of the Convention, which provides that if a party fails to pay the price or any other sum in arrears, the other party is entitled to interest on it. Based on these provisions, the Supreme Court concluded that the debtor's arguments against the award of interest were groundless.

This case raises issues related to the competence and jurisdiction of the arbitral tribunal, due process violations, and public policy grounds for non-enforcement. However, the Supreme Court interpreted these issues narrowly, evidencing a pro-enforcement approach.

In Case No. 4-10-2225/556, dated 17 October 2023,[39] a local pharmaceutical company, the debtor, argued against the enforcement of an arbitral award issued by the Vienna International Arbitral Centre on the grounds that: (a) it was not duly notified about the time and place of the arbitration proceedings; (b) the arbitration process did not comply with the agreement of the parties and the law of the country where the arbitration took place; (c) the arbitral award violated the public order of the Republic of Uzbekistan due to misapplication from the side of the arbitral tribunal of the substantive law of the Czech Republic; and (d) the arbitral tribunal ignored the limitations on liability measures that had been agreed upon and approved by the applicant and the debtor.

The Supreme Court dismissed the cassation complaint of the debtor and reinstated the ruling of the Tashkent City Court. The Court stated that the debtor had failed to provide the court with sufficient evidence to support his arguments. In contrast, the applicant presented evidence demonstrating that the debtor was properly notified of the appointment of an arbitrator and the arbitration proceedings. The Court also noted that the debtor had the opportunity to present his explanations to the arbitration court, and the arbitration proceedings were conducted in accordance with the arbitration rules. The dispute was covered by the arbitration clause, and the arbitral award was made in accordance with those terms.

Furthermore, the Supreme Court referenced Article 606(6) of the Civil Procedure Code of Austria and concluded that the recognition and enforcement of the award did not contradict or threaten the public order of the Republic of Uzbekistan.

39 Case no 4-10-2225/556 (Supreme Court, 17 October 2023).

4.3. Rejected Cases

In Case No. 4-11-1912/222, dated 7 June 2019,[40], a Danish company applied for the recognition and enforcement of the award of the ICC International Court of Arbitration against a Spanish company.[41] However, Tashkent City Court rejected the application, reasoning that the applicant failed to provide evidence of the debtor's property located on the territory of Uzbekistan. The Court also found that the Arbitration Court had not awarded damages for the applicant to collect from the debtor.

Under Article V of the New York Convention, there are no grounds for rejection based on the failure to locate a debtor's property in the jurisdiction where enforcement is sought. On the other hand, Article III of the New York Convention allows recognition and enforcement "in accordance with the rules of procedure of the territory where the award is relied upon". However, the Court did not cite any relevant articles of the EPC to substantiate its decision. A more appropriate reference would have been Article 239 of the EPC, which states:

> The economic courts of the Republic of Uzbekistan are authorised to consider cases on disputes arising in the economic sphere, with the participation of foreign organisations, international organisations, foreign citizens, or stateless persons, if:
>
> 1) the respondent is located or resides on the territory of the Republic of Uzbekistan or there is property of the respondent on the territory of the Republic of Uzbekistan.

The Court's findings that the arbitral award did not deal with the award of damages in favour of the applicant warrants further consideration. If the Arbitration Court had not ordered damages in favour of the applicant, then logically, the applicant would not have the right to request recognition and enforcement of the award specifically for this effect. Apart from this, the Court should not have rejected the application on the grounds not provided in Article V of the New York Convention.

In Case No. 4-10-2018/381, dated 24 March 2021,[42] Tashkent Regional Court rejected the application of a Russian company seeking recognition and enforcement of an ICAC award against a debtor located in Uzbekistan on the grounds that the debtor was not duly notified about the arbitration proceedings. The applicant had submitted evidence proving that the statement of claim was duly received by the debtor. However, the debtor's representative argued that the person who had received the documents did not work for the debtor's company. The Court stated that a notification addressed to a legal entity is served on a person authorised to receive correspondence, and in this case, the applicant did not provide the court with the evidence that the person who received the mail was authorised to do so.

40 Case no 4-11-1912/222 (Economic Court of Tashkent, 7 June 2019).

41 This Case was also discussed by Sharipov (n 18).

42 Case no 4-10-2018/381 (Economic Court of Tashkent Region, 24 March 2021).

Access to Justice in Eastern Europe
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The applicant submitted letters from the courier service, according to which the arbitration case materials were sent by the arbitration court to the legal address of the debtor. However, the courier service was unable to complete the delivery because there was no response to phone calls, and the organisation could not be reached at the address. The Court found that according to the note from the State Registry, the debtor was listed in the list of operating enterprises with a definite legal address. The Court concluded that no documents were submitted confirming the absence of the organisation at the address. Applying the rules of the EPC, local postal service regulations, and Article V of the New York Convention, the Court found that the debtor was not duly notified about the arbitration proceedings.

In Case No. 4-18-2204/14, dated 5 October 2022,[43] the Supreme Court reaffirmed the decision of the regional court that rejected recognition and enforcement of the arbitral award rendered in Kazakhstan for failing to submit an arbitration agreement or its certified copy under Article 252 of the EPC that provides:

> An application for recognition and enforcement of a foreign arbitration award, unless otherwise provided by an international treaty of the Republic of Uzbekistan, shall be accompanied by:
>
> 1) an award of a foreign arbitration or a copy thereof, certified by the competent authority of a foreign state or the Republic of Uzbekistan.

In Case No. 4-10-2304/528, dated 22 December 2023,[44] the Appellate instance of the Supreme Court found that a debtor was not duly notified about the appointment of an arbitrator and the arbitral proceedings and rejected the application based on Article V(1)(b) of the New York Convention and Article 256 of the EPC. Such grounds account for the breach of due process, and the application was rightly rejected,

4.4. Returned Cases

In Case No. 4-11-2207/117, dated 29 December 2022,[45] Tashkent Regional Court returned an application for the recognition and enforcement of the ICAC award on the grounds that a debtor was not duly notified about the time and place of the consideration of the case.

4.5. Partial Enforcement

Under Article V(1)(c) of the New York Convention, partial enforcement of the arbitral award is possible, which corresponds to Article 52(1) of the ICA Law.

In Case No. 4-14-2203/2, dated 11 October 2022,[46] an applicant from Kazakhstan applied for the regional court to recognise and enforce the ICAC arbitral award to recover

43 Case no 4-18-2204/14 (Supreme Court, 5 October 2022).
44 Case no 4-10-2304/528 (Supreme Court, 22 December 2023).
45 Case no 4-11-2207/117 (Tashkent Regional Court, 29 December 2022).
46 Case no 4-14-2203/2 (Supreme Court, 11 October 2022).

€1,288,609,37 in damages, a fine of €472,061,31 an arbitration registration fee of 48,491 USD, and a fine of 0.1% of the goods' value for each day of late delivery starting from 12 March 2021 until the actual performance of the obligation.

The regional court initially ruled on 28 January 2022 that the award should be recognised and enforced. However, on appeal, the Supreme Court modified the ruling on 18 August 2022 by rejecting the enforcement of a fine of 0.1% of the value of the goods for each day of late delivery from 12 March 2021 until the actual performance of the obligation.

The respondent filed a cassation complaint with the Supreme Court, requesting the annulment of the decisions made by both the first instance and appellate courts. The Supreme Court, on 11 October 2022, reaffirmed the ruling of the first instance court, finding that partial enforcement was allowed under the EPC, but it upheld the appellate court's decision to reject enforcement of the fine of 0,1 %.

In this case, the appellate court's re-examination of the arbitral award runs against the provisions of the New York Convention, the ICA Law and EPC, as well as the international pro-enforcement approach.

5 CONCLUSION

This analysis of Uzbek court decisions on the recognition and enforcement of foreign arbitral awards from December 2018 to June 2024 has led to key findings and conclusions. While minor oversights were observed at the first-instance court level, economic courts generally followed international standards of a pro-enforcement approach and narrowly interpreted the grounds for refusing the applications for recognition and enforcement.

In most cases, the Supreme Court of Uzbekistan demonstrated its commitment to follow best international practices in the recognition and enforcement of foreign arbitral awards. The economic courts narrowly interpreted the public policy ground, which is in line with international standards. With the exception of a minor deviation in one case discussed above, all other rejected cases were well-grounded by the courts for due process violations. However, a partially enforced case involving the award of interest, where the court re-examined the arbitral award, was against established international standards.

Thus, besides a few instances of rejection or re-examination, Uzbek courts have correctly recognised and enforced foreign arbitral awards. To prevent errors and ensure consistency, it would be beneficial for the Plenum of the Supreme Court of Uzbekistan to adopt a specialised resolution providing clear guidance on correctly applying international and national rules. This resolution should also deal with the issues related to public policy in detail. In this regard, the findings and conclusions of this research could be used to improve Uzbek court practice in the field further.

Access to Justice in Eastern Europe
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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ВИЗНАННЯ ТА ВИКОНАННЯ ІНОЗЕМНИХ АРБІТРАЖНИХ РІШЕНЬ В УЗБЕКИСТАНІ

Шерзодбек Масадіков

АНОТАЦІЯ

Вступ. *Визнання та виконання іноземних арбітражних рішень відображає бізнес-клімат певної країни. Іноземні інвестори та підприємства уважно стежать за тим, чи відповідають ці процеси встановленим міжнародним стандартам, оскільки вони можуть вплинути на їхній бізнес. Бізнес-спільнота надає пріоритет ефективному вирішенню спорів і процедурам примусового виконання. Таким чином, для Узбекистану розв'язання цього питання є важливим не лише для покращення бізнес-клімату та залучення іноземних інвестицій, але й з погляду забезпечення доступу до правосуддя.*

Методи. *Це дослідження ґрунтується на первинних даних, зібраних із судових рішень про визнання та виконання іноземних арбітражних рішень в Узбекистані. У роботі використовуються як якісні, так і кількісні методи дослідження. Потім ці рішення проходять юридичну перевірку для оцінки їх відповідності міжнародним стандартам із застосуванням порівняльно-правового аналізу. У статті автори також спираються на відповідні дослідження у сфері права та міжнародну судову практику.*

Результати та висновки. *Висновки були зроблені за допомогою аналізу рішень судів Узбекистану про визнання та виконання іноземних арбітражних рішень з грудня 2018 року по червень 2024 року. У той час як на рівні судів першої інстанції спостерігалися незначні порушення, господарські суди дотримувалися міжнародних стандартів виконавчого підходу та вузького тлумачення підстав для відмови у задоволенні заяв про визнання та виконання. Здебільшого Верховний суд Узбекистану продемонстрував прагнення відповідати кращим міжнародним практикам у цій сфері. Крім того, господарські суди тлумачать публічний порядок вузько, що відповідає міжнародним стандартам.*

Ключові слова: *визнання, виконання, іноземне арбітражне рішення, публічний порядок, Узбекистан.*

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Review Article

LEGAL REGIME OF A DOMAIN NAME AND PROCEDURE FOR RESOLVING DOMAIN DISPUTES IN UKRAINE

Leonid Tarasenko*, Khrystyna Kmetyk-Podubinska, Maksym Sukhanov, Kostiantyn Zerov, Olesia Kharchenko and Yuriy Nosik

ABSTRACT

Background: *Domain name disputes arise concerning the protection of rights to domain names. The legal nature of a domain name as an object remains uncertain, leading to ambiguity in its legal regime. This uncertainty creates challenges in law enforcement and affects the procedures for resolving domain disputes. Ukraine's current civil legislation does not clarify the classification of domain names within the system of civil rights objects. However, the growing role of the digital environment has significantly increased the importance of domain names, contributing to increased disputes over their ownership and use.*

While the law does not provide for a special procedure for the consideration and resolution of domain name disputes, both judicial and extrajudicial protection procedures are applied, taking into account the peculiarities of the legal nature of domain names. A unique feature of the protection of rights to domain names is the possibility of initiating and resolving a domain name dispute under the UDRP without the involvement of state institutions such as courts or bodies of the Antimonopoly Committee. The absence of proper legal regulation of the domain name as an object and the specifics of domain name dispute resolution has led to ongoing academic discussions on these issues.

Methods: *The article's primary purpose is to investigate the legal nature of domain names and study the procedures for resolving disputes related to them. In this regard, the article first analyses a domain name as an object, defines its legal nature, characterises the position of the ECHR while contributing to the broader scientific discussion on the legal certainty of domain names. The article further analyses the peculiarities of judicial and extrajudicial protection of rights to domain names. It establishes that such protection can be pursued through both jurisdictional (judicial procedure or appeal to the Antimonopoly Committee of Ukraine) and non-jurisdictional forms. The study further describes the procedure for resolving domain name disputes by the court and the Antimonopoly Committee of Ukraine, identifying the main problematic aspects associated with these processes.*

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Particular attention is given to the scientific analysis of the procedure for resolving domain name disputes by the UDRP. The article outlines the main stages of domain name dispute resolution under the UDRP and explains the content and peculiarities of bad faith domain name registration, which often serves as the basis for disputes. Subsequently, the author formulates conclusions on improving the legal regime of a domain name, as well as on the procedure for resolving domain disputes.

Results and conclusions: *Domain disputes are a common category of cases resolved both in and out of court. The author considers that difficulties in resolving domain disputes are caused by the legal uncertainty of a domain name as an object of civil rights. Currently, the legal nature and legal regime of domain names are not defined in the law. There is no special law governing domain names, and while the Civil Code of Ukraine and other legislative acts mention them, they do not comprehensively regulate the rights associated with them.*

The study proves that, in this regard, domain name rights are protected through other objects reflected in a domain name, such as trademarks, commercial names, geographical indications, copyrighted objects, and names of individuals. The author substantiates that a domain name is an independent object that may be subject to sui generis law and which grants domain name owners (in particular, registrants) special property rights to use a website (administration, use, etc.); these rights can be transferred (for a fee or free of charge) and can be waived.

The author further establishes that domain name disputes may be resolved in or out of court. It is considered that the practice of resolving domain disputes under the UDRP is widespread. At the same time, its drawback, which should be addressed, is that it applies only to disputes involving trademarks reflected in domain names. The approach to resolving such a dispute is based solely on proving the unfair nature of the domain name registration. It is substantiated that these circumstances significantly narrow the possibilities for applying the UDRP in resolving domain name disputes. To address this limitation, *the author proposes supplementing the Law on Marks to include a special method of protection: granting trademark certificate holders the right to demand the re-delegation of a domain name as an additional method of protection.*

1 INTRODUCTION

Domain name disputes arise over the protection of rights to domain names. However, the legal nature of a domain name as an object is uncertain. The lack of a clearly defined legal regime gives rise to problems of law enforcement, making it difficult for registrants to always effectively enforce their rights. This issue is not limited to Ukraine, where domain names are mentioned in only a few legislative acts, none of which specifically regulate them. The Law of Ukraine "On the Protection of Rights to Trademarks and Service Marks"[1]

1 Law of Ukraine no 3689-XII of 15 December 1993 'On the Protection of Rights to Trademarks and Service Marks' (amended 31 December 2023) <https://zakon.rada.gov.ua/laws/show/3689-12#Text> accessed 25 November 2024.

(hereinafter - Law on Marks) and the Law of Ukraine "On Electronic Communications"[2] reference domain names, but these legislative acts are not aimed at legal regulation of domain names and do not define their legal regime. Likewise, the Civil Code of Ukraine does not clarify the status of domain names within the system of civil rights objects.

Despite this legal ambiguity, domain names are frequently the subject of numerous disputes, which should be called domain disputes because they arise in relation to a domain name. The law does not prescribe a special procedure for the consideration of domain disputes; instead, both judicial and extrajudicial remedies are applied, taking into account the peculiarities of the legal nature of domain names. A unique feature of enforcing rights to domain names is the possibility of initiating and resolving a domain name dispute under the UDRP without the involvement of state institutions. The absence of proper legal regulation of a domain name as an object and the peculiarities of domain name dispute resolution lead to numerous scientific discussions on these issues.

This article aims to define the legal nature of domain names, examine the procedure for enforcing rights to domain names, determine the specifics of the UDRP's application, and substantiate conclusions on improving the legal regulation of the relations under study.

2 RESEARCH METHODOLOGY

In accordance with the research's purpose and objectives, the authors employed general scientific and special legal methods of scientific cognition, including analysis and synthesis, comparative legal methods, formal-logical methods, analogy methods, systemic and structural methods, and dialectical methods. The choice of methods was determined by the specific nature of the research subject.

The analysis method was applied to determine the legal nature of a domain name as a special property right associated with using a particular website, highlight the content of this concept, and determine the specifics of domain disputes. Conversely, the synthesis method was used to define the concept of "domain name" and to create a list of entities with rights to a domain.

Cognitive methods such as induction and deduction facilitated an in-depth examination of Ukrainian legislation on judicial and out-of-court domain dispute resolution. The analogy method was used to study the ECHR's case law and the practice of applying the UDRP. The modelling method assisted in formulating legal cases and situations regarding certain forms of realisation of the right to domain names and their protection.

The comparative legal method allowed a comparison of national legislation and other regulations governing the procedure for resolving domain name disputes. The formal and

2 Law of Ukraine no 1089-IX of 16 December 2020 'On Electronic Communications' [2021] Official Gazette of Ukraine 6/306.

Access to Justice in Eastern Europe
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logical method allowed the formulation of judgments and conclusions based on the analysed scientific positions, empirical material, and case law.

The historical and legal method traced the evolution of law enforcement concerning the exercise of rights to domain names, as well as the formation and development of judicial and extrajudicial practice on the protection of domain name rights. The formal legal method of cognition is used to study the sources of domestic and foreign legislation.

3 DOMAIN NAME

3.1. Legal nature of a domain name

A domain name is an object of civil rights, and it has value as an asset usually used in legal entities and individuals' business activities.

Formally, a domain name, as a record consisting of letters or characters, holds no value. However, the content of a website that is "hidden" behind this domain is essential. Despite this, the domain name remains an important element of a website as an integral object; without it, a website cannot function as such. Instead, it would merely exist as a collection of certain information, including copyrighted works and other objects that are digitally stored, without being publicly accessible on the Internet.

The definitions of a domain name given in the law reflect its technical aspects rather than its legal nature.[3] The legal nature of a domain name is debatable, and for the most part, scholars and law enforcement practice treat domain names either as a right that arises on the basis of an agreement between the registrar and the registrant or as an object of property rights, including intangible ones.[4] Ukrainian legislation pays little attention to the domain as an object of civil rights, so its legal nature remains debatable. As noted in the scientific literature, the domain name as an object is at the stage of legal uncertainty.[5] The Law of Ukraine "On Electronic Communications" defines a domain in Article 2 as a part of the hierarchical address space of the Internet, uniquely identified by its domain name, served by a group of domain name servers, and centrally administered.[6]

From this definition, we can see the correlation between the concepts of "domain" and "domain name": a domain is a broader concept, encompassing various features such as its role within the hierarchical address space of the Internet, its management by a group of domain name servers, and its centralised administration. Among these attributes, it

3 Gergana Varbanova, 'Legal Nature of Domain Names' (2022) 1 Economics and Computer Science 54.
4 Claudio Caruana, 'The Legal Nature of Domain Names' (2014) 4 ELSA Malta Law Review <https://www.um.edu.mt/library/oar/handle/123456789/124078> accessed 25 November 2024.
5 Konstantinos Komaitis, *The Current State of Domain Name Regulation: Domain Names as Second Class Citizens in a Mark-Dominated World* (Routledge 2010) 39, doi:10.4324/9780203849583.
6 Law of Ukraine no 1089-IX (n 2) art 2.

includes a unique name—the domain name—which serves to identify it. In other words, a domain name is a verbal (alphabetic) expression of a digital domain address, necessary for its individualisation and distinction from other domains.

The Law on Marks defines a domain differently, focusing on its role in regulating trademark-related rights. Thus, Article 1 of this Law states that a domain name is a name used to address computers and resources on the Internet.[7] However, this definition is not informative and needs to be harmonised with the concept of a domain defined in other legislative acts. In addition, the narrow scope of the Law on Marks, which applies exclusively to trademarks, cannot outline all possible areas of use of domain names since a domain name is not only a form of use of a trademark but also a form of use of other means of individualisation, such as commercial names, geographical indications, other commercial designations, copyrighted items, and names of individuals.

The Civil Code of Ukraine (hereinafter referred to as the CC of Ukraine) does not mention a domain name. A domain name is undoubtedly an object of civil rights, an object in civil circulation. Article 177 of the CC of Ukraine, which defines the types of civil rights objects, does not mention a domain name but provides an exhaustive list of civil rights objects.[8] The analysis of the scientific literature shows that the domain applies to digital things, the results of intellectual and creative activity, property rights, and other tangible/intangible goods.

This diversity of opinions is due to legislative uncertainty regarding the legal nature of a domain name. This, in turn, leads to difficulties in enforcing the rights to a domain name in case of their violation. Thus, courts often require a clear legal identification of a domain as a certain object whose rights have been violated. Therefore, enforcing rights to a domain name independently is practically impossible. Instead, claimants must rely on enforcing trademark rights or rights to a commercial name, which are exercised through the use of a domain name.

If a Claimant does not provide legal identification of the domain name in their claim, the court may dismiss the claim for termination of the infringed right to the domain name.[9]

To address domain-related disputes, the .UA Domain Name Dispute Resolution Policy and the .UA Domain Name Dispute Resolution Policy Rules regulate the procedure for resolving disputes arising from domain names and trademark infringement.[10] This globally recognised approach has been implemented in many countries to resolve domain name disputes, which was introduced by the World Intellectual Property Organization (hereinafter referred to as the WIPO).

7 Law of Ukraine no 3689-XII (n 1) art 1.

8 Civil Code of Ukraine no 435-IV of 16 January 2003 (amended 3 September 2024) <https://zakon.rada.gov.ua/laws/show/435-15#Text> accessed 25 November 2024.

9 Case no 14/190pd (Economic Court of Donetsk Region, 25 October 2006) <https://reyestr.court.gov.ua/Review/211108> accessed 25 November 2024.

10 'UA-DRP - Domain Dispute Resolution Policy in the .UA Domain' (*.UA*, 2024) <https://www.hostmaster.ua/policy/ua-drp> accessed 25 November 2024.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

3.2. Domain name as an object of civil rights

Part 2 of Article 179 of the CC of Ukraine provides for the possibility of civil rights objects both in the material world and in the digital environment. This determines the form of objects, peculiarities of acquisition, exercise, and termination of civil rights, and obligations in relation to them.[11]

A domain exists in the digital environment, but no law defines the procedure for acquiring, exercising, and terminating rights and obligations in relation to it.

Article 179-1 of the CC of Ukraine describes a digital thing as a good that is created and exists solely in the digital environment and has property value. In general, a domain exists solely in the digital environment and does have property value for its owner. [12]

The law defines the list of digital things, which includes virtual assets, digital content, and other benefits to which the above provisions apply to the concept of a digital thing.

A domain cannot be attributed to virtual assets or digital content as it does not fall within the legal definition of these objects. Thus, a virtual asset is an intangible good, has value and is expressed as a set of data in electronic form; its existence and turnover are ensured by the system of guaranteeing the turnover of virtual assets; it can certify property rights.[13]

A domain is similar in legal nature to a virtual asset, as it is an intangible good, has a value expressed in electronic form, and certifies property rights to administer and use a website. However, the system of ensuring the turnover of virtual assets does not ensure the domain's existence and turnover, which does not allow it to be classified as a virtual asset.

Digital content cannot include a domain, as it is data created and exists in digital form (computer programs, applications, music files, digital games, video and audio files, and e-books). Instead, a domain is the address of a website where certain digital content can be found.

Therefore, a domain can be interpreted as another object (good) created and existing exclusively in the digital environment, with inherent property value as it certifies special property rights to use a particular website. This interpretation allows us to refer to domains as digital things.

At the same time, we emphasise that the property rights to a particular website granted by a domain should not be equated with the property rights related to the right of ownership as a real right. If a domain were considered a thing, its legal regime would fall under the legislation governing real rights (on the right of ownership), which in Ukraine, in particular, is Book Three of the CC of Ukraine.

11 Civil Code of Ukraine (n 8) art 179.
12 ibid, art 179-1.
13 Law of Ukraine no 2074-IX of 17 February 2022 'On Virtual Assets' [2022] Official Gazette of Ukraine 31/1629.

As a result, applying remedies in rem—such as vindication, negative claim, a claim for recognition of rights—to a domain is impossible. Instead, disputes over domain names are resolved through special remedies, including re-delegation and cancellation of domain name registration.

A domain is an object that grants special property rights related to the use of a particular website (its administration, use, etc.); these rights can be transferred, donated, or abandoned. In this case, the word "property" (in the phrase "property rights") characterises a domain as an asset, as a certain good that can generate profit or that can be useful in other ways (but has a certain property value).

Although domain disputes formally and legally arise over a domain name, a website's content (content) is also essential. Often, the parties to a domain dispute carry out identical or similar activities, and it is the domain as a means of individualisation that helps consumers choose a particular website.

3.3. Domain name in the ECHR case law

In 2007, the ECtHR addressed the legal nature of a domain name in a domain name dispute. In *Paeffgen v. Germany*, the ECtHR stated that property rights should be understood in a broad sense, not limited to property (tangible things), and therefore, property rights also apply to intangible assets (benefits), such as the right to use a domain name.[14]

When analysing this decision of the ECtHR, it should be borne in mind that the ECtHR was considering a case of violation by the state of the provisions of the European Convention on Human Rights (1950). Specifically, in *Paeffgen v. Germany*, the Court investigated whether Article 1 of Protocol No.1 of the Convention (adopted on 20 March 1952), which refers to the peaceful enjoyment of property (protection of property rights), had been violated. Notably, the Convention itself does not define the concept of "property," nor does Article 1 of Protocol No.1 of this Convention contain its definition. Therefore, as of 2007, the concept of "property" has acquired a broad interpretation, and the ECtHR has repeatedly applied it in the context of the protection of property rights, intellectual property rights, labour, and social rights.

In this context, the right to property under Article 1 of Protocol 1 is used in the broadest possible sense, as well as the concept of property as the object of protection. The ECtHR considers a domain name as an object of protection of property rights, treating it as a special property right related to the use of a website. This position of the ECtHR has given rise to numerous academic discussions on interpreting the said decision.

14 *Paeffgen GmbH v Germany* App nos 25379/04, 21688/05, 21722/05 and 21770/05 (ECtHR, 18 September 2007) <https://hudoc.echr.coe.int/eng?i=001-82671> accessed 25 November 2024.

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

Building on the above ECtHR conclusion, Nekik K. points out that a domain name should be considered a special type of property—a property right and, accordingly, an object of property rights. She points out that to determine whether a domain name is an object of property rights, it is necessary to establish whether its use affects financial interests and whether such an object has economic value. The domain name owner has the right to determine how it is used independently; therefore, the exclusive right to use a domain name has economic value and, accordingly, is a property right within the meaning of Article 1 of Protocol No. 1 to the Convention.[15.]

Oliynyk K. points out that the registrant does not own the entire property rights to a domain but only the right to use and dispose of it for a certain period. This distinction determines certain peculiarities of the disposal of a domain name as an object of civil rights. At the same time, since a domain name can be considered in civil law as a good, i.e. an object of a certain value, the ECtHR in *Paeffgen GmbH v. Germany* recognised that the right to use and dispose of a domain name qualifies as a property under the broad interpretation of "property".[16]

Bulat N. contends that a domain name, by its legal nature, is a special object of intellectual property rights. Such a domain name feature is not only that it has special, inherent features and is separate from other objects, but also that, given the improper regulation of relations in the field of domain names, the legal protection of these objects remains unprotected.[17] V. Bontlab proposes to provide a special chapter on domain names in civil legislation, specifically under the provisions governing intellectual property rights.[18]

We argue that a domain name is not an object of intellectual property rights, though it may reflect certain objects of intellectual property rights.[19] Instead, it should be regarded as an intangible asset, granting a special property right to use, administer, and manage a particular web resource. In addition, domain names may incorporate trademarks, commercial names, geographical indications, copyrighted works, or personal names. If such elements are used in a domain name without the consent of the respective right holder, the resulting dispute is treated as a domain name dispute. However, its core issue revolves around enforcing intellectual property rights against unlawful use within a domain name. These disputes may be adjudicated in court, and in some cases, the antimonopoly bodies may also play a role in their resolution.

15 Kateryna Nekit, 'Domain Name as an Object of Civil Rights' (2017) 23 Journal of Civil Studies 40.

16 'Domain Name Disputes: Ukrainian and International Current Practice' (*YURIST & ZAKON*, 24 October 2019) <https://ips.ligazakon.net/document/EA013152?ed=2019_10_24> accessed 25 November 2024.

17 Nataliia M Bulat, 'The Main Ways of Existing Legislation Improvement Concerning Domain Names Protection' (2020) 31-1(2) (70) Scientific notes of Taurida National VI Vernadsky University, Series: Juridical Sciences 74, doi:10.32838/2707-0581/2020.2-1/14.

18 Vasyl V Bontlab, 'Civil Law Regulation of Domain Names' (PhD thesis, Taras Shevchenko National University of Kyiv 2006) 8.

19 Graham JH Smith, *Internet Law and Regulation* (Sweet & Maxwell 2007) 160..

4 JURISDICTIONAL AND NON-JURISDICTIONAL FORMS OF ENFORCEMENT OF RIGHTS TO DOMAIN NAMES

4.1. General principles of enforcement of rights to a domain name

Inadequate legal regulation of domain names contributes to the emergence of domain disputes.[20] Domain names cannot be an independent object of enforcement either in or out of court. The domain name owner may enforce his/her right to a domain by using the mechanisms of enforcement of intellectual property rights to the objects reflected in domain names (trademarks, commercial names, geographical indications, copyrighted objects, etc.) or by enforcing his/her data (for example, the name of an individual reflected in a domain name). Most often, in case of infringement of rights to a domain name, their registrants resort to the enforcement of intellectual property rights and thus indirectly enforce the right to a domain name.

The procedure for enforcing intellectual property rights to objects used in domain names may be carried out within the jurisdictional form of rights enforcement: judicial procedure or appeal to the bodies of the Antimonopoly Committee (out-of-court protection).

Non-jurisdictional form of intellectual property rights protection includes dispute resolution:

a) through alternative domain name dispute resolution such as the UDRP or other arbitration procedures
b) through negotiation or mediation.

Domain name disputes regarding the unlawful use of a trademark in a domain name may be resolved in accordance with the UDRP. UDRP and the Domain Name Dispute Resolution Policies developed under it (in particular, the UA-DRP Domain Name Dispute Resolution Policy - hereinafter referred to as the UA-DRP, the UA-DRP Policy) are aimed at prompt and professional consideration of a domain name dispute. At the same time, resolving domain disputes through the UDRP procedure aims to enforce intellectual property rights exclusively to trademarks, significantly narrowing the possibilities for enforcing rights to domain names (as they may also reflect other intellectual property rights).

The global practice of applying the UDRP in different countries also indicates a unified approach to considering domain disputes only if the domain name reflects only a trademark, since a domain dispute under the UDRP procedure is aimed at protecting the rights of its owner. The DRP rules in almost all countries are similar and copy the UDRP with minor changes that reflect national characteristics. For example, in Japan, according to the JP-DRP (.jp), it is possible to protect rights not only to a trademark but also to other

20 Stella Tsybizova, 'Problems of legal regulation of domain names: the experience of the United States of America' (2023) 4 Law Review of Kyiv University of Law 169, doi:10.36695/2219-5521.4.2023.30.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

designations.[21] However, this can be explained by the narrow meaning of a trademark, which is specified in the Japanese Trademark Law. Expanding the scope of the UDRP deserves attention since trademarks are not the only ones used in domain names.

It should be noted that the EU has Regulation (EU) 2019/517 of 19 March 2019 on the implementation and functioning of the .eu top-level domain name.[22] This Act is important for regulating the acquisition, exercise and protection of rights to .eu top-level domain names. It states that domain disputes concerning .eu top-level domain names must be resolved by authorities located in the Union and that the relevant national law shall apply. At the same time, the Regulation provides the possibility of using alternative dispute resolution procedures to resolve domain disputes, particularly ICANN's UDRP.

4.2. Resolving domain name disputes in court

4.2.1. Domain name as an object of judicial enforcement

Given the uncertain legal nature of a domain name, it cannot be treated as an independent object of judicial enforcement. Instead, domain name rights can be indirectly enforced in court by filing lawsuits aimed at enforcing intellectual property rights to trademarks, trade names, geographical indications, and similar rights reflected in the domain name.

Judicial proceedings are a universal mechanism for enforcing any violated right, including the right to a domain, which is protected through other objects. In such cases, claims are aimed at stopping the violation of rights and are often formulated to oblige the Defendant to stop using a certain domain name or to oblige the Defendant to re-delegate the domain name registration to the Claimant.

While a domain dispute is being resolved in court, the Claimant may block any changes to the record of the disputed domain name, ensuring the domain remains functional for mail, website, etc. To do this, the Claimant, upon filing a statement of claim with the court, must provide a copy of it (with evidence of acceptance by the court) to the administrator. This request results in the private domain being placed in "FROZEN" status, meaning no changes can be made to its record—such as re-delegation or cancellation—while the dispute is ongoing.

An appeal to the administrator will be more effective if the court takes measures to secure the claim. It should be borne in mind that according to the provisions of the Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine, interim measures that

21 European Union Intellectual Property Office, *Comparative Case Study on Alternative Resolution Systems for Domain Name Disputes* (EUIPO 2018) 6, doi:10.2814/294649 TB-06-18-312-EN-N.

22 Regulation (EU) 2019/517 of the European Parliament and of the Council of 19 March 2019 on the Implementation and Functioning of the .eu Top-Level Domain Name and Amending and Repealing Regulation (EC) no 733/2002 and Repealing Commission Regulation (EC) no 874/2004 [2019] OJ L 91/25.

are identical to the satisfaction of the stated claims are not allowed if the dispute is not resolved on the merits.

Thus, interim measures in disputes concerning the enforcement of intellectual property rights to objects used in domain names on the Internet may include prohibiting the registrant from taking any actions to re-delegate the domain name in favour of other persons, as well as prohibiting the registrar from taking actions to re-delegate a domain name in favour of any person. Such a court ruling is subject to immediate execution from the date of its issuance, regardless of its appeal and the opening of enforcement proceedings.

4.2.2. Ways to enforce rights to domain names

The enforcement of intellectual property rights related to objects used in domain names typically focuses on stopping the infringement, although another method provided for by contract or law may be applied.

Special legislation in the field of trademark enforcement also specifies that using another's trademark or similar sign in a domain name violates trademark rights (Part 2, Article 2 of the Law on Marks).[23] In other words, the prohibition of using a trademark in a domain name will be the most appropriate method of enforcement that meets the law's requirements in this case.

In line with this, the Supreme Court of Ukraine in its decision of 21 May 2012 in Case №. 6-20цс11 established that: "...legislative restrictions on substantive legal remedies for the protection of a civil right or interest are subject to the provisions of Articles 55, 124 of the Constitution of Ukraine and Article 13 of the ECHR, according to which everyone has the right to an effective remedy not prohibited by law. Since the provisions of the Constitution of Ukraine and the Convention have the highest legal force (Articles 8, 9 of the Constitution of Ukraine), and the restrictions of substantive law contradict these provisions, violations of civil rights or civil interests will be subject to judicial protection in a manner not provided for by law, in particular Article 16 of the CC of Ukraine, but which is an effective remedy, that is, one that corresponds to the content of the violated right, the nature of its violation and the consequences caused by this violation."[24]

Such a way of enforcing the violated right as re-registration, transfer, or re-delegation of a domain name to the Claimant fully meets the outlined criteria.

The judicial procedure for resolving domain name disputes is a universal mechanism for enforcing violated rights. Court proceedings are based on the principles of competitiveness, equality, and dispositive, which guarantee that both parties to a domain dispute can prove the validity of their claims and objections with appropriate and admissible evidence.

23 Law of Ukraine No. 3689-XII (n 1) art 2.

24 Case no 6-20cs11 (Supreme Court of Ukraine, 21 May 2012) <https://reyestr.court.gov.ua/Review/24704776> accessed 25 November 2024.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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4.2.3. Respondent in domain name disputes

Legal relations related to the registration and use of domain names are included .UA and .УКР domains involve three key parties:

a) public domain administrator: a person who carries out measures for administrative support of the public domain and ensuring its performance;
b) domain name registrar: a person who provides services necessary for technical support of registration, delegation and functioning of the domain name;
c) domain name registrant: a person in whose interests the registration and delegation of the domain name are carried out.[25]

The identity of the domain name registrant can be established through various methods. One approach is using the WHOIS service (public data). Alternatively, this information can be obtained by submitting a request through an attorney or directly from the court.

The WHOIS service contains publicly available information about the domain name registrar. If the disputed domain name is registered in the. UA domain zone, the open LICENCE field in WHOIS displays the number of the trademark certificate, which greatly facilitates the identification of the domain name registrant. In addition, the *Created* field in WHOIS displays the date of creation of the domain name, which may be relevant for determining the fact of prior use of the trademark in accordance with the provisions of Part 1 of Article 500 of the CC of Ukraine.

If the disputed domain name is registered in the private third-level domain zone, domain name registrars withhold information about the domain names' registrants from public access, citing the Law of Ukraine "On Personal Data Protection" and the GDPR.

Please note that the Law of Ukraine "On Copyright and Related Rights" in Part 11 of Article 56 provides for the obligation of website owners (who are the registrants of the respective domain name and/or the recipient of hosting services, or other person who establishes the procedure and conditions for the use of the website), except for individuals who are not business entities, and the obligation of hosting service providers to provide information about themselves publicly (including in the WHOIS service). This includes their name, location, and contact information.[26]

The law requires website owners who are individuals and not business entities to make their contact information, such as email addresses and telephone numbers, freely available on the websites they own or in public databases of domain name records (WHOIS). This legislative approach makes it possible to identify the person who owns the website, i.e., the domain name registrant.

25 Rules of the Dispute Resolution Policy for Domain Names in the .UA domain (entered into force on 1 November 2024), see: UA-DRP (n 10).

26 Law of Ukraine no 2811-IX of 1 December 2022 'On Copyright and Related Rights' [2023] Official Gazette of Ukraine 3/196.

However, these legislative provisions are currently not practically enforced. In addition, if the website owner (registrant) is an individual (not an entrepreneur), the law requires only an email address and phone number to be provided on the website and in the WHOIS service. This data, even if the provisions of the law are met, may not be sufficient to identify the Defendant.

Thus, the initial Defendant in these disputes is the domain name registrar. If the right holder is unable to directly provide information about the registrant, they have the right to file a motion requesting the court to obtain the evidence, as stipulated in Article 81 of the Commercial Procedure Code of Ukraine and Article 84 of Civil Procedure Code of Ukraine (depending on the type of proceedings). In cases where this information is critical to the dispute, the court may request evidence before filing a claim as a measure to secure evidence by the procedure established by Articles 110-112 of Commercial Procedure Code of Ukraine, Articles 149-151 of Civil Procedure Code of Ukraine.[27]

Upon receipt of information about the domain name registrant, at the plaintiff's request, the court of first instance will involve the domain name registrant as a co-defendant in the case.

4.3. Enforcement of rights to domain names in the bodies of the Antimonopoly Committee of Ukraine

4.3.1. Unfair competition and domain names

The unfair competition consists of the use of trademarks in domain names and also of other objects of industrial property rights.[28] The enforcement of rights to domain names in the Antimonopoly Committee is carried out under the provisions of the legislation on protection against unfair competition (the Law of Ukraine "On Protection against Unfair Competition"). Domain names are not explicitly mentioned as an object of protection under this law, but the Antimonopoly Committee may still enforce their rights. In this case, the provision of Article 4 of this law is decisive ("Unlawful Use of Designations").[29]

From this provision, it is evident that the law uses the term "designation" as a generic term that includes:

a) name (obviously of the entrepreneur);
b) commercial (brand) name;

27 Commercial Procedure Code of Ukraine no 1798-XII of 6 November 1991 (amended 19 October 2024) <https://zakon.rada.gov.ua/laws/show/1798-12#Text> accessed 25 November 2024; Civil Procedure Code of Ukraine no 1618-IV of 18 March 2004 (amended 19 October 2024) <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 25 November 2024.

28 Pedro de Miguel Asensio, *Conflict of Laws and the Internet* (2nd edn, Edward Elgar 2024) 282.

29 Law of Ukraine no 236/96-BP of 7 June 1996 'On Protection against Unfair Competition' (amended 16 October 2020) <https://zakon.rada.gov.ua/laws/show/236/96-%D0%B2%D1%80#Text> accessed 25 November 2024.

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

c) trademark;
d) advertising materials;
e) design of packaging for goods and periodical; and
f) other designations used by business entities.

A domain name may be a form (method) of using a trademark (most often), a commercial name, or an individual's name. A domain name also falls under the concept of another commercial designation a business entity uses. In this case, the phrase "other designations used by business entities" is used in contrast to the existing means of individualisation (trademark, commercial name, and geographical indication). Therefore, the legislator uses the word "other" commercial designations that are not directly provided for in the law, and a domain name belongs to such designations if it does not reflect the above means of individualisation.

4.3.2. Domain name as another commercial designation

The disadvantage of legal regulation is that in other provisions of the Law on Protection against Unfair Competition, the legislator does not disclose the content of the concept of "other commercial designation", and the only mention of it in Article 4 of this law does not provide this object with proper legal protection. Therefore, we have a double discussion on the legal regime of both other commercial designations and the legal regime of a domain name that may be reflected in such a designation, which does not contribute to the proper protection of domain name rights.

The Commercial Code of Ukraine in Article 33 duplicates the provisions of Article 4 of the Law of Ukraine "On Protection against Unfair Competition", emphasising in Part 2 of this article the illegality of using the designations of other entities.[30] At the same time, the word "priority" is not specified in the law. It refers to the priority in the fair use of a specific designation, including a domain name, in commercial (economic) activities. The Supreme Court, in resolving a dispute over unfair competition, emphasised that priority means the preemptive right to use the results of lawful, bona fide and honest business activities.[31]

Thus, the legal regulation of "other (commercial) designations", which may include a domain name, is limited to their mention in the Law of Ukraine "On Protection against Unfair Competition" and the Commercial Code of Ukraine.

Another commercial designation is often used by entrepreneurs and business entities in their business activities. Traditionally, this refers to a brand, business name, etc., which, despite its use, is not registered as a trademark or geographical indication and does not

30 Commercial Code of Ukraine no 436-IV of 16 January 2003 (amended 15 November 2024) <https://zakon.rada.gov.ua/laws/show/436-15#Text > accessed 25 November 2024.

31 Case no 910/15222/18 (Supreme Court of Ukraine, 10 March 2021) <https://reyestr.court.gov.ua/Review/95567204> accessed 25 November 2024.

coincide with a commercial name. Almost every business entity wants to be represented on the Internet, and for this purpose, a website is used, the domain name of which usually duplicates the relevant brand (which is not protected as a named means of individualisation, in particular, as a trademark). Thus, in this case, the domain name acquires the legal regime of another commercial designation and, therefore, may be protected by the procedure established by the legislation "On Protection against Unfair Competition". However, in this case, the domain name is a form (method) of use of the "other commercial designation" and is not an independent object of protection in these legal relations.

The Supreme Court, in its Resolution of 18 August 2021 (Intellectual Property Chamber), emphasised that the "designation" itself is not an independent object with a specially provided status, which gives rise to certain rights and obligations and, therefore, does not have specific (special) protection. This was also discussed above in this article. The Supreme Court notes that according to the competition law, namely, Article 4 of the Law of Ukraine "On Protection against Unfair Competition", a designation (including a domain name that reflects such a designation) receives protection in competitive relations and not as an independent intellectual property object. At the same time, the critical issue will be business entities' good faith/bad faith use of such designation.[32]

We consider the position of the Supreme Court to be debatable but formally correct since the few references to another commercial designation in the Law of Ukraine, "On Protection against Unfair Competition," and the Civil Code of Ukraine determine the use of another commercial designation as an object of competitive relations rather than intellectual property rights. Therefore, the rights to it can only be enforced within the framework of competitive relations by appropriate remedies, and consequently, it is possible to apply to both the court and the Antimonopoly Committee. Undoubtedly, this approach has significantly narrowed the possibilities for owners of commercial designations (including domain name owners) to enforce their rights since the possibility of the plaintiff (complainant, applicant) to refer to the provisions of the Civil Code of Ukraine on intellectual property is excluded. Consequently, this approach encourages owners of digital commercial designations to register these as trademarks, granting them better legal protection.

4.3.3. The right to apply to the Antimonopoly Committee of Ukraine

The owner of the rights to a domain name may file a complaint with the Antimonopoly Committee in case of violation of the legislation on unfair competition. However, in such a case, it should be clearly stated what exactly is the violation of the complainant's domain name rights since, as mentioned above, a domain is not an independent object of protection but is only a form of use of a trademark, other means of individualisation, or a form of use of another commercial designation.

32 Case no 922/1966/18 (Supreme Court of Ukraine, 18 August 2021) <https://reyestr.court.gov.ua/Review/99087668> accessed 25 November 2024.

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

In this case, the subject of the appeal must be the owner of a trademark certificate, the owner of rights to another means of individualisation (or another person who legally owns intellectual property rights to these objects), or the owner of rights to another commercial designation, who must also have the status of a business entity. In this case, the complainant must additionally prove the existence of rights to the domain name in which the relevant intellectual property right or other commercial designation is expressed. The owner of a website is the account holder who sets the website's terms of use. The website's owner is presumed to be the registrant or the recipient of hosting services.[33] Therefore, the applicant must prove that he or she is the registrant, pays for hosting services, or provides other evidence of ownership of a particular website. Usually, business entities are rarely the registrants of a domain name; instead, the registrant is an individual close to the relevant business entity, a person related to it. Therefore, it is vital to demonstrate the applicant's connection with a particular domain name, in defence of which proceedings are initiated before the Antimonopoly Committee.

Thus, by the decision of the Administrative Board of the Kyiv Regional Territorial Department of the Antimonopoly Committee of Ukraine dated 20 September 2016, No. 43, the unlawful use of the designations "REHAU" and "REHAU" in the domain name without the permission (or consent) of LLC "REHAU", which had previously started using them in its business activities, was addressed. The Defendant was obliged to cease infringement of trademark rights within two months by removing the domain name http://rehau.kiev.ua/ trademarks "REHAU" and "REHAU".[34]

The application for enforcement to the Antimonopoly Committee is primarily related to the facts of unfair competition, which results in the likelihood of confusion among consumers (buyers, clients) between the activities of the owner of a certain commercial designation (trademark, other means of individualisation or other commercial designation) and the activities of a business entity that illegally uses such designations, including in its domain name.

For competition to exist and for a complaint to be filed with the Antimonopoly Committee, several conditions must be met: the respondent's business activities must be identical and have the same geographic region of operation. If these conditions are not met, no competition exists between business entities, and there are no grounds to file a complaint with the Committee. It is important to note that a website is not always used for commercial purposes. Therefore, we believe that if a domain name refers to a website used for non-commercial purposes, it cannot be protected, in particular, as another commercial designation in the framework of the proceedings of the Antimonopoly Committee.

33 Law of Ukraine no 2811-IX (n 26).

34 Case no 975/33-p-02-05-16, Decision no 43 (Administrative Board of the Kyiv Regional Territorial Department of the Antimonopoly Committee of Ukraine, of 20 September 2016) <http://www.amc.gov.ua/amku/doccatalog/document?id=84156&schema=kyivr> accessed 25 November 2024.

Of course, in cases involving the protection of rights to trademarks, other means of individualisation, and other commercial designations used in domain names (and the dispute concerns the termination of the use of such a domain name by the infringer), geographical boundaries may disappear or be an optional condition for protection, since the digital environment (the Internet) has no formal borders. However, in this case, the complainant must prove that its activities, which are covered on a particular website with a particular domain name, extend to the entire territory of Ukraine. In this case, the geographical factor of the competition may be levelled.

In the course of consideration of cases by the Antimonopoly Committee concerning unfair competition involving the use of signs in a domain name, the Antimonopoly Committee authorities, having established the fact of the violation, may decide to bring the guilty person to justice by imposing a fine. However, the Committee is not authorised to oblige the infringer (the Respondent) to cease using the domain name, nor are they permitted to re-delegate the domain name or cancel its registration. The application of these remedies is the prerogative of the court, or some of them (re-delegation, cancellation of domain name registration) may be applied as part of the domain name dispute procedure in accordance with the UDRP.

The Antimonopoly Committee considers cases to stop unfair competition. Therefore, this procedure for protecting domain name rights is rather limited regarding possible remedies. Among the positive aspects of the proceedings before the Antimonopoly Committee are the possibility of establishing the fact of infringement as well as the creation of prejudice for further prosecution of the infringer in court.

5 APPLICATIONS OF THE UDRP POLICY

5.1. UDRP Policy: General Remarks

Domain names are vital for digital identity and can lead to disputes when they conflict with trademarks, and UDRP is a globally accepted mechanism for dealing with issues such as cybersquatting and unauthorised control of domain names.[35] The commercial significance of domain names is directly reflected in the disputable situations, and a domain name portfolio needs to be the strongest intellectual property asset to promote and support a business and protect its online identity.[36] The practice of resolving domain disputes by the judiciary shows that the proceedings may take more than one year, during which the right holder may suffer significant financial and reputational losses.

35 Christopher Gibson, 'Domain Name Arbitration' in Simon Klopschinski and Mary-Rose McGuire (eds), *Research Handbook on Intellectual Property Rights and Arbitration* (Edward Elgar 2024) 200.

36 Almosova Shahnoza, 'Analysis of Problematic Issues between Domain Names and other Means of Individualization' (2024) 4(2) International Journal of Law And Criminology 73, doi:10.37547/ijlc/Volume04Issue02-13.

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

WIPO and ICANN proposed a more balanced approach to resolving this category of cases under the UDRP Policy, which focuses on proving the bad faith nature of the domain name registration. The UDRP is a private international procedure for resolving domain disputes efficiently, primarily conducted online with simple rules, which makes it easy to understand.[37] The UDRP is characterised by a high level of regulation of all aspects of filing a complaint, providing evidence and objections, and deadlines for issuing decisions.[38]

Unfortunately, as of today, this domain name dispute resolution mechanism applies solely to domain names that reflect trademarks. UDRP is only a mechanism for prompt protection of trademark rights.[39]

According to Konstantinos Komaitis, domain names should be separated from trademark law (in the context of protection of rights), and the sui generis right should be extended to them.[40] Bulat N. also states that the resolution of domain disputes should protect rights to trademarks and other objects—a commercial name, a geographical indication, the name of a world-famous person, a previously registered domain name.[41] We support a broader approach, as it would enable the protection of domain names as independent objects while safeguarding the rights to other objects (including intellectual property rights reflected in it) within the framework of a domain dispute.

In 2023, WIPO received more than 6,200 applications filed by brand owners to resolve domain name disputes under the UDRP procedure—an increase of more than 7% compared to 2022.[42]

There is another opinion that arbitration procedures (UDRP) are not always effective, which necessitates going to court.[43]

Neither domestic law nor domestic justice is ready to deal with cases related to domain disputes, because in practice they face the problem of clarifying judicial jurisdiction and the impossibility of applying the rules of international law.[44] Therefore, resolving a domain dispute under the UDRP has its advantages.

37 Olena M Skazko, 'Legal Framework for the Domain Name Dispute Resolution in Ukraine' (PhD thesis, Research Institute of Informatics and Law of the National Academy of Legal Sciences of Ukraine 2021) 167.

38 ibid 191.

39 MV Petriv, 'The Procedure for Resolving Domain Disputes' (2023) 78(1) Uzhhorod National University Herald, Series: Law 203, doi:10.24144/2307-3322.2023.78.1.32.

40 Komaitis (n 5) 39.

41 Nataliia Bulat, 'Comparative Legal Characteristics of Measures of Protection against Cybersquatting Established by Administrators of .UA and .UKR Domains' (2024) 5 Journal of Kyiv University of Intellectual Property and Law 19, doi:10.32782/chasopyskiivp/2024-5-3.

42 'WIPO ADR Highlights 2023' (*WIPO*, 2024) <https://www.wipo.int/amc/en/center/summary2023.html> accessed 25 November 2024.

43 SA Tsybizova, 'Legal Regulation of Domain Names: European Experience' (2024) 1 Irpin Legal Chroniclles 52, doi:10.33244/2617-4154.1(14).2024.51-60.

44 Alla Diduk and Stepan Lytvyn, 'Domain Disputes: Problematic Aspects' (2021) 2(59) Scientific works of National Aviation University, Series: Law Journal "Air and Space Law" 128, doi:10.18372/2307-9061.59.15606.

Compared to court proceedings, the UDRP offers several advantages:

a) It supports a large number of domain zones, including the .UA and COM.UA domain zones - UA-DRP.[45]
b) Cases are typically resolved in approximately 60 calendar days.
c) The arbitrators who decide the case are experts in the relevant field.
d) Decisions are executed promptly, with implementation occurring 10 days from the decision date.
e) Cases are generally decided in absentia (unless the arbitrators decide, as an exception, that a face-to-face hearing is necessary to decide the case).
f) Available remedies including re-delegation or cancellation of the domain name (for the .UA domain zone - only re-delegation is permitted).
g) All correspondence is conducted electronically.
h) electronic payments.
i) The domain name registrar cannot be involved in the dispute, as the UDRP does not consider the registrar to be a party to the dispute (the registrar may be requested to provide the necessary information).
j) The procedure provided by the UDRP is out-of-court and does not preclude the case from being brought to court.

At the same time, the UDRP Policy and Rules cover only those domain name disputes in which there is a conflict between a domain name and a trademark and do not address disputes related to the conflicting use of domain names and other intellectual property rights. Under the UDRP Policy and the UDRP Rules, domain name disputes should be considered through the prism of enforcement against unfair competition and compliance with the principle of good faith.

Domain name disputes concerning .UA domains under the UA-DRP procedure may be considered exclusively by the WIPO Arbitration and Mediation Center.

The main advantages of the UA-DRP procedure over judicial proceedings are the certainty of the place of consideration of the case, the possibility of quick domain blocking, prompt receipt of information about the domain owner, and the term of consideration of cases up to three months.[46]

Despite its procedural advantages, the UDRP cannot be considered a type of international commercial arbitration, primarily due to the following reasons:

a) An absence of an arbitration agreement between the applicant and the domain name registrant.
b) The parties may not, at their discretion, agree on the procedure for appointing an arbitrator or arbitrators.

45 UA-DRP (n 10) Rules.

46 AV Khodosh, 'Domain Name Disputes arising from Trademark Infringements: Possible Ways of their Resolution' (2021) 10 Juridical Scientific and Electronic Journal 185, doi:10.32782/2524-0374/2021-10/45.

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

c) The language of the dispute cannot be determined by the parties.
d) Unlike commercial arbitration awards, all UDRP awards are published in the public domain.
e) An arbitral award may be challenged in court only on the grounds specified by law, while the UDRP and court proceedings on the merits are substantively independent.

5.2. Stages of domain name dispute resolution under the UDRP

We note that the UDRP procedure for resolving domain name disputes consists of the following stages:

a) Filing a complaint: The Complainant submits a complaint to an organisation authorised by ICANN.[47] The subject of the complaint may be one or more domain names, provided they belong to the same registrant—usually, such situations arise when one person owns several similar domain names that contain the complainant's trademark.
b) Respondent's reply: The domain name registrant has 20 days to submit a response. If the Respondent fails to do so, the dispute shall be further considered based on the available materials (as per Clause 5(e) of the Policy).
c) Panel appointment: A panel of one or three experts is appointed to review the case.
d) Deciding and notifying all interested parties.
e) Implementation: The domain name registrar executes the decision, which may result in refusing the claims, cancelling the registration, or transferring the domain name to the complainant.

The Complainant's complaint must also indicate the Complainant's decision as to whether the dispute should be heard by a one- or three-arbitrator panel. Suppose the Applicant decides to proceed before a one-arbitrator panel. In that case, the Respondent must indicate whether it is necessary to have the dispute resolved by a three-arbitrator panel (Paragraph 5(b)(iv) of the Rules). If there is a disagreement between the parties to the dispute regarding the number of arbitrators (the Complainant wants one, the Respondent wants three), then the Respondent is obliged to pay half of the fee for considering the dispute.[48]

47 'Rules for Uniform Domain Name Dispute Resolution Policy' (*ICANN*, 21 February 2024) <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en> accessed 25 November 2024. These Rules are in effect for all UDRP proceedings in which a complaint is submitted to a provider on or after 31 July 2015.

48 ibid.

5.3. Bad faith domain name registration as a ground for satisfaction of a complaint in a domain name dispute

The UDRP identifies the following conditions of unfair domain name registration, which, if established by the Panel, lead to a decision to satisfy the complaint:

a) identity (or similarity) of the domain name and trademark;
b) the registrant has no rights (interests) in the domain name;
c) bad faith in registering and using a domain name (clause 4(a) of the Policy, clause 3(a)(ix) of the Policy).[49]

Unlike the UDRP, the UA-DRP formulates the third element of bad faith more dispositive: the domain name was registered **or** used in bad faith.[50] A sign of a domain dispute is the registration or use of the domain name in bad faith.[51] To some extent, this approach narrows the scope of proof for the complainant, as it is necessary to prove only one unlawful, bad-faith action of the Respondent (registrant): either bad-faith registration of the domain name or its bad-faith use.

During the proceedings, the applicant must **prove the existence of each of the three elements.** Let us consider them in more detail.

The first element of the UDRP is the identity (or confusingly similar) of the domain name and the complainant's trademark.

This provision involves comparing the domain name and the trademark (verbal part). The purpose is to assess the recognizability of the trademark within the contested domain name., In the event of a coincidence (including the dominant element) of a trademark and a domain name, they will be considered confusingly similar.

A domain name that contains a trademark misspelled intentionally is also treated by arbitrators as confusingly similar to the trademark. This is because the domain name contains recognisable aspects of the respective trademark.

Given the peculiarities of the Internet's global nature, the jurisdiction in which the trademark was registered is irrelevant for arbitrators when assessing the first element.[52]

49 ibid.

50 Policy for Resolving Disputes Regarding Domain Names in the .UA domain (entered into force on 1 November 2024), see: UA-DRP (n 10).

51 Skazko (n 37) 43.

52 Case no D2007-1629 *Hoffmann-La Roche AG v Relish Enterprises* (WIPO, 17 December 2007) <https://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1629.html> accessed 25 November 2024.

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

Geographical indications used only in their ordinary meaning, except for their registration as a trademark, do not give rise to proceedings under the UDRP.[53]

The transliteration or translation of a trademark that is reflected in a domain name may also indicate their similarity to the point of confusion.[54]

Arbitrators usually do not consider the relationship of the website content to the domain name when assessing similarity under the first element.

The second element of the UDRP states that the registrant has no rights (interests) in the domain name.

To confirm rights (legitimate interests) in a domain name, the Respondent can prove the following:

a) Bona fide use (preparation for use) of the domain name prior to the date of filing of any dispute notice;
b) The Respondent was known to a wide range of persons under the domain name in question, even without holding any trademark rights; or
c) Lawful non-commercial or fair use of the domain name without intent to obtain commercial advantage by luring consumers, misleading them or discrediting the trademark or service mark to which the rights are claimed.[55]

When assessing the second element of the UDRP, arbitrators identify and consider the following factors:

a) The purpose behind using the domain name, determining whether it serves a legitimate purpose or is intended as a means for the Respondent to obtain commercial benefit;
b) Whether it is transparent to Internet users visiting the Respondent's website that the applicant does not operate the website;
c) Whether the Respondent tried to avoid registration of domain names corresponding to the marks owned by the applicant or third parties;
d) The presence or absence of a link (including explanatory text) to the trademark owner's website; and
e) Whether the Respondent has warned individuals by email (but whose messages are intended for the Complainant) that the message was sent to the wrong recipient;

53 Case no D2000-0617 *Kur- und Verkehrsverein St Moritz v StMoritz.com* (WIPO, 17 August 2000) <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0617.html > accessed 25 November 2024.

54 Case no D2004-0279 *Compagnie Générale Des Etablissements Michelin - Michelin & Cie v Graeme Foster* (WIPO, 25 May 2004) <https://www.wipo.int/amc/en/domains/decisions/html/2004/d2004-0279.html> accessed 25 November 2024.

55 Case no D2012-2006 *B-Boy TV Ltd v bboytv.com c/o Whois Privacy Service / Chief Rocka LTD, formerly named BreakStation LTD* (WIPO, 23 November 2012) <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2012-2006> accessed 25 November 2024.

f) The presence or absence of a connection between the Applicant's trademark and the relevant content of the website under the disputed domain name; and
g) Whether the registration of the domain name and its use by the Respondent consistently complies with the pattern of good faith activity, both online or offline.[56]

If certain persons (intermediaries, distributors, etc.) use a domain name that contains the Complainant's trademark, but such activity is in good faith (such as trading the Complainant's goods, repairing such goods, providing services for such goods), they may be granted the right to use the domain name. In doing so, the following circumstances are taken into account, which must be present in the aggregate (the so-called Okidata test):

a) The Defendant must offer the goods or services in question;
b) The Defendant must use the website to sell only goods or services labelled with the respective trademarks;
c) The website must accurately disclose the registrant's relationship with the trademark owner; and
d) The Respondent should not attempt to "lock the market" in domain names that reflect the trademark.[57]

The prior registration of a trademark corresponding to a domain name usually supports to prove the Respondent's good faith, however does not automatically confer rights or legitimate interests on the Respondent, since when considering the case it should be established whether the registration of the trademark is not aimed at circumventing the application of the UDRP rules.[58]

Using a domain name for illegal activities (e.g., selling counterfeit goods or illegal pharmaceuticals, phishing) cannot confer rights and legitimate interests on the respondent. Cybersquatting is an unethical practice that involves parties acquiring domain names related to well-known brands and companies, intending to exploit their reputation for their own gain.[59]

The third element of the UDRP states that the domain name is registered and ("or" for UA-DRP) used in bad faith.

56 Case no D2015-1128 *Philip Morris USA Inc v Borut Bezjak, A Domains Limited* (WIPO, 11 September 2015) <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2015-1128> accessed 25 November 2024.

57 Case no D2001-0903 *Oki Data Americas, Inc v ASD, Inc* (WIPO, 6 November 2001) <https://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0903.html> accessed 25 November 2024.

58 Case no D2000-0847 *Madonna Ciccone, p/k/a Madonna v Dan Parisi and "Madonna.com"* (WIPO, 12 October 2000) <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0847.html> accessed 25 November 2024.

59 Gaytri Devi and Muskan Vats, 'The Threat of Cyber Squatting:Understanding the Risks of Digital Identity Theft' (*SSRN*, 3 August 2024) <https://ssrn.com/abstract=4915086 > accessed 25 November 2024.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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Bad faith means parasitism on the Complainant's trademark. The trademark confers advantages, and therefore the unlawful (without the permission of the right holder) use of these advantages by the Defendant is unlawful. The Complainant must prove that their rights have been violated. Paragraph 4(b) of the UDRP provides for instances that constitute evidence of bad faith on the part of the Respondent:

a) the Respondent registered or purchased the domain name not for actual use, but for sale to the Complainant or a competitor of the Complainant;
b) the Respondent registered the domain name to prevent the trademark owner from registering;
c) the Respondent registered the domain name with the intent to disrupt the business of a competitor; or
d) using a domain name to attract users to own website, who, by mistake, through misleading, have visited this particular site, believing it to be the site of the owner of a certain trademark that is reflected in the domain name.

The circumstances of the case may indicate that the Respondent, by registering a domain name (reflecting a "foreign" trademark), intended to make a profit, which indicates the Defendant's bad faith. Such cases include:

a) the Defendant's alleged knowledge of the complainant's rights;
b) distinctiveness of the complainant's trademark;
c) the model of improper registration by the Defendant;
d) threats to post objectionable content on a website that is offensive to the trademark;
e) threats to sell the domain to third parties who offer a high price;
f) the Respondent's inability to provide a reliable justification for the domain name registration;
g) past behaviour or business operations; and
h) after receiving a notification from the Complainant about the violation of their rights, committing actions that aggravate the fact of the violation, such as registration of additional domain names that reflect the Complainant's mark.

In particular, if the disputed domain name is identical or similar to a well-known trademark, arbitrators will not consider the Respondent's arguments regarding the ordinary registration of the trademark, as such actions are directed against the trademark owner.[60]

Given the foregoing, if the Respondent has a right or legitimate interest in the domain name, they can sell it and an offer to sell that domain name will not constitute evidence of bad faith for purposes of the UDRP.

60 Case no D2015-0379 *Revevol SARL v Whoisguard Inc / Australian Online Solutions, Domain Support* (WIPO, 18 May 2015) <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2015-0379> accessed 25 November 2024.

Refusal to use a domain name does not prevent the detection of bad faith under the doctrine of passive abstention.

5.4. Domain name dispute resolution in accordance with the UDRP

Domain disputes are disputes that are resolved online using technical means and most often do not involve direct (including visual) contact between the parties.[61] The Panel shall render its decision based on the applications and documents submitted following the UDRP Policy and any rules and principles of law it deems appropriate. If the Panel consists of three arbitrators, the Panel's decision shall be made by a majority vote. The Panel's decision shall be made in writing and shall contain the grounds on which it is based, as well as the date and names of the arbitrators, and then it is sent to the parties, to the public domain administrator and the respective Registrar.

Within three business days of receipt of the decision in the case, the relevant Registrar shall notify each Party and the Authorised Organisation of the date of execution of the decision made by the UDRP Policy.

The consideration of the case under the UDRP procedure does not prevent the interested party from initiating legal proceedings and protecting the rights to the domain name in court. Suppose the Panel decides that it is necessary to delete or re-delegate the domain name registration. In that case, the Authorised Organisation shall wait ten business days after receiving the notification from the Authorised Organisation of the decision of the Administrative Panel before implementing such decision.

In other words, the deadline for appealing a decision under the UDRP procedure is ten business days from the decision date, after which it will be enforced. At the same time, the obligation to prove the fact of applying to the court is imposed on the party who will file a claim with the national court.

6 CONCLUSIONS

Domain disputes are a common category of cases that can be resolved both in and out of court. Difficulties in resolving domain disputes are caused by the legal uncertainty of a domain name as an object of civil rights. Their legal nature and regulatory framework remain undefined, as no specific law governs domain names. While the CC of Ukraine and other legislative acts mention domain names, they do not establish a clear legal regime for their exercise.

61 OO Izbash, 'Mediation and Alternative Dispute Resolution Online' (2022) 1 Kyiv Law Journal 80, doi:10.32782/klj/2022.1.12.

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In this regard, domain name rights are protected through other objects reflected in the domain name, such as trademarks, commercial names, geographical indications, copyrighted objects, or personal names. At the same time, a domain name functions as an independent object subject to sui generis law, granting special property rights to the administration and use of a particular website. These rights are transferable and can be waived.

Domain name disputes may be resolved in court or out of court. The practice of resolving domain disputes under the UDRP Policy is widespread. However, a notable drawback is the possibility of resolving only those domain disputes that relate to trademarks reflected in domains. The resolution process focuses solely on proving the unfair nature of domain name registration, which significantly limits the possibility of applying the UDRP to resolve domain name disputes.

To improve the legal regulation governing domain disputes, the Law on Marks should be amended to introduce a provision allowing trademark certificate owners to apply special methods of protecting their rights. This would enable more effective enforcement in cases where a trademark or a similar designation is used in the domain name without authorisation. Specifically, it is advisable to supplement Article 20 of the Law on Marks with the following provision: "The owner of the certificate may also demand the re-delegation of a domain name in which his trademark or designation specified in paragraph 5 of Article 16 of this Law has been used without his consent."

This amendment would expand the list of special methods of protecting trademark rights and eliminate legal uncertainty regarding domain name redelegation. Courts sometimes perceive such claims critically due to the absence of explicit legal provisions allowing this method of protection.

It is also advisable to supplement Article 21 of the Law on Marks with a provision on the possibility of protecting trademark rights in the arbitration procedure for resolving domain disputes in accordance with the UDRP. Currently, the law permits the protection of trademark rights only through courts or other procedures established by law, without expressly recognising arbitration for domain disputes. To eliminate this legal gap, it is necessary to provide the owner of the trademark certificate with the opportunity to protect their rights in the procedure provided for by the UDRP, including UA-DRP in particular. This approach would provide legal legitimacy to Panel decisions in domain name disputes.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ПРАВОВИЙ РЕЖИМ ДОМЕННОГО ІМЕНІ ТА ПОРЯДОК ВИРІШЕННЯ ДОМЕННИХ СПОРІВ В УКРАЇНІ

Леонід Тарасенко*, Христина Кметик-Подубінська, Максим Суханов, Костянтин Зеров, Олеся Харченко та Юрій Носік

АНОТАЦІЯ

Вступ. *Спори стосовно доменних імен виникають щодо захисту прав на доменні імена. Їхня правова природа як об'єкта залишається невизначеною, що призводить до неоднозначності правового режиму доменного імені. Ця невизначеність створює проблеми для правоохоронних органів і впливає на процедури вирішення доменних спорів. Чинне цивільне законодавство України не роз'яснює належність доменних імен до системи об'єктів цивільних прав. Однак зростання ролі цифрового середовища значно підвищила важливість доменних імен, що сприяє виникненню спорів щодо їхнього володіння та використання.*

З урахуванням особливостей правової природи доменних імен застосовуються як судові, так і позасудові процедури захисту, хоча законодавство не передбачає спеціального порядку розгляду та вирішення спорів щодо доменних імен. Унікальною особливістю захисту прав на доменні імена є можливість ініціювання та вирішення доменного спору за UDRP без залучення державних інституцій, таких як суди чи органи Антимонопольного комітету. Відсутність належного законодавчого регулювання доменного імені як об'єкта та особливостей вирішення доменних спорів призвела до наукових дискусій.

Методи. *Основна мета статті – дослідити правову природу доменних імен та вивчити порядок вирішення спорів щодо них. У зв'язку з цим у роботі було вперше проаналізовано доменне ім'я як об'єкт, визначено його правову природу, схарактеризовано позицію ЄСПЛ, а також зроблено внесок у ширшу наукову дискусію щодо правової визначеності доменних імен. У дослідженні проаналізовано особливості судового та позасудового захисту прав на доменні імена. Встановлено, що такий захист може здійснюватися як у юрисдикційній (судовий порядок чи звернення до Антимонопольного комітету України), так і в неюрисдикційній формі. Далі в статті описано порядок вирішення спорів щодо доменних імен судом та Антимонопольним комітетом України, визначено основні проблемні моменти, пов'язані з цими процесами.*

Окрему увагу приділено науковому аналізу процедури вирішення спорів щодо доменних імен UDRP. У статті викладено основні етапи вирішення доменного спору за UDRP та роз'яснено зміст та особливості недобросовісної реєстрації доменного імені, яка часто є підставою для спорів. Згодом були сформульовані висновки стосовно вдосконалення правового режиму доменного імені, а також щодо порядку вирішення доменних спорів.

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Результати та висновки. *Доменні спори є поширеною категорією справ, які вирішуються як у суді, так і поза ним. Автор вважає, що труднощі у вирішенні доменних спорів викликані правовою невизначеністю доменного імені як об'єкта цивільних прав. На сьогодні правова природа та правовий режим доменних імен не визначені законодавством. Спеціального закону, який регулює це питання, немає, і хоча Цивільний кодекс України та інші законодавчі акти згадують про доменні імена, вони не регулюють комплексно права, пов'язані з ними.*

У дослідженні доведено, що у зв'язку з цим права на доменне ім'я захищаються за допомогою інших об'єктів, відображених у доменному імені, таких як торговельні марки, комерційні найменування, географічні зазначення, об'єкти авторського права, а також імена фізичних осіб. Автор обґрунтовує, що доменне ім'я є самостійним об'єктом, який може бути суб'єктом права sui generis і який надає власникам доменних імен (зокрема, реєстрантам) особливі майнові права на використання веб-сайту (адміністрування, користування тощо); ці права можна передати (за плату або безкоштовно) і від них можна відмовитися.

Також було встановлено, що спори стосовно доменних імен можуть вирішуватися в судовому або позасудовому порядку. Вважається, що практика вирішення доменних спорів за UDRP є поширеною. У той же час його недоліком, на який слід звернути увагу, є те, що він застосовується лише до спорів щодо торговельних марок, відображених у доменних іменах. Підхід до вирішення цієї проблеми ґрунтується виключно на доведенні недобросовісності реєстрації доменного імені. Обґрунтовано, що ці обставини суттєво звужують можливості застосування UDRP у вирішенні спорів щодо доменних імен. Для усунення цього обмеження автор пропонує доповнити Закон «Про знаки для товарів і послуг» спеціальним способом захисту: надання власникам свідоцтв на знаки для товарів і послуг права вимагати делегування доменного імені як додаткового способу захисту.

Ключові слова: *доменні імена, інтелектуальна власність, торговельна марка, цифрове середовище, Інтернет, UDRP, недобросовісна конкуренція.*

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Review Article

STRUCTURAL REFORMS IN ALBANIA: POLITICAL AND LEGAL CHALLENGES IN THE FRAMEWORK OF EU INTEGRATION

Meljana Bregu* and Juliana Gjinko

ABSTRACT

Background: *Since the fall of the communist regime, Albanian foreign policy has focused mostly on democratic consolidation but continues to be classified as a hybrid democracy, even as it has made steady progress toward liberal democratic progress and European integration. Both the Albanian population and political elite welcome and encourage the integration process, with the prospect of EU membership transforming the European Union into a powerful force for democracy, driving structural changes, and affecting the rule of law. However, a combination of internal and external obstacles has influenced the process.*

Using the adoption of the justice and public administration reform, the internal political debate and public sentiments on the integration process, the article explores Albanian political representatives and institutions' complex relationship with the EU.

The article underlines the role of EU conditionality and contribution in the adoption of the crucial reforms and the diffusion of EU values in the face of major hostilities between Albanian political forces. While external incentive models offer a valuable framework for comprehending the Albanian Europeanization process, it is essential to consider additional factors that may influence and promote democratisation and adoption of essential reforms.

Methods: *This article uses a case-study approach to analyse the adoption and implementation of reforms in Albania. While Albania is an interesting case study, it is often analysed as part of the EU foreign policy in the Western Balkans. The findings of this paper are expected to be relatively limited in their applicability to similar cases, i.e., small transition countries aiming to fulfil the EU accession criteria.*

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Political and societal perceptions of EU integration, including time-series analysis, public opinion surveys and political narratives have been discussed and compared with relevant EU reports, reform strategies, and theoretical models on conditionality.

Insights into their implementation were uncovered through a systematic content analysis approach.

Results and Conclusions: *The Albanian example shows the influence and restrictions of EU conditionality. More general lessons include the requirement to constantly engage in support of long-term reform implementation and the need to customise conditionality to the political and institutional setting of candidate countries. The long-term sustainability of the reforms in Albania depends on several aspects, such as political will, internal institutional independence, and public trust.*

1 INTRODUCTION

Starting from the Thessaloniki Summit of 2003, the European Union has shown a progressively growing interest in the Balkan Region.[1] The new enlargement strategy in 2020 increases the EU institutional impact and their transformative power in the candidate countries, using the major power conditionality to shape reforms.[2] In the enlargement process, the EU acts as a promoter of human rights, democracy and rule of law, which constitute the pillars of EU Treaties. Manners affirms that "the European Union capacity to impact the behavior of other countries by disseminating its ideals, principles, and norms, part of the *Acquis Communautaire*, establishes it as an actor in world politics".[3]

In the last decade, Albania has made remarkable progress in its EU accession and negotiation process while also facing some of the most dramatic internal political crises. The Albanian Parliament and Government have continued implementing the fundamental judicial reform initiated in 2016, a strategic effort aimed at countering widespread corruption and assuring a greater autonomy of the judicial system. This strategy was considered one of the core requirements of the EU to initiate membership negotiations with Albania. Regarding the political crises, 2019 saw the Albanian opposition coalition stage a series of tough protests culminating in their unprecedented abandonment of democratic institutions and processes in the local elections.

1 'Eu-Western Balkans Summit Thessaloniki: Declaration' (*European Commission*, 21 June 2003) <https://ec.europa.eu/commission/presscorner/detail/en/pres_03_163> accessed 28 December 2024.

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2020 Communication on EU Enlargement Policy, COM(2020)660 (6 October 2020) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:660:FIN> accessed 28 December 2024.

3 Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) JCMS 235, doi:10.1111/1468-5965.00353.

The relationship between the EU and Albania is continuously evolving, and the EU representatives in Albania have had to balance promoting political stability and advancing integration progress in a sometimes-precarious equilibrium.

This paper illustrates the transformative role of EU institutions in Albania, using the adoption of justice and administrative reforms as case studies. This analysis underlines the importance of EU conditionality instruments for pushing forward democratic reform while acknowledging the challenges posed by internal political factors. Political elites often manipulate narratives about EU membership to avoid criticism and accountability for their failings while leveraging the Albanian population's continued strong support for European integration.

Albania's trajectory from a post-communist transition to a hybrid democracy with aspirations for EU membership reflects broader patterns in the Western Balkans. This context allows for comparative analysis with other regional candidates and highlights unique aspects of Albania's journey.

2 LITERATURE REVIEW

The impact and conditionality of the European Union (EU) in candidate countries, particularly in the geopolitical context in the last decade, reveals a complex interplay of dynamics and institutional requirements. The EU's enlargement policy has evolved, emphasizing rules of law and governance standards while adapting to the unique circumstances of candidate nations. This review synthesises key insights from recent literature on the subject.

One key aspect is the implementation of conditionality to empower the rule of law in candidate member countries. The EU has applied ambitious rule of law conditionality in Eastern Europe, leveraging the urgency created by the ongoing war with Russia to enforce reforms.[4] Conditionality mechanisms focus on building effective anti-corruption institutions and judicial reforms, such as strategies extensively used in the Western Balkans.[5] The introduction of a new enlargement methodology emphasizes tangible progress across interconnected negotiation chapters, enhancing the clarity of EU expectations.[6]

4 Maryna Rabinovych and Anne Pintsch, 'Political Conditionality as an EU Foreign Policy and Crisis Management Tool. The Case of EU Wartime Political Conditionality Vis-à-Vis Ukraine' [2024] Journal of European Integration, September 1, doi:10.1080/07036337.2024.2407091.

5 ibid; Marin Brusis, 'The Conditional Impact of Democracy Conditions. How the European Union Interacts with Political Competition in Eastern Partnership Countries? (2017) 62(1) Studia Universitatis Babes-Bolyai: Studia Europaea 141.

6 Ana Knežević Bojović and Vesna Ćorić, 'Challenges of Rule of Law Conditionality in EU Accession' (2023) 7(1) Bratislava Law Review 41, doi:10.46282/blr.2023.7.1.327; Marina Matić Bošković and Milica Kolaković Bojović, 'New Approach to the EU Enlargement Process – whether C19 Affected Chapter 23 Requirements?' (2022) 6 EU and Comparative Law Issues and Challenges Series (ECLIC) 330, doi:10.25234/eclic/22433.

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Another important element is the collaborative or defiant political culture of the political elites and the engagement of civil society in the integration process. Political elites in the Balkans significantly influence EU integration, often failing to meet democratic standards and contributing to public distrust and disengagement from political processes.[7] EU conditionality has transformed civil society's role in policymaking within candidate countries, fostering greater engagement and accountability.[8] Active civil society pressures political elites to adhere to European norms, thereby facilitating the reform process.[9]

However, the EU's credibility may be undermined if it prioritizes political expediency over adherence to democratic values, as seen in member states like Poland and Hungary.[10] In contrast, while the EU's conditionality aims to promote democratic reforms, there are concerns that the pressures of geopolitical strategy may lead to compromises on these values, potentially jeopardizing the integrity of the enlargement process.[11]

In the last decade, many studies have been conducted on the EU role in promoting and enhancing the implementation of justice reform in the Western Balkans as part of their enlargement strategy. Authors consider the intersection between EU conditionality, reform approval and implementation, public support, political collaboration and geopolitical perspectives.[12] The literature on justice reform in Albania and the EU focuses on technical aspects, such as Hajdini's use of technology to combat corruption.[13] Anastasi discusses EU

7 Geoffrey Pridham, 'The Scope and Limitations of Political Conditionality: Romania's Accession to the European Union' (2007) 5(4) Comparative European Politics 347, doi:10.1057/palgrave.cep.6110109; Corina Stratulat (ed), *EU Integration and Party Politics in the Balkans* (EPC Issue Paper 77, EPC 2014) <http://aei.pitt.edu/id/eprint/56419> accessed 25 December 2024.

8 Igor Vidačak, 'The Effects of EU Conditionality on Patterns of Policy Engagement of Civil Society Organizations in Candidate Countries' (2021) 21(4) Southeast European and Black Sea Studies 571, doi:10.1080/14683857.2021.1951864.

9 Andrea Gawrich and Doris Wydra, 'Conditions and Contestation: Ukraine on Its Way to EU-Membership' in Claudia Wiesner and Michèle Knodt (eds), The War Against Ukraine and the EU (Palgrave Macmillan, Cham 2024) 161, doi:10.1007/978-3-031-35040-5_8.

10 Victoria Lomaka, Ivan Yakoviyk, and Yevhen Bilousov, 'Europeanisation and Its Impact on Candidate Countries for EU Membership: A View from Ukraine' (2023) 6(2) Access to Justice in Eastern Europe 59, doi:10.33327/AJEE-18-6.2-a000221.

11 Zoran Ivanov, 'The EU – Balkans Enlargement Process Deadlock: The Role of Perceptions, Stabilitocracy, and Recommendations' (2023) 24 Uluslararası Suçlar Ve Tarih 131, doi:10.54842/ustich.1315682.

12 Andi Hoxhaj, 'The EU Rule of Law Initiative Towards the Western Balkans' (2021) 13 Hague J Rule Law, 143, doi.org/10.1007/s40803-020-00148-w; Marco Kmezić, 'Recalibrating the EU's Approach to the Western Balkans' (2020) 19(1) European View 54, doi:10.1177/1781685820913655; Besnik Maho, 'Approval of the New Judicial Map: A Priority of the Albanian Justice Reform' (2022) 16(2) Jus & Justicia 7, doi:10.58944/qxwe1334; Ismail Tafani, 'Dalla giurisdizione della corte suprema alla competenza del tribunale speciale: la sfida del sistema giudiziario albanese contro la corruzione ad alto livello governativo'(2022) 13(2) Optime 111.

13 Bojana Hajdini and Gentjan Skara, 'The Role of Information and Communication Technology in Fighting Corruption in the Judiciary System: The Case of 2016 Judicial Reform in Albania' (2022) 8(3) Journal of Legal and International Affairs 115, doi:10.47305/JLIA2283115h%20.

integration reforms, specifically technical support from EU specialists to increase the independence of the legal system.[14]

Specific publications by Albanian and foreign authors regarding Albania and its peculiar characteristics remain insufficient compared to other cases in the region. This study aims to shed some light on the unique role that the EU has played in Albania's process of democratisation.

3 METHODOLOGY

The article's methodology uses a case-study approach to analyse Albania's adoption and implementation of structural reforms. Specifically, it examines justice and public administration reforms within the broader context of Albania's EU integration process.

One of the key methodological approaches is case study analysis. Rather than situating Albania within the broader EU intervention in the Western Balkans, the study treats it as a distinct case. This approach illustrates the specific features of the case and contributes to broader research regarding Albania. Albania's political landscape, marked by high levels of polarisation, corruption, and institutional weaknesses, offers valuable insights into the complexities and limitations of EU-driven reforms.

The study also employs a comparative approach to assess political elites and societal perceptions of EU integration. This assessment uses time-series analysis, public opinion surveys, and political narratives. The research draws on surveys and data collected over the last decade by organisations such as Freedom House, the Albanian Media Institute, the Western Balkans Security Barometer, and the Center for the Study of Democracy and Governance.

Additionally, document analysis plays a crucial role in the study. It examines findings within EU reports, reform strategies, and theoretical models on conditionality to evaluate Albania's Europeanization process. The article also reviews articles and press releases from main political actors.

Finally, the study acknowledges that its findings might have limited applicability to other small transitional countries determined to meet EU accession criteria.

14 Aurela Anastasi, 'The Albanian Justice Reform in the Framework of the European Integration Process' (2021) 2 Euro-Balkan Law and Economics Review 1, doi:10.15162/2612-6583/1317.

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

4 THE EFFICIENCY OF THE EU ROLE IN THE ADOPTION OF STRUCTURAL REFORMS

The primary EU enlargement strategy lies on the conditionality to fulfill political, economic, and legal reforms as defined by the Copenhagen criteria of 1993 (a stable democratic rule of law, functioning market economy, and the ability to enact additional policies).[15] In 2005, Schimmelfennig and Sedelmeier illustrated their theory on the EU's use of external incentives approach to influence the political, economic and institutional changes in candidate countries.[16]

The EU enlargement strategy for Albania relies heavily on conditionality to drive reforms necessary for accession. While this approach has led to some progress, ongoing challenges highlight the complexity of aligning domestic conditions with EU expectations and the diffusion and reception of norms, values and ideas that can transform society.[17] The relationship between EU conditionality and the efficacy of rule adoption in potential candidate countries has been examined by Böhmelt and Freyburg.[18] However, it is important to note that both internal factors and EU strategies also influence the degree of effectiveness of EU conditionality in Albania.

The EU has encouraged Albania to observe the enlargement requirements and undertake important reforms to meet the accession criteria. Two critical reforms from 2005 to 2020 have been administrative and justice reforms.

Juncos has stated that the credibility of EU enlargement conditionality depends on the EU's credibility of the accession prospect.[19] Using her theory to analyse the role of the EU in Albania, we can assume that the EU is promoting core norms and values like democracy, rule of law and the efficacy of the public administration. The adoption and implementation of EU-driven reforms can evaluate the efficiency of the EU conditionality. In Albania, the EU transformative power has been limited by internal factors, such as the lack of political will, specifically in the fulfillment of two important accession criteria, like the enforcement of the rule of law and the enhancement of the public administration.[20]

15 Oton Anastasakis, 'The Europeanization of the Balkans' (2005) 12(1) The Brown Journal of World Affairs 77.

16 Frank Schimmelfennig and Ulrich Sedelmeier (eds), *The Europeanization of Central and Eastern Europe* (Cornell UP 2005) 210-1.

17 Ziya Öniş and Mustafa Kutlay, 'Global Shifts and the Limits of the EU's Transformative Power in the European Periphery: Comparative Perspectives from Hungary and Turkey' (2017) 54(2) Government and Opposition 226, doi:10.1017/gov.2017.16.

18 Tobias Böhmelt and Tina Freyburg, 'The Temporal Dimension of the Credibility of EU Conditionality and Candidate States' Compliance with the Acquis Communautaire, 1998-2009' (2012) 14(2) European Union Politics 250, doi:10.1177/1465116512458164.

19 Ann E Juncos, 'Power Discourses and Power Practices: The EU's Role as a Normative Power in Bosnia' in Richard G Whitman (eds), *Normative Power Europe: Empirical and Theoretical Perspectives* (Palgrave Macmillan 2011) 83, doi:10.1057/9780230305601_5.

20 Wouter Zweers and others, The EU as a Promoter of Democracy or "Stabilitocracy" in the Western Balkans?: A report by the Clingendael Institute and the Think for Europe Network (TEN) (Clegendael Institute 2022).

4.1. Public Perception and Political Will

Two of the most important internal factors legitimising reform and policies are public perception and political elite compliance. All the polls conducted in the past decade have shown that Albanians persist in being amongst the most enthusiastic EU people in the Western Balkans.[21] While Albanians have a general aspiration for EU membership, significant gaps in knowledge and communication hinder effective public engagement in the integration process. This overview will explore key aspects influencing public perception, including political culture, institutional challenges, and the role of civil society in the face of major reforms.

Surveys conducted by Albanian and international NGOs over the past decade indicate strong support for European Union (EU) integration among Albanian citizens.[22] Given the general dissatisfaction with the performance of elected officials, Albanian citizens perceive the EU's criteria and conditions as a constructive impetus for enhancing governance outcomes and perspectives. This sentiment reflects a broader understanding that alignment with EU standards may serve as a catalyst for political accountability and institutional improvement within the country. In the last years, the accomplishment of EU membership held great importance for the Albanian people, as has been evidenced in the polls conducted by the Western Balkans Security Barometer (WBSB): almost the totality of the responses expressed full support of the Albanian full integration in the EU (Table 1).[23]

Table 1. Public perception on the support of EU membership

		2021	2022
Do you support your country's membership in the EU?	Don't know/ No opinion	0.79%	0.41%
	Yes, in the near future	96.69%	98.43%
	No	2.52%	1.71%

When asked why Albania has not fulfilled this popular aspiration, most of those who answered the questionnaire (71.17%) identified the main reason as the Albanian political system's poor performance. Only a minority expressed concern about the impact regional and European disputes or prejudices have on the duration of the integration process (Table 2).[24]

21 Ilir Kalemaj, *Public Perception of the EU in Albania* (Albanian Media Institute 2022).

22 ibid.

23 Miranda Hallunaj and Nino Strati, *Public Perceptions Towards European Integration, Influence of External Actors and Government Performance in Albania* (Kosovar Center for Security Studies 2023) 4.

24 ibid 5.

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

Table 2. Public perception on the reasons why Albania isn't an EU member yet (WBSB 2023, 5)

Why do you think your country is not an EU member yet?	Don't know/No opinion	0,53%
	Poor state of democracy, widespread corruption and lack of reforms	71,17%
	Because of the open bilateral disputes in the region	9,22%
	Because of the EU's discriminatory approach to my country	10,41%
	EU does not want to enlarge	7,43%
	None of the above	1,24%

Albania has been categorised as a transitional or hybrid regime in the survey Nations in Transit by Freedom House, which analyses democracy in historical series, evaluating different criteria (Table 3).[25] These evaluations are compatible with the before-mentioned Albanian public perception.

Table 3. Albanian democracy evaluation 2014–2024 according to Freedom House

2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
3.82	3.86	3.86	3.86	3.89	3.82	3.82	3.75	3.75	3.79	3.79

Another important factor impacting legitimacy reform is the political elite's attitude towards the EU. Their attitude determines the success or failure of these reforms in several important aspects, including political legitimacy, institutional cooperation and quality reform.

Since 2017, Albania has encountered significant political crises characterised by a series of protests, some of which escalated to violence, led by opposition factions against the socialist government of Prime Minister Edi Rama. These demonstrations were primarily fueled by allegations of corruption and perceived insensitivity to social issues within the national government. In an unprecedented move, the opposition engaged in a radical boycott of institutional processes; nevertheless, the ruling party proceeded with local elections in 2019

25 'Freedom in the World 2024: Albania' (*Freedom House*, 2024) <https://freedomhouse.org/country/albania/freedom-world/2024> accessed 28 December 2024.

despite this boycott, effectively limiting voters' political choices.[26] The political landscape during this period was marked by deep divisions and heightened tensions, reflecting broader concerns regarding democratic governance and electoral integrity. The opposition's actions, while aimed at challenging the government, also underscored the complexities of Albania's political dynamics as it sought to navigate its aspirations for European Union membership amidst internal political polarisation.

Political polarisation significantly impacts new democracies, undermining democratic norms and feeding the distrust among citizens. The relation between polarization and democratic commitment is complex, with far-reaching consequences for governance and social cohesion.

One immediate effect of polarisation is the erosion of democratic norms. When ideological extremism prevails among political discourse, democratic norms can deteriorate, leading to institutional instability.[27] Additionally, polarisation can create hostile cleavage, making the democratic system regress to widespread populism. As divisions deepen, democratic institutions may find themselves in a condition of diminished diversity, disabling the ability to address public concerns in an effective manner.[28]

An important feature of Albania's political landscape is the prioritisation of EU full membership achievement, a goal supported by all political parties. It is necessary to analyse and evaluate whether these declarations reflect a genuine commitment or if they are simply rhetorical, serving various political objectives. The commitment of Albania's political elites to European Union integration is a complex and evolving issue, characterized by both aspirations and substantial challenges. Although the political elite often highlights EU integration as a national priority, their actual dedication to implementing necessary reforms and democratic practices has been inconsistent. In the communication strategies of Albanian leaders, topics related to the European Union and integration are prioritised over other domestic or international issues. As crucial negotiation phases approach, these themes are increasingly emphasised in political speeches.

In 2019, Albania's relationship with the European Union reached a critical development stage as the country strived to meet membership criteria. In June 2018, the European Council decided to begin membership talks with Albania. Despite that, negotiations have faced strong opposition from France and the Netherlands, who insisted on further reforms and stricter fulfillment of membership requirements.

26 'Albania: Research & Recommendations' (*Freedom House*, 2021) <https://freedomhouse.org/country/albania> accessed 28 December 2024.

27 Julian Borba, Ednaldo Aparecido and Mario Fuks Ribeiro, 'Polarization and Ideology: Exploring the Contextual Nature of Democratic Commitment' (2024) 32 Revista de Sociologia e Política 112, doi:10.1590/1678-98732432e006.

28 Jonathan Benson, 'Democracy and the Epistemic Problems of Political Polarization' (2024) 118(4) American Political Science Review 1719, doi:10.1017/s0003055423001089.

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

One recurrent feature in text analyses is that Prime Minister Edi Rama (2013 to present) addresses the EU integration issue more frequently than opposition leader Lulzim Basha (2013 to 2023). Rama's political discourse on EU integration reflects a complex interplay of national aspirations and the broader European context. His rhetoric emphasises the importance of EU membership as a vehicle for democratisation and societal transformation in Albania. This discourse is not only a political tool but also a reflection of Albania's historical and ongoing challenges in its integration journey.[29]

This communication strategy appears very natural, as the most important reforms undertaken are consistently legitimised and highlighted as an imperative condition to fulfil EU accession criteria. Both the government and opposition leaders portray their party platforms as the pinnacle of European values.[30] However, during the milestones of the integration process, when progress is noted, the current administration tends to take all the credit, while every major setback or blocking in the integration path is attributed to the opposition.

An analysis of political communication strategies suggests that, for the Albanian political elite, dedication to the integration process is more of a formality than substantive. This feature becomes an obstacle during the effective implementation of structural reforms. Internal and external obstacles have impeded the implementation of the reforms, even though the membership perspective has been employed as a leverage to accelerate their adoption. To expedite the integration process, Albania has implemented reforms that are motivated by EU external incentives.[31]

4.2. The Public Administration and Justice Reform

To align with the European *acquis,* the administrative reform was essential to fulfil the third Copenhagen criteria. This was a general condition; however, the administrative criterion was incorporated from the Madrid Council in 2005 and after the EU Commission evaluated Albania's administrative capacity development.[32] The administrative reform was facilitated by financial and technical assistance (IPA program, a form of dissemination through transference of normative values) and pressure from using conditionality. The civil servant law had been approved under EU pressure. However, despite the positive steps taken, the

29 Lorenc Ligori, 'The Culture of Political Communication in Albania in the Process of Integration to the European Union' (2022) 9(1) European Journal of Social Sciences, Education and Research 77, doi:10.26417/965vxc68.

30 Maarten Lemstra, The Destructive Effects of State Capture in the Western Balkans: EU enlargement undermined (*EU Council Library Think Tank Review*, 2020) 41 <https://consilium-eureka.primo.exlibrisgroup.com/discovery/fulldisplay?vid=32CEU_INST:32CEU_VU1&tab=Everything&docid=alma991739485504371&searchScope=TTR&context=L&lang=en> accessed 28 December 2024.

31 Schimmelfennig and Sedelmeier (n 16) 210.

32 Arolda Elbasani, *European Integration and Transformation in the Western Balkans: Europeanization or Business as usual?* (Routledge 2013) 87.

implementation of the reform was postponed for an extended period. The Commission expressed apprehensions regarding the proper implementation of the legal framework, the politicisation of public services, and the lack of transparency during the selection phase in a variety of Progress Reports.[33]

Despite exerting some pressure, the EU has evidently chosen to apply positive conditionality in the context of administrative reform. Even when there was evidence of limited progress, the advancement of institutional relations and the integration process was not impeded.

However, in 2009, the European Commission (EC) confirmed Albania's advancement was contingent upon implementing the public administration reform. Consequently, the EU implemented a more stringent conditionality. The 2010 Progress Report assessed the legal framework in accordance with European standards and practices, but it also expressed apprehension regarding its effective implementation.[34]

In 2010, the European Council established visa-free travel for Albania and Bosnia-Herzegovina, marking a significant milestone in Albanian integration. The EU's commitment to Albanian integration was unequivocal. Additionally, in 2010, the European Commission issued an opinion on Albania's membership, which included public administration reform as one of 12 important priorities.

The Albanian government responded to the situation by approving the Cross-Cutting Public Administration Reform Strategy 2009-2013, designed to modernise the Albanian public administration and fortify the country's most critical institutions. This strategy followed the EU's explicit commitment to the enlargement process.

From 2010 to 2014, the EU strictly related the Albanian integration process to the implementation of the public administration reform, incorporating it into the National Integration Strategy as a demonstration of political support for the reform.[35] The European Commission financed the implementation of the reform through the IPA instrument, signaling a positive step forwards while also tying ulterior funding to Albania's performance in implementing the reforms effectively.[36]

33 Commission Staff Working Document: Albania 2023 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement policy SWD/2023/690 final (8 November 2023) 13 <https://enlargement.ec.europa.eu/albania-report-2023_en> accessed 28 December 2024.

34 Elbasani (n 32) 104.

35 Commission Staff Working Document: Albania 2016 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2016 Communication on EU Enlargement Policy SWD/2016/0364 final (9 November 2016) 10 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016SC0364> accessed 28 December 2024.

36 ibid 15.

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

The European Commission (EC) identified public administration reform (PAR) as one of three "fundamental first" areas of the EU enlargement process in its 2014 and 2018 Enlargement Strategies.[37]

The implementation of the reform was boosted after the positive recommendation of the European Commission in 2018 to the opening of the accession negotiations talks. Regarding Key Priority 1, on the public administration reform, in 2020 the EC considered fulfilling the relevant legal and strategic frameworks and declared that the implementation of the reform was continuous and consistent.[38]

It is possible to distinguish between two distinct phases of the EU's transformative role in implementing public administration reform in Albania. Until 2010, the EU-driven reform of Albania's public administration sector was restricted by domestic factors, such as the elite's willingness to implement it. However, Albania made significant strides in public administration reform from 2010 to 2024 despite a moderate implementation and the development of a new cross-cutting strategy.

The government cooperated effectively during this period, and the EU made additional political and economic endeavors. The EU's transformative role has been evident in the last decade because of a more credible enlargement strategy and the restriction of the application of the conditionality. The political elite was compelled to implement the reform to advance the integration process.

The integration process is strictly connected with the justice reform. In 2020, the European Council granted the opening of the accession negotiations but requested more efforts in key areas, such as judicial reform, fight against corruption and organised crime.[39]

The EU asserts that justice reform is the most pressing issue. Diverse actors, including the political elite, civil society, and citizens, were all implicated in this structural reform. The reform was considered necessary due to the judiciary's lack of independence from the executive authority, the slow administration of justice, the non-enforcement of judicial decisions, the insufficient accountability of judges and prosecutors, and the widespread corruption within the justice system.

37 'Strategy for the Western Balkans: EU sets out new flagship initiatives and support for the reform-driven region' (*European Commission*, 6 February 2018) <https://ec.europa.eu/commission/presscorner/detail/en/ip_18_561> accessed 28 December 2024.

38 Commission Staff Working Document: Albania 2021 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Communication on EU Enlargement Policy SWD/2021/289 final (19 October 2021) 14 <https://eur-lex.europa.eu/legal-content/FI/TXT/?uri=CELEX:52021SC0289> accessed 28 December 2024.

39 Council of the EU, 'Council Conclusions on Enlargement and Stabilisation and Association Process - Albania and the Republic of North Macedonia' (*European Council*, 25 March 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/03/25/council-conclusions-on-enlargement-and-stabilisation-and-association-process/> accessed 28 December 2024.

The Justice Reform in Albania was approved in 2016 with favourable votes from all 140 members of Parliament. The reform legislative package amended the constitution and 25 organic or simple laws.[40] Throughout the period from 2016 to 2022, the EU exerted continuous pressure for the adoption of the justice reform. Many EU representatives, along with representatives from member states, expressed the necessity of the reform, particularly its connection to the country's progress in the integration process.[41]

The justice reform in Albania has introduced several groundbreaking institutional changes that have reshaped the country's judicial landscape.[42]

The reform was enhanced by the European Union, which backed up the government in this "new era" of the rule of law.[43] The development of Albania's justice reform represented a collaborative effort that brought together diverse expertise and stakeholders through an inclusive consultation process. The European Union provided expertise and financial resources, and most of all, it facilitated a political compromise between the Socialist ruling party and the opposition, the Democratic party. The judicial reform was not only a key condition for the opening of the accession negotiations, but its implementation was also part of the conditions to be fulfilled prior to the first intergovernmental conference.[44]

Public sentiment in Albania strongly favoured the judicial reform initiative, as demonstrated through various opinion polls and surveys.[45] While citizens welcomed the reform, its implementation did not fulfill their expectations. The reform's primary objective was to reevaluate suitability for the office of all judges and prosecutors in the country, otherwise known as the vetting process.

However, the removal of corrupt judges and prosecutors through this vetting process does not guarantee the timely filling of the justice system's vacancies, thereby limiting public access to justice.[46] Since 2017, due to a high number of dismissals, the courts have been suffering from a shortage of judges and prosecutors, resulting in delays and an inability to deliver justice on reasonable terms.

40 Republic of Albania, *The Justice Reform Strategy* (Albanian Parliament 2015) 6 <https://rm.coe.int/strategjia-ne-refomen-e-sistemit-te-drejtesise/16809eb53a> accessed 28 December 2024.

41 'Jean-Claude Juncker and EU "Enlargement Fatigue"' (*EuroNews*, 2 March 2018) <https://www.euronews.com/2018/03/02/jean-claude-juncker-and-eu-enlargement-fatigue> accessed 28 December 2024.

42 Ardian Hackaj, *EU Enlargement in SEE6 and Country Reforms: The Justice Reform in Albania as a Case Study* (Cooperation Development Institute 2020) 34.

43 Luigi Soreca, 'Speech of EU Ambassador Luigi Soreca During the Conference "The Role of Self-Governing Justice Institutions in Strengthening Professionalism and Performance of the Judiciary"' (*Delegation of the European Union to Albania*, 1 October 2021) <https://www.eeas.europa.eu/delegations/albania/speech-eu-ambassador-luigi-soreca-during-conference-%E2%80%9C-role-self-governing-justice-institutions_en> accessed 28 December 2024.

44 Council of the EU (n 39).

45 Instituti per Kerkime dhe Alternativa Zhvillimi (IDRA), 'Judicial Reform in Albania – General Public Survey' (Fondacioni Shoqëria e Hapur për Shqipërinë, 2016) <https://www.idrainstitute.org/en/projects/reforma-n-drejt-si-sondazhi-i-opinionit-publik> accessed 28 December 2024.

46 Hackaj (n 42) 45.

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

In several cases, the European Court of Human Rights has evaluated the vetting procedure to establish compliance with the European Convention on Human Rights, especially the right to a fair trial and the legitimacy and independence of the vetting process. The first case discussed was *Xhoxhaj v. Albania*.[47] Ms. Xhoxhaj, a former judge, complained of a violation of Article 6 of the ECHR. The court dismissed the applicant's claims and affirmed that there was no violation of the right of fair trial.[48] The case is important regarding the legitimacy of the vetting process because the Court decided that the vetting bodies in Albania have been legally established. Indirectly, the Court recognised Albania's effort to reform the justice system.

The Court followed the same line in *Sevdari v. Albania*,[49] affirming that there was generally no reason to doubt the independence of the review bodies referring to how their members were appointed, more specifically their election by Parliament.[50] The Court has followed the same line also in *Thanza v. Albania*,[51] the vetting process when in line with the legislative framework does not violate the ECHR, but in the specific case found violation of the right to a fair trial for the complainant.[52] In conclusion, we can affirm that the European Court of Human Rights recognises the importance of justice reform as well as the bodies created by it, but it requires caution regarding the guarantee and protection of human rights, specifically the right to an independent and impartial process.

5 CONCLUSION

The article aimed to analyse the characteristics of EU conditionality in Albania during the key reform processes from 2016 to 2020, considering them as essential conditions for fulfilling the obligations of the integration process. A range of factors have contributed both positively and negatively to the progress of these reforms. On the positive side, Albania still has one of the most enthusiastic populations regarding European integration. This democratic demand from Albanian society has historically influenced the unanimous support of political parties for the European Union.

This support is observed to have increased due to the geopolitical conflict in Eastern Europe following Russia's attack on Ukraine. Additionally, Albanian citizens, disappointed with the performance of their political representatives, have developed the perception that the

47 *Xhoxhaj v Albania* App no 15227/19 (ECtHR, 9 February 2021) <https://hudoc.echr.coe.int/fre?i=001-208053> accessed 28 December 2024.
48 ibid, para 336.
49 *Sevdari v Albania* App no 40662/19 (ECtHR, 13 December 2022) <https://hudoc.echr.coe.int/?i=001-221482> accessed 28 December 2024.
50 ibid, paras 295-6.
51 *Thanza v Albania* App no 41047/19 (ECtHR, 4 July 2023) <https://hudoc.echr.coe.int/?i=001-225653> accessed 28 December 2024.
52 ibid, para 97.

European integration process will bring economic benefits, strengthen democratic institutions, combat corruption, and safeguard individual freedoms and rights. Albanian citizens also perceive and support the reform of the public administration and the justice system as instruments in the fight against corruption and impunity.

The EU's revised enlargement methodology in 2020 is based not only on the adoption of the acquis but also on the real progress made by candidate countries in implementing reforms. This approach seeks to give the enlargement process more credibility, predictability, and dynamism.

However, factors within the Albanian political scene have negatively impacted the integration process and the implementation of key reforms. These include the superficial commitment of local elites and the high level of political conflict, especially since 2017. This article seeks to explore the dynamics of political elite behavior, the structural challenges faced, and the implications for EU integration.

The role of political elites in Albania's EU integration process is multifaceted, characterized by both obstruction and potential facilitation of the process. Political elites often exhibit a disconnect between their pro-European rhetoric and actual reform efforts, significantly impacting the integration process. Albanian political elites have been criticized for prioritizing political survival over genuine Europeanization efforts, often using institutional frameworks to block necessary reforms.

One of the most comprehensive institutional overhauls in its history is its justice reform, which has been driven by both internal needs for a more effective judiciary and external pressures from the EU accession process. While significant strides have been made, particularly in establishing new institutions and processes, challenges remain in fully realizing the reform's goals. Continued commitment from both Albanian representatives and international partners is essential for sustaining these efforts and achieving lasting improvements in Albania's judicial system. This accomplishment must encounter the positive will of the EU institutions to provide a viable and certain progress pattern until the full membership of Albania. A positive signal in this direction is the opening of negotiations related to the first cluster of integration chapters in October 2024.

The Albanian experience illustrates both the potential and limitations of EU conditionality. While significant reforms have been initiated, their sustainability and impact remain uncertain. Broader lessons drawn from this experience emphasise the importance of adapting conditionality to the specific political and institutional contexts of candidate countries, the need for continuous engagement and capacity-building to support long-term reform implementation, and the value of emphasising tangible benefits to maintain public and elite commitment to the integration process. The EU should adopt a more flexible and context-sensitive approach to conditionality, complemented by a robust support framework that addresses both technical and political challenges.

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

The findings from Albania underline the transformative potential of the EU's enlargement policy, while also exposing critical areas for improvement. By refining its conditionality framework, enhancing support mechanisms, and addressing political and institutional barriers, the EU can strengthen its role as a transformative force in the Western Balkans and beyond. This approach will not only advance Albania's integration journey but also reinforce the EU's credibility and influence in the region.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

СТРУКТУРНІ РЕФОРМИ В АЛБАНІЇ: ПОЛІТИЧНІ ТА ПРАВОВІ ВИКЛИКИ В МЕЖАХ ІНТЕГРАЦІЇ ДО ЄС

Мельяна Бреґу* та Юліана Джінко

АНОТАЦІЯ

Вступ. *Після падіння комуністичного режиму зовнішня політика Албанії була зосереджена переважно на демократичній консолідації, але політичний режим у країні продовжують класифікувати як гібридна демократія, незважаючи на те, що Албанія досягла стабільності в напрямку ліберально-демократичного прогресу та європейської інтеграції. Як албанське населення, так і політична еліта вітають і заохочують процес інтеграції з перспективою членства в ЄС, що перетворює Європейський Союз на потужну силу демократії, стимулює структурні зміни та впливає на верховенство права. Однак на цей процес вплинула сукупність внутрішніх і зовнішніх перешкод.*

У статті досліджуються складні відносини албанських політичних представників та установ ЄС, використовуючи ухвалення реформи правосуддя та державного управління, внутрішні політичні дебати та суспільні настрої щодо процесу інтеграції.

У дослідженні підкреслено роль умов та внеску ЄС у прийнятті важливих реформ і розповсюдженні цінностей ЄС під час серйозних протистоянь між албанськими політичними силами. Хоча зовнішні моделі стимулів пропонують цінну основу для розуміння процесу європеїзації Албанії, важливо враховувати додаткові фактори, які можуть впливати та сприяти демократизації та прийняттю важливих реформ.

Методи. *У цій статті використано метод тематичного дослідження для аналізу прийняття та впровадження реформ в Албанії. Хоча Албанія є цікавим прикладом, її часто аналізують як частину зовнішньої політики ЄС на Західних Балканах. Очікується, що висновки цієї роботи будуть відносно обмеженими щодо застосування у подібних випадках, тобто до невеликих країн із перехідною економікою, які прагнуть виконати критерії вступу до ЄС.*

Політичне та суспільне сприйняття інтеграції до ЄС, включно з аналізом часових проміжків, опитуванням щодо громадської думки та політичними наративами, обговорювалися та порівнювалися з відповідними звітами ЄС, стратегіями реформ та теоретичними моделями умов.

Уявлення про їх впровадження було виявлено за допомогою систематичного контент-аналізу.

Результати та висновки. *Приклад Албанії демонструє вплив та обмеження умов, які висуває ЄС. Більш загальні уроки містять вимогу постійно брати участь у підтримці реалізації довгострокових реформ і необхідність адаптувати умови до політичних та інституційних умов країн-кандидатів. Довгострокова стійкість реформ в Албанії залежить від кількох аспектів, таких як політична воля, внутрішня інституційна незалежність і суспільна довіра.*

Ключові слова: *умова, структурні реформи, елітарна культура, громадська думка.*

CASE STUDY

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Case Study

DISCIPLINARY LIABILITY OF JUDGES FOR VIOLATION OF ETHICAL REGULATIONS IN UKRAINE: PRACTICAL ASPECTS

Yurii Prytyka* and Maryna Stavniichuk

ABSTRACT

Background: *This article is devoted to the study of the disciplinary liability of judges for violations of ethical norms, which constitutes an integral part of the institute of legal responsibility of judges. It highlights the relationship between the violation of ethical norms by a judge and the negative consequences that occur as a result.*

Based on a detailed analysis of the current practice of bringing judges to disciplinary responsibility for violating ethical norms, the article identifies characteristic features of the wording in the relevant decisions and addresses their specific shortcomings.

The conclusions drawn can contribute to the improvement of both the normative provisions regulating this issue and their effective law enforcement in disciplinary proceedings. Given that this issue is of national interest, the findings may also support the development of a more robust system for holding judges accountable.

Methods: *The study employed analytical, normative and comparative methods. The analytical method was used to analyse the practice of bringing judges to disciplinary responsibility for violating ethical norms and related judicial cases. The normative method allowed for a review of the legal framework and provisions that regulate the grounds for disciplining judges for violations of ethical norms. Finally, with the help of the comparative method, the authors compared the practical aspects of initiating the procedure for initiating disciplinary proceedings by different groups of subjects authorised to do so, as well as contrasted the language used in decisions regarding the application of disciplinary measures on judges.*

Results and Conclusions: *The article demonstrates that in the issue of holding judges accountable for violations of judicial ethics, the normative framework plays a crucial role in response to new social challenges. However, the practical application (disciplinary and judicial) holds special and decisive importance. Examples of these are considered in detail, and conclusions are drawn regarding the regularities in the use of grounds for judicial responsibility in general formulations. In terms of the nature of the misconduct and the damage caused to the status of the judge and the authority of justice, the fact of public disclosure of the circumstances surrounding the judge's offence is of great importance.*

Based on a systematic analysis of legislation and disciplinary cases, several features of bringing a judge to justice for violation of ethical norms have been allocated.

1 INTRODUCTION

Among the basic principles of a modern democratic society in which the rule of law is proclaimed, one of the fundamental principles is the principle of independence of courts and judges. The basic principles of legal regulation of the status and responsibility of judges are defined in the Constitution of Ukraine in Chapter 8 "Justice".[1] By granting judges broad powers to consider and fairly resolve conflicts, the state and society naturally impose on them a significant burden of responsibility to the public. The pressing need to study the characteristic features of disciplinary liability of a judge for violation of ethical norms is explained, in particular, by the modern social need to restore confidence in the judiciary, as well as the increasing public demand for fair justice in the context of the development of the legal system of Ukraine to fulfil the requirements for European Union accession.

The Report presented by the European Commission within the framework of the 2024 EU Enlargement Package, which contains progress assessments made by candidate and potential candidate states, underscores the importance of judicial reforms in Ukraine. The report highlights the need for the High Council of Justice (hereinafter the HCJ) to improve the reasoning and uniformity of practice in disciplinary cases. It stresses that disciplinary offences relating to judges' conduct need to be defined more precise, in line with the Council of Europe's Group of States against Corruption (GRECO) recommendations.[2]

1 Constitution of Ukraine no 254k/96-VR of 28 June 1996 (amended 1 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 15 May 2024.

2 European Commission, *Commission Staff Working Document: Ukraine 2024 Report Accompanying the Document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of Regions 2024, Communication on EU Enlargement Policy* SWD/2024/699 final (30 October 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52024SC0699> accessed 06 November 2024.

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Notably, a recent survey underscores the gravity of this issue, revealing that only 25% of respondents trust the judiciary, while a substantial 72% lack confidence in it.[3] Disciplinary liability, one aspect of a judge's legal liability, alongside civil, administrative and criminal liability, focuses on holding judges accountable for ethical violations. This framework addresses the relationship between the violation of ethical norms by a judge in their "pure form" and the negative consequences they face as a result. Other types of legal responsibility for a judge, while not directly concerned with ethical violations, indirectly demonstrate this relationship.

2 NORMATIVE REGULATION OF ETHICAL STANDARDS OF CONDUCT OF JUDGES

The peculiarity of normative regulation of judicial ethics at the national level is the "vertical" nature of consolidating the relevant norms, starting with the state constitution, the applicable law regulating the status of judges, and the code of ethics. This naturally affects the degree of abstraction or concretisation of the norms.

The current state of legal regulation regarding the disciplinary liability of judges for violating the norms of judicial ethics is marked by a wide range of legally provided grounds with an ethical basis. The juridization of integrity as an ethical category, its consolidation at the constitutional level as a requirement for a judge and its embodiment in various provisions of the current Law of Ukraine "On the Judiciary and the Status of Judges," actually reflects the public demand for morality and ethics of the judiciary formed after the events in Ukraine in 2013-2014. However, in relation to judges, integrity largely focuses on their property status and behaviour in substantive relations.

The study of the peculiarities of holding a judge accountable for ethical violations must begin with a clear definition of ethical standards. These standards serve as universal, stable guidelines, ideas, and beliefs that crystallised from public morality and were specified by the professional environment. Their source lies in an individual's personal understanding of public morality, the value of justice, and their capacity for moral development and self-restraint. When these ethical principles transform into a system of values, they acquire the status of rules for a certain social group with a professional status – judges. By establishing a single space in which the behaviour of representatives of the judicial community is regulated, taking into account historically formed beliefs about the meaning and ideals of justice, they stimulate and motivate judges to choose the optimal behaviour model tailored to the specific circumstances and situations they face.

3 'Success or Not? How Ukrainians Assess Law Enforcement Reforms and the EU's Support' (*European Union Advisory Mission (EUAM) Ukraine*, 28 October 2024) <https://www.euam-ukraine.eu/news/success-or-not-how-ukrainians-assess-law-enforcement-reforms-and-the-eu-s-support/> accessed 06 November 2024.

Therefore, this paper proposes considering the specifics of bringing a judge to disciplinary responsibility for violating these ethical standards of conduct. To summarise, judicial ethics are a system of universal norms, values, rules, and formulas that guide judges' behaviour in specific circumstances. These standards take into account personal ideas about morality, ethics of judicial activity, ideals of justice, and the significance of a judge's professional status in society.

The Code of Judicial Ethics, approved in 2013 by the XI (regular) Congress of Judges of Ukraine, has become a marker in assessing the moral aspect of the judicial profession. It sets a foundation for the development of the status of judges in Ukraine in the context of moral guidelines and values. Its adoption reflects the domestic judicial community's awareness of the importance of ethical rules of conduct for judges, albeit relatively recent, compared to similar documents in other countries.[4]

At the same time, the practice of bringing judges to disciplinary responsibility indicates the need to introduce a clearer definition in the legislation of the grounds for disciplinary liability related to violations of judicial ethics. There is also a need to strengthen the requirements for disciplinary liability, as well as to adopt clear rules, standards and procedures for considering complaints about improper conduct by judges and making decisions based on the results of these complaints. In particular, it is necessary to update the Code of Judicial Ethics, ensure a uniform practice of its application, and establish additional grounds for terminating the powers of a judge, in particular in cases of committing behaviour that discredits the title of a judge or undermines the authority of justice. Furthermore, there is a need to introduce an effective mechanism for monitoring the lifestyle of judges, particularly regarding the obligation to confirm the legality of the sources of their property.[5]

Since June 2016, when the "new" Law of Ukraine "On the Judiciary and the Status of Judges" was adopted, which took a "revolutionary" approach to the issue of bringing judges to disciplinary responsibility, Part 1 of Article 106 contains 19 paragraphs of various grounds for holding a judge accountable. Thus, the juridization of integrity as an ethical category, its consolidation at the constitutional level as a requirement for a judge (Article 127 of the Constitution of Ukraine) and its embodiment in various provisions of the current Law of Ukraine "On the Judiciary and the Status of Judges" were a direct response to the public demand for greater morality and ethics within the judiciary, which emerged in the wake of the events in Ukraine during 2013-2014.[6]

4 Code of Judicial Ethics (2013) 3 Bulletin of the Supreme Court of Ukraine 27.

5 Decree of the President of Ukraine no 231/2021 of 11 June 2021 'On the Strategy for the Development of the Justice System and Constitutional Justice for 2021–2023' [2021] Official Gazette of Ukraine 23/2963.

6 Iryna D Kondratova, 'Genesis of Judge's Responsibility for Violation of Ethical Norms' (Current Challenges and Actual Problems of Judicial Reform in Ukraine: V International conference, Chernivtsi, 29 October 2021) 40.

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To restore public confidence in the credibility of the courts and support Ukraine's path to EU integration, it is crucial to ensure compliance with high international standards of judicial conduct. Foremost among these standards are the Bangalore Principles of Judicial Conduct,[7] which provide judges with guidance and establish a regulatory framework for judicial behaviour. Additional foundational documents include the *Basic Principles on the Independence of the Judiciary*,[8] endorsed by UN General Assembly resolutions 40/32 and 40/146 in November and December 1985, as well as the *Commentary on* the Bangalore Principles of Judicial Conduct (2007).[9] Furthermore, *Opinion No. 3* of the Consultative Council of European Judges (CCJE)[10] highlights principles related to judicial ethics, incompatible behaviour, and impartiality.

Together, these principles assert that judges must be held accountable for their conduct by independent and impartial institutions that uphold judicial standards.

3 ANALYSIS OF THE PRACTICE OF BRINGING JUDGES TO JUSTICE FOR VIOLATIONS OF ETHICAL NORMS

The disciplinary practice of applying Paragraph 3 of Part 1 of Article 106 of the Law of Ukraine "On the Judiciary and the Status of Judges" – the so-called "ethical" norms – demonstrates that on this basis, a judge may be brought to disciplinary responsibility for unethical behaviour that discredits the judge's title and undermines the authority of justice, both in the administration of justice and beyond. In cases involving judicial misconduct within the administration of justice, there is often a parallel violation of procedural law, leading to the qualification of the judge's actions as misdemeanours under various provisions of Part 1 of Article 106 of the Law of Ukraine "On the Judiciary and the Status of Judges". In such cases, the judge is held accountable based on the totality of the corpus delicti.

In cases of misconduct outside judicial proceedings, disciplinary actions are typically taken when the judge faces either administrative or criminal liability or when the relevant procedures for investigating the fact of improper conduct of a judge are ongoing. In this case, regardless of their outcome, the judge is held disciplinarily

7 ECOSOC, *The Bangalore Principles of Judicial Conduct* (UN 2018) <https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf> accessed 06 November 2024.

8 Basic Principles on the Independence of the Judiciary (1985) ST/HR/1/Rev.6(Vol.I/Part1) <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> accessed 06 November 2024.

9 The Judicial Integrity Group, *Commentary on the Bangalore Principles of Judicial Conduct* (2007) <https://rm.coe.int/168066d6b9> accessed 06 November 2024.

10 Opinion no 3 (CCJE, 19 November 2002) <https://rm.coe.int/16807475bb> accessed 06 November 2024.

responsible under Paragraph 3 of Part 1 of Article 106 of the Law of Ukraine "On the Judiciary and the Status of Judges".[11]

In line with this, Principle 6.7 of the Bangalore Principles mandates that a judge shall not engage in conduct incompatible with the diligent discharge of judicial duties, while Opinion № 3 of the CCJE reinforces that judges should behave with integrity both in office and their private lives.

Therefore, the prosecution of a judge for violation of ethical norms is marked by features that can be singled out by referring to the analysis of disciplinary and judicial practice.

On 1 January 2017, the Law of Ukraine "On the High Council of Justice" came into force, according to which the powers to consider disciplinary complaints were transferred to the disciplinary chambers of the High Council of Justice.[12] At present, compliance with the requirements of independence and impartiality during disciplinary proceedings against judges in Ukraine is ensured by Article 131 of the Constitution.

To confirm the conclusions made at the end of this section and the article regarding the peculiarities of the application of "ethical norms" by the High Council of Justice when considering the issue of bringing judges to disciplinary responsibility, statistical data will be examined.[13]

From February 2017 to August 2021, the High Council of Justice considered more than 65,000 disciplinary complaints against judges. From 2020 to 2023, the High Council of Justice received 30,485 disciplinary complaints, of which 14,045 were left without consideration and returned to the complainant.

Regarding the consequences of these complaints, the Disciplinary Chambers of the High Council of Justice opened 568 disciplinary cases between 2020 and 2023. However, only 201 decisions resulted in bringing 221 judges to disciplinary liability. The disciplinary penalties included a warning (for 110 judges), a reprimand from deprivation of the right to receive surcharges before official salary judges (for 45 judges), a severe reprimand for one month (for 37 judges), temporary suspension from the administration of justice (for 6 judges), and the petition for dismissal (for 23 judges).

For the purposes of this article, we are undoubtedly interested in the application of disciplinary liability based on violations of ethical norms. It should also be borne in mind that some of the decisions adopted by Disciplinary Chambers of the High Council of Justice contain multiple grounds for bringing a judge to trial in accordance with the law.

11 Law of Ukraine no 1402-VIII of 2 June 2016 'On the Judiciary and the Status of Judges' (amended 8 August 2024) <https://zakon.rada.gov.ua/laws/show/1402-19> accessed 06 November 2024.

12 Law of Ukraine no 1798-VIII of 21 December 2016 'On the High Council of Justice' (amended 15 April 2024) <https://zakon.rada.gov.ua/laws/show/1798-19> accessed 15 May 2024.

13 Statistics and information on bringing judges to disciplinary responsibility, see on the website: *High Council of Justice* <https://hcj.gov.ua/> accessed 15 May 2024.

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During the specified period, the Disciplinary Chambers of the High Council of Justice approved 21 decisions (out of a total of 201 decisions) involving 27 judges (out of a total of 221 judges) in which judges were prosecuted for disciplinary liability based on the grounds defined in Paragraph 3, Part 1, Article 106 of the Law of Ukraine "On the Judiciary and the Status of Judges". This provision addresses a judge's behaviour that defames their title or undermines the authority of justice, including matters related to morality, honesty, incorruptibility, the judge's lifestyle in compliance with their status, and observance of the other rules of judicial ethics and behaviour standards that ensure public confidence in the court. Disrespect toward other judges, lawyers, experts, witnesses or other participants in the trial process is also covered. This indicates a fairly significant volume of decisions by the High Council of Justice applying the "ethical" basis for bringing judges to justice, especially given that the use of such a ground entails the most severe disciplinary measures in accordance with the law.

When bringing judges to disciplinary responsibility or in the process of appealing such decisions to the court, the relevant practice is often guided by the decisions of the ECtHR. In the vast majority of cases, the disciplinary sanction against judges has included removal from office, as seen in cases like *Oleksandr Volkov v. Ukraine*, *Saghatelyan v. Armenia*, *Baka v. Hungary*, *Ivanovski v. the former Yugoslav Republic of Macedonia*, *Ermeni v. Hungary*, *Kamenos v. Cyprus*, *Denisov v. Ukraine*, *Sturua v. Georgia*, *Gerovska Poptsevska v. the former Yugoslav Republic of Macedonia, Jakšovskovski*, *Trifunovski v. the former Yugoslav Republic of Macedonia*, *Poposki and Duma v. the former Yugoslav Republic of Macedonia, Kulikov and others v. Ukraine, Mitrinovski v. the former Yugoslav Republic of Macedonia, Olujić v. Croatia, Ozpinar v. Turkey*. However, other penalties have also been applied.

The ECtHR's decisions highlight that the principle of judicial independence, on the one hand, involves not only the rights of judges enshrined in the ECHR but also concerns about their impartiality. A judge who has exercised his right to privacy or freedom of expression can make decisions with due impartiality. Thus, the question arises of whether a judge is free to exercise his rights under the ECHR and, if so, what the consequences of such actions will be for him as a judge.

As stated in Opinion № 3 of CCJE, a reasonable balance must be struck between the degree to which judges may be involved in society and the need to be seen as independent and impartial in discharging their duties.[14] In the final analysis, it is crucial to assess whether a judge's actions, in their social context and through the eyes of a reasonable observer, could objectively compromise their independence or impartiality.[15]

In terms of considering the prosecution of judges for violations of "ethical norms," several cases considered by the ECtHR illustrate the potential infringement of judges' rights, particularly concerning the right to respect for private life. According to the established

14 Opinion no 3 (n 10) para 28.

15 The Judicial Integrity Group (n 9) 103.

practice of the ECtHR, the concept of "private life" does not exclude professional activity, as restrictions in this area can impact the development of a person's relationships and social identity. Therefore, such cases were considered under Article 8 of the ECHR, and it was established that dismissal from office interfered with the right to respect for private life.

In cases such as *Özpinar v. Turkey*, the ECtHR found that the judge's dismissal involved both professional and private conduct, calling into question the moral or ethical aspect of her personality and character. The Court noted that the allegations against the applicant concerned not only the fulfilment of her duties but also the public image she projected. Therefore, the proceedings in question inevitably went beyond the scope of her professional life. The ECtHR emphasised that conduct in a judge's conduct, whether in their professional or private life, that undermines their ability to command the trust and respect essential to their role can adversely affect the judiciary's reputation.

At the same time, the ECtHR also stressed that in matters relating to the private life of a public servant, the person concerned must be able to reasonably foresee the potential consequences of their private actions and benefit from appropriate safeguards. Such guarantees are particularly necessary given that professional life often intersects with private life in the strict sense of the term, making it challenging to distinguish the capacity in which a person is acting at any given time.

In this case, the ECtHR found that the minimum level of protection was not ensured in the applicant's proceedings. The Court stressed that judges facing dismissal on grounds related to private or family life should receive guarantees against arbitrariness, including the right to adversarial proceedings before an independent and impartial supervisory body. Consequently, the ECtHR concluded that the interference with the applicant's right to respect for private life was not proportionate to the legitimate aim pursued, constituting a violation of Article 8 of the ECHR.[16]

Regarding the procedure of disciplinary proceedings for violation of ethical norms by judges in Ukraine, it is important to highlight the principle of autonomy, which plays a significant role in such cases. According to this principle, disciplinary proceedings are considered regardless of the consideration (results of consideration) of administrative or criminal proceedings. This is clearly demonstrated by the cases we have identified where a judge faces disciplinary responsibility for committing an ethical offence outside of their procedural activities, regardless of any concurrent administrative or criminal charges.

Thus, in the decision of the Third Disciplinary Chamber of the High Council of Justice dated 9 May 2021 (No. 1271/3дп/15-21), the disciplinary body emphasised: "A disciplinary

16 Council of Europe, *Review of the Practice of the European Court of Human Rights on the Protection of the Rights of Judges* (Support to the Functioning of Justice in the War and Post-War, Council of Europe Office in Ukraine 2023) <https://hcj.gov.ua/sites/default/files/field/oglyad_praktyky_yevropeyskogo_sudu_z_prav_lyudyny_shchodo_zahystu_prav_suddiv_zhovten_2023_0.pdf> accessed 15 May 2024.

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

offence and a criminal offence are not identical concepts. It is quite possible to bring a person to disciplinary, criminal or administrative responsibility for the same actions. This does not contradict the Basic Law, which prohibits bringing twice to legal responsibility of the same type (part one of Article 61 of the Constitution of Ukraine). The question of a person's guilt in committing a crime (criminal offence), of course, can only be decided by a court. At the same time, the exclusive authority to establish the absence or presence of elements of a disciplinary offense in the actions of a judge is vested in the disciplinary body – the Disciplinary Chambers of the High Council of Justice (Article 42 of the Law of Ukraine "On the High Council of Justice"). Accordingly, the decisions of any body, including a court verdict, cannot be binding on a disciplinary body, which has the right and at the same time is obliged to independently determine the presence of elements of a disciplinary offense in a person's actions. Moreover, A disciplinary body may not be restricted in exercising its powers in disciplinary proceedings due to the absence of a decision of the competent authority in another procedure, in particular due to the absence of a court verdict on facts that may be grounds for bringing a person to criminal and disciplinary liability at the same time. Similarly, the decision of the disciplinary body does not have any legal significance for the court when considering criminal proceedings or a case of an administrative offence. In the course of disciplinary proceedings, only the facts that may indicate the presence or absence of elements of a disciplinary offense in the conduct of a judge and the degree of his guilt are assessed. The facts and circumstances established in the course of disciplinary proceedings are relevant only for making a decision within their competence and in no way testify to the proof of a person's guilt in committing administrative or criminal offences."[17]

This position is consistent and applicable to all Disciplinary Chambers of the HCJ and is "cemented" by judicial practice.

In particular, the Grand Chamber of the Supreme Court considered a case involving a complaint against the decision of the High Council of Justice to uphold the decision of the disciplinary body to impose disciplinary liability on a judge under Paragraph 3 of Part 1 of Article 106 of the Law of Ukraine "On the Judiciary and the Status of Judges" in relatively similar circumstances. The Court emphasised that "during disciplinary proceedings, the facts and clarified circumstances are relevant only for the adoption of disciplinary body decisions within its competence and in no way testify to the proof of the person's guilt in committing the criminal offence incriminated to him/her. In disciplinary proceedings, the principle of autonomy applies, according to which disciplinary proceedings are considered independently of the consideration of criminal proceedings. During the consideration of a disciplinary case, the disciplinary body independently assesses the admissibility, appropriateness and validity of the evidence

17 Decision no 1271/3дп/15-21 (High Council of Justice, Third Disciplinary Chamber, 9 June 2021) <https://hcj.gov.ua/sites/default/files/field/file/1271_09.06.2021.docx> accessed 15 May 2024.

available in the materials of the disciplinary case, establishes signs of a disciplinary offence in the actions of a judge and makes a decision to bring a judge to disciplinary liability" (Resolution of the Grand Chamber of the Supreme Court as of 28 April 2021).[18]

An important development occurred on 24 April 2024 when the Second Disciplinary Chamber of the High Council of Justice decided to hold Judge T. disciplinarily responsible and imposed a sanction in the form of a motion for dismissal from office. Notably, despite ongoing criminal proceedings against the judge, the Second Disciplinary Chamber of the High Council of Justice determined that a disciplinary body may not be restricted in exercising its powers in disciplinary proceedings in the absence of a decision of a competent authority in another procedure. Specifically, it stayed that the absence of a court verdict by a competent body in a separate procedure – such as a court verdict on facts that could simultaneously serve as grounds for bringing a person to criminal and disciplinary liability – does not limit the disciplinary body's authority to proceed.[19]

Notably, the position on this issue regarding the autonomy of disciplinary proceedings against judges continues to be upheld. Its development and justification are found in the recently adopted decisions of the new composition of the High Council of Justice. A notable example is the decision expressed on 1 May 2024 by the Third Disciplinary Chamber of the High Council of Justice based on the results of considering the disciplinary case initiated against Judge B.

Judge B., who relocated from the Russian-occupied city of Berdyansk in the Zaporizhia region to the city of Poltava, was subjected to disciplinary proceedings after the competent authorities (in particular, the Security Service of Ukraine) brought quite serious allegations and criminal charges. These charges, under Part 2 of Article 111 of the Criminal Code of Ukraine "Treason") were based on reasonable suspicion of Judge B.'s cooperation with the intelligence organisation of an enemy country (FSB).

During the disciplinary proceeding, the Third Disciplinary Chamber of the High Council of Justice established the facts and circumstances relevant to its jurisdiction. The Chamber clarified that its findings were solely for the purpose of making decisions within its competence and did not serve as evidence of Judge B.'s guilt regarding the alleged criminal offences. This approach aligns with the principle of autonomy, ensuring that disciplinary proceedings are conducted independently of any criminal proceedings. Simultaneously, the Third Disciplinary Chamber of the High Council of Justice noted that, within the powers granted to it by law, it does not determine the validity of the accusation against Judge B. but rather only examines the circumstances set out in the disciplinary complaints to assess the

18 Case no 11-238сап20 (Supreme Court of Ukraine, Grand Chamber, 8 April 2021) <https://reyestr.court.gov.ua/Review/96310157> accessed 15 May 2024.

19 Decision no 1241/2дп/15-24 (High Council of Justice, Second Disciplinary Chamber, 24 April 2024) <https://hcj.gov.ua/doc/doc/45142> accessed 15 May 2024.

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

judge's compliance with the norms of judicial ethics and standards of conduct that uphold public confidence in the court.

From the above-mentioned decisions, we can single out one more peculiarity, which is that such a guarantee as the presumption of innocence does not apply in disciplinary proceedings:

> "According to the practice of the ECtHR, it is not a violation of Article 6 of the Convention to bring to disciplinary responsibility on the basis of information about the facts established in criminal proceedings, if such information was analysed from the point of view of the rules of professional ethics, even if the person was acquitted in the criminal proceedings (see, mutatismutandis, the judgment of the European Commission of Human Rights of 6 October 1982 in the case of X. v. Austria on the inadmissibility of application No. 9295/81) or such proceedings were closed (see, mutatismutandis, the decision of the European Commission of Human Rights of 7 October 1987 in the case of C. v. the United Kingdom on the inadmissibility of application No. 11882/85). Moreover, the presumption of innocence guaranteed by Article 6 § 2 of the Convention applies to a procedure that is inherently criminal and in which the court concludes that a person is guilty in the criminal sense (judgment of the European Court of Human Rights of 11 February 2003 in the case of Ringvold v. Norway, application No. 34964/97). Therefore, this guarantee cannot be extended to disciplinary and other proceedings which, according to Article 6 § 1 of the Convention, are covered by the concept of a dispute over rights and obligations of a civil nature."[20]

This position was earlier affirmed in the resolution of the Grand Chamber of the Supreme Court dated 4 October 2018 in case No. 800/398/16 (P/9901/334/18).[21]

In the judgment of 24 April 2024 concerning Judge T., whose actions in "committing a fatal accident while intoxicated" on the night of 26 May 2023 were the subject of consideration by the Third Disciplinary Chamber High Council of Justice, a similar position was developed regarding cases where signs of a criminal offence may be present in the actions of the judge. Specifically, it was determined that disciplinary and criminal offences are not identical concepts. It is possible to bring a person to disciplinary, criminal or administrative responsibility for the same actions, and this does not contradict the Constitution of Ukraine, which prohibits bringing twice to the legal responsibility of the same type for the same offence (Part 1 of Article 61).

Only a court can decide whether a person is guilty of committing a criminal offence and whether corpus delicti exists. Disciplinary proceedings cannot replace criminal proceedings.

20 Case no 11-238сап20 (n 18).

21 Case no 800/398/16 (P/9901/334/18) (Supreme Court of Ukraine, Grand Chamber, 4 October 2018) <https://reyestr.court.gov.ua/Review/77136529> accessed 15 May 2024.

The exclusive authority to establish the absence or presence of elements of a disciplinary offence in a judge's action is vested in the disciplinary body – the Disciplinary Chambers of the High Council of Justice (Article 42 of the Law of Ukraine "On the High Council of Justice"). Accordingly, the disciplinary body has both the right and the obligation to independently determine the presence of elements of a disciplinary offence in a person's actions. A disciplinary body may not be restricted in the exercise of its powers in disciplinary proceedings through the absence of a decision of the competent authority in another procedure, in particular, due to the absence of a court verdict on facts that may be grounds for bringing a person to be a criminal and disciplinary liability at the same time.[22]

Regarding proof in disciplinary cases, when assessing the circumstances of the case and the evidence provided, the disciplinary body is guided by the standard of "beyond reasonable doubt". This standard has been interpreted and justified in the decisions of the Disciplinary Chambers of the High Council of Justice, particularly in cases where disciplinary responsibility was not imposed under Paragraph 3 of Part 1 of Article 106 of the Law of Ukraine "On the Judiciary and the Status of Judges," resulting in the termination of proceedings. As stated in one such decision: "… When choosing the standard of proof to be used in disciplinary proceedings, and taking into account the public law nature of disciplinary liability, the "beyond reasonable doubt" standard should be preferred to the "balance of probabilities" standard. It means that there should be no reasonable doubt about the reliability of the fact (the guilt of the person). This is not to say that its credibility is not in doubt, but it does mean that all alternative explanations for the evidence presented are unduly unlikely. The proof should be based on a set of sufficiently reliable, clear and consistent assumptions or similar irrefutable presumptions of facts" (Decision of the Second Disciplinary Chamber of the HCJ dated 5 October 2020 No. 2771/2дп/15-20).[23]

The Resolution of the First Disciplinary Chamber of the High Council of Justice dated 13 March 2020 (No. 770/1дп/15-20) reproduces a similar position in a broader interpretation: "As stated in the Resolution of the Grand Chamber of the Supreme Court of 8 October 2019 in case No. 9901/855/18, when choosing the standard of proof to be used in disciplinary proceedings, and taking into account the public law nature of disciplinary liability, one should give preference to the standard "beyond a reasonable doubt" over the standard "Balance of probabilities". It means there should be no reasonable doubt about the fact's reliability (the person's guilt). This is not to say that its credibility is not in doubt, but it does mean that all alternative explanations for the evidence presented are unduly unlikely. The basis of the "beyond a reasonable doubt" standard is the

22 Decision no 1241/2дп/15-24 (n 19).

23 Decision no 2771/2дп/15-20 (High Council of Justice, Second Disciplinary Chamber, 5 October 2020) <https://hcj.gov.ua/doc/doc/1414> accessed 15 May 2024.

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

fundamental value of society – it is worse to condemn the innocent than to allow the guilty to escape punishment. Accordingly, a society that values the good name and freedom of everyone should not condemn a person when there are reasonable doubts about his guilt. This approach is consistent with the European Court of Human Rights case law. Thus, paragraph 55 of the European Court of Human Rights judgment of 15 February 2012 in the case of "Hrynenko vs. Ukraine" states that when evaluating evidence, the European Court usually applies the standard of proof "beyond any reasonable doubt". However, the proof must be based on a set of sufficiently reliable, clear and consistent assumptions or similar irrebuttable presumptions of facts."[24]

At the same time, according to the recommendation of the Council of Europe set out in its report "On the System of Disciplinary Proceedings and Liability of Judges in Ukraine" (June 2023), the standard of proof to impose a disciplinary sanction on a judge is not required to be the same as the standard to convict a defendant in a criminal procedure. Thus, invoking the standard of proof of "beyond any reasonable doubt" might potentially hinder the effective functioning of the disciplinary liability system for judges, as it may create an obstacle to imposing any disciplinary sanction due to the high threshold of proof required. This being said, special attention should be paid, particularly when the sanction to be imposed is the judge's dismissal.[25]

It is noteworthy in this regard that the position of the High Council of Justice in recent decisions has increasingly considered the public's opinion, the condemnation of society and media publicity in determining whether a judge has violated ethical norms. According to the High Council of Justice, public trust in the entire judicial system as a whole suffers when a judge's conduct receives widespread negative attention, undermining the authority of justice, which is the basis for the application of disciplinary liability.

As an example, in its decision of 24 April 2024 regarding Judge T., the Third Disciplinary Chamber of the High Council of Justice highlighted that the status of a judge imposes an additional burden of responsibility for personal behaviour. In this case, the improper actions of Judge T., who was involved in "committing a fatal accident while intoxicated," received significant media coverage and negative public assessment. The High Council of Justice noted that such circumstances not only harmed the authority of Judge T. and that of the court he headed but also undermined public confidence in the judicial system as a whole.

24 Resolution no 770/1дп/15-20 (High Council of Justice, First Disciplinary Chamber, 13 March 2020) <https://hcj.gov.ua/doc/doc/4672> accessed 15 May 2024.

25 Council of Europe, *Report on the System of Disciplinary Proceedings and Liability of Judges in Ukraine* (June 2023) <https://rm.coe.int/report-on-the-system-of-disciplinary-proceedings-and-liability-of-judg/1680af07af> accessed 07 November 2024.

In this regard, any judge must accept the constraints related to the observance of ethical standards imposed on him in accordance with his status. These restrictions may seem burdensome to the average citizen, but a judge must comply with such limits voluntarily and knowingly.[26]

This conclusion aligns with the international principles of judicial conduct, specifically the Bangalore Principles of Judicial Conduct, which assert that the behaviour and conduct of a judge must reaffirm the public's faith in the judiciary's integrity. Accordingly, a judge is also required to lead an exemplary life outside the courtroom. A judge must behave in public with the sensitivity and self-control demanded by the judicial office, as a display of injudicious temperament undermines the justice process and is inconsistent with the dignity of judicial office.

On 1 May 2024, the Third Disciplinary Chamber of the High Council of Justice, in its consideration of the disciplinary case against Judge B., accused of high treason (investigative actions are currently underway to prosecute this judge), highlighted a critical principle regarding the disciplinary liability of a judge. The Chamber noted that not all behaviour indicating a judge's non-compliance with the norms of judicial ethics and standards of conduct is sufficient for disciplinary action. Instead, only behaviour that discredits the title of a judge or undermines the authority of justice constitutes the objective basis for such a disciplinary offence.[27]

This decision strongly reflects the principles repeatedly mentioned in international documents, which assert that a breach of an ethical standard should not, by itself, lead to disciplinary proceedings. Rather, the relevant conduct must constitute a disciplinary offence subject to the disciplinary process. To justify disciplinary proceedings, misconduct must be serious and flagrant, exceeding mere non-compliance with professional standards set out in guidelines.[28]

A systematic analysis of decisions made by disciplinary and judicial bodies on bringing judges to disciplinary responsibility under Paragraph 3 of Part 1 of Article 106 of the Law of Ukraine, "On the Judiciary and the Status of Judges", allows us to draw attention to another significant aspect regarding the motivation of these decisions and the justification adopted by these bodies.

When assessing a judge's conduct as failing to meet the high standards of judicial ethics, violating ethical norms of judicial conduct, discrediting the title of a judge and undermining the authority of justice and public confidence in the court, jurisdictional authorities often base their conclusions on the provisions from the Law of Ukraine "On the Judiciary and the Status of Judges" alongside the general provisions of the Code of Judicial

26 Decision no 1241/2дп/15-24 (n 19).

27 Decision no 1336/3дп/15-24 (High Council of Justice, Third Disciplinary Chamber, 1 May 2024) <https://hcj.gov.ua/doc/doc/45337> accessed 15 May 2024.

28 Opinion no 3 (n 10) para 60.

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

Ethics. However, these references are limited to the most abstractly formulated articles of the Code, particularly Articles 1 and 3, which stipulate that a judge must be an example of strict compliance with the requirements of the law and the rule of law, the judicial oath, and high standards of conduct to strengthen public confidence in the judiciary's honesty, independence, impartiality and fairness. Furthermore, they state a judge must make every effort to ensure that, in the opinion of a sensible, law-abiding and informed person, his demeanour is impeccable.[29]

Thus, out of dozens of analysed decisions of the High Council of Justice Disciplinary Chambers, only one decision, in addition to the above-mentioned general provisions of the Code of Judicial Ethics, provided the content of its norms governing the conduct of a judge in the administration of justice.

In its decision dated 27 November 2020 (No. 3279/1дп/15-20), the First Disciplinary Chamber of the High Council of Justice invoked Articles 8, 9 and 10 of the Code of Judicial Ethics, which state that a judge, when administering justice, should not allow manifestations of disrespect for a person on the grounds of race, gender, nationality, religion, political views, socio-economic status, physical disabilities, etc., and allow others to do so. Judges are required to perform their duties impartially and refrain from conducting any actions or statements that may lead to doubts about the equality of professional judges, people's assessors, and jurors in the administration of justice. A judge must administer justice within the limits and in accordance with the procedure determined by the procedural law, and at the same time, show tact, politeness, restraint and respect for the participants in the trial and other persons.

Assessing the judge's behaviour through the prism of the above provisions, the disciplinary body noted that "by making derogatory remarks about the plaintiff, his minor daughter and representative, Judge B. demonstrates arrogance and points out the plaintiff's ignorance of the current legislation, which contradicts the requirements for the conduct of a judge during a trial".[30]

In addition, both the disciplinary authority and the Supreme Court always reference key international and domestic guidelines on judicial conduct. These include the Bangalore Principles of Judicial Conduct and CCJE Opinion No. 3 (2002) on the principles and rules governing the professional conduct of judges, particularly the issues of ethics, incompatible conduct and impartiality. Occassionally, reference is also made to the Basic Principles on the Independence of the Judiciary, endorsed by UN General Assembly Resolutions 40/32 and 40/146 of 29 November and 13 December 1985, and to the Commentary to the Code of Judicial Ethics, approved by the CJU Decision No. 1 of 4 February 2016.

29 Code of Judicial Ethics (n 4) art 3.

30 Decision no 3279/1дп/15-20 (High Council of Justice, First Disciplinary Chamber, 27 November 2020) <https://hcj.gov.ua/sites/default/files/field/file/3279_27.11.2020.docx> accessed 15 May 2024.

Thus, the studies of practice suggest that this approach to motivating decisions related to disciplinary responsibility for judges' violations of ethical norms is traditional for domestic justice. In motivating decisions, jurisdictional authorities typically do not refer to specific norms of ethics violated by the judge but use general formulations.

4 CLASSIFICATION OF GROUPS OF INITIATORS OF DISCIPLINARY PROCEEDINGS

It is impossible to analyse the peculiarities of holding judges accountable for violations of ethical rules of conduct without examining who initiates disciplinary proceedings against a judge.

Our analysis gives grounds for asserting that the composition of the initiators of disciplinary proceedings on the issue under study differs depending on the field of activity in which the judge commits unethical behaviour—whether it occurs during or outside the administration of justice.

In cases where the violation of ethical norms occurs in the course of the administration of justice, the complainants are typically participants in the proceedings, such as parties to the trial, lawyers, or prosecutors. In this regard, the Consultative Council of European Judges (CCJE) has highlighted the importance of the issue, specifically "of what measures can be taken by persons who believe that they have suffered as a result of a judge's professional error. These persons should have the right to lodge their complaint with the person or body responsible for initiating disciplinary proceedings. However, they may not have the right to initiate or insist on the initiation of disciplinary proceedings on their own. There must be a filter, otherwise judges will often be subject to disciplinary proceedings initiated by a disgruntled party to the proceedings."[31]

Assessing the national legislation and local acts regulating the activities of the High Council of Justice for the existence of these filters, it can be stated that such mechanisms are adequately established both procedurally and through legally defined guarantees supported by appropriate liability measures. For instance, Article 107 of the Law of Ukraine "On the Judiciary and the Status of Judges" provides clear provisions in this regard: "It is not allowed to abuse the right to appeal to the body authorised to carry out disciplinary proceedings, including initiating the issue of responsibility of a judge without sufficient grounds, using such a right as a means of pressure on a judge in connection with the administration of justice. If an attorney files a knowingly groundless disciplinary complaint, such an attorney may be subject to disciplinary liability in accordance with the law. Disciplinary proceedings against a judge may not be initiated on the basis of a complaint that does not contain

31 Opinion no 3 (n 10) .

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

information about the presence of signs of a disciplinary offense of a judge, as well as on the basis of anonymous statements and reports."[32]

The procedure for disciplinary proceedings, which includes a preliminary examination of disciplinary complaints, incorporates several safeguards to prevent groundless actions against judges. For example, if the disciplinary complaint lacks information about the signs of a disciplinary offence or does not include a reference to factual data (such as testimonies or documents), it may be returned during the preliminary verification stage of the disciplinary complaint by a member of the Disciplinary Chamber of the High Council of Justice, as outlined in Articles 43 and 44 of the Law of Ukraine "On the High Council of Justice".

However, the Council of Europe, in the aforementioned report, suggests considering the acceptance of disciplinary complaints when they appear to be grounded, even if the complainant does not include the relevant evidence. The report questions whether disciplinary oversight is overly restricted by requiring complainants to identify themselves and provide evidence. While allowing anonymous complaints could lead to potential harassment of judges, refusing to proceed with a *prima facie* reasoned complaint simply because the complainant has not provided evidence does not seem appropriate for ensuring the integrity of the justice system. Many complainants may not have direct access to such evidence or the power to summon witnesses, and such restrictions can limit the ability of court users and citizens to actively contribute to overseeing the judicial process and ensuring accountability.[33]

The range of persons who can file complaints about violations of the rules of judicial ethics by judges outside the judicial process is more diverse due to the legislative approach that grants any person the right to file a disciplinary complaint against a judge. Based on the analysis, three distinct groups of individuals have emerged among the initiators of disciplinary proceedings regarding unethical behaviour by judges unrelated to the administration of justice:

1) public authorities that have become aware of the unlawful conduct of a judge by virtue of the exercise of their powers;
2) individuals who, by virtue of their own initiative and desire, exercise the function of public control over the activities of courts;
3) the heads of the courts by virtue of the exercise of their administrative powers.

Thus, the first group includes the bodies of the High Qualification Board of Judges of Ukraine, the Security Service of Ukraine, the National Anti-Corruption Bureau of Ukraine, and the National Police of Ukraine. At the same time, the latter predominates, as the vast majority of complaints pertain to unethical behaviour resulting from the circumstances of traffic accidents involving either the direct participation of judges or their presence.

32 Law of Ukraine no 1402-VIII (n 11).
33 Council of Europe (n 25).

Generally, all situations are accompanied by the judge's state of alcohol intoxication, which has a proven or probable nature with a considerable degree of assumption. However, in the eyes of an outside observer, this did not raise any doubts.

A separate group of initiators in disciplinary proceedings consists of persons acting either on their own behalf or on behalf of public organisations to exert public control over the activities of judges. It should be noted that from a historical point of view, this represents a characteristic feature of the modern development of the domestic judiciary. Public control is generally a positive trend that seeks to eliminate and prevent the causes that give rise to inconsistencies between the activities of the authorities and certain social norms, ensuring compliance with both written and unwritten regulations.[34]

However, it is crucial that public initiatives related to judges are implemented in compliance with the principle of independence. The entities initiating such actions must be guided solely by the principles of competent and conscientious performance of their assigned duties while avoiding any form of material, moral, forceful influence or dependence.[35]

Finally, the disciplinary practice of prosecuting judges for violations of ethical standards includes cases where the complainant is the head of the court. This approach is ambiguously perceived within judicial teams, largely due to corporate culture. In addition, a hidden point in such complaints is the potential for pressure from the head of the court on the judge, which raises questions about the objectivity of such complaints.

Therefore, the disciplinary body must thoroughly and comprehensively examine the materials related to the disciplinary complaint and provide an objective assessment of them. Simultaneously, the existing decisions made by the disciplinary body, resulting from the consideration of the complaint by the head of the court, indicate that these typically pertain to the unethical behaviour of colleagues regarding non-compliance with service discipline and neglect in the performance of their official duties.

5 APPLICABLE SANCTIONS IN CASES OF PROOF OF UNETHICAL BEHAVIOR OF A JUDGE

The Consultative Council of European Judges notes that in common law legal systems with a small, homogeneous judiciary comprised of senior and experienced legal practitioners, the only formal sanction that can be applied – though typically only in an unlikely eventual emergency –is dismissal. However, informal warnings or discussions can also be effective.

34 AS Krupnyk, 'Public Control: Essence and Mechanisms of Implementation' (2007) 1 Theoretical and Applied Issues of State Formation <https://novyi-stryi.at.ua/gromkontrol/KRUPNYK_A_pro_grom_kontrol.pdf> accessed 15 May 2024.

35 Oksana Z Khotynska-Nor, 'Public Control as a Factor in the Development of the Judicial System' (16) 4 Journal of Civil and Criminal Justice108.

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

In other countries, where the judiciary is larger and, in some cases, less experienced, it is considered appropriate to establish a gradation of formally defined sanctions, sometimes even with the possibility of applying financial penalties.[36]

As for the national normative regulation of this issue, it is necessary to apply in accordance with the provisions of Article 109 of the Law of Ukraine "On the Judiciary and the Status of Judges", which stipulates that if a violation of ethical norms by a judge is qualified under Paragraph 3 of Part 1 of Article 106 of this Law, then in practice one of two types of disciplinary sanctions can be applied. The first type involves a petition for temporary suspension of the judge from the administration of justice, accompanied by the deprivation of the right to receive additional payments to the judge's official salary. Additionally, the judge is required to attend a refresher course at the National School of Judges of Ukraine for a refresher course. Afterwards, a further qualification assessment is conducted to determine the judge's ability to administer justice.

The second type of sanction applies when the judge's unethical behaviour qualifies as a significant disciplinary offence or gross neglect of the duties, which is incompatible with the status of a judge or indicates their inconsistency with the position held. In such cases, a motion to dismiss a judge from office is made.

It is important to note that lighter sanctions, such as a warning, reprimand or severe reprimand with a corresponding deprivation of the right to receive additional payments to the judge's official salary, may not be applied in these cases.

A study of specific cases of bringing judges to such responsibility gives grounds to conclude that applying the most severe sanction in these categories of cases is justified – a motion to dismiss a judge from office, which should not be considered a violation of the principle of proportionality. Such "severity" is due to the decisive importance of the moral "face" of a judge and the image of a fair trial in society, which are of particular relevance in the context of the formation and development of public trust in judicial power in the state. As the High Council of Justice has repeatedly noted in its decisions, "an act that can be regarded as a minor offence committed by a judge in relation to others receives wide publicity and undermines his authority and calls into question the integrity of this judge and the judicial system as a whole".[37]

Thus, in approximately every third case, a motion to dismiss a judge from office is applied as a sanction for unethical behaviour that has been classified as a significant disciplinary offence or gross neglect of duties, behaviour that is incompatible with the status of a judge or indicates his/her inconsistency to uphold the position. Therefore, in practice, most violations of judicial ethics, which discredit the title of a judge and harm the authority of

36 Opinion no 3 (n 10).

37 Decision no 1058/0/15-21 (High Council of Justice, 18 May 2021) <https://hcj.gov.ua/doc/doc/1365> accessed 15 May 2024.

justice, are qualified by a disciplinary body as a significant disciplinary offense or gross neglect of duties. Judges who violate ethical norms are often subject to a motion for dismissal from office within the framework of disciplinary proceedings.

6 CONCLUSIONS

An analysis of judicial practice, practice bringing judges to disciplinary responsibility for violation of ethical norms, as well as the results of the study of the problem of disciplinary liability of judges in the course of previous studies, allow us to distinguish the characteristic features inherent in the institute of disciplinary liability. These features highlight its role as an integral part of the broader institution of legal responsibility of judges.

The specific features of judges' disciplinary liability for violating ethical rules are the general nature of the rules and the lack of precise criteria that define unethical behaviour as a disciplinary offence; the manifestation of subjectivity by the disciplinary body in assessing the judge's behaviour; and the possibility that judges' liability for breaching ethical rules may combine with liability for procedural violations or apply separately if the offence was committed outside of the administration of justice.

Thus, the study of the characteristic features of disciplinary liability for judges who violate ethical norms, along with an analysis of judicial practice on this issue, has enabled the authors to make key generalisations and conclusions about the key features and pressing issues related to holding judges accountable for ethical violations. One of the primary findings of the study is that the professional activity of a judge is one of the few spheres of state activity regulated not only by the norms of legislative acts, which oblige a judge to act on the basis and within the framework of laws, but also by the norms of morality, which constitute the ethical basis of behaviour, ensuring the judge's authority in society.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Практичне дослідження

ДИСЦИПЛІНАРНА ВІДПОВІДАЛЬНІСТЬ СУДДІВ ЗА ПОРУШЕННЯ ЕТИЧНИХ НОРМ В УКРАЇНІ: ПРАКТИЧНІ АСПЕКТИ

Юрій Притика* та Марина Ставнійчук

АНОТАЦІЯ

Вступ. *Ця стаття присвячена дослідженню дисциплінарної відповідальності суддів за порушення етичних норм, яка є невід'ємною частиною інституту юридичної відповідальності суддів. Висвітлюється взаємозв'язок між порушенням суддею етичних норм і негативними наслідками, які виникають внаслідок цього.*

У статті визначено характерні особливості формулювання відповідних рішень та виявлено їхні окремі недоліки на основі детального аналізу існуючої практики притягнення суддів до дисциплінарної відповідальності за порушення етичних норм.

Зроблені висновки можуть сприяти вдосконаленню як нормативних положень, що регулюють цей інститут, так і їхньому ефективному застосуванню у дисциплінарному провадженні. Враховуючи те, що це питання становить національний інтерес, результати можуть також сприяти розробці більш надійної системи притягнення суддів до відповідальності.

Методи. *У дослідженні використано аналітичний, нормативний та порівняльний методи. За допомогою аналітичного методу проаналізовано практику притягнення суддів до дисциплінарної відповідальності за порушення етичних норм та пов'язані з цим судові справи. Нормативний метод дозволив переглянути законодавчу базу та положення, які регулюють підстави притягнення суддів до дисциплінарної відповідальності за порушення етичних норм. Нарешті, за допомогою порівняльного методу автори дослідили практичні аспекти ініціювання процедури відкриття дисциплінарного провадження різними групами уповноважених на це суб'єктів, а також порівняли формулювання рішень щодо застосування заходів дисциплінарного стягнення до судді.*

Результати та висновки. *У статті обґрунтовано, що у питанні притягнення суддів до відповідальності за порушення суддівської етики вирішальну роль відіграє нормативна база як відповідь на нові суспільні виклики. Проте практичне застосування (дисциплінарне та судове) має особливе та вирішальне значення. Детально розглянуто такі приклади та зроблено висновки щодо закономірностей використання підстав відповідальності суддів у загальних формулюваннях. З точки зору характеру проступку та шкоди, завданої статусу судді та авторитету правосуддя, велике значення має факт публічного оприлюднення обставин вчинення суддею правопорушення.*

На основі системного аналізу законодавства та дисциплінарних справ виділено декілька особливостей притягнення судді до відповідальності за порушення етичних норм.

Ключові слова: *верховенство права, суддя, етичні норми, дисциплінарна відповідальність, правосуддя, судоустрій, судова влада, демократія, інститути публічної влади, національна правова традиція.*

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Case Study

SEXUAL HARASSMENT PROVISIONS IN THE UAE AND THE FRENCH PENAL CODES

Abdulaziz Alhassan*, Raed S. A. Faqir, Pierre Mallet, Alaeldin Mansour Maghaireh, Ehab Alrousan, Mohammed Nour Eldeen Sayed and Dorsaf Arfaoui

ABSTRACT

Background*: The study compares sexual harassment laws in the UAE and France, focusing on their legal provisions and differences, with the aim of developing and raising awareness to combat this growing issue. This crime is prevalent in work environments, educational institutions, public places, and even homes and is no longer confined to any specific group but has spread in a manner that no one is immune from. It is, therefore, necessary to address the concept of sexual harassment and distinguish it from other criminal behaviour that intersects with it in some ways but differs in others. The study explores the legal structure of this crime under French and UAE law, discussing the material element and the criminal intent of the perpetrator, as well as the penalties imposed on the perpetrator in both its simple and aggravated forms.*

Methods: *The study focused on the UAE and France from the outset. A mixed-methods design was employed, combining analytical and comparative approaches to compare changes approved in the UAE Penal Code regarding sexual harassment with indicators from France. This involved assigning thematic units to the respective articles on sexual harassment in the UAE and French Penal Codes, as well as the jurisprudential orientation on sexual harassment achieved in the French judicial context. The main data collection techniques consisted of legal and non-legal document analysis, which are the best and most efficient methods for comparative legal research. These methods are effective in revealing and interpreting legislative and jurisprudential changes. Data were collected from different sources based on legal documents, such as the UAE Penal Code and the French Penal Code, to avoid approval bias of the changes made in the UAE or the French connection errors.*

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Results and conclusions: *The French Penal Code criminalises five types of sexual harassment with varying punishments. The definition of "unwanted acts of sexual aggression" is unclear, but it can be divided into physical and verbal abuse. The closest definition is "physical contact taking the form of an act of a sexual nature". French rape and sexual harassment laws do not harmonise. In contrast, the UAE Penal Code also criminalizes sextual harassment but adopts a different legal framework and terminology. The lack of harmonization between the rules addressing rape and sextual harassment in both French and UAE laws underscores the demand for clearer legislative guidelines. Finally, the study contains many suggestions and recommendations that aim to enhance the legislative role in combating such kinds of crimes.*

1 INTRODUCTION

Sexual harassment is a sensitive social issue that has recently garnered significant attention both internationally and nationally, fueled by the rise of human-rights-based calls and other voices denouncing the severity of sexual harassment and its profound social, psychological, economic, and educational impact on individuals and communities. It has emerged as a palpable problem affecting a broad segment of the population.

In UAE, sexual harassment-related crimes have fluctuated between 2017 and 2023, reflecting increased societal awareness and reporting. Rape rates rose slightly from 0.2 per 100,000 in 2017 to 0.3 in 2023, peaking at 0.4 in 2022. Aggravated assaults linked to sexual violence showed notable spikes in 2020 and 2022 (2.0 per 100,000). These trends highlight a growing need for enhanced preventive measures and stricter legal enforcement to address sexual offences.[1]

A survey of 4,111 students aged 10–18 revealed that 132 out of every 1,000 children face abuse at school, compared to 65 at home. Boys are more prone to abuse, with 7.2% affected at home versus 5.7% of girls and 15.1% at school compared to 9.3% of girls. Middle school students experienced the highest rates of abuse. The sample included students from 39 private schools, with a near-equal gender split.[2]

Both reports underline the importance of addressing abuse and harassment through stronger legal frameworks, societal awareness, and preventive strategies. The Dubai Police report highlights fluctuating crime rates, while the Foundation's study sheds light on the prevalence of child abuse, emphasising the need for protective measures in schools and homes.

1 Dubai Police, 'Major Crime Statistics' (*Government of Dubai: Dubai Police*, 3 September 2024) <https://www.dubaipolice.gov.ae/wps/portal/home/opendata/majorcrimestatistics> accessed 19 November 2024.

2 Majda Malawi and others, 'Child Molestation is a Dehumanization' *Al-Bayan* (Dubai, 24 May 2016) <https://www.albayan.ae/across-the-uae/accidents/2016-05-24-1.2646226> accessed 19 November 2024.

Sexual harassment in France, particularly street harassment, has shown a significant rise in recent years. In 2023, 3,400 sexist harassment offences were reported under the gender-based contempt law, marking a 19% increase from the previous year. Since the law's introduction in 2018, a total of 11,300 cases have been reported, though the actual numbers are believed to be much higher. Urban areas, especially Paris, see the highest rates, with 8.5 incidents per 100,000 inhabitants in 2023. Most victims (88%) are women under 30, while perpetrators are predominantly men (97%). The rise in reports highlights growing public awareness but represents only a fraction of the actual violence faced by women in public spaces.[3]

Sexual harassment is often misunderstood and has long been considered a taboo subject that should not be discussed. Indeed, there was a time when even uttering the word "harassment" was considered daring. However, this does not justify ignoring the presence of harassment or pretending it does not exist. Importantly, sexual harassment is not an unfamiliar issue; it occurs daily in both public and private spaces. It takes place on the streets, in workplaces, schools, universities, shopping areas, and parks, on public transportation, in offices, and even within homes.

Harassers can be individuals or groups, male or female. A harasser might be a stranger to the victim or someone they know—a boss, employee, coworker, client, passerby, relative, family member, or guest. Victims can also be individuals or groups, encompassing all segments of men, women, or both. Although sexual harassment most commonly involves men harassing women, it is not exclusive to them; women can also harass men, and same-sex harassment occurs as well.

Most sexual harassment cases involve men harassing women, but this does not negate the occurrence of other forms. Therefore, most legislation does not specify the gender of the perpetrator or the victim. It is a daily and repeated exposure for many women to the extent that some people trivialise it, viewing it as part of male behaviour. However, the discomfort felt by a woman experiencing harassment is pivotal. Every woman has the right to enforce personal boundaries that ensure her comfort and to have those boundaries respected.[4]

It is crucial to remember that sexual harassment is never the fault of the harassed or assaulted individual. Harassment is a choice made by the harasser, regardless of the victim's clothing or behaviour.

3 Service Statistique Ministériel de la Sécurité Intérieure, 'Sexist Street Harassment Complaints on the Rise in France, Figures Show' (*The Local France*, 1 August 2024) <https://www.thelocal.fr/20240801/sexist-street-harassment-complaints-on-the-rise-in-france-figures-show> accessed 19 November 2024.

4 A recent report on the use of social networks in Morocco revealed that one in every three women has been subjected to sexual harassment, compared to 4.3% of men. Read more: Mohammed Al-Siddiqi, 'A Third of Moroccan Women have Experienced Sexual Harassment on Social Media' *Moroccan Depth* (Rabat, 15 April 2024) <https://al3omk.com/924541.html> accessed 19 November 2024.

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Moreover, sexual harassment is a form of sexual violence that the victim endures. Recently, online harassment has been recognised as a cybercrime punishable under most comparative penal codes[5] and regional agreements and conventions.[6]

The research questions are presented as follows:

1. What forms of sexual harassment are recognised in the UAE and France, and how are they distinguished from similar behaviours?
2. How do the legal definitions in both countries address the nature of sexual harassment, including intent and conduct?
3. What are the key legal elements that define sexual harassment in the UAE and France?
4. What penalties are imposed for sexual harassment in both jurisdictions and how do they compare?
5. What aggravating circumstances influence penalties for sexual harassment in the UAE and France?

The main objective of this study can be summarised as follows:

1. To explore the forms of sexual harassment in the UAE and France and how they differ from similar behaviours.
2. To analyse the legal definitions and the nature of sexual harassment in both countries.
3. To compare the legal frameworks defining sexual harassment in the UAE and France.
4. To examine the penalties for sexual harassment in both countries and their severity.
5. To investigate aggravating circumstances that affect penalties for sexual harassment in both legal systems.

2 METHODOLOGY

The study employs a mixed-methods design, combining analytical and comparative approaches. The analytical approach is used to deeply analyse the legal provisions related to sexual harassment within the UAE and French penal laws, focusing on their meaning, scope and legislative structures. This is achieved through legal text analysis, dissection of legal terms, and case law examination. The study begins by gathering the relevant articles from the UAE and French Penal codes regarding sexual harassment, including

5 Lisa Sugiura and Smith April, 'Victim Blaming, Responsibilities and Resilience in Online Sexual Abuse and Harassment' in Jacki Tapley and Pamela Davies (eds), *Victimology: Research, Policy and Activism* (Palgrave Macmillan Cham 2020) 45, doi:10.1007/978-3-030-42288-2_3.

6 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention, 11 May 2011) [2023] OJ L 143I/7, art 40.

definitions, reporting mechanisms, penalties and measures for victim protection. Key legal terms related to sexual harassment in both codes, such as "consent", "workplace", or "sexual conduct," are analysed. Moreover, the analytical approach is used to analyse relevant judicial rulings concerning sexual harassment in both the legal environments of the UAE and France.

The second approach is a comparative one, used to compare the differences and similarities between the sexual harassment laws of the UAE and France and to identify areas for potential improvement. This involves identifying areas of comparison, including legal definitions, scope and coverage, juristic views, and penalties. Both approaches are integrated, starting with an analytical breakdown of legislation in each country. Data and case studies provide a practical lens for both approaches, demonstrating how legal norms, provisions, judicial rulings and juristic efforts reflect the effectiveness of each system in criminalising and penalising acts of sexual harassment.

This study addresses the topic by examining the nature of sexual harassment, including its concept, forms, and distinctions from similar behaviours. Additionally, it explores the legal framework for the crime of sexual harassment in the UAE and France, focusing on several key issues, such as the elements of the crime (Actus Reus and Mens Rea) and the associated penalties.

3 THE NATURE OF SEXUAL HARASSMENT

Sexual harassment is a complex issue involving personal and professional spheres, often manifesting in the workplace due to unequal hierarchical relationships.[7] It involves varied interpersonal relationships between victims and perpetrators, and some individuals experience repeated adverse effects on their personal and professional lives.

3.1. The Concept of Sexual Harassment

Sexual harassment is a concept that exists independently in various international legal instruments. It is often labelled as "equal treatment," "obligation to protect human rights," or "discrimination." However, some aspects of the issue have not been specifically addressed in some international legal instruments. In the UAE, the concept of sexual harassment in the workplace has been imported from a France.

Sexual harassment is considered a violation of human values and rights, as it undermines equal opportunities and equal treatment. Both Islamic and Western feminists view it as a

7 Raphaël Simian, 'Le harcèlement en droit penal' (Thèse de doctorat, Université de Nice 2005) 16.

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violation of power dynamics.[8] Legal systems often include "human dignity" as a necessary element in defining harassment, prohibiting any distinction, exclusion, or preference based on race, colour, sex, religion, or national origin.

Defining sexual harassment is complex due to its varying victim experiences. It requires a comprehensive understanding of psychology, sociology, penal jurisprudence, international conventions, and national laws.[9]

Sexual harassment is defined as verbal or physical behaviour initiated by a male against a female, causing sexual, psychological, physical, or moral harm. It can occur in various settings, including workplaces, educational institutions, public spaces, and on the streets.[10] Harassment includes unwelcome advances, obscene remarks, and abusive sexual conduct, forming a form of sexual discrimination.[11]

Sexual harassment is a psychological issue where the harasser seeks to gain power and control by exploiting the victim's body.[12] This can include explicit sexual behaviours, non-physical harassment, and attempts to sexually arouse a female without her consent. The most common instances of sexual harassment occur in the workplace, where men in positions of power engage in such behaviours.[13]

The crime of harassment threatens individuals' values, moral principles, and the sanctity of their bodies. It involves behaviours that violate personal dignity and boundaries, causing emotional, psychological, or physical harm. Harassment undermines respect for individual autonomy and safety, infringing on rights and creating a hostile environment.[14]

Sexual harassment is defined as deliberate sexual behaviour by the harasser, causing harm to the victim in various settings, including public and private spaces.[15] It can be linked to fear, exploitation of influence, or rejection of sexual tendencies.[16] It can involve physical, verbal, written, or obscene material and can be expressed in various

8 Norani Othman, 'Muslim Women and the Challenge of Islamic Fundamentalism/Extremism: An Overview of Southeast Asian Muslim Women's Struggle for Human Rights and Gender Equality' (2006) 29(4) Women's Studies International Forum 339, doi:10.1016/j.wsif.2006.05.008.

9 Simian (n 7) 16.

10 Abdessamad Dialmy, 'Sexuality in the Contemporary Arab Society' (2004) 299 Al-Mustaqbal Al-Arabi 138.

11 Jamal Shihatah Habib, *Community Police and Social Defense* (Al-Maktab Al-Jaami'i Al-Hadith 2011) 445.

12 Gabriel A Akinbode and Folusho Ayodeji, 'Sexual Harassment: Experiences, Prevalence and Psychopathology in Some Selected Higher Institutions in Lagos, South-West Nigeria' (2018) 21(3) African Journal for the Psychological Studies of Social 112.

13 Rashad Ali Abdel Aziz Musa, *Questions about Harassment, Sexual Assault, Perfume, and Sexual Attractiveness* (Alam Al-Kutub 2009) 13.

14 Linda C McClain, 'Inviolability and privacy: The castle, the sanctuary, and the body' (1995) 7(1) Yale Journal of Law & The Humanities 195.

15 Rasha Mohamed Hassan and Aliaa Shokry, "*Clouds in the Sky of Egypt": Sexual Harassment from Verbal Altercations… to Rape (A Sociological Study)* (Al-Markaz Al-Masri li-Shu'un Al-Mar'a 2008) 6.

16 Nabil Saqr, *The Concise Dictionary of Personal Crimes* (Dar Al-Huda 2009) 32.

forms.[17] Sexual harassment is a form of violence expressed in diverse forms, regardless of gender or age group.[18]

From our perspective, sexual harassment can be defined as: "Any deliberate behaviour in the form of an action, word, gesture, drawing, insinuation, or inappropriate compliment, whether in a public or private setting, or via traditional or electronic communication, that carries sexual implications towards another person, regardless of their gender or age group, causing physical, psychological, or moral harm, which is not merely unaccepted but also rejected."

The 1979 Convention on the Elimination of All Forms of Discrimination Against Women defines sexual harassment as unacceptable behaviour, including physical contact, advances, and pornography demands. It is discriminatory if the woman believes it would disadvantage her employment or create a hostile working environment.[19]

Transparency International's report on sexual harassment identifies it as a form of corruption in the workplace, characterised by hostile, aggressive, and embarrassing sexual behaviour affecting employee performance, health, and livelihood.[20]

The UN General Secretariat defines sexual harassment as any unwelcome sexual advances, requests, or gestures that cause offence or humiliation interfere with work, affect employment conditions, or create an intimidating work environment.[21]

Sexual harassment is defined by various national laws, including American law, which includes verbal, physical, and visual harassment, which must be perceived as an assault on the victim.[22]

Art. 222/33 of the French Penal Code defines sexual harassment as repeated acts of imposing words or actions with sexual connotations, either undermining dignity or creating an

17 Thuraya Naeem Shalala, *Lawsuits Involving Harassment and Sexual Assault* (Manshurat Al-Halabi Al-Huquqiyya 2010) 8.

18 Guadalupe Pastor-Moreno and others, 'Frequency, Types, and Manifestations of Partner Sexual Violence, Non-Partner Sexual Violence and Sexual Harassment: A Population Study in Spain' (2022) 19(13) International Journal of Environmental Research and Public Health 8108, doi:10.3390/ijerph19138108.

19 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> accessed 19 November 2024; Hisham Abdel Hamid Farag, *Sexual Harassment and Crimes of Honor* (Dar Al-Wathaa'iq 2011) 20.

20 Transparency International - National Branch Palestine, *Sexual Harassment in Workplaces as a Form of Corruption (Annual Report, Aprile 2010)* (Advocacy and Legal Advice Center 2010) 4.

21 Secretary-General's bulletin on Harassment, Including Sexual Harassment, and Abuse of Authority, ST/SGB/2008/5 (11 February 2008) <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=ST/SGB/2008/5&Lang=E> accessed 19 November 2024.

22 Atiq Al-Sayyed, *The Crime of Sexual Harassment: A Comparative Criminal Study* (Dar Al-Nahdah Al-Arabiyya 2003) 7.

Access to Justice in Eastern Europe
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intimidating or offensive situation, even if not repeated.[23] The definition extends to sexual harassment even if the act is not repeated, encompassing the use of any kind of serious pressure for the clear purpose of obtaining a sexual favour, whether for the benefit of the perpetrator or another party.[24]

Art. 413 of the Penal Code in UAE defines sexual harassment as persistent harassment aimed at compromising a victim's modesty or influencing their sexual desires.[25]

French and UAE legislators have broadened the definition of sexual harassment beyond work-related situations, encompassing all instances of harassment in any environment. Sexual harassment is defined as unwanted sexual behaviour, manifesting physically and verbally. Despite penal laws, it is difficult to fully encompass its various forms, causing daily victim suffering.

Both the UAE and French legal systems recognise the psychological harm caused by harassment. UAE law emphasises the manipulation of sexual desires, while French law covers a broader range of unwanted behaviours, both repeated and non-repeated. Both systems extend protection beyond the workplace and prioritise personal dignity and the prohibition of discrimination.

In our view, both legal frameworks offer significant protections against sexual harassment, but they differ in scope and approach. UAE law focuses on persistent behaviour impacting modesty and sexual desires, reflecting a more traditional view, especially in workplace contexts. However, this may not fully address modern forms of harassment, particularly non-physical ones such as online harassment.

French law provides a broader definition, recognising both repeated and single acts of harassment and including verbal and psychological harm. This wider approach may offer stronger protection by acknowledging the full spectrum of harmful behaviour, even without physical contact. While both systems emphasise dignity and anti-discrimination, adopting a broader definition of harassment, like the French model, could improve the UAE legal framework's effectiveness in addressing all forms of sexual harassment, aligning with global standards and the evolving nature of such offences.

23 Art. 222-33 of the French Penal Code states: "Sexual harassment is the act of repeatedly imposing on someone, in a repeated way, words or actions that have a sexual connotation and that either undermine their dignity by reason of their degrading or humiliating nature, or create an intimidating, hostile or offensive situation." See: Code Penal (adoption 22 July 1992) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/> accessed 19 November 2024.

24 The French legislator has also defined sexual harassment in Art. 1153-1L of the French Labor Law. See: Code du travail (version in force 2024) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072050/> accessed 19 November 2024.

25 See: Federal Law by Decree no (31) of 2021 'Promulgating the Crimes and Penalties Law' [2021] Official Gazette 712 <https://uaelegislation.gov.ae/en/legislations/1529> accessed 19 November 2024.

3.2. Forms of Sexual Harassment

Recognising sexual harassment's forms, including verbal, non-verbal, physical, bargaining, and intimidation harassment, is crucial for addressing the issue among men, women, or both.[26]

3.2.1. Verbal Harassment

Verbal Harassment is a form of violence against a victim involving language with sexual connotations. It can manifest in various ways, such as direct sexual propositions, persistent phone calls, offering services in exchange for favours, inappropriate comments about body parts, and sending inappropriate messages.[27] It involves intrusion into an individual's personal life, persistently monitoring their activities, and invading their privacy, as well as interfering in their work or personal affairs for sexual purposes.

Bargaining harassment occurs when a superior at work offers subordinates work-related privileges such as promotions, transfers to more desirable positions, job security, and bonuses in exchange for sexual favours.[28]

3.2.2. Non-Verbal Harassment

Direct harassment (non-verbal harassment) involves sexual gestures, movements, or expressions, including kissing, lewd gestures, scrutinising the body, winking, suggestive hand movements, and facial expressions.[29] It includes stalking, offering contact details, sending text messages, and making suggestive noises.[30]

Harassment occurs when verbal or non-verbal actions are rejected by the victim, causing psychological and moral harm or threatening their well-being. It is distinct from consensual romantic interactions. [31]

Intimidation harassment involves similar demands for sexual favours as seen in bargaining harassment but lacks mutual consent between the harasser and the victim concerning job

26 Mohamed Ali Qutb, *Sexual harassment: Dimensions of the Phenomenon and Mechanisms of Confrontation: A Comparative Study between Statutory Laws and Islamic Law* (Etrac for Printing, Publishing and Distribution 2008) 26.

27 Dialmy (n 10) 139.

28 Fatimah Qaffaf, 'The Crime of Sexual Harassment of Women in the Workplace in Algerian Legislation' (2020) 7(2) Al-Baheth Journal of Academic Studies 354.

29 Joan Williams and others, 'What's Reasonable Now? Sexual Harassment Law after the Norm Cascade' (2019) 1 Michigan State Law Review 139, doi:10.17613/haww-h214.

30 Wendy Pollack, 'Sexual Harassment: Women's Experience vs Legal Definitions' (1990) 13 Harvard Women's Law Journal 35.

31 Musa (n 13) 20.

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

benefits. The harasser employs threats to disadvantage the victim or cause them to miss opportunities unless they acquiesce to sexual demands.[32]

3.2.3. Digital and Physical Harassment

Digital harassment, also known as online sexual harassment, is a growing concern in contemporary society. It occurs on social media or electronic message boards and shares similarities with traditional workplace sexual harassment. Digital harassment is primarily intra-professional, while traditional harassment occurs across both constituency spheres.[33] It is a unique form of harassment where the perpetrator remains anonymous for a long time before being identified by law enforcement. Targets are usually unaware of the harassment, and the psychological impact is nine times greater than street sexual harassment. Victims may feel isolated and stigmatised, making it urgent to address this issue effectively.[34]

Physical harassment involves sexually explicit actions, such as unwanted touching, rubbing, or exposing body parts, which can escalate to sexual assault, causing discomfort or harm through contact with sexual implications. It involves the harasser or victim engaging in deliberate physical contact, such as grabbing body parts or touching genitals, often in public spaces. Sexual exhibitionism involves the perpetrator deliberately exposing sexual body parts, coercing the victim to undress, or displaying suggestive body parts. [35]

3.3. Differentiating Sexual Harassment from Similar Behaviors

Unlike other types of harassment that can arise in various situations, sexual harassment refers explicitly to inappropriate conduct occurring within a workplace setting.

3.3.1. Sexual Harassment and Bullying

Bullying and harassment are prevalent forms of aggression, crossing cultural, intellectual, economic, social, and age boundaries. The term "bullying" lacks a precise definition due to legislative gaps.[36] The UAE law does not include sexual bullying in the Penal Code, as the

32 ibid

33 See: Jaber Ghanaimi, 'Cyber Harassment in Light of National and International Laws' (*Shams Al Yaoum*, 8 October 2023) <https://shams-alyaoum.com> accessed 19 November 2024.

34 Emma Marshak, 'Online Harassment: A Legislative Solution' (2017) 54(2) Harvard Journal on Legislation 503.

35 Nawal Ali Al-Shahri and Waheed Bin Ahmad Al-Hindi, 'The Woman and Sexual Harassment in the Workplace: A Survey Study on the Banking Sector in the Kingdom of Saudi Arabia' (2015) 22 (3) Arab Journal of Administrative Sciences 393.

36 Mohamed Saeed Al-Qaza'ah, 'The Crime of Bullying in Light of the Recent Amendments to Law No 189 of 2020: A Comparative Study' (2023) 35(101) Spirit of Laws 1449, doi:10.21608/las.2022.178921.1111.

crime of bullying is not criminalised in UAE law, while French law treats it as an independent crime under terms like "moral, psychological, or emotional harassment".

The French legislator has codified the crime of bullying in the Penal Code at various levels (Art. 222-33-2), with specific provisions criminalising bullying when committed in the workplace, as well as in contexts such as marital relationships, civil solidarity pacts or between partners. Additionally, there is a general provision that broadly punishes bullying.[37]

Bullying in France involves aggressive behaviour that degrades an individual's working conditions and causes psychological or physical disorders. It is characterised by power imbalance and repeated behaviour.[38]

The UAE Penal Code does not define or specifically criminalise bullying. However, Paragraph 2 of Art. 14 of the 2021 Federal Labor Law prohibits sexual harassment, bullying, or any verbal, physical, or psychological violence against an employee by an employer, supervisors at work, or colleagues.[39] This indicates that the UAE legislator equates sexual harassment with bullying to some extent. [40]

In brief, bullying and harassment are often rooted in individuals' belief in impunity, lack of accountability, or the ability to manipulate the law to escape consequences. Bullying, both verbal and non-verbal, has escalated to harassment, causing violations of rights, particularly for women.

3.3.2. Sexual Harassment and Acts against Modesty

Modesty violations involve voluntary physical actions that violate public and private modesty. Overtly indecent acts, such as caressing or embracing someone without consent, are also considered.[41]

Sexual harassment and acts that violate modesty share similarities and differences. Both involve acts that affect personal honour and are characterised by deliberate behaviour. These acts can occur publicly or privately, with or without force, and can involve spoken words or

37 Evelyne Monteiro, 'Le concept de harcèlement moral dans le code pénal et le code du travail' (2003) 2 Revue de science criminelle et de droit pénal comparé 277.

38 David Masson, 'Harcèlement Moral: Identification et Preuve' (*Village-Justice*, 31 July 2023) <https://www.village-justice.com/articles/harcelement-moral-identification-preuve,26467.html> accessed 19 November 2024.

39 Federal Decree by Law no (33) of 2021 'Concerning Regulating Labour Relations' [2021] Official Gazette 712 <https://uaelegislation.gov.ae/en/legislations/1541> accessed 19 November 2024.

40 E Baillien et d'autres, *Violence, Harcèlement Moral ou Sexuel au Travail: Facteurs de Risque Organisationnels* (SPF 2006).

41 Hassan Al-Marsafawi, *Al-Marsafawi on Special Criminal Law* (Al-Maaref Establishment in Alexandria 1991) 667.

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ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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actions.[42] While sexual harassment can involve male and female victims, acts that violate modesty typically involve male perpetrators and female victims.[43] In both cases, consent is absent, and actions are directed towards another individual. Some laws also require dependency relationships.[44] Acts can occur in public or private locations, while acts that violate modesty typically require public places.

Indecent acts are overt, observable, and require consent from the victim, while sexual harassment is an act intended to derive sexual benefit without consent, involving words, physical contact, or gestures, both publicly and privately.[45]

3.3.3. Sexual Harassment and Indecent Assault

Indecent assault is a severe sexual freedom attack, like rape but involving unnatural sexual contact and touching private parts.[46] It involves a physical violation of the victim's privacy, causing severe harm to their modesty. Examples include touching the victim's anus, placing a hand inside a woman's clothes, or touching her breasts or abdomen.[47]

The UAE legislator has categorised two types of indecent assault under Art. 407 of the Penal Code: one involving force or threat, and the other without force or threat.[48]

Sexual harassment and indecent assault share similarities but also have notable differences. Both crimes can be committed by males against females, females against males, or both. Victims are human, regardless of gender or age. Both crimes involve acts short of intercourse. Sexual harassment involves the perpetrator using actions, gestures, words or acts to obtain sexual gratification from the victim, while indecent assault involves contact with the victim's body and breaches modesty. Indecent assault occurs when the act violates modesty significantly, with the severity determined by the presiding judge.[49] Sexual harassment involves persistently disturbing the victim through repeated actions, words, or gestures, aiming to induce them to acquiesce to the harasser's sexual desires.

42 Appeal no 1348 of Legal Year 26 (Egyptian Criminal Cassation, 29 December 1975) [1975] Technical Office 196/891.

43 ibid.

44 Catharine A MacKinnon and Reva B Siegel (eds), *Directions in Sexual Harassment Law* (Yale UP 2008).

45 Mohamed Al-Saeed Abdelfattah, *Crimes against Persons and Property: Explanation of the Federal Crimes and Penalties Law of the United Arab Emirates* (Dar Al-Afaq Al-Ilmiyyah 2022) 169.

46 Appeal no 290 (Dubai Court of Cassation, 20 November 2006).

47 Mahmoud Najeb Ḥosni, *A Concise Explanation of the Special Section of the Criminal Law* (Dar Al-Nahdah Al-'Arabiyyah 1993) 464.

48 Farag (n 19) 20.

49 Ahmed Fathi Suroor, *The Simplified Reference for the Special Part of Criminal Law* (Dar Al-Nahdah Al-'Arabiyyah 2016) 662.

4 THE LEGAL FRAMEWORK FOR THE CRIME OF SEXUAL HARASSMENT IN THE UAE AND FRANCE

Legal provisions' effectiveness depends on offence formulation, liability standards, and penalties for sexual harassment, but weak provisions can hinder victims' access, and civil society groups and advocates influence legal discourse.

According to the UAE Legislation Art. 413 of the UAE Penal Code states, "Anyone who commits the crime of sexual harassment shall be punished by imprisonment for no less than one year and a fine of no less than 10,000 dirhams, or by one of these two penalties. Sexual harassment includes any persistence in bothering the victim by repeating actions, words, or gestures that are likely to violate their modesty with the intent of inducing them to comply with the sexual desires of the perpetrator or others. The penalty increases to imprisonment for no less than two years and a fine of no less than 50,000 dirhams if there are multiple perpetrators, if the perpetrator is armed, if the victim is a child under the age of 18, if the perpetrator is a parent, relative, guardian, or has authority over the victim, or was employed by them or by someone previously mentioned."[50]

The French Law Art. 222-33 of the French Penal Code[51] defines sexual harassment as any act committed by the perpetrator through issuing orders, threats, or coercion to obtain sexual favours or gratification, and the perpetrator is punished in this case with two years imprisonment and a fine of 30,000 euros. The penalty increases to three years imprisonment and a fine of 45,000 euros if the sexual harassment occurs under aggravated circumstances.[52]

4.1. Elements of the Crime of Harassment

The UAE and French penal codes define harassment as intentional acts, words, and communications causing suffering or fear. The intent of the perpetrator in a case of harassment is difficult to prove due to the lack of knowledge between the parties.

50 Federal Law by Decree no (31) of 2021 (n 25).

51 Code Penal (n 23).

52 In cases of sexual harassment with aggravating circumstances, the perpetrator may face up to three years in prison and a fine of 45,000 euros. The law recognizes several aggravating circumstances:
- The victim is a vulnerable person: a pregnant woman, sick individual, physically or mentally disabled person, elderly person, etc.
- The perpetrator has abused the position of authority conferred by their role.
- The victim is a person under the age of fifteen.
- The sexual harassment was committed by several individuals acting as perpetrators or accomplices.
- The offense was committed in the presence of a minor.

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4.1.1. Actus Reus (The Guilty Act) under the UAE and French Legislation

The Actus Reus outlines the visible aspect of sexual harassment, encompassing conduct, result, and causal relationship, reflecting the sinful intent of the perpetrator.

A. The Actus Reus Under French Legislation:

In French law, the legislator has outlined several means or forms that a harasser may use, including:[53]

- **Orders:** Sexual harassment involves unjustified orders from superiors to subordinates, often expressed verbally through gestures or eye signals.[54] Following the amendment to Art. 222-33 of the French Penal Code by Law No. 2002-73 in 2002, the French legislator no longer requires a dependent relationship between the perpetrator and the victim or a boss-subordinate relationship for a harassment charge. Instead, the crime may occur if the perpetrator is a colleague of the victim, a child of the employer, a hiring manager, or a client of the company.[55] This means that the French legislator no longer requires a specific status for the perpetrator. The 2012 amendment by the French legislator has made the exploitation of power an aggravating circumstance for the penalty.[56]
- **Threats:** Sexual harassment can involve threats, verbal or written, involving crimes against oneself, property, or others or scandalous events. These threats can include psychological violence, such as termination from employment, and physical harm to the victim or someone close to them.[57] The extent of the threat is irrelevant if the person can understand its meaning.
- **Coercion**: French law does not define coercion in sexual harassment, leaving it to jurisprudence and the judiciary. Coercion is a physical or psychological pressure, either physical or psychological, that cannot be repelled or expected, compelling the person to commit the crime. [58] Psychological coercion is the pressure exerted on an individual to perform a specific act due to the fear of

53 See: 'Le harcelement sous toutes ses formes: Réunion CST inter associations, Du 16-12-2019' <https://www.afrcinetv.org/wp-content/uploads/2020/06/doc_cchsct_harce_lement-_cst122019b.pdf> accessed 19 November 2024.

54 Saqr (n 16) 330.

55 Law of the French Republic no 2012-954 of 6 August 2012 Concerning Sexual Harassment 'Relative au harcèlement sexuel' [2012] JORF 0182/1.

56 Christophe Radé, 'Le Conseil constitutionnel et le harcèlement sexuel' (*LexBase*, 28 August 2014) <https://www.lexbase.fr/revuesjuridiques/6262806jurisprudenceleconseilconstitutionneletleharcelementsexuel> accessed 19 November 2024.

57 Marine Gautier, 'Le harcèlement sous toutes ses formes: quels sont les recours pour les victimes?' (*Justifit*, 12 June 2024) <https://www.justifit.fr/b/guides/droit-penal/droit-penal-harcelement/> accessed 19 November 2024.

58 Abdelaziz Alhassan, Explanation of Crimes and Punishments under UAE Law (Dar Al-Nahdah Al-'Ilmiyyah 2022) 363.

imminent harm. [59] For this form of criminal behaviour to be realised in the crime of sexual harassment, the following conditions must be met: There must be physical or psychological coercion, it must be practised on a person, male or female, and the purpose of exercising the coercion must be to obtain a favour, privilege, or advantage of a sexual nature.

As regards the criminal result of sexual harassment, the French legislature establishes sexual harassment as a formal crime, requiring no tangible criminal result. This protection of sexual freedom is achieved without the need for sexual desires, as crime occurs even without realisation. There is no punishment for attempts at this crime.

Trial courts have not established a causal link between sexual harassment and the criminal result, which is a violation of the right to sexual autonomy, even though the perpetrator's actions were not necessary for this violation.

B. The Actus Reus under the UAE Legislation

Art. 413 of the UAE Penal Code defines sexual harassment as the persistent troubling of a victim through actions, statements, or gestures aimed at causing them to succumb to sexual desires. The methods that a perpetrator may use to persistently harass include:[60]

- **Sexual harassment through actions:** Perpetrators engage in indecent gestures, sexual harassment through written communication, and physical behaviour to induce prohibited acts, including touching, kissing, pinching, hugging, and holding hands.
- **Sexual harassment through words:** Harassment involves using obscene language, jokes, questions, and sounds to persuade someone to conform to their sexual desires or those of others.
- **Sexual harassment through gestures**: Harassment involves the harasser using physical gestures, such as suggestive looks, physical hints, winks, and hand gestures, to compel the victim to submit to their sexual desires.

As regards the criminal result of this crime, the UAE legislator does not require a tangible criminal result for sexual harassment to be established, making it a formal crime designed to protect sexual freedom. Sexual desires are not required, and there is no punishment for attempts at this crime.

Trial courts must establish a causal link between sexual harassment and the criminal result, which is a violation of the right to sexual autonomy, even though the perpetrator's actions were not necessary for this violation.

The stance of the French legislator is focused on protecting personal dignity, ensuring public order, and safeguarding vulnerable individuals, particularly minors. The French legal

59 Olivier Fardoux, *Fiches de Droit pénal du travail: Rappels de cours et exercices corrigés* (Ellipses 2018) 239-49.

60 Federal Law by Decree no (31) of 2021 (n 25) art 413.

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

system criminalises a wide range of sexual offences, from harassment to assault, with varying severity based on the nature of the act and the parties involved. The law recognises both physical and psychological harm and provides clear avenues for victims to seek justice. It also aims to create a safe environment in workplaces and public spaces by holding offenders accountable for actions that create hostile atmospheres. Arts. 222-27 to 222-29 of the French Penal Code specifically address sexual assault, including non-violent acts like groping or unwanted touching, and extend protection to both adults and minors. Art. 222-30 strengthens penalties when the offence involves minors or vulnerable persons, reflecting their heightened vulnerability and offering additional protection to those at greater risk of sexual assault, such as children or individuals with disabilities.[61]

In French and UAE law, sexual harassment must offend modesty and involve repetition by the perpetrator. A single occurrence is not criminal. However, the French judiciary does not require repetition in cases where severe pressure is used to obtain sexual favours, regardless of whether the intent is real or apparent.[62] In such cases, the crime is considered to have occurred irrespective of whether there is severe, repeated pressure.[63]

French and UAE legislation does not mandate specific characteristics for sexual acts or gestures, as the crime is merely a desire for a sexual favour. The requirement to prove consent in response implies that the victim's consent is absent, thus excluding the act from the realm of sexual harassment. The court's discretion in determining if a specific form is present is crucial, but it must specify it in its reasoning for a conviction.

French and UAE criminalise sexual harassment if the criminal aims to obtain advantages or favours, excluding behaviour without such intent. Sexual desires or advantages embody any sexual acts, including kissing, bodily contact, fondling, and touching, which constitute the preliminaries to sexual intercourse.

4.1.2. Mens Rea (The Guilty Mind) under the UAE and French Legislation

Sexual harassment is considered an intentional crime requiring criminal intent, regardless of the perpetrator's knowledge of the specific consequences. In comparative jurisprudence, it is based on general intent. Perpetrators must be aware of infringing on the victim's sexual freedom and understand the seriousness of the act. They must also consciously direct their will to command their body parts to perform the crime, aiming to gain sexual advantages.[64]

61 Code Penal (n 23).

62 ibid, art 222-33, states: "II. - Is assimilated to sexual harassment the act, even if not repeated, of using any form of serious pressure with the real or apparent aim of obtaining a sexual favor, whether for the benefit of the perpetrator or a third party."

63 See: Marilyn Baldeck et Laure Ignace, 'La Cour de cassation consacre l'acte unique de harcèlement sexuel en droit du travail' (*Avft*, 27 November 2017) <https://www.avft.org/2017/11/27/cour-de-cassation-consacre-lacte-unique-de-harcelement-sexuel-droit-travail/> accessed 19 November 2024.

64 Abbas Hekmat Farman and Mayada Mahmod Fayyad, 'The Crime of Sexual Harassment' (2020) 8 The College of Law and Political Science Journal 77, doi:10.61279/edv7zt31.

French jurisprudence has settled on the requirement of specific criminal intent for the crime of sexual harassment. Therefore, the mere presence of general intent, consisting of knowledge and volition, is insufficient for the crime to occur. Rather, the perpetrator's specific intent must be present, aimed at achieving a particular goal—namely, gaining a sexual favour.[65] The French Court of Cassation has emphasised that trial courts must determine this intent in their reasoning for a conviction and must literally state "the perpetrator's intent to coerce the victim to comply with his sexual desires." If this intent is absent, the act does not constitute sexual harassment.[66]

Similarly, UAE law considers that the mere presence of general criminal intent alone is insufficient for the crime of sexual harassment to occur. It additionally requires specific intent aimed at gaining sexual favour for the perpetrator or someone else. This is evident from the phrases used by the UAE legislator in defining the crime of sexual harassment, which establish a causal link between the perpetrator's behaviour in harassing the victim through repeated acts, words, or gestures that could offend the victim's modesty, with the intent to compel them to respond to his or others' sexual desires. If the perpetrator's intent lacks the aim of gaining sexual favour, then his act is not considered sexual harassment.[67]

Proving specific intent in sexual harassment is challenging due to the perpetrator's lack of physical evidence and dual interpretation of behaviours. Instances are examined through the judgment of a trial judge, who examines elements and circumstances that can be interpreted as harassment or inappropriate.

It is believed that if the presence of general criminal intent alone sufficed for the occurrence of the crime of sexual harassment, this would be the optimal solution for proving this, especially since requiring and proving specific intent is extremely difficult and would consequently lead to many sexual harassers escaping criminal liability.

In brief, the UAE's criminalisation policy is more focused on modesty and sexual conduct, with a particular emphasis on workplace harassment, while French law has a broader, more inclusive approach, encompassing both physical and non-physical behaviours and extending protection across different settings. The differences in the criminalisation policy reflect the varying emphases on the scope and nature of sexual harassment in each jurisdiction.

In the past, the UAE judiciary recognised the power dynamics involved, emphasising verbal, non-verbal, and coercive behaviours that create a hostile environment. This landmark ruling led to new legislation explicitly addressing sexual harassment, providing clearer guidelines

65 See: Appeal no 10-80570 (French Court of Cassation, Criminal division, 8 June 2010) <https://www.legifrance.gouv.fr/juri/id/JURITEXT000022457458> accessed 19 November 2024.

66 Gautier (n 57).

67 Helema Mohammed Humaid and Mohammed Al-Hourani, 'Sexual Abuse against Children in UAE Society' (2022) 142 Al-Adab Journal 383, doi:10.31973/aj.v1i142.2801.

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ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

for the judiciary. It sparked conversations about consent, boundaries, and gender equality, creating increased awareness and consciousness. Case No. 37 marked a turning point in the fight against sexual harassment, contributing to a more inclusive society where individuals can speak out, and everyone's rights and dignity are protected.[68]

5 PENALTIES FOR THE CRIME OF SEXUAL HARASSMENT IN THE UAE AND FRENCH LEGISLATION

Both UAE and French legislators have determined penalties for the crime of sexual harassment in both its simple and aggravated forms.

5.1. Penalties of Sexual Harassment in the UAE Law

Art. 413 of the UAE Penal Code stipulates that anyone committing the crime of sexual harassment in its simple form, as presented in the previous section, shall be imprisoned for no less than one year and fined not less than ten thousand (10,000) dirhams, or shall be given one of these two penalties.

The second paragraph of Art. 413 of the UAE Penal Code states that the punishment for a harasser is increased such that the period of imprisonment shall not be less than two (2) years and the fine not less than fifty thousand (50,000) dirhams or one of these two penalties in cases where there are multiple perpetrators, or the perpetrator carries a weapon, or if the victim is a child who has not reached eighteen (18) years of age, or if the perpetrator is a relative of the victim or responsible for their upbringing or care, or has authority over them, or was a servant at their residence or that of those mentioned above.

The aggravated circumstances of the crime of sexual harassment under the UAE Law can be explained as follows:[69]

- **Multiple offenders:** The UAE legislator has increased punishment for crimes committed by multiple perpetrators, recognising the increased danger to victims when the crime is carried out by a collective effort.[70] This intensification is necessary to prevent victims from losing their ability to resist and submit to the situation, as the minimum threshold for plurality is at least two persons.

68 Appeal no 37 of 7 QC (Ras Al Khaimah Court of Cassation, 7/10/2012).

69 See: Federal Law by Decree no (31) of 2021 (n 25) art 413.

70 Mahmoud Najib Hassani, *Criminal Participation in Arab Legislation* (Dar Al-Nahda Al-Arabiyah 1992) 51.

- **Armed perpetrator**: The UAE legislator has made the carrying of a weapon an aggravating circumstance in harassment crimes, as it facilitates the crime. [71] Visible weapons instil fear and terror, while invisible weapons endow the perpetrator with power and make them more dangerous.[72] Weapons can be inherently recognised or designated. While inherently recognised weapons are considered aggravating, designated weapons must be visible.[73]
- **Harassment by a victim's progenitors or *Mahrams***: The UAE legislator has increased the punishment for harassment committed by a victim's progenitors or mahrams, including parents, grandparents, and others. This is due to the personal nature of the perpetrator, guided by personal status laws and Islamic Law. The penalty also applies to harassment by close kin, such as parents, siblings, or marriage partners, who are permanently barred from marrying the victim.[74]
- **Perpetrators responsible for the upbringing or care of the victim**: The UAE legislator increases penalties for sexual harassment committed by individuals responsible for the victim's upbringing and care, such as guardians, custodians, tutors, teachers, stepfathers, uncles, and maternal uncles, as the mere act of committing such harassment is sufficient.[75]
- **Perpetrators with authority over the victim:** Harassment penalties increase when perpetrators have authority over the victim, whether it's legal or practical. This authority can be temporary or permanent, and anyone tasked with supervising the victim, regardless of duration, is considered to have actual authority. The Egyptian Court of Cassation has ruled that the presence or absence of actual authority is a substantive issue decided by the trial court without Court of Cassation oversight.[76]
- **Minor-aged victims:** Art. 413 of the UAE Penal Code states that perpetrators of minor-aged victims of harassment face up to two years imprisonment and a fine of fifty thousand dirhams. This is due to their vulnerability and lack of discernment, which facilitates the perpetrator's behaviour. The victim's age is determined at the time of the crime, and official documents are used to establish it.[77]

71 AS Abu Khattouah, *The Special Section in the Penal Code: Crimes of Agrression on Property* (Dar Al-Nahda Al-Arabiyah 1994) 116.

72 Mahmoud Najib Hassani, *Explanation of the Penal Code: A Special Section* (Dar Al-Nahda Al-Arabiya 2012) 116.

73 Appeal no 13 (Dubai Court of Cassation, 19 March 2005).

74 Samir Khalaf and John Gagnon (eds), *Sexuality in the Arab World* (Saqi 2014).

75 Bahaa Al-Marri, *Bullying and Suspected Crimes* (Dar Al-Ahram 2021) 15-85.

76 Appeal no 9077 of Legal Year 62 (Egyptian Criminal Cassation, 6 June 1994) [1994] Technical Office 109/714.

77 Art. 4 of the 2022 Law on Juvenile Delinquents and Juveniles at the Risk of Delinquency states: "Age shall be proven by an official document; if that is not possible, the investigative or judicial authority shall appoint a specialized physician to assess it using technical means." See: Federal Law no (6) of 2022 'Concerning Juvenile Delinquent and Juvenile at Risk of Delinquency' [2022] Official Gazette 741 <https://uaelegislation.gov.ae/en/legislations/1618> accessed 19 November 2024.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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- **The victim is a servant of the perpetrator**: The UAE legislator has increased the punishment for perpetrators who harass a victim employed as a servant, imposing a minimum of two years imprisonment and a fine of fifty thousand dirhams. This aims to protect servants from the abuse of power that the perpetrator may have on them, which could lead to negative psychological effects.

5.2. Penalties of Sexual Harassment in French Law

The French legislator punishes the perpetrator of sexual harassment, in its simple form, with two years' imprisonment and a fine of thirty thousand (30,000) euros.[78] It should be noted that the French legislator has combined both penalties without giving the judge the choice to apply one without the other, reflecting the legislator's concern in addressing the widespread phenomenon of sexual harassment.

Art. 222, para. 3, item 3 of the French Penal Code specifies circumstances for increasing the punishment. Some relate to the characteristics of the perpetrator, and others to those of the victim or the nature of the means used to commit the harassment. When any of these aggravating factors are present, the punishment increases to three years imprisonment and a fine of 45,000 euros.

The aggravated circumstances of the crime of sexual harassment under French Law can be explained as follows:[79]

- **Dependency relationship between the perpetrator and the victim**: Harassment punishment increases when the perpetrator has authority over the victim and uses it to harass others, often during duties[80] or on occasion, indicating a dependency relationship between the perpetrator and the victim.[81]
- **Multiple perpetrators:** Sexual harassment can be intensified when multiple perpetrators collaborate to commit the criminal act. This intensification is due to the increased danger to victims when multiple perpetrators work together.[82] Sound penal policy requires increasing punishment for crimes committed by multiple perpetrators, with the minimum involvement of at least two individuals.[83]

78 Code Penal (n 23) art 222-33 III, sates: "The acts mentioned in I and II are punishable by two years' imprisonment and a fine of €30,000."

79 ibid, art 222-33.

80 See more at: Sophie Ferry, 'Le harcèlement sexuel' (*Le Mag*, 3 August 2022) <https://www.lemag-juridique.com/categories/penal-15552/articles/le-harcelement-sexuel-3080.htm> accessed 19 November 2024.

81 Abigail C Saguy (ed), *What Is Sexual Harassment?: From Capitol Hill to the Sorbonne* (University of California Press 2003).

82 Hassani (n 72) 51.

83 Michel Véron, *Droit pénal spécial* (15e éd, Sirey 2015) 80.

- **The perpetrator is a progenitor of the victim or holds legal or actual authority over them**: French law intensifies punishment for sexual harassment if the perpetrator is a progenitor of the victim or holds legal or actual authority over them, regardless of lineage. This is due to the moral influence these individuals have over the victim, whether temporary or permanent.
- **The young age of the victim**: The French legislator increases the punishment for perpetrators who harass victims under the age of fifteen due to their vulnerability and inability to fully recognise the behaviour. This age group is particularly vulnerable due to their inability to manage their affairs without assistance and their inability to defend themselves against assault.
- **Vulnerability of the victim**: Victim vulnerability can be attributed to age, illness, disability, impairment, economic or social condition, or if the perpetrator knows or sees the victim is pregnant. Sexual harassment can be attributed to various factors, including age, vulnerability, illness, and disability.[84] Victims of advanced age are more vulnerable to harassment, as they have a weakened physical constitution and a weakened will. Additionally, victims with disabilities, such as those with visual, auditory, mental, or learning disabilities, are often subjected to increased punishment.
- **Pregnancy of the victim:** The punishment for sexual harassment increases if it occurs against a pregnant woman if her pregnancy is visible or known to the perpetrator. The rationale for this lies in the physical vulnerability and psychological disturbance that pregnant women experience.
- **Vulnerability or dependence of the victim:** The victim's vulnerability or dependence, arising from their fragile economic or social status, if visible or known to the perpetrator, also leads to an increase in the penalty.
- **Nature of the means used:** The French legislator increases the punishment if sexual harassment is committed using public communication services over the internet or through any digital or electronic means.

Assessing the adequacy of laws criminalising sexual harassment in the UAE and France highlights key differences. France's Penal Code, including its 2018 law against street harassment, provides a comprehensive framework with clear definitions, strict penalties, and mandatory workplace measures. In contrast, while the UAE also criminalises sexual harassment, its legal framework could benefit from refining definitions, strengthening enforcement mechanisms, and enhancing victim protection and public awareness. Adopting aspects of France's approach could help the UAE strengthen its legal protections and reduce harassment.

84 Appeal no 01-83.559 (Court of Cassation, Criminal Division, 23 January 2002) [2002] Criminal Bulletin 12/31.

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6 CONCLUSIONS

To effectively address sexual harassment, comprehensive legal provisions are necessary, covering definitions, types, and related crimes. While the UAE does not have specific sexual harassment legislation, its Penal Code criminalises all forms of harassment. In contrast, France has specialised laws that criminalise five types of sexual harassment, each with varying punishments, and includes specific legislation addressing moral harassment. This study emphasises the severity of sexual harassment as a widespread criminal issue affecting nations globally. It examines the concept of sexual harassment, its various forms, and its overlap with other related crimes. Furthermore, the study evaluates the legal frameworks in both the UAE and France, highlighting the strengths and weaknesses in terms of the comprehensiveness of harassment laws and the adequacy of punishments. The research also identifies the lack of clarity in the French definition of "unwanted acts of sexual aggression," which can be categorised into physical and verbal abuse, and the distinction between rape and sexual harassment laws in France.

Both the UAE and France criminalise sexual harassment as actions, words, or gestures that violate the victim's dignity, with an emphasis on the intent to obtain sexual favours. Neither jurisdiction requires tangible harm to establish the offence, focusing instead on the perpetrator's specific purpose. Both systems impose imprisonment and fines, with harsher penalties for aggravated circumstances, which are determined by factors such as the victim's vulnerability, the perpetrator's relationship with the victim, and the methods used to commit the offence. Civil society and advocacy groups play a crucial role in shaping legal provisions and ensuring their enforcement in both jurisdictions.

UAE law focuses on persistent behaviour that affects modesty, requiring repeated actions to induce compliance with sexual desires, while French law covers a broader range of acts, including threats, coercion, and psychological pressure, often in workplace settings, without requiring repetition in some cases. French courts require explicit proof of intent, while UAE law allows repeated behaviour as evidence of intent. Penalties in France include both fines and imprisonment, with harsher penalties for aggravated circumstances, whereas UAE judges can impose either or both penalties with minimum thresholds. UAE's aggravating factors include the use of weapons, multiple perpetrators, and the victim's role as a domestic servant, while France emphasises digital harassment, dependency relationships, and public communication services.

Finally, the study offers several suggestions and recommendations to enhance the legislative response to combating sexual harassment. These are as follows:

1. Clarify sexual harassment by distinguishing physical, verbal, and psychological forms to improve legal clarity and victim protection in UAE law, which is in line with French law.
2. Introduce specific laws for online harassment, with adjusted penalties for cyber harassment, ensuring protection across both physical and digital spaces in UAE laws.

3. Incorporate the victim's perspective on intent, especially in cases of coercion or psychological pressure, to enhance legal clarity and support reliable convictions.
4. Include workplace harassment and abuse of authority in aggravating circumstances, addressing power dynamics to better protect victims in professional settings.
5. Introduce graded penalties for harassment of vulnerable individuals (e.g., elderly, disabled), ensuring stronger legal consequences for targeting these victims.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Практичне дослідження

ПОЛОЖЕННЯ ПРО СЕКСУАЛЬНІ ДОМАГАННЯ В КРИМІНАЛЬНИХ КОДЕКСАХ ОАЕ ТА ФРАНЦІЇ

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АНОТАЦІЯ

Вступ. *У дослідженні порівнюються закони про сексуальні домагання в ОАЕ та Франції, увага зосереджується на їхніх законодавчих положеннях і відмінностях, з метою розвитку та підвищення обізнаності для боротьби з цією проблемою, що зростає. Цей злочин охоплює робоче середовище, навчальні заклади, громадські місця і навіть дім, і більше не обмежується жодною конкретною групою, а поширюється, тож від нього ніхто не застрахований. Тому необхідно розглянути концепцію сексуальних домагань і відрізнити їх від інших видів злочинної поведінки, які в чомусь перетинаються з ними, а в чомусь мають відмінності. У статті досліджується правова структура цього злочину згідно із законодавством Франції та ОАЕ, обговорюється матеріальний склад і злочинний намір правопорушника, а також покарання, призначені злочинцеві як у пом'якшувальних, так і в обтяжуючих формах.*

Методи. *Дослідження від початку було зосереджено на ОАЕ та Франції. Для порівняння змін, ухвалених у Кримінальному кодексі ОАЕ щодо сексуальних домагань, із показниками Франції, було використано змішаний метод, що поєднує аналітичний і компаративний підходи. Це передбачало присвоєння тематичних блоків відповідним статтям про сексуальні домагання в Кримінальному кодексі ОАЕ та Франції, а також правову спрямованість щодо сексуальних домагань, окреслену в контексті судової практики Франції. Основні методи збору даних полягали в аналізі юридичних та неюридичних документів, які є найкращими та найефективнішими методами порівняльно-правового дослідження. Ці методи ефективні у виявленні й інтерпретації законодавчих та судових змін. Дані були зібрані з різних джерел на основі юридичних документів, таких як Кримінальний кодекс ОАЕ та Кримінальний кодекс Франції, щоб уникнути упередженого схвалення змін, внесених в ОАЕ, або помилок у застосуванні законодавства Франції.*

Результати та висновки. *Кримінальний кодекс Франції передбачає кримінальну відповідальність за п'ять видів сексуальних домагань із різними покараннями. Визначення «небажаних актів сексуальної агресії» є незрозумілим, але його можна розділити на фізичне та словесне насильство. Найближче визначення – «фізичний контакт у формі акту сексуального характеру». Закони Франції про зґвалтування та сексуальні домагання не гармонізовані. На противагу цьому, Кримінальний кодекс ОАЕ*

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також передбачає кримінальну відповідальність за сексуальні домагання, але приймає іншу правову базу та іншу термінологію. Відсутність гармонізації між правилами щодо зґвалтування та сексуальних домагань у законах Франції та ОАЕ підкреслює потребу в більш чітких законодавчих вказівках. Нарешті, дослідження містить багато пропозицій та рекомендацій, спрямованих на посилення ролі законодавства у боротьбі з такими видами злочинів.

Ключові слова: *сексуальні домагання, правова структура, законодавство Франції, законодавство ОАЕ, злочинний намір, матеріальний склад, покарання винних.*

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Case Study

PUNISHABILITY IN RADIOECOLOGICAL SAFETY: CASE LAW FROM UKRAINE

Anastasiia Ternavska

ABSTRACT

Background: *The dangerous nature of illegal activities in the field of radioecological safety underscores the pressing need to prevent and deter the negative consequences of using nuclear and radioactive materials, to avert the threat of their occurrence, and to counteract criminal practices of this category, in particular through their criminalisation.*

This article aims to provide suitable analytical support for such activity, focusing primarily on identifying the most appropriate framework for punishability that aligns with the nature and degree of social danger posed by these actions and their legal consequences.

Methods: *A dialectical method of cognition was employed to investigate and substantiate the fundamental concepts examined in this article. Statistical methods were utilised to analyse judicial statistics for this category of cases and calculate the relevant indicators. A sociological method was applied to conduct a content analysis and generalise judicial practice. The logical-legal method was used to develop and substantiate ways to improve the sanctions under examination.*

Results and conclusions: *Based on official statistical data (Prosecutor General's Office and the State Judicial Administration of Ukraine), a long-term criminological analysis of the studied crimes was conducted. It determined absolute, average, and relative values, as well as indicators reflecting the ratio between recorded criminal offences, individuals whose court decisions entered into legal force during the reporting period, and convicted persons—both overall and for specific types of the studied offences.*

Key indicators of criminal conviction were determined, including conviction rates and structural composition, categorised by type of punishment and criminal offence. The research results revealed a significant gap between the types and amount of punishments provided for by the sanctions of the criminal-legal provisions under study and the factual punishability.

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The findings led to the conclusion that the first parts of Articles 265 and 267[1] of the Criminal Code of Ukraine exhibit "excessive" penalisation. To construct an optimal punishability model for this category of crimes, proposals for changes to the sanctions of the studied provisions were substantiated.

1 INTRODUCTION

Humanity's mastery over nuclear energy and its utilisation has fundamentally altered the global security environment, creating a new security paradigm for national and planetary concerns, all the while ecological pressures on the biosphere exist.

Considering the extremely high socially dangerous degree of infringements in the field of radioecological safety, the potential magnitude and irreversible nature of damages resulting from such breaches, and the global nature of nuclear hazards, the state has established and enforced the most suitable punitive measures to eradicate such conduct. These measures aim to incapacitate individuals from committing prohibited acts, facilitate correction, and promote general and special prevention.

As a result, punishment for committing criminal offences in radioecological safety remains one of the significant means of ensuring law and order—with penalisation (or establishment of punishability—serving as a key instrument of criminal law policy. The effectiveness of penalisation, particularly in this area, requires appropriate scientific support for such activities, given the complexity and multifaceted nature of determining an optimal level of criminal responsibility. This level must correspond to the nature and degree of social danger posed by the act, as well as its factual punishability.

In Ukrainian criminal law literature, the issues of criminalisation and penalisation have been the subject of research by R. Babanly, D. Balobanova, N. Gutorova, O. Knyzhenko, P. Melnyk, A. Mytrofanov, Ye. Nazymko, N. Orlovska, L. Pavlyk, Yu. Ponomarenko, P. Fris, and others. However, the specific issues related to the penalisation of criminal offences and judicial practice in the field of radioecological safety have been studied fragmentarily in domestic scientific literature.

2 DETERMINATIONS OF THE SUBJECT AND PERIOD OF RESEARCH

Several approaches to the concept of penalisation have emerged in scientific literature. A. Mitrofanov defines penalisation as the process of imposing adequate, fair, and appropriate sanctions for criminalised acts.[1] P. Fris characterises penalisation as a synthetic

1 Anatoliy A Mitrofanov, 'General Ways of the Policy of Criminal Law in Ukraine: Forming and Realization' (PhD (Law) thesis, VM Koretsky Institute of State and Law of National Academy of Sciences of Ukraine 2005).

process comprising the normative determination of the character of punishability of acts and the practical sentencing of a punishment for a specific crime, and other definitions.[2] Similar definitions are provided by other authors.[3]

N. Gutorova and Yu. Ponomarenko emphasise the distinction between two key features of penalisation: the legislative definition of the punishability of crimes, which establishes potential criminal responsibility applicable to anyone who may potentially commit such acts, and the sentencing of a punishment, which is carried out exclusively by the court. The latter involves determining the actual criminal responsibility of a specific person who has committed a crime.

O. Knyzhenko offers a slightly different perspective, viewing lawmaking and law-enforcement penalisation as sequential stages and noting that the process of penalisation of criminal offences is inextricably linked with the process of establishing criminal legal sanctions. The latter is primarily a formal reflection of the penalisation process. P. Melnyk concurs with this view.

The foundation for the penalisation of criminal offences in the field of radioecological safety lies in objectively dangerous forms of conduct related to the use of nuclear energy, handling of radioactive materials, and other sources of ionising radiation, which are declared criminally unlawful by the legislator and for which a specific type and measure of punishment are defined. Criminal law sanctions related to radioecological safety offences constitute a fundamental benchmark for the criminal law activity of the judicial system.

While improving criminal law provisions in the field of radioecological safety—which by their nature perceive the existence of law in the dimension of the proper, potential, and necessary—does not automatically lead to an increase in their effectiveness, the results of applying these legal prescriptions are found in actual practice. These results can not be acquired from the text of the law or through its interpretation. The only feasible approach is to conduct empirical research, a representative analysis that meets the requirements of both the reliability of the indicators being studied and the sufficiency of the number of indicators for selected analysis.

Through this research, the author has identified distinguishing features that enable the isolation of criminal offences in the field of radioecological safety into a relatively independent group. An element-structural analysis of the relevant criminal law provisions

2 Pavlo L Fris, *Criminal Law Policy of the Ukrainian State: Theoretical, Historical and Legal Problems* (Atika 2005) 332.

3 YeS Nazymko, 'General Overview of Political and Legal Processes of Establishment of the Measure of Punishment in Criminal Law Sanctions' (2012) 1 Bulletin of the Ministry of Justice of Ukraine 67; LV Pavlyk, 'Differentiation of the Criminal Responsibility, Punishment and Implementation of Punishment: Features of the Concepts Delimitation' (2015) 2 Scientific Journal of Lviv State University of Internal Affairs: Legal series 256; Dar'ya O Balobanova, 'Dynamics of the Criminal Law of Ukraine (Theoretical and Applied Research)' (DPhil (Law) thesis, National University "Odesa Law Academy" 2021).

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has enabled us to delineate the scope of criminal offences in the field of radioecological safety. Based on the features of the object of infringement, the researched provisions can be separated into those, with the direct primary object being public relations in the field of radioecological safety and those where radioecological safety serves as an additional object of infringement. The first category, which encompasses criminal offences directly related to radioecological safety, includes Articles 265, 265[1], 266, 267[1], 274, and 327 of the Criminal Code of Ukraine. All other relevant articles fall under the second category.[4]

When researching the law-enforcement penalisation of criminal offences in the field of radioecological safety, the subject of our review will be the activity of law-enforcement agencies and the court regarding the application of criminal law provisions that establish responsibility for committing criminal offences in the field of radioecological safety in the narrow sense. The empirical basis of this study consists of official data contained in statistical reports such as Form No. 1 of the Office of the Prosecutor General (Uniform Report on Criminal Offenses)[5] as well as Form No. 6 of the State Judicial Administration of Ukraine "Report on Persons Held to Criminal Responsibility and Types of Criminal Punishment".[6]

2002 is a logical starting point for analysing the recording of criminal offences in the field of radioecological safety, as it represents the first full year following the enactment of the Criminal Code of Ukraine,[7] which defines the system of criminal offences under study.

For a comparative analysis of law-enforcement practice indicators, the period from 2004 to 2023 has been selected, taking into account the specific features of how judicial statistics are recorded and reflected.

3 CRIMINOLOGICAL ANALYSIS OF CRIMINALITY IN THE FIELD OF RADIOECOLOGICAL SAFETY

A statistical analysis of the data from OPG Form No. 1, "Uniform Report on Criminal Offenses," indicates a low level of recorded criminal offences falling under the scope of this study. Specifically, over the 22-year period from 2002 to 2023, a cumulative total of 760 criminal offences were documented under Articles 265, 265[1], 266, 267[1], 274, and 327 of

4 Anastasiia A Ternavska, 'Doctrinal Approaches to the Systematization of Criminal Offenses in the Field of Radioecological Safety' (2024) 31(1) Bulletin of Criminological Association of Ukraine 87, doi:10.32631/vca.2024.1.06.

5 'Statistics of the Office of the Prosecutor General: Annual Reporting' (*Prosecutor General's Office of Ukraine*, 2024) <https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2> accessed 1 September 2024.

6 'Judicial Statistics: Annual Reporting' (*Judicial Power of Ukraine*, 2024) <https://court.gov.ua/inshe/sudova_statystyka/> accessed 1 September 2024.

7 Criminal Code of Ukraine no 2341-III of 5 April 2001 (amended 20 August 2024) <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 7 September 2024.

the Criminal Code of Ukraine. Using the simple arithmetic mean, the average annual value of the absolute number of registered (recorded) criminal offences in the field of radioecological safety during this period is calculated to be 35.[8]

A structural analysis provided further insights into the nature of these offences, examining them as systemic objects under criminal law. This analysis also allowed us to determine their distribution (Fig. 1).

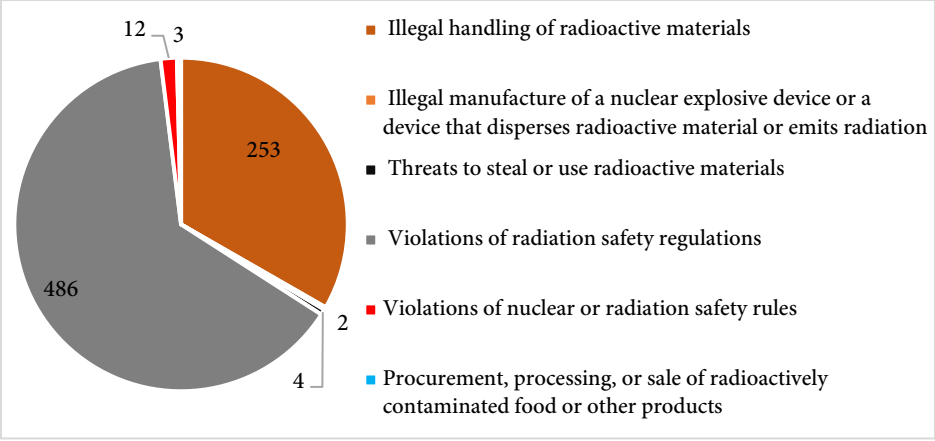

Figure 1. Structure of criminal offences in the field of radioecological safety in Ukraine during 2002-2023

As previous studies have shown,[9] the dominant types of criminal offences in the field of radioecological safety are the illegal handling of radioactive materials (Article 265 of the Criminal Code of Ukraine), which accounts for 33.3% of cases, and violations of radiation safety regulations (Article 267[1] of the Criminal Code of Ukraine) representing 63.9% of offences. Other violations are significantly less frequent, with breaches of nuclear or radiation safety rules (Article 274 of the Criminal Code of Ukraine) constituting only 1.6%; threats to steal or use radioactive materials (Article 266 of the Criminal Code of Ukraine) at 0.5%; the procurement, processing, or sale of radioactively contaminated food or other products (Article 327 of the Criminal Code of Ukraine) at 0.4%; and the illegal manufacture of a nuclear explosive device or a device that disperses radioactive material or emits radiation at 0.3%. The analysis of the dynamic indicators (Fig. 2) suggests a wave-like pattern in the number of recorded criminal offences.

8 'Statistics of the Office of the Prosecutor General (n 5).

9 Yuliya Turlova and others, 'Criminological Analysis of Crimes in the Field of Nuclear and Radiation Safety' (2024) 1 Nuclear and Radiation Safety 9, doi:10.32918/nrs.2024.1(101).01.

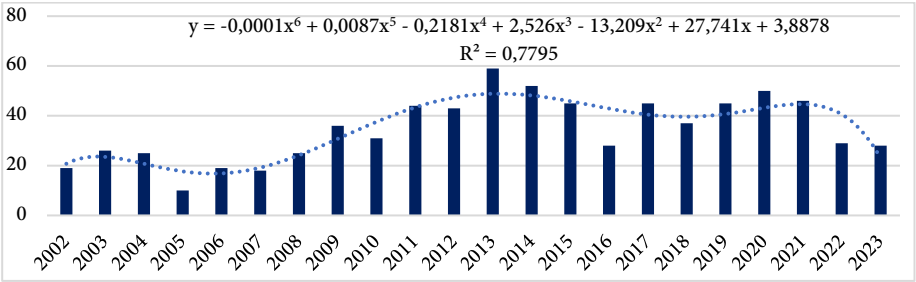

Figure 2. Dynamic in criminal offences related to radioecological safety in Ukraine from 2002 to 2023

To model the trend that describes the dynamics of the studied criminal offences, the author employed a 6th-ordered polynomial function ($y = -0{,}0001x^6 + 0{,}0087x^5 - 0{,}2181x^4 + 2{,}526x^3 - 13{,}209x^2 + 27{,}741x + 3{,}8878$). According to the constructed trend, the last period (2022–2023) shows a rapid decline in the number of recorded criminal offences: 29 in 2022 and 28 in 2023. This is due to objective factors related to armed aggression, intense hostilities, and partial dysfunction of the criminal justice system caused by its structural and functional imbalance.

4 ANALYSIS OF THE STATE OF CRIMINAL LAW-ENFORCEMENT PENALISATION OF CRIMINAL OFFENCES IN THE FIELD OF RADIOECOLOGICAL SAFETY

Attempts to assess the conformity of criminal punishment and its factual application (law-enforcement penalisation) with the conceptual tasks of combating criminality must rely on an empirical basis, particularly on a statistical analysis of law-enforcement practice.[10]

As the diagram illustrates, judicial practice in cases of this category was virtually non-existent before 2007. This changed with the criminalisation of offences such as the illegal manufacture of nuclear explosive devices or devices that disperse radioactive material or emit radiation (Article ст. 265[1] of the Criminal Code of Ukraine) and violations of radiation safety requirements (Article 267[1] of the Criminal Code of Ukraine). While the application of Article 265[1] had little impact on the situation with convictions in the field of radioecological safety (2 convicted persons or 0.4% over the analysis period), the number of persons convicted under Article 267[1] accounted for 92.2% of all total convictions. The remaining convictions were for the illegal handling of radioactive materials (Article 265) at 7.1% and threats to steal or use radioactive materials (Article 266) at 0.2%.

10 Judicial Statistics (n 6); Stanislav Mozol, Hennadii Polishchuk and Anastasiia Ternavska, 'Perspectives for the Imposition of Individual Types of Punishment in Ukraine' (2021) 9 Entrepreneurship, Management and Law 131, doi:10.32849/2663-5313/2021.9.19.

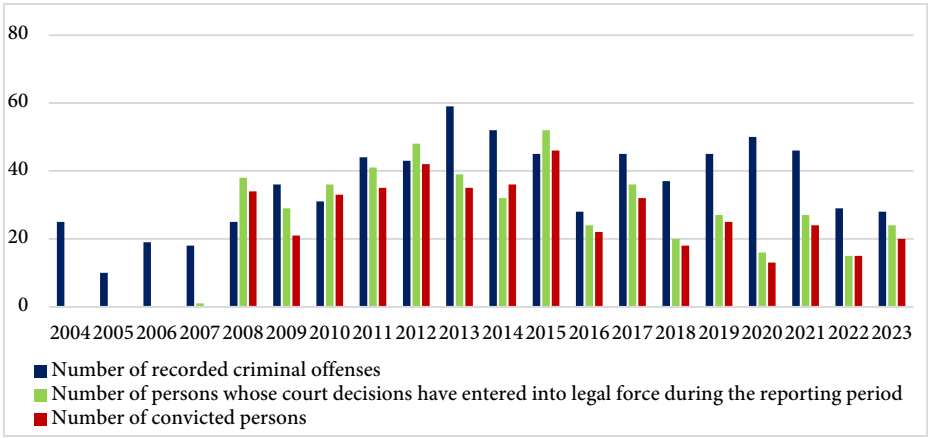

Figure 3. Correlation of indicators reflecting law-enforcement practice in the field of radioecological safety in Ukraine during 2004-2023

No convictions were recorded for violations of nuclear or radiation safety rules (Article 274) or for preparing, processing, or selling radioactively contaminated food or other products (Article 327). It should be noted that two persons were brought to criminal responsibility under Article 274, but the court closed both cases in 2007 (Part 2 of Article 274) in connection with amnesty and in 2011 (Part 1 of Article 274) on other grounds.

When considering the studied criminal offences, the ratio between the number of recorded criminal offences and the number of persons with court decisions that entered into force during the reporting period is 1.4:1, while the ratio between recorded criminal offences and convicted persons is 1.6:1. However, depending on the type of criminal offence, this ratio varies significantly. For instance, for Article 265, these indicators are 4.2:1 and 6.7:1; for Article 265[1], it is 1:1 for both. Under Article 267[1], these indicators are 1.1:1 and 1.2:1, whereas under Article 274, the ratio between the number of recorded criminal offences and the number of persons whose court decisions have entered into legal force during the reporting period is 6:1. In the case of Article 327, only one criminal offence was recorded (in 2013), but no court decisions or convictions followed.

As the calculated indicators show, the smallest gap between the number of recorded criminal offences, court decisions, and convicted persons is characteristic of violations of radiation safety requirements (Article 267[1]). This is largely due to the obvious nature of such violations and their relatively low level of social danger, which facilitates their detection and prosecution. The majority of convicted persons (52.2%) were held accountable under Part 1 of Article 267[1] of the Criminal Code of Ukraine, which criminalises unauthorised movement beyond exclusion zones or zones of unconditional (mandatory) resettlement

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without obtaining the permit provided for by law or conducting dosimetry control of food products of plant and animal origin, industrial or other products, animals, fish, plants, or any other objects. Part 3 of the same article, which applies to similar actions committed with the purpose of sale or involving the sale of such objects, accounts for 42.3% of convictions. Part 4, which targets more severe violations, such as repeated offences, actions committed by officials, or those resulting in fatalities or other grave consequences, represents 4.1% of convictions. Convictions under Part 2, which deals with the acquisition, use, or sale of objects with prior knowledge of their origin from the exclusion zone or the zone of unconditional (mandatory) resettlement, are rare, with only 0.5% of convicted persons (two individuals) being sentenced under this provision in 2012.

A typical example of a violation under Part 1 of Article 267[1] is case No. 1-кп/366/157/24, which occurred on 12 August 2023. In this case, the accused, without the permission required by law, bypassed the police checkpoints located around the perimeter of the exclusion zone, gained unauthorised access by cutting through the wire fence marking the boundary of the exclusion zone, and entered the 171-forest quarter of the Dityatkivske forestry, part of the State-Owned Specialized Enterprise "Pivnichna Pushcha". During their unauthorised access, the accused collected six kilograms of "Chanterelle" mushrooms. While attempting to leave, they were detected and detained by police officers patrolling the territory of the exclusion zone.[11]

Regarding the unlawful handling of radioactive materials under Article 265 of the Criminal Code of Ukraine, one-third (33.3%) of the total number of persons convicted of crimes in the field of radioecological safety were found guilty under this provision. Among 32 convicted of crimes under this article, only three persons were held accountable under Part 2, which pertains to committing the offence with the intent to entail the perishing of people, bodily injury, significant property damage, or substantial environmental pollution. The remaining convictions were under Parts 1 and 3. Notably, judicial decisions under Part 3 applied the aggravating circumstance of committing the offence in a prior arrangement by a group of persons. The subject matter of these offences included radioactive materials (depleted metallic uranium, caesium, strontium, radium) and devices containing sources of ionising radiation, radioactive substances, or nuclear materials, including radioisotope smoke detectors, radioisotope freeze alarms, aviation clock chronometers, emanation apparatus for saturating drinking water with radioactive radon-222 gas, and transport containers like the "Gammarid," designed for transporting sources of ionising radiation.

Proceedings regarding violations of nuclear or radiation safety rules (Article 274 of the Criminal Code of Ukraine) have demonstrated the lowest likelihood of conviction,

11 Case no 1-кп/366/157/24 (Ivankiv District Court of Kyiv Oblast, 3 April 2024) <https://reyestr.court.gov.ua/Review/118104400> accessed 20 August 2024.

attributable to the complexity of such cases. These cases typically involve specially licensed persons operating in the nuclear energy sector, where they handle radioactive materials and other ionising radiation sources. Investigating and adjudicating such cases demands that law enforcement and judicial bodies grapple with a vast array of nuclear and radiation safety laws and regulations, requiring expert input and assessments.

Criminal proceedings under Article 274 have been initiated in cases where personnel at nuclear power plant personnel were alleged to have violated safety protocols and emergency response procedures, thereby creating a risk of severe consequences. Furthermore, investigations were launched under Article 274 following railway reports of radioactively contaminated scrap metal with gamma radiation levels significantly exceeding safety standards, posing a threat to life or serious harm.[12] The complexity and potential severity of such cases make them challenging to investigate and prosecute.

5 MAIN INDICATORS OF CONVICTIONS IN THE FIELD OF RADIO-ENVIRONMENTAL SAFETY (BY TYPES OF PUNISHMENT AND CRIMINAL OFFENSES)

Considering the types of sentences imposed on the convicted, a fine was the most frequently applied punishment, constituting 60.9% of all sentences. The limitation of freedom was imposed on 8.5%, while deprivation of freedom for a determined period was applied to 7.9% of those convicted. Only one convicted person was sentenced to arrest under Part 4 of Article 267.[1]

A notable proportion of the conviction structure in the sphere of radioecological safety involves relief from punishment (22.2%). The most common form of relief from punishment was probation, applied in 88.9% of all exemptions. Amnesty accounted for 10.1% of cases, with other grounds accounting for the remaining 1.0%. Furthermore, 15 persons (3.4% of the total number of convicted) were sentenced under Article 69 of the Criminal Code of Ukraine, resulting in a less severe punishment than provided for by law.

Fig. 4 illustrates the structure of convictions by type of punishment in the field of radioecological safety in Ukraine for the period 2004-2023.

12 Turlova and others (n 9) 15.

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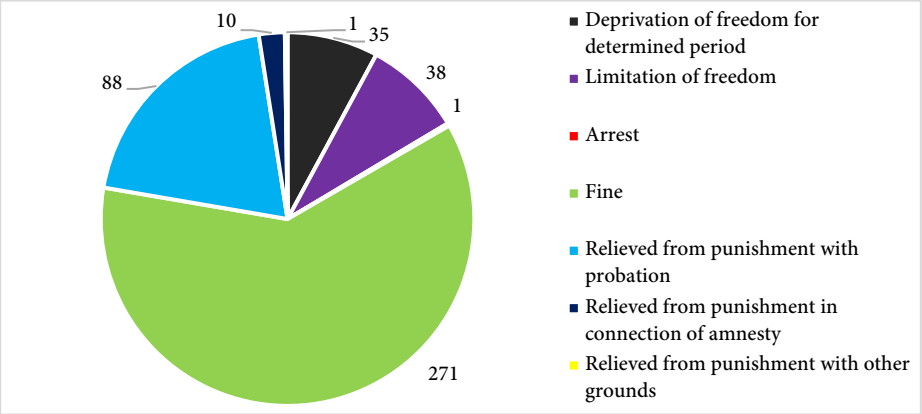

Figure 4. Structure of convictions in the field of radioecological safety for the period 2004-2023 in Ukraine

Sentencing for radioecological crimes exhibits a particular specificity. Despite a significant part of the non-alternative sanctions (due to the gravity of criminal offences)[13] which provide for only one type of punishment due to the seriousness of the offences—typically in the form of deprivation of freedom for a determined period (as specified in Articles 265, Part 2 and 3, 265[1], 266, Part 4, 267[1], Part 2, and 327 of the Criminal Code of Ukraine)—this punishment constitutes approximately half of the total number of convictions. Even under Article 265, where all three parts prescribe deprivation of freedom, it was applied in just 25% of cases, with Part 3 of Article 265 accounting for 87.5% of those sentences. The remaining cases resulted in relief from punishment with probation (46.9%) or amnesty (25.0%).

For offences under Article 267,[1] punishment in the form of limitation of freedom was exclusively imposed, with 44.7% of sentences under Part 1[1] and 55.3% under Part 3.[1]

The most common punishment for the commission of radioecological crimes is a fine, accounting for 60.9% of all sentences. The use of a fine has advantages over punitive measures involving the isolation of convicted persons from society, aligning with Ukraine's overall penal policy. Most often, fines were imposed for violations of radiation safety requirements (Part 1 of Article 267[1] of the Criminal Code of Ukraine) at a rate of 63.8%. For more qualified types of this crime, a fine was applied less frequently: Part 2 — 0.8%; Part 3 — 35.0%; Part 4 — 0.4%.

An analysis of judicial statistics allows us to conclude that the presence of alternatives to deprivation of freedom in the studied sanctions leads to the choice of alternative

13 Natalya A Orlovska, 'The Sanction of Criminal Law Norms: Fundamentals and Principles of Construction' (DPhil (Law) thesis, National University "Odesa Law Academy" 2012).

punishments (most often, a fine and limitation of liberty). However, in cases where the criminal offence is deemed by the legislator to have a higher level of social danger, and the sanction is alternative-free punishment (i.e. deprivation of liberty for a determined period), the court often opts to relieve the convicted person from punishment.

This phenomenon is not unique to sentencing in Ukraine; it is also in other categories of criminal offences. In the scientific literature, it is argued that the widespread application of provisions on relief from punishment in general and with probation, in particular, is explained by the stricter sanctions of certain articles of the Special Part of the Criminal Code of Ukraine, the lack of alternative punishments to deprivation of liberty, prison overcrowding, and excessive liberal judicial practice, which may indicate judicial corruption.[14] Despite the significant improvements in prison overcrowding, the general statement still holds some validity.

Particular attention should be paid to judicial practice regarding criminal offences in the field of radioecological safety, which objectively pose a high level of social danger. For instance, no convictions have been recorded for the illegal manufacture of nuclear explosive devices or devices that disperse radioactive material or emit radiation (Article 265[1] of the Criminal Code of Ukraine), nor for threatening to steal or use radioactive materials (Article 266 of the Criminal Code of Ukraine). Even in the few cases that reached the court, the convicted were relieved from punishment. In this case, the law-enforcement decriminalisation of these criminal offences can be stated.

Identified trends in the application of criminal-legal provisions in the field of radioecological safety, which characterise the current state of sentencing, must serve as a specific guideline for the legislator and be considered when constructing or optimising the sanctions for these offences.

The analysis of sanctions under Article 267[1] of the Criminal Code of Ukraine, "Violation of Requirements of Radiation Safety Regime", indicates that it is inexpedient to apply such punishments as limitation of freedom and deprivation of freedom to persons guilty of an unqualified form of violation of radiation safety requirements (Part 1 of Article 267[1]). Given the relatively low social danger of such offences, it would be more appropriate to include alternative sanctions like social tasks and probation, which, according to Article 51 of the Criminal Code of Ukraine, are less severe types of punishment. Probation, as a new novel of punishment, involves restrictions on the rights and freedoms of the convicted person as defined by law and the court's judgment, but it does not involve isolation from society (Article 59[1] of the Criminal Code of Ukraine). This approach mirrors the widely applied relief from serving a punishment with probation (Article 75 of the Criminal Code of Ukraine). The proposed changes would also allow such offences to be reclassified under

14 R Babanly, *Punishment in Ukraine: Theoretical and Applied Principles* (Desna Polihraf 2019) 352.

Access to Justice in Eastern Europe
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Article 12 of the Criminal Code of Ukraine as criminal misdemeanours, which corresponds with the level of social danger of such acts.

A similar situation is observed regarding the application of sanctions under Part 1 of Article 265 of the Criminal Code of Ukraine. Although deprivation of freedom is the only possible punishment for this offence according to the alternative sanction, only one person was sentenced to deprivation of freedom during the entire analysed period. The rest (seven convicts) were relieved from serving their sentence with probation, while one convict was fined under Article 69 of the Criminal Code of Ukraine. A closer examination of both judicial statistics and the circumstances of specific criminal proceedings [15] allowed the author to conclude that the social danger of offences of this category, which objectively did not cause (and could not cause) real harm to human life, health, and the environment, as provided for by the sanction of Part 1 of Article 265, does not correspond to the punishment in the form of deprivation of freedom for a term of two to five years. Therefore, as with Part 1 of Article 267[1], it is proposed that the punishment for this offence be replaced with social tasks and probation. In addition to the arguments, the choice of social tasks, rather than a fine, is further supported by the fact that the vast majority of guilty persons in this category are neither employed nor studying.

Conversely, the situation under Part 1 of Article 265[1] of the Criminal Code of Ukraine, which criminalises the illegal manufacture of nuclear explosive devices or devices that disperses radioactive material or emits radiation, is significantly different. Such actions are objectively preparatory actions for the possible use of either a nuclear explosive device or a "dirty bomb", both of which pose a high level of social danger. Therefore, given the gravity of such offences and their severe potential consequences, punishment in the form of a fine (which is formally the least severe punishment in the system of punishments) or limitation of freedom corresponds to the social danger of this crime. Thus, it is proposed to amend the sanction of Part 1 of Article 265[1] by excluding fines and limitation of freedom as possible punishments, ensuring that the sanction matches the level of social danger associated with these crimes.

15 Case no 1-кп/89/14 (Novoselytskyi District Court of Chernivtsi Oblast, 4 Jule 2014) <https://reyestr.court.gov.ua/Review/39594734> accessed 30 August 2024; Case no 314/2581/16-к (Vilnianskyi District Court of Zaporizhzhia Oblast, 5 April 2016) <https://reyestr.court.gov.ua/Review/57079581> accessed 30 August 2024; Case no 354/818/15-к (Yaremchan City Court of Ivano-Frankivsk Oblast, 2 June 2016) <https://reyestr.court.gov.ua/Review/58053539> accessed 30 August 2024; Case no 643/5448/18 (Kharkiv District Court, 20 December 2018) <https://reyestr.court.gov.ua/Review/78726450> accessed 30 August 2024; Case no 359/2700/20 (Boryspil City and District Court of Kyiv Oblast, 14 April 2020) <https://reyestr.court.gov.ua/Review/88794137> accessed 30 August 2024; Case no 462/6675/20 (Railway District Court of Lviv, 19 September 2023) <https://reyestr.court.gov.ua/Review/113574660> accessed 30 August 2024.

6 CONCLUSIONS

The article has provided a comprehensive analysis of judicial practice regarding criminal offences in the field of radioecological safety over the past 20 years, utilising official statistical reporting data. The author identified, generalised, analysed, and compared relevant absolute and relative indicators, assessing the level, structure, and dynamics of detecting such offences and providing a criminological interpretation of the findings. The effectiveness of the studied criminal law provisions was evaluated by determining the ratio of the recorded criminal offences of this category, persons whose court decisions entered into legal force during the reporting period, and convicted persons between 2004 and 2023. Additionally, the study explored the structure of convictions, categorising them by types of punishment and specific offences.

The analysis of judicial statistics revealed a tendency of courts to favour alternative punishments, such as fines and limitation of freedom when such options exist alongside deprivation of freedom in the studied sanctions. In cases where legislators deem a criminal offence to have a higher level of social danger and mandate an alternative-free sanction of deprivation of freedom, courts, in most cases, choose to relieve convicted individuals from punishment. This suggests an issue of "excessive" penalisation, particularly in the first parts of Articles 265 and 267[1] of the Criminal Code of Ukraine. To address this, it is proposed that the punishment in the form of deprivation of freedom in Part 1 of Article 267[1] of the Criminal Code of Ukraine—be replaced with social tasks and probation, which would allow reclassifying such acts as criminal misdemeanours and would correspond to the level of their social danger.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Практична нотатка

КАРАНІСТЬ У СФЕРІ РАДІОЕКОЛОГІЧНОЇ БЕЗПЕКИ: СУДОВА ПРАКТИКИ УКРАЇНИ

Анастасія Тернавська

АНОТАЦІЯ

Вступ. *Небезпечний характер протиправної діяльності у сфері радіоекологічної безпеки підкреслює нагальну необхідність попередження та стримування негативних наслідків використання ядерних та радіоактивних матеріалів, запобігання загрозі їх виникнення та протидії злочинним діям цієї категорії, зокрема через їх криміналізацію.*

Ця стаття має на меті забезпечити відповідну аналітичну підтримку такої діяльності, зосередившись, насамперед, на визначенні найбільш прийнятної системи покарання, яка відповідає характеру та ступеню суспільної небезпеки цих дій та їхніх правових наслідків.

Методи. *Для дослідження та обґрунтування фундаментальних понять, розглянутих у цій статті, було використано діалектичний метод пізнання. Для аналізу судової статистики за вказаною категорією справ та розрахунком відповідних показників задіяно статистичні методи. Для проведення контент-аналізу та узагальнення судової практики застосовано соціологічний метод. Логіко-юридичним методом розроблено та обґрунтовано способи вдосконалення досліджуваних санкцій.*

Результати та висновки. *На основі офіційних статистичних даних (Генеральної прокуратури та Державної судової адміністрації України) проведено багаторічний кримінологічний аналіз досліджуваних злочинів. Визначено абсолютні, середні та відносні величини, а також показники, що відображають співвідношення між зареєстрованими кримінальними правопорушеннями, особами, судові рішення щодо яких набрали законної сили протягом звітного періоду, та засудженими особами – як у цілому, так і за окремими видами досліджуваних злочинів.*

Визначено ключові показники судимості, зокрема судимість та структурний склад за видами покарань та кримінальними правопорушеннями. Результати дослідження виявили значний розрив між видами та розмірами покарань, передбачених санкціями досліджуваних кримінально-правових положень, та фактичною караністю.

У результаті було зроблено висновок, що частиною першою статті 265 та 267[1] Кримінального кодексу України передбачено «надмірну» відповідальність. Для побудови оптимальної моделі караності цієї категорії злочинів обґрунтовано пропозиції щодо зміни санкцій досліджуваних положень.

Ключові слова: *кримінальні правопорушення у сфері радіоекологічної безпеки, пеналізація, правозастосовна практика, статистичні дані, покарання, санкція.*

EDITORIAL NOTE

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Editorial Note

JOURNAL-AUTHOR COMMUNICATION: CONTENT ANALYSIS OF HIGH-IMPACT JOURNALS' ACCESSIBILITY

Olha Dunaievska

ABSTRACT

Background: *The paper addresses the challenges faced by authors when submitting their work to high-impact journals. It highlights the most common issues authors experience in their preparation for submission, the submission process itself, and the subsequent acceptance or rejection of papers submitted to Q1 and Q2 domestic journals. The difficulties reported by the researchers embrace the issue of rejection reasons as well as the quality of communication from journals. The latter has been addressed by analysing the way and the context in which Q1 and Q2 domestic journals communicate their requirements for submission, their decision-making processes, and the guidelines provided for preparing a manuscript prior to submission.*

Methods: *The results of the research were obtained through the application of content analysis. It presupposed the formation of the corpus of illustrative material consisting of texts disclosed on journals' websites related to the submission and decision-making processes. The criterion for analysis was the presence or absence of assessment criteria disclosed by high-impact journals (Q1, Q2) to assess their adherence to principles of "transparency" and "accessibility" for authors.*

Results and Conclusions: *The issues identified by the authors in the questionnaire were addressed by highlighting the most common issues encountered when submitting manuscripts. The guidelines for authors were explained in terms of the basic elements that embody the major criteria for assessment, namely relevance, quality, ethics and integrity. These elements were presented in a table for quick reference, which potential authors can apply before submitting their papers to their chosen high-impact journal. Moreover, a list of other potential issues was provided as an extra reference for authors. To conclude, not all the journals analysed communicated the full range of information requested by authors, so in this respect, the communication of the decision-making process is somewhat complicated and thus potentially unclear for authors.*

1 INTRODUCTION

The international fame of national science is the result of an array of factors, among them the number of national journals with high impact indexed in Scopus / Web of Science. Scopus is one of the largest abstract and citation databases covering a wide range of disciplines. Web of Science is developed by Clarivate Analytics as an expansive citation index for scholarly literature. The journals are also graded by quartiles. Quartiles of the journals are formed according to their impact factor and other metrics to provide researchers with information about the journal's current status within its field. This standing of the journal can be ranked with Quartile (Q), ranging from Quartile 1 (Q1) as the most influential to journals with Quartile 4 (Q4) as the least influential in its field. Each Quartile covers 25% of all journals indexed by the database. The most preferential among the scholars aiming to spread their research to the vastest public are the journals with Quartiles 1 and 2 (Q1 and Q2), which have obtained assessment as belonging to the category with a high level of quality and influence.

According to Open Science in Ukraine (OSU) (dated 31 July 2024), there are 183 Ukrainian journals listed as such that are indexed either in Scopus or WOS.[1]

According to the OSU database dated 2024, there are 29 domestic journals marked with Q1 and Q2 in Scopus and WOS in 2023,[2] among them are:

- 14 Ukrainian journals with only Q1 in Scopus or WOS, which make 26 % of all indexed in Scopus or WOS;
- 10 Ukrainian journals with only Q2 in Scopus or WOS, which make 18 % of all indexed in Scopus or WOS;
- 5 Ukrainian journals with Q1 and/or Q2 in both Scopus and WOS, which make up 9 % of all indexed in Scopus or WOS.

The above-listed journals are the most reputable and thus make a top choice for prospective authors. This raises an important question: Are these journals sufficiently accessible to allow the majority of prospective authors to submit their research and achieve publication? To explore this, prospective authors communicate with the journal or its editor, who acts as the journal's representative.

Upon selecting the journal, prospective authors of scientific works begin their communication with the journal by familiarising themselves with the instructions for authors. These resources come in the form of authors' guidelines, submission samples, and instructions. Such type of communication is indirect, occurring between the author and the journal's hypothetical editor through guidelines and other texts intended for prospective authors.

1 'Ukrainian Scientific Journals in Scopus and Web of Science' (*Open Science in Ukraine (OSU)*, 31 July 2024) <https://openscience.in.ua/ua-journals> accessed 30 September 2024.

2 ibid.

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Content analysis presupposes the formation of the corpus of the illustration material, namely the texts disclosed on the website of the journal in sections "Submissions," "Recommendations for Authors," and "Guidelines for Authors" in terms of the presence or absence of some basic elements like assessment criteria, policies, samples etc. These elements, as outlined by international editorial societies, are recognised as contributing to a journal's transparency. So, the content analysis of the assessment criteria and policies disclosed by high-impact (Q1 and Q2) journals aims to determine whether these journals meet the criteria of transparency and accessibility.

Are authors, as stakeholders of the publishing process, familiar with what is requested from them?

To answer the question posed, a survey was conducted[3] involving 60 participants with prior authorship experience. The questionnaire focused on monitoring authors' experience in communicating with journals indexed in Scopus та Web of Science (Q1, Q2). The findings revealed that:

1) all respondents had had experience with their submissions to the mentioned journals within the last 5 years;
2) the most common reasons for rejection were:
    - mismatching the scope: outlined by 35 % of respondents;
    - issues with methods and methodology: reported by 23 % of respondents;
3) although the majority of respondents were quite satisfied with communication with the journal, 30 % were not content with the quality of communication they experienced;
4) 30 % of respondents reported that among the reasons for the rejection of their papers, some were either different or only partially different from those stated in the requirements for submission. These respondents expressed a desire for clear, open-access information outlining the journal's requirements regarding impact/originality, text quality, methodology, literature selection, and the submission and publication process.

The survey results point to several challenges, particularly in communicating requirements related to scope, originality, impact, methodology, and other key aspects. Additionally, the communication method—such as language factors, structural difficulties, or other elements within submission guidelines—was not always clear or transparent enough for authors to fully grasp. Therefore, it can be concluded that authors, as key stakeholders in the publishing process, are not always familiar with what is requested of them.

3 The survey was conducted by the National Research Foundation of Ukraine (NRFU) as part of the competition for research and development projects "2023.03 Excellent Science in Ukraine", see: NRFU, 'Publishing Ecosystems: Series 1 (Authors Concerns): The Questionnaire' <https://docs.google.com/forms/d/12XE_5eCerTShwTlMN6bVfdpFOsd5bUHiIY1OOfzsGIw/edit#responses> accessed 30 September 2024.

In this respect, creating a publishing ecosystem is highly requested since the journals and potential authors must be familiar with each other's needs and demands. The success of a journal significantly depends on the top research it publishes, while prospective authors rely on clear and precise guidelines from the journal to ensure their submissions meet the required standards. Therefore, analysing how journals communicate their request for originality, quality, and field of research/scope is essential to ensure their accessibility is timely. Since these expectations are typically conveyed through submission guidelines, content analysis is necessary to monitor the content of these texts.

2 ACCESSIBILITY OF A JOURNAL

The accessibility of a journal lies in its ability to clearly communicate its policies to potential authors, which in turn will contribute to further publication. Successful manuscript publication depends on many factors, one of which is the manuscript assessment. The newest study by Kate Chatfield (Editor, *Research Ethics*), supported by Joao Monteiro (Chief Editor, *Nature Medicine*) and Fritz Schmuhl (Executive Publisher Springer, *Nature*), and funded by the European Union, was presented in February 2024 under the title "Guidance for Fair and Fast Desk Assessment of Submitted Manuscripts During Times of Crisis." The study offered some basic suggestions for journals to maintain transparency and thus remain accessible to authors.[4] These suggestions emphasise ensuring fairness in the assessment process through establishing transparent criteria, which are listed as follows:

- the criteria for submission assessment should be specified in the journal's guidelines for submission;
- the description of the editorial decision-making process is recommended to be included in the journal's guidelines for submission
- authors should be informed about the reasons for the rejection, referring to the assessment criteria outlined in the guidelines for submission.[5]

The availability of clearly defined submission criteria is a fundamental requirement for a fair journal policy and the transparency of its activities, ensuring submissions are assessed without bias. Moreover, such criteria can enable authors to understand what is requested and highly appreciated by the journal, thus aiding them in avoiding rejection due to issues of relevance, quality, ethics and integrity.

4 Kate Chatfield, João Monteiro and Fritz Schmuhl, *Guidance for Fair and Fast Desk Assessment of submitted Manuscripts During Times of Crisis: A Report for PREPARED* (EU 2024) <https://prepared-project.eu/fast-track-guidance/> accessed 30 September 2024.

5 ibid 7.

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

Table 1. Presence and content of authors' guidelines

Guidelines for Submission (GFS)		Process of decision making		Criteria for submission assessment	
Provided in GFS	100 % in Q1J* 100 % in Q2J**	Included In GFS	50 % in Q1J 30 % in Q2J	Specified in GFS	100 % in Q1J 100 % in Q2J
Not provided in GFS	0 % in Q1J 0 % in Q2J	Not included GFS	50 % in Q1J 70 % in Q2J	Not specified in GFS	0 % in Q1J 0 % in Q2J
		Not disclosed	20 % in Q1J 35 % in Q2J	Not disclosed	0 % in Q1J 0 % in Q2J

** Quartile 1 Journal*

*** Quartile 2 Journal*

The analysis of 28 domestic Q1 and Q2 journals offered by the platform OSU[6] (see Table 1) outlines that all the above-stated journals communicate the guidelines for authors, submission demands, and assessment criteria. Of these, 50% of Q1 and 30 % of Q2 journals communicate their decision-making process.

3 BASIC ELEMENTS OF SUBMISSION'S ASSESSMENT CRITERIA

The Committee on Publication Ethics (COPE) outlines the necessity of transparency, educating researchers about publication policies, and publishing clear instructions in journals regarding submission expectations as top priorities for good editorial practice.[7] To address the demand for transparency, journals are encouraged to disclose their submission assessment criteria to prospective authors.[8]

Submission assessment is the vital and decisive point in determining the status of the paper. It is a complicated process and requires the involvement of a set of indicators to

6 Ukrainian Scientific Journals (n 1).

7 In 2017, COPE reviewed the Code of Conduct and Best Practice Guidelines for Editors and consolidated them into one, much shorter, document entitled 'Core Practices', see: COPE, 'Core Practices' (*Committee on Publication Ethics*, 2017) <https://publicationethics.org/core-practices> accessed 30 September 2024.

8 Chatfield, Monteiro and Schmuhl (n 4) 6.

correspond on the part of an author[9] and the criteria for submission assessment on the part of the journal (COPE, EASE). The latter function as threshold criteria embracing relevance, quality, ethics and integrity. Each of the criteria is further split into several indications to be evaluated.

Criterium of *relevance* embraces:

- assessment for scope (whether the manuscript lies within the scope and the aims of the journal);
- checking for the presence of up-to-date priorities (whether the manuscript corresponds to the current priorities of the journal);
- understanding the novelty /originality (whether the contribution of the manuscript is novel to the field);
- assessment of the quality context (whether the context of the manuscript is devised from the contemporary database).[10]

Clearly stating the journal's scope and aims allows journal managers and potential authors to quickly master the relevance factor of a paper, whether already published or offered for publication and ensures prospective authors submit pertinent manuscripts.[11] The priorities oriented toward the agenda and novelty of the research attract potential readers, bring new citations, and promote the journal's popularity. Consistent context driven by contemporary databases ensures the research's quality.

Criterium of *quality* includes:

- assessment of adhering to writing standards (appropriate academic style and required formatting);
- assessment of the quality of analysis (its depth and support by the arguments);
- assessment of methodology consistency (whether the methods for data collection are appropriate for the research aims);
- assessment of aims stated (whether the aim/hypothesis/research question is distinctly formulated).

Clearly defining "quality" in a journal's submission requirements enables potential authors to understand what falls into the category of "low" or "insufficient quality." This clarity allows the quality assessment to be transparent and allows prospective authors to evaluate the risk of rejection based on insufficient quality. Adversely, it provides authors preparing

9 Please, refer to: Sylwia Ufnalska and Alison Terry, *EASE Quick Check Table for Submission* (EASE Publ 2023) <https://ease.org.uk/publications/ease-statements-resources/quick-check-table-for-submissions> accessed 30 September 2024; European Association of Science Editors, 'EASE Guidelines for Authors and Translators of Scientific Articles to be Published in English' (2018) 44(4) European Science Editing e1, doi:10.20316/ESE.2018.44.e1 <https://ease.org.uk/publications/author-guidelines-authors-and-translators/> accessed 30 September 2024.

10 Chatfield, Monteiro and Schmuhl (n 4) 9.

11 *Open Access Journal Toolkit* <https://www.oajournals-toolkit.org/> accessed 30 September 2024.

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

for submission the opportunity to prepare thoroughly, using a checklist that includes elements such as academic writing style, sound analysis and argumentation, sound methodology, and clearly stated aims. Additionally, this proactive approach benefits both authors and journal managers by reducing the likelihood of low-quality submissions and, consequently, the workload associated with processing them.

Criterium of *ethics and integrity* includes:

- Availability of ethics approval evidence (where relevant);
- Compliance with research ethics (where relevant);
- Statement of conflict of interests (whether information on funding of the study and related issues are disclosed);
- Proper researcher conduct, with no evidence of misconduct such as data fabrication, falsification, plagiarism, citation manipulation, excessive self-citation, or suspicious submission patterns, such as third-party submission. Check for the presence of AI-generated fragments of the text.

4 JOURNAL'S COMMUNICATION OF THEIR ASSESSMENT CRITERIA, DECISION-MAKING PROCESS AND TOOLS APPLIED

Guidelines for authors in Journals under analysis are split into several sections:

⇒ *Journal's communication of assessment criteria*
⇒ *Journal's communication of editorial decision-making process*
⇒ *Journal's communication tools applied: guidelines, templates, instructions*
⇒ *Journal's communication of editorial decision-making process*

Each of the sections is communicated by journals differently (Table 2).

Table 2. Communication of journals' policies

Relevance criterium	stated by 80 % of Q1J and 78 % of Q2J
	not stated by 0 % of Q1J and 0% of Q2J
	partially stated 20% of Q1J and 22 % of Q2J
Quality criterium	explained by 100 % of Q1J and 100 % of Q2J
	not explained 0 % of Q1J and 0 % of Q2J
	partially explained 0 % of Q1J and 0 % of Q2J
Ethics and Integrity Criterium	explained by 100 % of Q1J and 100 % of Q2J
	not explained by 0 % of Q1J and 0 % of Q2J
	partially explained by 0 % of Q1J and 0% of Q2J

Editorial making process is disclosed in guidelines for authors by:	Editorial making process is *not* disclosed in guidelines for authors by:
50 % of Q1J	50 % of Q1J
30 % of Q2J	70 % of Q2J

To make the process of applying for submission assessment criteria more accessible and understandable for authors, it is recommended that some basic items be included in a brief self-assessment process. Therefore, the table below has been devised to assist potential authors in conducting a preliminary assessment of their paper.

Table 3. Quick Check of Instruments for the Decision-Making Process

Relevance	Does the manuscript lie within the scope and aims of the journal?
	Does the manuscript correspond to the up-to-date priorities of the journal?
	What novelty does the research bring to the field?
	Is the quality of the content derived from contemporary databases?
Quality	Are the norms and format of academic style followed?
	Is the analysis presented characterised by its depth? Is the analysis well supported by arguments?
	Is the aim/hypothesis/research question clearly formulated?
Ethics and Integrity	Is there any suspicion of non-compliance with research ethics?
	Are the authors, when working in collaboration between high-income and low-income, aware of the TRUST Code?
	Is there any issue regarding an undisclosed conflict of interest?
	Is there suspicion of available funding?
	Is there any sign of misconduct?
	Are there any authorship problems spotted?
	Is the original author submitting the paper?
	Is there any evidence that the submission is redundant or duplicates another one published previously?
	Is there any suspicion of the presence of fragments of AI-generated text? Is there a declaration of not using AI tools in the submitted research?

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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The table was designed to enhance the transparency and accessibility of the submission assessment process and facilitate more transparent author-journal communication.

Additionally, it enables prospective authors to review their submissions against international criteria for submissions, ensuring the absence of common issues such as:

- Non-compliance with the journal's scope;[12]
- Suspected ethical problems in the submitted manuscript;[13]
- Authors working in international collaborations;[14]
- Issues with conflict of interests;[15]
- Authorship disputes;[16]
- Manipulation involving third-party authorship;[17]
- Issues of redundancy and duplication.[18]

5 CONCLUSIONS

Author-journal communication begins when a potential author familiarises themselves with the journal, namely its specificity and grounds for publication, and continues until either the manuscript is published or rejected (unless the author does not appeal the editorial decision). This communication is implied due to the fact that the potential author communicates with the editor of the journal through the materials placed on the journal's website; its quality plays an important role in engaging perspective research to the journal. Such type of communication is not always effective. Among the problems authors face while submitting to a high-impact journal are those that cover the requirements of the journal's scope, originality, impact, and methodology. Therefore, an analysis of journal websites to evaluate the presence and availability of these requirements is essential.

12 COPE, 'Flowcharts and Infographics' (*Committee on Publication Ethics*, 2024) <https://publicationethics.org/guidance/Flowcharts> accessed 30 September 2024.

13 COPE, 'Suspected Ethical Problem in a Submitted Manuscript' (*Committee on Publication Ethics*, 4 January 2022) <https://doi.org/10.24318/cope.2019.2.19> accessed 30 September 2024.

14 *The TRUST Code: A Global Code of Conduct for Equitable Research Partnerships* (TRUST 2018) <https://www.globalcodeofconduct.org/> accessed 30 September 2024.

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Additionally, it has been further established that the inclusion of such elements is a significant indicator of high-impact journals, which must adhere to the criteria of transparency and availability for prospective authors. The quality of a journal also depends on effectively communicating the requirements for submission as well as their content, namely a clear description of evaluation criteria, the submission assessment procedure and the editorial decision-making process.

Content analysis of high-impact journals revealed that all journals under analysis communicate the requirements for submission in authors' guidelines, with a strong emphasis on the requirements for originality. However, it has been established that not all journals communicate their editorial-making process or evaluation of submissions. Therefore, a quick-check table for authors to self-assess their submissions, together with a list of references to educational material, has been provided to help resolve potential challenges that mostly arise during the submission and publication processes.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

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КОМУНІКАЦІЯ "ЖУРНАЛ – АВТОР": КОНТЕНТ-АНАЛІЗ ДОСТУПНОСТІ ЖУРНАЛІВ ІЗ ВИСОКИМ ІМПАКТ-ФАКТОРОМ

Ольга Дунаєвська

АНОТАЦІЯ

Вступ. *У статті розглядаються проблеми, з якими стикаються автори, коли звертаються з поданнями до журналів із високим ступенем впливу. Дослідження висвітлює найпоширеніші проблеми, з якими автори стикалися під час підготовки до подання, самої подачі та подальшого прийняття чи відхилення їхніх робіт (поданих у вітчизняні журнали Q1, Q2). Труднощі, про які повідомляють дослідники, стосуються причин відмови, а також якості спілкування. Останнє було розглянуто шляхом аналізу способу та контексту, у якому вітчизняні журнали Q1 та Q2 повідомляють про свої вимоги до процесів подання та прийняття рішень, а також шляхом виявлення вимог до елементів, які потрібно переглянути перед поданням статті до журналу.*

Методи. *Результати дослідження отримано шляхом застосування контент-аналізу. Це передбачало формування корпусу ілюстративного матеріалу з текстів, оприлюднених на сайтах журналів, що стосуються процесів подання та прийняття рішень. Показником, який слід було визначити під час аналізу, була наявність чи відсутність критеріїв оцінки, які оприлюднюють журнали з високим впливом (Q1, Q2), щоб оцінити відповідність журналів принципам «прозорості» та «доступності» для їх авторів.*

Результати та висновки. *Проблеми, зазначені авторами в анкеті, були вирішені шляхом розгляду найбільш вразливих питань під час подання їхніх рукописів. Інструкції для авторів були роз'яснені з точки зору того, що містять основні елементи, які втілюють основні критерії для оцінювання, а саме: відповідність, якість, етика та чесність. Вони були пояснені та запропоновані в таблиці для швидкої перевірки, яку потенційний автор може застосувати перед тим, як подати свою статтю до вибраного журналу з високим ступенем впливу. Крім того, перелік інших потенційних проблем, які можуть виникнути, був зроблений як додаткова довідкова примітка автора. Підсумовуючи, не всі проаналізовані журнали повідомляли повний спектр інформації, яку запитували автори, тому внаслідок цього процедура прийняття рішень є дещо складною для авторів і, отже, є потенційно незрозумілою.*

Ключові слова: *доступність журналу, журнали з великим впливом, комунікація журналу, подання статті, процес прийняття рішень.*

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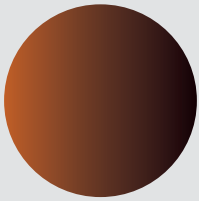

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