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Editor-in-Chief's Note

ABOUT ISSUE 1 OF 2022

This is the first issue of Access to Justice in Eastern Europe in 2022 and I am delighted to present our authors' contributions. This year is marked with a few very important events – we are going to celebrate 25 years since the ratification of the European Convention on Human Rights in 1997 and 10 years since the adoption of the Criminal Code of Ukraine. Special issues are an essential part of academic publishing, and in honour of these years we prepared a few very important and interesting collections joined by a single topic. These were issues related to 1) justice during the Covid-19 Pandemic[1], 2) justice in Ukraine during the period of independence[2], 3) on the Occasion of the 70th Anniversary of the European Convention on Human Rights[3], 4) the special edition related to the development of Alternative Dispute Resolution development in Europe[4]. I am delighted to note the attention of readers to these issues and that the published results are widely discussed and used by academics. We are continuing to follow this tradition, and the AJEE special issue for this year will be announced soon.

The research articles section opens with the article related to a very important practical issue in procedural law and the theory of law – the division of cases into easy ones and hard ones. It seems that the digitalisation of justice may significantly impact this division because of the courts' decision-making processes in such cases. In this essay, the author examines whether the solutions proposed by legal positivism (such as applying syllogisms and precedents) are sufficient to deal with easy cases and what factors analysed by legal realists have an impact on judges when making decisions in hard cases. I am delighted to note that the study takes a broad approach, considering psychological factors, such as hindsight bias, intuition, hunches, the anchor effect, laziness, unwillingness to take responsibility, or the gambler's fallacy, as well as social factors, like upbringing, life experience, social relations, gender, age, education, etc. I would support the author's conclusions that 'easy cases should eventually be delegated to artificial intelligence to resolve, whereas hard cases will remain in the competence of human judges, at least until technological development reaches a certain level' and admit that this is currently happening around us. Human beings continue to manage the 'hard' cases in all areas, while the 'easiest' are moved to digital tools, and this is spreading rapidly. Learn more about this topic and why and how these changes occur in the article of a young and promising researcher from Vilnius University, ***Goda Strikaitė-Latušinskaja***.

1 I Izarova *About Special Double Issue 2-3/2020 "Justice under the Covid-19 Pandemic"* 2020 2/3(7) Access to Justice in Eastern Europe 74-77.

2 I Izarova *About Issue 3 of 2021 and the Evolution of Justice in Ukraine During the Period of Independence* 2021 3(11) Access to Justice in Eastern Europe 5–7.

3 I Izarova, S Kravtsov 'About the Special Issue on the Occasion of the 70th Anniversary of the European Convention on Human Rights' 2021 1(9) Access to Justice in Eastern Europe 5–7.

4 I Izarova *About Special Issue in Access to Justice in Eastern Europe*, 2019, Issue 3 (4), Pp. 4.

A fresh and interesting perspective on derivative lawsuits and the right to file such a lawsuit was included in this issue. The regulation of derivative lawsuits differs in each jurisdiction, despite sharing common features, raising a variety of issues to be resolved. The author points out several issues and their possible solutions, which could be implemented in Ukrainian legislation. It is a great pleasure for me to highlight that the author ***Heorhii Smirnov*** is a postgraduate Student of our Law School at Taras Shevchenko National University of Kyiv.

An excellent study related to land rights disputes and the effective protection of rights was prepared by ***Oleh Ilnytslyi*** and ***Ivan Boychenyk***. The choice of an effective and appropriate method of protection is one of the most important stages of legal proceedings because it determines the achievement of the proceedings' goal. Procedural legislation and the practice of its application to unresolved issues have limited methods of protection in cases of the rights and interests of persons to land by courts of different jurisdictions and limited possibilities for cross-application. I highly recommend reading this article to discover more about how procedural legislation and the practice of its application to unresolved issues have limited methods of protection in cases of the rights and interests of persons to land by courts of different jurisdictions and the possibility of their cross-application in Ukraine.

I also particularly want to draw the attention of our readers to the very interesting and inspiring note prepared by ***Dobrosława Szumiło-Kulczycka*** from Jagiellonian University as part of the 'Costs of a Criminal Trial in View of an Economic Analysis of Law' project. In her article, ***prof. Szumiło-Kulczycka*** points out three fundamental factors determining the amount of the expenses, i.e., the fact of the accused being imprisoned during the proceedings, the use of scientific evidence (opinions produced by expert witnesses), and the participation of a public defender remunerated by the State Treasury.

Joanna Bodio's review on the book '*Implementation of the principle of the best interests of the child in mediation in matters concerning the exercise of parental authority and contacts*', edited by **Joanna Mucha**, appears in our issue as well.

This monograph was prepared with the wide participation of colleagues from European states and focused on a very important goal – the thesis that in court proceedings in matters relating to a child and mediation in matters concerning the exercise of parental rights and contact with a child, the primary value to be protected should be the best interests of the child.

I would like to thank both of my colleagues – the reviewer and the editor of this excellent book – and sincerely hope that we will continue this promising and important research.

A few notes have also been included in this issue due to their interesting insights and importance for further research.

Finally, let me share our latest announcement.

At AJEE, we made **Online First Articles** so that we could publish articles online as soon as they are reviewed, accepted, edited, and corrected. In some cases, authors face publishing delays, even though their work is complete. **Online First Articles** helps to address this problem by making articles available as soon as they are ready.

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RESEARCH ARTICLE

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Research Article

CAN WE MAKE ALL LEGAL NORMS INTO LEGAL SYLLOGISMS AND WHY IS THAT IMPORTANT IN TIMES OF ARTIFICIAL INTELLIGENCE?

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ABSTRACT

Background: *The term 'hard cases' trace back to Herbert Lionel Adolphus Hart who was one of the first legal philosophers who directly used it in his works and Ronald Myles Dworkin to whom the development and establishment of this concept in legal language is linked. Even though these two legal philosophers in one of the most famous - The Hart–Dworkin – legal debate couldn't agree on certain things, they both agreed that when dealing with hard cases, there is a need to act*

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creatively in order to resolve such a case properly. The division of cases into easy ones and hard ones gradually lost its popularity, even in legal theory, but perhaps it can be resurrected and used these challenging times to help meet the challenges prompted by technology?

Methods: This paper analyses the dichotomy of hard and easy cases as well as circumstances relating to the courts' decision-making processes in such cases. The essay examines whether the solutions proposed by legal positivism (such as applying syllogisms and precedents) are sufficient to deal with easy cases. The paper also examines what factors analysed by legal realists have an impact on judges while making decisions in hard cases (for example, psychological factors, such as hindsight bias, intuition, hunches, the anchor effect, laziness, unwillingness to take responsibility, or the gambler's fallacy, as well as social factors, like upbringing, life experience, social relations, gender, age, education, etc.). Given that the article is theoretical in nature, logical, systemic, teleological methods dominate. Both descriptive method and scientific research method were used as well.

Results and Conclusions: The author concludes that easy cases should eventually be delegated to artificial intelligence to resolve, whereas hard cases will remain in the competence of human judges, at least until technological development reaches a certain level.

1 INTRODUCTION

The uncertainty regarding how judges make decisions raises doubts about compliance with both the principle of legitimate expectations and the principle of legal certainty and contributes to the lack of trust in the judiciary in general. The analysis of court decisions is important not only for private interests (parties of the proceedings) but for the public interest as well, since court decisions that shape case law are also important to society. Moreover, the analysis of what lies behind the discretion of judges and for which types of cases certain decision-making methods are most appropriate and effective is useful not only for the parties in a court case and society but also for the judges and courts themselves.

In 2019, France became the first country in the world to criminalise research on individual judges and predictions of their future decisions.[2] These violations are currently punishable by up to five years in prison. Naturally, the question arises, why should the activities of judges not be analysed? This paper invites us, in R. A. Posner's words, to focus on helping judges cope with complexity because, *inter alia*, they need instruction in the cognitive abilities and psychological characteristics of judges, jurors, and witnesses, as well as instruction in avoiding fallacies in reasoning.[3] The analysis of the decision-making process is considered to be beneficial for the courts, individual judges, and the public.

The administration of justice is the prerogative of the courts, implemented when the courts make decisions that are subject to requirements of legality and reasonableness. The proper exercise of this exclusive competence directly correlates with greater trust in the courts. Increasing public confidence in the judiciary system is a constant goal of all courts worldwide. The absence of a single common formula for judicial decisions poses a risk of mistrust in the courts and directly correlates with the principle of legal certainty. Accordingly, this analysis of a judge's decision-making is likely to provide some legal certainty and thus promote greater trust in the judiciary.

Art. 109 of the Constitution of the Republic of Lithuania enshrines that: 'When considering

2 Art. 33 of the Law on 2018-2022 programming and reform for justice of France.

3 RA Posner, Reflections on Judging (Harvard University Press 2013) 346.

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cases, judges shall obey only the law'.[4] The positivistic approach to decision-making embedded *expressis verbis* raises the question of whether this decision-making approach is still sufficient in modern times.

2 DIVIDING CASES INTO HARD ONES AND EASY ONES

Before analysing the dichotomy of hard and easy cases, it should be noted that there are no uniform definitions of these concepts in legal doctrine. The theory of hard cases has been proposed by representatives of legal positivism – H. L. A. Hart's 'The Concept of Law' describes hard cases as situations where rational and informed lawyers may disagree on which of the answers is legally correct. According to him, in such cases, the law itself is fundamentally incomplete – it simply does not provide an answer to the questions raised in such cases. As H. L. A. Hart claims, different principles supporting competing analogies may arise in each hard case; therefore, a judge will often have to choose between them, relying, like a conscientious legislator, on his or her sense of what is best and not on any pre-established order of priorities prescribed by law.[5] R. Dworkin, a representative of a unified theory of law, categorically opposed these ideas and argued that those are the cases where the result is not clearly dictated by statute or precedent, but the judge's duty, even in hard cases, remains the same: to reveal the rights of the parties rather than to retrospectively create new ones. According to Hart, the structure of law is complete – it is an all-encompassing empire of law – so every legal question has right and wrong answers, answers in accordance with the law and contrary to the law. The judge must discover the law, not create it.[6] Without going into the discourse of whether judges in hard cases create law or interpret it, the opposite views outlined above show something in common regarding this chapter: hard cases cause uncertainty about to what approach to choose – which legal norm or which method of interpreting a certain norm. Thus, cases in which alternatives arise from which the judge must choose are deemed to be hard cases.

This definition of hard cases is quite abstract and requires a little more detailed investigation. The word *hard* is defined as difficult to understand or solve.[7] Linguistically speaking, the cases that require a great deal of effort from a judge to resolve them correctly are indeed hard. In fact, another definition of the word hard is simply the opposite of the word easy. This is how the concept of hard cases will be explored further – as an opposite to easy ones. As mentioned before, there are different approaches to the concept of easy cases. Both the initiative of the Estonian Ministry of Justice to create a 'robotic judge' to solve disputes on petty cases amounting to less than €7000 and the initiative to reform the judiciary system in England and Wales to enable new technological solutions to decide cases under £25,000 online show that in some countries, cases are divided into easy and hard ones based on the amount of a claim. Naturally, the question arises as to whether such a correlation between the amount of the claim and the complexity of a case is justified. After all, there are many cases where the financial expression of a dispute related to morality or religion is relatively small, but its value and significance for the law and thus, the complexity, are enormous. A claim to recover damages in the amount of several thousand euros, but arising from, for example, a failure to satisfy the conditions of an agreement of purchase and sale, could be resolved in a very simple manner, even though the amount of the dispute would be relatively high. Consequently, the division of cases into hard and easy based on the amount of a dispute, as

4 Constitution of the Republic of Lithuania, 1992.

5 HLA Hart, The Concept of Law (3rd edn, Clarendon Press 1994) 275.

6 R Dworkin, Law's empire (Belknap Press 1986); R Dworkin, Taking Rights Seriously (Bloomsbury Publishing Plc 2013).

7 A Stevenson, Oxford dictionary of English (Oxford University Press 2010) 799.

well as, for example, based on the scope or a number of parties or charges, are relative and do not reflect the real complexity of the case.

It seems most appropriate to understand easy cases as ones where there are only primitive, uncomplicated legal questions to which the answer is obvious, and such a case can be resolved by applying the relevant legal norm. This approach is supported by professor V. Mikelėnas – if the applicable legal norm is completely clear both from the linguistic and other points of view, there is no need to interpret it. In easy cases, the judge may resolve a case without interpreting the law. Easy cases are those in which judgments are easily reasoned and made – they are made almost without thinking.[8] In principle, in an easy case, the judge does not have to decide which of several possible options to choose, and legal reasoning becomes essentially unnecessary, as no one questions why that particular legal norm is applicable, and the case is resolved in that way. To conclude, simplicity, obviousness, and comprehensibility of the arguments of the adopted judgment are the features by which an easy case should be defined. According to R. A. Posner, such cases are easy to decide by virtue of being controlled by existing law.[9] Therefore, hard cases are fundamentally different from easy cases since easy cases are clearly governed by existing law, and the right decision is obvious, whereas in hard cases, other factors must be used to make the right decision. Hard cases are special, non-traditional, atypical, exceptional cases where there is a lack of legal regulation or improper enshrining of legal norms. Thus, in hard cases, it is not enough for judges to rely on a legal norm (as in easy cases), considering that there is no appropriate legal norm, or its application would be manifestly incorrect. In such cases, judges seek a solution, for example, while trying to determine the legislative intent of the legislature or with the help of principles of law.

After discussing the common features of both hard and easy cases, it is important to analyse the importance of this division. First of all, the decisions in hard cases must be fairly and convincingly reasoned by judges. The judge must, in a sense, convince others why he or she has chosen a certain way to resolve the case (as mentioned, in hard cases, there is no single, clear solution), whereas the legal norms applicable in easy cases are clear, so there is no need for a judge to interpret them. In these cases, over-argumentation could even have a negative effect –the judge could risk saying too much about a certain established practice or the meaning of a legal norm. Secondly, the role of the judge in the decision-making also depends on where the particular case will be assigned. In easy cases that can be resolved by deduction, a detailed legal analysis would be redundant and would not be in line with the principle of legal effectiveness. In difficult cases, on the contrary, judges must put a lot of effort into finding the right solution. In this essay, the division of cases into hard and easy is particularly important, as the aim will be to show that the methods of resolving cases proposed by legal positivism are only suitable for easy cases, while in hard cases, judges are often influenced by factors identified by legal realism.

3 THE WAYS OF RESOLVING CASES PROPOSED BY LEGAL POSITIVISM

A judge in a democratic mechanism does not have the right to be Shakespeare.[10]

A. Comte's positivist philosophy, which laid the foundations for the doctrine of legal positivism, sought to formulate new, clear, and precise principles of the social world,

8 D Mikelėnienė, V Mikelėnas, Teismo procesas: teisės aiškinimo ir taikymo aspektai (Justitia 1999) 21.

9 RA Posner, The Problems of Jurisprudence (Harvard University Press 1990) 161.

10 T Berkmanas, 'Ar lingvistinis neapibrėžtumas užkerta kelią teisės viešpatavimo (rule of law) įsigalėjimui?' (2002) 1 (1) International Journal of Baltic Law 52.

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analogous to the laws of nature. As a result, the representatives of legal positivism sought to purify the law, separate it from values, and objectify it. In a much-simplified version of legal positivism, a judge's activity in interpreting the law and making decisions is considered an almost mechanical process in which the court's decision cannot be based on illegal arguments, political or social values, or the judge's opinion. The law perceived by the paradigm of legal positivism is a clear system of instructions of the legislator in which a rational, logically reasoned answer to practically any question of law can be found. Thus, there is no need for the judge to find a way to resolve the case on the basis of subjective non-judicial criteria – the decision of the case for the positivist judge is dictated by the duty to find that single logical, obvious, and ultimately predictable solution.

The spirit of legal positivism is perfectly reflected in the provision entrenched in para. 3 of Art. 109 of the Constitution of the Republic of Lithuania, which states that when considering cases, judges shall obey only the law.[11] It is in the law that the judge finds the right answer – by applying the pre-existing law. Legal positivism recognises these ways of resolving cases as deduction and adherence to the principle of *stare decisis*, which is the essence of court precedent. Firstly, both methods of resolving cases ensure the principle of legal certainty – they are predictable. Secondly, both methods also find answers in law, which means that decisions are based exclusively on legal norms.

It is worth analysing the criticism of the ways of resolving cases suggested by legal positivism. Some claim that the correct answer cannot be found by following the rules of formal, ambiguous logic alone. In each case, the answer is found only after a value decision has been made, that is, by applying certain evaluation criteria: fairness, reasonableness, equality, and other general principles of law. However, these values and principles are not sufficiently defined and clear, so their content and application to specific life situations also must be interpreted.[12] The question arises as to whether it is really effective to insist on a value decision in a legal dispute that can be resolved with the help of a simple legal syllogism. Is it really necessary to apply the principles of justice, reasonableness, fairness, equality, and other general principles of law in each and every case? Given the axiom that justice delayed is justice denied, the essence of both the principles of efficiency and effectiveness, and the constant problem of judicial backlog, it can be argued that not all cases require a thorough legal assessment – the fabula of some cases can be fitted into a mathematical formula and solved much more efficiently with the help of formal logic. Criticising the analysed approach to the activities of a judge, R. A. Posner points out that in this way, the law is treated as a set of data having no chronological dimension and the principles themselves as timeless, like the propositions of Euclidean geometry. In this way, law is separated from life because a formal system, such as geometry, is a system of the relationship between ideas and not the relationship between ideas and physical reality.[13] Nevertheless, assessing such a criticism within the limits of pure legal positivism, it should be noted that a positivist judge does not create law – on the contrary, he interprets the law created by the legislator. The principle of the separation of powers is particularly prevalent in democratic countries; hence it is the legislator that must deal with the discrepancy between the rules in force and real life, not the judges. The courts must respect the will of the legislator, presume that the legislator is rational and prudent, seek to identify its real objectives, and see whether the content deriving from the legal text is in line with those objectives and intentions. In summary, there should be a presumption that legal norms are relevant, and the correlation between the law and the actual legal relationship in easy cases must be followed and steered in the right direction by the legislator.

11 Constitution of the Republic of Lithuania, 1992.

12 D Mikelėnienė, V Mikelėnas, *Teismo procesas: teisės aiškinimo ir taikymo aspektai* (Justitia 1999) 140.

13 RA Posner, *The Problems of Jurisprudence* (Harvard University Press 1990) 16.

It is claimed that the approach of legal formalism (the model of extreme legal positivism) does not assess the difference between hard and easy cases but treats all cases as if they were easy. Accordingly, a judge's activity is limited in the field of interpretation of the law, without recognising their choice or creative contribution in determining the meaning of the legal norm.[14] However, perhaps on the basis of this reason alone, the benefits of legal positivism in resolving court cases in general should not be underestimated. After all, the fact that the methods of resolving cases promoted by legal positivism are not sufficient for some cases does not *per se* presuppose the fact that these methods are completely unusable. After identifying the main features of easy cases, the rest of this chapter will seek to demonstrate that the methods of resolving cases proposed by legal positivism are not only sufficient but should also be deemed a priority – they should be considered the first option in easy cases.

3.1 SYLLOGISMS AS A WAY TO RESOLVE CASES

According to N. MacCormick, an easy case is one in which there is no dispute as to the relevant facts or the applicable law and where the decision can, in principle, be justified by deduction.[15] Syllogism, as one of the oldest and most popular kinds of logical argument that apply deductive reasoning, can be understood as a scheme consisting of a legal norm (the major premise), the factual circumstances of the case (the minor premise), and a deducted conclusion. For example, on the basis of syllogism, (certain) administrative offences (for example, speeding more than 10 km / h but not more than 20 km / h) may be subject to half the minimum penalty provided for in the relevant article (the major premise). Person X has committed an administrative offence referred to in the major premise (the minor premise); consequently, person X will be subject to half of the statutory minimum fine for the violation. This example was chosen to show that by putting the routine and mechanical process of compiling an administrative order into a legal syllogism – starting with 1 January 2019 – certain amendments that introduced the automation of administration order without any human intervention came into force in Lithuania.[16]

When considering the application of syllogisms in the decision-making of judges, it should be emphasised that, in principle, when a judge is making decisions, a connection is established between the legal norms and the facts, which determines a certain conclusion. It is a mechanical, logical sequence of actions when moving from assumptions to conclusions. As J. Gumbis fairly points out, when a judge's decision is based solely on the applicable law, it is not the decision of an individual. It is a decision of the state that acts through that person – it is the exercise of power.[17] This model, also known in academic literature as the doctrine of mechanical justice, is based on the so-called static doctrine of legal interpretation, according to which a judge must always follow only the letter of the law and cannot interpret law *praeter legem* or *contra legem*. Consequently, a judge, even if he or she sees that the application of a certain legal norm may lead to a violation of legal principles (for example, proportionality, equality), he or she must apply such a norm anyway. Thus, legitimacy > proportionality, equality, etc. Such a conclusion is presupposed by the principle of separation of powers promoted by legal positivism – a positivist judge merely carries out the will of the legislator and must follow and apply it until the legislator (and not the court itself) decides to change it.

14 R Latvelė, *Teisėjo vaidmuo aiškinant teisę. Daktaro disertacija* (Vilniaus universitetas 2010) 49.

15 N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978).

16 Art. 611(4) of the Code of Administrative Offenses of the Republic of Lithuania.

17 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 Teisė 50.

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Syllogisms as a means of resolving cases in legal doctrine are often criticised for 1) proving only the fairness of the thought process, rather than establishing the truth in the process,[18] or 2) that in such cases, the work of judges is more similar to the administration of justice rather than the execution,[19] or 3) that the judge treats the law as a set of data without a chronological dimension and views the principles and norms of law as truths that are independent of changes in time or the environment.[20] However, the advantages solving cases using syllogisms provides – such as ensuring legal stability (judgments are based on norms that were agreed by the public), recognising the authority of the legislature, and ensuring the principle of legal certainty – are essential for the sustainable existence of a sound legal system.

Legal doctrine states that a syllogistic approach in cases is necessary in order to protect legal certainty and stability and to ensure the principle of the rule of law.[21] It is obvious that such regulation expresses respect for the legislative body and encourages the presumption of reliability and validity of the norms developed by the legislator. It also creates more legal certainty and predictability, as the conformity of court decisions with legal norms is visible. The principle of legal certainty is ensured because such decisions are easy to predict in the future. For example, a litigant expects that the judgment of the court will not be determined by any subjective factors, and the judge will be objective and will apply the law properly. More generally, this means that the public wants to know what competence is given to a judge to act as a representative of state power and to make a binding decision that affects individual freedoms and property and can be enforced by state coercion. The public wants a court decision to be a legitimate exercise of state power.[22] Consequently, the use of syllogisms helps to ensure the objectivity of judges and thus of the decision taken – the autonomy and objectivity of the law are secured by confining legal analysis to the formal level, requiring only an exploration of relations among legal ideas. Autonomy and objectivity are threatened when the legal outcome depends on facts surrounding the world, which might be facts of a dispute or social or ethical facts relevant to creating or interpreting a rule.[23] It is believed that it was the closure of the system and the mechanisation of dispute resolution that determined the success of eBay – one of the largest online auctions and e-commerce sites, resolving an average of 60 million consumer disputes a year through an online dispute resolution centre. Disputes over goods of poor quality, late delivery, or improper delivery through this platform are resolved remotely through alternative dispute resolution.[24] It was the limited possibilities of the cases and solutions that determined the efficiency and people's confidence in the system.

It is indisputable that legal syllogisms are difficult to apply in hard cases where several possible solutions compete and/or the solution proposed by the rules of reasoning is questionable from the point of view of common sense and/or justice. Hard cases are not usually resolved in accordance with established formal legal rules, but they result in decisions that are atypical, extreme, and incompatible with normal legal standards. They also usually provide for exceptions to the legal rules.[25] However, syllogisms are an excellent basis and starting point from which judges should resolve cases, and in easy cases, it should be deemed a sufficient and priority way to do that. The principle of separation of powers

18 RA Posner, *The Problems of Jurisprudence* (Harvard University Press 1990) 54-55.
19 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 Teisė 51.
20 R Latvelė, *Teisėjo vaidmuo aiškinant teisę. Daktaro disertacija* (Vilniaus universitetas 2010) 48.
21 Ibid 40.
22 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 Teisė 50.
23 RA Posner, *The Problems of Jurisprudence* (Harvard University Press 1990) 40.
24 For more information, see www.ebay.com
25 G Lastauskienė, 'Teisinis kvalifikavimas formaliosios logikos požiūriu' (2009) 73 Teisė 51.

presupposes that the legislator is entrusted with a special legislative function, so it should be reasonable to expect that the clearest, easiest model cases will be properly regulated by the legislators. It should be noted that the rule of law requires laws to be consistent, stable, and comprehensible. Consequently, authoritative legislators have a constitutional obligation to ensure the adoption of such laws. In summary, the presumption that the least that can be expected from an authoritative legislator is the proper enactment of the most basic 'rules of the game' and, accordingly when noting that it would be manifestly incorrect to apply a rule which is appropriate to a clear, elementary ordinary legal dispute, such gaps in easy cases should be filled by the competent legislature and not by the courts, seems reasonable. Advantages of the formal application of rules identified by J. Gumbis are as follows: rule makers are often in a better position to decide what justice is and how to achieve it in a particular case, and in general, the legislature generally has more time to analyse problems and systematically consider more elements. It has more sources of information, is not bound by gathering evidence and/or other procedural rules. Rules are often more effective than discretion because they essentially consolidate experience. A rule is a certain crystallised element formed by the lengthy process of how certain conflicts are to be resolved.[26] It is argued that, in easy cases, the judge would, in a sense, become an administrator of the law. Rather than insisting on seeking justice by deviating to various discourses, the principles of legal expediency and economy would be better ensured, the workload of courts would be significantly reduced, the law would be more predictable, and that would encourage greater public confidence in the judiciary. Perhaps, this would even reduce the number of cases in the courts in general, as individuals would be able to resolve disputes in easy cases themselves, and judges would be able to focus more on difficult cases.

3.2 APPLICATION OF ANALOGY (PRECEDENT)

We refer to a legal precedent as a decision of a state institution, usually a court, made in a specific case and later considered as an example in resolving similar cases. It can be understood as an authoritative opinion on how to resolve a problematic dispute. The application of precedents helps to ensure compliance with the *stare decisis* principle (similar cases must be dealt with in a similar way). Relying on precedents is a condition for uniform (consistent) case law and thus for the full administration of justice. Therefore, the precedents of the courts cannot be unreasonably ignored when resolving similar cases.[27]

The origin of court precedents is often linked to the medieval kingdom of England. The axiom is that in the common law countries, where court precedent is recognised as the main source of law and case law was the basis for the formation of the whole legal tradition. Precedent is of far greater importance than in the continental legal tradition. However, the institution of precedent is also extremely important for the states of the Romano-Germanic tradition. Lithuanian legal doctrine notes that the dominance of court precedents as sources of law is a natural stage of legal development, which each evolving legal system goes through.[28] For example, the doctrine of *stare decisis* prevailing in the Anglo-American legal tradition can be summarised in the following instructions: (1) the court is bound by the decisions of the higher courts, the courts of the highest levels (sometimes any level), and their own; (2) the decision of any other court in the present case is a compelling argument and must be considered; (3) the decision is binding only to the extent of its *ratio decidendi*; (4) a precedent

26 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 Teisė 47.

27 E Kūris, 'Teismo precedentas kaip teisės šaltinis Lietuvoje: oficiali konstitucinė doktrina, teisinio mąstymo stereotipai ir kontrargumentai' (2009) 2 (116) Jurisprudencija 134.

28 J Machovenko, Teisės istorija (Vilniaus universiteto leidykla 2013) 98-99.

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does not automatically lose its binding force over time, but a very old one may be disapplied if it no longer meets the changed social relations. For example, in Lithuania, although the principle of *stare decisis* is not explicitly established, even without using this concept, a court decision is not considered to be a mere act of law, but an authoritative source of law, binding not only other courts dealing with similar cases but also the precedent-maker him/herself. Thus, court precedent is a source of law in both vertical and horizontal terms.[29] In Lithuania, the peculiarities of the institute of court precedent have mainly been developed by the Constitutional Court of the Republic of Lithuania, which states that the following factors are decisive (among other important factors) in ensuring the continuity of jurisprudence: courts of general jurisdiction of higher instance must, when reviewing decisions of courts of general jurisdiction of lower instance, always assess those decisions in accordance with the same legal criteria; those criteria must be clear and known *ex ante* to legal persons and *inter alia* to courts of general jurisdiction of a lower instance (hence, the jurisprudence of courts of general jurisdiction must be foreseeable).[30] Subsequently, the duty of courts to formulate uniform case law allows precedent a special place in the legal system, regardless of whether the principle of *stare decisis* is explicitly enshrined or not. Such adherence to consistent case-law ensures the safeguarding of constitutional principles, such as the principle of equality – if similar cases were to be handled differently or different cases were to be treated equally, we would face unjustified unequal treatment of persons; the principles of legal certainty and legal predictability encourage clear precedents, and there should be no deviation from them without reason – this fosters legal clarity and predictability. In summary, in Lithuania, which does not belong to the Anglo-American legal tradition, the special place of precedent as a source of law is determined not by the explicit establishment of the *stare decisis* principle, but rather by such constitutional principles of law as equality, predictability of law, and legal certainty.

After describing the essential features of precedent, it is appropriate to discuss its applicability in easy cases. It should be noted that, in principle, the process of deciding on the application of precedent in a particular case can be divided into the following essential steps: identification of precedent content, assessment of its suitability for the case, and the actual application.[31] It should be noted that the second and third steps are very similar in nature to the application of syllogisms in decision-making analysed in section A of this chapter. For example, when we have a clear and appropriate precedent, we equate it with a certain legal norm. Such an approach is also supported in legal doctrine, where it is stated that the *ratio decidendi* part of a court precedent can be understood as having a normative nature.[32] Equating the application of analogy by precedent to the application of legal syllogism, it can be concluded that this way of resolving a case, which reflects the ideas of legal positivism, should also be sufficient and the main approach in easy cases.

The main advantages of applying analogy (precedent) in easy cases will be analysed below. First, the fact that in a similar situation, the court will have to decide the case in the same way as in the case law allows individuals to predict court decisions, even when such legal instruction is not explicitly disclosed in law. In this way, as was already mentioned, the principles of legal certainty and legitimate expectations are ensured. When similar situations are resolved in the same way, the court's decision by analogy makes its arguments more

29 E Kūris, 'Teismo precedentas kaip teisės šaltinis Lietuvoje: oficiali konstitucinė doktrina, teisinio mąstymo stereotipai ir kontrargumentai' (2009) 2 (116) Jurisprudencija 135.

30 See, e.g., Ruling of 24 October 2007, no. 111-4549 and ruling of 28 March 2006, no. 36-1292 of the Constitutional Court of the Republic of Lithuania.

31 There are a number of legal problems in the first step of applying precedent, but this discourse is not the subject of the present paper. This paper presupposes the existence of criteria for relying on precedents, which can be used to identify the need to apply certain precedents in specific cases.

32 R Cross, JW Harris, Precedent in English Law (Oxford University Press 1991) 72.

convincing to the parties, the judge is considered more objective, and his or her decision is determined by the application of obvious law and not by non-legal factors, promoting greater public confidence in the judiciary. The application of precedents in easy cases is also in line with the principles of economy and efficiency of the process because of the following reasons. 1) The efficiency of court proceedings increases (it can be objectively perceived that the productivity of judges would be significantly reduced, whereas the workload would increase significantly if relevant decisions made in the past could not be relied upon) – it should also be mentioned that the consistent application of precedents in easy cases would also reduce the workload of courts of appellate and cassation instances. 2) Clear and widely applied precedent rules are expected to lead to less litigation and encourage individuals to settle disputes out of court, the outcome of which can be easily predicted (this would, of course, also contribute to a lower workload of judges). In summary, the automatic application of precedent (analogy) in easy cases would give courts more time to focus on hard ones. Another particularly important argument is the duty of courts to shape common practice. As mentioned above, when resolving a specific dispute, the court enforces not only the private interests of the parties to the proceedings but also the public interests, as the prerogative exercised by the judge to interpret legal norms in the form of judgments are duty-bound by the public.

It should be noted that this paper does not analyse the problems of the application of precedent in difficult cases, such as, for example, competition between precedents or a situation where precedent is legally valid but does not reflect the existing relationship, since the aim was to defend the idea that the application of the analogy is a comprehensive and sufficient way of dealing with easy cases specifically. Summarising the above, it can be stated that this hypothesis was defended on the grounds that not applying precedents in easy cases and re-establishing the compliance of the subject matter with the legal norms each time would be ineffective, and this would not guarantee the principles of legal expediency and economy. In addition, once the application of precedents in easy cases became common practice in the courts, greater predictability in court decisions would be seen, which would lead to greater public confidence in the courts and the judiciary (this would happen due to the perception that the decisions of such courts are objective and their adoption is not influenced by subjective factors) and encourage the search for a solution to such cases without turning to courts. As was emphasised, the principle of legal stability requires at least a minimum degree of predictability in how judges will decide a case. Therefore, we can argue that easy cases could constitute that minimum. The rule of law and respect for trustworthy authorities should presuppose respect for the laws they enact and a reasonable presumption that legal regulation in the clearest, simplest, easiest cases is legal and fair. In the event of a situation where such regulation does not correspond to the actual situation, the solution should not be to allow courts to be creative in easy cases, but rather to oblige the entity that created such regulation to ensure its relevance and the 'vitality' of the law.

4 LEGAL REALISM AND HARD CASES

In most cases, especially in the most important ones,
the judge will stick to a reasonable result,
rather than being able to come up with a result that
is demonstratively and indisputably logically correct.[33]

In the previous chapter, it was concluded that methods of legal reasoning, such as conclusions drawn with the help of syllogisms or reliance on precedents created in the past, are useful,

33 RA Posner, *Reflections on Judging* (Harvard University Press 2013) 6.

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sufficient, and even encouraged as the main approaches in easy cases. If we put it in a formula, we would get the following result in easy cases: factual legality > justice. In complex disputes, in cases that require a wide judicial discretion to assess the facts, logic is of little help. It is a fiction that the court is guided only by the law, is impartial, and so on. However, the most important criteria for resolving such disputes are clearly not logical.[34] As it was correctly observed, the most important and constant reason for dissatisfaction with the law always stems from the necessary mechanical application of legal norms.[35] It should be noted that society also wants not only to restrict the freedom of a judge (so that he or she does not interfere in the field of legislation or become biased) but also to feel justice in general rather than in the specific legal meaning of the word. The judgment must also be understood from a moral or ethical point of view. A judge in a given situation should not blindly follow the law, the adoption of which may have been influenced by lobbyists, but also argue on the basis of good morals, a general public understanding of what is right and wrong, honest, etc.[36] In hard cases, because of their special importance and the legal relationship on the basis of which the dispute arises, factual legitimacy loses its relevance, and, more precisely, justice outweighs other principles of law. In the words of R. A. Posner, it is legal realism that helps to avoid this short-sighted justice.[37]

O. W. Holmes Jr. gave us the aphorism that the essence of law is not logic but experience.[38] The ideas of legal realism are based on the idea that a judge must discover and, in some cases, create the law. Divided into American and Scandinavian versions, legal realism is fundamentally at odds with the idea of legal positivism that law is comprehensive – judges supposedly make decisions based not on the law but on what seems right to them, influenced by certain factors and incentives.

Legal positivism and the methods of resolving easy cases discussed before leave no room for the judge's discretion – the right judgment of the case is obvious, so the judge is, in a sense, more like an administrator of the law, who simply attributes the appropriate norm to the legal dispute that has arisen. Meanwhile, in hard cases, it is more difficult to apply the right legal norm – the right solution is not so obvious, and the judge must choose what decision to make. In other words, the judge has discretion. Those with discretion are not entirely indifferent to the environment. This is not always negative – on the contrary, one of the purposes of discretion is to give the law flexibility so that the applicable law is not a mere blind norm.[39] It is those factors that can influence judges' decision-making that will be further analysed in this essay, dividing them into the social factors researched by the representatives of American legal realism and the psychological factors researched by Scandinavian legal realism.

4.1 PSYCHOLOGICAL FACTORS THAT DETERMINE DECISION-MAKING

A judge uses his mind to rule the mind. So, it is not allowable for a judge's mind, from its earliest years, to be brought up in close contact with minds which are no good, or for it to have done a complete course in all forms of wrongdoing for itself, so

34 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 Teisė 50.

35 M Stone, 'Formalism' in JL Coleman, S Shapiro (eds) The Oxford Handbook of Jurisprudence and Philosophy of Law (Oxford University Press 2002) 166–205.

36 SJ Burton, *An Introduction to Law and Legal Reasoning* (Little, Brown & Co. 1985) 167-183.

37 RA Posner, *Reflections on Judging* (Harvard University Press 2013) 5.

38 OW Holmes, The common law (Little, Brown, and Co. 1881) 1.

39 J Gumbis, 'Teisinė diskrecija: teorinis požiūris' (2004) 52 Teisė 53.

that it can readily draw on its own experience in dealing with the wrongdoings of others.[40]

According to the representatives of Scandinavian realism, the personality and individual psychological characteristics of a judge are of special importance in their decision-making in cases. Cognitive psychologists have found that even educated, intellectually refined people are prone to retrospective determinism – they tend to view events that have already occurred or facts that have been identified as obvious, regardless of the lack of primary information to identify them, which leads to incorrect statements and can become the result of methodological problems in the interpretation stage (hindsight bias), the anchor effect, and overconfidence in one's intuition. These problems exist at all levels of the judiciary. For example, according to J. Frank, judges' decision-making is a factor in human psychology, so there is no point in developing any normative theory that explains to judges how to make decisions.[41] K. Olivercona argued that the reality that legal scholars should study consists of the psychological reactions of individuals – the images and feelings they experience when they become familiar with a particular rule. Therefore, in order to perceive legal norms as effective, it is necessary to consider them as a psychological phenomenon.[42]

Concerning psychological factors affecting specific judges, CH. S. Hutcheson said that judges use intuitive decision-making (hunches) first and only then use logical thinking to find a justification for the desired outcome.[43] Simple internal factors and reasons, such as laziness, unwillingness to take responsibility, or even a desire to avoid repetitive reasoning, also affect judges. In summary, when judges have discretion to make one decision or another, the decision-making process is influenced by a variety of psychological factors, such as over-reliance on intuition, the anchor effect, and such internal factors as, for example, laziness or unwillingness to take responsibility for the decision.

The gambler's fallacy is one of the logical errors arising from a misinterpretation of probabilities. It is an underestimation of the occurrence of random sequences. Hypothetically, if someone flips a coin landing heads up four times, most people will believe that the coin would land on the tails side next time, although, in reality, the probability is still 50/50. Empirical research has shown that the gambler's fallacy can be discovered when judging asylum cases. It was found that there is a 0.5% lower probability that a judge would make a positive decision to grant asylum to an applicant if the previous decision to grant asylum was positive rather than negative, despite all other circumstances being identical. Interestingly, a stronger negative autocorrelation was also observed between cases resolved on the same day. The closer the cases were to each other in time, the more consistent the occurrences of the player's error were observed, as newer cases are more obvious and lead to stronger expectations for change.[44]

Another psychological phenomenon affecting judges' decision-making is the anchor effect. In principle, the anchor is understood as the starting point, on the basis of which a decision is made in the future when information is lacking. After analysing the influence of the social environment on the entities implementing the discretion, the possible influence of public criticism on the decisions of lawyers in decision-making can be observed. Judgments made by judges can be and often are criticised by journalists, politicians, and society at large. The relationship between the anchor effect and the possible influence of journalists and the

40 Plato, The Republic (Cambridge University Press 2003) 100-101.

41 R Latvelė, *Teisėjo vaidmuo aiškinant teisę. Daktaro disertacija* (Vilniaus universitetas 2010) 212.

42 JW Harris, Legal Philosophies (2nd edn, Butterworths 1997) 106.

43 JC Hutcheson Jr, 'Judgment Intuitive: The Function of the Hunch in Judicial Decision' (1929) 14 Cornell Law Journal, Rev. 274, 273-288.

44 DL Chen, et al, 'Decision-Making Under the Gambler"s Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires' (2016) 131 The Quarterly Journal of Economics 1199-1205.

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impact on judges dates back to 2006 when an experiment was carried out in which some of the participants in the investigation (prosecutors and judges) who were familiar with all the relevant material in the case had to imagine receiving a hypothetical call from a journalist asking whether the custodial sentence imposed on the defendant would exceed a certain length or be less. The duration of the custodial sentence in this case was the anchor. One study group was asked whether the sentence would exceed a period of one year and the other – a period of three years. Next, study participants had to consider what answer they would give to their fellow investigators about the length of the prison sentence proposed by the journalist – whether the length of the prison sentence proposed by the journalist was appropriate, too long, or too short. The results obtained showed that the decisions of the study participants, regardless of their experience and competence, were influenced by the anchor provided: those who were suggested to impose three years in prison imposed an average of a 33.38-month sentence, whereas those who were given a one-year anchor imposed 25.43 months.[45] In summary, when a judge has discretion as to what decision to make, empirical research shows that his or her decision is affected by psychological phenomena such as the gambler's fallacy or the anchor effect.

There is, of course, a risk that judges, influenced by various psychological factors, will make decisions by replacing public expectations with personal ones. It is believed that judges often do not even understand that their decision-making process is influenced by various factors. This is especially the case with psychological factors. Judges tend to think that they individualise each case, take into account all the relevant circumstances, and make the decision as objectively as possible. R. A. Posner suggested appointing more judges to reduce the impact of psychological factors on judges' decision-making, giving judges more time to consider each case.[46] But would judges really use that time for deliberations? And, after all, should judges' decisions be completely objective? When making a decision, a judge has the facts at his or her disposal (external factors) and the legal norms (internal factors). All a judge must do is establish the facts and apply a legal norm accordingly. Thus, the judge's activity when making a decision is rather theoretical – there is no room for personal experience, rationality, or values. The work of a judge is cognitive when they establish the facts and logical when he or she applies certain legal norms.[47] However, in support of the statement that the methods of resolving cases proposed by legal positivism are not sufficient for resolving hard cases, we are also basically arguing that an objective decision based only on legal norms is legal but not fair in hard cases. Thus, we recognise a certain need for subjectivity in hard cases. The problem arises only when trying to determine how much of the influence of psychological factors should be allowed when resolving hard cases. In order to find the right answer, analysis of judges' activities without discrediting the work of those judges should be encouraged.

4.2 SOCIOLOGICAL FACTORS DETERMINING DECISION-MAKING

Sociological factors also influence the decision-making of judges. Such factors have been widely studied by representatives of American realism. For example, B. Cardozo argued that the final form of a decision is given by the judge's life experience: a judge's understanding of the canons of justice and morality, his or her studies of the social sciences, sometimes intuition, conjecture, even ignorance or prejudice. After assessing the correlation between

45 D Petkevičiūtė-Barysienė, et al, 'Inkaro efekto pasireiškimas skiriant laisvės atėmimo bausmę' (2012) 11 Tarptautinis psichologijos žurnalas: biopsichologinis požiūris 135.

46 RA Posner, *Reflections on Judging* (Harvard University Press 2013) 312.

47 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 Teisė 48.

the social connection between persons and a more favourable decision for a close person, the principles of judicial impartiality were established. Art. 6(1) of the European Convention on Human Rights states that in the determination of his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[48] For example, the Constitutional Court of the Republic of Lithuania has clarified that a person's constitutional right to have his or her case examined by an impartial court also means that a person's case may not be heard by a judge whose impartiality is in doubt. The judge hearing the case must be neutral. The impartiality of the judiciary, like the independence of the judiciary, is an essential guarantee of human rights and freedoms, a prerequisite for a fair trial, and thus a requirement for confidence in the judiciary.[49] In summary, the absence of influence of certain social relations in the decision-making of judges is ensured with the help of the institute of removal of judges.

However, the decision-making of judges is also determined by other social factors, which, due to certain circumstances, cannot be measured and regulated by law. People differ from each other by gender, age, education, origin, and religion, and these are the factors that may determine their decisions. For example, in cases of gender discrimination or equality, female judges tend to take a more liberal position.[50] Female judges also tend to punish those who have committed violent sexual offences more severely than their counterparts.[51] Besides, each judge is a part of his or her nation, and all judges in a certain society live in the same environment, which affects each of them almost identically; thus, the decisions of judges are not determined by some mystical individualities of each case but can be predicted on the basis of general social regularities. Although, as in cases of influence of psychological factors, judges are often unaware of the social laws that influence decision-making, and even if they are aware, they often do not recognise that influence, such laws do exist and may even be predictable. In principle, the law gives the judge the freedom to choose one of several ways to resolve the case, and the judge chooses a particular option under the influence of social factors.

Traditionally, the exercise of discretion is understood as a highly subjective decision driven by largely unexplained factors: success, emotion, or even whim. From a social point of view, decision-making can also be explained by less mystical actions. Decision-makers rely on their consciousness, presenting different conclusions depending on the social situation.[52] As mentioned, the social factors that determine the decision-making of judges form certain social laws, which, due to their low attractiveness, are not widely analysed in legal doctrine. Indirect empirical research shows that legal training or judicial experience does not produce a higher expert judgment. One of the reasons why judges do not make better decisions than ordinary subjects is that judging is poorly based on the environment – judges do not receive feedback on the quality of the decisions they make, so judges do not improve their decision-making skills.[53] As has been emphasised in this paper, in hard cases, short-sighted justice, complete objectivity, and formal application of rules are not the aspirations to be followed. In such cases, the public expects that judges will not formally apply the letter of the law but will seek justice and individualise the dispute. With this in mind, there is a need to examine the

48 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

49 Ruling of 12 February 2001, no. 14-445 of the Constitutional Court of the Republic of Lithuania.

50 LJ Siegel, JL Worrall, Essentials of criminal justice (Wadsworth 2017).

51 K O'Connor, Gender and Women's Leadership: A Reference Handbook. (Vol 2, SAGE Publications Inc 2010).

52 J Gumbis, 'Teisinė diskrecija: teorinis požiūris' (2004) 52 Teisė 56.

53 V Tumonis, et al, 'Judicial Decision – Making from an Empirical Perspective' (2013) 6 (1) Baltic Journal of Law & Politics 158.

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social factors that may influence a judge's decision-making. This would promote greater public confidence in the judiciary since social factors form laws, the examination of which in cases requiring the discretion of a judge would form tendencies of judgments made, and that would bring legal certainty. In this way, judges would also have a better understanding of themselves and the functioning of the decision-making mechanism and would be able to assess the impact of certain factors that may have had an influence on the decision-making process.

5 THE DICHOTOMY OF HARD AND EASY CASES AND ARTIFICIAL INTELLIGENCE

Technology is evolving so fast that it has acquired the name of the Fourth Industrial Revolution.[54] In Estonia, a robot-judge project is currently being developed to resolve small (up to € 7,000) civil disputes arising from contracts.[55] It is believed that court systems will be able to concentrate on complex cases, and cases will be resolved more efficiently and expeditiously. It is likely that the number of countries that will follow Estonia's example will increase rapidly, especially considering that the European Ethical Charter of the use of AI in judicial systems and their environment encourages the use of artificial intelligence in online dispute resolution.[56] R. Susskind, the world's most-cited author on the future of legal services, discusses the possibility that the decision-making processes of judges will be entirely replaced by artificial intelligence eventually.[57] Accordingly, an analysis of the judicial decision-making mechanism is required not only to assist in the development of technology but also to assess which cases could potentially be delegated to technological solutions.

Cases that can be and even should be resolved using either syllogisms or by applying precedents – referred to in this essay as easy cases – will be the first ones assigned to artificial intelligence to resolve. Lawyers must be the first ones to submit their insights; otherwise, we risk putting the rule of law in jeopardy. Technology is evolving very rapidly, and we are on the brink of disaster if we do not react quickly. A method should be proposed to accommodate as many cases as possible into legal syllogisms and precedents. Otherwise, as mentioned before, cases in which a claim corresponds to a certain amount of money will *prima facie* be deemed to be easy cases. The first examples could be licensing, court orders, consumer disputes, etc. This way, hard cases – those that usually have a particular impact on legal systems – would remain at the discretion of human judges rather than robot judges, at least until the development of technology reaches a certain level, when we can confidently delegate even cases of this scale to an AI.

6 CONCLUSIONS

When judges make decisions in easy cases, the ways of resolving cases proposed by legal positivism should be deemed to be a priority. The use of syllogisms in easy cases helps to ensure compliance with the principles of efficiency and effectiveness, respect for the principle of separation of powers and an authoritative legislature, and minimum legal stability. This also ensures legal clarity and predictability. The application of analogy (precedent) in easy

54 K Schwab, The Fourth Industrial Revolution (Crown Publishing Group 2017).

55 E Niiler, 'Can Al Be a Fair Judge in Court? Estonia Thinks So' (WIRED, 24 March 2019) <https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/> accessed 5 October 2021.

56 CEPEJ European Ethical Charter on the use of artificial intelligence in judicial systems and their environment 2018.

57 R Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019).

cases is in line with the principles of procedural economy and efficiency, thus reducing the workload of courts not only in the first instance but also in courts of appeal and cassation, which means that courts have more time to resolve hard cases. It also encourages less litigation, and the consistent application of precedents helps to ensure the duty of courts to develop uniform practice.

When judges make decisions in hard cases, where they have the discretion to choose how a certain case is decided, they are influenced by various sociological and psychological factors. A broader examination of these factors without discrediting judges would not only help judges to critically assess the factors that affected them in the process of making a judgment but would also be beneficial to society by identifying some systematic influence of factors, which would lead to greater predictability of decisions. The methods of resolving cases proposed by legal positivism are not sufficient when resolving hard cases, as such cases require more than just full objectivity and formal application of legal norms. Empirical research shows that judges are influenced by such psychological factors as overconfidence in intuition, gambler's fallacy, anchor effect, and social factors such as close relationship with the party to the case or/and gender. More in-depth research on the performance of judges should be encouraged, as this would allow judges to assess the impact of factors that affect them on their decisions and give the public a better understanding of how decisions are made, which would foster greater trust in the judiciary.

Given the current state of technological development, lawyers should be encouraged to accommodate as many cases as possible – such as consumer disputes or court orders – into legal syllogisms and transfer precedents into certain formulas. This way, only easy cases will be delegated to AI, whereas hard cases will remain in the competence of human judges for some time yet.

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Research Article

LAND RIGHTS DISPUTES: TOWARDS THE EFFECTIVE PROTECTION OF RIGHTS, FREEDOMS, AND INTEREST BY THE ADMINISTRATIVE COURTS OF UKRAINE

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ABSTRACT

Background: *The choice of an effective and appropriate method of protection is one of the most important stages of legal proceedings because it determines the achievement of the proceedings' goal. Procedural legislation and the practice of its application to unresolved issues have limited methods of protection in cases of the rights and interests of persons to land by courts of different jurisdictions and the possibility of their cross-application.*

Methods: *To obtain reliable and substantiated conclusions, general and special research methods were used, which processed the results of theoretical research on the problems of justice in Ukraine, land law and administrative process, and materials of legal practice in the form of conclusions on international human rights institutions and Ukrainian courts.*

Results and Conclusions: *The study found that when choosing a method of protection for the infringed right, freedom, or interest, courts should consider the direct relationship between the claim for protection, the content of the right, and the nature of the offence. The jurisdictional component of the right to a fair trial presupposes the need for courts to consider the scope of their powers under the Constitution and laws of Ukraine. The concept of expanding the limits of permissible remedies allows administrative courts to use such remedies (general and special), which will ensure the real restoration of the violated rights, for the protection of which the plaintiff appealed to the court. When considering the requirement to protect the right to a certain object of ownership (including land) in an administrative case, the administrative court is authorised to apply substantive remedies, taking into account the material nature of the violated right, as well as whether the violation was committed by a decision, action, or inaction of the subject of power, which legalises the right of a person to the relevant object of property and is beyond the discretion of the authority in the management of public property.*

1 INTRODUCTION

1.1 ONTOLOGICAL BASIS OF SCIENTIFIC INTEREST

The purpose of any type of proceedings, except constitutional and criminal, is revealed in the procedural codes as the effective protection of the rights, freedoms, and interests of individuals from violations. Administrative proceedings specify the range of subjects of such protective legal relations and indicate the need to ensure the protection of the rights, freedoms, and interests of the individual from the subjects of power (para. 1 Art. 2 of the Code of Administrative Procedure of Ukraine, hereinafter – CAP).

This goal determines the subordination of other procedural institutions to its achievement and directly affects the procedural activities of courts in considering relevant disputes. The primary importance of the right, freedom, or interest protected by the court requires an assessment of the outcome of the proceedings from the standpoint of achieving the *status quo*, which preceded the violation, or the creation of unimpeded conditions for further implementation. Accordingly, the result will depend on the application of such a method of protection, which would terminate the state of the offence and restore the status of the plaintiff in the disputed primary substantive legal relationship.

The issue of how to protect the rights of the individual in court is closely related to the definition of the powers of the court in considering and resolving the case. O. Khotynska-Nor attributes this to one of the two structural elements of the right to a fair trial, which is provided in Art. 6 of the European Convention on Human Rights (hereinafter – ECHR). She considers that this is a jurisdictional component of the guarantees of this right, to which she attributes the obligation of the court to act in the manner and in accordance with the powers provided by law, within its competence. This not only determines the principles of the organisation of a legitimate judiciary in the state but is also closely related to its procedural regime.[3] Courts that are part of the state apparatus are subject to the provisions of the constitutional system, as found in Art. 6 and para. 2 Art. 19 of the Constitution of Ukraine on the obligation to act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine to comply with the principle of functional separation of powers.

Therefore, the purpose of the proceedings cannot be used to fully justify any methods, forms, or remedies of action used by the appropriate authority. Failure to comply with the statutory framework of authority and competence can destroy the foundations of the constitutional order.

The sphere of litigation over the rights and interests of a person to land is one of the largest in terms of both quantity and legal significance because it decides the fate of a specific (exhaustive, valuable, and natural) property resource – the basis of ownership and production.

Prior to the emergence of administrative courts, depending on the method of protection of the plaintiff's land rights, claims arising from land relations in the literature were divided into claims for recognition, awards, and conversion lawsuits, and they were considered in civil or commercial proceedings.[4] The ways of protecting rights and interests to land were determined in Art. 16 of the Civil Code of Ukraine (hereinafter – CC) and Art. 152 of the Land Code of Ukraine (hereinafter – LC).

Instead, there were already ideas that an effective way for the courts to protect the land rights of individuals, which is the subject of dispute or presumption of a legal fact, the establishment of which is associated with the exercise of powers by the subjects of power, would be to transfer the power of parallel decision-making to those courts. In fact, it was a matter of transferring the powers of active management to the courts.[5]

The creation of administrative courts, the practice of their activities, and the specifics of the remedies, derived from the normative nature of disputes (defined in Art. 5 and Art. 245

3 O Hotynska-Nor, 'The right to a 'court established by law' as a structural product of the right to a fair court: the Ukrainian context' (2015) 1 Advokat 185.

4 O Snidevych, 'Some issues of classification of civil lawsuits in cases arising from land relations' (2006) 2 Pravo Ukrainy 99-100.

5 O Snidevych, 'Land management lawsuits in the civil process of Ukraine' (2006) 6 Pravo Ukrainy 72; O Ilnytskyy, *Land disputes and the procedure for resolving them in Ukraine: administrative and legal approach* (FOP Pyatakov 2011) 191.

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of the CAP), only added to the question of how they can effectively protect the rights and interests of a person regarding disputed land and whether they have the opportunity to apply the traditional tools of protection of property rights to land, in connection with which the administrative lawsuits arise.

1.2 RESEARCH METHODOLOGY AND APPEARANCE OF ACADEMIC INTEREST

The reason for the detailed study of the stated issues were numerous materials of law enforcement practice, which testified to the existence of problems of effective protection of land rights. According to the plaintiffs, these problems arise when appealing against decisions, actions, or inactions of government officials in administrative proceedings in this area. It also leads to the appeal of judicial institutions with requests for scientific conclusions on the application of methods of protection of violated property rights and property interests in the consideration of public law disputes and the formation of appropriate uniform case law.

Given the specifics of the topic, purpose, and objectives, the basis of the study is a dialectical approach to research. The systematic method was used to establish the content and purpose of remedies and methods of protection of rights, freedoms, and interests in accordance with regulations. On this basis, with the help of the formal-logical method, the definition of legal concepts that are essential (substantive) content, as well as the defined purpose of legal regulation, was formulated. The formal-dogmatic method allowed us to carry out the analysis of the normative-legal base of the state and reveal the functional orientation of the system of protection of the rights and interests of persons in land legal relations with the participation of subjects of power, their technical and legal perfection.

A number of other general scientific research methods were also used, in particular: analysis (to study the systematic application of concepts), historical and legal method (to study the establishment, change, and development of the deposit guarantee system), comparative law (in the study of legislation determining the features of protection of land rights and interests, litigation), and others.

The theoretical basis of the study was provided by the results of analytical reviews on the problems of justice in Ukraine, land law, and administrative process. But researchers avoid addressing the pressing issues that arise on the border of public and private regulation in the field of substantive law and procedural justice and are characterised by a high degree of controversy and inconsistency of conclusions. However, their avoidance in science does not mean the loss of practical significance of the search and unification of solutions.

At the same time, the applied theoretical approaches and the scientific conclusions formulated by the authors were substantiated by the wide application of materials of legal practice through the conclusions of international human rights institutions and Ukrainian courts.

2 INITIAL PRINCIPLES OF ESTABLISHING JUDICIAL PROTECTION IN THE FIELD OF LAND RELATIONS

2.1 THE CONTENT OF THE LAWSUIT AS A BASIS FOR JUDICIAL PROTECTION

The question of how to protect the rights and legally protected interests of subjects is key in the context of legal regulation of a particular sphere of public life in a state-organised system. In the absence of the possibility of effective protection, any subjective right loses

the necessary certainty for its owner in the unimpeded implementation of the opportunities provided or sanctioned by the state, which determine the content of this right.

The analysis of the institutions of protection of law is inextricably linked with the study of the impact on the sphere of rights, freedoms, and interests of the person after active, aggressive intervention by its violators. From a normative point of view, such interference is referred to as a violation, non-recognition, or challenge of a right.

Violation of the law should be considered a consequence of illegal behaviour of a person (offender) whose actions have harmed the subjective rights and interests of the entitled party in the legal relationship.[6] The nature of the damage in this case has no significant legal meaning but is considered from the standpoint of material losses and non-material negative consequences (physical damage, moral distress, negative feelings, including ignoring the certainty and stability of legitimate expectations) due to the violator's behaviour towards the sphere of existence of the right holder.

Non-recognition of civil rights and interests belonging to a person consists in both active and passive actions of a third party, which are aimed at full or partial denial of the subjective rights of a person. These actions create uncertainty for the holder of subjective rights in their legal status. A challenge is the existence of a dispute between the participants in a civil law relationship about the affiliation or absence of a right of one of the parties.[7]

These three forms of interference combine to create barriers to the use of opportunities that constitute the content of a person's rights. This requires the state to intervene to remove these obstacles and restore the 'normal' order of satisfaction of a person's legitimate needs through permissible behaviour, the necessary influence on the violator in the primary legal relationship to a particular object and influence on their subject.

The established legal position of the Supreme Court affirms the direct relationship between the requirement of protection of the infringed right not only with the content of such right (which will be discussed in more detail below) but also with the nature of the offence.[8]

Therefore, the purpose of protection is to provide a person with the opportunity to meet their own legitimate needs in the primary dispute, in which unlawful interference (by violating, not recognising, or challenging these rights) makes it impossible or difficult to achieve the intended result in the form of material or other defined or expected benefit. The essence of the protection of the right is to eliminate the relevant barriers between the behaviour of the person and their expected (desired) result in the form of satisfaction of needs.

2.2 LEGAL INTEREST – THE OBJECT OF PROTECTION IN THE FIELD OF LAND RELATIONS

According to the current legislation of Ukraine, not only is the subjective right of a person protected by law but so is the interest. The concept of 'legally protected interest' was officially defined in the Decision of the Constitutional Court of Ukraine of 1 December 2004,[9] and a detailed and thorough development was defined in judicial practice in the Resolution of the Supreme Court of 20 February 2019.[10]

6 TO Rodoman, 'On the question of methods to protect civil rights and interests in the context of the provisions of Art. 16 of the Civil Code of Ukraine' (2015) 4 (11) Sudova apeliatsia 66.

7 Ibid.

8 Case No 378/596/16-ц (Supreme Court [GC], 29 September 2020) <https://reyestr.court.gov.ua/Review/93327297> accessed 22 July 2021; Case No 910/7164/19 (Supreme Court [CCC], 28 May 2020) <https://reyestr.court.gov.ua/Review/89485041> accessed 18 June 2020.

9 Case No 18-рп/2004 (Constitutional Court of Ukraine, 1 December 2004) Uriadovyi kurier 239.

10 Case No 522/3665/17 (Supreme Court [ACC], 20 February 2019) <https://reyestr.court.gov.ua/Review/80167902> accessed 22 July 2021.

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The systematic application of the approaches of the current legislation indicates that the definition of 'legal interest' reveals its following features:

1) it is a legitimate desire of a person (arising from the functioning of the system of objective law),

2) it meets the natural, socio-economic, cultural, and other needs of the person in accordance with the level of personal or social development,

3) it does not contradict legislative restrictions, public interests, justice, good faith, reasonableness, and other common law principles.

The normative concept of 'legally protected interest' in legal relations concerning land as a type of public property is important from the point of view of expanding the scope of protection. The public law regime of the land is based on this resource as the main national wealth (para. 1 Art. 14 of the Constitution of Ukraine) and the object of property rights of the Ukrainian people (para. 1 Art. 13 of the Constitution of Ukraine). It combines the features of land use as a territorial basis and natural resource and the main remedies (para. 'a' Art. 5 of the LC).

This significantly diversifies approaches to building an effective human rights system and obliges one to take into account not only the existence of direct property relations between entities and specific land plots but also the possibility of an unregistered (undocumented) relationship in the form of legal interest. This also needs proper (adequate) legal protection.

Based on this, in its decision, the Grand Chamber of the Supreme Court upheld the plaintiff's right to apply to the court (Representation of the American Association of Committees for Jews of the Former Soviet Union) on the grounds that the Zhytomyr City Council of Lviv Oblast had taken into communal ownership of the disputed garages located in the ancient Jewish cemetery in Zhydachiv in violation of the regime of lands of historical and cultural purpose of the land plot on which these garages were built. At the same time, the motivation for the need for protection was not based on the establishment of a property relationship with the disputed land plot as an object of the plaintiff's right. According to the Court, the defence needed an interest in the desire to use specific tangible and intangible goods due to the general content of objective and not directly mediated in subjective law of simple legitimate permission for the development of ethnic, cultural, linguistic, and religious identity as a national minority of Ukraine, preservation of monuments and other objects of cultural value, the development of national cultural traditions, the celebration of national holidays, the practice of their religion, and the preservation of the living environment in places of their historical and modern settlement in order to meet individual and collective needs.[11]

Autonomous interpretation of the concept of 'possessions' as an object of conventional guarantees and protection in the ECHR system according to Art. 1 of the Protocol defines, *inter alia*: 'legitimate (legal) expectations' or 'lawful expectations' to take certain actions in accordance with a permit issued by public authorities (for example, legitimate expectations to be able to carry out the planned development of the territory, given the permit in force at the time (*Pine Valley Developments Ltd and Others v. Ireland*, application no. 12742/87, judgment of 23 October 1991); use of the land (decision on the admissibility of application no. 10741/84 '*S. v. the United Kingdom*' of 13 December 1984), private interests recognised under national law (*Beyeler v. Italy*), judgment [GC] of 05 January 2000, application no. 33202/96).[12]

11 Case No 914/582/17 (Supreme Court [GC], 26 June 2018) <https://reyestr.court.gov.ua/Review/75265992> accessed 22 July 2021

12 TI Fulei, *Application of the case law of the European Court of Human Rights in the administration of justice* (2015) 129-130; N Blazhivska, 'Interpretation of the concept of property in the case law of the European Court of Human Rights' (2018) 10 Entrepreneurship, Economy and Law 219-223.

To a large extent, legal interests in the field of land relations correspond to the conventional understanding of a person's legitimate (legal) expectations, including in relation to real estate.

2.3 'DISPUTE ABOUT THE LAW' IN ADMINISTRATIVE JURISDICTION

Before considering specific ways of protecting the rights and interests in administrative proceedings, it is also important to establish the characteristics of the object of protection.

The Grand Chamber of the Supreme Court drew attention to the fact that the application of a particular method of protection of civil law depends both on the content of the right or interest sought by the person and on the nature of its violation, non-recognition, or challenge. Such a right or interest must be protected by a court in a manner that is effective, that is, appropriate to the content of the right or interest concerned, the nature of the violation, non-recognition, or challenge, and the consequences of those acts.[13] If the content of the latter is disclosed in advance (para. 2.1), the content of the violated right or interest is one of the key issues that not only affects the method of protection but also is used to delimit judicial jurisdiction and is known in law enforcement practice as a widely used criterion 'dispute about the civil law'.

According to the opinion of the judges of the Grand Chamber of the Supreme Court, which is consistently used in court decisions with an element of jurisdictional dispute, the criteria for distinguishing cases of civil jurisdiction from others are, firstly, their 'dispute about civil law', and secondly, the subjective composition of such a dispute (one of the parties to the dispute is, as a rule, an individual). Instead, the jurisdiction of administrative or commercial courts in the general sense can be defined as follows: the former has the power to resolve public law disputes, and the latter has the power to resolve disputes arising in the course of economic activity.[14]

The justification for such a difference in approaches can be found in doctrinal attempts to explain the difference between disputes over land relations of public law and private law, which is reflected, respectively, in the methods used by courts of different jurisdictions.

Public interest as a criterion for belonging of some of the land disputes to administrative jurisdiction is characterised by the fact that:

> 1) it is objectively present in society, i.e., the prerequisite for its existence is the natural needs of society, which are most important, significant, vital, in particular, the need to own, use and exploit of land;
>
> 2) it is inseparable, or independent, and is based on the will of the whole society, i.e., it concerns society as a set (wide range) of subjects for whom it is equally important and valuable;
>
> 3) it is recognised by the state and enshrined in the norms of public law, primarily in the provisions of the Constitution as the Basic Law;
>
> 4) it lies in the existence of obligations of the state to the society, which seeks their proper implementation, and public administration – the only entity that has the competence to ensure their implementation.

13 Case No 378/596/16-ц (Supreme Court [GC], 29 September 2020) <https://reyestr.court.gov.ua/Review/93327297> accessed 22 July 2021

14 O Kibenko, V Urkevych, 'Approaches of the Grand Chamber of the Supreme Court to determine the jurisdiction of disputes *(Sudebno-yuridicheskaya gaseta, 24 March 2020*) <https://sud.ua/ru/news/blog/164290-pidkhodi-velikoyi-palati-verkhovnogo-sudu-do-viznachennya-yurisdiktsiynosti-sporiv?fbclid=IwAR2FbIrsVFSL64rP4-xNA4JkNcYLPb-An5uojKhAGru4fWHkZS9zzF4upck> accessed 23 September 2021.

The public interest in land disputes is objectively present in the vital and important aspirations of the whole society or a significant part of it to own, use, and exploit the land as a national good, as well as to preserve and protect its natural state from the effects of negative natural and artificial factors, which are recognised by the state and enshrined in public law, and the obligation to ensure and protect them rests with the competent subject of public administration.

The public nature of such property is evidenced by the ability of every citizen to use land, as well as the state's commitment to protecting such property. That is, the purpose of such property is to promote the daily realisation of the public interest.[15]

However, such a difference between the content and nature of the dominant interest is an external attribute that is important for the organisation of the judiciary rather than for the actual administration of justice as a form of justice to protect the rights, freedoms, and interests of the plaintiff. As we mentioned earlier, the purpose of any form of justice in Ukraine, including administrative, is the effective protection of the rights, freedoms, and interests of the person in respect of whom they apply to the court (para. 1 Art. 2 of the CAP).

The right to apply to the court (right to access court proceedings) is not abstract. It relates to the right of the individual in whose interests the trial is taking place and to whose conviction the state (represented by public authorities, local governments, officials, and officials) has unlawfully interfered with their rights or freedoms. A mandatory feature of a public law dispute is that a person believes that there is a violation of their rights and freedoms as a result of the performance or non-performance of government functions. To apply to the court, the person (plaintiff) must have a substantive legal interest in resolving the dispute.

This precludes the existence in the Ukrainian court of a claim 'in the interests of the rule of law', which is known in legal theory as 'actio popularis'. This form of complaint implies the right of everyone to file a complaint against a normative act after its promulgation, without the obligation to prove that the relevant norm directly affects their rights and freedoms. In this case, the citizen simply fulfils their duty to protect the Constitution, the law, and established order.[16]

Any public interest is not dominant in determining the right to apply to the court for a particular person, as they have no right to apply 'in the public interest', but only to protect their own rights, freedoms, or interests, which must be duly confirmed, activated, and legally formalised, potentially being 'in opposition' to the public foundations of legal relations, formally represented in the activities of the subjects of power – the defendants. In disputes in the field of land relations, this is obviously objectified, first of all, due to the existence of direct (law) or indirect (interest) property-legal connection with the object, even if it is a dispute over the exercise of power regarding the management of the same object with the regime of public property.

Therefore, any disputes considered in administrative proceedings are also not disputes about the objective legality of decisions, actions, or inactions of the subjects of power – the defendants. It is wrong to try to distinguish them from land disputes that arise over

15 MV Udod, VS Pyrogov, 'Public interest in determining the jurisdiction of land disputes' (2020) 4 Juridical Scientific and Electronic Journal 232 <https://doi.org/10.32782/2524-0374/2020-4/55> accessed 13 July 2020.

16 V Kravchuk, 'Is the right to defense in an administrative court unlimited?' *(Sudebno-yuridicheskaya gaseta, 4 March 2019)* <https://sud.ua/ru/news/publication/136669-chi-ye-bezmezhnim-pravo-na-zakhist-v-administrativnomu-sudi> accessed 23 September 2021; Case No 522/3665/17 (Supreme Court [GC], 20 February 2019) <https://reyestr.court.gov.ua/Review/80167902> accessed 22 July 2021.

the existence or absence of a dispute between the parties over the subjective rights to land, which should be considered under the concept of 'dispute over the right' in civil proceedings. The main difference between land disputes, which are subject to administrative courts, in contrast to other types of litigation, is that they arise from the need to protect and concern different groups of rights or interests (including property rights or non-property rights in land relations) of persons in relations with public authorities and local self-government bodies or other appropriate defendants in the exercise of public authority administrative functions or the provision of administrative services as a defining feature of the jurisdiction of administrative courts.

The establishment of unlawful interference with the rights or interests of a person in the field of land relations is a necessary condition for obtaining legal protection, and the content of protection is determined by the essence of such right or interest and form of interference (violation, challenge, or non-recognition) and is carried out through appropriate remedies and methods of protection.

In addition, we consider it necessary to cite the conclusion of researchers who were at the origins of administrative proceedings in Ukraine, I.B. Koliushka and R.O. Kuybida (2007):

> The nature of the subjective right that is violated does not matter at all for administrative jurisdiction – the Code of Administrative Procedure does not state anywhere that administrative courts protect only the public rights of a person. It is important for the administrative court that the law (whether public or civil) is violated by the subject of power in public relations, i.e. in the exercise of their powers.[17]

Accordingly, in judicial practice, the content of claims is understood as the plaintiff's proposed ways to protect their public rights, freedoms, or interests, and the circumstances in which the plaintiff substantiates their claims are specific legal facts with the occurrence of which the subjects of public law enter into physical or legal entities in disputed legal relations (para. 25 of the decision of the Grand Chamber of the Supreme Court of 19 May 2021 in the case no. 9901/29/21 [administrative proceedings no. 11-118zai21]).[18]

Thus, when applying to the administrative court, the material and legal interest of the plaintiff is not in the sphere of abstract wishes in the public law sphere to ensure control over the legality of the public administration in any matter, but in the rights, freedoms, and interests concerning a particular part of land resources, unimpeded possession, use, or exploitation of them, which is violated by the exercise of power by the subject of power.

And this emphasises the question of how effective will the protection of the rights and interests of the person be in the land sphere when using the powers of administrative courts, which are enshrined in Art. 245 of the CAP and whether administrative courts have the opportunity to apply methods of protection of property and personal non-property rights, defined by Art. 16 of the CC and Art. 152 of the LC, when considering cases arising from their violation by decisions, actions, or inactions of the subjects of power.

17 IB Koliushko, RO Kyibida, 'Administrative courts: to protect human rights or the interests of the state?' (2007) 3 Law Ukraine 6.

18 Case No 9901/29/21 (Supreme Court [GC], 19 May 2021) <https://reyestr.court.gov.ua/Review/97286350> accessed 13 July 2021.

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3 METHODS OF PROTECTION OF RIGHTS, FREEDOMS, AND INTERESTS IN THE ADMINISTRATION OF JUSTICE

3.1 THE RATIO OF REMEDIES AND METHODS OF PROTECTION OF RIGHTS, FREEDOMS, AND INTERESTS OF A PERSON

The study of the categories 'remedy' and 'method' in relation to the protection of rights and interests, as well as the formulation of general conclusions in this regard, was carried out within the doctrine of civil procedure, given that civil proceedings have long remained the only type of litigation in the Soviet legal system for the protection of the individual.

For a long time, the lexical similarity of the etymology of the words 'remedy' and 'method' led to their identification by legal scholars for the purpose of characterising the constituent elements of the legal protection system. However, the evolution of legal regulation and theoretical thought, as well as the need to ensure the unification of legal terminology, has led to a kind of materialisation of the concept of 'remedies' of legal regulation. 'Remedies' should be considered in law from the standpoint of a set of actions and/or objects of the material world that allow to achieve a certain goal or perform any task. When applying the above approach to legal relations, it is proposed to consider legal norms or various institutional subjects of their application as remedies. Its main content is to outline the objects that ensure the achievement of a particular goal or task, which makes its legal significance closer to the method to another category in law – 'tools'.[19]

In this context, remedies are classified according to their institutional nature into two groups – jurisdictional and non-jurisdictional.

The former includes the activities of state-authorised bodies and officials to protect violated, unrecognised, or disputed rights (court, prosecutor's office, executive authorities, local governments, or other public entities, etc.), as well as the protection of subjective rights from possible encroachments (notary). Among the jurisdictional remedies, there are general (judicial) and special (administrative and notarial) remedies. The protection of the rights of the subjects of legal relations in court is the main among the jurisdictional remedies, has a universal character, is guaranteed by the Constitution of Ukraine, and is the most suitable for resolving disputes.

At the same time, the second group of remedies of protection of rights and interests of a person are non-jurisdictional remedies: it is the activity of individuals and legal entities to protect the rights and interests protected by law, which they carry out independently, without seeking help from competent authorities.[20]

We believe that today, the current regulations and the procedure for its application allow us to fully agree with and support this approach to the delimitation and establishment of the definition of relevant concepts.

For example, the Grand Chamber of the Supreme Court drew attention to the fact that the current CC divides the methods of protection of civil rights and interests into two groups – judicial (Art. 16) and extrajudicial (Art. 17-19) (para. 15 of the Grand Chamber of the Supreme Court from 29 May 2019).[21]

19 MM Lasarenko, 'The ratio of remedies, methods and forms of protection of property rights of a foreign investor in private international law' (2017) 6 Comparative and Analytical Law 110-111; MA *Rozhkova Remedies and methods of protection of the parties to a commercial dispute* (Wolters Kluwer 2006) 64.

20 OO Karmasa, 'Remedies and methods of protection of the rights of the subjects of housing relations' (2012) 2 Journal of Kyiv University of Law 155.

21 Case No 310/11024/15-ц (Supreme Court [GC], 29 May 2019) <https://reyestr.court.gov.ua/Review/82703516> accessed 13 July 2021.

Based on the analysis of the regulations cited in the decision, it can be noted that they clearly distinguish the concept of 'ways to protect rights and interests' depending on the competence of institutions to influence disputed legal relations – the President of Ukraine, public authorities, authorities of the Autonomous Republic of Crimea local government in accordance with Art. 17 of the CC, notaries on the basis of Art. 18 of the CPC, or the person him/herself, as a victim of violations and unlawful encroachments, in accordance with Art. 19 of the CC.

Each of the listed options of intervention by the relevant entity in order to protect the rights, freedoms, or interests is limited to its own tools and the procedure for its implementation, as emphasised by law. Thus, the procedure for applying these tools (by exercising competence or application of rights) from the standpoint of influencing the content of the disputed legal relationship (rights, interests, and responsibilities of the parties) to eliminate violations of rights or interests should be defined as ways to protect each subject legal protection systems. At the same time, the functioning of judicial institutions or other opportunities to protect the rights and interests in the state should be considered as separate remedies of protection of rights with unique methods.

Confirmation of this can be found in the provisions of the ECHR on the analysis of the rules of admissibility of appeals to the European Court of Human Rights. Art. 35 of the ECHR's condition of admissibility is the exhaustion of all domestic remedies of protection of rights, in accordance with generally accepted principles of international law. Similarly, Art. 55 of the Constitution of Ukraine establishes the right of every person, after using all national remedies, to apply for protection of their rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or a participant.

From the content of the autonomous interpretation in the application of these provisions, the assessment of the use of rights protection remedies provides a priority to establish the use of national institutional systems of human rights, among which the judiciary is in a leading position. Thus, states are relieved of the need to be accountable to an international body until they take the opportunity to remedy the situation through their own legal system. The rule is based on the assumption reflected in Art. 13 of the ECHR, according to which there is an effective remedy capable of essentially resolving a 'non-groundless complaint' under the Convention and securing adequate redress (para. 44 of the ECtHR decision of 4 July 2019).[22]

Further examination of the admissibility of a person's complaint about breaches of the Convention's obligations involves an analysis of the potential and actual ability of these systems to provide such protection through the definition of competence and its application (appropriate methods and their effectiveness).

The ECtHR holds a well-established position that:

> in deciding on admissibility, it draws attention to the fact that applicants should exhaust only those available domestic remedies to which they have direct access and which at the time of the event were effective both theoretically and practically, i.e. which were available and capable of reimbursing the damages and which provided prospects for successful consideration of the case.[23]

Thus, in addressing the admissibility of complaints to the ECtHR, both the systems of remedies (institutions) and the ways (defined by their competence) of the protections they apply are examined.

22 Case No 6433/18 *Sokolovskyy v Ukraine* [2019] Oficiynyi visnyk Ukrainy 87/34.

23 *Sejdovic v Italy* App no 56581/00 (ECtHR, 1 March 2006) <http://hudoc.echr.coe.int/eng?i=001-72629> accessed 11 March 2021; Paksas v Lithuania App no 34932/04 (ECtHR, 6 January 2011) <http://hudoc.echr.coe.int/eng?i=001-102617> accessed 11 March 2021.

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Also, in another of its decisions, the ECtHR reiterates:

> the mentioned provision of Art. 13 of the ECHR guarantees effective remedies for the exercise of the rights and freedoms provided for in the Convention at the national level, regardless of how they are expressed in the legal system of a country.
>
> The essence of this article is to provide a person with such remedies at the national level that would allow the competent public authority to deal with substantive complaints of violations of the provisions of the Convention and provide appropriate judicial protection, although the states under the Convention have some discretion as to how they ensure the fulfilment of their obligations.
>
> In some circumstances, the requirements of Art. 13 of the ECHR may be provided by the full range of remedies provided for under national law.[24]

The analysis of the above gives grounds to conclude that the legislative restrictions on the substantive legal remedies of civil law or interest are to be applied in compliance with the provisions of Arts. 55 and 124 of the Constitution of Ukraine and Art. 13 of the ECHR, according to which every person has the right to an effective remedy not prohibited by law.[25]

3.2 METHODS OF PROTECTION OF RIGHTS AND INTERESTS OF A PERSON IN LAND DISPUTES

3.2.1 General definition of protection of rights, freedoms, and interests

The resolution of a land dispute is a legal guarantee of protection of land rights, which is provided (implemented) with the help of public authorities within the powers defined by law to make a decision that will restore the violated, unrecognised, or disputed right[26].

In this article, we will focus only on the current state of judicial (jurisdictional) protection of rights and appropriate methods of protection of rights and interests in land relations, which are used within its functioning.

The theory formulates various approaches to understanding the meaning of the concept of how to protect rights or interests. They mainly concern the civil law aspect, which is determined by the duration of scientific research in this area. At the same time, the general results and approaches of such research can be applied to the field of disputes in the public sphere, as it is about the only basic principles of the state apparatus and the mechanism of legal regulation in protecting the rights and interests of the individual.

The general conceptual definition of the method of protection is provided by Z. Romovska (2005), who understands this concept as: 'A concentrated expression of the content (essence) of the measure of state coercion by remedies of which the desired result is achieved'.[27] Thus, the method of protection is most clearly tied to the mechanisms of state provision of law and order as the desired result of the functioning of the state-organised system of public relations.

This approach has found significant support in the special scientific literature and is supplemented by researchers' own additional features. O. Karmaz (2012) defines the method

24 Chahal v United Kingdom App no 22414/93 (ECtHR, 15 November 1996) <http://hudoc.echr.coe.int/fre?i=001-58004> accessed 11 March 2021.

25 Case No 910/7164/19 (Supreme Court [CCC], 28 May 2020) <https://reyestr.court.gov.ua/Review/89485041> accessed 18 June 2020.

26 YaZ Yaremak 'The importance of the institution of land dispute resolution in the land law system' (2019) 51 Current Issues of Improving the Current Legislation of Ukraine: A Collection of Scientific Papers 101-102, 106.

27 Z Romovska, *Ukrainian civil law* (Atika, 2005) 494.

of protection from its linguistic interpretation, complements the legal features of certainty in law, substantive and coercive nature of the impact on the behaviour of the offender, whose purpose is to restore (recognise) of violated (disputed or unrecognised) rights.[28]

A systematic study of the current legal regulation and law enforcement practice indicates that non-jurisdictional remedies are gaining more and more recognition and importance. Accordingly, it is possible to distinguish a group of methods of land rights and interests that restore them by exercising the competence of a notary (for example, in case of satisfaction of the creditor's claims by foreclosure on the subject of the mortgage, which is land, under Art. 33 of the Law of Ukraine 'On mortgage' of 5 June 2003), contractual forms of settlement of disputes (for example, the establishment of an easement and a contractual change in the legal relationship in this regard) or through self-protection (for example, unilateral termination of the contract due to breach of obligations' contracting or cutting off the roots and branches of trees in case of moving from one land site to another, if such movement is an obstacle to the use of land for its intended purpose or liquidation of trees at the common border, in order to implement the principles of good neighbourliness under Chapter 17 of the LC).

In this case, the definition of coercion is broad and includes both the force and effect of state influence as a result of the positive effect of legal regulation on a person's behaviour (so-called positive legal responsibility), including by both persuasion and real coercion to act against the will of the person concerned under the threat of legal sanctions.

In this aspect, we cannot agree with the identification in the literature of the remedies and measures of responsibility on the basis of the formula of 'coercion'. Instead, the remedies may include appropriate sanctions for violations of the rights, freedoms, or interests of the person, if the purpose of protection is to meet the needs of the person in dispute by restoring, recognising, and creating conditions for the unimpeded realisation of rights and interests.

Accordingly, we consider it appropriate to agree with the provided definition of ways to protect the violated, disputed, or unrecognised right or legal interest provided by V.V. Petrunya, as a set of actions provided by law, contract, or those that do not contradict the principle of the rule of law of authorised state bodies or relevant persons, which can be used to achieve termination, prevention, elimination of violations, restoration (recognition) of violated (disputed) rights, or compensation of damages and influence on the offender.[29]

A similar approach to determining the method of protection is accepted in law enforcement practice. Clause 14 of the decision of the Grand Chamber of the Supreme Court of 29 May 2019 defines the method of protection of civil rights or interests as: 'Actions aimed at preventing the violation or at restoring a violated, unrecognised, contested civil right or interest. The remedies of protecting a civil right or interest must be accessible and effective'.[30]

Scholars define ways of protecting a right as actions provided by law that are directly aimed at protecting the relevant right. Such actions are final acts of protection in the form of substantive legal actions or jurisdictional actions to remove obstacles to the exercise of their rights or the cessation of offences, the restoration of the situation that existed before the violation. The application of a specific method of protection of the violated or denied right is the result of protection activities.[31]

28 OO Karmasa, 'Remedies and methods of protection of the rights of the subjects of housing relations' (2012) 2 Journal of Kyiv University of Law 156.

29 VV Petrunya, 'The concept and system of methods to protect the rights of economic entities' (PhD (Law)thesis, National University 'Odesa Law Academy' 2019) 4.

30 Case No 310/11024/15-ц (Supreme Court [GC], 29 May 2019) <https://reyestr.court.gov.ua/Review/82703516> accessed 13 July 2021.

31 'On methods to protect the law in public law relations' (Yurydychna gazeta Online, 19 November 2019) <https://yur-gazeta.com/publications/practice/sudova-praktika/pro-sposobi-zahistu-prava-u-publichnopravovih-vidnosinah.html> accessed 23 September 2020.

In its relationship with the subject of research of this scientific intelligence in the jurisdictional judicial remedies of protection of rights or interests of land rights, speaking of the relevant acts (actions or inactions), it should be about the competence of relevant jurisdictions to influence the dispute and the disputed legal relationship from which it arose.

3.2.2 Different ways to protect the rights and interests of persons in land relations for individual jurisdictions

In procedural codes, there is a significant difference between the methods of protection used by administrative courts and courts when considering disputes arising from civil, labour, family, housing, economic, and other legal relations, including land – in the sense of para. 1 Art. 19 of the CPC and cases in disputes concerning the right of ownership or other real rights to property (movable and immovable, including land) for para. 6 para. 1 Art. 20 of Commercial Procedural Code (hereinafter – ComPC) – which fall under the jurisdiction of civil and commercial courts.

Paras. 1 and 2 Art. 5 of the CAP guarantees every person the right to apply to an administrative court in accordance with the procedure established by this Code, if they consider that the decision, action, or inaction of the subject of power violates their rights, freedoms, or legal interests, and to request their protection by:

> 1) recognition of a normative legal act or its separate provisions as illegal and invalid;
>
> 2) recognition as illegal and cancellation of the individual act or its separate provisions;
>
> 3) recognition of the actions of the subject of power as illegal and the obligation to refrain from certain actions;
>
> 4) recognition of the inaction of the subject of power as illegal and the obligation to take certain actions;
>
> 5) establishing the presence or absence of competence (powers) of the subject of power;
>
> 6) adoption by the court of one of the decisions specified in paragraphs 1-4 of this part and recovery of funds from the defendant-subject of power to compensate for the damage caused by his illegal decisions, actions, or inactions.

Protection of violated rights, freedoms, or interests of a person who appealed to the court may be carried out by the court in another way that does not contradict the law and provides effective protection of the rights, freedoms, and interests of man and citizen, or other entities in the field of public relations, from violations by the subjects of power.

The remedies listed in para. 1 Art. 5 and para. 2 Art. 245 of the CAP are based on the nature and forms of activity of subjects of power, indicate coercive measures that can be applied in court, ways to counteract the illegal exercise of competence by public authorities or local governments as the main defendants in administrative proceedings. We believe that the basis of this approach is that after the court corrects the violations of the procedure for exercising their powers, the authorities, within the framework of the special permit principle, will refrain from repeating these violations in the future, with minimal actual interference in the problem of distribution of authorities and competencies between branches of government.

However, even when correcting an error in the activities of the public administration in such ways or equally effectively, the court will take care of the restoration of violated, disputed, or unrecognised rights and interests of the person. In part, it may seem that under the existing system of judicial protection by administrative courts, the main focus of their activities is on the problems of the apparatus rather than the rights and interests of the person violated by it. This gives researchers and practitioners of justice the opportunity to even support the discussion and substantiate their own theses about the doubts for the 'ontological purity' of administrative justice as a form of administration of justice.

It is hardly possible to agree with the last thesis from both the formal and the factual points of view. But the peculiarities of the application of methods of protection by administrative courts in the protection of the rights, freedoms, and interests of the individual obviously exist, which confirms the relevance of this and subsequent scientific developments.

Instead, regulations of paras. 1 and 2 Art. 5 of the CPC and paras. 1 and 2 Art. 5 of the ComPC, which are similar in content, define:

> in the administration of justice, the court protects the rights, freedoms and interests of individuals, the rights and interests of legal entities, state and public interests in the manner prescribed by law or contract.
>
> If the law or the contract does not determine an effective way to protect the violated, unrecognized or disputed right, freedom or interest of the person who appealed to the court, the court in accordance with the claim of such person may determine in its decision such a method of protection that does not contradict the law.

Thus, civil and commercial litigation in determining the remedies mainly refers to the content of special legislation governing the disputed legal relationship and therefore determines the implementation of rights, freedoms, and interests of the individual and possible ways to restore them through coercive force. This approach is obviously more correct, given the substantive nature of the violated rights, freedoms, or interests and the consequent nature of the remedies that should be used to restore them.

For the current state of legal regulation, a non-exhaustive list of ways to protect land rights is contained in para. 3 Art. 152 of the LC, para. 2 Art. 16 of the CC, and para. 2 Art. 20 of the Commercial Code of Ukraine (hereinafter – ComC).

Analysis of the content of methods of protection of land rights shows that their role and significance are different: each method of protection has its own characteristics, functions, purpose, and conditions of use.

As defined by the doctrine of land law, some of them are directly aimed at protecting the right of ownership of land or land use rights; others are aimed indirectly. All these methods of protection of land rights can be classified into separate, relatively independent groups: property law, contract law, and special methods of land rights protection. Property and legal methods of protection of land rights are directly aimed at protecting the subjective right of ownership of land or land use rights of persons who at the time of the violation of the right are not in a binding relationship with the infringer (claiming land from someone else's illegal possession [vindicative claim]; the requirement of the landowner or land user to eliminate violations in the exercise of their rights, which are not related to the deprivation of land ownership [negative claim]; and so on). Mandatory legal remedies are aimed at protecting the rights of the subject as a party to the binding relationship (compensation for damages caused by non-performance or improper performance of the contract; return to the owner of the land provided for use under the lease, etc.). Special methods of protection of land rights apply to special cases of violation of the rights of landowners and land users. They are due to a special circle of authorised or obligated persons and extraordinary circumstances

(recognition of the land agreement as invalid; invalidation of decisions of executive authorities or local governments that violate the rights of landowners and land users, etc.).[32]

It is noted in the literature that the definition of methods in the Land Code of Ukraine as legal guarantees of protection of land rights places a functional burden on them, which is to restore the rights that were violated, to remove obstacles to their implementation, and so on.[33] In fact, this is what any kind of litigation seeks, if we carefully examine their regulatory tasks.

However, the methods of protection used by administrative courts and in civil or commercial proceedings are significantly different, except for invalidation (which is identical to illegality, unlawfulness, invalidity) of decisions of public authorities and local governments, which suggests the existence of normative-formal difference of legal protection in the order of various types of legal proceedings. However, such a conclusion would force us to agree with the difference in the essential common principles of the functioning of the justice system, its goals, and objectives.

3.2.3 Assessment of the possibility of recourse to the court to achieve the purpose of administrative proceedings

Regarding the legal characteristics of jurisdictional (judicial) methods of protection in administrative proceedings, special attention should be paid to the definition of such methods in court proceedings in public law disputes, at the request of the subject of power in cases where the right to apply to the court for a public law dispute is granted to such a subject by law (clause 5 para. 1 Art. 19 of the CAP).

In this category of disputes, the usual basic model of approaches to the characterisation of judicial activity is undergoing significant changes. This is evidenced by the fact that for a long time, any possibility of referring this category of cases to the jurisdiction of administrative courts was denied, justifying their inconsistency in the legal nature and purpose of administrative justice, the real punitive functions when it considers cases caused by the claim of the object of power to the person.[34] System analysis of Art. 55 of the Constitution of Ukraine and the provisions of the CAS of Ukraine indicates that administrative courts consider cases 'person against the state' and are designed to protect people from the arbitrariness of the state (state bodies), not vice versa.

However, the experience of the institute of administrative justice has proved the unfoundedness of the last objections and their lack of motivation since the basis of their argument was superficial external attributes of proceedings initiated by the subjects of power. Instead, it should be agreed that a detailed study of the categories of cases and the grounds for their consideration in courts, on the contrary, allows us to speak more fully of administrative proceedings, due to the consideration of such disputes it should prevent human rights violations by judicial control over 'interference' powers of the authorities.[35]

32 Land Code of Ukraine: comment (Odissey, 2002) 402; MV Shulha, HV Anisimov, NO Bahai, AP Hetman, Land Law Ukraine (Yurincom Inter, 2004) 143; ZV Yaremak, 'The effectiveness of methods to protect land rights: problems of judicial practice' (2020) 4 Juridical Scientific and Electronic Journal <https://doi.org/10.32782/2524-0374/2020-4/27> accessed 21 March 2021.

33 Ibid.

34 V Averyanov, D Lukyanets, Yu Pedko, 'Code of Administrative Procedure of Ukraine: the need and ways to eliminate conceptual and conceptual defects' (2006) 3 Law Ukraine 10-11; VM Bevzenko, SM Minko, 'Features of determining the jurisdiction of public law disputes' (2007) 3 Bulletin of Commercial Justice 124-125.

35 IB Koliushko, RO Kuibida, *Administrative justice: European experience and proposals for Ukraine* (Fakt, 2003) 33.

The basic instructions of the CAP, which outline the tasks and principles of this form of justice in Arts. 2 and 5 of the CAP, indicate the universal obligation of the court to use procedural possibilities and powers in order to effectively protect the rights, freedoms, and interests of individuals in the process of considering public law disputes of administrative jurisdiction. When appealing to the administrative court, when only the adoption of a judicial act allows them to exercise the powers granted, in cases established by law, the court checks the activities of the representative of the government. In such cases, the court actually grants permission to enforce the administrative act. This again raises the question of verifying the legitimacy of the document, which provides for the assessment of the behaviour not so much of the person subject to coercive measures but of the compliance by a representative of the authorities with the requirements relating to legal acts of management.[36]

The continental German model of administrative justice, received by Ukraine, has, over its long history, approved the approach to the expediency and jurisdiction of the relevant categories of cases within the competence of administrative courts.[37]

In the same category of cases, it is objectively difficult to apply the traditional approach to determining the methods of protection used by administrative courts in other disputes 'against a subject of power'. Therefore, it demonstrates the multifaceted discussion of the object and subject of this scientific article.

In decisions on appeals of subjects of power, the courts neither recognise the activity of the authority as illegal with the recognition of invalidity or cancellation of the act, nor require certain actions, nor refrain from committing them in the resolution. Instead, quite often, the decision to satisfy the appeals of the subject of power, on the contrary, can raise doubts on who is protected by the courts in a particular case when deciding to forcibly alienate land, other real estate located on it, for reasons of public necessity (Art. 267 of the CAP).

Even in such an extraordinary form, the internal content of judicial activity is primarily aimed at assessing the legality of decisions (acts), actions, or inactions of the subject of power, which potentially lead to interference in the rights, freedoms, and interests of the individual. Its result, establishing their legality or illegality, determines the satisfaction of the court with the relevant appeal or the refusal of such satisfaction, which authorises public administration activities.

From the description above of the methods of protection as actions of authorised state bodies, by remedies of which the prevention of violations of rights can be achieved, this judicial activity best corresponds to the given definition. It has the potential to provide effective protection in terms of preventing violations that will negatively affect the rights, freedoms, and interests of the individual, to prevent such from the negative impact of the actions of the subjects of power.

According to O.V. Ilnytsky (2011), for land relations, this category of cases is one of the most important in terms of exercising the powers of administrative courts to monitor the observance of human rights, which is determined by the constitutional principle of inviolability of property and exclusion of grounds for compulsory alienation (Art. 41 of the Constitution of Ukraine).[38]

36 Yu Bytyak, N Pysarenko, 'Procedural form of administration of justice in disputes involving a subject of authority' (2006) 10 Law Ukraine 79-80.

37 Siegfried F Franke, *Allgemeines Verwaltungsrecht der Bundesrepublik Deutschland: Grundzűge, Erläuterungen und Beispiele* (R. v. Decker's Fachbűcherei: Recht und Wirtschaft 1999) 173-175.

38 O Ilnytskyy, *Land disputes and the procedure for resolving them in Ukraine: administrative and legal approach* (FOP Pyatakov 2011) 207.

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In this regard, for example, Art. 143 of the LC, when determining the grounds for compulsory termination of land rights, indicates as the imperative the provision of judicial procedure to assess the existence of factual and regulatory grounds for such interference in the field of land rights, freedoms, and interests of the person, some of which is at the request of the subject of power in administrative proceedings.

In the civil theory of protection of rights, freedoms, and interests, 'other ways of protection' can also include judicial activity, namely prior judicial control. That is, when performing an action that may have legal consequences and affect the rights and legal interests of the authorised person, it is necessary to first go to court. Thus, in accordance with the provisions of the Constitution of Ukraine, no one may be forcibly deprived of housing other than on the basis of law by a court decision (Art. 47).[39]

4 ENSURING THE EFFECTIVENESS OF WAYS TO PROTECT THE RIGHTS AND INTERESTS OF THE PERSON REGARDING LAND IN ADMINISTRATIVE PROCEEDINGS

4.1 UNDERSTANDING OF EFFECTIVENESS AS A CRITERION FOR THE PURPOSE OF THE PROCEEDINGS

The purpose of legal proceedings, which is formulated through the sign of 'effectiveness' of judicial protection, requires the establishment of a normative definition of this sign. Moreover, this feature is currently important in law enforcement, which borders on the guarantee of the right to judicial protection. Frequent cases in the practice of the Supreme Court are the refusal to satisfy the claim on the grounds of the ineffectiveness of the chosen method of protection of the rights of the person, which is defined by them in the claims, because it does not restore violated, disputed or unrecognised rights, freedoms, or interests of the plaintiff. Consequently, the task of judicial proceedings is not fulfilled. This leads to the courts' assessment of the question of to what extent such a dispute in this case is legal and belongs to the court jurisdiction according to Art. 124 of the Constitution of Ukraine.

The provision on ensuring the effectiveness of judicial protection also corresponds to the guarantees of the rights of the person set forth in Art. 13 of the ECHR. The ECtHR has repeatedly stated in its decisions, analysing national redress systems for compliance with the right to the effectiveness of internal safeguards mechanisms, that in order to be effective, the remedies must be independent of any action taken by the public authorities, be directly available to those concerned (*see Gurepka v. Ukraine*, application no. 61406/00, para. 59) and able to prevent the occurrence or continuation of the alleged infringement or to provide adequate compensation for any infringement that has already taken place (see *Kudla v. Poland*, judgment of 26 October 2000 in the case *Kudla v. Poland*, (<…>) [GC], application no. 30210/96, ECHR 2000-XI, para. 158) (para. 29).[40]

The remedies must be 'effective' in the theory of law and in practice, in particular in the sense that its use cannot be unduly complicated by the actions or inactions of the respondent State authorities (decision of 18 December 1996 in *Aksoy v. Turkey*, para. 95).

39 OO Karmasa, 'Remedies and methods of protection of the rights of the subjects of housing relations' (2012) 2 Journal of Kyiv University of Law 156.

40 Case 20390/07 Garnaga v Ukraine [2013] Oficiynyi visnyk Ukrainy 1/203.

In assessing effectiveness, it is necessary to take into account not only the formal remedies but also the general legal and political context in which they operate and the applicant's personal circumstances (decision of 24 July 2012 in *Djordjevic v. Croatia*, para. 101; decision of 6 November 1980 in *Van Osterwijk v. Belgium*, para. 36-40). Thus, the effectiveness of the remedies is assessed not in an abstract way but by taking into account the circumstances of a particular case and the situation in which the plaintiff found him/herself after the violation.

The issue of the effectiveness of legal protection was analysed in the decisions of national courts. In particular, in the decision of 16 September 2015 in case no. 21-1465a15, the Supreme Court of Ukraine concluded that the court decision, in case of satisfaction of the claim, should be such that would guarantee the protection of the rights, freedoms, and interests of the plaintiff from violations by the defendant, ensure its implementation and prevent the need for further appeals to the court. The method of restoring the violated right must be effective and such that excludes further illegal decisions, actions, or inactions of the subject of power, and in case of non-execution or improper execution of the decision, there would be no need to go to court again, and enforcement of the decision would take place.

In its case law, the Supreme Court has repeatedly stated that an 'effective remedies' within the meaning of Art. 13 of the ECHR must ensure that the violated right is restored and that the person obtains the desired result. Making decisions that do not directly lead to changes in the scope of rights and ensuring their enforcement does not comply with this provision of the Convention (Resolution of the Grand Chamber of the Supreme Court of 28 March 2018 in case no. 705/552/15-a, decisions of the Supreme Court of 18 April 2018 in case no. 826/14016/16, of 11 February 2019 in case no. 2a-204/12).

The method of protection chosen by the plaintiff should be aimed at restoring the violated rights, protection of legal interests and, if the court satisfies his/her claims, the decision should result in the actual restoration of those rights for which the plaintiff went to court (para. 27-31).[41]

The effectiveness of the protection of rights, freedoms, and interests as a result of application to the courts is a complex collective concept, which in the most general terms, can be described as the ability to ensure the real impact of the court decision on the legal status of the person in dispute by restoring or recognising unrecognised rights, freedoms, or interests of the person, for which he/she appealed to the court.

V. Kravchuk (2020) distinguishes the reality of protection of rights, speed, and accessibility (in the context of monetary costs) by the criteria of efficiency of judicial protection. The reality depends on the quality multiplied by the immediate implementation of the decision. In turn, the quality of the decision, in his opinion, is clarity, effectiveness, 'enforceability', and its independence from the plaintiff. In addition, the decision should include safeguards against the recurrence of violations and the formation of new disputes.[42]

Thus, an effective remedy (method) should be understood as one that leads to the desired results, consequences, or has the greatest effect. Therefore, an effective method of protection must ensure the restoration of the violated right and be adequate to the existing circumstances.

41 Case No 340/2074/19 (Supreme Court [ACC], 4 August 2020 <https://reyestr.court.gov.ua/Review/90755073> accessed 13 July 2021.

42 V Kravchuk, 'Principles of administrative proceedings' (*UBA*.ua, 19 June 2020) <https://uba.ua/ukr/news/7657/> accessed 26 June 2021.

Therefore, the administrative court, having received the statement of claim, must establish the existence of the fact of violation of the right and apply a specific way to protect the violated right. The method used depends on the content of the subjective right for the protection of which the person applied and the nature of the violation.

All this inevitably leads to the use of methods of protection by the court in resolving the case that would ensure the set goal and perform the tasks that follow from it in the specified context.

When choosing between general methods of protection of law (provided by law) or special methods, administrative courts must prevent abuse of the right to protection and violation of the rights of defendants, repeated proceedings on essentially identical but formally different requirements, as well as not complicate enforcement decisions. That is, having established the violated right of the applicant, the court must protect his/her right and must not allow chaos in law enforcement.

It follows that for the effective restoration of the infringed right, it is necessary that there be a clear link between the offence and the method of protection of the right. In other words, the purpose of the stated claims should be to eliminate obstacles to the exercise of the right, and its achievement is a certain way to protect the right, which would exhaust itself.[43]

4.2. THE LEVEL OF EFFECTIVENESS OF GENERAL METHODS OF PROTECTING THE RIGHTS OF FREEDOMS AND INTERESTS OF ADMINISTRATIVE COURTS IN DISPUTES OVER LAND RIGHTS

The right to property is an indisputable object of protection by the parties in cases of appeal against decisions, actions, or inactions of subjects of power in the usage of public property (including land property).

The range of tools used by the substantive and legal powers of administrative courts is aimed at resolving issues of restoring the legitimacy of public administration in compliance with the guarantees of the constitutional system (for example, in terms of the concept of the functional distribution of branches of government). In deciding the issue of the proper exercise of competence, the result of its implementation is also one of the criteria for judicial evaluation. However, for the party, this algorithm has the opposite effect: they protect their own rights, freedoms, or interests, which must be provided by public authorities or local governments.

In the scheme of evaluating the activities of the subject of power, the courts face numerous problems of competence, discretion, and public succession as a result of the reorganisation of the mechanism of the state. The court decision, through the 'general' means of protection of administrative proceedings (Arts. 5 and 245 of CAP), provides an assessment of the exercise of powers, directing the defendant (subject of power) in the legal direction of activity. Only relatively recently have administrative courts taken a proactive stance, according to which the mere finding of illegal actions in person-friendly proceedings does not restore the rights of such a plaintiff. To this end, the administrative court is endowed with appropriate powers, in particular, Part 4 of Art. 245 of the CAP of Ukraine stipulates that in the case specified in para. 4 of Part 2 of this article, the court may oblige the defendant, who is the subject

43 'On methods to protect the law in public law relations' (*Yurydychna gazeta Online*, 19 November 2019) <https://yur-gazeta.com/publications/practice/sudova-praktika/pro-sposobi-zahistu-prava-u-publichnopravovih-vidnosinah.html> accessed 23 September 2020.

of power, to decide in favour of the plaintiff, if such a decision meets all the conditions prescribed by law and acceptance of such a decision does not provide for the right of the subject of power to act at its own discretion. Therefore, the long inaction of the defendant in violation of regulatory requirements for the exercise of their competence and the need to ensure effective protection, which excludes further illegal decisions, actions, or inaction of the subject of power, determine the need to oblige the defendant to authorise (those which grant (certify) the relevant right) decisions (paras. 58-60).[44]

This is especially important in cases where the previous dishonest behaviour of the subject of power indicates the absence of their intent to make a reasonable and lawful decision in the form prescribed by applicable law, taking into account the position of the court. As the process of refusing the plaintiff to grant permission to develop a land management project on formal grounds without making an appropriate government decision (according to Art. 118 of the LC) can be quite long, as indicated by the wrongful conduct of the defendant, who repeatedly enforces similar violations rights of the plaintiff, in this case, the proper way to protect the violated right is the obligation of the land management authority to grant permission to develop a land management project (para. 55).[45]

From the practice of law enforcement, even the satisfaction of such claims is not a guarantee of restoration of violated rights, as the court decision will not be a direct basis for technical activities in the field of land management. O. Snidevych (2006) notes that it is quite reasonable to see the possibility of violation of human rights to effective judicial protection, guaranteed by Art. 13 of the ECHR. The adoption of such acts by the relevant body is only a delay in the development of the land management process. The acts of these bodies do not bring anything new to the regulation of land relations. They are just an extra part of this process. In addition, such decisions can be enforced only by the executive or local self-government bodies themselves.[46] And this contradicts the existing positions of guarantees for the effectiveness of judicial protection.

Thus, having chosen the procedure for exercising competence by the subject of power as the main 'goal', administrative-procedural methods of protection come into formal conflict with the normative task of the judiciary on the priority of rights, freedoms or interests of a person violated by such public authority.

This conclusion is indirectly confirmed in the legal positions of the Grand Chamber of the Supreme Court. For example, in a study of the use of land rights common to civil and administrative litigation, declaring as illegal and challenging decisions of public authorities and local governments, the Court considered this method of protection ineffective because it could not protect or restore the infringed property right of the plaintiff (if there is any), in particular, the return to their possession or use of the disputed land, compensation of damages.

The methods of protection of property rights are defined in the Civil Code. Judicial protection must be complete and comply with the principle of procedural economy, i.e., ensure that there is no need to go to court to seek additional remedies. Satisfying the claims for illegality and challenging the disputed decision to lease the land to a third party, which has already been sold and expired, will not restore the plaintiff's rights, restore possession, use, or disposal of the property, and it will require additional protection. Based on the circumstances of this case, the proper way to protect the plaintiff will be to apply to the court to recover property from someone else's illegal possession, if the plaintiff was deprived of land

44 Case No 813/5074/17 (Supreme Court [ACC], 2 April 2021) <https://reyestr.court.gov.ua/Review/95982464> accessed 13 July 2021.

45 Case No 812/1313/18 (Supreme Court [ACC], 30 April 2020) <https://reyestr.court.gov.ua/Review/89035537> accessed 13 July 2021.

46 O Snidevych, 'Land management lawsuits in the civil process of Ukraine' (2006) 6 Pravo Ukrainy 72.

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ownership, or remove obstacles to the exercise of property use and disposal, if the plaintiff is denied their right. The Grand Chamber of the Supreme Court also draws attention to the fact that according to the method of protection chosen by the plaintiff, the proper defendant, in addition to the subject of power, may be an individual to whom the land was transferred. The plaintiff's choice of an inappropriate way to protect his/her rights is a separate ground for dismissing the claim (para. 47-54).[47]

T.O. Tretyak's (2016) study of the recognition of the legality or illegality of a legal act gives reason to believe that it is not a separate method of protection and has no independent significance. The resolution of this issue during the protection of the right to land is necessary to determine the rights and obligations of the plaintiff and the defendant after the decision of the executive authorities or local governments. The protection of these rights may, without any harm to the plaintiff and society, be carried out by other means of protection.[48]

In these examples, we can see that for civil and commercial litigation, the criterion for the effectiveness of protection is the shortest path for a person to obtain or restore his/her rights. Obviously, this is also relevant for administrative proceedings. However, the application of the remedies defined in the CAP (powers of administrative courts) is not always able to perform this task, given the denial of the substantive nature of violated rights, freedoms, and interests on the basis of public law in the exercise of administrative functions.

4.3 PROBLEMS OF EXPANDING THE METHODS OF PROTECTION OF LAND RIGHTS USED BY ADMINISTRATIVE COURTS

As stated in this article, within the framework of certain principles of the constitutional order, the question of the methods of protection used by the court, in addition to assessing their effectiveness, is based on the principles of determination of legal competence.

Therefore, when resolving disputes by administrative courts, the list of methods of protection and powers of administrative courts, which are defined in Arts. 5 and 245 of the CAP, are applied as an imperative.

At the same time, for example, para. 2 Art. 5 of the CAP provides that the protection of violated rights, freedoms, or interests of the person who appealed to the court may be carried out by the court in another way that does not contradict the law and provides effective protection of the rights, freedoms, and interests of people, citizens, and other entities of public relations from violations by the subjects of power. This provision allows the court to act with a significant degree of freedom within law, choosing a method of protection that is not directly provided by procedural law but follows from the nature of the law, the protection of which is sought by the person in a public dispute within the jurisdiction of administrative courts and its legal regulation, taking into account the requirements of the effectiveness of protection.

The issue of legislative restrictions on the use of remedies in civil and commercial proceedings, instead of expanding them to ensure the completeness and effectiveness of judicial protection, was explained by the underdevelopment of the independence of the judiciary and distrust of judicial discretion, which should determine the content of remedies.

47 Case No 945/642/19 (Supreme Court [GC], 02 February 2021) <https://reyestr.court.gov.ua/Review/95439652> accessed 13 July 2021.

48 TO Tretyak, 'Recognition of illegal decisions, actions or inactions of executive authorities or local governments as a way to protect property rights or land use rights' (2016) 1-2 Ecology Law of Ukraine 75.

However, expert research on this issue has substantiated the opposite trend.[49] This trend was substantiated by the fact that the legislative restriction of the remedies does not guarantee the correct application of law but becomes an obstacle to the real protection of a person's property rights. The latter may be dismissed by the court for non-compliance with statutory remedies. The list of methods of protection is considerable, but even in this case, it is almost impossible to prescribe in the law the grounds and procedure for the application of each of them. The court is forced to adapt the provisions of the law to real social relations, for example, the way to restore the violated right to the content of the violation. In this case, there are as many ways to restore the violated right as ways to violate it. Resolving issues of protection on the basis of formal provisions of the law, instead of the rule of law, leads to negative phenomena: covert denial of justice, protection of the interests of the state (rather a person authorised to make decisions on its behalf), instead of rights and legal interests of a person from the realisation of power competence.[50]

The protection of property rights in the field of land relations has always been and remains one of the main areas of scientific and practical discussion on the effectiveness of protection. For example, O. Podtserkovny (2009) noted that:

> Judicial bodies refuse to satisfy claims of land users to local governments for recognition of land ownership, given that this method of protection is not provided by the Land Code, and the solution of these issues is the exclusive competence of local governments. It turns out that the right to property in relations with individuals can be protected in practice, in particular, by recognizing the right, and in relations with public authorities one should expect 'mercy' of these authorities. It is clear that this upsets the balance between public and private interests, undermines confidence in the domestic legal system.[51]

Para. 4 of the Letter of the Supreme Court of Ukraine dated 29 October 2008 no. 19-3767/0/8-08 'On the consideration of land disputes' denied the possibility of acquiring ownership of the land by a court decision by establishing a fact of legal significance, thus asserting the inadmissibility of equating the court decision and the relevant decision of the competent subject of management as a legal fact of the emergence of land rights in non-litigation proceedings. This virtually remedies that a court decision assesses legal relations only in a disputed situation regarding the existence of land rights and cannot be a self-sufficient act to establish such rights, bypassing executive or local self-government bodies. However, in the case when a person applies for protection of the right to land, the court may not limit itself to assessing the general legality of decisions, actions, or inactions that violate this right, but also take measures to protect it – even if the violator is a subject of authority.

The reason for restricting the entry of administrative courts beyond the limits of Arts. 5 and 245 of the CAP are not only formal requirements of the law but also the systematic assertion of the lack of independent legal significance of property claims in cases of administrative jurisdiction, as well as a high level of discretion of management entities in cases involving public property and inadmissibility of court intervention in this area.

However, in this case, taking into account the content of the disputed legal relationship, it is necessary to consider which protection of the right or interest of the person is in question.

Property claims with appropriate substantive remedies may be considered and satisfied

49 D Luspenyk, 'Those, who play with procedural laws, can easily break the logic of the CPC with one failed innovation' (2012) 6 Law and Business 1, 4.

50 OP Podzerkovnyi, 'About problems of application of method of protection of the broken right (on an example of recognition of the property right in mortgage relations)' (2012) Scientific Works of the National University of Odessa Law Academy 190-191.

51 OP Podzerkovnyi, 'Methods of protection in land relations' (2009) 9 Law of Ukraine 190-191.

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by administrative courts in the event that the subject matter of the case, which meets the characteristics of administrative, was the right of the person to the individual property, and not just the right to receive it in the sense of 'Lawful (legitimate) expectation' in the context of protection Art. 1 of the Protocol of the ECHR.

On the basis of a detailed scientific study of the application of land rights protection methods, Y. Myahkohod (2014) came to the conclusion that

> The use of the recognition of a right as a means of its protection will be quite effective when a person acquired the right to land in accordance with the land law, but due to various circumstances this right was not officially formalized and is disputed.[52]

It is clear that this conclusion is relevant in the case of obstacles to the legalisation of the right to land due to improper exercise of power and public authority management functions by the subjects of power.

Thus, the application of recognition of the right by the administrative court is possible, but only in respect of established property, when the decision of the subject of power is only a fact that legalizes the right of the person to the property and is beyond the discretion of the authority management of public property at this stage of the right of the person (for example, in the final stages of the transfer of the formed land plots from the state or municipal property to private property by way of privatisation). This will comply with the principles of effective judicial protection of property rights violated by the subject of power, instead of making the plaintiff's right dependent on additional procedures to enforce the court's decision by the defendant, obliging the latter to reconsider and decide on legalisation of the person's right.

The nature of the claim due to the circumstances of the case, which allows for the differentiation of the dispute over the **right to property (land)** or the **right to a particular property (land)**, must be taken into account by the court as to the procedure, including determining the subject and procedure evidence in court and in assessing the permissible effective ways to protect the rights of the individual.

5 CONCLUSIONS

In choosing the method of protection of the infringed right, freedom, or interest, the courts must take into account the direct relationship between the claim for protection and the content of such right and the nature of the offence. Accordingly, the requirement of complete protection of rights, freedoms, and interests in administrative proceedings does not limit the categories of cases they consider on the basis of violated rights, freedoms, or interests, and jurisdiction is determined solely on the basis of the subject composition and nature of the disputed relationship due to the implementation of public authority management functions.

The jurisdictional component of the right to a fair trial presupposes the need for courts to take into account the scope of their powers under the Constitution and laws of Ukraine. At the same time, the concept of expanding the limits of permissible remedies, which are not limited to formal legal instructions but are determined only by the requirements of the need to ensure effective protection of rights, freedoms, and interests, allows administrative courts to use means (general and special) that will ensure the real restoration of the violated rights, which are adequate to the existing circumstances. In the future, rights will not depend on the will or other additional actions of the defendant, and if necessary, will be restored by enforcement.

52 YV Miahkohod, 'Ways to protect land rights' (PhD (Law)thesis, Taras Shevchenko National University of Kyiv 2014) 32.

The administrative court is authorised to apply substantive remedies when considering the claim for the protection of the right to a certain object of property rights (including land) in an administrative case, taking into account the material nature of the violated right, as well as if the violation is committed by decision, action or inaction of the subject of power and is only a fact that legalises the right of a person to the relevant object of property, and is beyond the discretion of the authority in the management of public property.

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Research Article

DERIVATIVE LAWSUIT IN UKRAINE: THE ISSUE OF IMPROVING LEGAL REGULATION

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ABSTRACT

Background: *Some jurisdictions provide for the right of members of a corporation to sue on its behalf and in its interests. This remedy is called 'a derivative action' (derivative lawsuit), and the right to file such a lawsuit is granted to a company's members in case the wrongdoers are in its control, preventing the company from taking actions to protect its rights and interests – which*

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is detrimental to the interests and rights of minority shareholders. However, derivative lawsuit's regulation differs in each jurisdiction despite sharing common features, raising a variety of issues to be resolved.

Methods: *In this article, the author points out several issues and their possible solutions, which could be implemented in Ukrainian legislation: property qualification by itself cannot prevent abuse in filing a derivative lawsuit – extended 'locus standi' has to be implemented; holders of preferred shares have to be granted the right to file a derivative lawsuit; property qualification has to be substituted with a representation quota for members of non-entrepreneurial corporations; the circle of defendants should include major members (majority of members) and third parties, etc.*

Results and Conclusions: *The concepts of a preventive derivative lawsuit and a derivative lawsuit for the invalidation of a company's transaction and possible issues regarding them are analysed. Additionally, the necessity for implementing a 'business judgement rule' is emphasised.*

1 INTRODUCTION

The institute of derivative action originated from common law countries, namely the United Kingdom, as an exception to the precedent-based 'proper plaintiff rule' in the case of *Foss v. Harbottle*, which is worded as follows: 'In any action in which a wrong is alleged to have been done to a company, the proper claimant (plaintiff) is the company itself'.[2]

This means that the plaintiff may be the person that has the financial claim against the defendant. At the same time, there are frequent circumstances in corporate (membership) relations where the legal entity's ability to defend its violated rights on its own is ruled out due to a defect of its will: the offender is also the person who forms and (or) expresses the legal entity's will. Such persons can be a majority member (shareholder), a majority of members (shareholders), or an official. In due course, these circumstances resulted in the exception to the 'proper plaintiff rule': members of a corporation may bring a claim for and on behalf of the legal entity if a wrong has been done to the latter by the persons who manage it (both majority members and officials). This opportunity of the persons affiliated with the corporation with membership constitutes the content of a derivative action as a remedy.

A derivative lawsuit is defined as a legal remedy used to defend a legal entity's rights, which enables its members to bring and affirm claims for the legal entity if the latter does not initiate the lawsuit on its own due to the interests of its controllers.[3] A derivative action is generally used to indirectly defend the interests of members (shareholders) in connection with the value of their stock (shares) and payment of dividends or liquidation quota rather than their rights. As O. V. Bihniak rightly states:

> regarding the use of the term "indirect" and "derivative", it comes down to the fact that the participant (shareholder) who initiated the lawsuit is not a direct beneficiary in the dispute, such a person is the company itself, but the rights (interests) of the participant are protected by protecting the interests of the company.[4]

1 D Kershaw 'The Rule in Foss v Harbottle is Dead; Long Live the Rule in Foss v Harbottle' (2013) 5 LSE Legal Studies Working Paper 4-5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209061> accessed 8 August 2021.

2 LA Ostrovska 'Indirect (derivative) lawsuits: international experience and legislation of Ukraine' (abstract of PhD (Law) Thesis, National University 'Odessa Law Academy' 2008) 4-5.

4 OV Bihniak OV, 'Derivative action and corporate contract as means of corporate rights protection: experience of Ukraine' (2018) 5 (3) European Political and Law Discourse 231-232.

It is essential to note that pecuniary equity rights (not to be confused with the equity rights of binding nature – such as the right to demand payment of declared dividends or right to demand payment of the liquidation quota) are not violated since their idea is to establish the holder's capability of having a property interest in the results of the corporation's activity. They do not enable the person to claim the specific volume of property: it is only a proportional interest in the future distribution of property results. At the same time, the above does not mean that a derivative action cannot be used as a remedy to defend the rights of members (shareholders) of the corporation. We agree with the opinion that a derivative lawsuit may be filed in order to indirectly protect not only the interests but also the rights of a legal entity's members.[54] In particular, indirect protection of a shareholders' rights takes place when the company's losses, resulting from the actions (inaction) of officials or a majority of members or even transactions conducted by the executive body, prevent the exercise of equity rights of a binding nature – payment of dividends or liquidation quota. Given the specific volume of dividends or liquidation quota that the shareholder is entitled to, the corporation's inability to make payments in the prescribed volumes violates the shareholders' rights.

However, a derivative action is not limited to damages. Officials (or a majority member or majority of members) are usually not able to fully pay damages caused by their actions (or inaction). In addition, there are many cases of concluding fraudulent transactions to the detriment of the interests of a minority of members of the corporation. In such cases, when the corporation cannot defend its violated rights, the rights and interests of the corporation (as well as the rights and interests of its members) are protected by invalidating the transaction on the claim of a minority participant (or participants) of the corporation, which is also a derivative claim. Regarding this type of derivative lawsuit, another instance of indirect protection of the shareholder's specific right may be presented – namely, when a transaction was concluded in breach of the preliminary approval procedure, filing a lawsuit for rendering it void will indirectly protect the shareholder's right to manage the company.

It should be noted that a derivative action is a form for implementing the doctrine of 'piercing the corporate veil' due to transferring the right to bring an action for damages held by the legal entity to its members (shareholders), even though their rights have not been directly violated. In the case of *Agrotexim Hellas SA and others v. Greece (1995),* deciding whether the shareholders could bring an action on the company's behalf and could be recognised 'victims' instead of the company in the meaning of the Convention on Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention'), the European Court of Human Rights (ECtHR) reiterated that

> ...the piercing of the "corporate veil" or the disregarding of a company's legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators.[5]

In its judgement, the ECtHR repeats the equivalent stance of the UN International Court of Justice, which was presented in Paragraphs 56-58[3] and 66[4] of its judgement in the case of *Barcelona Traction, Light and Power Company Limited* dated 5 February 1970. In its judgement, the court emphasised that the independent existence of the legal entity could not be treated as an absolute, and the economic realities sometimes required protective measures and remedies in the interests of those within the corporate entity, as well as of those outside

5 SO Koroed, VM Mahinchuk, 'Derivative (indirect) lawsuits of the founders of legal entities as a form of implementation of the doctrine of piercing the corporate veil' (2020) 44 Scientific Bulletin of the International Humanities University. Series: Jurisprudence 75.

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who have dealings with it, and there could be 'lifting of the corporate veil'[6] (in cases of protection of rights and interests of members, a derivative action, as noted by H. Yu.).

2 A PLAINTIFF UNDER DERIVATIVE LAWSUIT

2.1 GENERAL STATUS OF A PLAINTIFF

In Ukrainian law, a derivative action is prescribed in Art. 54 of the Commercial Procedural Code of Ukraine (hereinafter 'the CPC of Ukraine'). According to this article, the right to bring an action is granted to the person (member, shareholder, owner) that holds 10% or more of the authorised capital or property of the legal entity.[7] According to the Draft Law of Ukraine 'On Joint-Stock Companies', namely Clause 9 of Section XIX, the right to bring a derivative action is granted to the person (member, shareholder, owner) that personally or jointly holds 5% or more of the authorised capital or property of the legal entity.[8] According to Part 2 of Art. 54 of the CPC of Ukraine (which the legislator is not planning to amend), the procedural status of a plaintiff is granted to the legal entity, while its members (shareholders) act as persons, who by law are entitled to file a lawsuit in the interests of the others. Such members (shareholders) are granted the same procedural rights and obligations as a plaintiff – a legal entity.[9] They are not the legal entity's representatives, as found in Art. 54-55, which regulates their procedural status, located before the subsection dedicated to the regulation of representatives in litigation procedure. The official against whom the claim for compensation for the losses incurred is filed may not act on behalf of such a legal entity.

Regarding the issue of who must be granted the status of a plaintiff, there is no consensus among scholars. O. R. Kovalyshyn argues that members of a corporation must be given the status of a plaintiff, while the corporation itself has to act as a third party who does not make independent claims.[10] Ye. Talykin is convinced that under a derivative lawsuit, the main emphasis should be on the conflict between members of the corporation and the management – thus, members are to be deemed as plaintiffs.[11] M. K. Bogush claims that it is the corporation that has to be given the status of a plaintiff.[12]

In our opinion, the status of a plaintiff under the derivative action must be indeed granted to the legal entity whose rights and interests have been directly violated by the official's actions (or inaction). We are inclined to agree with the opinion that the legal relationship regarding the liability of officials or members of collective bodies (majority of shareholders included) arise from the material legal relationship between these persons and the legal entity (regarding

6 Case concerning Barcelona Traction, Light and Power Company, Limited, (Belgium v Spain) [1970] I.C.J. Rep 1970 p. 3, paras 56-58, 66.

7 Commercial Procedure Code of Ukraine (as amended of 5 July 2021) <https://zakon.rada.gov.ua/laws/show/1798-12#Text> accessed 8 August 2021.

8 Draft Law of Ukraine 'On Joint-Stock Companies' register No 2493 of 25 November 2019 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67468> accessed 8 August 2021.

9 CPC of Ukraine (n 7).

10 OR Kovalyshyn, 'Indirect (derivative) lawsuits as a legal remedy for participants in corporate relations' (2010) 17 Bulletin of the Academy of Advocacy of Ukraine 65.

11 Ye Talykin, 'Derivative lawsuit in commercial litigation of Ukraine: general principles of procedural construction' (2014) 4 Law Herald 164.

12 MK Bogush, 'Protection of the rights and interests of the subjects of corporate legal relations' (PhD (Law) Thesis, Taras Shevchenko National University of Kyiv 2018) 186-188.

the authority to act on its behalf, make its decisions, etc.).[13] The wrongdoing in question was committed against the corporation in the first place, not against a minority of its members. Therefore, a corporation must be given the procedural status of a plaintiff under a derivative lawsuit. The fact that, given the defect of will, the action is brought to court by the minority members (shareholders) rather than the legal entity itself does not contradict our statement since it is fully consistent with the definition of a plaintiff. According to Part 3 of Art. 45 of the CPC of Ukraine, plaintiffs are persons that have brought an action, or for the benefit of whom an action has been brought, to defend the right that has been violated, has not been recognised, has been challenged, or whose legally protected interest has been violated.[14] Under a derivative action, a legal entity acts as a plaintiff in the United Kingdom (Art. 206 of the Companies Act),[15] in Canada (Art. 239 of the Business Corporations Act), etc.[16] At the same time, the legal entity's members (shareholders) act as plaintiffs under derivative actions in the USA (Rule 23.1 of the Federal Rules of Civil Procedure),[17] Germany (Art. 148 of the Joint-stock Companies Act),[18] and Spain (Art. 239 Corporate Enterprises Act).[19]

2.2 EXERCISE OF PROCEDURAL RIGHTS AND OBLIGATIONS

In Ukrainian legislation, the members of a corporation act as its procedural representatives. According to Art. 54 of the CPC of Ukraine, the legal entity exercises its procedural rights and fulfils its procedural obligations only *upon consent of the members that have brought a derivative action* and gives the latter, pursuant to Art. 55 of the CPC of Ukraine, the procedural rights and obligations of the entity for the benefit of which they have brought the action. In our opinion, however, this model is doubtful and must be reconsidered.[20]

Since the members will just *approve resolutions of the legal entity*, the latter will be adopted as a result of the traditional process of formation and expression of the company's will (via governing bodies and the majority of shareholders who committed wrongdoing or prevented the company from protecting itself) against the background of the defect of will. We believe that since the offenders control the legal entity, it would be better if the procedural legal capacity of the legal entity in this category of actions were exercised in another manner. The law already conditions the commission of any procedural action of a legal entity by the need to obtain the consent of minority participants (shareholders) who filed a lawsuit on its behalf. We suggest that members (shareholders), due to wrongdoers being in control, act on behalf of a legal entity during the litigation itself, exercising the management of the legal entity instead of its majority members (shareholders) or officials. The legal entity's ability to

13 SO Koroed, VM Mahinchuk, 'Derivative (indirect) lawsuits of the founders of legal entities as a form of implementation of the doctrine of piercing the corporate veil' (2020) 44 Scientific Bulletin of the International Humanities University. Series: Jurisprudence 23-24.

14 Ibid.

15 Companies Act of United Kingdom of 2006 <https://www.legislation.gov.uk/ukpga/2006/46/contents> accessed 8 August 2021.

16 Business Corporations Act of Canada of 1985 (as amended 1 January 2020) <https://laws-lois.justice.gc.ca/eng/acts/C-44/index.html> accessed 8 August 2021.

17 Federal Rules of Civil Procedure of United States of America of 1938 (as amended 12 January 2021) <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure> accessed 8 August 2021.

18 Act of Germany 'On Joint-Stock Companies' of 1965 (as amended 3 June 2021) <https://www.gesetze-im-internet.de/englisch_aktg/index.html> accessed 8 August 2021.

19 Corporate Enterprises Act of Spain of 30 August 2010 (as amended 2015) <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Corporate_Enterprises_Act_2015_-_Ley_de_Sociedades_de_Capital.PDF> accessed 8 August 2021.

20 Commercial Procedure Code of Ukraine (n 7).

act via its members (shareholders) is already provided for by Part 6 of Art. 44 of the CPC of Ukraine,[21] although it is ultimately derived from Part 2 of Art. 92 of the Civil Code of Ukraine[22] and is first and foremost related to a general and limited partnership. Thus, we suggest amending Part 2 of Art. 54 of the CPC of Ukraine as follows:

> When case proceedings based on such an action are instituted, the legal entity acquires the status of a plaintiff, and its procedural rights and obligations shall be exercised for and on behalf of that legal entity by its members and (or) shareholders that have brought the action.

In suggesting such amendments, we understand that it is highly probable that the persons that have brought the action will try to prevent the defendant from obtaining relevant evidence and hinder the adversarial nature of proceedings in general. However, its procedural status is balanced by the plaintiff's burden of proof, the capability of claiming evidence, preventive mechanisms of the derivative action itself (which will be discussed later in this article – H. Yu.), and the concept of the 'business judgement rule'. The latter is the refutable presumption of the lawful nature of actions (refusal to take them) and decisions of the officials, provided that they have acted in good faith, reasonably, and for the benefit of the legal entity. We will examine this issue separately in more detail later in this article.

2.3 PERSONS THAT CAN FILE A DERIVATIVE LAWSUIT ON BEHALF OF A LEGAL ENTITY

According to Art. 54 of the CPC of Ukraine, the right to file a derivative lawsuit may be granted to members of the company.[2323] Usually, the right to file a derivative lawsuit is granted to minority shareholders under the circumstances of the corporation's inability to protect itself. Ukrainian legislation does not contain a direct ban on the use of this right by a majority shareholder, establishing the minimum property quota for the right to be exercised. The same approach is used in Art. 260 of Companies Act in United Kingdom.[24] O. A. Chaban, studying the institute of a derivative lawsuit in the United Kingdom, aptly notes that despite there being no direct prohibition on filing a derivative lawsuit by a majority shareholder, other types of remedies are available to such a person, and thus the court will most likely dismiss the claim of such a plaintiff.[25] As a majority shareholder, such a person can decide that a corporation will file a lawsuit directly.

It should be emphasised that the provisions of Art. 54 of the CPC of Ukraine do not provide a clear answer to the question of whether a derivative action can be brought by a person that was not a company member when losses were sustained by the company.[26]

For example, according to Clause 1 of Part 1 of Art. 148 of the Joint-stock Companies Act of the Federal Republic of Germany, the person bringing a derivative action, or, in case of universal legal succession, its legal predecessor, must hold shares *before the moment they knew or could have known about the damages inflicted upon the joint-stock company.*[27]

21 Ibid.

22 Civil Code of Ukraine of 16 January 2003 (as amended 1 August 2021) <https://zakon.rada.gov.ua/laws/show/435-15#Text> accessed 8 August 2021.

23 Act of Germany 'On Joint-Stock Companies' (n 16).

24 UK Companies Act 2006 (n 13).

25 OA Chaban, 'Institute of derivative action in England and Wales' (2020) 27 Scientific Papers of National University 'Odessa Law Academy' 21-22.

26 Commercial Procedure Code of Ukraine (n 7).

27 Act of Germany 'On Joint-Stock Companies' (n 16).

Usually, such a requirement is due to the need to prevent abuse of the right to bring a derivative action: i.e., the purchase of shares (stock) in order to engage the legal entity in prolonged litigation based on minor claims and to make the latter 'buy off' the unconscientious applicant, who files a lawsuit on behalf of the legal entity and therefore gains the benefits.

However, such abuse may also be enacted by a current member (shareholder) of the legal entity. We believe that it is expedient to grant the right to bring a derivative action to members (shareholders) that did not have that status as of the date of damages inflicted upon the legal entity. There are several reasons for this:

1) the right to claim damages is held by the legal entity rather than its member;

2) the losses inflicted by the official indirectly influence the rights and interests of such a member (possibility and volume of payment of dividends, whether the goals of a corporation are to be achieved, etc.) – such a person's rights and interests, having been indirectly violated, also deserve protection;

3) the abuse of the right to bring a derivative action is prevented by the expanded *locus standi* model and examination of conformity of the decision not to take action to protect the violated right to the business judgement rule.

The stance above is reflected in Part 4 of Art. 260 of the UK Companies Act, according to which it is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.[28] In the Explanatory Note to Art. 260 of the Law, the drafters explained their approach with the fact that a derivative action is used to defend the rights of the company rather than its members.[29]

Another aspect that should be taken into consideration is that upon the alienation of shares (stock) by members (shareholders) of a corporation, there is a singular succession in the rights and obligations owned by the previous owner as a member of the corporation. For example, Part 4 of Art. 260 of the UK Companies act was developed by taking into account the recommendation by the Law Commission of England and Wales, which had noted in its Shareholder Remedies Report, dated 24 October 1997, that the right to bring a derivative action was a part of the 'bundle of rights represented by a share', so it could be transferred to third parties upon the alienation of the share.[30]

While studying the institute of a derivative action, we should mention that the current legislation contains the absolute ban on the use of this remedy by holders of preference shares (Part 1 of Art. 54 of the CPC).[31] This approach has been preserved in Clause 9 of Section XIX of the Draft Law of Ukraine 'On JSCs'.[32] In our opinion, such a ban is unreasonable due to the following reasons.

Firstly, the legal status of holders of preference shares is indeed somewhat limited compared to the status of holders of ordinary shares in terms of management. For example, according to Part 5 of Art. 28 of the Act of Ukraine 'On Joint-Stock Companies (hereinafter – Act of Ukraine 'On JSCs'), their right to participate in management is limited by specific issues they are allowed to vote on.[33] However, the same article provides for the expanded list of issues on which holders of preference shares may vote.

28 28 UK Companies Act 2006 (n 13).

29 29 Explanatory Note to Section 260 of Companies Act of United Kingdom <https://www.legislation.gov.uk/ukpga/2006/46/notes/division/9/2/1/1> accessed 8 August 2021.

30 30 Shareholder Remedies Report of Law Commission of England and Wales as of 24 October 1997, p. 101 <https://www.lawcom.gov.uk/project/shareholder-remedies/> accessed 8 August 2021.

31 Commercial Procedure Code of Ukraine (n 7).

32 Draft Law of Ukraine 'On Joint-Stock Companies' (n 8).

33 Act of Ukraine 'On Joint-Stock Companies' of 17 September 2008 (as amended 1 July 2021) <https://zakon.rada.gov.ua/laws/show/514-17#Text> accessed 8 August 2021.

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Secondly, in addition to protection of the legal entity's rights, the purpose of a derivative action is to protect the violated rights and interests of the shareholder. In that regard, it should be emphasised that the right to claim payment of dividends, which is held by holders of preference shares, is of priority (Clause 2 of Part 2 of Art. 31 of the Act of Ukraine 'On JSCs') compared to the same right of holders of ordinary shares.[34]

Thirdly, that the comparative legal analysis of this issue has found no examples of situations where holders of preference shares have been deprived of their right to bring a derivative action in any other country. For example, Part 1-1 of Art. 63 of the Act of Kazakhstan 'On Joint-stock Companies' gives the right to bring the action both to holders of ordinary shares and preference shares.[35] This issue is similarly regulated by Art. 148 of the German Joint-stock Companies Act.[36] Art. 261 of the UK Companies Act uses the concept of 'a member of a company', and there are no limitations as to persons that may bring the claim based on the criterion of a proper type of shares.[37]

Fourthly, if holders of preference shares are forbidden to bring a derivative action, it might be detrimental to the legal entity's interests since about a quarter of the shareholders potentially cannot defend their rights either personally or jointly. Moreover, it is easier for the offenders to arrange with the other shareholders so that they will not exercise their right to bring a derivative action.

Therefore, we believe that the ban on a derivative action brought by holders of preference shares must be lifted in Ukrainian legislation.

3 MECHANISMS TO PREVENT THE ABUSE OF THE RIGHT TO FILE A DERIVATIVE LAWSUIT

Prevention of the abuse of the right to file a derivative lawsuit is provided through *locus standi* – a procedure that establishes a person's right to bring a derivative action to court, during which conformity of submission of the derivative action to the criteria established by the law or case law is assessed. *Locus standi* itself is comprised of a set of preventive mechanisms. In common law countries, the *locus standi* criteria are established for the cases in which a derivative action may be brought, whereas it is typical of the civil law countries that the criteria are aimed at determining the group of persons entitled to bring a derivative action.[38] For example, according to Art. 263 of the UK Companies Act, the court considers the following facts for permission to continue the claim as a derivative claim: 1) whether the act or omission of the officials has been ratified by the company; 2) whether the act or omission gives rise to a cause of action that the member could pursue in his or her own right rather than on behalf of the legal entity (whose rights have been violated); 3) whether the company has decided not to bring an action (pursue the claim).[39] Moreover, the court also finds out whether the offenders control the company's operations and whether a derivative action will be in the best interests of the company.

The classic *locus standi* criterion in civil law is the property qualification in holding the interest in the authorised capital or the stock as a precondition to bringing a derivative action.

34 Ibid.

35 Act of Kazakhstan 'On Joint-Stock Companies' of 13 May 2003 (as amended 8 June 2021) <https://online.zakon.kz/Document/?doc_id=1039594> accessed 08 August 2021.

36 Act of Germany 'On Joint-Stock Companies' (n 16).

37 UK Companies Act 2006 (n 13).

38 Z Zhang, 'The Shareholder Derivative Action and Good Corporate Governance in China: Why the Excitement is Actually for Nothing' (2020) 28 (2) Pacific Basin Law Journal 183-189.

39 UK Companies Act 2006 (n 13).

Thus, Part 1 of Art. R225-169 of the Commercial Code of France establishes the property qualification of 5% of personal or joint holding of shares. Also, this property qualification is progressive: it decreases along with the size of the authorised capital. According to Part 2 of Art. R225-169 of the Commercial Code of France, if the authorised capital of the company exceeds 750,000 euros, for the first 750,000 euros of surplus, the property qualification is 4%, for 750,000–7,500,000 euros, it is 2.5%, and for 7,500,000–15,000,000, it is 1%.[40] In Germany, according to Ar. 148 of the Joint-stock Companies Act, the property qualification is established at the level of personal or joint holding of 1% of the company's share or under the condition of holding the shares with the value of at least 100,000 euros.[41] According to Clauses 1–2 of Art. 2393-bis of the Civil Code of Italy, the property qualification to bring a derivative action is 2.5% of the authorised capital for public joint-stock companies and 20% of the authorised capital for private joint-stock companies (unless otherwise stipulated in the articles of association).[42] As for members of limited liability companies, the right to bring a derivative action under Art. 2476 of the Civil Code of Italy is granted to each member of the company.[43] The same rule is stipulated in Part 1 of Art. 157 of the Czech Act 'On Commercial companies and cooperatives (Business Corporations Act)' (hereinafter – Czech Business Corporations Act).[44]

According to Art. 847 of the Companies Act of Japan, a person must own one share, i.e., be the company's shareholder, to have the right to bring a derivative action. This rule also requires continuous ownership of shares for six months to bring a derivative action.[45] To our mind, such a requirement is inefficient since it makes the person wait for a certain period despite losses having been incurred, thus depriving a member (shareholder) of an opportunity to respond to the event promptly. Therefore, we believe that such a preventive mechanism should not be introduced into Ukrainian law.

It should be emphasised that scholars have various standpoints regarding property qualification for bringing derivative lawsuits. Yu. Popov believes that this matter should be established by considering the specific features of each legal entity. For instance, in his opinion, since shares in the authorised capital of limited and additional liability companies are not suited for quick turnover, it is inexpedient to establish the property qualification in their respect to prevent abuse of the right to bring the action. As for joint-stock companies, Yu. Popov believes that such qualification is necessary.[46] O. O. Kot notes the member's right to bring the respective derivative action should be found reasonable in case its equity rights as a member are also violated, regardless of the interest.[47]

The advantage of property qualifications in most countries of the world is the necessity for the preventive mechanism against abuse by minor shareholders (members). However, the property qualification must be reasonable. According to M. Gelter, if it is relatively large, it

40 Commercial Code of France as amended 2 August 2021 <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379> accessed 8 August 2021.

41 Act of Germany 'On Joint-Stock Companies' (n 16).

42 Civil Code of Italy of 16 March 1942 (as amended26 October 2020) <https://www.altalex.com/documents/codici-altalex/2015/01/02/codice-civile> accessed 08 August 2021.

43 Ibid.

44 Czech Act 'On Commercial companies and cooperatives (Business Corporations Act)' of 25 January 2012 <http://obcanskyzakonik.justice.cz/images/pdf/Business-Corporations-Act.pdf> accessed 8 August 2021.

45 Companies Act of Japan of 26 July 2005 (as amended 2014) <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=2&dn=1&yo=companies+act&x=0&y=0&ia=03&ja=04&ph=&ky=&page=3> accessed 8 July 2021.

46 46 Yu Popov 'Derivative (indirect) lawsuits: foreign experience and Ukrainian prospects' (2012) 12 Ukrainian Commercial Law 55-65.

47 47 OO Kot, 'Implementation and protection of subjective civil rights: problems of theory and judicial practice' *(Alerta 2017)* 382.

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will be a factor restraining a derivative action rather than a tool preventing abuse.[48] On the other hand, in their research regarding the lack of popularity of derivative actions in Europe, M. Sekyra and K. Grechenig referred to the obvious connection between the property qualification giving the right to bring such claim and the level of risk of potential such a member, acting on behalf of the legal entity, being bribed by senior executives: the higher the percentage threshold for a derivative action is, the higher the risk of potential members (shareholders), who bring a derivative action, being bribed (given the small number of the latter).[49] Therefore, the optimum qualification is the one that would concurrently prevent abuse by members (shareholders) and unlawful arrangements with officials and create no unreasonable hindrance in the exercise of this right. The property qualification at 5% of the authorised capital (property of the legal entity), prescribed by Clause 9 of Section XIX of the Draft Law of Ukraine 'On Joint-Stock Companies',[50] is much more reasonable than the 10% prescribed by Art. 54 of the CPC of Ukraine,[51] and, taking into account the comparative study above, it conforms with the foreign practices. Such a size is optimal since it is capable of preventing abuse of the right to bring a derivative action by minor members (shareholders) and does not create major obstacles to exercising this right. If it was established at the level of participatory share 1%, it would be of a formal nature and perform no preventive function.

At the same time, we believe that the legislative focus on property qualification as the only mechanism to prevent abuse of a derivative action is somewhat excessive.

Firstly, it is insufficient for effective prevention of abuse since it only prevents abuse by minor members (shareholders) and fails to cover quite a wide range of participatory shares that will be held by members (shareholders) who can file a derivative lawsuit. Awareness of this fact is reflected by the case law of the Supreme Court. In its Resolution dated 17 February 2021 in case No. 910/13643/19, the court did not limit itself to establishing the existence of the property qualification and emphasised that a derivative action could only be brought in the exceptional circumstances that justify the need of the company's member to file a claim on the company's behalf if the legal entity's inability to defend its rights on its own if proven.[52]

Secondly, by using the property qualification, the legislator unreasonably deprives members of the legal entities without participation shares (condominiums, public associations, charitable organisations, etc.) of the right to bring a derivative action. The nature of this remedy is preconditioned by the tortious act of the officials or majority of the members participating in management when the legal entity cannot file a claim to court to defend its right on its own. Since there is no participation share, another criterion should be used: per cent of the total number of members. Therefore, Part 1 of Art. 54 of the CPC of Ukraine[5353] should be supplemented with para. 2 as follows:

> In the legal entities where members have no share in authorised capital (stock, shares, equity interest, etc.) or property of the company, the right to bring an action is granted to the persons that jointly represent 1/20 of the total number of members.

Bringing a derivative action is traditionally preconditioned by the obligation of the legal entity's member to file a demand to the legal entity to act as an element of expanded *locus*

48 M Gelter, 'Why do Shareholder Derivative Suits Remain Rare in Continental Europe?' (2012) 37 Brooklyn Journal of International Law 857.

49 K Grechenig, M Sekyra, 'No Derivative Shareholder Suits in Europe – A Model of Percentage Limits and Collusion' (2010) 15 Discussion Paper Series of the Max Planck Institute for Research on Collective Goods 1-3.

50 50 Draft Law of Ukraine 'On Joint-Stock Companies' (n 8).

51 51 Commercial Procedure Code of Ukraine (n 7).

52 Resolution of Supreme Court in case 910/17602/19 of 17 February 2021 <https://reyestr.court.gov.ua/Review/95170089> accessed 8 August 2021.

53 Commercial Procedure Code of Ukraine (n 7).

standi. Such a requirement exists in the legislations of a few foreign states: Clause 2 of Part 1 of Art. 148 of the German Joint-stock Companies Act,[54] Art. 158 of the Czech Business Corporations Act,[55] Rule 23.1 of the Federal Rules of Civil Procedure in the USA, etc.[56] It is necessary to introduce such a *locus standi* element because it will perform a preventive function (prevent the members (shareholders) acting in bad faith from bringing a derivative action where there are no grounds) and the function of proving that the officials (majority of members) have failed to take action to defend the legal entity's rights. The necessity for the implementation of an obligation to file a demand was introduced by Ye. Talykin.[57] To prevent minority shareholders from any abuse in the form of deliberate determination of the shortest possible period of time, the law should provide for a reasonable period of time within which the majority of shareholders (corporation's officials) may decide on the filed demand. In our opinion, this period should be one month from the day of the receipt of a demand.

Given the above, the model of expanded *locus standi* is proposed to be introduced into Ukrainian law. In addition to a property qualification, a derivative action should be preconditioned by the following requirements: 1) the person holds a required volume of share in authorised capital or property of the company or represents 1/20 of members of a non-entrepreneurial company; 2) the person has already demanded the legal entity to take action to defend the legal entity's rights and interests that have been violated (have not been recognised, have been challenged); 3) the legal entity, contrary to its interests, has failed to take any action to defend its rights and interests for one month, or has rejected the person's demand (is unable to defend its rights and interests on its own); 4) there are no other grounds that would prevent a derivative action from being brought.

4 OTHER TYPES OF DERIVATIVE LAWSUIT

4.1 PREVENTIVE DERIVATIVE LAWSUIT

A traditional derivative lawsuit is not without its own shortcomings. For example, the losses may not have been inflicted by the official's actions (omission) yet, or, as M. O. Sukhanov aptly notes, such a legal remedy may be ineffective in Ukraine in cases where the director's property is insufficient to enforce the court's decision to satisfy the claim.[58] In cases when the losses have not yet been inflicted, the point at issue is the so-called 'preventive derivative action' – the ability to eliminate the real threat of causing damages – the need for which was first emphasised by M. K. Bogush.[59] In suggesting this remedy, Bogush foresaw the risk of abuse of the right to bring a preventive derivative action, so she found it necessary to introduce the obligation of the members of the corporation to deposit some money (make a pledge) to the judicial saving account as counter security.

In our opinion, such a proposal is somewhat ambiguous. Despite being aimed at preventing the abuse of the right to file a derivative lawsuit, the obligation to deposit money will constitute an additional property qualification (alongside the qualification of holding stock, shares, or equity interest in a certain volume), so it will equally (or even further) prevent both abuse and the

54 Act of Germany 'On Joint-Stock Companies' (n 16).

55 Czech Business Corporations Act (n 43).

56 Federal Rules of Civil Procedure of United States of America (n 15).

57 Ye Talykin, 'Derivative lawsuit in commercial litigation of Ukraine: general principles of procedural construction' (2014) 4 Law Herald 21-22.

58 MO Sukhanov, 'Analysis of the practice of the supreme court regarding judicial protection of corporate rights of members of a limited liability company' (2020) 6 Law and Society 21-24.

59 MK Bogush 'Protection of the rights and interests of the subjects of corporate legal relations' (PhD (Law) Thesis, Taras Shevchenko National University of Kyiv 2018) 95-97.

capability of bringing a derivative action itself. We believe that introduction of such a preventive mechanism is unlikely to positively influence the already rare practice of derivative actions.

On the other hand, Bogush reasonably notes that reduced term for hearing of the cases based on preventive derivative actions would be expedient. She suggests that the hearing of such cases should be limited to one month 'since the prompt application of respective remedies to eliminate the threat of violation of the subjective corporate right/interest itself is a precondition for a preventive derivative lawsuit to be effective'.[6060] In general, we agree with her suggestion since, for instance, economic operations, both entrepreneurial and non-entrepreneurial ones, are associated with the need to promptly respond to changes in the economic environment to efficiently reach the goals in full (to increase profit, to perform statutory tasks, etc.). If our purpose is to prevent the corporation's losses, the court must also promptly respond to the existing threat by ruling to cease the action/obliging to act as soon as possible. The need above also exists in respect of derivative actions in general: the legal entity that has sustained losses because of the official's actions (omission) or majority shareholder's decision must receive the compensation as soon as possible, to replenish its property on time at least to a certain extent and to use it for statutory objectives/ business development, etc.

Therefore, we consider it necessary to improve the suggestion by Bogush: the reduced term for hearing should be introduced not only for preventive derivative actions but also derivative actions in general. To our mind, the above-mentioned term of one month is reasonable.

4.2 DERIVATIVE LAWSUIT TO CHALLENGE COMPANY TRANSACTIONS

A claim filed by the member of the corporation for and on behalf of the latter for challenging the transaction conducted by the executive body of the corporation is deemed to be another type of derivative lawsuit. The logic of the concept is quite simple: just as a defect in the will of a corporation to protect its rights by compensating it for damages is a ground for filing a derivative lawsuit by its members, in the same way, the protection of the corporation's rights, violated through a transaction being conducted contrary to its interests, may require bringing a derivative action when a defect of corporation's will precludes it from filing a lawsuit by itself. Moreover, when it comes to the prevention of losses, an offence can be terminated by invalidating the transaction and terminating the legal relationship before the parties start to take the actions that might result in losses by the corporation. Additionally, an official is not always able to compensate for the losses resulting from his or her actions (omission), whereas restitution will enable the protection of the corporation's rights and interests to a larger extent. In other words, a classic derivative action for claiming damages is imperfect in the above-mentioned cases. The proposals to introduce such a concept of a derivative action in the national law have been made by O. S. Dotsenko[61] and Yu. Popov.[62] M. K. Bogush rightly treats the claim filed by the member (shareholder) of the corporation for invalidation of the transaction conducted by the latter as a kind of a derivative action.[63] For example, the shareholder's right to challenge an interested party transaction is prescribed by Part 12 of Art. 72 of the Law of Ukraine 'On JSCs'. However, not only does the law not mention anything about it being possible only when a legal entity cannot file such a lawsuit by itself, it also does not contain such a provision regarding major transactions.

In Ukraine, when it comes to major transactions, analysis of Parts 1 and 2 of Art. 46 of the

60 Ibid 95-97.

61 OP Dotsenko 'Invalidation of a transaction committed by the executive body of a business company in excess of its powers as a way to protect corporate rights' (2020) 3 Entrepreneurship, Economy and Law 74.

62 Yu Popov, 'Derivative (indirect) lawsuits: foreign experience and Ukrainian prospects' (n 45) 10-11.

63 MK Bogush 'Protection of the rights and interests of the subjects of corporate legal relations' (n 56) 162.

Law of Ukraine 'On LLCs'[64] and Parts 1–2 of Art. 72 of the Law of Ukraine 'On JSCs' [65] shows that a major transaction and an interested party transaction, concluded in violation of the procedure established by law – without a resolution to grant consent for its conclusion – creates, changes, and terminates civil rights and obligations of a joint-stock company and limited and additional liability companies only in cases where the transaction is approved by the company thereafter. Due to the imperfection of the legal drafting, the wording above may drive the interpreting entity to the conclusion that such a transaction is void. However, the rules contain no direct indication that the transaction is invalid, so it is impossible to state the voidness of major transactions and interested party transactions. It appears that the legislator provided for voidability of such transactions in the way: for instance, it is done in respect of approval of transactions by the minors conducted beyond their legal capacity or transactions conducted by representative *ultra vires* (Arts. 221 and 222; Art. 241 of the Civil Code of Ukraine).[66] This conclusion can also be drawn based on the analysis of the Explanatory Note to the Draft Law of Ukraine 'On Limited Liability and Superadded Liability Companies'. The authors note that Art. 46 of the Draft Law prescribes non-conclusion of the major transaction in case the procedure for approval thereof has been breached.[67] However, in the authors' opinion, the transaction will be concluded by virtue of Clause 2 of Part 3 of Art. 92 of the Civil Code of Ukraine. It should be remembered that, according to Part 1 of Art. 638 of the Civil Code of Ukraine, a contract is deemed to be concluded if parties thereto have agreed upon all the materials terms and conditions.[68] Accordingly, if the provisions of Part 1 of Art. 638 are not fulfilled – the parties have not agreed on the essential terms – only then should the contract be deemed not concluded. The director's transaction concluded *ultra vires* does not comply with Part 2 of Art. 203 of the Civil Code of Ukraine. Thus, there are grounds for invalidating it and deeming it voidable. This approach is used in Part 1 of Art. 74 of the Law of Kazakhstan 'On Joint-stock Companies'.[69] It allows for the defence not only of rights and interests of the legal entity (and its members) but also the turnover of goods, rights, and interests of third parties acting in good faith.

However, it should be noted that the director's transaction concluded *ultra vires* violates, first, the rights and obligations of the corporation, rather than its members (their interests are also violated, but indirectly). Thus, bringing a direct action in this case seems to be erroneous. The opposite approach will undermine the concept of a legal entity as an independent subject of the legal relationship, different from its members. The same stance is expressed by the ECtHR in the case of *Feldman and Bank Slavyansky v. Ukraine*, which reiterated that the shareholder could not be considered a proper plaintiff if the legal entity's rights had been violated: it required exceptional circumstances of the legal entity's inability to claim defence of its rights via the governing bodies.[70] In Ukraine, such an opinion was first expressed by the Grand Chamber of the Supreme Court in its Resolution dated 8 October 2019 in case No. 916/2084/17, where the court also permitted representation of the legal entity by its member (shareholder) if the

64 Act of Ukraine 'On Limited Liability and Additional Liability Companies' of 16 February 2018 (as amended 16 July 2020) <https://zakon.rada.gov.ua/laws/show/2275-19#Text> accessed 8 August 2021.

65 Act of Ukraine 'On Joint-Stock Companies' (n 32).

66 Civil Code of Ukraine (n 23).

67 Explanatory Note to the Draft Law of Ukraine 'On Limited Liability and Additional Liability Companies' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59093> accessed 8 August 2021.

68 Civil Code of Ukraine (n 23).

69 Act of Kazakhstan 'On Joint-Stock Companies' of 13 May 2003 (as amended 8 June 2021) <https://online.zakon.kz/Document/?doc_id=1039594> accessed 8 August 2021.

70 Feldman and Slovyanskyy Bank v Ukraine App No 42758/05 (ECtHR, 21 December 2017) <https://hudoc.echr.coe.int/eng# {%22f ullte xt%22:[%22slovyanskyy%22] ,%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-179557%22]}> accessed 8 August 2021.

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entity was unable to defend its rights on its own[71] (the court does not specify this directly, but it is regarding the concept of a derivative action – H. Yu.). Henceforth, the above-mentioned approach became the established law enforcement practice and was reflected in Resolution of the Supreme Court dated 14 May 2021 in case No. 904/9839/16[72] and Resolution of the Supreme Court dated 23 June 2021 in case No. 913/344/20.[73] At the same time, as we have stated before, the rights and interests of members of the corporation are violated, so it would be somewhat erroneous for the Supreme Court to deprive them of remedies in general. In this category of cases, the court should rely on somewhat different reasons.

When the legal entity's transaction is challenged, the point at issue is not only internal relations between the corporation, its members, and officials authorised to manage the corporation – invalidation of the corporation's transaction directly affects the rights and interests of third parties (contracting parties). Thus, it is necessary to maintain stable civil turnover as well as the adequacy of the legal consequences of the selected remedy. The property qualification, along with the obligation to file a demand for the corporation to act (challenge the transaction), will prevent abuse of derivative action (as well as any of the other types of derivative actions), but rights of a third party that did not know and could not have known about the limited authority of the sole or collective executive body must not be violated. Under these circumstances, Clause 2 of Part 3 of Art. 92 of the Civil Code of Ukraine must be used.[74] According to it, in relations with third parties, the restriction on the powers of representation of a legal entity has no legal force, except when the legal entity proves that the third party knew or in all circumstances could not have been unaware of such restrictions. The reasoning for the legislator's decision is that mere failure to adhere to the approval procedure does not have to result in such harsh implications as invalidation of the transaction. The plaintiff must only prove the circumstances in connection with which the transaction may be invalidated or an action for applying the consequences of invalidity is brought: 1) it is a major (interested party) transaction; 2) the transaction has not been approved or has been approved in breach of the established procedure.

As for the burden of proof that the third party was aware of the executive body's (director's) limited authority, it should be noted how the awareness and the person's ability to find out about the director's limited power are established. In its Resolution dated 20 July 2021 in case No. 911/1605/20, the Supreme Court reiterated that the contracting parties' examination of the scope of authority of the legal entity pursuant to the articles of association is within ordinary care during the conclusion of a contract. Limitation of the authority to act on behalf of a legal entity enters into force for a third party in case it has acted in bad faith and unreasonably – in particular, knew for sure that the company's executive body did not have the necessary scope of authority or must have known that if it had exercised at least reasonable care.[75] In other words, if the third party did not exercise due care by requesting a copy of articles of association, for instance, when data in the Unified State Register is incomplete or missing, the transaction concluded with such party in excess of the director's authority (*ultra vires*) may be invalidated on the claim of the legal entity or based on the derivative action of its member. Due care should also be exercised when a contract is signed: if it contains the clause where it is stipulated that the contract is signed by the person acting under the articles

71 Resolution of Grand Chamber of the Supreme Court in case 916/2084/17 of 8 October 2019 <https://reyestr.court.gov.ua/Review/84911545> accessed 8 August 2021.

72 Resolution of the Supreme Court in case 904/9839/16 of 14 May 2021 <https://reyestr.court.gov.ua/Review/96342397> accessed 8 August 2021.

73 Resolution of the Supreme Court in case 913/344/20 of 23 June 2021 <https://reyestr.court.gov.ua/Review/98170295> accessed 8 August 2021.

74 Civil Code of Ukraine (n 23).

75 75 Resolution of the Supreme Court in case 911/1605/20 of 20 July 2021 <https://reyestr.court.gov.ua/Review/98523674> accessed 8 August 2021.

of association, the court will rely upon the fact that the signatory's contracting party has been informed of the identity and authority of the signatory. Such stance was expressed by the Supreme Court in its Resolution dated 9 June 2021 in case No. 911/3039/19.[76]

5 DEFENDANTS IN A DERIVATIVE LAWSUIT

After it is determined who can bring a derivative action for and on behalf of the legal entity, the defendant's identity must also be established. According to Art. 54 of the CPC of Ukraine, a defendant is the official of a legal entity.[77] However, this clause does not offer a unified definition of an 'official'. The problem is that a group of people covered by the notion of an 'official' differs depending on the type of the business company (the legal entity in itself). According to Part 2 of Art. 23 of the Act of Ukraine 'On Business Partnerships', officials include: the chairman and members of the executive body, the audit committee, the auditor of the company, as well as the chairman and members of another body of the company who are authorised to manage the company if such body is established in accordance with the company's statutory documents (constitutional documents).[78] According to Part 1 of Art. 42 of the Law of Ukraine 'On LLCs', officials of the limited liability or additional liability company are members of the executive body and the supervisory board, as well as other persons under the company's charter.[79] According to Clause 27 of Art. 2 of the Draft Law of Ukraine 'On JSCs',[80] the status of an official may be prescribed in the charter the same way as provided for by the Law of Ukraine 'On LLCs'. Also, officials include a corporate secretary and members of the liquidation committee.

However, the definition of an official given in the Law of Ukraine 'On LLCs' and the Draft Law of Ukraine 'On JSCs' should be interpreted in such a manner that discretion as to the establishment of the group of officials in the articles of association is not and may not be unlimited. Thus, according to the Letter of the Ministry of Justice of Ukraine dated 22 February 2013 No. 1332-0-26-13/11, an official should be the person that holds the office associated with the discharge of organisational, executive, administrative, and economic functions.[81] If the person's duties do not include the above-mentioned functions, or he or she does not act on behalf of the legal entity, he or she is not and shall not be treated as an official.

However, when considering a defendant in the derivative action, the focus should also be placed on some inaccuracy of Art. 54 of the CPC of Ukraine. Although the effective version of Art. 54 of the CPC of Ukraine refers to a claim for compensation for damages against the official, lack of detail creates a formal legal opportunity for such person to avoid liability if he or she no longer has the status of an official as of the date of the action.[82] Thus, according to Part 3 of Art. 372 of Czech Business Corporations[83] an official, against whom a derivative action can be brought, means without limitation the person who had that status as of the

76 Resolution of the Supreme Court in case 911/3039/19 of 09 June 2021 <https://reyestr.court.gov.ua/Review/97926318> accessed 8 August 2021.

77 77 Commercial Procedure Code of Ukraine (n 7).

78 78 Act of Ukraine 'On Business Partnerships' of 19 September 1991 (as amended of 3 July 2020) <https://zakon.rada.gov.ua/laws/show/1576-12#Text> accessed 08 August 2021.

79 79 Act of Ukraine 'On Limited Liability and Additional Liability Companies' (n 61).

80 80 Act of Ukraine 'On Joint-Stock Companies' (n 29).

81 81 The Letter of the Ministry of Justice of Ukraine No 1332-0-26-13/11 of 22 February 2013 <https://zakon.rada.gov.ua/laws/show/v13_1323-13#Text> accessed 8 August 2021.

82 82 Commercial Procedure Code of Ukraine (n 7).

83 83 Czech Business Corporations Act (n 43).

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date of the damages inflicted upon the legal entity. Similarly, Sub-clause a) of Clause 5 of § 260 of the UK Companies Act defines the director as a former director as well.[84]

Therefore, Part 1 of Art. 54 of the CPC of Ukraine should be amended and supplemented with para. 3 as follows:

> for the purposes of this article, "officials" include members of the executive body, supervisory board, audit committee, chairperson and members of another governing body, or persons with the status of officials pursuant to the statutory document, by virtue of their administrative, economic, organisational, and executive functions, including the ones who had the status as of the date of the damages inflicted upon the legal entity.

Losses are sometimes inflicted upon the legal entity by its majority members and shareholders rather than its official. The need to expand the circle of persons against whom a derivative action can be brought by including the company's members has already been emphasised by Yu. K. Chelebiy-Kravchenko.[85] However, a legal entity's losses may also be inflicted upon it by third parties as to which governing bodies do not make a decision to bring an action. Losses can also be inflicted by full members of unlimited and limited partnerships with no governing bodies, so the concept of a derivative action in the existing form will be 'dead' in their respect. A suggestion to expand the circle of defendants under a derivative lawsuit by including third parties has already been expressed by O. V. Bihniak.[86] The opportunity to bring a derivative action against other members of the legal entity was recognized by the Supreme Court of Virginia in the case of *Cattano v. Bragg*.[87] In another case, *James Talcott, Inc. v. McDowell*, the court of appeal reiterated that the member/shareholder could bring a derivative action for compensation for the losses inflicted upon the company by a third party.[88] Each member's opportunity to bring a derivative action for compensation for the losses inflicted by another member is provided for by Art. 108 of Czech Business Corporations Act [89]

Thus, to our mind, the circle of persons against whom a derivative action may be brought must be expanded: *there must be an opportunity to bring this action against officials, members (shareholders) and third parties (provided that the legal entity is unable to protect its rights on its own).*

5.1 THE ISSUE OF FINANCIAL (CIVIL) AND EMPLOYMENT (MATERIAL) LIABILITY OF COMPANY'S OFFICIALS

The grounds for holding officials liable are prescribed by Part 2 of Art. 89 of the Commercial Code of Ukraine, according to which they include inflicting losses due to actions (omission) if they are inflicted by: 1) actions taken by the official *ultra vires* or by abusing his or her official authority; 2) actions of the official taken in breach of the preliminary approval procedure or another decision making procedure for such actions; 3) actions taken in accordance with the approval procedure or another decision making procedure, but based on the false data furnished by the official; 4) failure to act by the official in case he or she had to take certain

84 84 UK Companies Act 2006 (n 13).

85 85 YuK Chelebiy-Kravchenko, 'General overview of participants of a legal proceeding brought by a derivative claim' (2018) 2 Entrepreneurship, Economy and Law 87-88.

86 86 OV Bihniak, 'Derivative action and corporate contract as means of corporate rights protection: experience of Ukraine' (n 3).

87 *Cattano v Bragg*, 727 S.E.2d 625 (Va. 2012).

88 *James Talcott, Inc v McDowell,* 148 So.2d 36, 37 (Fla. App. Dist. 3 1962).

89 Czech Business Corporations Act (n 43).

actions pursuant to his or her official duties; 5) other guilty actions of the official.[90] Based on the above-mentioned list of the grounds for the financial liability of officials, one can conclude that some of them are rather abstract and broad.

In particular, Clause 4 of Part 2 of Art. 89 of the Commercial Code of Ukraine does not specify which duties of the official are meant.[91] For example, officials of a corporation, namely the director or members of the executive body, can enter into employment contracts, so this is a liability for violating employment duties. Violation of employment duties entails financial liability under employment law, and such cases are heard by general courts. In turn, according to Clause 12 of Part 2 of Art. 20 of the CPC of Ukraine, the cases based on a derivative action are considered by commercial courts and entail civil (property) liability.[92] Therefore, the question is whether a derivative action for compensation for the losses inflicted upon the legal entity by the official with the employment contract may be brought.

A. Didenko and O. Nesterova have reasonably noted that where there are no criteria to divide the civil and labour liability of officials, there will be an absurd situation when officials with the same status will bear different liability depending on the type of their contract, either an employment one or civil law one.[93] O. Koltok believes that when civil financial and employment material liability is divided, one should consider which duties have been violated by the official.[94] Yu. Popov suggests that despite the existing employment relationship, the legal entity's members must have an opportunity to bring a derivative action due to the nature of relations between the legal entity and its senior executive (official).[95]

In comparison with other employees, officials have a special legal status and concurrently have employment and civil legal relations to discharge legal entity management functions. As noted by the Supreme Court in its Resolution dated 9 December 2020 in case No. 487/2178/19, the above does not establish the priority of employment regulation over the civil one.[96] However, we should emphasise that since an official is a subject of civil and employment relations that exist concurrently and in parallel to each other, civil legal regulation to the extent of the losses inflicted by the employed official cannot fully displace the employment regulation. In cases where the person does not act on behalf of the legal entity and does not discharge management functions, the official acts as a subject of employment relations, so the legal labour rules on financial liability are to be applied. The point at issue is the losses sustained in connection with failure to take actions to avoid downtime, improper registration and storage of valuables, other employment duties, or damages to the property of such legal entity, etc. In cases where the opposite approach is used, the line between legal regulation of civil and employment relations is erased, and the mechanism for holding officials liable becomes unclear.

The above-mentioned stance is also confirmed by the fact that the grounds for holding officials liable under Part 2 of Art. 89 of the Commercial Code of Ukraine are associated with the losses inflicted during the management of the legal entity.[97] Part 4 of Art. 92 of the

90 Commercial Code of Ukraine of 16 January 2003 (as amended of 1 August 2021) <https://zakon.rada.gov.ua/laws/show/436-15#Text> accessed 8 August 2021.

91 Ibid.

92 92 Commercial Procedure Code of Ukraine (n 7).

93 93 AG Didenko, EV Nesterova 'Financial (civil) liability of officials of joint-stock companies' (2012) 7 Lawyer 7.

94 94 OI Koltok 'Derivative claims: innovations that are worth paying attention to' (2016) 16 Law and Business 21-28.

95 Yu Popov, 'Derivative (indirect) lawsuits: foreign experience and Ukrainian prospects' (n 45).

96 Resolution of the Supreme Court in case 487/2178/19 of 9 December 2019 <https://reyestr.court.gov.ua/Review/93879586> accessed 8 August 2021.

97 Commercial Code of Ukraine (n 89).

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Civil Code of Ukraine,[98] which also provides for holding officials liable for losses inflicted upon a company, is dedicated to the legal capacity of the legal entity, so it is associated with the formation and expression of its will (management thereof) and does not provide for the opportunity to bring a derivative action on the grounds other than losses resulting from a discharge of management functions.

In its Resolution, the Grand Chamber of the Supreme Court reiterated that employment relations between the legal entity and its official did not influence the determination of jurisdiction of such dispute, and it had to be heard in accordance with Clause 12 of Part 1 of Art. 20, Part 1 of Art. 54 of the CPC of Ukraine.[99] The cause of action was the losses resulting from illegally accrued salaries (excessive payments to the staff). At first glance, this case seems to be within the competence of general courts by virtue of the direct legal rule, and the official's liability must be financial (under employment law). Thus, the Resolution of the Grand Chamber of the Supreme Court contradicts the law. However, it is not that unambiguous. Firstly, according to the facts of the case, the director's powers to determine the labour remuneration form and system were provided for by the articles of association, so these duties arise not so much from his or her status as an employee, but from his or her managerial position. Secondly, the powers to accrue salaries are rather of administrative nature since they provide for the disposal of the legal entity's funds (property). Under such circumstances, the official (director) acts as a competent governing authority of the legal entity in the first place rather than an employee.

The approach we have presented is used as a basis for the regulation of derivative actions in the legislations of other countries. For example, according to Arts. 147 and 148 of the German Joint-stock Companies Act, shareholders may bring a derivative action only for compensation for the losses inflicted *'during the management of the company's affairs'*.[100] Similarly, it is stipulated in Arts. 236 and 239 of the Spanish Business Corporations Act that the cause of a derivative action is losses resulting from actions (omission) of the director(s) in breach of the law, statutory documents, or official duties.[101] Moreover, Part 2 of Art. 239 of the Law that governs the procedure for several members or shareholders to bring a derivative action uses the concept of 'corporate interest',[102] which can only be breached when losses are inflicted upon the legal entity by the official as a subject of administrative powers rather than an employee.

Therefore, a derivative action against the official with the employment contract, given the specific legal status and in accordance with the effective law, does not depend on the existence of employment relations themselves and depends on how such an official acted, as a subject of employment or civil (managerial) relations, when he or she inflicted losses upon the legal entity. If losses result from a violation of the duties associated with management of the legal entity (management decisions taken, transactions conducted on behalf of the legal entity, etc.), a derivative action may be brought. If losses result from the official's actions (omission) as an employee (are not associated with management of the legal entity), the liability of such officials is financial, and a derivative action cannot be brought.

As for conditions for officials' liability, the following should be noted. In its Resolution in case No. 904/982/19 dated 24 February 2021, the Supreme Court reiterated that a person might be held liable in a derivative action only when four elements of the civil offence are proven,

98 Civil Code of Ukraine (n. 23).

99 Resolution of the Supreme Court in case 910/12217/19 of 14 April 2020 <https://reyestr.court.gov.ua/Review/88815574> accessed 8 August 2021.

100 Act of Germany 'On Joint-Stock Companies' (n 16).

101 Corporate Enterprises Act of Spain of 2010 (as amended July 2015) <https://www.spenceclarke.com/wp-content/uploads/Tax%20treaties%20etc/Company-law.pdf> accessed 8 August.

102 Ibid.

which include: 1) unlawful conduct; 2) losses; 3) cause-and-effect relationship between the unlawful conduct and losses incurred; 4) guilt.[103] The burden of proof is borne by the plaintiff, and if one of the elements of the offence is missing, the official cannot be held liable. We would like to avail of an opportunity and draw attention to Part 4 of Art. 92 of the Civil Code of Ukraine in respect of the liability of officials.[104] The point is that this rule provides for joint and several liability of officials for the losses sustained by the legal entity. However, the wording of this rule does not enable a clear understanding of whether the persons who, for instance, have not voted for the resolution that has resulted in the losses are also held liable. This issue was also raised by O. O. Kot in his study of a derivative lawsuit in Ukraine.[105]

According to the special rule, Part 3 of Art. 40 of the Law of Ukraine 'On LLCs', an official (namely, the member of the supervisory board or executive body) is released from liability if he or she proves that he or she is not guilty of the damages; in other words, individual liability of each official is established.[106] This rule can be interpreted so that the officials who have not voted for the resolution that has resulted in the company's losses will not be held liable. The same individualistic approach is also demonstrated by Art. 293 (in limited liability companies) and Art. 483 (in joint-stock companies) of the Commercial Companies Code of Poland, Part 3 of Art. 187 of Commercial Code of Estonia.[107] The effective Law of Ukraine 'On JSCs' does not contain an equivalent rule,[108] but it is stipulated in Part 2 of Art. 86 of the Draft Law of Ukraine 'On JSCs' that only the officials who have voted for the resolution in the collegiate bodies of the joint-stock company are held liable for the losses inflicted upon by the body's resolution.[109]

In our opinion, such an approach is ambiguous. It is absolutely wrong to hold the official who has voted against the respective resolution liable for the losses sustained by the company. However, there is still an open question of how to qualify actions of the official in the collective body who has not voted against and has abstained from voting: as passive approval of the unlawful resolution of the governing body or as a ground for being released from liability? On the one hand, such an official does not vote for the unlawful resolution. On the other hand, such conduct may be treated as a violation of the official's fiduciary duties by omitting to take the actions that would prevent the adoption of a resolution that will inflict damages upon the corporation. Moreover, such person's attendance can, for instance, procure quorum at the general meeting in a joint-stock company and their power to adopt a resolution.

In our opinion, this is the very reason why only those officials who have directly disagreed with the resolution and voted against it should be released from liability. This approach is implemented in the laws of a number of foreign jurisdictions. For example, according to Clause d) of Art. 316 of the Corporations Code of California, abstaining from voting is considered to be a passive approval of the respective resolution, so a director is jointly and severally liable together with the other members of the executive body.[110] According to

103 Resolution of the Supreme Court in case 904/982/19 of 24 February 2021 <https://reyestr.court.gov.ua/Review/95240657> accessed 8 August 2021.

104 Civil Code of Ukraine (n 23).

105 OO Kot, 'Derivative lawsuit as a remedy for protection of corporate rights' (2016) 5-6 Bulletin of Economic Justice 21-27.

106 Act of Ukraine 'On Limited Liability and Additional Liability Companies' (n. 61).

107 The Commercial Companies Code of Poland of 19 September 2000 (as amended 2014) <https://supertrans2014.files.wordpress.com/2014/06/the-commercial-companies-code.pdf> accessed 8 August 2021; the Commercial Code of Estonia of 01.09.1995 (as amended 4 April 2014) <https://www.riigiteataja.ee/en/eli/504042014002/consolide> accessed 8 August 2021.

108 Act of Ukraine 'On Joint-Stock Companies' (n. 32).

109 Draft Law of Ukraine 'On Joint-Stock Companies' (n.8).

110 Corporations Code of California of 1947 (as amended 1 January 2021) <https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CORP&division=1.&title=1.&part=&chapter=3.&article=> accessed 8 August 2021.

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Clause 2 of Part 6 of Art. 63 of the Act of Kazakhstan 'On Joint-stock Companies', abstaining from voting is treated as 'unlawful omission' that has resulted in losses.[111] According to §123 of the Canada Business Corporations Act, a director who is present at a meeting of the executive body is deemed to have consented to any resolution passed unless he or she directly expresses his or her dissent.[112]

6 BUSINESS JUDGEMENT RULE

However, it should be noted that the circumstances under which a resolution (action or omission) is adopted by officials are usually unclear, the scope of information is insignificant, and the time is limited. Therefore, it is extremely difficult to foresee consequences in advance, so there is quite a high probability of the resolution or transaction that will not only fail to meet the expectations but also will do damages, despite good-faith estimates of its performance and economic feasibility. The above constitutes risk as an integral attribute of any economic operations in which it is necessary to promptly respond to internal and external factors, which will not be ensured if officials keep doubting their decisions all the time for fear of liability for their bona fide actions – in the end, it is the corporation that will suffer.[113][114] Judges and participants of litigation are often unable to tell apart negligence as the improper discharge of the official's duties and competent management under the conditions of limited information, time, resources, etc., which, due to the risky nature thereof, entailed unfavourable results.[114] There are several reasons for the above: 1) the judge does not have the sufficient level of knowledge and experience in the business sphere to assess economic aspects of the officials' resolution; 2) there is a frequent basis for the so-called hindsight bias: a tendency to perceive the facts and events that have occurred as evident and predictable ones as well as reversible ones, despite the fact that the initial information before occurrence thereof was insufficient to foresee them; in other words, a resolution of the officials that was reasonable when it was adopted might seem unreasonable in the course of time.[115] Therefore, there is an actual probability that the officials' actions can be misjudged as negligence, and they can be held liable. It is necessary to create guarantees to protect the latter from liability for risky actions (non-actions), provided that their fiduciary duties are discharged.

Given the above, the common law was the first to develop the refutable presumption called *'business judgement rule'*, a refutable presumption that the officials acted in good faith, reasonably (on an informed basis), and for the benefit of the legal entity. The burden of proof is generally borne by the plaintiff, although in some jurisdictions, the defendant has to prove that the resolution, actions, or omission meet the applicable criteria (Germany, Austria, etc.).[116] However, while assessing risk factors in good faith, they can arrive at a reasonable conclusion on the feasibility of not conducting a transaction or adopting a resolution, which can also inflict losses upon the corporation in the future (including as lost profit). The doctrine of the business judgment rule covers the above-mentioned cases. According to Part 3 of Art. 180 of the Australian Corporations Act business judgement rule applies to any

111 Act of Kazakhstan 'On Joint-Stock Companies' (n 68).

112 Business Corporations Act of Canada (n 14)

113 L McMillan, 'The Business Judgment Rule as an Immunity Doctrine' (2013) 4 (2) Wm. & Mary Bus. L. Rev. 567.

114 A Ponta, RN Catana, 'The business judgement rule and its reception in European countries' (2015) 4 (7) The Macrotheme Review 132, 137.

115 D Despotovic 'Fiduciary Duties and the Business Judgment Rule (with the Emphasis on the Citigroup Case)' (Master Thesis, University of Tilburg 2010) 12-13.

116 P Nimmerfall, LJ Peissl, 'The Business Judgment Rule and its Impact on Austrian Law' (2015) 4 Časopis pro právní vědu a prax 354-357.

decision to take or not take action in respect of a matter relevant to the business operations of the corporation.[117]

According to the judgement of the Delaware Supreme Court in the case of *Smith v. Van Gorkom*, the duty of care should mean that the corporation's officials acted in an informed manner the same way as any reasonable person would do under the same circumstances. In its turn, an informed manner means that officials must take a decision only after they have examined all the information, both available and obtainable.[118] The law enforcement practice then confirmed that the duty of care was only associated with the requirement for the procedure for decision-making by the informed person. In particular, an official will not be held liable for the decision that would not be made by an ordinary reasonable person, which means that the decision as an outcome is not assessed.[119] However, it does not mean that the decision taken in the process is of no significance at all. If the decision taken is obviously irrational or is an abuse of discretion, i.e., the one that cannot be taken by any other person, the official enjoys no immunity in this case. Given the above, one can conclude that the courts rather assess how unreasonable the decisions taken are. However, it does not mean that reasonableness of the decision is ignored when it is resolved whether to use the business judgment rule: when lack of reasonableness is assessed, 'reasonableness' of the decision is indirectly assessed as well.

According to the judgement of Delaware Supreme Court in the case of *Aronson v. Lewis*, the duty of loyalty means that when a decision was made, the official acted in the best interests of the company, did not have a personal interest therein, was not a party to the transaction or did not gain indirect personal benefit from the decision made, and was independent of external influence in the decision made.[120]The court defined independence as follows in its judgement:

> While directors may confer, debate, and resolve their differences through compromise, the end result, nonetheless, must be that each director has brought his or her own informed business judgment to bear without regard for or succumbing to influences that convert an otherwise valid business decision into a faithless act.121

Still, it should be noted that a separate 'duty to act in good faith' is fairly criticised in the USA. A. Gold argues that even when the director has misled the members (shareholders) of the corporation and has been confident that his actions will be in the interests of the corporation, ultimately, it is the duty of loyalty that is breached since deceit by the official, no matter the motives, can hardly be in the interests of the company.[122] Gold suggests that the business judgement rule must be limited to checking adherence to two duties only: duty of care and duty of loyalty, in the broad meaning of the latter. The same stance can be found in the Judgement of the Delaware Supreme Court in the case of *Stone v. Ritter*.[123] In civil law countries, the duty to act in good faith is generally not separated from other fiduciary duties of the officials. According to Art. 93 of the Joint-stock Companies Act of the Federal Republic of Germany, 'failure to discharge their duties by members of the governing body does not take place if the latter reasonably assumed while taking a decision that they acted based on sufficient information and in the best interests of the company'.[124] According to

117 Corporations Act of Australia of 2001 (as amended 2017) <https://www.legislation.gov.au/Details/C2018C00031> accessed 8 August.

118 *Smith v Van Gorkom*, 488, A.2d 858 (Del. 1985).

119 C Hansen, 'The Duty of Care, the Business Judgment Rule, and The American Law Institute Corporate Governance Project' (1993) 48 (4) The Business Lawyer 1357.

120 *Aronson v Lewis*, 473 A. 2d 805 (Del. 1984).

121 Ibid.

122 AS Gold, 'The New Concept of Loyalty in Corporate Law' (2009) 43 UC Davis Law Review 12-15.

123 *Stone v Ritter*, 911 A.2d 362 (Del. 2006).

124 Act of Germany 'On Joint-Stock Companies' (n 16).

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the laws of France, the grounds for holding officials liable are erroneous actions, violation of the law or articles of association (Art. L. 225–251 of the Commercial Code of France), and taking actions contrary to the company's interests.[125]

Fiduciary duties that comprise a business judgment rule as a refutable presumption are implemented in Part 3 of Art. 92 of the Civil Code of Ukraine, which prescribes the duty of the company's officials to act in good faith, reasonably, and in the company's interests.[126] The same rules can be found in Part 1 of Art. 40 of the Law of Ukraine 'On Limited Liability Companies'[127] and Parts 1 of Art. 63 of the Law of Ukraine 'On JSCs'.[128] It is worth noting that the courts determine the unlawfulness of the official's conduct as a condition for holding him or her liable for the losses sustained by assessing the actions taken in pursuance of the fiduciary duties established by the above-mentioned rules. Combined with the fact that the burden of proof lies within the plaintiff, we can argue that a kind of business judgment rule is implemented in case law. For example, according to the Resolution of the Supreme Court in case No. 904/3852/18 of 26 February 2020, unlawful conduct constitutes certain improper and unscrupulous actions, without adherence to the limits of normal business risk, with personal interests or abuse of official duties on purpose (at own discretion), obviously negligent and wasteful decisions taken deliberately for the benefit of the official.[129] The equivalent extended interpretation of the concept of 'unlawfulness' can be found in the Resolution of the Supreme Court in case No. 904/982/19 dated 24 February 2021.[130]

However, it should be noted that the main shortcoming of the above legal rules is that they do not detail the content of the fiduciary duties of officials. This issue has been remedied in the Draft Law of Ukraine 'On JSCs'. In particular, Art. 85 of the Draft Law establishes the extended list of the fiduciary duties imposed on the official and details their content.[131] At the same time, the duty to take independent decisions is not defined precisely enough. Part 4 of Art. 85 attempts to describe this duty in more detail: the duty will not be breached if the limitation of the official's discretion is stipulated in the contract between him or her and the company.[132] However, the question is whether an official can take a decision independently if it has consulted or actively debated with another, possibly qualified person. The legislator gives no answer to this question, but, according to the case of *Aronson v. Lewis*, the official's actions (omission) are independent in case he or she ultimately takes his or her own informed decision, which may be based without limitation on consulting, debating, etc.[133] Therefore, to our mind, the equivalent definition of this duty should be introduced since the director will otherwise be considerably deprived of an opportunity to make an informed decision and discharge his or her duty to act in good faith.

We should note another shortcoming inherent both to Part 3 of Art. 92 of the Civil Code of Ukraine, Art. 40 of the Law of Ukraine 'On LLCs', and Art. 86 of the Draft Law of Ukraine 'On JSCs'. In all these articles, the duties to act in good faith, the duty of care and the duty of loyalty are established in respect of the officials' actions, their active conduct.[134] However, as we have

125 Commercial Code of France (n 39).

126 Civil Code of Ukraine (n 23).

127 Act of Ukraine 'On Limited Liability and Additional Liability Companies' (n 61).

128 Act of Ukraine 'On Joint-Stock Companies' (n 32).

129 Resolution of the Supreme Court in case 904/3852/18 of 26 February 2020 <https://reyestr.court.gov.ua/Review/87735735> accessed 8 August 2021.

130 Resolution of the Supreme Court in case 904/982/19 of 24 February 2021 <https://reyestr.court.gov.ua/Review/95240657 > accessed 8 August 2021.

131 Draft Law of Ukraine 'On Joint-Stock Companies' (n 8).

132 Ibid.

133 *Aronson v Lewis,* 473 A. 2d 805 (Del. 1984).

134 Civil Code of Ukraine (n 23); Act of Ukraine 'On Limited Liability and Additional Liability Companies' (n 61); Draft Law of Ukraine 'On Joint-Stock Companies' (n 8).

emphasised before, adherence to the above-mentioned fiduciary duties may also occur when the officials, acting in the legal entity's interests and with due care, take a decision not to conduct a transaction or adopt a resolution. It should be noted that Part 2 of Art. 40 of the Law of Ukraine 'On LLCs'[135] and Art. 86 of the Draft Law of Ukraine 'On JSCs'[136] provide for the officials' liability for the omission, but it is not a question of omission under the above circumstances since omission is associated with failure to discharge official duties while informed decisions not to take certain actions result from the discharge of the official's duties. Thus, we suggest supplementing Part 3 of Art. 92 of the CC of Ukraine, Part 1 of Art. 40 of the Law of Ukraine 'On LLCs', and Art. 86 of the Draft Law of Ukraine 'On JSCs' with para. 3 as follows: 'Officials are not liable for the losses inflicted upon the legal entity if the decision to act (or not to act) has been taken in accordance with the duties of care and duty of loyalty'. We are also critical about the establishment of the officials' duty to act in good faith since this category is rather judgement-based and deprived of its own sense beyond the duty of loyalty and duty of care.

To our mind, the establishment of the list of fiduciary duties will positively influence the legal regulation of the derivative action. In fact, according to Art. 86 of the Draft Law of Ukraine 'On JSCs', officials shall only be liable for the actions (omission) taken contrary to the company's interests.[137] However, if officials have acted in the company's interests, but have taken the decision in breach of the duty to act reasonably (duty of care), i.e., have violated any of the fiduciary duties, the business judgement rule shall also not be used, and the official must be held liable. Therefore, it will be logical to amend the rule and prescribe that officials are liable for the actions (omission) taken contrary to the company's interests and in breach of the duty to act reasonably (duty of care).

7 CONCLUSIONS

The institute of a derivative lawsuit is a complex legal concept only recently implemented in Ukrainian legislation. Nevertheless, a derivative action is an important guarantee of protection of the rights and interests of the corporation and minority participants (minority participants) from abuse and wrongful acts by those who control the corporation. At the same time, the current model of legal regulation of the derivative lawsuit contains many shortcomings, the analysis and solution of which is carried out in this scientific work.

The formation of the will (decision-making) to exercise the procedural rights and obligations of the corporation is an incorrect and internally contradictory approach, as the latter are subject to further approval by the applicants (members of the corporation). The corporation must be allowed to acquire and exercise its procedural rights and obligations (make decisions) on its own behalf through its members, who filed a lawsuit.

The right to file a derivative lawsuit must be granted to members of all corporations – entrepreneurial and non-entrepreneurial alike. To that end, property qualification must be substituted with a representation quota for members of non-entrepreneurial corporations. Continuing the topic of persons, who can file a derivative lawsuit, such a right must be granted to holders of preferred stock since there is no reason to deprive them of such right, as it was shown in this scientific work. The right to file a derivative lawsuit must also be granted regardless of whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

135 Act of Ukraine 'On Limited Liability and Additional Liability Companies' (n 61).

136 Draft Law of Ukraine 'On Joint-Stock Companies' (n 8).

137 Ibid.

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The prevention mechanism regarding any abuse of the right to file a derivative lawsuit should amount to the extended *locus standi* procedure. The latter has to consist of the following requirements: 1) property qualification or representation quota; 2) mandatory application of a demand to the corporation for taking actions; 3) the legal entity, contrary to its interests, has failed to take any action to defend its rights and interests for one month or has rejected the person's demand (is unable to defend its rights and interests on its own); 4) there are no other grounds that would prevent a derivative action from being brought.

The cause for a derivative lawsuit is the inability of the legal entity to protect their rights and interests in cases where the persons controlling it do not take any measures, and the damage was caused by the majority of members or even third parties. Considering this, it is necessary to extend the circle of defendants by including members of the corporation and third parties as those against whom the lawsuit may be filed. Such a suggestion confirms with foreign practices.

It is quite common for a corporation's official to be employed. In that case, the necessity for distinguishing civil (financial) and employment (material) liability. The cause to file a derivative lawsuit and to bring officials to financial liability rises when the damages were caused by officials' acts (omission) in violation of the duties associated with management of the legal entity. Otherwise – the liability must be material. One other issue to consider is the possibility to hold liable an official who abstained from voting regarding the resolution of the governing body that caused the damage. To our mind, such conduct must be deemed a violation of the official's fiduciary duties by omitting to take the actions that would prevent the adoption of a resolution that will inflict damages upon the corporation.

To prevent any detrimental effect to the management of the corporation caused by officials' constant questioning of their decisions, the 'business judgement rule' must be implemented into Ukrainian legislation. This refutable presumption must include two duties – 'duty of care' (person acted reasonably and was informed) and 'duty of loyalty' (person acted in the interest of the corporation). The 'duty to act in good faith' is too broad in its meaning and can be effectively substituted with other duties – 'duty of care' and 'duty of loyalty'. For the implementation of the business judgement rule to be effective in national legislation, the latter must provide its application in cases where officials acting reasonably and in the interest of the corporation decided not to take any actions. The latter cannot be considered an omission because officials do not fail to discharge their duties.

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Note

ECONOMICS OF CRIMINAL PROCEEDINGS IN VIEW OF PROCEDURAL PRINCIPLES

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Keywords: economics of law, criminal procedure, costs of proceedings.

ABSTRACT

Background: This article was written as part of the *Costs of a Criminal Trial in View of an Economic Analysis of Law* research project. Part one contains deliberations on the impact of economic factors on the regulations concerning the criminal procedure. One needs to answer the question of whether such factors should be considered as affecting the principles on the basis of which the model of the criminal trial is being developed and whether there are any solutions that have been introduced specifically because of the profit and loss account

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related to the prosecution of a perpetrator. Part two focuses on the fundamental results and the conclusions of empirical studies carried out with respect to the expenses incurred by the State Treasury in criminal proceedings, considering the expenses incurred in serious cases, i.e., those examined in the first instance by regional courts, and in minor cases, which in the first instance are handled by district courts.

Results and Conclusions: The article points out three fundamental factors determining the amount of the expenses, i.e., the fact of the accused being imprisoned during the proceedings, the use of scientific evidence (opinions produced by expert witnesses), and the participation of a public defender remunerated by the State Treasury.

1 ECONOMIC ANALYSIS OF LAW IN CRIMINAL CASES – GENERAL REMARKS[2]

The economics of criminal proceedings are discussed rarely and to a small extent. A more popular concept is the simplicity of proceedings, which is sometimes placed in the context of the principle of efficiency of proceedings and combined with the postulate to ensure that procedural activities are carried out in a concentrated manner, in as much as this is possible without endangering the fundamental purposes of a criminal trial, i.e., a correct penal response based on the conclusions made with respect to facts.

The academic reluctance to analyse criminal proceedings from an economic point of view has historical and cultural foundations. Administration of justice, especially in the area of criminal law, is perceived as a duty and a right of the state to exercise its powers with respect to the individuals subject to its jurisdiction. Consequently, the need to maintain a state apparatus, the purpose of which is to administer justice in criminal cases, is considered to constitute a natural cost of exercising power that remains outside of economic evaluation, which, by nature, makes use of the concepts of profit and loss.

Continental academics seem to be particularly unwilling to engage in an economic analysis of criminal proceedings. The belief that the judiciary is an emanation of the power of the state, shaped over centuries and consolidated during the Enlightenment, excludes an approach where economic issues could be seen as factors that determine the essence of exercising judiciary prerogatives. Naturally, this does not mean that the problem of the costs of proceedings never existed or that no incidental discussions took place.[3] However, the economic aspect of criminal proceedings has never been treated (at least not directly) as a factor that is significant from the point of view of shaping the course of such proceedings and the solutions and concepts employed as part of it.

Economic analysis of law is a relatively new area, which emerged at some point in the middle of the 20th century. American academics were the precursors of using economic tools to analyse law. They initially focused on individual concepts and solutions used in broadly understood private law.[4] This approach followed from a natural assumption that changes to market regulations have economic consequences. Nonetheless, it is still claimed today that an economic approach may be useful when investigating individual regulations, concepts, and solutions rather than when

2 The text is partly based on the publication D Szumiło-Kulczycka, 'Ekonomia postępowania karnego a zasady procesowe' in M Rogacka Rzewnicka, H Gajewska-Kraczkowska (eds), A book to the memory of Professor Andrzej Murzynowski. Istota i zasady procesu karnego. 25 lat później (Warsaw 2020) 449.

3 H Kempisty, Koszty sądowe w sprawach karnych (Warsaw 1977). RJ Foellmer, Soll der Verurteilte die Kosten des Strafverfahrens tragen? (Göttingen 1981).

4 One of the most prominent precursors of this trend is R Posner, Economic Analysis of Law,(1st edn, New York 1973); see also R Coese, 'The problem of social cost' (1960) 3 Journal of Law and Economics 1; F Famulski, 'Economic efficiency in economic analysis of law' (2017) 3 Finanse i Prawo Finansowe 15, 27.

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describing law as a phenomenon in general.[5] This does not affect the fact that the economic approach to court law is becoming more and more popular, as can be seen, for example, in the regular research on the efficiency of the judicial systems by Council of Europe member states.[6]

This article is intended to present the 'economic perspective' in the evaluation of certain criminal law concepts and to point out that this context, even though usually omitted in academic discourse, is in fact noticeable in the recent development trends related to criminal proceedings and undoubtedly has to be taken into account when planning reforms.

2 COSTS VS THE PRINCIPLE OF TRUTH

There is no doubt that progress causes changes to the forms and methods of committing criminal offences, but it impacts crime detection methods to an even larger extent. These processes have been especially visible in recent years when, because of the impact of the technological revolution, new types of crime have come into existence (e.g., electronic espionage) and new methods of committing traditional crimes have emerged due to the development of electronic communication tools (stalking, criminal threats) and the electronic market of services (online scams, crimes against sexual freedom or against protection of minors against sexual violence, trafficking of tissues and organs, arms, and pharmaceuticals and parapharmaceuticals).

The authorities responsible for looking for truth and drawing conclusions with respect to facts are able to use increasingly better operating methods that allow them to arrive at more precise and detailed conclusions. Technical possibilities allow them to reach for highly specialised forms of acquiring knowledge (complex opinions of expert witnesses, court experiments, use of electronic data to determine the course of events). But this knowledge comes at a cost. Both in the original sense, meaning the price that must be paid for the opinion of an expert witness, for a court experiment to be carried out, for acquiring specific documents, etc., but also in a wider sense, as the price related to authorities having to spend time on gathering, analysing, and processing materials. A few years ago, in a criminal trial, it was rare to use psychological profiling, CCTV recordings, or printouts from hard drives, e-mails, mobile phones, etc. Today, these are standard items of evidence in proceedings that concern the most frequent criminal offences, such as domestic abuse, shoplifting, fraud committed with the use of online tools, road accidents, or the illegal drug trade. On the one hand, all of these possibilities in terms of gathering evidence allow law enforcement authorities to determine the actual course of the events reported with much higher precision. However, on the other hand, they take up much more time for the authorities responsible for criminal proceedings, which has a significant economic aspect related to the need to expand the human resources necessary to process incoming cases.

In the continental tradition, it would be difficult to accept an approach in which determining the truth in a criminal trial is not the ultimate goal or where a reduction of costs is an acceptable step. Ideas like that appear iconoclastic, striking at the very foundation of the belief — typical of the continental tradition — about what criminal justice should be, i.e., the importance of the conclusions made with respect to facts. There is no doubt that the principle of objective truth in a criminal trial is often treated as the overriding principle: a

5 EN Zalta, U Nodelman, C Allen, LR Andreson (eds), The Economic Analysis of Law. Stanford Encyclopedia of Philosophy (Stanford 2017) 1.

6 Such research has been carried out since 2010. One of the fundamental indicators taken into account are the financial outlays made on the judiciary by the particular member states. The most recent report covers 2016 data. See: European judicial systems. Efficiency and quality of justice, vol 26 (CEPEJ Studies 2018) <https://www.coe.int/en/web/cepej/eval-tools> accessed 1 October 2021.

principle that has a special and a priority meaning in relation to other procedural principles and one that is an essential element of a fair trial.[7] It is claimed that

> the justice system is able to properly perform its legal and social functions only when penal repressions are applied with respect to actual criminals and the crimes they did actually commit. Every judgment based on error, and therefore unfair, not only fails to perform its positive social function, but also harms the wrongly convicted person, undermining their trust and the trust of others in state authorities.[8]

If one shares the belief that the principle of objective truth is of overriding importance and that this principle is a priority from the point of view of justice in general, it is impossible not to notice that this belief seems axiologically indisputable in the case of imposing a penal sanction on an individual. However, its importance is not necessarily the same when it comes to relinquishing the prosecution of a criminal offence. Therefore, although abandoning the search for truth prior to pronouncing a judgment of conviction is incomprehensible and unacceptable, this mechanism does not appear to be equally black and white in the case of resigning from a prosecution that would be disproportionately expensive in view of the gravity and significance of the committed act.

Consequently, in spite of the special importance of the imperative to search for the truth in criminal proceedings, a closer look at regulations in particular legal systems and, even more so, at the actual practice in this area, shows that, in fact, economic factors and arguments often play a considerable role.

A good example in this respect is the growing number of legal bases for opportunistic discontinuation of proceedings in cases where, in the opinion of the legislator, there is little point in prosecution, the chances of determining the perpetrator are small, or the sense of punishing them is questionable.[9]

This aspect is even more noticeable in the practical actions of judicial authorities. There is no doubt that the authorities responsible for preparatory proceedings are ready to spend higher sums and engage more resources in order to determine the perpetrators of serious criminal offences that are highly harmful to society, e.g., offences producing a fatality, offences against common safety, offences against property of great value, or offences against commercial trading resulting in multi-million financial losses. It would also seem that the more the given crime moves public opinion, the higher this readiness is. On the other hand, simple criminal offences, such as theft or breaking and entering, even though they may be a significant nuisance, rarely entail the utilisation of cost-intensive state-of-the-art methods in order to determine the perpetrators. The fact that state authorities are ready to allocate

7 For a review of the standpoints on the role and importance of the principle of objective truth in relation to other procedural principles see S Waltoś, 'Zasada prawdy materialnej' in P Hofmański, P Wiliński (eds), System Prawa Karnego Procesowego. Zasady Procesu Karnego, vol III, part 1 (Warsaw 2014) 269.

8 A Murzynowski, Istota i zasady procesu karnego (Warsaw 1994) 115.

9 In terms of the Polish legal system, this concerns concepts such as the so-called registered discontinuation, which was added to the Code of Criminal Procedure in 2003 under pressure from the police and which allows for shortening the duration of formal preparatory proceedings to five days in cases of a lesser calibre and where chances to find the perpetrator are slim (Art. 325f of the Code of Criminal Procedure); after that time, proceedings may be discontinued. Another example of such an economical approach to the problem of prosecution of crime is the concept of absorptive discontinuation (Art. 11 of the Code of Criminal Procedure), where a perpetrator who has been identified is not tried since they have already been sentenced to a stricter punishment on account of another criminal offense. This category also includes conditional discontinuation of proceedings where the legislator allows the authorities to resign from prosecution, and therefore from making categorical statements as to whether the accused is in fact the perpetrator, if the gravity of the committed act, the personality of the accused, and the interest of the aggrieved party are not sufficiently significant to justify the engagement of the personnel and resources of the justice system in an operation that offers slim chances in terms of undoubtedly and ultimately confirming the guilt and of imposing a punishment (Art. 66 of the Criminal Code and Art. 341 of the Code of Criminal Procedure).

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substantial funds to finding the perpetrator of a murder and much less likely to do the same in the case of a stolen bike is understandable and, axiologically, fully accepted by society (although the owner of the bike would likely disagree). However, another phenomenon should be pointed out: extensive personnel is engaged, and large sums are spent in order to prosecute trivial offences purely in order to pursue political or ideological interests.[10] Unlike the actions intended to find the perpetrators and evidence in the case of truly grave offences, such actions give rise to axiological objections. In addition to other reasons, these objections are also motivated economically. Cases of this type necessarily lead to questions concerning the proportions between the gravity of the given contravention of offence and the resources engaged in order to detect and judge it. Do such actions of judiciary authorities, financed by the State Treasury and formally justified through the principle of legalism in law enforcement, actually enjoy moral and social acceptance?

3 COSTS VS THE PRINCIPLE OF LEGALISMUS

The problem of the economics of prosecution may be juxtaposed with the principle of legalism, which is widely adopted in continental legal systems, or the principle of equality before the law, which is related to that principle at a slightly higher level. Alternately, systems based on a purely legalistic approach to prosecution no longer exist. Furthermore, this principle does not apply anymore to the prosecution of contraventions and violations of order regulations. Legislators not only accept the resignation from engaging personnel and resources in trivial cases but are also ready to make such a resignation a principle in this area, with prosecution being an exception rather than the rule. Naturally, this is not a simple issue, and decisions as to whether to carry out criminal proceedings or resign from carrying them out can never be based exclusively on a purely economic profit and loss account. The fact that a single act seems trivial and the value of the damage done appears minimal is not sufficient to resign from prosecution. This is because criminal law performs much broader functions than imposing repressions with respect to individual behaviours. It is also a tool for implementing the desired social attitudes and reviling the unwanted ones, a tool for protecting the values that contribute to the well-being of the entire community, etc. A good example of a clash between the pure economics of prosecution of a given act and the general purposefulness of prosecuting a specific type of behaviour is the imposition of penalties on vendors in connection with their failure to record a given transaction on a cash register. A single unregistered transaction may result in the State Treasury losing as little as several cents. However, the costs of the proceedings intended to judge and punish the perpetrator

10 A good example in this respect was the case where the authorities attempted to identify and convict the persons who were preventing a column of government vehicles carrying the leader of the political party in power from entering the grounds of the Wawel Castle where his brother is buried. The event occurred on 18 December 2016; the judgment of acquittal was passed on 22 October 2019. In the course of the proceedings, several dozens of witnesses were questioned and even an expert witness was appointed in order to determine whether the road used by the column of vehicles was a traffic zone or not (!). <http://krakow.wyborcza.pl/krakow/7,44425,24414831,sprawa-blokowania-kaczynskiego-biegly-droga-na-wawel-nikt.html> accessed 1 October 2021; <http://krakow.wyborcza.pl/krakow/7,44425,22948179,prokuratura-umorzyla-sledztwo-ws-protestow-pod-wawelem-wizyty.html> accessed 1 October 2021.
Another example of engagement of personnel and funds disproportionate to the nature of the accusation was the searching and detention of an activist suspected of showing contempt to religious feelings by being in possession of an image of the Virgin Mary with a rainbow-colored aureole. The apprehension operation involved several police officers and included searching rooms, temporary confiscation of the computers and a mobile phone of the woman, and further actions related to examining the contents of the disks and memories of these devices. Ultimately, the court found these actions to be blatantly incorrect and granted the woman a compensation of approx. EUR 1,800. <https://warszawa.wyborcza.pl/warszawa/7,54420,25806812,8-tys-zadoscuczynienia-dla-elzbiety-podlesnej-za-niewatpliwie.html> accessed 1 October 2021.

may amount to several hundred euros. Still, this does not affect the fact that, in general terms, prosecution of this type of act turns out to be profitable because of its educational value. Showing the inevitability and severity of the sanction contributes to a spread of legalistic attitudes and therefore prevents such minor contraventions from being engaged in on a mass scale, which, overall, would generate massive losses for the state budget.

The broadly understood economics of proceedings manifests itself not only in connection with the decisions to resign from prosecution or not to search for the truth. It also surfaces in a number of typical issues related to criminal proceedings. The sole differentiation between the types of preparatory proceedings, into a more significant and formalised investigation, reserved for significant cases, and a less formalised probe intended for cases that are, in general, less important, as well as the differences between the types and compositions of courts, show that the legislator accepts higher expenses where a significant case is to be judged and, at the same time, is ready to limit these expenses in the case of minor cases.

Probably the most prominent example of an economic approach to the modelling of criminal proceedings is the dissemination of consensual methods of resolving cases in continental procedures during the last decades of the 20th century. The idea behind this concept, manifesting itself in resigning from carrying out evidentiary proceedings in court and accepting, instead, a resolution agreed upon and proposed by the parties, was solely to speed up proceedings and to reduce the global engagement of personnel and resources, and thus the costs, in terms of judging cases where this could be avoided. The resources thus spared could be used to prosecute and judge more difficult and more significant cases. Consensualism is a good example of the economics of the judiciary overlapping with other values that should be guaranteed in proceedings and the procedural principles intended to protect these values: to a really large extent, it entails at least a potential violation of these values and principles.[11] Even though in the normative aspect, all consensual methods of resolving cases known in Polish law require that for a judgment to be based on conclusions as to facts that raise no doubts and on confidence that the accused is in fact guilty, in practice, this area is full of ambiguities, nuances, individual interests of the accused and the aggrieved, and, finally, pragmatic interests of the judiciary authorities themselves — few would be ready to claim with absolute certainty that the idealistic assumptions laid down in statutory regulations are actually being implemented.

4 COSTS VS THE PRINCIPLE OF DIRECTNESS

The principle of directness should also be mentioned in the context of the economics of criminal proceedings. This principle means that a court examining a subject matter should come into direct contact with the evidence on which it bases its conclusions as to facts and that this evidence should be of a primary nature, i.e., there should be a direct relationship between the evidence and the fact to be proven. This principle has never been codified in the Polish legal system; however, its existence has been perceived as a reasonable consequence of common sense. It seems obvious that the more indirect links between the given fact and the judge, the higher the risk of distortions. However, in recent years, the situation has started to change. In 2015, a reform was implemented where the scope of the options for the court of the second instance to supplement the previously collected body of evidence was expanded, leading to a possibility of a completely different decision being made with respect to the accused on the basis of evidence that is known to that court partially in a direct manner and

11 SC Thaman, 'Plea Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases' (2007) 113 Electronic Journal of Comparative Law, 47 et seq, available at <https://www.ejcl.org/113/article113-34.pdf> accessed 10 May 2019.

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partially only as a result of reading the case file. This has created a certain asymmetry in terms of the statutory standard of implementation of that principle in proceedings before a court of the first instance. There, the permitted exceptions from compliance with the principle of directness are usually related to the impossibility of all members of the adjudicating panel directly familiarising themselves with the evidence, lack of primary evidence, or the need to verify this evidence. However, the legislator was not bold enough to make it a principle that resigning from the direct taking of evidence should be possible also in a situation where taking evidence would entail significant costs that would be disproportionate to the purpose and importance of the given activity. Naturally, the point is not to force this solution but to consider and discuss the grounds and the boundaries of the principle of directness in the amended Criminal Code, also in view of the economics of proceedings.

5 COSTS VS THE PRINCIPLE OF RIGHT TO A DEFENCE

The last principle that is affected by the economics of proceedings is the principle of the right to a defence. Unlike the principle of directness, its primary meaning in criminal proceedings is obvious. Axiologically, the right to a defence seems to be absolutely impossible to undermine, and no exceptions should ever be allowed for purely financial reasons. But is this really the case? From the Polish perspective, both the existing regulations and the recent discussion concerning the scope of the right to have a defence counsel, as well as the resulting amendments to statutory provisions, clearly show that it is actually the other way round. The regulations concerning the right to a defence in its formal aspect were largely affected precisely by economic factors. Even before the introduction of the 1997 regulations, there had been discussions as to whether a public defender should be appointed *ex officio* to every person who is subject to an indictment and who decides not to employ the services of a defence counsel of their choice. Ultimately, this solution was not implemented precisely because of the costs it would entail. However, back then, the boundaries of obligatory defence were defined rather broadly: the state was obliged to finance, if necessary, a defence counsel also for a person that did not speak Polish. This was abandoned on 1 July 2003, with Art. 6 of the European Convention on Human Rights stated as the basis for the decision, as it only requires that free assistance of an interpreter be provided, with no mention of having to appoint a defence counsel to a person that does not speak the official language of the country in which they are tried. Naturally, the actual reasons for the resignation from obligatory defence in such cases were economic in nature. The same amendment also significantly limited the obligatory defence in the case of persons with respect to which the judiciary authority has doubts as to their sanity: a defence counsel is appointed only if an expert witness confirms that the person is sane.[12] Again, the motivation behind this decision was purely economic. Another amendment to the Polish Code of Criminal Procedure, which came into effect on 1 July 2015, provided that every accused who filed the relevant application for a public defence counsel to be appointed for them was to receive the assistance of such a counsel at the stage of court proceedings. This regulation was abandoned after less than a year, with a reintroduction of the obligation for such an application to demonstrate that the accused does not have sufficient funds to employ the services of a regular defence counsel.[13] Although the drafting team for this amendment did not directly refer to the costs of such a broadly defined right to demand a defence counsel (which was the case with the amendment

12 Art. 1 of the Polish Law of 10 January 2003 on Amendments to the Code of Criminal Procedure, the Provisions Implementing the Code of Criminal Procedure, the Law on Crown Witnesses, and the Law on the Protection of Classified Information (Journal of Laws No. 17, item 155).

13 The Polish Law of 11 March 2016 on Amendments to the Code of Criminal Procedure and Certain Other Laws (Journal of Laws of 2016, item 437).

of 1 July 2015), there is no doubt that they had to take this issue into account when deciding to reintroduce the principle that the appointment of such a counsel is possible only once the accused has demonstrated that they do not have sufficient funds to employ the services of a regular defence counsel.[14]

The problem of financing a public defender is naturally a mere drop in the ocean of the issues which fall within the scope of the economics of proceedings in relation to the principle of the right to a defence. These issues by no means come down to the simple claim that defence means additional costs of proceedings, which should be minimised as far as possible (although this approach occasionally seems to resonate in public discussions concerning the directions of changes to the criminal procedure). A professional defence also means the avoidance of tens of unnecessary activities (such as requesting the accused to make their representations or requests more precise or to remove formal deficiencies in their submissions) and a hope for a better selection of evidence or a reasonable and fair judgment to be delivered following a consensual procedure. The fact that the legislator does notice the positive role of a professional defence counsel in the context of broadly understood economics of proceedings is confirmed, e.g., by the obligation that parties be represented by an attorney-at-law with respect to cassation complaints, appeals against judgments of regional courts, or an indictment filed by the aggrieved party itself. Consequently, one cannot claim that higher outlays are all that the broad and publicly financed formal defence generates. Perhaps it also allows for a reduction of some unnecessary costs. However, the answers to these questions require extensive research and a more thorough analysis, which, due to obvious constraints, cannot be carried out in this article.

6 COSTS OF CRIMINAL PROCEEDINGS – RESULTS OF SELECTED EMPIRICAL DATA

Finally, the results of some research on the costs of criminal proceedings in Poland should be presented. The studies covered a sample of 745 cases where an indictment (or its equivalent)[15] was filed with a court between 1 January 2015 and 31 December 2017. Of these cases, 385 were within the competence of district courts, meaning they were less grave in nature, while 360 were considered by regional courts and, as such, were more significant.[16] The sample comprised courts located in large cities that are also strong academic centres (Kraków and Gdańsk) and two smaller cities located in eastern and western Poland (Białystok and Zielona

14 As pointed out in the grounds for the bill of the Polish Law of 11 March 2016 on Amendments to the Code of Criminal Procedure and Certain Other Laws, 'Considering the growing role of the judicial factor in searching for the truth, the restriction of formal requirements to be complied with by the so-called non-professional participants to proceedings, including in particular in terms of formulating means of challenge, it is proposed to abandon the principle of appointing a public defender and representative ex officio exclusively as a result of the relevant application being made and without an analysis of the financial and family situation of the applicant, as provided for in Articles 80a and 87 of the Code of Criminal Procedure. Providing a person of modest means with a defender and representative will take place once the financial and family situation of that person has been verified under Article 78 § 1 of the Code of Criminal Procedure'. See Sejm Deputy Document No. 207, available at <http://www.sejm.gov.pl/> accessed 10 May 2019.

15 For the purpose of the research, a request for a conviction without holding a hearing, a request for conditional discontinuation of proceedings, and a request for discontinuation of proceedings and the use of a protective measure with respect to an insane perpetrator were treated as equivalent to an indictment.

16 The research project was fully financed by the Polish National Science Center as part of the Costs of a Criminal Trial in View of an Economic Analysis of Law project (project number 2015/19/B/HS5/01217). Full results have been published in the following monograph: D Szumiło-Kulczycka (ed), Koszty procesu karnego w ujęciu teoretycznym i empirycznym (Cracow 2020).

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Góra, respectively). The idea was to create a demographically and economically diverse research profile. In order to determine the costs of proceedings, the following were taken into account at the stage of preparatory proceedings: remuneration of an expert witness for producing an expert opinion and reimbursement of their expenses, reimbursement of expenses incurred by witnesses on account of their participation in the case, costs incurred on account of temporary confiscation and securing of items, remuneration of translators and interpreters, costs of mediation, costs of convoys, costs of psychiatric observation, costs of detention or temporary arrest, fees for retrieval of information from the National Criminal Register, remuneration of a probation officer for carrying out community interviews, remuneration of public defenders or representatives appointed *ex officio*, and other costs disclosed in case files. The costs incurred both in preparatory proceedings and in court proceedings were taken into account, including proceedings before the courts of the first and the second instance and, if the judgment was quashed, retrials. Consequently, the studies covered costs directly incurred by the State Treasury in a given case. In turn, they did not cover indirect costs related to the maintenance of the entire judiciary system, such as the remunerations of judges, prosecutors, and clerks, costs of upkeep of technical infrastructure, including the buildings and rooms in which procedural activities are carried out, etc. Naturally, these costs should also be taken into account when discussing the general burden borne by the state with respect to administering justice. However, the primary objective of the studies was to determine the relationship between the current criminal procedure model and the resulting expenses and to find out which factors contribute to the greatest extent to the generation of costs, whether there are any significant differences between the particular courts that could be explained with a different practice of application of legal regulations, and which concepts and solutions used in the criminal procedure have the largest impact on the costs of proceedings.

Following the criteria above, it was determined that the total amount spent on examining all of the 745 cases covered with the study was PLN 8,874,576.19, which translates to approx. EUR 1,936,538.76.[17] Of this, PLN 4,870,559.96 (EUR 1,062,814.49) were the costs incurred at the stage of preparatory proceedings, and PLN 4,004.116.23 (EUR 873,746.09) was spent on court proceedings. This means that the cost of a single case amounted to an average of PLN 11,912.18 (EUR 2,599.38), of which PLN 6,537.53 (EUR 1,426.57) was spent on preparatory proceedings and PLN 5,374.65 (EUR 1,172.81) were the additional costs at the stage of court proceedings. However, the median was completely different, amounting to just PLN 861.08 (EUR 187.90). This was a result of substantial differences between the costs of handling the particular cases. The cheapest generated costs of PLN 40 (EUR 8.73) and covered just the flat fees for the delivery of documents. There were 13 cases like that. On the other extreme, the most expensive cases cost in excess of PLN 100,000 (EUR 21,821.20). In the sample, there were eight such cases, and two of those entailed the State Treasury spending more than PLN 200,000 (EUR 43,642.39) on criminal proceedings.

What is particularly important from the point of view of the previous assumptions is the substantial difference between the costs of handling minor cases (those within the competence of district courts) and serious cases (those within the competence of regional courts). The average costs for a case examined by a district court amounted to PLN 1,169.00 (EUR 255.09), while for cases before regional courts, the average was PLN 23,401.41 (EUR 5,106.46)! The medians were equally far away from each other: for cases within the competence of district courts, it was PLN 184.44 (EUR 40.25) and for cases handled by regional courts, PLN 11,099.81 (EUR 2,422.11).

17 According to the exchange rate published by the European Central Bank on 27/08/2021 (EUR 1 = PLN 4.5827).

7 CONCLUSIONS

Considering the above, there clearly are substantial differences between the costs of examining serious and minor cases. Further research has shown that there are only a few factors that generate these differences. The first entails costs related to the imprisonment of the accused in the course of a case. In more serious cases (handled by regional courts), the accused were imprisoned in one way or another (detention or temporary arrest) in a total of 245 instances (68%) at the stage of preparatory proceedings and in 160 out of 360 cases (45%) at the stage of court proceedings. For minor cases (handled by district courts), the same was true in 110 out of 385 instances (28%) at the stage of preparatory proceedings and only in 11 cases at the stage of court proceedings (2.8%). Consequently, it is not surprising that the costs related to imprisonment were a factor with a significant impact on the total cost of proceedings. Additionally, the duration of imprisonment in serious cases was usually much longer (counted in months), while in minor cases, it was mostly a one- or two-day detention.

The second factor that significantly affects the costs of criminal proceedings is the costs incurred in connection with the participation of expert witnesses. Evidence in the form of an expert witness opinion was admitted in 264 out of 360 cases handled by regional courts at the stage of preparatory proceedings (73%) and in 97 cases (27%) at the stage of court proceedings. Meanwhile, this type of evidence was used in 151 out of 385 cases within the competence of district courts (39%) at the stage of preparatory proceedings and only in 16 cases (4%) at the stage of court proceedings. This clearly shows that in cases concerning more serious criminal offences, judicial authorities significantly more often decide to reach for scientific evidence. Furthermore, this type of evidence is much more frequently used in serious cases at the stage of court proceedings. For cases handled by district courts, this occurs sporadically. A comparison of the average costs of an expert witness producing an opinion seems particularly important. In serious cases, the average cost of an opinion amounted to PLN 3,421.90 (EUR 747), while in minor cases, it was only PLN 757.20 (EUR 165). This means that the cost of single opinions produced in cases handled by district courts turns out to be noticeably lower than the cost of opinions produced in the cases within the competence of regional courts.

Finally, the last factor affecting the total expenses incurred directly by the State Treasury with respect to proceedings was the participation of a defence counsel appointed to serve as a public defender for the accused. These costs amounted to PLN 411,564.39 (EUR 89,808) in cases where regional courts were competent, which translated to 4.8% of all of the costs incurred by the State Treasury at this level, and PLN 29,580.96 (EUR 6,454.91) in cases handled by district courts. Again, however, a public defender was involved in cases examined by regional courts much more often than in those within the competence of district courts. In the former, a public defender participated in 139 cases (38%) already at the stage of preparatory proceedings and in 186 cases (52%) at the stage of court proceedings. In the latter, a public defender was appointed with respect to 59 cases (15%) at the stage of preparatory proceedings and in 32 cases (8.3%) at the stage of court proceedings. The average remuneration of a public defender amounted to PLN 924 (EUR 201) in minor cases and PLN 2,212,70 (EUR 482.83) for more serious cases. Yet again, in this aspect, the higher the gravity of the criminal offence, as abstractly defined by the legislator, the more frequent, in practice, the appointment of a public defender for the accused and the higher the remuneration for their services (incurred by the State Treasury).

It should also be pointed out that no major differences have been found in terms of serious cases (handled in the first instance by regional courts) and minor cases (which are within the competence of district courts) when it comes to consensual procedural forms. 137 out of 385 minor cases (35.6%) were settled through an agreement between the prosecutor and the

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accused, which was subsequently approved by the court, while this happened in 110 out of 360 more serious cases (30%). Similarly, the number of witnesses questioned in the course of proceedings turned out to be a completely insignificant factor when it came to the direct costs of the cases. This was because witnesses rarely applied for a reimbursement of their costs of appearing at the court. As a result, the total sum of the amounts paid on this account constituted only 1.5% of the total expenses in the investigated cases.

The data presented above is naturally only a small element of much more extensive research. Still, it confirms the claim that the judiciary has an economic aspect that is strictly related to the gravity of the committed act. Naturally, whether the differences in terms of the costs of proceedings are a simple consequence of the complexity of the case remains an open question. However, the results discussed above suggest that other factors should also be looked for. The sole fact that a given criminal offence has been classified as a serious one (and therefore within the competence of regional courts) does not determine that finding the perpetrator and proving their guilt must be a long, complex, and expensive process. Quite the contrary: for instance, murder, which is one of the prohibited acts that are most harmful to society, is usually relatively simple in terms of gathering evidence. When murder is committed within a group of close persons, the perpetrator often pleads guilty, and evidence found on the site does not require the use of complex forensic procedures. Consequently, it is not a rule that a criminal offence classified by the legislator as a major one actually requires more complex and therefore more expensive actions related to evidence, and the other way round: a less grave offence does not mean, by its nature, that finding the perpetrator and proving their guilt will not entail substantial costs.

When looking for the reasons for such significant differences between the costs incurred by the State Treasury in connection with the handling of cases that are within the competence of regional courts and those examined by district courts, the fact that regional courts were much more likely than district courts to take supplementary evidence in the form of an opinion produced by an expert witness seems particularly significant. The opinions of expert witnesses are most often produced at the stage of preparatory proceedings since the grounds for indictment must already be determined at this stage. It is unlikely that prosecutors expect thorough opinions in minor cases already at this stage, while in more serious cases decide that partial or unclear opinions are satisfactory. If anything, it is the other way round. However, there is something that makes the courts that adjudicate more serious cases more likely to supplement those opinions with questioning expert witnesses in person. One may perhaps venture to claim that this element is the awareness of the gravity of the committed act and the prospect of more severe punishment. This naturally translates to a propensity to accept higher expenses on the part of the State Treasury so as to make sure that the conclusions reached with respect to facts are as reliable as possible and that the penal response is appropriate.

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Reform Forum Note

LEGISLATIVE DEVELOPMENT OF CRIMINAL PROCEEDINGS AND EVIDENCE IN THE SLOVAK REPUBLIC (1993-2021)

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ABSTRACT

Background: In this article, the author focuses on the legislative development of criminal proceedings and evidence after the establishment of the Slovak Republic. This article pays special attention to the issue of evidence and means of proof. It also deals separately with the legal regulation of using information and technical means. It briefly suggests possible directions of development in the field of evidence, reflecting the current state of development of science and technology, as well as changes in the security situation.

Methods: The scientific methods of historical analysis and legal comparison were used to process the research data.

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Results and Conclusions: Developments in this area are constantly advancing, and the area of evidence in criminal proceedings in the Slovak Republic will inevitably be subject to updating.

1 INTRODUCTION

With the establishment of the independent Slovak Republic, the legislative regulation of criminal procedural law valid in Czechoslovakia was taken over on 1 January 1993. Specifically, Act no. 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) was amended.[2] This legislation then underwent additional amendments several times.

2 LEGISLATIVE DEVELOPMENT OF CRIMINAL PROCEEDINGS AND EVIDENCE IN THE SLOVAK REPUBLIC

In accordance with the focus of our article, it is necessary to mention the amendment made by Act no. 247/1994 Coll. amending the Criminal Procedure Code with effect from 1 October 1994.[3] This amendment introduces significant changes to the legal order of the Slovak Republic – one might even say these changes are groundbreaking.

The first change we will mention is the new regulation of the definition of bodies active in criminal proceedings, where 'search authorities' are replaced by the term 'police body', and these are defined in S. 12(2) as follows:

> "Police authorities" means the authorized bodies of the Police Force. The authorized bodies of the Military Police have the same status in proceedings on criminal offenses of members of the armed forces, in proceedings on criminal offenses of members of the Prison and Judicial Guard Corps of the Slovak Republic and on criminal offenses of persons serving a custodial sentence or bodies of this Force authorized in prisons, criminal offenses of members of the Railway Police of the Slovak Republic and on criminal offenses committed in the area of railways and sidings authorized by the bodies of the Railway Police of the Slovak Republic, customs authorities, in case of criminal offenses committed in connection with customs violations, and captains of long-distance ships engaged in criminal proceedings relating to crimes committed on those ships.

The amended wording of S. 88 with the new title 'Eavesdropping' and recording of telecommunication traffic also contains fundamental changes. In the interest of a more effective guarantee of the fundamental human rights and freedoms that were interfered with by this instrument, the legislator stipulates the period of interception of six months, as specified in para. 2 of the Section.

The fourth chapter of the Criminal Procedure Code is supplemented by Chapter 7, S. 88a, entitled 'Controlled Delivery' and S. 88b, entitled 'The Agent'. The amendment also changes the provisions of Chapter 5 of the Criminal Procedure Code (Evidence). The wording of S. 89(1) was newly conceived as follows:

> (1) In criminal proceedings, there must be proof of

2 Act no 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1961/141/20050415> accessed 15 October 2021.

3 Act no 247/1994 Coll. amending Act no 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1994/247/19941001> accessed 15 October 2021.

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a) whether an act that shows signs of a criminal offense has occurred,
b) whether the act was committed by the accused and on what motives,
c) the significant circumstances that affect the assessment of the danger of the act,
d) the essential circumstances for assessing the personal circumstances of the offender,
e) the material circumstances enabling the determination of the consequence and amount of damage caused by the criminal offense,
f) the circumstances which led to the crime or enabled it to be committed.

It is necessary to state that the legal definition of evidence in S. 89(2) of the Criminal Procedure Code. It underwent a substantial amendment, emphasising the aspect of the lawful acquisition of evidence. The exemplary calculation of evidence was extended as follows:

> (2) Evidence may be anything that can contribute to a proper clarification of the case and what has been lawfully obtained, in particular testimony of the accused, witnesses, experts, opinions and expert opinions, recognition, inspection, audio and video recording, things and documents important for criminal proceedings.

A new provision of S. 89(3) specifies that:

> The fact that the evidence was not obtained by a law enforcement authority but was submitted by one of the parties is not a reason for its rejection. The costs of obtaining and securing such evidence shall be borne by the party submitting them in the proceedings.

In accordance with the focus of our contribution, it is necessary to mention one of the other amendments, namely Act no. 272/1999 Coll. amending Act no. 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code), as subsequently amended.[4] The amendment in question, in the provision of S. 12(12), *inter alia*, introduces the definition of an agent as follows:

> An agent is a member of the Police Force who, on the order of a competent law enforcement authority contributes to the detection, finding and conviction of perpetrators of crimes specified in a special law and crimes listed in Chapter 3 of Title III of a special part of the Criminal Code ("Corruption"); a person appointed by the Ministry of the Interior of the Slovak Republic may also be an agent in detecting, identifying and convicting perpetrators of corruption.

In this context, the original wording of S. 88b 'The Agent' has been replaced by a new wording.

The wording of the provisions of S. 12(12) of the Criminal Procedure Code was subsequently amended by Act no. 173/2000 Coll., inserting the words 'and in S, 158 of the Criminal Code' after the words 'crimes listed in Chapter 3 of Title III of the special part of the Criminal Code (*corruption*)'.[5]

In our opinion, the amendment implemented by Act no. 366/2000 Coll. amending Act no. 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code), as subsequently amended,[6] was also relevant.

4 Act no 272/1999 Coll. amending Act no 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1999/272/19991101> accessed 15 October 2021.

5 Act no 173/2000 Coll. amending Act no 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1961/141/20050415> accessed 15 October 2021.

6 Act no 366/2000 Coll. amending Act no 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2000/366/20001107> accessed 15 October 2021.

In S. 12(12) 'Definition of the Agent', the words 'criminal offenses specified in a special law[2] and criminal offenses listed in Chapter 3 of Title 3 of the special part of the Criminal Code (hereinafter referred to as the "Corruption") and in S. 158 of the Criminal Code' are replaced with the words 'particularly serious criminal offenses, corruption and a criminal offense pursuant to S. 158 of the Criminal Code'.

The wording of S. 88 and S. 88b. was also amended, which, after modifications, read as follows:

> With regards to our goals of this Article, the Act no. 422/2002 Coll. amending the Act no. 141/1961 Coll. on Criminal Procedure *(Criminal Procedure Code)*, as subsequently amended, and on changes and amendments to certain acts with effect from 01/10/2002 meant another significant change.[7]

For the first time in the history of the Slovak Republic, a definition of information-technical means and means of operational-search activity is incorporated into the wording of the Criminal Procedure Code. Namely, the following wording was added to S. 12:

> (13) For the purposes of this Act, information-technical means mean electrotechnical, radiotechnical, phototechnical, optical, mechanical, chemical and other technical means and equipment or their sets used in a secret manner in interception and recording of telecommunication activities (S. 88) or making video images, sound or other recordings (S. 88e), if their use violates fundamental human rights and freedoms. Special regulations apply to the processing of information obtained through the use of information and technical means, its registration, documentation, storage and disposal, unless otherwise provided by this Act. Operators of public telephone networks, providers of public telecommunications services, providers of other telecommunications services and their employees shall, upon request and free of charge and without delay, provide the necessary cooperation in the use of information technology; they may not refer to the obligation of confidentiality laid down by special laws.
>
> (14) For the purposes of this Act, the means of operational search means a controlled delivery (S. 88a), an agent (S. 88b), a mock transfer (S. 88c) and the monitoring of persons and things (S. 88d).

The legal regulation of S. 88 'Interception and Recording of Telecommunication Activities (formerly Telecommunication Operations)' was also substantially amended.

The Criminal Procedure Code was further supplemented at the same time by a new Chapter 9 in Title 4 entitled 'Mock transfer, surveillance of persons and things and making of visual, audio or other recordings' (Ss. 88c-88e).

At this point, it should be recalled that the legislator foresaw the results of the use of individual means in the evidentiary process when adopting this legislation. In specific provisions, it defined the procedure and requirements that must be met in order for facts and information to be used as evidence in criminal proceedings.

In this context, it is necessary to state a fundamental change in the wording of the provisions of S. 89(2) of the Criminal Procedure Code, which read as follows after the amendment was made:

> Anything that can contribute to the proper clarification of the case and what was lawfully obtained from the means of evidence may serve as evidence. The means of evidence are, in particular, the examination of the accused, witnesses, experts, opinions and

7 Act no 422/2002 Coll. amending Act no 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/422/20060501> accessed 15 October 2021.

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> expert opinions, examination of the statement on the spot, recognition, reconstruction, investigative attempt, inspection, cases and documents important for criminal proceedings, notification (S. 59(2)), the use of information and technical means (S. 12(13)) and means of operational-search activity (S. 12(14)).

This is a demonstrative list of evidence – others are not explicitly excluded.

This definition clearly implies that the exemplary calculation of evidence was supplemented by an on-the-spot check of the statement, reconstruction, an investigative attempt, notification (S. 59(2)), the use of information and technical means (S. 12(13)), and means of operational-search activity (S. 12(14)).

Another amendment to the Criminal Procedure Code was implemented by Act no. 457/2003 Coll. amending Act no. 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code), as subsequently amended, and on amendments to certain acts with effect from 1 December 2003.[8]

The Act in question added, *inter alia*, paras. 9 and 10 to the legal regulation of interception and recording of telecommunications activities in S. 88 as follows:

> (9) If, in order to clarify a fact relevant to criminal proceedings concerning an intentional criminal offense, it is necessary to identify data on telecommunications activities which are the subject of telecommunication secrecy or covered by the protection of personal data or mediation data, proceedings of a judge on the motion of the prosecutor, in court proceedings without such a motion by a judge or the chairman of the senate, that their legal entity or natural person performing telecommunications activity notifies the judge or chairman of the senate in court proceedings and in preparatory proceedings to the prosecutor, investigator or police authority.
>
> (10) An order to ascertain and report data on the telecommunications activity carried out must be issued in writing and must be substantiated.

An exemplary list of facts proved in criminal proceedings in accordance with S. 89(1) was completed by the provision as follows: 'Proceeds of crime and the means of committing it, their location, nature, legal status and price'.

From the point of view of legal regulation, it is necessary to include the amendment of Act no. 141/1961 Coll. implemented by Act no. 403/2004 Coll. on the European Arrest Warrant and on changes and amendments to certain laws.[9] This Act replaced the wording of S. 88a(1) on controlled delivery with effect from 1 August 2004 as follows:

> Controlled delivery means the monitoring of the movement of a consignment from consignor to consignee on import, export or transport where the circumstances of the case justify the presumption that the consignment contains drugs, psychotropic substances, poisons, precursors, nuclear or other similar radioactive material without appropriate authorization; or high-risk chemical, counterfeit or altered money and counterfeit or altered securities, counterfeit, altered or illicitly produced stamps, postage stamps, stickers and postage stamps, electronic means of payment or other payment card, firearms or mass-effective weapons, ammunition and explosives, cultural monuments or other items for which a special permit is required, or items intended to commit a

8 Act no 457/2003 Coll. amending Act no 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2003/457/20060101> accessed 15 October 2021.

9 Act no 403/2004 Coll. on the European Arrest Warrant and on the amendments and supplementations of certain laws as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/403/20091101> accessed 15 October 2021.

criminal offense, or items derived from a criminal offense, for the purpose of identifying persons involved in the handling of this consignment.

It is appropriate to state that Act no. 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) was amended directly or indirectly during its validity between 1 January 1962 and 31 December 2005. Despite these changes, it no longer met the needs of the current level of development and was replaced by a new law as of 1 January 2006 after many years of preparations. Specifically, in the conditions of the Slovak Republic, this is Act no. 301/2005 Coll. on Criminal Procedure Code with effect from1 January 2006.[10] We address the legal regulation of evidence and partly also the preparatory proceedings in the next part of our article. The Criminal Procedure Code was also amended quite often when it was prepared.

To be precise, we would like to state that the Czech Act no. 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) has, of course, been amended many times.[11] The work on the recodification has been going on for a relatively long period of time, and the date of acceptance of the recodified criminal case is still impossible to determine precisely.

3 THE PERIOD OF THE SLOVAK REPUBLIC AFTER THE RECODIFICATION OF CRIMINAL LAW (FROM 1 JANUARY 2006)

Unlike the substantive legislation in the Criminal Code, the Criminal Procedure Code regulates the procedure of bodies active in criminal proceedings and courts so that criminal offences are duly detected, and their perpetrators are punished fairly by law. The intention of the recodification of criminal procedural law was, according to its authors, to modernise the process applied so far.

The process based on Act no. 141/1961 Coll. was very complicated, cumbersome, and rigorous, regardless of whether it was a prosecution of a factually and legally simple case or a very demanding case. In addition, the Criminal Procedure Code valid and effective until 31 December 2005 did not sufficiently ensure respect for fundamental human rights and freedoms in criminal proceedings (while respecting the legitimate interests of society) but instead allowed for lengthy and ineffective proceedings. The negative features of the so-called old criminal proceedings were mainly due to the fact that, as a rule, all evidence was to be ordered in a procedurally prescribed (demanding) manner and carried out in the preparatory proceedings, and the court hearing only took place afterwards. According to its authors, the new criminal trial was constructed taking into account the Slovak or Czechoslovak legal traditions, as well as the existing legal knowledge and legal culture. It is intended to be a synthesis of continental criminal proceedings with elements of Anglo-American law in areas where these often constructive elements will contribute to the achievement of its objectives. With regards to the above, significant elements of the adversarial nature of the proceedings were transferred to the Criminal Procedure Code. The adversarial role is intended to speed up and streamline proceedings.

The so-called diversions, enabling either the settlement of the case in the preparatory (pre-trial) proceedings or the settlement by the court outside the relatively procedurally demanding main hearing, are supposed to achieve the goal (speeding up or streamlining the procedure). With reference to the above, the clear purpose of the new code was to seek a faster, more flexible, and

10 Act no 301/2005 Coll. on Criminal Procedure Act, as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/301/20211201> accessed 15 October 2021.

11 Act no 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1961/141/20050415> accessed 15 October 2021.

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effective process of detecting and prosecuting perpetrators while fully respecting fundamental human rights and freedoms, streamlining the fight against growing organised crime cases, and expanding hearings. Following this intention, the new Criminal Procedure Code respects the regulation of human rights contained in international documents, such as the International Covenant on Civil and Political Rights of 1966 and the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, as well as the Constitution of the Slovak Republic. Based on the regulation in question (and in an effort to concretise it), the new Criminal Procedure Code also brings new basic principles of procedure, such as the basic legal ideas on which or criminal proceedings are to be established as a whole, as well as the activities of its individual entities. In addition to the existing basic principles of criminal procedure and related procedural institutes, the Criminal Procedure Code emphasises the principles of equality of parties, the right to a timely and fair trial, the adversarial principle, the right to active defence, and the modification of the principle of legality by the principle of opportunity.[12]

The criminal procedure in the Slovak Republic Act no. 301/2005 Coll. as subsequently amended is currently valid and effective and regulates the area of evidence in Chapter 6 'Evidence' with the provisions of Ss. 119-161.[13]

In comparison with the previous Criminal ProcedureCode (Act no. 141/1961 Coll.), dating back to the period of socialist Czechoslovakia, the legal regulation of evidence and the means of evidence itself was substantially expanded.[14]

The subject of evidence is regulated by S. 119(1) as follows:

> In criminal proceedings, there must be proof of
> (a) whether the act which has the particulars of a criminal offense has really occurred,
> (b) whether the act was committed by the accused and on what motives,
> (c) the seriousness of the offense, including the causes and conditions of its commission,
> (d) the personal circumstances of the perpetrator to the extent necessary to determine the type and extent of the punishment and the imposition of a protective measure and other decisions,
> (e) the effect and amount of the damage caused by the offense,
> (f) the proceeds of a criminal act and the means of committing it, its placement, nature, status and cost.

From our point of view, the legal characteristics of the evidence stated in S. 119(3) are of substantial importance. According to the provision in question:

> It shall be possible to use as evidence anything that may contribute to properly clarifying the matter and that has been obtained in a lawful manner from the means of evidence or under special law.
>
> The means of proof are in particular:
> 1) Interrogation of the accused
> 2) Examination of witnesses
> 3) Interrogation of experts
> 4) Papers and expert opinions
> 5) Verification of the notice on the spot
> 6) Recognition
> 7) Reconstruction

12 J Madliak, V Porada, *Niekoľko poznámok k rekodifikáciám trestoprávnych noriem v Slovenskej republike.* (Humanum: miedzynarodowe studia spoleczno-humanistyczne. Iss. 3 2009) 55-68.

13 Act no 301/2005 Coll. on Criminal Procedure Act, as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/301/20211201> accessed 15 October 2021.

14 Act no 141/1961 Coll. on Criminal Procedure (Criminal Procedure Code) as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1961/141/20050415> accessed 15 October 2021.

8) Investigative attempt
9) Inspection
10) Matters and documents relevant to criminal proceedings
11) Notification
12) Information obtained through the use of information and technical means
13) Means of operational search.

This is a demonstrative list of evidence – other types are not explicitly excluded.

In the context of the focus of our contribution, it is extremely important that, for the first time, the legislator explicitly enshrined the phrase 'or according to a special law' in the wording of the provision in question. In our opinion, this is a historic breakthrough in the legal regulation of evidence, which created the preconditions for increasing the efficiency and effectiveness of criminal law protection of society.

The provision of S. 119(4) regulates the possibility of obtaining evidence by the parties at their own expense. According to S. 285(a/, b/ or c/), the state shall reimburse the costs expediently incurred to the accused in the case of acquittal.

At this point, attention should be drawn, *inter alia*, to the legislator's statement that: 'Evidence obtained by unlawful coercion or threat of such coercion may not be used in proceedings unless it is used as evidence against a person who has used such coercion or threat of coercion' (S. 119(5)).

4 INFORMATION AND TECHNICAL MEANS

In the next part of our article, we will focus on information and technical means. We will address the legal regulation of their use in accordance with the Criminal Procedure Code and Act 166/2003 Coll. on the protection of privacy against unauthorised use of information and technical means and on the amendment of certain laws (the Act on protection against eavesdropping).[15]

The Criminal Procedure Code defines the information and technical means in S. 10(21):

> For the purposes of this Act, information and technical means mean electrical, radio, phototechnical, optical, mechanical, chemical and other technical means and devices or their sets used in a classified manner for interception and recording of traffic in electronic communication networks (hereinafter referred to as the "interception and recording of telecommunications traffic"), video, audio or video-audio recordings or in the search, opening and examination of consignments, where their use infringes fundamental human rights and freedoms. Special regulations apply to the processing of information obtained through the use of information and technical means, its registration, documentation, storage and disposal, unless otherwise provided by this Act. Operators of public telephone networks, providers of electronic telecommunications networks, providers of electronic telecommunications services, the postal undertaking, carriers and other forwarders and their employees are obliged to provide the necessary cooperation in the use of information technology; they may not refer to the obligation of professional confidentiality under special laws.

Specific conditions for the use of individual information and technical means are regulated by the provisions of Chapter V of the Criminal Procedure Code – Provision of Information (Ss. 114-117).

15 Act no 166/2003 Coll. on the Privacy Protection against Unauthorized Use of Information and Technical Means and on the amendments and supplementation of some laws, as subsequently amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2003/166/20160101> accessed 15 October 2021.

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The legal order of the Slovak Republic regulates the issue of the use of information and technical means in a special law as well, namely, Act no. 166/2003 Coll. on the Protection of Privacy against unauthorised use of information and technical means and on the amendment of certain laws (the Act on Eavesdropping Protection). The law in question regulates the conditions for the use of information technology without the prior consent of the person whose privacy is invaded by the state authorities using the information technology. It is the use of information and technical means outside criminal proceedings for the performance of the tasks of the relevant state authorities arising from a special law. In the practice of police and security authorities, cases of using information and technical means are relatively frequent, especially in connection with organised crime and violent crime.

Pursuant to provisions of S. 2 of Act no. 166/2003 Coll., information and technical means are:

> Information and technical means for the purposes of this Act are, in particular, electrical, radio, phototechnical, optical, mechanical, chemical and other means and devices or their sets used in a secret manner to
> a) Search, open, examine and evaluate postal items and other transported items,
> b) Obtain the content of messages transmitted via electronic communication networks, including interception of telephone communications,
> c) Make video, audio, video-audio, or other recordings.

Information and technical means may be used by the Police Corps, the Slovak Information Service, Military Intelligence, the Prison and Judicial Guard Corps, and the Customs Administration (meaning the Financial Administration of the Slovak Republic) to the extent specified in special regulations. The use of information and technical means for the Prison and Judicial Guard Corps and the Customs Administration is technically ensured by the Police Corps after submitting the written consent of a legal judge granting the use of information and technical means provided to the state authority. Using information and technical means according to para, 1b) of the Military Intelligence Act on the basis of a written request and with the submission of the written consent of a judge, the Police Corps shall provide technical support.

When intercepting and recording a telecommunications service, the only type of information technology that may be used is that which allows immediate identification of the telecommunications terminal equipment used to intercept and record the telecommunications service and does not allow the data identifying that equipment to be erased and does not allow the time of eavesdropping and recording services to be erased.

In accordance with the provisions of S. 2(7) of Act no. 166/2003 Coll., the local self-government authorities, private security services, or other natural or legal persons may not hold or use information technology.[16]

Information technology can be used only if it is necessary to ensure, in a democratic society, the protection of the constitutional order, internal order, and foreign policy interests of the state, security and defence of the state, obtaining information from foreign sources, preventing and clarifying crime, or protecting rights and the freedoms of others, and if achieving this purpose would otherwise be ineffective or substantially hampered. Within the scope of the Slovak Information Service and Military Intelligence, information and technical means may also be used outside the territory of the Slovak Republic within the scope of tasks according to special regulations. The data obtained by information technology may be used exclusively for the purpose of fulfilling the tasks of the state if it meets the conditions specified in the law.

The conditions for using the information technology are regulated by the Act in S. 4.

16 Act no 166/2003 Coll., on the Privacy Protection against Unauthorized Use of Information and Technical Means and on the amendments and supplementation of some laws, as subsequently amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2003/166/20160101> accessed 15 October 2021.

We believe that from the point of view of the topic at hand, the most important provision is S. 7(2) of the Act quoted on the use of information obtained (conditions, reasons) in criminal proceedings when such information can become evidence. Such procedure is inadmissible, for example, in the Czech Republic on the basis of a judgment of the Constitutional Court of the Czech Republic.

In Judgment no. I. ÚS 3038/07 of 29 February 2008 in the matter of a constitutional complaint of Ing. JH against the resolution of the Public Prosecutor of the Regional Public Prosecutor's Office in České Budejovice of 16 October 2007, file number KZV 48/2007, and against the resolution of the Police Forces of the Corruption and Financial Crime Detection Unit of the SKPV Police of the Czech Republic, České Budějovice Branch of 20 August 2007, ČTS: OKFK- 22/4-2007, initiating criminal proceedings against the complainant and against the inclusion in the above-mentioned records of interceptions among the evidence, connected to the motion to remove the records of these interceptions from the file and their subsequent destruction, the Constitutional Court of the Czech Republic stated quite explicitly that the use of intelligence interceptions was inadmissible since they were carried out in a different legal framework and not for the purpose of obtaining evidence in criminal proceedings. As evidence in criminal proceedings, it is not possible to use records of tapping telephone calls made in any other way than the one provided for in S. 88 of the Criminal Procedure Code of the Czech Republic.[17]

Intelligence interceptions (in accordance with Act no. 67/1992 Coll. on Military Defense Intelligence[18] or Act no. 154/1994 Coll. on Security Information Services[19]) and criminal interceptions have a completely different legal regime and purpose defined by law. The purpose of criminal proceedings is the proper detection of criminal offences and fair punishment of their perpetrators. The purpose of intelligence services is to provide information on intentions and activities posing a military threat to the Czech Republic, intelligence services of foreign powers in defence, intentions, and activities aimed at ensuring the defence of the Czech Republic, and activities threatening state and official secrets in the field of defence of the Czech Republic.

The Act on Intelligence Services of the Czech Republic stipulates that: 'Intelligence services transmit ... to police authorities information on findings that fall within their field of competence; this does not apply if the provision would jeopardise an important interest pursued by the relevant intelligence service' (S. 8(3) of Act no. 153/1994 Coll.).[20]

A different legal purpose limits the range of usability of information obtained by the intelligence services of the Czech Republic.

5 CONCLUDING REMARKS

As mentioned above, it is clear that in the historical context, there is a gradual expansion of the amount of evidence accepted in criminal proceedings. We believe that nowadays, both in terms of the intensive development of information and digital technologies and new

17 Judgment no I. ÚS 3038/07 of the Constitutional Court of the Czech Republic of 29 February 2008 as amended <http://nalus.usoud.cz/Search/GetText.aspx?sz=1-3038-07> accessed 15 October 2021.

18 Act no 67/1992 Coll. on Military Defense Intelligence as amended <https://www.zakonyprolidi.cz/cs/1992-67> accessed 15 October 2021.

19 Act no 154/1994 Coll. on Security Information Services as amended <https://www.zakonyprolidi.cz/cs/1994-154 accessed 15 October 2021.

20 Act no 153/1994 Coll. on Intelligence Services Czech Republic as amended <https://www.zakonyprolidi.cz/cs/1994-153> accessed 15 October 2021.

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security threats and challenges, particularly organised crime and terrorism, it will gradually be necessary to introduce and admit new means of gathering sources of evidence.

In our opinion, the following can be inspiring:

> 1) The European Investigation Order (Act no. 236/2017 Coll. on the European Investigation Order in Criminal Matters and on changes and amendments to certain acts)[21]
> 2) The European Parliament and Council Directive (EU) 2016/681 of 27 April 2016 on the Use of Passenger Name Record (PNR) for the purpose of preventing, detecting, investigation and prosecution of terrorist offenses and serious crime[22]
> 3) Satellite imagery
> 4) Dash cameras
> 5) GPS location data
> 6) The eCall system (for M1 and N1 vehicles, implied by the Regulation (EU) 2015/758 of the European Parliament and of the Council of 29 April 2015 on type-approval requirements for the deployment of the on-board eCall system using the 112 emergency service and amending Directive 2007/46/EC (hereinafter referred to as the 'Regulation (EU) 2015/758')[23]

We believe that monitoring by a camera system and technical means working on similar principles is very close to a witness statement in its content. The camera system can record the course of the committed crime, its perpetrator, and other important circumstances for clarifying the matter if they took place in the monitored area. Camera systems and the recording obtained from it, providing information on various criminal activities, are becoming increasingly common types of technical evidence in applied criminal practice.[24]

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21 Act no 236/2017 Coll. on the European Investigation Order as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2017/236/20171015> accessed 15 October 2021.

22 European Parliament and Council Directive (EU) 2016/681 of 27 April 2016 on the Use of Passenger Name Record (PNR) for the purpose of preventing, detecting, investigation and prosecution of terrorist offenses and serious crime <https://eurlex.europa.eu/legalcontent/SK/TXT/PDF/?uri=CELEX:32016L0681&from=EN> accessed 15 October 2021.

23 Regulation (EU) 2015/758 of the European Parliament and of the Council of 29 April 2015 on type-approval requirements for the deployment of the on-board eCall system using the 112 emergency service and amending Directive 2007/46/EC <https://eur-lex.europa.eu/legal-content/SK/TXT/PDF/?uri=CELEX:32017R0079&from=EN> accessed 15 October 2021.

24 M Lisoň, A Vaško a kol., Teória kriminálno-policajného poznania (Wolters Kluwer 2018).

5. Act no 236/2017 Coll. on the European Investigation Order as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2017/236/20171015> accessed 15 October 2021.

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18. European Parliament and Council Directive (EU) 2016/681 of 27 April 2016 on the Use of Passenger Name Record (PNR) for the purpose of preventing, detecting, investigation and prosecution of terrorist offenses and serious crime <https://eurlex.europa.eu/legalcontent/SK/TXT/PDF/?uri=CELEX:32016L0681&from=EN> accessed 15 October 2021.

19. Regulation (EU) 2015/758 of the European Parliament and of the Council of 29 April 2015 on type-approval requirements for the deployment of the on-board eCall system using the 112 emergency service and amending Directive 2007/46/EC <https://eur-lex.europa.eu/legal-content/SK/TXT/PDF/?uri=CELEX:32017R0079&from=EN> accessed 15 October 2021.

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Note

JUDICIAL SPECIALISATION THROUGH THE PRISM OF THE PRINCIPLE OF A 'NATURAL COURT': A COMPARATIVE ANALYSIS

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ABSTRACT

Background: *In the current conditions of the intensive development of public relations and the complication of their legal regulation, more and more states are turning to the specialisation of the judiciary and judicial exercise. Thus, in Ukraine, it is established at the constitutional level that the judicial system in Ukraine is built on the principles of territoriality and specialisation, and higher specialised courts may operate in accordance with the law. In addition, the Constitution of Ukraine states that the establishment of extraordinary and special courts is not allowed. Art. 31 of the Law of Ukraine 'On the Judiciary and the Status of Judges' (2016) states that in the judicial system, there are higher specialised courts, such as courts of first instance for certain categories of cases. This category of court now includes the High Court of Intellectual Property and the High Anti-Corruption Court.*

However, there has been a heated debate in Ukrainian political circles about the constitutionality of the anti-corruption court, and accordingly, the subject of the constitutional petition questioned the number of provisions of the Law on the High Anti-Corruption Court and appealed to the Constitutional Court to declare the law unconstitutional. The Constitutional Court of Ukraine has initiated constitutional proceedings on this issue. Acquaintance with the legal position of the subject of the constitutional petition indicates that the key issue of this constitutional proceeding concerns the presence of signs of a 'special court' (within the meaning of Part 6 of Art. 125 of the Constitution of Ukraine) in the mechanism of legislative regulation of the High Anti-Corruption Court.

Methods: *To find an objective answer to the existing conflict, it was necessary to clarify the legal nature of judicial specialisation and identify key features of the 'special court'. To solve this problem, the authors turned to the theoretical and applied provisions of the principle of a natural court, which became the basis of the subject of this work.*

Results and Conclusions: *In conclusion, this article argues for the idea of the unity and integrity of the judiciary. Common goals and tasks are assigned to the courts, regardless of their place in the judiciary and jurisdictional specialisation. Therefore, courts that are endowed with special goals and objectives, different from those of general courts, were assessed as special courts.*

1 INTRODUCTION

Courts of general jurisdiction are courts of universal specialisation. However, the intensive development of public relations increasingly complicates their legal regulation, forcing states to resort to certain forms of judicial specialisation to ensure optimal judicial protection. Moreover, the principle of judicial specialisation is established at the level of the constitutions of the states. According to Art. 125 of the Constitution of Ukraine, it is established that the judicial system in Ukraine is based on the principles of territoriality and specialisation. In

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addition, it has been established that higher specialised courts may operate in accordance with the law. At the same time, this constitutional norm states that the establishment of extraordinary and special courts is not allowed.

According to the European Commission for the Efficiency of Justice (CEPEJ), the judicial systems in 48 states and entities are divided into systems where most cases are heard in courts of general jurisdiction and systems where a significant proportion of disputes are heard by specialised courts. There are no specialised courts of first instance in 19 states (Andorra, Czech Republic, Georgia, Great Britain – Northern Ireland), and specialised courts of first instance are few in number (Armenia, Bosnia and Herzegovina, Denmark, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Slovenia, Romania, the Russian Federation, the 'former Yugoslav Republic of Macedonia', Ukraine, Great Britain – England and Wales, Great Britain – Scotland). Conversely, in Croatia, France, and Portugal, specialised courts make up more than 30% of the courts of first instance, and in Belgium, Malta, and Monaco, about 50%.

Specialised courts of first instance hear various cases. Most of the states have specialised administrative courts, arbitration courts, and labour courts. In several states, there are courts that deal with, for example, military cases, family cases, cases concerning the enforcement of criminal sanctions, and payment of rent. Special courts exist in Finland (the Supreme Court of Impeachment: Charges against the Ministers), Spain (the Court on Violence against Women), and Turkey (Civil and Criminal Courts in Intellectual Property Cases).[4]

In this context, a question arises about the legal nature of judicial specialisation in its relationship with the principle of a 'natural court', as well as the permissible limits of specialisation of judicial jurisdictions.

2 THE LEGAL CONTENT OF THE PRINCIPLE OF A NATURAL COURT

The principle of a 'natural court (judge)' (Spanish – *juez natural*) is a fundamental guarantee of the right to a fair trial. The ideological basis of this principle can already be seen as early as Magna Carta (1215) in the '*right to a court of equals in accordance with the laws of the country*'.[5] At the same time, during the French Revolution, the principle of a natural court was reflected in the French Constitution (1791),[6] which stated that citizens could not be deprived of legal jurisdiction by any special decrees or other orders to transfer or withdraw their cases, except as provided by law.

The idea of a 'natural court' has become decisive for the constitutional order of many countries. Thus, according to the Venice Commission's report on the independence of the judiciary,[7] many European constitutions contain the subjective right of a person to be heard by a 'lawful judge' (often defined in law as a 'judge of natural law pre-established by law'). The conclusion of this report states that the basic principles concerning the independence of the judiciary should be enshrined in the Constitution or in texts of equivalent legal force. Among them are the following: the judiciary is independent of other public authorities, judges are

4 Judicial systems of Europe. The efficiency and quality of the justice system. Study CEPEJ no 23/2016 r. (data 2014) p. 39.

5 O Shevchenko, *History of the state and law of foreign countries* (Ventura 1995) 65.

6 Constitution of France 1791 <http://www.hist.msu.ru/ER/Etext/cnst1791.htm> accessed 7 December 2021.

7 European Commission Report 'For Democracy through Law' (Venice Commission) on the independence of the judiciary (Venice, 12-13 March 2010) <https://newjustice.org.ua/wp-content/uploads/2018/05/EU_Standarts_book_web-1.pdf> accessed 10 December 2021.

subject only to the law, and differ only in the functions they perform, including the principle that a natural law judge or judge by law is pre-established by law and is immutable.

Most often, such guarantees are formulated through a negative sentence, for example, in the Belgian Constitution:

> No person may be deprived of the opportunity to be heard by a judge appointed by law (Art. 13).

or the Italian Constitution:

> No person may be deprived of the possibility of considering his/her case by a judge of natural law established by law.

Other constitutions define the 'right on a judge appointed by a law' in an affirmative way, such as the Slovenian Constitution:

> Only a judge appointed in accordance with the rules established in advance by law and the relevant court regulations may judge this person.

Art. 24 of the Estonian Constitution:

> No person may, without his or her own will, be transferred from the jurisdiction of one court to the jurisdiction of another court.

Art. 8 of the Constitution of Greece:

> No person shall, without his or her own will, be deprived of the right to have his or her case heard by a judge established by law.

Art. 33 of the Liechtenstein Constitution:

> No person shall be deprived of the right to have his or her case heard by a judge; the establishment of special tribunals is prohibited.

Art. 13 of the Luxembourg Constitution:

> No person may be deprived of the right to have his or her case heard by a judge established by law.

Art. 17 of the Constitution of the Netherlands:

> No person shall be deprived of his or her access to a court to which he or she has the right to apply in accordance with the law.

Art. 83 of the Austrian Constitution:

> No person may be deprived of the right to have his or her case heard by a judge established by law.

Art. 32 p. 9 of the Portuguese Constitution:

> No person shall be deprived of access to a court which already has jurisdiction under the law in force.

Art. 48 of the Slovak Constitution:

> No person may be excluded from the jurisdiction of a judge designated by law. The jurisdiction of the court is established by law.

Art. 101 of the Basic Law of Germany:

> No person may be excluded from the jurisdiction of his lawful judge.[8]

To date, the idea of a natural court is reflected in Art. 14 of the International Covenant on Civil and Political Rights (ICCPR), which establishes that all persons are equal before the courts and tribunals and that everyone has the right to a fair and public hearing in the determination of any criminal charge against him or her or in case of defining of

8 All the above-mentioned quotes may be found here: *European and international standards in the field of justice* (Kyiv 2015) 103.

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the responsibilities in any civil proceedings for a fair and public hearing by a competent, independent, and impartial tribunal established by law. Likewise, Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right to a fair trial and provides that everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, that will decide on his or her rights and obligations of a civil nature or establish the validity of any criminal charges against him or her.

The principle of a natural court is detailed in Clause 5 of the Basic Principles on the Independence of the Judiciary (1985),[9] which states that everyone has the right to a fair trial by ordinary courts or tribunals applying the established legal procedures. Tribunals that do not apply properly established legal procedures to replace the jurisdiction of ordinary courts or tribunals should not be established.

In the modern sense, the principle of natural judgment means that no person can be convicted except by an ordinary, previously established, competent court or judge. As a consequence of this principle, the creation of emergency, *ad hoc* extraordinary courts, and courts established *ex post facto* are not allowed. Although the principle of a 'natural court (judges)' is based on the related principle of equality before the law and the court, which means that laws should not be discriminatory or applied by judges in a discriminatory manner. However, as noted by the UN Human Rights Committee, equality before the law and equal protection of the law without any discrimination does not mean that any difference in treatment is discriminatory. As the Committee has repeatedly pointed out, a difference in behaviour is permissible only if it is based on reasonable and objective criteria.

The UN Commission on Human Rights has reaffirmed the principle of the 'natural judge' in a number of resolutions it has adopted. For example, in Resolution 1989/32, the Commission recommended that states take into account the principles contained in the draft Universal Declaration on the Independence of Justice, also known as the Singhvi's Declaration.[10]

Art. 5 of this Declaration states:

> (b) No judicial body shall be established ad hoc in order to replace the jurisdiction duly vested in the courts; (c) Everyone has the right to a fair trial within a reasonable time and without undue delay by ordinary courts or tribunals, in the manner prescribed by law, with the possibility of judicial review; (e) During emergencies, the State shall make every effort to ensure that the cases of civilians accused of any criminal offense are dealt with by ordinary civil courts. It is also worth noting the two resolutions on the "honesty and integrity of the judiciary", in which the Commission reiterated that everyone has the right to a fair trial in ordinary courts or tribunals that have established legal procedures, and that tribunals which do not apply properly established legal procedures, in order to replace the jurisdiction of ordinary courts or judicial authorities, should not be created.

The existence of specialised courts or jurisdictions is quite common and is due to the specifics of the issues that such courts consider. Thus, specialised jurisdictions exist in many legal systems to deal with issues related to labour, administrative, family, commercial law, and so on. In addition, for criminal proceedings, in exceptional cases, the existence of special jurisdictions for certain groups, such as indigenous peoples and minors, is recognised in international law and is determined by the specificities of the persons prosecuted.

9 Basic Principles of Judicial Independence (1985) <https://zakon.rada.gov.ua/laws/show/995_201#Text> accessed 10 December 2021.

10 The Singhvi Declaration became the basis for the United Nations Basic Principles on the Independence of the Judiciary.

In its work, the Human Rights Committee has not developed significant practice on the principle of 'natural judge', but it has addressed the issue of 'extraordinary' or special courts. Traditionally, it did not consider special courts, which are inherently incompatible with para. 1 of Art. 14 ICCPR.[11]

In general comment no. 13, adopted in 1984, the Human Rights Committee expressed the following view:

> The provisions of Art. 14 apply to all, both ordinary and special courts and tribunals, and are covered by this article. The Committee notes the existence in many countries of military and special courts dealing with civilian cases. This could lead to serious problems with fair, impartial and independent administration of justice. Often the reason for the creation of such courts is to allow the use of exceptional procedures that do not comply with the usual rules of justice. Although the Covenant does not prohibit such categories of courts, the consideration of civil cases by such courts may be carried out on an exceptional basis and under conditions in which all the guarantees provided for in Article 14 are fully complied with ... If member-states in case of emergency as provided in Art. 4, depart from the usual procedure required by Art. 14, they must ensure that these deviations do not go beyond what is necessary due to the severity of the actual situation, and meet the other conditions of paragraph 1 of Art. 14.[12]

The Committee has repeatedly expressed its concern about the use of special courts and has recommended in several cases that such courts shall be abolished. The Committee also considers the abolition of special courts as a factor contributing positively to the implementation of the ICCPR at the national level. For example, the Committee recommended that Nigeria repeal 'all decrees establishing special tribunals or abolishing ordinary constitutional guarantees of fundamental rights or the jurisdiction of ordinary courts'. In its case against Nicaragua, the Committee found that 'the proceedings before the Tribunales Especiales de Justicia [ad hoc special tribunals] did not provide the guarantees of fair trial provided for in Art. 14 of the Covenant'.

The Committee found a violation of the right to a fair trial in a case in which the accused was tried and convicted in both the first and appellate instances, consisting of 'faceless judges', without proper public hearings and adversarial proceedings; he was not allowed to be present[13] and defend himself during the trial, either in person or through his representative, and was not given the opportunity to ask questions of the prosecution witness.

In a similar case concerning Peru, the Committee concluded that the very nature of the

> "faceless judges" trial system in a remote prison was based on the exclusion of the public from the trial. In this situation, the accused do not know who the judges hearing them are, and unacceptable obstacles are created to prepare the accused for defense and communication with their lawyers. Moreover, this system is not able to guarantee the main aspect of a fair trial: the court must be, and this must be obvious, independent and impartial. The review system conducted by "faceless judges" does not guarantee the independence or impartiality of judges, as the court, being established ad hoc, may include active members of the armed forces.

The Human Rights Committee noted that special tribunals must comply with the provisions of Art. 14 ICCPR. However, he said that 'quite often the reasons for the establishment of

11 *International principles concerning the independence and accountability of judges, lawyers and prosecutors.* Practical Guide 1 (International Commission of Jurists 2007) 8-9.

12 Ibid, 10.

13 Ibid, 11.

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such courts are to allow the use of exceptional procedures that do not comply with the usual rules of justice'.

The Inter-American Commission on Human Rights also called for the principle of the 'natural judge' – 'The Commission's position was clearly summarized in the general guidelines it formulated for Member States in 1997: and their natural judges'.

If we turn to the case-law of the ECtHR on the application of Art. 6 of the ECHR, we can see that the Court dissonates the right to a natural (fair) to the courts of 'special' specialisation, including courts of state security and emergency or military court. Thus, in the case of *Arap Yalgin and Others v. Turkey* (2001),[14]

> The Court considers in this connection that where, as in the present case, a tribunal's members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties, accused persons may entertain a legitimate doubt about those persons' independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society (see, *mutatis mutandis*, the Sramek v. Austria judgment of 22 October 1984, Series A no. 84, p. 20, § 42). In addition, the Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces (see the İncal judgment cited above, p. 1573, § 72) (46).
>
> In conclusion, the applicants' fears as to the Martial Law Court's lack of independence and impartiality can be regarded as objectively justified (48).[15]

In *Ergín v. Turkey* (2006),[16] the Court concluded that

> The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto* (47)."
>
> … [the] Court considers that it is understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings. Accordingly, the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. The applicant's doubts about the independence and impartiality of that court can therefore be regarded as objectively justified (54). [17]

In the cases mentioned above, a question arises as to the correlation of the principle of a natural court with judicial specialisation, which is becoming more and more established in many countries, as well as the limits of such specialisation.

14 *Arap Yalgin and Others v Turkey* <https://hudoc.echr.coe.int/eng?i=001-59674> accessed 10 Dec 2021.

15 Ibid.

16 *Ergín v Turkey* (2006) <https://hudoc.echr.coe.int/eng?i=001-75327> accessed 10 December 2021.

17 Ibid. See also Jeremy McBride, *European Convention on Human Rights and criminal process* (2nd ed KIC 2019) 230-231.

3 THE NATURAL COURT AND 'EXTRAORDINARY' JUDICIAL SPECIALISATION

Today, judicial specialisation has taken many forms, including the establishment of specialised chambers in existing courts or the creation of separate specialised courts. This trend in the organisation of the judiciary has spread not only in Europe but also in other countries. It has become common practice for specialised courts (judges) to work with a limited area of law (e.g., criminal law, family law, economic and financial law, intellectual property law, competition law) or to deal with specific situations that arise in special areas (for example, related to social, economic, or family law). At the same time, it is extremely important to clearly establish the permissible limits of judicial specialisation, which should protect society and the state from illegal judicial entities of special specialisation.

If we turn to the position of the Consultative Council of European Judges (CCJE) on this issue, then this international institution clearly distinguishes between natural judicial specialisation and special (extraordinary) courts. This approach is due to the potential danger that the latter will not be able to ensure compliance with all the guarantees enshrined in Art. 6 of the ECHR. The CCJE has also repeatedly objected to the establishment of special courts, noting that, in the case of such courts, they must fully ensure compliance with all the guarantees imposed on ordinary courts.[18]

Examining the protection of human rights in the context of terrorist threats, the CCJE pointed out that the universal response of European states to the need to constitute a balance between counter-terrorism security and human rights was to refuse to establish a *tribunaux d'exception* as a response to threats carried by terrorism. States must trust their existing judicial institutions, which shall find a balance in accordance with the rules of law generally applicable in democracies, including international conventions and, in particular, the ECHR. The role of a judge in terrorist offences should not differ from that of a judge in relation to other offences, except where the nature of the subject matter does not justify a waiver of the usual rules governing the jurisdiction of the courts. However, the importance of terrorism implies that crimes in this category should be dealt with by courts with jurisdiction to hear and decide on the most serious crimes when such jurisdiction is shared between national courts. Local circumstances or needs related to the security of judges may sometimes justify recourse to specialised courts with jurisdiction over terrorism cases, but in any case, it is important that these specialised courts consist of independent judges and use ordinary procedures with full respect for the rights of the party to the defence and publicity of the trial and that the fairness of the trial is guaranteed in all cases. Thus, the CCJE recommends that states refrain from creating a *tribunaux d'exception* or legislation incompatible with universally recognised rights, both in the context of administrative action to prevent acts of terrorism and in the context of criminal proceedings.[19]

The research and acquired experience of CCJE in the field of judicial specialisation provided the opportunity to develop certain standards in this field. In particular, the laws and regulations governing the appointment, holding, promotion, tenure, and discipline of judges should be the same for both specialised and general judges. The principle of equal status for general and specialised judges should also apply to judges' remuneration. Specialisation in itself does not justify the definition of the work of a specialised judge as more important. It is seen that the dominant role in decision-making should be played by 'general' judges. Specialised judges and courts should exist only when necessary due to the complexity or peculiarity of the law or

18 Opinion No 15 (2012) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the specialisation of judges.

19 Opinion No 8 (2006) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on 'the role of judges in the protection of the rule of law and human rights in the context of terrorism'.

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facts and for the proper administration of justice. Specialised judges and courts should always remain part of a single judicial body. Specialised judges, as 'general judges', must meet the requirements of independence and impartiality in accordance with Art. 6 of the ECHR, and in principle, both general and specialised judges should have equal status.[20]

One of the features of modern judicial specialisation, in our opinion, is the extraordinary judicial specialisation, the introduction of which is due primarily to the crisis processes that are experiencing the judicial system itself. 'Extraordinary' specialisation is specialisation that is subject to already specialised courts, in particular, in the field of criminal justice. The tendency of a number of states to introduce such courts is primarily due to the corruption and inefficiency of general courts. In fact, such specialisation is a resuscitation, an anti-crisis mechanism of the existing judicial system.

Disbelief in the ability of the traditional justice mechanism to combat corruption properly has prompted many countries to set up specialised anti-corruption courts. The most common argument in favour of the establishment of specialised anti-corruption courts is the need for greater efficiency in dealing with corruption cases and the associated need to signal to the national and international community that the country is serious about fighting corruption.[21]

In Slovakia, for example, a specialised court was set up out of fear that criminal organisations would blackmail or bribe general court judges. The law establishing such a court was passed in 2003, and in 2005 the court began its work. The main reason for the creation of the anti-corruption court was the desire to break the local ties between judges, lawyers, prosecutors, and organised crime. The Anti-Corruption Court was formed of new judges who were offered high judicial remuneration, personal protection, and protection. During the first years of the anti-corruption court, certain results were achieved: special knowledge was accumulated, some local criminal ties were severed, and several cases were successfully completed.

However, the activities of the anti-corruption court have caused dissatisfaction among some politicians and judges of ordinary courts, which led to the repeal of a law on a specialised anti-corruption court in 2009 as a result of a constitutional complaint. In particular, the main grounds for the constitutional submission were: security screening for judges – requirements that did not meet the principle of judicial independence; the high salaries of judges of the specialised court, which was discrimination against other judges; the personal jurisdiction of the court over high-ranking officials.

Following the elimination of identified legal inconsistencies in 2009, a new law was passed, and a new specialised court was established. Today, the Specialized Court of Slovakia consists of 14 judges, and the Specialized Prosecutor's Office consists of 19 prosecutors. The court hears several categories of cases: premeditated murder, economic offences involving more than 6.6 million euros, serious crimes committed by a criminal or terrorist group, and extremist crimes.[22]

However, such special anti-corruption specialisation does not always become a panacea against corruption. In Indonesia, where anti-corruption courts have been set up as a counterweight to corrupted courts of general jurisdiction, several judges of such courts have been accused of corruption. In the Philippines, the Supreme Court has removed a judge from a specialised anti-corruption court on charges of involvement in corruption.[23]

20 Opinion No 15 (2012) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the specialisation of judges.

21 Matthew K Stevenson, Sophie A Schutte, 'Specialized anti-corruption courts – Comparative cartography' (2017) 5 U4 Issue Chr. Michelsen Institute 26.

22 Expert discussion of the best international practices of establishing specialised anti-corruption courts took place –<http://www.vru.gov.ua/news/2067> accessed 10 December 2021.

23 Andrew Sliusar, 'Anti-corruption court in Ukraine: preconditions for formation and guarantees of efficiency' <https://ti-ukraine.org/news/2175/> accessed 10 December 2021.

According to Matthew K. Stevenson and Sophie A. Schutte, the most important issue in the relationship between anti-corruption courts and the ordinary judicial system is the question of the place of the special court in the hierarchy of courts. In particular, should the anti-corruption court be a separate body, and should such judges specialise only in anti-corruption cases? Should a specialised anti-corruption court have primary jurisdiction (i.e., a court of first instance), an appellate court, or a combination of both? Also, which court should have appellate jurisdiction over anti-corruption court decisions? Countries with specialised anti-corruption tribunals have made different choices in addressing these issues.

Firstly, some countries do not have separate anti-corruption courts or units but only appoint certain judges to deal with corruption cases (the 'single judge' model). Under such an organisation, which predominates in Bangladesh and Kenya, appeals against decisions of judges of anti-corruption courts of first instance go through one or more regular intermediate rounds of appeals before the Supreme Court.

Secondly, for those countries that have established an independent specialised anti-corruption court, the most typical approach is to operate this special body as a court of first instance and to establish a procedure for receiving appeals from the anti-corruption court immediately to the Supreme Court. Judges of special courts are often given a status equivalent to that of intermediate judges of the Court of Appeal. Examples of this category include Burundi, Cameroon, Croatia, Nepal, Pakistan, Senegal, and Slovakia.

Thirdly, some countries have introduced a mixed system where the anti-corruption court can function both as a court of first instance in certain cases (usually more important cases) and as a court of appeals in other cases. The two most striking examples in this category are the Philippines and Uganda. In the Philippines, the court (Sandiganbayan) has exclusive primary jurisdiction over corruption-related offences committed by high-ranking officials; when such offences are committed by lower-level officials, local regional courts have primary jurisdiction, and the Sandiganbayan Court has appellate jurisdiction. Uganda's system is similar in that the anti-corruption unit (ACU) of the Supreme Court usually acts only as a court of first instance in high-profile cases; in other cases, the ACP considers appeals against decisions of magistrates.

In Botswana, all corruption cases are heard by ordinary magistrates' courts, but appeals are heard by the Corruption Court (Botswana High Court) and not by ordinary courts of appeal. Decisions of the Court of Justice on corruption cases can be challenged in the same way as any other decision of the High Court in Botswana - in the Court of Appeal, the highest court in the hierarchy of judicial authorities in Botswana. As the Botswana Court of Corruption has only an appeals function and never functions as a court of first instance, it can also be considered as a separate category: a special appellate unit.

Finally, at least four countries – Afghanistan, Bulgaria, Malaysia, and Indonesia – have established specialised anti-corruption courts, which include both courts of first instance and courts of appeal. That is, in these complete parallel systems, there are anti-corruption local courts and anti-corruption appellate courts to hear appeals against decisions of anti-corruption local courts.[24]

International and foreign experience separates the permissible limits of judicial specialisation in order to ensure equal and fair judicial protection. However, there are countries whose judiciary has failed to gain the necessary level of independence from corruption, bribery, intimidation, and undue political influence. To overcome this crisis of the judiciary, states are forced to resort to extraordinary judicial specialisation. In fact, the existence of separate anti-corruption courts (judges) indicates that other judges are potentially dependent, and

24 Stevenson and Schutte (n 20) 18-19.

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therefore cannot be trusted to hear certain categories of criminal proceedings. However, the existence of such judicial specialisation should be a temporary measure, as all judges should be equal in their independence and have an appropriate level of legitimacy.

4 THE ANTI-CORRUPTION COURT IN UKRAINE: 'SPECIALISED' OR 'SPECIAL'?

In 2018, Ukraine also introduced a separate anti-corruption judicial specialisation. Ukraine has chosen a model that provides for the establishment of a single state-wide Supreme Anti-Corruption Court (SACC) as a court of first and appellate instance with exclusive jurisdiction. The motives for choosing such a model were largely due to external influences. US Federal Judge Mark Wolf, an international expert who has been active in anti-corruption reforms in Ukraine, points out that

> the EU and the US have encouraged Ukraine to establish new institutions, hire new prosecutors, judges and other officials. And the world is watching to see if it can work, because if it fails in Ukraine, if the problem cannot be solved within the country, an international law enforcement mechanism will be needed, and this will create an even stronger argument for the International Anti-Corruption Court.

In this regard, Ukraine is seen as a 'laboratory of anti-corruption reforms'.[25]

Also, according to I. Y. Kuz and M. K. Stevenson, anti-corruption activists have been actively campaigning for a strong anti-corruption court, enlisting the support of international players such as the International Monetary Fund (IMF), the European Union (EU), the World Bank, and other donors. These actors, although reluctant to participate in the creation of the SACC at first, later became its indispensable driving force. In principle, local activists persuaded the IMF to make the creation of the SACC a condition for providing Ukraine with $ 1.9 billion in funding. In addition, the EU, in a Memorandum of Understanding with Ukraine, adopted in September 2018, similarly stipulated financial assistance.[26]

After the constitutional reform of 2016, there is a provision in Art. 125 of the Basic Law of Ukraine: 'According to the law, higher specialized courts may operate'. Developing this constitutional provision, it was established in Art. 31 of the Law 'On the Judiciary and the Status of Judges' (2016) that in the system of the judiciary, there are higher specialised courts as courts of first instance for consideration of certain categories of cases. The SACC and the High Intellectual Property Court (or IP Court) were included in this category of courts.[27] In 2018, the legislator passed the Law on the Supreme Anti-Corruption Court, and the Law on the Establishment of the Supreme Anti-Corruption Court initiated the establishment of this court.

However, in political circles, there was a discussion about the constitutionality of this court and, accordingly, the subject of the right to a constitutional petition (49 deputies) in the constitutional petition (no. 04-02 / 6-339 of 22 July 2020)[28] questioned a number of provisions of the Law 'About the Supreme Anti-Corruption Court' and appealed to the Constitutional

25 'International Anti-Corruption Court: Utopian Concept or Real Perspective?' <https://www.radiosvoboda.org/a/28583748.html> accessed 10 December 2021.

26 Ivanna Yana Kuz, Matthew K Stevenson, 'Supreme Anti-Corruption Court of Ukraine. Innovations for Impartial Justice' (2020) 4 (5) BRIEF 2.

27 The Supreme Court of Intellectual Property (or IP Court) was formally established in 2017 but has not yet started its activities (14 December 2021).

28 Constitutional submission (no 04-02 / 6-339 of 22 July 2020) on the compliance of the Constitution of Ukraine (constitutionality) with the Law of Ukraine 'On the Supreme Anti-Corruption Court' of 7 June 2018 no 2447-VIII <https://ccu.gov.ua/sites/default/files/3_349_2020.pdf> 6 September 2021.

Court of Ukraine to declare this law completely unconstitutional. In turn, the Constitutional Court of Ukraine has initiated constitutional proceedings on this issue.[29]

Detailed acquaintance with the legal position of the subject of the constitutional petition indicates that the key issue of this constitutional proceeding concerns the presence of signs of a 'special court' (within the meaning of Part 6 of Art. 125 of the Constitution of Ukraine) in the mechanism of legislative regulation of the SACC's legal status.

To find an objective answer to this collision, it is necessary to identify the main features of a 'special' court abstractly. And for the solution of this applied problem, in our opinion, it is appropriate to turn first to the ideological foundations of the principle of a 'natural court'.

Having survived the epoch of totalitarian terror, mass repressions, and punitive justice of the Soviet era, a clear awareness of what type of court is inadmissible in a democratic society with the rule of law has formed in modern Ukraine. On the domestic constitutional and legal basis, the concept of a 'natural court' was primarily reflected in the constitutional provisions (Part 6 of Art. 125) as an imperative norm-prohibition. The inadmissibility of the formation of extraordinary or special courts is a kind of safeguard against 'unnatural' courts.

As noted by V Komarov and N Sibilov, Art. 125 of the Constitution

> contains an imperative norm prohibiting the establishment of emergency and special courts. Moreover, neither the Constitution of Ukraine nor the Law of Ukraine "On the Judiciary and the Status of Judges" discloses the meaning of these concepts. The use of retrospective tools leads to the conclusion that both in law and in science, special courts are understood as separate judicial institutions with their own system of instances for consideration of certain categories of cases (usually only criminal). Extraordinary courts are considered courts that are formed once, to consider a specific (usually criminal) case on the basis of a special act of the relevant public authority. This significance of the above concepts shows that even enshrining in law the possibility of the existence of such courts and defining a certain order of their formation does not deprive them of special or extraordinary status, as they by their nature contradict the requirements of the Constitution.[30]

The difficult experience of one's own historical past has necessitated the establishment at the constitutional level (Art. 125 of the Basic Law) of a norm prohibiting the establishment of extraordinary and special courts. This constitutional provision is reproduced in the commented article of the Law. Extraordinary courts are judicial bodies with a special legal status (compared to general courts), which are created only in exceptional cases – in the event of a coup, revolution, state of emergency, war, etc. In some cases, extraordinary courts are created in the absence of a special state under normal conditions as an instrument of socio-political terror (for example, in the 1930s, the NKVD *troika*). Extraordinary courts always pursue a punitive goal. They are not conditioned by the tasks established by law, nor by the usual form of judicial procedure or general principles of justice, such as the right to defence or the presumption of innocence. Usually, the consideration of cases in the emergency court is a closed nature of terror, and their decisions are not subject to any appeal.

Special courts are judicial bodies that were formed to expedite the resolution of certain categories of cases specific to a certain period. In the history of Ukraine, there have been examples of special courts that operated under a simplified procedure, and cases were considered in the absence of protection. A distinction must be made between 'extraordinary'

29 You can view the open part of the plenary session on the official website of the Constitutional Court of Ukraine at <http://ccu.gov.ua/kategoriya/2020> accessed 10 December 2021.

30 VYa Tatsiy (ed), *Constitution of Ukraine. Scientific and practical commentary* (2nd edn, reworked and add., Pravo 2011) 873.

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or 'special' courts and 'specialised' courts. At the same time, in the presence of a separate specialisation in the field of administrative, economic, and criminal law, the introduction of a 'special' specialisation in intellectual property and anti-corruption has become a legislative novelty. The formation of 'higher' judicial units obviously presupposes the existence of lower-level instances subordinate to them. However, as follows from the provisions of the Law, higher specialised courts are formed as courts of first instance. In view of the above, it seems that there is a certain dichotomous inaccuracy in the name of the newly created judicial institutions, as well as in determining their place in the court system of Ukraine. Accordingly, either the status of these courts should be determined at the level of local specialised courts, or their name should be adjusted by removing the term 'higher'. Perhaps the most acceptable for their characterisation is the concept of 'special specialised courts'. However, as is well known, in the domestic legal system, intellectual property issues belong to the sphere of civil law relations (book four of the Civil Code of Ukraine 'Intellectual Property Law'), and corruption offences and crimes to the sphere of criminal law relations and crime prevention (Chapter 17 Criminal Code of Ukraine 'Crimes in the sphere of official activity'). Therefore, the separation of these courts into a separate group is unjustified, as there are all grounds to include them in the general judicial system of Ukraine.[31]

At the same time, the question arises whether there is any special specificity of court proceedings in a particular category of cases under the jurisdiction of the SACC, in contrast to criminal offences that are no less dangerous to society and the state, such as those concerning the national security of Ukraine, against the life and health of a person, drug trafficking, or against peace, the security of mankind and international law, etc. As we know, it does not exist. All this is the conduct of courts of general jurisdiction in the field of criminal law.

In contrast to the system of general jurisdiction, an 'extraordinary' jurisdiction was created – an exclusive jurisdiction that contains signs of contradiction to the constitutional concept of a 'natural court'.

The principle of specialisation in the organisation and activity of judicial bodies is primarily aimed at optimising the work of the general judicial system, improving its efficiency. As it is known, according to Part 2 of Art. 22 of the current law 'On the Judiciary and the Status of Judges' (2016), local general courts consider civil, criminal, administrative cases, as well as cases of administrative offences in cases and in the manner prescribed by procedural law. This fully corresponds to the notion of general jurisdiction, the formation of which is provided for in para. 12 of the 'Transitional Provisions' of the Constitution of Ukraine. The system of courts of general jurisdiction is a constitutional imperative.

Thus, certain forms of judicial specialisation in relation to general jurisdiction are permissible as subsidiary or ancillary forms, and in no case should they replace general judicial specialisation. The constitutional imperative of a separate judicial specialisation, within the general jurisdiction, is only administrative courts (Part 5 of Art. 125 of the Constitution of Ukraine).

The subsidiary nature of a particular judicial specialisation, in relation to the general judicial jurisdiction, is directly indicated by the constitutional provisions (Part 4 of Art. 125). In particular, the Basic Law clearly states the dispositive rather than the imperative nature of higher specialised courts: 'According to the law, higher specialized courts may operate'. The Constitution of Ukraine assumes the possibility of the existence of 'higher specialised courts' but does not stipulate the necessity of their existence, such as the Supreme Court or administrative courts.

31 Law of Ukraine 'On the Judiciary and the Status of Judges', *Scientific and practical commentary* (Kyiv: Alerta 2019) 21-22.

According to the 'natural court' principle, the jurisdiction of the system of courts of general jurisdiction should include all criminal and civil proceedings (general jurisdiction). It is obvious that the list of articles of the Criminal Code of Ukraine, which is transferred to the jurisdiction of the SACC, should naturally belong to the jurisdiction of general criminal proceedings. However, according to Art. 33-1 of the Criminal Procedure Code of Ukraine, the exclusive jurisdiction of the SACC was introduced, which includes criminal proceedings in respect of corruption offences provided for in the note to Art. 45 of the Criminal Code of Ukraine (corruption offences in accordance with the Criminal Code of Ukraine are criminal offences under Arts. 191, 262, 308, 312, 313, 320, 357, and 410, in case of their exercise by abuse of office, as well as criminal offences under Art. 210, 354, 364, 364-1, 365-2, 368, 368-3-369, 369-2, and 369-3 of the Criminal Code of Ukraine, as well as Arts. 206-2, 209, 211, and 366-1 of the Criminal Code Ukraine, if there is at least one of the conditions provided for in paras. 1-3 of Part 5 of Art. 216 of the Criminal Procedure Code of Ukraine (CPC). The SACC investigative judges exercise judicial control over the observance of the rights, freedoms, and interests of persons in criminal proceedings concerning criminal offences within the jurisdiction of the SACC.

Other courts defined by the CPC may not consider criminal proceedings in respect of criminal offences that fall within the jurisdiction of the SACC (except as provided for in paragraph 7 of Part 1 of Art. 34 of the CPC). That is, if the accused or victim is or was a judge or an employee of the SACC staff and the criminal proceedings fall within the jurisdiction of this court, such criminal proceedings in the first instance are carried out by the Court of Appeal, which has jurisdiction over the city of Kyiv, and in this case, decisions are appealed to the Court of Appeal, which is determined by the panel of judges of the Criminal Court of Cassation of the Supreme Court. Thus, by giving the SACC exclusive jurisdiction over the system of general courts, the legislator has significantly deviated from the permissible limits of constitutional legality.

According to the Constitution of Ukraine, the judiciary and directly the courts are entrusted with one of the key constitutional tasks - judicial protection of individual rights and freedoms.[32] In particular, it follows from Art. 8 'appeal to the court to protect the constitutional rights and freedoms of man and citizen directly on the basis of the Constitution of Ukraine is guaranteed'; Art. 55 'human and civil rights and freedoms are protected by the court'; Art. 32 'everyone is guaranteed by judicial protection of the right to refute inaccurate information...'; Art. 125 'in order to protect the rights, freedoms and interests of the person in the field of public relations, there are administrative courts'; Art. 145 'The rights of local self-government are protected in court'.

At the same time, the task of all courts, according to Art. 2 of the Law 'On the Judiciary and the Status of Judges' (2016), is to ensure everyone's right to a fair trial and respect for other rights and freedoms guaranteed by the Constitution and laws of Ukraine and international treaties, binding nature of which is granted by the Verkhovna Rada of Ukraine.

However, according to Art. 3 of the Law on the Supreme Anti-Corruption Court, the SACC has separate, special tasks that differ significantly from the tasks of general courts. Thus, the Law states:

> The task of the High Anti-Corruption Court is to administer justice in accordance with the principles and procedures of justice provided by law in order to protect individuals, society and the state from corruption and related criminal offenses and judicial control over pre-trial investigation of these criminal offenses, observance of the rights, freedoms and interests of persons in criminal proceedings, as well as resolving the issue of recognizing unfounded assets and their recovery into state revenue in cases provided by law, in civil proceedings.

32 Ibid, 18.

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The SACC is tasked with combating corruption, which has an accusatory bias. The 'newest' task of resolving the issue of declaring assets unfounded and collecting them into state revenue in cases provided by law in civil proceedings, which is, in fact, 'civil' confiscation, is also of concern. Thus, the SACC has special, 'extraordinary' tasks, which currently contradicts both the letter and the spirit of the Basic Law of Ukraine.

5 CONCLUDING REMARKS

The judiciary in the state must be unified and integral. Such unity and integrity are ensured by a single common goal and tasks assigned to the courts, regardless of their place in the judiciary and jurisdictional specialisation. Therefore, courts that are endowed with special, different from the general courts, goals, and objectives are special courts.

International and foreign experience indicates the permissible limits of judicial specialisation in order to ensure equal and fair judicial protection. However, there are countries whose judiciary has failed to achieve the required level of independence. To overcome this crisis of the judiciary, states are forced to resort to extraordinary judicial specialisation. In fact, the existence of separate anti-corruption courts (judges) indicates that other judges are potentially dependent, and therefore cannot be trusted to hear certain categories of criminal proceedings. However, the existence of such judicial specialisation should be a temporary measure, as all judges should be equal in their independence and have an appropriate level of legitimacy.

Given the current situation in Ukraine, it is crucial to strike a reasonable balance between national sovereignty and constitutional legitimacy on the one hand and the external influences of international and foreign actors trying to administer the legal system on the other.

This theoretical analysis also provides grounds to single out the features of a 'special court' in the context of Art. 125 of the Constitution of Ukraine, in particular:

1) A separate judicial institution with a separate system of instances for consideration of certain categories of cases selected from the general array (special jurisdiction) or in respect of a separate category of persons.

2) A court that is entrusted with a special purpose and objectives, different from other general courts.

3) A court that is formed to expedite the resolution of certain categories of cases or cases that are special for a certain period.

4) A court in which judges have a special legal status (special tasks in the case of judicial proceedings; special professional qualifications (requirements, selection criteria); special (extraordinary) procedure for forming the judiciary, etc.).

At the same time, the establishment of the principle of natural justice is a fundamental constitutional and legal heritage of civilised humanity, which is designed to protect people and their rights and freedoms from arbitrariness and the use of justice as an instrument of terror and wrongful persecution.

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Reform Forum Note

INTERNATIONAL STANDARDS OF JUVENILE JUSTICE: ITS CREATION AND IMPACT ON UKRAINIAN LEGISLATION

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ABSTRACT

Background: *The rights of the child have always been a focus of international organisations, including the United Nations. This is evidenced by the fact that in 1979 the UN Commission on Human Rights established a Working Group to draft a convention on the rights of the child, which from 1979 to 1989 worked on establishing a universal treaty for children around the world. Among other articles, members of the Working Group developed provisions on juvenile justice. The result of this hard work was that international standards of juvenile justice were established in Arts. 37 and 40 of the UN Convention on the Rights of the Child.*

Methods: *The historical and legal methods were the main methods of the research, which allowed us to make a comparison of the draft texts of Arts. 37 and 40. This comparison gave us an opportunity to trace the development of thoughts of states parties about the treatment of children in penal matters and punishments for committed crimes. The paper begins by considering the draft texts of Art. 20 (which would become Arts. 37 and 40) of the Convention that were proposed for discussion. We reveal the main discussions and contradictions of the members of the Working Group. The next part describes the reason for dividing the initial article about juvenile justice into two separate parts. The final important comments and suggestions of state parties are also highlighted.*

Results and Conclusions: *The process of adopting these articles was long and difficult, as it turned out that developing universal proposals with which all member states would agree was a complex task. Nowadays, Ukraine is trying to reform its legislation, particularly in the sphere of juvenile justice. That is why some useful recommendations for Ukrainian legislation are proposed in the concluding remarks.*

Keywords: *the UN Convention on the Rights of the Child, juvenile justice, the treatment in penal matters, rights of the minors, juvenile delinquency*

1 INTRODUCTION

In a democratic state, children's rights and, most importantly, their observance, has always been a focus of attention. In view of this, no one has ever doubted the need for their legislative consolidation. Certainly, the problem of guaranteeing them becomes especially acute when it comes to children who are in conflict with the law. Taking all of this into account, the decision to develop a regulatory framework for juvenile justice was made at the international level. Due to this, international standards of the protection of children's rights in the field of juvenile justice were developed.

Even though Ukraine postures itself as a social, legal, and democratic state, some provisions on the legal regulation of children need to be improved. Therefore, studying international standards for the protection of children's rights in the field of juvenile justice will be useful.

First of all, it should be noted that today, the main international legal document that enshrines the rights of the child and effective mechanisms for their implementation is the UN Convention on the Rights of the Child (hereinafter – the Convention).

This UN's act contains articles on juvenile justice, namely Arts. 37 and 40. Having familiarised ourselves with the content of the above-mentioned norms of the Convention, we can say that in order to comply with these norms, the participating states are required to take concrete action.[3] Given the importance and conceptuality of the document under consideration, it is

3 Henrietta JAN Mensa-Bonsu, 'Ghana' in SH Decker, N Marteache (eds), International Handbook of Juvenile Justice (Springer 2017) 3.

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quite logical that the national legislation of the state parties to the Convention, including in the field of juvenile justice, should be based on its provisions.

According to Godfrey O. Odongo, there are six indications in the Convention that new standards of juvenile justice have been introduced, namely:

> a) founding separate institutions, laws and procedures valid for children accused or suspected of committing crimes;
> b) establishing the minimum age of criminal responsibility;
> c) adherence to the principle of using detention as a last resort and for the shortest period of time;
> d) the desirability of diversion as a binding obligation on states parties;
> e) the degree to which juvenile justice takes into account the procedural guarantees of the Convention and relevant international instruments, such as the UN Beijing Rules on the Administration of Juvenile Justice;
> f) limiting the use of specific court verdict and the necessity to provide for alternative types of punishment at the stage of sentencing.[4]

Yet, in practice, it turned out that establishing these features is not so easy. Thus, Arts. 37 and 40 of the Convention in its current version were discussed and passed by the Working Group in 1986 as a single article – Art. 20 (this is a discussion of the so-called Polish draft of this provision, which will be discussed later). It should be noted that at first reading, the article mentioned was Art. 19. Subsequently, the Working Group decided to divide Art. 19 into two – Art. 19 and 19-bis, which later became Arts. 37 and 40, respectively.[5]

However, nowadays, there are unfortunately no comprehensive historical or legal studies of the process of developing international standards of juvenile justice. This type of research requires the usage of the historical and legal method, about which was written earlier.[6]

2 THE FIRST WORKING GROUP DISCUSSIONS ON JUVENILE JUSTICE

An article on the rights of a child accused or found guilty of violating criminal law was first proposed to the Working Group by a Canadian representative in 1985.[7]

In addition to the above, there were two other proposals regarding the content of this article submitted by the Ad Hoc Group of Informal NGOs and Poland in 1986. During their debate, the representatives of the USA, Austria, and the Netherlands advanced an opinion that the text proposed by Canada could be used as a springboard for discussion. It is noteworthy that the member of the delegation of the USSR stressed that all proposed draft texts (the Polish and Canadian) could be taken as a basic text while waiting for the revised text of the Canadian version, as the Canadian observer said in her introductory statement that to continue the debate an updated version of the article would be presented to the group shortly. The proposal of the representatives from Canada was considered by the Working Group at its session in 1986. It is advisable to dwell on what the Canadian delegation suggested. The study of the content of the proposed edition allows us to state that the main concepts for the

4 Godfrey O Odongo, 'Kenya' in SH Decker, N Marteache (eds), International Handbook of Juvenile Justice (Springer 2017) 31.

5 Legislative history of the Convention on the Rights of the Child. Volume II (OHCHR, The Office of the United Nations High Commissioner for Human Rights, Save the Children Sweden, 2007), 739.

6 D Shygal, A Omarova 'Evaluation of the Results of the Historical and Legal Comparison of the Juvenile Justice of Ukraine and Poland in the 1920s' 2021 2(10) Access to Justice in Eastern Europe 67–85.

7 Report of the working group on a draft convention the rights of the child E/CN.4/1985/64 <https://undocs.org/E/CN.4/1985/64> accessed 11 November 2021.

representatives of this country remain respect for human (in this case, the child's) dignity and the value of the individual. This is confirmed by the provisions of the article that all states parties of the Convention 'recognize the right of children accused or found guilty of violating criminal law to be treated in a manner consistent with the development of their dignity and worth' (para. 1). It should be noted that it is significant for us that, despite the child's violation of the law, i.e., the commitment of punishable acts, the Canadians believe that states should primarily seek their rehabilitation, correction, return to society as full members. As proof, we cite the provision of subpara. (c) of the article under consideration, which states that the main goal of the state should be the correction and social rehabilitation of children 'found guilty of violating criminal law'.

It is also worth noting subpara. (a) of para. 2: 'No child shall be arbitrarily detained or imprisoned'. Moreover, a child who has committed a criminal offence has the same rights as any other person, namely the right to: humane treatment, respect for his/her dignity, immediate notification of charges against him/her in a language he/she understands, consideration cases in accordance with the law within the framework of a fair judicial proceeding within a rational time by an independent and impartial court, legal aid for defence. In addition, the child is presumed innocent until proven guilty. In our opinion, the last paragraph of the article testifies to the desire to consolidate the humane treatment of the child: 'No child can be sentenced to death. No child shall be subjected to cruel, inhuman or degrading treatment or punishment, or to any act which is disproportionate to the circumstances of both the offender and the crime'.

Examining the texts of the proposed provisions, during the next consideration, the representative from Iraq noted that he preferred the draft text proposed by Canada in the original version, which, in his opinion, should be merged with the one proposed by Poland. It is worth pointing out that the representative from Austria expressed the view that, when examining the content of the article under examining by the Working Group, care should be taken not to duplicate the statutory provisions of other existing international human rights documents applicable to children. Of no less interest is the statement made by the representative from the United Kingdom that a strict ban on the separation of children from adults may not always be of benefit to the child, and he noted that the Working Group should focus on what is in the best interest of children. It should be added that some scholars have also noted that when studying the participation of minors in criminal proceedings, it is important (and better) to have respect to the child's opinion and interests, which can be achieved by minimising the negative consequences that may affect the child's emotional intelligence, his/her social activity, comprehensive healthy development, and upbringing.[8]

Based on this, the Chairman of the Working Group, after some debate, established an informal working group consisting of delegations from Austria, Canada, Poland, and concerned NGOs to consult and formulate an article consolidating the views of many delegations. Incidentally, the Chairman, like the above-mentioned representative from Iraq, believed that para. 1 of the revised text proposed by Canada could be the springboard for discussion of the para. 1 of the article, which would be adopted by the Working Group, while the compromise text prepared by an informal group could be the basis for para. 2.

In the context of the above, it is appropriate to analyse the text proposed by the informal working group. First of all, almost at the beginning of the article, the members of the group (as well as the delegation from Canada) recognised the main goal of the state correction and social rehabilitation of children found guilty of violating criminal law, which could be achieved by behaving in a manner appropriate to develop their sense of dignity and value

8 OV Kaplina, OP Kuchynska, OM Krukevych, 'Interrogation of minor and juvenile witnesses in criminal proceedings: Current state and prospects for improvement' (2021) 28(3) Journal of the National Academy of Legal Sciences of Ukraine 270.

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and the strengthening of their respect for the rights and fundamental freedoms of others (para. 1).

Equally important is the assertion that children have the same legal rights as adults. The provisions of subparas. (b) and (d) deserve special attention. The first enshrined the need to use detention in custody unless it was absolutely necessary and for as short a period of time as possible. The other prohibits arbitrary detention, imprisonment, torture, or cruel, inhuman, or degrading treatment or punishment. It should be added that according to the group's proposals, criminal law and the penitentiary system should not be used instead of procedures and means of child protection. However, it is our opinion that the innovation and progress that could have been made during the discussion was the prohibition of capital punishment and life sentence as a penalty for persons under the age of 18.

During the discussion, it was suggested that some additions and changes should be made to the text of para. 1. For example, the representative from the USA noted that her delegation understood that this article covered criminal proceedings against both adults and juveniles, namely, cases when a child has committed an act that would be considered a criminal offence if it was committed by an adult. In this regard, the delegation from Japan expressed uncertainty about the appropriateness of enshrining in the text of the article the provision 'subject to juvenile justice proceedings', as in his country, it includes family court proceedings, and that is why he reserved the right to express some reservations about the content of para. 2 until its final composition. An observer from the Netherlands argued against the above formulation and proposed to supersede it by stating: 'children who are accused of or recognized as having infringed the penal law'. This proposition of the Netherlands was supported by the representative from the USA.

Let us focus on the detention of juveniles, which was also the subject of discussion, the results of which were documented and taken into account when agreeing on the text of the norms under consideration. According to M. Taylor, placing juveniles in prisons increases the likelihood of them offending against criminal law in the future. At the same time, it should be remembered that detention is used unless it is absolutely necessary and only for ordinary offenders or persons who have committed serious crimes.[9] A similar view is held by Bruckmüller, who believes that a juvenile can be detained only if the associated consequences for personal development or reintegration into society are not disproportionate to the crime. Therefore, the assessment of the interests of society and the child should be carried out with special care, but at the same time quickly. It should be taken into consideration that the younger the suspect is, the more reasons to refuse detention.[10]

It should be mentioned that the representatives of different states did not overlook the need for legal assistance. Everyone agreed that it was important and necessary. However, the delegation of the United Kingdom expressed concern about the inclusion of 'legal assistance' in para. 2 of this draft text. He explained his attitude by saying that, for example, legal qualifications were not required for social workers to participate in juvenile court proceedings.

So, as can we see, during the first reading, there were three draft texts of the article devoted to juvenile justice. The main discussions were about legal assistance for the children in conflict with law, taking into account an opinion of the child during criminal procedure and detention in custody. The debates in 1986 established the general provisions on juvenile justice. These provisions needed to be improved, which was done during the second reading.

9 M Taylor, 'USA' in SH Decker, N Marteache (eds), International Handbook of Juvenile Justice (Springer 2017) 31.

10 K Bruckmüller, 'Austria' in SH Decker, N Marteache (eds), International Handbook of Juvenile Justice (Springer 2017) 221.

3 DIVIDING OF THE ARTICLE INTO TWO SECTIONS: TREATMENT IN PENAL MATTERS AND TORTURE/CAPITAL PUNISHMENT

Continuing the consideration of the issue, it should be noted that in 1989, there were five versions of Art. 19 adopted in the first reading. The draft text includes amendments offered by the Crime, Prevention and Criminal Justice Branch and the Centre for Social Development and Humanitarian Affairs of the United Nations Office at Vienna, and two texts proposed by Venezuela that were reflected in documents E/CN.4/1988/WG.1/WP.11 and E/CN.4/1988/WG.1/WP.49.[11]

After a general discussion, during which it became clear that a consensus could not be reached, the Chairman proposed the formation of an open-ended drafting group, which would include representatives of states parties such as China, Canada, the USA, Argentina, Cuba, the USSR, Mexico, Portugal, and India. It was this group that had to agree on the draft text with Venezuela. Following the inaugural meeting of this drafting group, which was attended by a majority of the Working Group, Venezuela invited the delegation from Portugal to adjoin it in coordination and elected a group of friends of the coordinator, including Spain, Venezuela, Senegal, Canada, Portugal, NGOs, and other interested delegations that expressed a wish to participate. The group's coordinators set out their proposals in document E/CN.4/1989/WG.l/WP.67/Rev.l, which they submitted for consideration. Having studied the text, we note that it reflects the key provisions that every child has the right to a humanist attitude and respect for dignity. It is prohibited to impose on persons under the age of 18 such criminal punishments as the death penalty, life imprisonment and to torture children and behave in a manner that is cruel, inhuman, or degrading. Additionally, a child may not be imprisoned illegally or high-handedly. Moreover, imprisonment can only be used unless it is absolutely necessary and for as short a period of time as possible. Enshrined rights of the child deserve to be highlighted: maintaining contact with his/her family through correspondence and dating; immediate access to legal and other relevant redresses; the right to appeal the lawfulness of imprisonment in court (or another competent, independent, and impartial body) and a speedy decision on this kind of act.

Presenting the proposal set out in working document E/CN.4/1989/WG.l/WP.67/Rev.l, the representative from Portugal said that the drafting group had tried to draft a text consistent with the documents adopted in this area by the UN, dividing the various independent situations in need of protection into two articles. Thus, the new Art. 19 covered situations such as the prohibition of torture and other violent, inhuman, or degrading treatment or punishment, the capital punishment or life sentence. Additionally, it provided for such punishment as imprisonment. It should be noted that in considering this issue, the representatives sought to reflect the comments made by the Human Rights Committee, as the priority was to show respect for human dignity, recognition of children's needs, and concern for legal or other assistance. Recognising the initiatives of the UN in the field of juvenile justice, the drafting committee included some of its guidelines in Art. 19-bis, but using non-mandatory wording. It is worth noting that this step has been taken to allow states to strike a balance between the desirability and the appropriateness of providing for these measures in national legislation. It should be added that given the emphasis and focus on respect for human rights and the provision of legal safeguards, as well as for the child to grow up in an atmosphere of love and understanding, the decisions were sometimes less formal than those reflected in other documents and caused concern, which, incidentally, was reflected in the provisions on the appearance at the hearing of the parents or legal representatives of the child. The members of

11 Report of the working group on a draft convention the rights of the child E/CN.4/1989/48 <https://undocs.org/E/CN.4/1989/48> accessed 11 November 2021.

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the open-ended drafting group requested the delegation from Canada to submit paragraphs of the article to the Working Group, taking into account this proposition.

Speaking of changes and additions to the original versions of the articles under consideration, it should be noted that the representatives from Venezuela, the Federal Republic of Germany, Austria, and Senegal proposed deleting the words 'without possibility of release' from para. 1. At the same time, representatives from the USSR, Norway, Japan, China, the USA, and India advocated their preservation. For example, the delegations from Norway and India stressed that they would not support the removal of these words, as such a step would lead to a significant change in the text adopted in the first reading and approved by their governments. As a way to reach a consensus, the representatives from the Federal Republic of Germany, China, Venezuela, and the Netherlands proposed deleting the reference to life sentence and release provisions from this section. However, the representative from Senegal considered it important to maintain these provisions, as if they were excluded from the text, judges would have the right to impose a life sentence as a replacement for the death penalty. Para. 1 of Art. 19 was agreed and accepted after all discussions. Although, by joining the consensus, the representative from the USA reserved the right of his country to make reservations to this article if the USA ever decided to ratify the Convention.

In presenting para. 2, the observer from Canada noted that it overlapped the provisions of the Beijing Rules and the International Covenant on Civil and Political Rights. The representatives of the UK and the Netherlands reserved the right of their countries to make reservations to this article if they ever decide to ratify the Convention. Representatives from Kuwait and the USSR expressed their concern over the content of the second sentence of this para of the article. In particular, they were concerned that the Working Group would decide on detailed measures to punish juveniles without the needed experience. The representative from the USSR wondered whether there was a consensus of experts on juvenile punishment, especially that imprisonment ought to be applied only 'for the shortest possible period of time'. The representative from the Federal Republic of Germany stressed that he would not support this proposal for a sentence, as the legislator from the Federal Republic of Germany did not support that imprisonment for minors ought to be only 'for the shortest possible period of time'. The same opinion about this wording was the representative from Italy. As a consensus, she proposed to delete the second sentence, leaving only the first, which had already been accepted and agreed upon, but without insisting on this proposal. The representative from Senegal noted that the sentence under consideration was significant with a view to stimulating judges to contemplate other educational or corrective measures than imprisonment and to guarantee that detention measures were used only in exceptional cases (i.e., in extreme cases). An alternative proposal for a compromise was made by the representative from Norway, who offered to remove the words 'and for the shortest possible period of time'. By the way, this proposition was supported by representatives from Mexico and the USSR. However, the latter suggested replacing the wide-ranging concept of 'deprivation of liberty' with more exact words 'imprisonment, arrest and detention' and stating in the text that these measures ought to be 'in conformity with the law'. The proposal of Norway with amendments of the representative from the USSR was supported by Libya.

However, this issue was not immediately agreed upon. Thus, C. Slobogin and M. Fondacaro noted that juveniles are less capable of mellow judgment, impulse control, and prescience than adults, and therefore, public intervention to change criminal behaviour can help reduce recidivism, i.e., be more effective than deprivation of liberty.[12] However, the role and functions of juvenile detention have been discussed in connection with the existence of a juvenile court, which has the power to take measures such as detention. Although, the court, when choosing detention, imposes varying degrees of restraint to prevent re-offending

12 C Slobogin, M Fondacaro, 'Juvenile Justice: The Fourth Option' (2009) 11(8) Iowa Law Review 131.

(protection of public safety), to prevent harm to both the juvenile and the society (protection of himself and others), and to ensure the presence of the juvenile in court (prevention of escape). It also confirms the fact of custody or guardianship for people of this age group. It should be noted that this is possible while the court decides and carries out post-disposition placement or provision of services.[13] It is appropriate to add that paras. 3 and 4 of Art. 19 did not provoke special comments and did not require additional discussions. As a consequence, Art. 19 was adopted and became Art. 37 of the Convention.

The drafting group formed to prepare the text of Art. 19 also provided the text of Art. 19-bis. Innovations of this article (compared to the above-mentioned draft texts) can be considered that the child in each case has at least the following guarantees: to be presumed innocent until proven guilty according to law; to be immediately informed of the charges against him/her; to receive legal and other relevant assistance in preparing and presenting his/her defence; immediate trial in the presence of a legal adviser and his/her parents or legal guardians; not being forced to testify; reviewing a court decision by a higher authority; receiving free assistance from an interpreter when the child does not understand or does not speak the language used; observance of his/her confidentiality at all stages of the proceedings.

When introducing the proposed version of Art. 19-bis, the representative of Portugal pointed out that, given the reservations expressed by the members of the Working Group, particular norms had not been intentionally written as imperatives. She explained that this was done in order to give all members of the Working group the opportunity to approve or not support the measures proposed in them. Para. 1 and subparas. (a) and (b) were adopted without much discussion. Contradictions arose over several points of subpara. (b) of para. 2 of Art. 19-bis. For example, with regard to point (ii), the discussion revolved around two issues: the child would be directly informed of the charges against him/her and the type of legal aid that will be provided to him/her. The first question was asked by a representative from the USSR, who said that charges against the child could not be made through representatives because it would create severe challenges. The same consideration was expressed by the delegation from the German Democratic Republic. The delegations from Honduras, Italy, Venezuela, Senegal, and Mexico emphasised the need for parents and/or legal guardians to be informed of the charges against the child. With regard to legal aid, some members of Working Group, in particular, the Netherlands and the Federal Republic of Germany, noted that, given the specifics of their legal systems, the use of the wide-ranging concept of 'legal assistance' could be problematic, as in cases of minor violations of the law, child protection could be provided by non-lawyers. Japan also stated that the presence of legal counsel is not required under Japanese juvenile procedures. Finally, a compromise text was adopted and presented by the observer from Canada.

During the discussion on point (iii), several members of the Working Group elicited two issues, which were the use of the terms 'legal counsel' and 'judicial body'. Delegates from some countries of Western Europe agreed that, with regard to the specificities of their legal systems, the term 'judicial body' should be considered too broad in meaning, and therefore a more precise term was needed. The delegate from Japan stressed that not all hearings were open in his country – for example, in family courts, the use of the term 'fair hearing' creates certain problems when interpreted as a public trial. The representative from Japan stated that the principle of confidentiality set out in point (vii) was contradictory with the principle of a public trial. Finally, all the above-mentioned delegations stressed that they understood 'legal counsel' on a gross scale so that the term should also cover non-legal persons, as mentioned earlier. Only after all the proposals and amendments were taken into account point (iii) was adopted.

13 David W Rosh, 'Juvenile Detention. Issue For the 21st Century' in Albert R Roberts (ed), Juvenile Justice Sourcebook: Past, Present, and Future (Oxford University Press) 218.

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In the light of the above-mentioned discussion, we want to highlight that Albert R. Roberts identifies three basic types of juvenile decisions: nominal, conditional, and custodial. Nominal decisions often apply to offenders who have committed a nonviolent crime for the first time and include reprimands or warnings that a juvenile will be imprisoned for a long time if he/she commits a new crime. Conditional decisions often require juvenile offenders to meet certain probationary conditions, such as participation in a two-month treatment for addictions, including six days a week of intensive group therapy, psychosocial assessment, individual clinical treatment twice a week, completion of professional assessment, and placement. The custodial decisions restrict the freedom of movement of minors by placing them in dangerous reception facilities, temporary community detention, safe detention, or secure detention, including home detention with electronic monitoring devices, group houses, forest camps, structured wildlife programs, schools, and juvenile security facilities.

Points (iv), (v), (vi), (vii) of para. 2, as well as paras. 3 and 4 of Art. 19-bis were adopted without much debate. After changing the order of the articles, Art. 19-bis became Art. 40 of the Convention.

Thus, we can conclude that the second reading of the article devoted to juvenile justice was more complicated than the first reading. During the second reading, it was difficult to reach a consensus. There were five draft texts of the article, and the heated discussions led to dividing the article into two sections: the first enshrined the provisions on punishment and prohibition of torture and other violent treatment of the child, while the second enshrined guarantees of the child alleged as or accused of committing a crime and necessity of establishment of special laws, institutions, authorities, and procedures valid to children. Mainly all debates were about the rational duration of imprisonment of the child, punishments, and legal assistance. Sometimes the result of the discussion simply reserved the right to make reservations on the article.

4 CONCLUSIONS

The disputes over the content of certain articles of the Convention led to the adoption of Arts. 37 and 40. We also found that setting international standards for juvenile justice is a difficult and time-consuming process. Sometimes, it was necessary to appoint an open-ended drafting group to reach an agreement on contentious issues. The debate showed that the differences between the proposals made by different nations were ultimately resolved as follows: the use of non-imperative language to allow states to strike a balance between the desirability and expediency of introducing articles into their legal systems, agreeing with some proposals in a spirit of compromise and the most radical way – reserving the right of countries to enter reservations on these articles.

Although, despite all the differences of opinion, Arts. 37 and 40 were adopted, and after that, their provisions were implemented in national legislation, including the legislation of Ukraine. In examining the creation of Arts. 37 and 40 of the Convention, we came to the conclusion that nowadays, in Ukraine, there are several problems in the sphere of juvenile justice. The main problems are the following. The first problem is the absence of a comprehensive system of legislation on the protection of children's rights that could create a forceful state institute of juvenile justice. The second problem is the necessity of training social inspectors that could identify a problem in a family, solve it, and know the range of actions in different situations that are dangerous for the child. Also, obligatory special training for juvenile investigators, prosecutors, and judges should be provided. The third problem is the absence of mechanisms for the coordination and monitoring of the activities of state bodies, institutions, and non-governmental organisations that carry out measures

to prevent delinquency among children. One of the main principles of Arts. 37 and 40 is the principle of positive promotion, which offers an alternative to the standard strategies of the 'new youth justice'. The starting point is the placement of the child in the centre of the system through the mechanisms of influence on the development and provision of services. Participatory practices are promoted to increase the involvement of children in youth justice processes and activities.[14] Ukrainian legislation still needs to be harmonised with the basic principle of the Convention and facilitate a real change in the status of the child from an object to a subject of juvenile justice.

The first step in this direction has already been taken. Currently, the draft law on child-friendly justice was submitted to the Verkhovna Rada of Ukraine on 4 July 2021.[15] Unfortunately, it was not even in the first reading at the session of the Ukrainian parliament, and all the above-mentioned problems of the Ukrainian system of juvenile justice still exist. Therefore, we are convinced that this draft law must be discussed and adopted as soon as possible to strengthen the protection of the rights and resocialisation of juveniles who have committed criminal offences.

However, it is undeniable that the heated discussions in the Working Group in 1979-1989 made a significant contribution to international and national laws, changing the lives of millions of children, as all law enforcement agencies act from the viewpoint of legal language.

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Reform Forum Note

PROTECTING THE FUNDAMENTAL RIGHTS OF THE CHILD BY CRIMINALISING VOLUNTARY INCESTUOUS RELATIONS

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ABSTRACT

Background: The notion that incest is an extremely widespread problem in contemporary society has been rejected by most of the scientific community until the last couple of decades. Therefore, legal professionals and national legislators have only recently begun to understand the need to act in order to prevent the long-lasting, harmful effects that such relations might have upon the participants.

Methods: In order to achieve the main objective of this paper, the authors have reviewed a selection of primary sources (mainly legal norms included in various national and international legal instruments). They have also consulted secondary sources, trying to obtain the relevant interdisciplinary data from legal, historical, and psychological studies. This paper does not intend to outline the complete state of the art concerning studies on the phenomenon of incest, therefore only the most relevant data regarding the prevention of incest by the enactment of the norms on the protection of the fundamental rights of the children have been collected.

The goal of this paper is to present a few considerations regarding the link between the implementation of the fundamental rights of the child and the criminalisation of incestuous relations between members of the same nuclear family.

Results and Conclusion: The results of this brief study are worrisome, to say the least, as it appears that the states that are actively promoting the rights of the children also have a veritable tradition of denying the extent of the phenomenon of incest and actively and/or passively ignore its perils.

Keywords: incest, criminal law, child, rights, direct relatives

1 INTRODUCTION

One could start this paper by celebrating the crucial role played by human rights culture in shaping the national and international legal instruments of the second half of the twentieth century. Particular attention should be paid to the fact that children are our future and that we are under a collective obligation to ensure the observance of their fundamental rights as a way to protect the future development of mankind. Unfortunately, a paper such as ours is still necessary, as one should remember a simple truth already synthesised in the literature: 'female children are regularly subjected to sexual assaults by adult males who are part of their intimate social world' and 'the aggressors are not outcasts and strangers; they are neighbours, family friends, uncles, cousins, stepfathers, and fathers.'[3]

This paper is about one of the internationally-recognised rights of the child and how national governments could do more to protect it by criminalising at least certain forms of incest. When this paper was written, there were 196 parties to the United Nations Convention on the Rights of the Child of 1990, which means that this is one of the most well-received international instruments in the history of mankind. However, one can easily see that there is still a long way to go before these rights are observed in every corner of the world.

The notion that direct relatives or siblings could willingly engage in intercourse might be one of the most rejected notions in the history of humankind. There are many reasons lurking behind this attitude, and it would not be a good strategy to attempt to formulate an explanation based solely on emotional blindness, cultural biases, lack of medical knowledge,

3 Judith Lewis Herman, *Father-Daughter Incest* (Harvard University Press 2003) 7.

a paternalistic culture reinforced by religious dogma, or moral taboos. The truth is that we need to have many more interdisciplinary studies before pronouncing a generally acceptable conclusion.

The idea that incest might be much more prevalent than one would expect, given the cultural and legal prohibitions present in most countries, has been known for more than a century. Nevertheless, as is the case with individuals, the fact that one society knows or intuits that it might have a problem does not mean that that society is willing to accept the truth about what causes that problem. As we are about to see in the next section of this paper, there are historians who argue that some of the most radical social movements from the modern and contemporary eras might have been linked to an attempt by the ruling classes to dissimulate the extent of this problem among their own ranks.[4]

The structure of this paper is meant to simplify our research by dividing the key points into different sections. The first section analyses the evolution of the main international instruments that are meant to protect the rights of the child. This is meant to highlight what we consider to be the most important three instruments adopted in the last century on this topic. If done correctly, it will become clear that the child has a right to a normal upbringing and to be safe from inappropriate sexual relations with the ones most close to him or her. The second section has the objective of presenting the reader with an overview of the key moments that marked the evolution of the perspective of Western societies on the phenomenon of incest. The third section includes a brief analysis of the social and cultural role played by the criminalisation of certain acts. The paper ends with a few conclusions, which represent the convergence point of the ideas presented in the previous three sections.

All this being said, we should mention that most of our arguments have been influenced by the results of the scientific studies conducted in the past half a century. Unfortunately, this means that our conclusions are based in great part on data collected while studying the most famous type of incest (father-daughter).

This does not mean that other types of incest are completely ignored, especially since there are obvious similarities between the dynamics of various incestuous relations. Nevertheless, differences should be taken into account when they appear. As an example, the data accumulated in the literature would seem to indicate that when a young boy is molested by one of his parents, it is as likely for the perpetrator to be the father or the mother.[5] However, one should remember that there have been far fewer recorded cases where a boy is involved in incestuous intercourse with one of his parents than there have been cases where a girl is used in such a way. Unfortunately, although 'the mother-son incest is probably the most involved, the least understood, and the most subtly traumatic of all forms of incest',[6] little data has been gathered on this subject.

This lack of knowledge directly impacts any sort of legal effort meant to prevent and/or punish the mothers who take advantage of the innocence of their sons for their own sexual gratification, especially since it makes it a lot harder for the judicial authorities to understand the fundamental differences between the dynamics of a mother-son incestuous affair and those of a father-daughter incestuous affair.

If anything, we believe that the legal community cannot afford to wait a few more decades in order to have more data about the intrinsic link between the fundamental rights of the child and the (largely) unchecked phenomenon of incest. This is why this paper represents

4 Lynn Sacco, *Unspeakable: Father-Daughter Incest in American History* (The Johns Hopkins University Press 2009) 50-51.

5 Herman (n 3) 20.

6 Susan Forward and Craig Buck, *Betrayal of Innocence. Incest and Its Devastation* (Penguin 1984) 73.

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an intermediate point, providing future legal studies with an interdisciplinary footing for an amelioration of the national and international instruments which seek to protect our children.

As we have already said, in the next section, we will realise a short overview of the international norms which have improved the chance of the children to better legal protection.

2 THE MAIN INTERNATIONAL INSTRUMENTS MEANT TO PROTECT THE RIGHTS OF THE CHILD

On 2 September 1990, the United Nations Convention on the Rights of the Child (hereinafter – the CRC) entered into force, marking a fundamental shift in the attitude of the international community with respect to the relation between an adult-oriented society and the children. The Convention was adopted and opened for signature, ratification, and accession by General Assembly Resolution 44/25 of 20 November 1989, and it entered into force the following September. One of the main goals of this document was to strengthen a legal framework which was meant to enforce a simple enough idea, 'that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.

The principles that govern the 1990 UN Convention were not new when it was adopted. One could say that they were built on existing principles. In fact, these ideas were stated for the first time at an international level in 1924, when the League of Nations adopted the Declaration of the Rights of the Child (hereinafter – 24.D) in Geneva on 26 September. This document, which is extremely succinct and political in nature, affirmed five basic rights of the child, 'beyond and above all considerations of race, nationality or creed'.

We have elected to begin this part of our exposition by citing these norms precisely because they all share an unfortunate historical coordinate. None of these provisions is directly linked to the notion of incest prevention, and that is quite normal, as we are about to argue in the following section. Most of the members of the European or North American societies would have plainly refused the idea that incestuous relationships between the members of the same nuclear family were a problem in that era. It was believed that Western civilisation could not indulge such savage urges. Therefore, barring the possibility of discovering new contrary evidence, it is safer to assume that the authors and signatories of the 24.D were not thinking about this issue when they drafted and signed it. However, at least one of these provisions, the very first point of the 1924 Declaration, is meant to promote the obligation of parents in particular but also of society in general to ensure the normal development of the child. In fact, the first point of the 24.D states that 'The child must be given the means requisite for its normal development, both materially and spiritually'.

As we mentioned before, this document was not legally binding for anyone, not even for the members of the League of Nations. Nevertheless, the same rules of interpretation may be applied when studying the meaning of its wording. Thus, we believe that the idea of allowing a child to develop normally implies that no generally-accepted and known taboos are to be breached, including the one prohibiting incestuous intercourse between members of the same nuclear family. As we are about to see, the incest taboo was extremely strong in Western society at the beginning of the twentieth century, which justifies the plausibility of this theory. It was almost a given truth.

Another world war had to pass before another important initiative for the history of the fundamental rights of the child appeared. On 20 November 1959, the General Assembly of the United Nations proclaimed a second Declaration of the Rights of the Child (hereinafter –

59.D). This new international document was supposed to reflect the more cautious and invested attitude of this body in solving the problems and injustices suffered by children from all over the world. However, one should also note that, like its ancestor from 1924, the 1959 Declaration was also a non-binding manifestation of the will of the international community. Consequently, even though it would have been able to provide a stronger footing for claims based on international customary law, the 59.D did not provide any viable instruments that one could have used in order to force a community to treat its children better.

One should also remember that 1959 was not the best of times from a global perspective. The decolonisation process was underway, and many former colonies were struggling to survive as democratic states in a very unfavourable economic, political, and cultural context. The Cold War was also more present than ever, hindering any kind of humanitarian efforts that would have been able to improve the standard of living on a global scale. It was a time marked by military and political conflicts and by a general lack of resources in several parts of the world. In this context, one can easily see how the adoption of a convention on the rights of the child was a beacon of light, even if a dim one, as it lacked any legal effect.

As in the case of the 1924 League of Nations Declaration, barring any new evidence that was previously unavailable to us, the 59.D. was not drafted or signed as a means to prevent the abuse of children or the endangering of their development through involvement in voluntary incestuous relations. However, as we are about to see in the next section, the second half of the twentieth century was a time in history when the scientific community was beginning to realise two things. Firstly, incest among members of the same nuclear family is a much more common problem than one would have expected. Secondly, such relations may have lasting harmful effects on the minors who participate, willingly or unwillingly. This actually provided a scientific explanation for the incest taboos which have been present in Western society since the Middle Ages.

All this being said, one notices that the authors of the 1959 Declaration elected to use a much more detailed manner of promoting the right of the child to develop normally (to use the terminology of the 1924 Declaration). In this sense, the sixth principle of the 59.D. states that

> the child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security (…).

One should also notice that the ninth principle affirms that

> the child shall be protected against all forms of neglect, cruelty and exploitation.

However, in our opinion, it would be a bit of an exaggeration to consider that this norm was meant to promote the prohibition of incestuous relations between adults and minors when all of them are members of the same nuclear family. It is certainly true that such forms of intercourse or similar acts may represent a form of cruelty and/or exploitation. Nevertheless, the goal of the ninth principle is to remember that children should not be used as a labour force and that their physical, mental, and moral development should not be endangered by employing or engaging them in any kind of activities as means to gain profit.

In light of these, we would argue that at the moment of the adoption of the CRC in 1990, the international community had already been affirming the rights of the child in an increasingly exhaustive manner. At the same time, in 1990, as we are about to see, both the scientific community and the general public (in Europe and North America at least) already understood not only the perilous nature of the incestuous relations between members of the same nuclear family but also the alarming presence of this problem in the contemporary society.

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The CRC is most certainly a major step forward, if one is to compare its provisions with those of the 24.D or even with those of 59.D. The ever-growing nature of the protection granted by the international community for the rights of the child is extremely visible. We have already seen that the five principles put forward as a declaration in 1924 have been reshaped, annotated, and enriched in 1959 when five more principles were added. In 1990, the General Assembly of the United Nations took the opportunity and added many more provisions, and it included all of them in a legally binding instrument for the signatory states, thus imposing the observance of specific obligations upon the public authorities of the latter.

Even if this document does not address the issue of incest in a direct manner either, it is very clear that the international community was less than shy in limiting the rights of the parents and/or legal guardians of the child in relation to the upbringing of the latter. Pursuant to the provisions of Art. 19 par. (1) of the CRC

> states parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

It could be argued that this is just a rephrasing of the sixth principle of the 1959 Declaration on the Rights of the Child, and the thesis most certainly has its merits. Still, it should be noted that the 1959 text was a simple statement, an idea which was not enhanced by any kind of procedural mechanism which would allow the public authorities to intervene in order to prevent or put an end to the various forms of abuses that a parent or a legal guardian could easily inflict upon a child. If the state was a part of the United Nations and if the said state voluntarily introduced in its national legislation such a mechanism, then the sixth principle could become an effective legal argument. If the state was unwilling to 'burden' its public authorities with such a task, then no legal obligation existed in order to impose the application of the sixth principle. The CRC remedied that loophole and introduced the obligation of the public authorities to act in such cases. The para. 2 of Art. 19 identifies practical means that should be used by the state in order to exercise due diligence in such cases:

> such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

However, given the subject of our paper and the positioning of these provisions in the economy of this particular international instrument, para. 1 of Art. 19 of the CRC represents the set of general norms. For us to be able to discover the importance of the criminalisation of voluntary incestuous intercourse between an adult and a minor, we would also have to mention the provisions of Art. 34 a) of the 1990 Convention. These are explicitly meant to create an obligation for the signatory parties to protect any child from all forms of sexual exploitation and sexual abuse. In fact, states are required to take all the necessary steps, legislative, logistical, or otherwise, for the prevention of 'the inducement or coercion of a child to engage in any unlawful sexual activity'. Moreover, these measures must be regulated and implemented at a national, bilateral, or multilateral level, depending on the nature of the risk.

As we are about to see, the scientific community agrees that, within certain limits, the involvement of a minor (of a child) in incestuous relations with members from the same nuclear family more often than not endangers normal development. However, at the same time, not all states agree with that thesis, and some refuse to criminalise voluntary incestuous relations, even when such forms of intercourse occur between an adult and a minor.

All these being said, we can now proceed to analyse the sinuous path of Western societies to acknowledging and preventing incestuous relations between members of the same nuclear family. Many of the hurdles encountered during the process were generated by the very incapability of the scientific community to accept that their quotidian reality included civilised men and women who were utilising their own children in a sexual manner.

3 THE PROBLEM OF VOLUNTARY INCESTUOUS INTERCOURSE BETWEEN ADULTS AND MINORS

When this paper was written, the vast majority of the researchers who have dedicated time and resources for the study of the effects of incestuous relations between an adult and a minor belonging to the same nuclear family have accepted that more often not, these relations produce harmful lasting effects upon the latter. However, one should remember that this conclusion was not a given fifty years ago, and it was very much neglected or even dismissed one hundred years ago. Even Sigmund Freud, the famous psychoanalyst who started his career by researching the effects of unresolved sexual issues from childhood, abandoned the study of incestuous relations later in life.[7] He had discovered that the sexual traumas underlining and generating mental health problems for countless adults were sexual abuses, including incest, which occurred when they were children or adolescents. Unfortunately, he was not comfortable with his discovery, as it actually proved that his society, the highly praised and civilised European society of the beginning of the twentieth century, had an endemic problem that was tolerated, if not generated, by the otherwise extremely respectable and certainly prosperous paterfamiliases.[8]

In a letter from 1897, Sigmund Freud admits that he could not believe his patients with regard to their accounts of being sexually abused as children by their fathers: 'then there was the astonishing thing that in every case blame was laid on perverse acts by the father, and realisation of the unexpected frequency of hysteria, in every case of which the same thing applied, though it was hardly credible that perverted acts against children were so general'. Then, the great psychoanalyst had a moment of weakness and tried to calm his conscience by doing the unspeakable. He shifted the blame towards the victim and concluded that the daughters were lying in order to dissimulate their own incestuous desires towards their fathers.[9] In other words, feeling conflicted, Freud ended up repudiating his own original theory. However, 'this conclusion was based not on any new evidence from patients, but rather on Freud's own growing unwillingness to believe that licentious behaviour on the part of fathers could be so widespread'.

Accepting that incest was a rather widespread practice was also hindered by otherwise well-intentioned norms. As an example, the *in-camera* rule included in the 1908 United Kingdom`s Punishment of Incest Act ensured that

> cases were heard in closed court not only restricted the publication of information about such trials but reinforced the incest "taboo" prolonging public ignorance that it was a crime, allowing some offenders to claim lack of knowledge and preventing, or at least limiting, informed public discourse.[10]

7 Arnold W Rachman and Susan A Klett, *Analysis of the Incest Trauma. Retrieval, Recovery, Renewal* (Karnac Books 2015) 17-18.

8 Herman (n 3) 9.

9 Herman (n 3) 10.

10 Kim Stevenson, '"These Are Cases Which It Is Inadvisable to Drag into the Light of Day": Disinterring the Crime of Incest in Early Twentieth-Century England' 20 Crime, History and Societies' <https://journals.openedition.org/chs/1669?lang=en> accessed 4 January 2022.

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In the United States of America from the end of the nineteenth century and the first half of the twentieth century, a gonorrhoea epidemic among young girls from reputable families with no history of sexual activity baffled the doctors at first, but it quickly became obvious that this was a clear sign of incestuous intercourse between fathers and underage daughters in many white privileged homes.[11] These suspicions were left unspoken, as it would have exposed an extremely serious inherent problem of what society perceived at the time as the ideal form of the nuclear family. An 'elegant' solution was quickly discovered, and the myth that gonorrhoea passed through toilet seats and doorknobs was created instead. It would take almost one hundred years to refute this myth and train the medical community to accept that the presence of sexually transmitted diseases in young girls with no record of sexual activity is a sign of possible child abuse.[12]

At the same time, one should consider that at the beginning of the twentieth century, the public space was not ready for a debate about incest for reasons apparently not connected to the phenomenon. As most of the minor participants in voluntary incestuous intercourse are women, society also needed to overcome some of its other issues for the former to start speaking as young adults. In this sense, the rise of feminism in the past century had the indirect effect of forcing media institutions, politicians, and public authorities to allow more space and time to discuss this problem, while it also proved that the idealised nuclear family has its own limitations and dangers:

> until the resurgence of the women's liberation movement, even the most courageous explorers of sexual mores simply refused to deal with the fact that many men, including fathers, feel entitled to use children for their sexual enjoyment.[13]

According to one author, this does not mean that feminism should only speak about the traumas of young girls and women, as the feminist position is not just about highlighting the sexual damage suffered by girls and women but simultaneously forms a fundamental critique of the family, of the construction of gendered sexualities, of the 'normality' of incestuous abuse.[14] In other words, feminism has facilitated a partially open-minded discussion about incest as a form of child abuse but, unfortunately, at the same time, directed the entire attention of the public towards one single form of incest – that which occurs between adult males and their underage female offspring.

Moreover, we should not automatically assume that the data provided by the studies conducted in Europe or in North America is enough to understand a phenomenon that has proved to be much more complex than expected. A study conducted in South Africa and relied heavily on the testimonies of thirteen survivors showed that a society characterised by a strong paternalistic culture of the white man over the public and private life has a strong potential to favour the occurrence and hiding of severe cases of incest.[15] In the case of this country, this type of culture was the result of a centuries-old juxtaposition of political, cultural, racial, and religious elements. This does not mean that paternalistic societies may only appear in former European colonies. Nevertheless, the effect is that 'as long as fathers dominate their families, they will have the power to make sexual use of their children'.[16] The simple fact that most men have chosen not to exercise this power for their sexual pleasure does not mean that some do not. Moreover, if incestuous relations, even voluntary ones, are

11 Sacco (n 4) 210.

12 Sacco (n 4) 212.

13 Herman (n 3) 21.

14 Vikki Bell, *Interrogating Incest. Feminism, Foucault and the Law* (Routledge 1993) 174-175.

15 Diane EH Russell, *Behind Closed Doors in White South Africa. Incest Survivors Tell Their Stories* (Macmillan Press Ltd 1997) 156-157.

16 Russell (n 15) 158.

not criminalised, one could hardly argue that adults will restrain themselves because of the mere existence of a taboo or of any other type of social prohibition that is not matched with the threat of proportionate punishment. In fact, there are researchers that doubt the efficacy of such taboos, especially when they are not reinforced by more pressing and immediate medical, biological, or economic needs.[17]

All this being said, there are a few studies that can give us a general idea about how widespread the problem of incestuous relations might be. We insist that the results might vary considerably if such research were to be conducted nowadays, as the original data was collected in the United States of America between 1953 and 1978, conducted by Alfred Kinsey in 1953, by Judson Landis in 1956, by John Gagnon in 1965, and by David Finkelhor in 1978.[18] We have already shown that cultural, religious, moral, and economic differences may play a determining factor in inhibiting or favouring the incest phenomenon. At the same time, we must mention that we are not going to reanalyse the methodology of these studies or their findings. We simply do not have the space for such an endeavour, and it would not significantly improve our own research. Consequently, we will limit ourselves to presenting the general quantitative conclusion derived from the combined results of these four studies:

> - one-fifth to one-third of all women reported that they had had some sort of childhood sexual encounter with an adult male;
> - between four and twelve per cent of all women reported a sexual experience with a relative;
> - one woman in one hundred reported a sexual experience with her father or stepfather.[19]

As we mentioned in the first part of our paper, one should also remember that the dynamics of father-daughter incestuous affairs are substantially different from what we encounter in other types of incest. These differences should be taken into account not only when one attempts to extrapolate the results of studies like the ones previously presented but also when assessing the effects that such an affair has on the other members of the same nuclear family. As an example, in the case of father-daughter incest, the mother is usually a silent partner, ignoring and/or denying what is happening.[20] In the case of mother-son incest, the father is usually an absent partner, and his lack of involvement in the family life prevents him from understanding what is happening. In both cases, the non-offending partner might act in good faith, or they might actively and knowingly facilitate the abusive relationship, thus intentionally contributing to the harming of the minor.

If father-daughter incest is a phenomenon different enough from mother-son incest, one should remember that both are usually radically different from sibling incest. If one of the siblings is much older than the other, then the dynamics of the incestuous relationships can become similar in certain ways, but not completely. This is because 'siblings are generally so inclined to experiment sexually that some experts estimate that at least casual sibling sexual contact occurs in nine out of ten families with more than one child'.[21] Despite it being the most widespread and unreported form of incest, it usually remains in a benign form, especially when the siblings are of similar age and very young (the 'show-me-yours-I'll-show-you-mine' game serves the purpose of allowing children to discover their own sexualities in

17 Eran Shor and Dalit Simchai, 'Incest Avoidance, the Incest Taboo, and Social Cohesion: Revisiting Westermarck and the Case of the Israeli Kibbutzim' (2009) 114 American Journal of Sociology 1836.

18 Herman (n 3) 12.

19 Ibid.

20 Forward and Buck (n 6) 74.

21 Forward and Buck (n 6) 85.

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a playful, naïve, and reciprocal manner). Nevertheless, one should keep in mind that sibling incest can easily cross the boundaries of fraternal games and become extremely violent and traumatic, especially when the age difference between the participants is substantial.[22]

Consequently, we are of the opinion that the data that has been collected so far during various studies justifies the conclusion that any form of incestuous relationship between an adult and a child has the potential to irreversibly harm the development of the latter, thus endangering his or her capacity to lead a healthy and well-balanced adult life.

In the following section, we will analyse the possibility of utilising the norms of the criminal law to prevent incestuous relations.

4 THE PURPOSE OF CRIMINALISING INCESTUOUS INTERCOURSE BETWEEN DIRECT RELATIVES AND SIBLINGS

The criminalisation of incest may be explained in at least two ways. Firstly, it can be viewed as an expression of the strong cultural and religious prohibitions (taboos) instituted in most of the world's societies since the Middle Ages. Secondly, it may be perceived as the result of the latest scientific discoveries regarding the lasting harmful effects that incestuous relations may have upon the participants. Unfortunately, we do not have the space to explore the nature of these criminal norms for each and every contemporary country, therefore the object of this section of our study has an alternative, much more precisely aimed objective. We will attempt to see what the purpose of criminal norms is and how they could prevent incestuous relations between an adult and a minor in a national system of law. However, such an exercise has its own clear limitations, and the results may vary considerably from one legal system to another. Therefore, we would suggest that our findings represent a good starting point for future research, but we do not claim they are applicable in all countries.

Before proceeding to this brief analysis, one should remember that nowadays, incest is criminalised in most countries, even if there are a few notorious exceptions: France, Spain, Russia, the Netherlands, and some of the South American countries.[23] In our opinion, this option cannot be explained by one single theory for all the indicated states. They are much too different, and what seems to be a plausible explanation in the case of one of them would inevitably fail in the case of another. As an example, we believe that the notorious secularism embraced by the French Government must have played an important role in repealing the provisions that incriminated some forms of incestuous relations, not only because they were considered unnecessary in French society, but also because they represented the influence exercised by religious institutions over the public authorities. In this sense, one could verify the norms included in the 1804 Civil Code in relation to matrimony and blood relations.[24]

The idea that various factors influence national legislators in different ways is important because it can also explain why the offence of incest has different definitions in different countries. The Albanian Criminal Code includes the offence of sexual or homosexual activity with consanguine persons and persons in the position of trust, pursuant to the provisions of Art. 106, which is defined as the

22 Ibid.

23 Martin O'Reilly, 'Is Adult Incest Wrong?' (2015) Humanism Ireland 18.

24 1804 French Code < https://revolution.chnm.org/items/show/358 > accessed 4 January 2022.

> engagement in the act of sexual or homosexual intercourse between parents and children, brother and sister, between brothers, sisters, between consanguine relatives in an ascending line or with persons in the position of trust or adoption.[25]

One can easily see that this is a norm with a very large scope, as it creates a legal fiction by stating that sexual intercourse between a person who has been adopted and one of their legal relatives is also considered incest, and it is punished accordingly. As we are about to see, such norms may have even larger scopes.

Section 155 of the Canadian Criminal Code also introduces a very specific definition of the offence of incest, as it stipulates that

> everyone commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.[26]

In this case, the national legislator has opted for the incrimination of sexual intercourse between members of the same nuclear family (child-parent or sibling-sibling), but also of such relations when they occur between children and grandparents. Still, it is easier to justify the need for incrimination in the case of section 155 of the Canadian Criminal Code than it is in the case of Art. 106 of the Albanian Criminal Code. There are both medical arguments and strong taboos surrounding the relations prohibited by the former, while part of the latter is justified only by the cultural and religious taboos already existing in Albanian society. It is a matter of opinion whether taboos and other forms of moral, cultural, or religious prohibitions may be accepted as a basis for a severe limitation of the fundamental rights of a person.

Serbia, another European country with a strong conservative majority, has elected to incriminate incestuous relations, but its norms have a far narrower scope. Pursuant to Art. 197 of the Serbian Criminal Code,[27] the offence of incest may have been committed when 'an adult engages in sexual intercourse or an act of equal magnitude with an underage relative by blood, or an underage sibling'. Essentially, Serbia did not criminalise any kind of incestuous relations between adults, thus providing our study with an example of a moderate criminal policy, found somewhere in the middle between Russia or France, on the one hand, and Iceland, on the other hand.

A fourth and last example is the Icelandic Criminal Code,[28] which adopts one of the severest attitudes towards incestuous relations. One could even say that if we are to consider a spectrum of the attitudes that countries adopt regarding the phenomenon of incest, France would be at one end, while Iceland would be on the other end. Art. 200 paras. (1) and (2) of this document incriminate any kind of sexual intercourse, sexual relations, or sexual harassment when committed against the perpetrator's own child or another type of descendant (ex. nephew). The punishment imposed by the Icelandic legislator is imprisonment for up to eight years under normal circumstances and up to 12 years if the child is 15, 16, or 17 years of age. If the participants are aged 15 years or older, then sibling incest is also incriminated under the provisions of Art. 200 par. (3) of the Icelandic Criminal Code, but the punishment is less severe: up to four years of imprisonment. However, if both siblings were under the

25 Albanian Criminal Code, Law No. 7895, dated 27 Jan 1995. < https://adsdatabase.ohchr.org/IssueLibrary/ALBANIA_Criminal%20Code.pdf > accessed 4 January 2022.

26 Canadian Criminal Code, last amended on 27 August 2021. <https://laws-lois.justice.gc.ca/eng/acts/c-46/ > accessed 4 January 2022.

27 Serbian Criminal Code, last amended on 24 December 2012. <https://www.legislationline.org/download/id/5480/file/Serbia_CC_am2012_en.pdf > accessed 4 January 2022.

28 Icelandic Criminal Code (General Penal Code) No. 19, dated on 12 February 1940 < https://www.legislationline.org/download/id/6159/file/General%20Penal%20Code%20of%20Iceland%201940,%20amended%202015.pdf accessed 4 January 2022.

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age of 18 years at the time of the offence, then the court is allowed to waive the punishment application.

Art. 201 of the Icelandic Criminal Code proves that two societies with very different historical backgrounds can produce very similar norms, as it is formulated with an even bigger scope in mind than it was the case for Art. 106 of the Albanian Criminal Code. Pursuant to the provisions of the first paragraph of the former, a punishment of up to 12 years of imprisonment may be applied to

> any person who has sexual intercourse or other sexual relations with a child aged 15, 16 or 17 year who is his or her adopted child, step-child, foster-child or the child of his or her cohabiting partner, or is bound to him or her by similar family relationships in direct line of descent, or is a child who has been committed to his or her authority for education or upbringing.[29]

Except for the last thesis, one may easily notice that the Icelandic legislator went to great lengths to promote in the society a very clear message: the relations established between the members of the nuclear family, regardless of whether they are blood relatives or not, must not be of a sexual nature.

Regardless of the factors which influenced the national legislators and determined them to criminalise or not some of the incestuous forms of intercourse, the effect is representative for these societies at a given time. In other words, 'criminal justice systems symbolise states' national identity and culture'.[30]

However, one should note that the notion of justice is not as clear as it might appear at first glance, both from a philosophical and a legal standpoint.[31] When a person breaches a criminal law provision, that is a form of a violation of the law, which has different names in different national systems: crime, offence, felony, misdemeanour, etc. As this paper does not attempt to analyse the subtleties of comparative criminal law, there is no need to present at this time the various differences and similarities established by different states between these notions. Consequently, for the purposes of this study, we are going to use the notion of offence to indicate a violation of the criminal law, irrespective of the terminology used by each specific domestic legal system.

The literature offers multiple explanations for the nature of offences. According to one opinion, they are both wrongs and public wrongs.[32] Firstly, they are wrongs because there is a need for the public authorities to forbid one from committing them. Secondly, they are public wrongs because they cannot be settled by private individuals among themselves, neither within the framework of a judicial trial nor in private. When an offence is committed, the public authorities must intervene in order to rectify the situation and in order to punish the perpetrator. This intervention is justifiable according to the theories formulated during the modern era, as the perpetrator is a free agent and morally (and legally) accountable for his or her actions. However, the general goal of the criminal law and of the authorities in charge of implementing the criminal policy of the state should not be limited to harsh retribution against the perpetrator, but it should also envisage healing the collective traumas inflicted by the commission of the offence.[33]

29 Albanian Criminal Code, Law No. 7895, dated 27 Jan 1995. < https://adsdatabase.ohchr.org/IssueLibrary/ALBANIA_Criminal%20Code.pdf > accessed 4 January 2022.

30 Merita Kettunen, *Legitimizing European Criminal Law. Justification and Restrictions* (Springer 2020) 47.

31 Cătălin Constantinescu-Mărunțel, 'The Rather Ambiguous Notion of Justice Utilised by the European States' (2020) 10 Union of Jurists of Romania. Law Review 74-75.

32 Kettunen (n 24) 51.

33 Sergio Dellavalle, 'Reconciliation v. Retribution, and Co-Operation v. Substitution: Hegel's Suggestions for a Philosophy of International Criminal Law' in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (Torkel Opsahl Academic EPublisher 2018) 501.

At the same time, one has to remember that one of the most important functions of the criminal law is to prevent the very conducts which are being criminalised by the effect of its own norms.[34] In the European literature that analyses the role of the criminal law in the continental legal systems, several authors have argued that this preventive function can be accomplished if the national legislator formulates the norms so that they can serve not only as a form of immaterial protection but also as an educational tool that is disseminated to the general public with the help of the educational system.[35]

However, little has changed during the last one hundred years, even if a researcher were pointing out the inadequacies of the criminal law even during the 1960s.[36] Legislative inertia causes an undetermined number of dramas every year.

In light of all the information provided in this section, we can now conclude that the criminalisation of incest could be an invaluable tool for a national legislator who wanted to promote the fact that incestuous relations between an adult and a minor are dangerous, especially for the latter. As we have seen in the second section, there is an incredibly fine line in such cases between voluntary intercourse and child abuse, even when the minor is almost an adult and might have already reached the age of consent.

5 CONCLUSIONS

While it is certainly understandable that most people experience a form of emotional blindness to the phenomenon of incest, it is extremely dangerous for an entire society to knowingly embrace such a handicap.[37] We must accept that incestuous relations are a constant in our society and promote the idea that they are intrinsically linked to the phenomenon of domestic child abuse. Consequently, not criminalising them presents undeniable risks, at least by hindering the efforts of the public authorities to investigate possible cases of child endangerment.

In the first section of our paper, we showed that a society that denies vehemently even the possibility of having a problem is prone to be blind to even the most obvious evidence of having this problem. One of the consequences of this collective choice is the apparition of a strong bias among the members of the scientific community. As an example, in the twentieth-century United States, the fact that medical professionals were formally trained to identify the least pathological cause of disease meant that a doctor would be inclined to think that father-daughter incest was a rather rare occurrence and was less likely to consider it a distinct possibility unless there was an external factor that raised it directly.[38] The same principle applies to the judicial authorities and law enforcement agencies.

Criminalising incestuous relations between the members of a nuclear family sends a strong message that cannot be denied: children might be preyed upon by their parents or elder siblings. In turn, this creates the space and the tools for the public opinion to discuss the problem, prevent it, and intervene when the act has already been committed. The fundamental right of a child to normal development cannot be truly implemented in the absence of such criminalisation.

34 Constantin Mitrache and Cristian Mitrache, *Drept Penal Român. Partea Generală* (Third edition, Universul Juridic 2019) 31-32.

35 Florin Streteanu and Daniel Nițu, *Drept Penal. Partea Generală* (Universul Juridic 2014) 12-13.

36 Graham Hughes, 'The Crime of Incest' 55 Journal of Criminal Law and Criminology 329-330.

37 Rachman and Klett (n 7) 1-2.

38 Sacco (n 4) 212.

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However, we would also like to revert to the international legal norms cited at the beginning of our analysis. If the experience of the twentieth century has shown anything, it is that the protection of the most fundamental rights of a person should not be trusted solely to a state and its public authorities, as political factions with infamous agendas can easily take absolute control over those. Therefore, we are of the opinion that the international community should consider amending the international provisions regarding the relevant rights of the children to put pressure on the national legislators to acknowledge and directly tackle the phenomenon of incest.

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Reform Forum Note

LAW OF UKRAINE 'ON MEDIATION': MAIN ACHIEVEMENTS AND FURTHER STEPS OF DEVELOPING MEDIATION IN UKRAINE

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ABSTRACT

Background: *Although mediation is considered one of the most popular ways of consensual dispute resolution, for many years, mediation in Ukraine had no legislative regulation. This was one of the obstacles that restrained alternative dispute resolution (ADR) development in Ukraine, even though the mediation community had been growing. Eventually, the Law of Ukraine 'On mediation' was adopted on 16 November 2021.*

Methods: *The article is devoted to distinctive features of the new Ukrainian legislative mediation regulation that are decisive for the national mediation model, such as the definition and principle of mediation, its principles and scope, requirements for mediators, etc. Special attention is paid to the perspective and challenges for the mandatory mediation in terms of the provisions of Art. 124 of the Constitution of Ukraine and European standards for access to court (para. 1 Art. 6 of the ECHR). The article addresses organisational and procedural aspects of integrating mediation into judicial proceedings. Different models of integrating mediation into the Ukrainian court system piloted in Ukraine are analysed. The authors define current trends in the development of mediation in Ukraine.*

Results and Conclusions: *The authors conclude that the adoption of the Law 'On mediation' contributes to the ADR movement in Ukraine but needs some further steps, such as developing a national model of court mediation, the amendment of procedural legislation introducing a special procedure that would lead to the enforcement of agreements resulting from international mediation in commercial disputes, and the adoption of special regulation for integrating mediation into other jurisdictional activities (notariat, system of legal aid).*

Keywords: *mediation; court mediation; mandatory mediation; mediator; Ukraine*

1 INTRODUCTION

Mediation is one of the most popular methods of alternative dispute resolution (hereinafter – ADR) worldwide. It is considered a part of the international standard of access to justice, which is interpreted today not only as access to courts of a classical kind but also as access to ADR.[3] The development of ADR methods in general and mediation in particular is recognised as one of the aims of the justice sector reform in Ukraine.[4] As a result, on 16 November 2021, the Law of Ukraine 'On mediation' (hereinafter – the Law 'On mediation')[5] was adopted. The mediator community had been waiting for this regulation for more than 25 years since the first mediators were trained with the support of the donor community,[6] and nowadays, many

3 See V Komarov, T Tsuvina, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' (2021) 1(9) Access to Justice in Eastern Europe 79-101. DOI: 10.33327/AJEE-18-4.1-a000047; V Komarov, T Tsuvina, 'International standard of access to justice and subject of civil procedural law' (2021) 28(3) Journal of the National Academy of Legal Sciences of Ukraine 197-208. DOI: 10.37635/jnalsu.28(3).

4 Decree of the President of Ukraine of 11 June 2021 'On the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023' <https://zakon.rada.gov.ua/laws/show/231/2021#n10> accessed 1 January 2022;

5 Law of Ukraine 'On mediation' of 16 November 2021 <https://zakon.rada.gov.ua/laws/show/1875-20?lang=en#Text> accessed 1 January 2022.

6 See the collection of articles '5 Years of Dialogue and 25 Years of Mediation in Ukraine: from Division to Cohesion' (Kiyv, VAITE 2019) 340 <https://www.osce.org/project-coordinator-in-ukraine/448165> accessed 1 January 2022; I Izarova, 'Sustainable Civil Justice Through Open Enforcement – The Ukrainian Experience Studying' (2020) 9(5) Academic Journal of Interdisciplinary Research 206-216 <https://doi.org/10.36941/ajis-2020-0098> accessed 1 January 2022; I Izarova, V Nekrošius, V Vėbraitė, Y Prytyka 'Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 Teise (Law) 8-23 <https://doi.org/10.15388/Teise.2020.116.1> accessed 1 January 2022.

hopes are placed on it. It is supposed to have a positive effect on the development of the ADR movement in Ukraine and an improvement of access to justice and its effectiveness. At the same time, the Law 'On mediation' is a framework and needs some further steps to be put into practice.

The article is devoted to the analysis of the main features of the new Ukrainian Law 'On mediation' and its gaps, as well as further directions in the promotion of mediation in Ukraine. The article consists of the introduction, three parts, and the conclusion. In the first part of the article, a general review of the Law 'On mediation' is made. In the second part, the authors focus on mandatory mediation in terms of the constitutional provisions on court jurisdiction. In the third part, the authors address the organisational and procedural aspects of integrating mediation into judicial proceedings. In the conclusion, the authors identify current trends and further steps for developing mediation in the Ukrainian legal system.

2 A LONG WAY TO LEGISLATIVE REGULATION: MAIN ACHIEVEMENTS OF THE LAW 'ON MEDIATION'

The institutionalisation of mediation in Ukraine has come a long way. As a result, the Law 'On mediation' has several distinguishing features. Firstly, the Law was developed on the basis of the international mediation standards, such as Directive 2008/52/EC of the European Parliament and of the Council of Europe on certain aspects of mediation in civil and commercial matters,[7] Council of Europe mediation recommendations for various categories of cases,[8] guidelines for better implementation of the above-mentioned recommendations developed by the European Commission for the Efficiency of Justice,[9] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation,[10] etc. Secondly, the Law 'On mediation' reflects the best foreign countries' practices of mediation legislative regulation.[11] Thirdly, the work on the draft law was conducted with the broad involvement of all interested parties – mediators' community,

7 Directive 2008/52/EC of the European Parliament and of the Council of Europe of 21 May 2008 on certain aspects of mediation in civil and commercial matters <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> accessed 1 January 2022.

8 Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters, adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies <https://rm.coe.int/16805e1f76> accessed 1 January 2022; Recommendation No R (98)1 on family mediation, adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies <https://rm.coe.int/1680747b77> accessed 1 January 2022; Recommendation Rec (2001) 9 of the Committee of Ministers to Member States on Alternatives to Litigation between Administrative Authorities and Private Parties adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies <https://rm.coe.int/16805e2b59 > accessed 1 January 2022; Recommendation No R (99) 19 of the Committee of Ministers to Member States on Mediation in Penal Matters, adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies <https://rm.coe.int/1680706970> accessed 01 January 2022.

9 CEPEJ Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters <https://rm.coe.int/16807475b6> accessed 1 January 2022; CEPEJ Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters <https://rm.coe.int/1680747759> accessed 1 January 2022 etc.

10 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002) <https://www.uncitral.org/pdf/english/commissionsessions/51stsession/Annex_II.pdf> accessed 1 January 2022.

11 See CEPEJ European Handbook for mediation Lawmaking, adopted at the 32nd plenary meeting of the CEPEJ Strasbourg, 13 and 14 June 2019 <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928> accessed 1 January 2022.

legal practitioners, state authorities, and scholars, taking into account the interests of all stakeholders. All of the mentioned features determine the national model of mediation in Ukraine enshrined in the Law 'On mediation'.

Definition of mediation. In the literature, one can find various classifications of mediation models or types.[12] In the broadest sense, there are two models of mediation depending on the role and intervention of the mediator – facilitative and evaluative.[13] In the former, the mediator is responsible for the managing of the procedure but cannot offer his or her own proposals for dispute resolution variants. In the latter, the mediator has broader powers: he or she can help parties by making formal or informal recommendations, offering the variants of the settlement, etc. The Law 'On mediation' enshrines the classical facilitative mediation model. It draws on the definition of mediation as 'an extrajudicial voluntary, confidential, structured procedure, during which the parties with the mediator (mediators) try to prevent or resolve the conflict (dispute) through negotiations'.[14] It is also evidenced by other legislative provisions. In particular, the mediator is obliged to manage the mediation procedure,[15] but he or she cannot provide advice and recommendations to the mediation parties about the decision on the merits of the dispute or make such decisions.[16] The mediator's advice and recommendations can only be related to the mediation procedure and finalisation of its results.[17] The parties independently determine the list of issues to be discussed during the mediation, options for resolving the dispute, the content of the agreement resulting from mediation, terms and methods of its execution, and other issues related to the dispute and mediation procedure.[18]

Mediator. The mediator is defined as 'a specially prepared neutral, independent, impartial person who conducts the mediation'.[19] There are no minimum age requirements for the mediators, but persons with limited civil capacity or incapable persons, as well as persons with a criminal record, cannot act as mediators. The legislation of some post-soviet countries distinguishes professional and non-professional mediators:[20] the former should have completed special training on mediation and obtained a mediator's certificate; the latter have no special education and can conduct the mediation if parties have agreed to such a person as a mediator in their case. Ukraine does not endorse such a distinction: only those who have completed the basic mediation course in Ukraine or abroad are entitled to act as mediators. Basic mediation courses should have at least 90 hours, including no less than 45 hours of practical skills training.[21] The training of mediators, in addition to the basic training, may include specialised trainings. Additionally, parties, public authorities, different institutions, and other persons may impose additional requirements on mediators they engage, for

12 See N Alexander 'The mediation metamodel: Understanding practice' (2008) 26 (1) Conflict Resolution Quarterly 97-123 DOI: https://doi.org/10.1002/crq.225; L Riskin 'Mediator Orientation, Strategies and Techniques' (1994) 12 Alternatives to the High Cost of Litigation 111-114 DOI: https://doi.org/10.1002/alt.3810120904.

13 K M Roberts 'Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement' (2007) 39 Loyola University Chicago Law Journal 187-213.

14 Para 4 Part 1 of Art 1 of the Law 'On mediation'.

15 Para 7 Part 1 of Art 12 of the Law 'On mediation'.

16 Para 2-3 Part 2 of Art 7 of the Law 'On mediation'.

17 Part 5 of Art 7 of the Law 'On mediation'.

18 Part 2 of Art 8 of the Law 'On mediation'.

19 Para 2 Part 1 of Art 1 of the Law 'On mediation'.

20 For example, in Kazakhstan, mediators are divided into two groups: professional and non-professional. Non-professional mediators are, for example, all judges during conciliation proceedings in court in accordance with the Civil Procedure Code of the Republic of Kazakhstan and the Administrative Procedure Code of the Republic of Kazakhstan (Part 2 Article 9 the Law of Kazakhstan 'On mediation' <https://online.zakon.kz/Document/?doc_id=30927376&pos=3;-106#pos=3;-106> accessed 1 January 2022.

21 Part 1 of Art 10 of the Law 'On mediation'.

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example, special trainings, age, education, experience, etc.[22] Also, persons who have been trained in basic mediator skills for at least 48 hours, which is confirmed by the relevant certificates before the entry into force of the Law 'On mediation', can act as a mediator. It is worth noting that the Law 'On mediation' allows notaries to conduct a mediation if they obtained the basic mediation course,[23] and the Notary Chamber of Ukraine is allowed to conduct a basic mediation course and keep a register of notaries who can act as mediators.

Scope of the Law 'On mediation'. The scope of the Law 'On mediation' is quite broad. It is identified as

> relationships pertaining to conduct of mediation for the purposes of preventing the onset of conflicts (disputes) in the future or settling any conflicts (disputes) including civil, family, labor, commercial, administrative ones as well as those in administrative offense and criminal proceedings in order to reconcile a victim with a suspect (defendant).[24]

At the same time, the legislation may contain specific regulations of mediation procedures for different categories of disputes. As we can see, the Law 'On mediation' regulates not only the mediation of dispute settlement but also a so-called preventive mediation, i.e., mediation of the dispute which can only appear in the future, for example, mediation of the conclusion of a contract or premarital agreement.

Mediation can also be integrated into litigation at different stages. In view of this criterion, the following types of mediation can be distinguished: a) *pre-trial mediation*, which takes place before the commencement of a trial and can be a mandatory pre-trial procedure for resolving a dispute, the non-use of which makes it impossible to initiate court proceedings; b) *mediation in the court of first instance*, which takes place during the preparatory proceedings or trial of the case on the merits before the court judgment; c) *mediation in higher courts* during the review of court judgments in appellate or cassation courts; d) *mediation in enforcement proceedings*, or post-judicial mediation, conducted during the enforcement of a court judgment. The same is relevant for integrating mediation into arbitration.

Principles of mediation. The Law 'On mediation' recognises classical principles of facilitative mediation, such as: voluntariness (Art. 5), confidentiality (Art. 6), neutrality, independence, and impartiality of the mediator (Art. 7), self-determination of the parties, and equality of the rights of the parties of mediation (Art. 8).

3 MANDATORY MEDIATION AND CONSTITUTIONAL PROVISIONS

The Law 'On mediation' says nothing about mandatory mediation while proclaiming voluntariness to be one of the basic principles of mediation, according to which the parties can only voluntarily, by mutual consent, apply to the chosen mediator, no one can be forced to participate in the mediation, and the procedure can be stopped at any time at the initiative of one of the parties.[25] It may seem that the Law 'On mediation' enshrines a classic voluntary model of mediation. But nowadays, more and more countries establish different

22 Part 3 of Art 9 of the Law 'On mediation'.

23 Part 3 of Art 1 of the Law of Ukraine 'About notaries' <https://zakon.rada.gov.ua/laws/show/3425-12#Text> accessed 1 January 2022.

24 Part 1 of Article 3 of the Law 'On mediation'.

25 Art 5 of the Law 'On mediation'.

kinds of mandatory mediation for some categories of cases.[26] The first country in Europe to develop such a provision was Italy, where mediation is a mandatory pre-trial procedure, for example, in condominium co-owner disputes, medical negligence disputes, defamation disputes, and disputes arising from banking and insurance contracts, etc.[27] This tendency caused a shift in the interpretation of the voluntariness principle from the voluntary entering into the mediation procedure to the voluntary ending of such a procedure. Nowadays, the introduction of different kinds of mandatory mediation have become the global trend in the legal regulation of mediation.

We can identify different kinds of mediation depending on the division of initiative between the parties and the court in deciding on the use of mediation: a) completely voluntary mediation, initiated by the parties; b) mediation initiated by at least one party, which obliges the other party to participate in mediation without the right to refuse; c) mediation, initiated by the court: i) mediation on the recommendation of the court, when the judge has only the right to recommend mediation and explain its advantages and sanctions for refusal to use mediation according to national legislation; ii) mediation by appointment or direction of the court, which reflects the greater degree of binding nature of this procedure, and the obligation in this case may relate to attending an information session or the mediation itself; d) mediation as a statutory pre-trial procedure established by law, which means that the plaintiff could not bring the action unless parties try to resolve their dispute by the means of mediation.[28]

Art. 124 of the Constitution of Ukraine provides that the jurisdiction of the courts extends to any legal dispute and any criminal charge. In cases provided by law, courts also consider other cases. The law may provide for a mandatory pre-trial dispute resolution procedure.[29] This constitutional provision opens the door for the legislator to introduce mandatory mediation in certain categories of cases in the future in spite of the fact that the Law 'On mediation' does not regulate any kind of mandatory mediation.

Mandatory mediation causes challenges for Ukraine. Adopting the provisions on the mandatory mediation, the state extends to this procedure the effect of para. 1 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereinafter – the ECHR) in terms of the positive obligation of the state to guarantee access to court. In spite of the fact that in light of the European Court of Human Rights (hereinafter – the ECtHR), case-law mandatory mediation does not violate the access to court requirement, in every case, the proportionality principle should be met. The classical structure of the proportionality test for the cases concerning access to court reads as follows:

> 1) the aim of the access to court restriction enshrined by law should be legitimate;
> 2) means which were used for the restriction should be minimally burdensome and necessary in a democratic society;
> 3) there was a reasonable and proportionate relationship between the means employed and the aim sought to be achieved;
> 4) the restriction under consideration does not contradict the very essence of the access to court right, because the person cannot be deprived of the right to judicial

26 See CH van Rhee 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4(12) Access to Justice in Eastern Europe 7-24 DOI: https://doi.org/10.33327/AJEE-18-4.4-a000082.

27 See E Silvestri, R Jagtenberg, 'Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation' (2013) 17(1) Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement 29-45.

28 See T Tsuvina, A Serhieieva 'Comprehensive Analysis of the Current Situation, Barriers and Possibilities of Mediation Development: with Recommendations for the Promotion and Implementation of Mediation in Ukraine' (2019) 38-41.

29 Constitution of Ukraine <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 1 January 2022.

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> protection due to the restriction and there should always be alternative ways to protect violated rights, freedoms or interests, if the consideration of certain cases is excluded from the court jurisdiction.[30]

In view of the above, it can be concluded from the interpretation of mediation as a mandatory pre-trial procedure that such procedure pursues a legitimate aim which has two aspects: on the one hand, it pursues the public interest in access to justice for all and its effectiveness, as well as caseload relief; on the other hand, it aims to satisfy the private interest of the parties, which is to ensure the use of an effective and appropriate consensual way to resolve their dispute. If the parties are given the opportunity to voluntarily end the mediation procedure, the means employed for the restriction are minimally burdensome and proportionate with the aim of restrictions.

At the same time, the question arises as to whether such a legislative provision will not cause situations where, in reality, a person will be deprived of the right to a fair trial at all, taking into account the real development of mediation in Ukraine and quantity of certificated mediators. The introduction of mediation as a mandatory pre-trial procedure for resolving disputes, even in some categories of cases, implies a positive obligation of the state to ensure unimpeded access to mediation throughout the state. At the same time, in cases where parties have the right to legal aid, mediation should be provided free of charge at the expense of the state budget.[31] In our opinion, this task is unachievable in the current situation in Ukraine, taking into account the number of mediators, large territory of the country, and diversification of the judicial system. As a result, it may lead, on the one hand, to additional burdens on the budget and, on the other hand, to violation of the rights to a fair trial (para. 1 Art. 6 ECHR). Yet now, there are several pro-bono projects of mediators' associations and legal aid systems in large cities and online mediation projects in small cities. All in all, it is important to remember that compulsory mediation can increase the number of mediations but will not increase the number of settled disputes, as the parties and lawyers will often see such a procedure as a formality before filing a lawsuit. According to these considerations, before introducing mediation as a mandatory pre-trial procedure, the state needs to do some serious work on the popularisation of mediation and increasing the number of mediators.

4 INTEGRATION OF MEDIATION INTO JUDICIAL PROCEEDINGS

Though historically, mediation appears as an alternative to the classical judicial proceedings, over time, the effectiveness of mediation has led to the integration of mediation into judicial proceedings. Mediation seeks to lighten the load on the judicial system and help in combating such negative trends in civil procedure as the excessive length of a trial, high court fees, and the complexity of litigation, which characterise the crisis of civil justice in the second half of the 20th century.[32] It is currently recognised that mediation can improve the accessibility and efficiency of justice, enrich judicial practice, increase flexibility and adaptability of litigation to the nature of the dispute, etc. As a result, on the one hand, it may increase trust in the justice sector and the level of satisfaction of ordinary people by a judiciary, and on the other hand, it allows parties to choose the most appropriate way to solve their dispute.

30 See among others: *Golder v United Kingdom* App No 4451/70 (ECtHR, 21 February 1975) para 34; *Ashingdane v the United Kingdom* App No 8225/78 (ECtHR, 28 May 1985); *Stanev v Bulgaria* [GC] App No 36760/06 (ECtHR, 17 January 2012).

31 See Para 4 Part 1 of Art 1 of Law of Ukraine 'On Free Legal Aid' <https://zakon.rada.gov.ua/laws/show/3460-17#Text> accessed 19 June 2021.

32 See AA Zukerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press 1999).

Modern trends in strengthening the interaction between mediation and legal proceedings allow us to distinguish court mediation, which is integrated into judicial proceedings and provided with the assistance of the court. In general, the development of a strategy for integrating mediation into the court proceedings concerns two main aspects: an organisational one, which is associated with the development of an optimal model of court mediation, as well as procedural, which is focused on the procedural features of such integration.

4.1 ORGANISATIONAL ASPECT OF INTEGRATION

Analysis of legislation and practice of implementation of pilot projects for mediation integrated into judicial proceedings in foreign countries allows to distinguish the following models of court mediation:

a) judicial mediation, or 'judge-mediator' model, which is conducted directly in court by judges who have passed special mediation training;

b) court-related mediation of two types:

i) internal court-related mediation, in which mediation is carried out in the centre of the mediation or ADR centre in court, so the mediation is supposed to be conducted 'inside' the court by inside mediators;

ii) external court-related mediation, in which cases for mediation are sent to external public or private mediation centres or mediators.[33]

There were several pilot schemes of court mediation in Ukraine supported by the donor organisations. The following models of mediation integrated into judicial proceedings were presented:

- external court-related mediation ('Support for mediation development in eight courts of the Volyn region as an alternative way to resolve the conflict' with the support of USAID within the framework of the Fair Justice Project);
- judicial mediation, in which specially trained judges acted as mediators (grant of the European Commission and the Council of Europe 'The procedure for selection and appointment of judges, their preparation, bringing to disciplinary responsibility, distribution of cases and alternative dispute resolution' in 2006-2007 and 'Transparency and effectiveness of the justice system in Ukraine' in 2008-2011);
- a special procedure for settling a dispute with the participation of a judge as a special kind of the conciliatory procedure held by a judge (project 'Education of Judges for Economic Growth' with the support of the Canadian National Judicial Institute).

Within these projects, the following results were obtained. According to statistics, within the framework of an external mediation that was implemented in eight courts of the Volyn region, 142 persons were involved in the mediation process, 108 information-evaluation meetings with parties, and 38 mediations were conducted, 14 of which were successful (among them –

33 T Tsuvina, A Serhieieva, 'Comprehensive Analysis of the Current Situation, Barriers and Possibilities of Mediation Development: with Recommendations for the Promotion and Implementation of Mediation in Ukraine' (2019) 24-25.

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two inheritance disputes, three land disputes, four family disputes, five civil disputes). After conducting a successful mediation, parties were asked to answer the questionnaire: 20 of the 24 persons indicated that they did not expect such a result; 18 of 24 persons reported that the judge fully understood the essence of the problem and contributed to the resolution of a dispute as much as possible and recommended them the mediation; 16 of 24 persons said that in the future they would first try to use mediation in order to save money and time. At the same time, among 24 cases in which mediation was not successful: 4 mediations were stopped by the mediator (including three mediations, during which mediators were informed about violence), and in five cases, the mediation was stopped because of parties' legal representative position in the case.[34]

Instead, in the pilot project of the judicial mediation (model 'judge-mediator') which was held in four courts (Bila Tserkva City Court of Kyiv Oblast, Vinnytsa District Administrative Court, Donetsk Administrative Court of Appeal, Ivano-Frankivsk City Court) during the period from 5 July 2010 to 15 November 2010, 83 cases were transferred to mediation, in 50 cases mediation took place, 36 mediations ended successfully, and in 33 cases settlement mediation agreements were concluded.[35]

The project connected with the implementation of the procedure for settling a dispute with the participation of a judge even became a basis for the amendments to the procedural legislation in 2017. In fact, it is not mediation – it is a kind of conciliation led by the judge who conducted the trial.

Although different kinds of integrating mediation were piloted in Ukraine, the new Law 'On mediation' says nothing about the possibility of conducting mediation by judges or other court staff, so we can conclude that in Ukraine, external court-annexed mediation will be developed in the future. From this point of view, the main question is how and by whom the mediators for this kind of mediation will be selected and who will form and keep the register of such mediators.

4.2 PROCEDURAL ASPECTS OF INTEGRATION

Even before the adoption of the Law 'On mediation', mediation could be used in parallel with court proceedings due to the existence of legal provisions on the possibility of reaching a settlement agreement between the parties at any stage of civil, commercial, or administrative proceedings, including appellate and cassation proceedings and enforcement proceedings. In practice, if parties of litigation use mediation and find an amicable solution, they can bring it to the court, and it can be approved by the court as a settlement agreement. Moreover, although there was no legislative regulation of mediation, since 2017, the mediator's immunity has already been enshrined in procedural law,[36] which effectively made it impossible to interrogate a mediator as a witness about the facts which became known to him or her during the mediation.

Simultaneously with the adoption of the Law 'On mediation' amendments to procedural codes – the Civil Procedure Code (hereinafter – the CPC), the Commercial Procedure Code (hereinafter – the ComPC), and the Code of Administrative Procedure (hereinafter –

34 OM Matviychuk, OG Zavydovska, Mediation in the courts: myth or reality? (Lutsk: B.v. 2016).

35 Transparency and Efficiency of the Judicial System of Ukraine: Materials for Training Mediators from the Circle of Judges of the Supreme Court of Ukraine, Higher Specialized Courts and Representatives of Higher Education Institutions in the Framework of the Joint Program of the European Union and the Council of Europe, 20-25 March 2011 6.

36 Para 2 Part 1 of Art 70 of the CPC; Para 2 Part 1 of Art 66 of the ComPC.

the CAP) – were made. The main judicial guarantees in case of mediation usage can be summarised as follows:

A) Procedural law explicitly stipulates that the parties may reconcile, including through mediation, at any stage of the judicial proceedings, and the result of the parties' agreement may be approved as a judicial settlement agreement.[37]

B) Special guaranty of the neutrality principle is connected with the prohibition to combine two roles – mediator and legal representative: a person who acted as a mediator in a dispute related to a case before a court cannot act as a representative in the same case.[38]

C) The judge is now obliged to find out during the preparatory hearing in the case whether the parties wish to settle the dispute out of court through mediation.[39]

D) If the parties agreed to conduct an out-of-court mediation on preparatory stage, a court can adjourn the preparatory hearing;[40] at the same time, the court is obliged to suspend the proceedings if both parties request to suspend the proceedings during the conduction of mediation before them for the period of the mediation but not more than 90 days from the date of the decision to suspend the proceedings.[41] After the resumption of proceedings, if the parties reached a mediation settlement agreement, a court may close the proceedings and approve such an agreement. Other options are to close the proceedings because of the plaintiff's waiver of the claim or to deliver court judgment in case of admitting the claim by the defendant. In case of unsuccessful mediation, the court after resuming the proceedings must consider the case on the merits and deliver a judgment.

E) The use of mediation procedure is incentivised by the rules on court fee return: in case of the settlement agreement, plaintiff's waiver of the claim or recognition of the claim by the defendant resulting from the mediation, 60 percent of the court fees in the first, appeal or cassation instances are reimbursed.[42]

F) A special rule is established for administrative proceedings, which sets deadlines for filing suits: mediation does not suspend the duration of the period for filing a suit to the administrative court.[43] The same relates to the limitation period for all types of non-criminal cases.[44]

5 CONCLUSIONS: CURRENT TRENDS IN THE DEVELOPMENT OF MEDIATION IN UKRAINE

The Law 'On mediation' opened a new page in the ADR movement in Ukraine in terms of the rule of law and access to justice. Despite its expected positive effect, a lot of problems are still open for discussion.

37 Part 7 of Art 46 ComPC; Part 7 of Art 49 CPC; Part 5 of Art 47 CAP.
38 Para 5 Part 5 of Art 183 ComPC; Para 5 Part 5 of Art 198 CPC; Para 5 Part 6 of Art 181 CAP.
39 Para 2 Part 2 of Art 182 ComPC; Para 2 Part 2 of Art 197 CPC; Para 2 Part 2 of Art 180 CAP.
40 Para 5 Part 5 of Art 183 ComPC; Para 5 Part 5 of Art 198 CPC; Para 5 Part 6 of Art 181 CAP.
41 Para 3-1 Part 1 of Art 227 ComPC; Para 4-1 Part 1 of Art 251 CPC; Para 4 Part 1 of Art 236 CAP.
42 Part 1, 2 of Art 130 ComPC; Part 1, 2 of Article 142 CPC.
43 Part 6 of Art 122 CAP.
44 Part 2 Art 3 Law 'On mediation'.

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Firstly, the law focuses on general issues of developing mediation in Ukraine without providing general guidelines for any specific model of court mediation. Yet, the development of the latter is one of the strategic goals for the promotion of ADR in Ukraine and justice sector reform. From this point of view, the next steps may relate to the development of organisational and quality standards of court mediation, as well as the introduction of mandatory mediation in specific types of cases in the context of the implementation of the provisions of Art. 124 of the Constitution of Ukraine.

Secondly, in 2019, Ukraine signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (hereinafter – the Singapore Convention).[45] Therefore, further changes will be aimed at amending the procedural legislation, in particular, introducing a special procedure that would lead to the enforcement of agreements resulting from international mediation in commercial disputes, similar to that provided for arbitration by the New York Convention on the recognition and enforcement of foreign arbitral awards.[46] The Ministry of Justice organised the working group for the ratification of the Singapore Convention at the same time as the working group at the draft Law 'On mediation' was organised. Now, this group is working on the amendments to the procedural law, taking into account the Law 'On mediation'. It should be noted that signing the Singapore Convention can bring the practice of mediation to a new level, significantly increasing its use in cross-border commercial disputes, which will have a positive impact on Ukraine's image on the world stage and the development of mediation in Ukraine.

Thirdly, the Law 'On mediation' envisages integration of mediation into other jurisdictional activities, such as that of notaries and bailiffs and systems of legal aid, yet there is no special regulation on mediation in this context. Some further steps should be taken by the Ministry of Justice to find an effective model for integrating mediation into these areas.

Fourthly, the legislation does not pay due attention to the integration of mediation into arbitration and international commercial arbitration. The practice of so-called hybrid procedures, in particular med-arb and arb-med, based on a combination of mediation and arbitration in different variations, is popular all over the world. The status of mediation agreements and mediation clauses remains unclear in the Law 'On mediation'. A systematic analysis of the rules of national procedural law suggests that they are not mandatory. An important issue in the context of promoting mediation and developing a culture of ADR is the need for mediation clauses contained in contracts, as well as mediation agreements to be binding for the parties.

Fifthly, the information policy of the state is needed to popularise mediation in society. It should explain the advantages of mediation, its principles, and benefits; foster layperson's trust in this institution and the desire to use non-competitive ways of resolving disputes, create a positive image of mediators and raise awareness of their mission in society, etc.

45 United States Convention on International Settlement Agreements Resulting from Mediation <https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf> accessed 1 January 2022.

46 Convention on the Recognition and Enforcement of Foreign Arbitral Awards <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> accessed 1 January 2022.

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Note

'PUBLIC ORDER' AS GROUNDS FOR REFUSAL IN THE RECOGNITION AND ENFORCEMENT OF A DECISION IN INTERNATIONAL COMMERCIAL ARBITRATION: UKRAINIAN REALITIES AND INTERNATIONAL EXPERIENCE

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ABSTRACT

Background: *The question of recognition and enforcement of international commercial arbitration (ICA) decisions, as a prototype of a foreign court decision, finds radically opposite answers in different legal systems and in the doctrine of the ICA. Thus, in the Regulation of the Council (EU) 44/2001 of 22 December 2000 on the jurisdiction, recognition, and enforcement of judgments in civil and commercial matters, formerly the Brussels Convention of 1968 and the Lugano Convention of 1988, the notion of 'arbitration' was excluded from the sphere of execution and recognition of foreign court decisions.*

Methods: *Nevertheless, the procedure for recognising and enforcing an ICA award has a unified approach in many countries around the world. Thus, national courts, when deciding on the recognition and enforcement of an ICA award, are increasingly faced with such problematic issues as the grounds for refusing to recognise and enforce such an award. This article reveals that these grounds for refusing to recognise and enforce the award of the ICA are a violation of public order of the country where the arbitral award is subject to recognition and enforcement. Particular attention is paid to the distinction between 'substantive' and 'procedural' public order and the practical approaches of national courts in some countries to this issue.*

Results and Conclusions: *The authors state that the way to overcome this inconsistency is still a unified approach to understanding 'public order' in all member states of the New York Convention of 1958 and clearer international regulation of this issue.*

1 INTRODUCTION

In the Code of Civil Procedure of Ukraine,[4] Chapter 3 of Section IX bears the title 'Recognition and granting of permission to execute awards of international commercial arbitration'. This legislative decision is explained by the fact that in this chapter, the legislator focuses on the recognition and enforcement of the awards of international commercial arbitration. Moreover, not only are the awards of a foreign ICA subject to recognition with the issuance of a permit for enforcement but also the voluntary execution of such decisions must be confirmed by the court consideration of the application for recognition and granting permission for voluntary execution of decisions on recovery of monetary funds.

The recognition and enforcement of ICA awards are more important issues in the arbitration mechanism for the settlement of disputes, which is governed by multilateral conventions,

4 Law of Ukraine 'Civil Procedure Code of Ukraine' of 18 March 2004 No 1618-IV (updated on 4 November 2018) <http://zakon.rada.gov.ua/laws/show/1618-15> accessed 16 October 2021.

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bilateral agreements, and national law.[5] The most widely-used and successful instrument, as already noted, is the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[6]

Despite the universality of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereafter – the New York Convention), it remains for the state court to recognise and enforce them and for state courts to consider applications for recognition and permission to enforce arbitral awards, and to refuse such recognition. In connection with the use, the problem of the relationship between the Convention and the domestic law of the countries in which the arbitral award is to be enforced arises.

The international legal regulation of the recognition and enforcement of arbitral awards was initially aimed at creating a regime of the imperative obligation of states to comply with arbitral awards rendered in their territory (internal arbitral awards). This provision was enshrined in Art. 3 of the Geneva Protocol on Arbitration Reservations of 1923.[7] Later, in the Geneva Convention on the Enforcement of Foreign Arbitral Awards of 1927, member states undertook the enforcement in their territory of arbitral awards rendered in the territory of other member states to the Convention on the basis of arbitration agreements that fell under the Geneva Protocol of 1923.[8]

Mechanisms for the recognition and enforcement of foreign and domestic arbitral awards in the international legal unification of ICA were formed gradually. However, neither the New York Convention nor other international conventions on international commercial arbitration contain the concept of an 'internal' arbitral award and general rules on the criteria for qualifying arbitral awards as 'foreign' or 'domestic'.

The scope of the New York Convention is defined extremely broadly. In accordance with para. 1 of Art. I of the Convention, a state shall recognise and enforce any arbitral award rendered outside the territory of the state in which such recognition and enforcement is required. In preparing the text of the New York Convention, proposals to narrow the scope of the Convention were rejected on the grounds that disputes referred to arbitration must include foreign elements. Thus, the member states to the Convention have, in essence, agreed to limit the powers of national courts to hear a large proportion of commercial disputes between individuals and legal entities that have close links with their territory.[9]

5 On bilateral agreements between Ukraine and the EU member states, see Iryna Izarova, 'Enhancing judicial cooperation in civil matters between the EU and Ukraine: first steps ahead', in A Trunk, N Hatzimihail (eds), *EU Civil Procedure Law and Third Countries: Which Way Forward?* (Nomos 2021) 191-212.

6 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards <https://www.newyorkconvention.org/english > accessed 16 October 2021.

7 Protocol on Arbitration Reservations, Geneva, 24 September 1923 <https://www.uncitral.org/pdf/russian/publications/sales_publications/Register_texts_vol_II.pdf> accessed 16 October 2021.

8 Convention on the Enforcement of Foreign Arbitral Awards, Geneva, 26 September 1927 <https://www.uncitral.org/pdf/russian/publications/sales_publications/Register_texts_vol_II.pdf> accessed 16 October 2021.

9 United Nations Conference on International Commercial Arbitration. Comments by Governments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards. E/Conf. 26/3. 10 March 1958. P. 3 <http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958> accessed 16 October 2021.

2 CLASSIFICATION OF GROUNDS FOR REFUSAL TO RECOGNISE AND ENFORCE THE AWARD OF ICA

A key issue in the procedure for the recognition and enforcement of foreign arbitral awards is the refusal of a national court to recognise and enforce foreign arbitral awards. Although the New York Convention provides the same grounds for refusing to recognise and enforce foreign arbitral awards in all contracting states, their application may lead to different results due to the peculiarities of the regulation of this issue by domestic law.

The New York Convention enshrines two exhaustive sets of grounds for denial of recognition and enforcement of arbitral awards. The first group of grounds includes the cases provided for in Art. V (1), when:

> a) the parties to the agreement are incapable in some way or this agreement is invalid under the law to which the parties have subjected this agreement, and in the absence of such subordination, for the law of the country where the decision was made;
>
> b) the party against whom the award has been made has not been duly notified of the appointment of the arbitrator or of the arbitral proceedings or has otherwise failed to submit their explanations;
>
> c) the said decision is rendered on a dispute not provided for, or which does not fall under the terms of the arbitration agreement or arbitration clause in the contract, or contains rulings on issues beyond the arbitration agreement or arbitration clause in the contract;
>
> d) the composition of the arbitral tribunal or the arbitral proceedings did not comply with the agreement of the parties or, failing that, did not comply with the law of the state where the arbitration took place;
>
> e) the decision has not yet become final for the parties or has been revoked or suspended by the competent authority of the country where it was given or the country whose law is applicable.

The second group of grounds for a refusal to recognise and enforce foreign arbitral awards includes the cases provided for in Art. V (2) of the New York Convention:

> a) the subject matter of the dispute may not be subject to arbitration under the laws of that country;
>
> b) the recognition and enforcement of this decision are contrary to the public order of that country.

3 THE DEFINITION OF 'PUBLIC ORDER' IN THE DOCTRINE OF INTERNATIONAL COMMERCIAL ARBITRATION

Particular attention should be paid to such grounds for a refusal to recognise the enforcement of an ICA award as non-compliance with the public order of the country where the ICA award is subject to recognition and enforcement.

The issue of public order is one of the difficult problems of international commercial arbitration. Public order is a protective mechanism designed to protect the foundations of law and order that have developed at a certain point in time and are effective and necessary

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for the functioning of a given society. The legislation of almost all states and relevant international agreements enshrines a well-known rule: a foreign arbitral award is not enforceable if the court finds that such enforcement may cause a result that is incompatible with the law and order of the state (public order). However, in no legal system is there a clear legislative definition of the concept of 'public order'. There is also no unified approach to determining the content of public order in law enforcement practice and legal doctrine.

One of the most famous Ukrainian scholars, Vasyl Kysil, identifies elements that are mostly included in the content and can be a characteristic of such a concept as the 'foundations of law and order' of Ukraine:

> a) the fundamental principles of the national law of Ukraine, which cover such imperative norms of public, private, and procedural law as constitute the skeleton of the rule of law in Ukraine;
>
> b) universally recognised principles of morality and justice that are important for the Ukrainian legal order and prevailing in Ukrainian society;
>
> c) the legitimate interests of Ukrainian individuals and legal entities, the Ukrainian state, and Ukrainian society, the protection of which is the main task of the Ukrainian legal system;
>
> d) generally recognised principles and norms of international law that are part of the Ukrainian legal system and especially international human rights standards.

The author also notes that due to the inconsistency of doctrinal approaches, the legislators of most countries resort only to general formulations, so the *ordre public* reservations are very similar to each other in different laws. As a rule, explanations on the rules of application of the public order clause are given by the courts on the basis of the interpretation of the norms of law, the qualification of the factual composition of the case, and doctrinal statements.[10]

The concept of 'public order' is enshrined in some regulations of Ukraine. Thus, in accordance with para. 'b' item 2 part 2 of Art. 459 of the CPC of Ukraine, the decision of the ICA may be revoked if the court determines that the arbitral award is contrary to the public order of Ukraine. Para. 12 of the Resolution of the Plenum of the Supreme Court of Ukraine of 24 December 1999 no. 12 'On the Practice of Consideration by Courts of Requests for Recognition and Enforcement of Decisions of Foreign Courts and Arbitrations and Revocation of Decisions Ruled by ICA in Ukraine' stated that public order should be understood as the legal order of the state, the defining principles and regulations that form the basis of the system in it (concerning its independence, integrity, independence and inviolability, basic constitutional rights, freedoms, guarantees, etc.).[11]

Art. 12 of the Law of Ukraine 'On Private International Law'[12] also contains reservations on public order, according to which the rule of foreign law is not applied in cases where its application leads to consequences that are clearly incompatible with the principles of law and order (public order) of Ukraine. In such cases, the law that is most closely related to the legal relationship is used, and if such a right cannot be determined or applied, the law of Ukraine is applied.

10 AS Dowgert, VI Kisil (eds), *International private law* (К.: Алерта 2012) 228-229.

11 Resolution of the Plenum of the Supreme Court of Ukraine of 24 December 1999 no 12 'On the practice of consideration by courts of petitions for recognition and enforcement of decisions of foreign courts and arbitrations and revocation of decisions rendered by international commercial arbitration in Ukraine' <https://zakon.rada.gov.ua/laws/show/v0012700-99#Text> accessed 16 October 2021.

12 Law of Ukraine 'On Private International Law' <https://zakon.rada.gov.ua/go/2709-15> accessed 16 October 2021.

4 TYPES OF PUBLIC ORDER AND PRACTICE OF APPLICATION

The main feature of the protection of public order in many jurisdictions is the distinction between 'substantive' and 'procedural' public order. Therefore, in applying Art. V (2) (b) of the New York Convention, national courts consider not only the outcome of the arbitral award on the merits but also the procedure leading to such award, and in the case of substantial procedural irregularities in the arbitration proceedings, recognition, and enforcement in accordance with Art. V (2) (b).

National courts, when considering an application for recognition and enforcement of an arbitral award, may establish a violation of public order in cases where the right of the party to be heard has been violated. For example, the Quebec High Court, in *Louis Dreyfus S.A.S. v. Holding Tusculum B.V.*, refused to recognise and enforce the arbitral award because the arbitral tribunal applied a remedy that went beyond the arbitration proceedings on the basis of the arguments of only one party. Therefore, the court ruled that such an arbitral award violates the principle of *audiatur et altera pars* (the other party should also be heard).[13]

Another example of a breach of procedural public order is when arbitrators act in violation of the principles of independence and impartiality. For example, in *Soc. Excelsior Film TV v. Soc. UGC-PH*, the French Court of Cassation, which was involved in two parallel arbitrations between the same parties, one of the arbitrators who participated in the two arbitration proceedings provided false information about the essential terms of the case in one of the arbitration proceedings, which influenced the decision of this arbitral tribunal regarding its jurisdiction. In the present case, the French Court of Cassation found that in so doing the arbitrator had violated the principle of equality of parties of arbitration proceedings, which was contrary to the most basic requirements of due process.[14]

The District Court of Affoltern-on-Albis of Switzerland, in a decision of 24 March 1994, established that when the lawyer of one of the parties in the negotiations included in the contract a provision appointing himself as sole arbitrator in case of dispute between the parties, he had violated public order. The court found that the conduct of the arbitrator, Dr. E., was so extreme that it was difficult to imagine that any free and democratic legal system could equate an arbitral award rendered by such an arbitrator with an act of justice of a sovereign state and ensure its enforcement. It was absolutely unacceptable for a person who draws up a contract as an arbitrator to give it a binding interpretation, especially if he had been a lawyer for many years.[15]

An example of a breach of procedural public order may be a situation where two parties to a tripartite contact had to appoint one arbitrator. The Court of Cassation of France in the case of *Siemens A.G. v. BKMI Industrienlagen GmbH* acknowledged that the principle of equality of parties in the appointment of arbitrators is part of the French understanding of international public order, which can be ignored only after a dispute has arisen. The court concluded that the decision rendered by the court of three arbitrators, one of whom had been appointed with objections jointly by the two defendants, should be cancelled.[16]

The Federal Supreme Court of Switzerland in the case of *Egemetal Demir Celik Sanayi ve Ticaret A.S. v. Fuchs Systemtechnik GmbH* stated that the main procedural guarantees, including the

13 *Louis Dreyfus SAS v Holding Tusculum BV*, Superior Court of Quebec, Canada, 12 December 2008 <http://newyorkconvention1958.org/index.php?lvl=notice_display&id=959> accessed 16 October 2021.

14 *Société Excelsior Film TV v Société UGC-PH*, Court of Cassation, France, 24 March 1998 <http://newyorkconvention1958.org/index.php?lvl=notice_display&id=152> accessed 16 October 2021.

15 Leon Trakman 'Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection' (2018) 6 (2) The Chinese Journal of Comparative Law 174-227.

16 *Siemens AG v BKMI Industrienlagen GmbH*, Court of Cassation, France, 7 January 1992 <https://heinonline.org/HOL/P?h=hein.journals/intfinr12&i=129> accessed 16 October 2021.

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principle of procedural public order, guarantee to ensure an independent decision-making process regarding those claims and objections of the parties that have been submitted to the arbitral tribunal in accordance with the relevant requirements of the procedural rules.[17] In another judgment of the Swiss Federal Supreme Court in case *X (S.p.A.) v. Y (S.r.l.)*, the court stated that procedural public order is violated when fundamental and generally accepted principles are not followed, which leads to certain contradictions regarding the fair trial, so that the decision is inconsistent with the values recognised by the rule of law.[18]

Regarding the application of substantive public order, the following cases can be cited: violation of the principle of *pacta sunt servenda*; the principle of good faith and the prohibition of abuse of rights; property rights, such as expropriation without proper compensation; antitrust and competition law, including in the member states of the European Union (EU), the basic provisions of the EU on the common market; fiscal legislation, such as tax legislation, the law on currency control; laws on social protection, such as the law on consumer protection; foreign policy laws or other direct international obligations, such as export/import restrictions, embargoes, sanctions in UN Security Council resolutions.[19]

The national laws of the member states of the New York Convention, disclosing the content of public order, also distinguish between internal public order (*ordre public interne*) and international public order (*ordre public international*). According to this distinction, public order at the national level reflects the most fundamental concepts of morality and justice, recognised in the legal system of the state, and legal relations of an international nature fall under the standard of public order.

The distinction between the concept of international public order (*ordre public international*) and domestic public order (*ordre public interne*) is traced in the doctrine of international commercial arbitration. In countries such as Austria, Brazil, China, the Czech Republic, Hungary, Italy, Russia, Slovenia, Taiwan, the United Kingdom, and the United States, courts do not apply this distinction. National courts in countries such as Australia, Canada (at least in Quebec), Croatia, France, Germany, Italy, Portugal, Slovenia, Turkey, Uruguay, and Venezuela identify such differences. In Portugal, arbitration law explicitly provides that the recognition and enforcement of foreign judgments is subject to international rather than domestic public order. Pursuant to Art. 56 (1) (b) (ii)) of the Portuguese Law on Voluntary Arbitration, the court refuses to recognise and enforce a foreign arbitral award if it leads to a result that is manifestly incompatible with international public order in Portugal.[20]

It is also pertinent to emphasise that in some countries, in particular France and Switzerland, courts deliberately use this difference. For example, the French Supreme Court in *Société SNF v. Société Cytec*, the French Court of Cassation notes that a breach of international public order occurs only when, in certain circumstances, such a breach can be described as 'effective and specific', 'gross' or 'deliberate'.[21]

17 *Egemetal Demir Celik Sanayi ve Ticaret AS v Fuchs Systemtechnik GmbH* (2000) (Switz.) <http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F126-III-249%3Ait&lang=it&type=show_document> accessed 16 October 2021.

18 *X SpA v Y Srl*, Federal Tribunal, Switzerland, 8 March 2006, Arrêts du Tribunal Fédéral (2006) 132 III 389 <http://www.swissarbitrationdecisions.com/sites/default/files/8%20mars%202006%204P%20278%202005.pdf> accessed 16 October 2021.

19 Steiner Szabolcs, 'Public order as ground for refusal of recognition of foreign arbitral awards with special focus on Austria and Hungary' <http://www.etd.ceu.hu/2012/steiner_szabolcs.pdf> accessed 16 October 2021.

20 Portuguese Voluntary Arbitration Law 2011 <https://a.storyblok.com/f/46533/x/68d5f16880/the-new-law-on-voluntary-arbitration.pdf> accessed 16 October 2021.

21 *Société SNF v Société Cytec*, Court of Cassation, France <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000018947552> accessed 16 October 2021.

Due to the lack of clear legal regulation of the concept of 'public order' in Ukraine, a certain approach is reflected in the practice of national courts. Thus, in accordance with the position of the Supreme Court, public order should be understood as the rule of law of the state and certain principles and guidelines that form the basis of its existing system (concerning its independence, integrity, sovereignty, and inviolability and basic constitutional rights, freedoms, guarantees, etc.).[22] The international public order of any country includes the fundamental principles and principles of justice, the morals that the state wishes to protect even when it is not directly related to the state itself; rules that ensure the fundamental political, social, and economic interests of the state (rules of public order) – the obligation of a state to comply with its obligations to other states and international organisations. These are the unchanging principles that express the stability of the international system: including the sovereignty of the state, non-interference in the internal affairs of states, non-violation of territorial integrity, and so on.

According to the position of the Supreme Court, it is stated that the legal concept of public order exists to protect the state from foreign arbitration awards that violate the fundamental principles of justice and judicature in the state. These provisions are intended to establish a legal barrier to decisions taken contrary to the fundamental procedural and substantive principles of public and state order. They are also designed to prevent the possibility of recognising and authorising the execution of decisions related to the corruption or unacceptable ignorance of arbitrators.[23]

An unjustified refusal to grant permission to enforce a decision of the ICA Court is a kind of blocking of the decision and is an artificial regulatory barrier, which is absolutely unacceptable from the point of view of international law. This block will not only not meet the objectives of international arbitration but will also violate the legal rights that this arbitral award may actually grant to the claimant in other countries.

Refusal to recognise and grant permission for enforcement on the territory of Ukraine of the arbitral award will violate part one of Art. 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, will interfere with the claimant's ownership of the awarded funds (decision in the case of *Stran Greek Refineries and Stratis Andreadis v. Greece* of 9 December 1994, Series A, no. 301-B).

The reservation on public order in general is formulated in international conventions. In particular, Art. 6 of the UN Convention on the Law Applicable to the International Sale of Goods of 15 June 1995 states that in each of the contracting states, the application of the law defined by this Convention may be excluded for reasons of public order. The same rule is laid down in Art. 18 of the UN Convention on the Law Applicable to Contracts for the International Sale of Goods of 22 December 1986. Thus, the main task of the reservation on public order in international law is to resolve conflicts between different countries.

The object of the reservation on public order is international private law relations, and the subject is non-application of foreign law, which is chosen to regulate civil relations with a foreign element, if its application violates the public order of the state. In this case, the reservation on public order will regulate an independent sphere of public relations, which does not depend on the sphere of interstate relations.

22 Resolution of the Civil Court of Cassation of the Supreme Court of 29 November 2018 in case no 760/5924/17 on the application of the Limited Liability Company 'CITIPORT' on the recognition and granting of permission to enforce the decision of the International Commercial Arbitration Court at Trade-Industrial Chamber of Ukraine of 21 January 2016 in the case of AU no 611r/2015.

23 Resolution of the Civil Court of Cassation of the Supreme Court of 5 September 2018 in case no 761/46285/16-c on the claim of the Joint-Stock Company 'Avia-FED-Service' to grant permission to enforce the decision of the International Commercial Arbitration Court at the Chamber of Industry of the Russian Federation of 3 October 2016 in case no 300/2015.

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Art. 12 of the Law of Ukraine 'On Private International Law' stipulates that a rule of law of a foreign state is not applied in cases where its application leads to consequences that are clearly incompatible with the principles of law and order (public order) of Ukraine.[24] In such cases, the law that has the closest connection with legal relations is applied, and if such right cannot be defined or applied, the law of Ukraine is applied. If the court considers the disputed legal relationship on the basis of an agreement between the parties, the public order of this state is not directly affected. In view of the above, a reference to a breach of public order may take place only in cases where the execution of a foreign arbitral award is incompatible with the foundations of the rule of law of the state.[25]

A clearer approach to the understanding of 'public order' is reflected in the dissenting opinion of the judge, which states that the definition of 'public order' should take into account the recommendations of the Association of International Law on Public Order, adopted in New Delhi in 2002, which state that the finality of arbitral awards in ICA should be respected except in exceptional circumstances.[26]

According to para. 1 (d) of these recommendations, the international public order of any state includes:

(I) the fundamental principles of justice or morality which the state wishes to protect, even if it has not been directly involved in the dispute;

(II) rules designed to serve the fundamental political, social, or economic interests of the state, known as *lois de polis* or 'rules of public order'; and

(III) the duty of a state to comply with its obligations to other states or international organisations.

A breach of public order will occur if the recognition and enforcement of a foreign arbitral award in a particular case are so contrary to national law that it is inadmissible under national law.

Under this approach, foreign arbitral awards, the enforcement of which may conflict with the mandatory rules of the national law of the country where enforcement is sought, or with the rules of international treaties of such a country, are recognised as contrary to public order and are not enforceable.[27]

5 CONCLUSIONS

Thus, it is clear that the rules of the New York Convention, although they contain exclusive grounds for refusing to recognise and enforce foreign arbitral awards, the national laws and courts of the member states regulate this issue, taking into account the specifics of their own legal systems. This is especially true regarding approaches to the definition and practice of public order as grounds for refusing to recognise and enforce an ICA award. We believe that

24 Iryna Izarova, 'Strengthening Judicial cooperation in civil matters between the EU and neighboring countries: the example of Ukraine and the Baltic states' (2019) 12 (2) Baltic Journal of Law & Politics 115-133. https://doi.org/10.2478/bjlp-2019-0014

25 Resolution of the Civil Court of Cassation of 5 September 2018 in case no 761/46285/16-t <http://reyestr.court.gov.ua/Review/76502952> accessed 16 October 2021.

26 Opinion of a judge of the First Judicial Chamber of the Civil Court of Cassation in the Supreme Court Karpenko SO from 27 March 2019 in case no 756/618/14-c.

27 Separate opinion of the Judge of the First Judicial Chamber of the Civil Court of Cassation as a part of the Supreme Court Karpenko SO dated 27 March 2019 in case no 756/618/14-t <http://reyestr.court.gov.ua/Review/82885459> accessed 16 October 2021.

the only way to overcome this inconsistency is still a unified approach to understanding 'public order' in all member states of the New York Convention and a clearer international regulation of this issue.

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CASE NOTE

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Case Note

THE RULE OF LAW PRINCIPLE IN THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

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Keywords: *rule of law, constitutional state, human rights principle of proportionality, direct action of norms of the Constitution of Ukraine, Constitutional Court of Ukraine*

ABSTRACT

Background: *The Constitutional Court of Ukraine and courts of general jurisdiction play one of the main roles in the application of the rule of law. The article is devoted to the study of the constitutionalisation of the principle of the rule of law, as well as its constituent elements, in particular, the principle of legal certainty, proportionality, and direct action of the Constitution of Ukraine. The article analyses the legal positions of the Constitutional Court of Ukraine on the content of the above elements of the rule of law. It is emphasised that the principle of proportionality is fundamental to defining the limits of human rights. The content of this fundamental principle is manifested in the proportionally reasonable relation between the purpose of restricting a certain human right and the means used by the state to limit it. In addition, it is noted that the principle of direct action of the Constitution as an element of the rule of law has limited effect and relates mainly to provisions on human and civil rights and freedoms, as well as the provisions of new procedural codes introducing a novelty, which are generally perceived positively.*

Methods: *The paper used the following methods of analysis and synthesis to examine the main approaches to the definition of the rule of law and its individual elements: the system-structural method, which allowed us to give a structural description of the principle of the rule of law, as well as to analyse the content of its elements, and the logical-legal method, which provided an opportunity to clarify the content of the legal positions of the Constitutional Court of Ukraine on the interpretation of the rule of law.*

Results and Conclusions: *Theoretical and practical approaches to substantiating the nature of the rule of law and the content of its structural elements in the legal positions of the Constitutional Court of Ukraine were developed and analysed.*

1 INTRODUCTION

The rule of law principle is the fundamental principle that guides the Constitutional Court of Ukraine in exercising constitutional control and is embodied in the principle of the rule of the constitution.[5] In particular, the Constitutional Court of Ukraine emphasises the latter thesis, pointing out that by adopting the Law of Ukraine 'On the All-Ukraine Referendum', the Verkhovna Rada of Ukraine of the sixth convocation went beyond its constitutional powers, which is inconsistent with the rule of law. The Constitution of Ukraine is of the

5 As Yu.Todyka stated in this regard, 'Consideration of the rule of law outside the rule of the Constitution and laws – is a way to lawlessness and permissiveness, and recognition only of the rule of law outside the systematic understanding of the rule of law – is a way to accept unjust, inhumane, undemocratic laws, other normative legal acts' (Yu Todyka, *Fundamentals of the constitutional system of Ukraine* (Fact 1999) 67-68).

highest legal force. Laws and other normative legal acts are implemented according to the Constitution of Ukraine and must meet its norms by resolving issues in the constitutional petition.

Let us now consider the characteristics of the rule of law principle.[6]

2 THEORETICAL FUNDAMENTALS OF UNDERSTANDING THE PRINCIPLE OF THE RULE OF LAW

It is generally accepted that the classical justification of the rule of law principle was made by a well-known English lawyer, A. V. Dicey, in the work *Introduction to the study of constitutional law* (1907). In his opinion, the basis of this principle is found in three provisions: 1) the absence of state arbitrariness; 2) the subordination of each to the ordinary law applied by the ordinary courts; 3) the general norms of constitutional law form the result of the common law of the state.[7]

According to Dicey, the first element is explained by the fact that 'no person can be punished and cannot pay personally or with his/her wealth other than for a violation of the law, which is confirmed by ordinary law before ordinary courts'. In this sense, 'the rule of law is opposed to any system of government based on the use of broad, arbitrary and discretionary restrictive powers by those in power'.[8] The second element of the rule of law principle, according to Dicey, requires that 'everyone obey the common law applied by ordinary courts'.[9] Dicey believed that the third element of the rule of law involves the recognition of general rules of constitutional law as a result of the common law of the state, which reflects the difference between the English constitution based on court decisions and written constitutions of other European states.[10]

According to F. Hayek, the general nature, equality, and certainty of the law, as well as the fact that the discretionary powers of administrative bodies to apply coercive measures (administrative interference with individuals and their property) can always be challenged in court, constitute in practice 'the very essence of the matter, the decisive point on which it depends whether the rule of law prevails or not'.[11]

In modern legal literature, you can find many different definitions of the rule of law. But they all come down to two basic concepts of the rule of law – 'formal' and 'material'. The peculiarity of the material component is that it includes requirements for the content of the law (as a rule, it must be based on such fundamental legal and moral principles as freedom, equality, and justice); and the peculiarity of the formal is that it focuses on the external form of legality.[12]

6 Judgment of the Constitutional Court of Ukraine of 26 April 2018 no 4-r / 2018 in the case on the constitutional petition of 57 people's deputies of Ukraine on the compliance of the Constitution of Ukraine (constitutionality) with the Law of Ukraine 'On All-Ukrainian Referendum' ≤https://zakon.rada.gov.ua/laws/show/v004p710-18#Text> accessed 10 November 2021.

7 A Dicey, *Fundamentals of public law in England. Introduction to the study of English constitutions* (Type of. comrade ID Sitina 1907) 212-231.

8 Ibid. 209-210.

9 Ibid. 216-217.

10 Ibid. 219-220.

11 B Leoni, *Freedom and the law* (IRISEN 2008) 308.

12 Tetiana Slin'ko, Yevhenii Tkachenko, 'Constitutional law and the constitutionality criterion of state bodies' acts' (2020) Band 3 Wissenschaftlich-Praktischer Sammelband zum 10-jährigen Jubiläum der DUJV 70-90; Iu Barabash, B Mokhonchuk, *The principle of the law-governed state in the constitutional doctrine of Ukraine. A new way to law* (Balja Publishing 2021) 162; H Berchenko, A Maryniv, S Fedchyshyn, 'Some Issues of Constitutional Justice in Ukraine' (2021) 2 Access to Justice in Eastern Europe 128-145; T Slinko, O Uvarova, 'Freedom of Expression in Ukraine: (Non) sustainable Constitutional Tradition' (2019) 9(3) Baltic Journal of European Studies 25-42.

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B. Tamanaha, analysing the various definitions of the rule of law, distinguishes its formal and material components. Among the formal concepts, Tamanaha identifies such varieties as 1) government based on law, 2) formal legality, and 3) legality in combination with democracy, and among the material, he indicates 1) individual rights, 2) the right to dignity and/or justice, and 3) the welfare state.[13]

L. Fuller, in his famous work, *The Morality of Law* (2007), which is devoted to the analysis of external moral characteristics of natural law, emphasises the eight procedural requirements for the rules of law: 1) the existence of general rules of law; 2) promulgation and publication of such norms; 3) prohibition of retroactive effect of laws; 4) clarity and legibility of laws; 5) avoiding contradictions of laws; 6) a ban on passing laws that require the impossible things; 7) stability of laws over time; 8) correspondence between official actions and proclaimed rules. Failure in any of these eight areas means not just a bad legal system but leads to a situation that cannot be called a legal system at all.[14]

M. Radin formulates these requirements in a more generalised form: universality, general knowledge, prospects, clarity, consistency, conformity, stability, and congruence of legislation.[15]

R. Summers emphasises that the rule of law ideal is the empowered governance, at least in the sphere of basic social relations between citizens and between citizens and their government, as far as is possible through published formal norms that are properly interpreted and applied. Official law is subject to rules defining the manner and limits of its application, as well as sanctions or other compensation by citizens and officials for violations of norms applied only by impartial and independent courts or similar tribunals after proper notification and hearing.[16]

In his understanding of the rule of law, P. Gauder also distinguishes its material and formal concepts, emphasising equality as a key component:

> 1) The rule of law has a moral value, because it requires the state to treat subjects as equals ("the thesis of equality"). In particular, the rule of law promotes vertical equality between officials and ordinary people and horizontal equality among the latter.
>
> 2) States adhere to the rule of law to the extent that they meet three conditions ("three principles" thesis):
>
> Settlement: officials are reliably restricted in the use of coercive state power only when the latter is applied with due purpose and on the basis of a reasonable interpretation of specific rules of law.
>
> Publicity: subjects of law have the opportunity to familiarize themselves with the rules referred to by officials to justify coercion; upon due request, the officials explain their application in a particular case of rules that allow coercion; officials invite those who are coerced to provide arguments regarding the application of legal rules in their situation; the public can hear about these considerations and arguments in their favor.
>
> Generality: neither the rules under which officials exercise coercion nor the exercise by officials of the discretion provided for in those rules constitute an unjustified difference between subjects of law; the difference is unjustified if it is not justified on public grounds for all concerned.[17]

T. Bingham believes that the requirements of the rule of law apply to both public and private persons and provide: 1) accessibility of the law, i.e., its clarity, legibility, and predictability;

13 B Tamanaha, *The rule of law: history, politics, theory* (Kiev-Mohyla Academy 2007) 106-107.
14 Lon L Fuller, *The Morality of Law* (IRISEN 2007) 53.
15 MJ Radin, 'Reconsidering the Rule of Law' (1989) 69 Boston University Law Review 785.
16 RS Summers, 'A Formal Theory of the Rule of Law' (1993) 6(27) Ratio Juris 127-142.
17 P Gauder, The rule of law in the real world (Pravo 2018) 33.

2) settlement of human rights issues according to the rule of law, and not on the basis of discretion; 3) equality before the law; 4) exercise of power in a lawful, fair and reasonable manner; 5) protection of human rights; 6) providing means for resolving disputes without excessive material costs or excessive duration; 7) justice of the court; 8) observance by the state of international legal obligations and obligations arising from national law.[18]

S. Pogrebnyak also highlights the formal and material aspects of the rule of law. In particular, the last aspect of the rule of law provides for the following requirements: 1) the rules of law must meet the standards of fundamental human and civil rights and freedoms; 2) the rules of law must comply with the general principles of law, other principles of natural law.[19] As the Constitutional Court of Ukraine (CCU) noted in the case of a milder sentence imposed by a court, the rule of law requires the state to implement it in law-making and law enforcement activities, namely, the content of laws should be permeated primarily by the ideas of social justice, freedom, equality, and so on.

A report by the Venice Commission on the rule of law of 25-26 March 2011 states that the rule of law is a key feature of the state in many constitutions of the former socialist countries of Central and Eastern Europe and is much less common in the constitutions of old democracies. Despite all this, a consensus has been reached in modern Europe on the key importance of the concept of rule of law and on the elements covered by it. These elements are not only formal but also material (substantial).

The experts of the Venice Commission include the main material and formal elements of the principle of the rule of law:

> legality (rule of law), which applies to individuals, as well as to government agencies, public and private entities. Legal certainty, which means the availability of the text of laws, the accuracy and clarity of their content. Prohibition of arbitrariness, in which discretionary powers, although necessary for the exercise of the full range of functions of power in today's complex societies, these powers should not be exercised arbitrarily. Independent and impartial courts provide access to justice. Respect for human rights. Prohibition of discrimination and equality before the law.[20]

3 COMPONENTS OF THE PRINCIPLE OF THE RULE OF LAW IN THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

The principle of the rule of law and its components have been repeatedly considered by the Constitutional Court of Ukraine (CCU). For example, the Court stated that in accordance with Part 1 of Art. 8 of the Constitution of Ukraine, Ukraine recognises and enacts the rule of law. The rule of law is the supremacy of law in society (p. 4.1).[21]

The Court also identified the material components of the rule of law, namely, that hat the state must implement the rule of law in law-making and law enforcement actions, especially in laws infused by the ideas of social justice, freedom, equality, etc. And since these categories

18 T Bingham, *The Rule of Law* (Penguin Books 2010) 37-132.

19 S Pogrebnyak, *Fundamental principles of law (substantive characteristics)* (Pravo 2008) 148-178.

20 Rule of Law Report no 512/2009, approved by the Venice Commission at the 86th plenary session of 25-26 March 2011, Law of Ukraine 10, 168-184.

21 Judgment of the Constitutional Court of Ukraine of 2 November 2004 no 15-rp / 2004 (case on imposition of a milder punishment by a court) <https://zakon.rada.gov.ua/laws/show/v015p710-04#Text> accessed 10 November 2021.

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are not only legal but also moral, the CCU concluded that the law is not restricted only to law-making but also includes other social regulators, including morals, traditions, customs, etc., achieved and legitimised by society. That is why such a definition of the law does not provide a basis for its identification with the law, which can sometimes be unfair, including restricting the freedom and equality of the individual.

In another decision, the CCU defined the rule of law as a mechanism to ensure control over the use of state power and protect people from arbitrary actions of state power. The Court stressed that the principle of the rule of law is a normative ideal towards which every system of law should strive, and it should be considered a universal and integral principle of law, in particular, in the context of its fundamental components: the principle of legality, the principle of separation of power, the principle of democracy, the principle of legal certainty, and the principle of a fair trial (p. 4).[22]

Thus, the fundamental component of the material concept of the rule of law is respect for human rights. As T. Allan correctly points out,

> the core of the analysis of the rule of law as an ideal of the constitutional system of government is a clearly defined concept of law. From this point of view, human dignity and individual autonomy are basic values and, therefore, integral prerequisites of any law: accordingly, we reject the "positivist" understanding of law as a certain condition or requirement at the state level imposed by any power source, regardless of the nature of his rise.[23]

After all, human rights are an integral part of law – their existence outside the law is impossible, just as law cannot exist without human rights. Through the catalogue of human rights, and above all constitutional rights, the ideas of equality, freedom, and justice are embodied and guaranteed.

This idea is also embodied in the national law. In particular, part 1 of Art. 6 of the Code of Administrative Procedure states that the court in decision-making on the case is guided by the principle of the rule of law, according to which, in particular, human rights and freedoms are recognised as the highest values and determine the content and direction of the state.

One of the requirements of the material aspect of the rule of law is the establishment of clear rules for the restriction of human rights in law-making and law enforcement practice. In the practice of the body of constitutional jurisdiction on this issue, the following fundamental ideas have been developed. In particular, the CCU, in the argumentation of the motivating part of its decision, linked the understanding of Part 1 of Art. 29 of the Constitution of Ukraine (right to liberty and security of person) with the rule of law.[24]

To this end, the CCU outlined the content of freedom:

> The Constitutional Court of Ukraine proceeds from the fact that among the fundamental values of an effective constitutional democracy is freedom. The existence of freedom inside the person is one of the prerequisites for his/her development and socialization. The right to liberty is an inalienable constitutional human right and gives the opportunity to freely choose behavior and comprehensive development, to act independently in accordance with own decisions and intentions, to set priorities,

22 Judgment of the Constitutional Court of Ukraine of 20 June 2019 no 6-r / 2019 <https://zakon.rada.gov.ua/laws/show/v006p710-19#Text> accessed 10 November 2021.

23 T Allan, Constitutional justice. *Liberal theory of the rule of law* (Kyiv-Mohyla. Acad. 2008) 14-15.

24 Judgment of the Constitutional Court of Ukraine 1 June 2016 p. №2-рп/2016 https://zakon.rada.gov.ua/laws/show/v002p710-16#Text accessed 10 November 2021.

> to do everything not prohibited by law, to move freely throughout the territory of the state, choose a place of residence, etc. The right to liberty means that a person is free in his or her activities from outside interference, except for the restrictions established by the Constitution and laws of Ukraine (p. 2.3). [25]

The court concluded that in accordance with Art. 8 of the Basic Law (rule of law), this principle provides for judicial control over interference with the right of everyone to liberty – the constitutional human right to judicial protection is a guarantee of all human and civil rights and freedoms (p. 2.5[26]).

The restrictions on the exercise of constitutional rights and freedoms cannot be arbitrary and unjust – they must be set exclusively by the Constitution and laws of Ukraine, pursue a legitimate goal, be conditioned by the public need to achieve this goal, be proportionate and reasonable, and are obliged to show such a legal regulation that will allow a person to achieve a legitimate goal with minimal interference in the exercise of this right or freedom and not to violate the essential content of such a right.

Thus, one of the principles that are fundamental to defining the limits of human rights is the principle of proportionality. The content of this fundamental principle is manifested in a proportionally reasonable relation between the purpose of restricting a certain human right and the means used by the state to limit it. S. Shevchuk emphasises the origin of the principle of proportionality from the principle of the rule of law and the concept of liberal democratic statehood, pointing out that in the most general form, the principle of proportionality requires that the measure taken by the state be proportional to the purpose of this measure. According to Shevchuk, this principle is aimed at protecting the rights and interests of citizens *vis-à-vis* public authorities, requiring that state intervention through the adoption and application of legal acts meet its purpose.[27]

According to S. Pogrebnyak, this principle is aimed at ensuring a reasonable balance of private and public interests in the legal regulation, according to which the goals of restrictions should be significant, and the means to achieve them should be reasonable and minimally burdensome for persons whose rights are limited.[28]

Representatives of the science of constitutional law in Germany understand the principle of balance as one of the manifestations of a more general principle, namely, the principle of proportionality. Thus, R. Alexi believes that the principle of proportionality includes three elements (subprinciples): admissibility, necessity, and proportionality in its narrow sense, which together express the idea of optimisation. The interpretation of constitutional rights in light of the concept of proportionality means their interpretation as prerequisites for optimisation, i.e., as principles, not just ordinary norms. As a prerequisite for optimisation, principles are norms that require that everything that is highly possible be given factual and legal expression. The principles of admissibility and necessity contribute to optimisation by determining what is possible in reality. Thus, they express the idea of Pareto optimality. The third subprinciple – proportionality in its narrow sense – relates to the concept of optimisation in terms of determining the legal possibility. Since legal opportunity is based on competition principles, achieving balance is nothing more than optimising the connection between these competing principles. Therefore, the third sub-principle can be expressed as

25 Judgment of the Constitutional Court of Ukraine 1 June 2016 p. №2-рп/2016 https://zakon.rada.gov.ua/laws/show/v002p710-16#Text accessed 10 November 2021.

26 Judgment of the Constitutional Court of Ukraine 1 June 2016 p. №2-рп/2016 https://zakon.rada.gov.ua/laws/show/v002p710-16#Text accessed 10 November 2021.

27 S Shevchuk, *Judicial law-making: world experience and prospects in Ukraine* (Abstract 2007) 315-316.

28 Pogrebnyak (n 19) 204.

the following rule: the greater the degree of dissatisfaction or violation of one principle, the more important it is to adhere to another.[29]

In its practice, the CCU has repeatedly defined the content of the principle of proportionality and, based on the understanding of its content, has recognised the norms of law that were the subject of its consideration as unconstitutional.[30] In particular, the Court noted that for compliance with the constitutional principles of social and legal states, the rule of law requires the implementation of legislative regulation of public relations on the basis of justice and proportionality, taking into account the obligation of the state to provide decent living conditions for every citizen of Ukraine (p. 2.1).[31]

The CCU also defined the understanding of the principle of proportionality, stating that when introducing additional responsibilities for citizens related to the right to freedom of association, the legislator must ensure a fair balance between the interests of persons exercising their right to freedom of association, the associations themselves, and the interests of national security and public order, public health, or the protection of the rights and freedoms of others. Based on this, the provisions of part one Art. 36 of the Basic Law of Ukraine allows certain legislative restrictions on the exercise of this constitutional right. The need for the legislator to apply the relevant restrictions on the constitutional right to freedom of association must be carefully weighed and supported by convincing grounds that, under any circumstances, preference will be given to measures with minimal restrictive effects and that these restrictions will apply in a narrow area (p. 3.1)[32].

In another decision, the CCU stressed that the right to liberty and security of person may be restricted, but such restriction must be exercised in compliance with constitutional guarantees of protection of human and civil rights and freedoms, principles of justice, equality, and proportionality, ensuring a fair balance of interests of the individual and society, on the basis and in the manner prescribed by the laws of Ukraine, taking into account international law, the position of the European Court of Human Rights, and the reasoned decision of the court (p. 2.2)[33].

In the same judgment, the Court noted that the scope of the right to an appellate review, determined by law, should guarantee a person the effective exercise of the right to judicial protection to achieve the objectives of justice, ensuring the protection of other constitutional

29 R Alexi, 'Balance, constitutional control and representation' (2006) 2 Comparative Constitutional Review 113; S Maksimov, Robert Alexi, 'Constitutional rights and constitutional control' (2015) Volume 1-2 Philosophy of Law and General Theory of Law 446-456.

30 Judgment of the Constitutional Court of Ukraine in the case on the constitutional petition of 56 people's deputies of Ukraine on the constitutionality of the provision of the second paragraph of the first part of Art. 39 of the Law of Ukraine 'On Higher Education' (case on the age limit of a candidate July 2004 no 14 rp / 2004 <https://zakon.rada.gov.ua/laws/show/v014p710-04#Text> accessed 10 November 2021; Judgment of the Constitutional Court of Ukraine in the case of the constitutional appeal of Kirovogradoblenerho Open Joint-Stock Company on the official interpretation of the provisions of Part 8 of Art. 5 of the Law of Ukraine 'On Restoration of Debtor's Solvency or Recognition of Debtor's Bankruptcy' no 5rp / 2007 <https://zakon.rada.gov.ua/laws/show/v005p710-07#Text> accessed 10 November 2021; Judgment of the Constitutional Court of Ukraine of June 1, 2016 no 2-rp (case on judicial control over the hospitalization of incapacitated persons in a psychiatric institution) <https://zakon.rada.gov.ua/laws/show/v002p710-16#Text> accessed 10 November 2021, and others.

31 Judgment of the Constitutional Court of Ukraine in the case on constitutional petitions of 49 people's deputies of Ukraine, 53 people's deputies of Ukraine and 56 people's deputies of Ukraine on compliance of the Constitution of Ukraine (constitutionality) with para. 4 of section VII 'Final Provisions' of the Law of Ukraine 'On State Budget of Ukraine 2011' 26 December 2011 no 20-rp / 2011 <https://zakon.rada.gov.ua/laws/show/v020p710-11#Text> accessed 10 November 2021.

32 Judgment of the Constitutional Court of Ukraine 6 June 2019 № 3-r/2019 https://zakon.rada.gov.ua/laws/show/v003p710-19#Text accessed 10 November 2021.

33 Judgment of the Constitutional Court of Ukraine 13 June 2019 № 4-r/2019 https://zakononline.com.ua/documents/show/380283___380348 accessed 10 November 2021.

rights and freedoms. Restriction of access to the appellate court as a component of the right to judicial protection is possible only with the mandatory observance of constitutional norms and principles, namely, the priority of protection of fundamental human and civil rights and freedoms, as well as the rule of law. Such an appellate review procedure, which would ensure the effectiveness of the right to judicial protection at this stage of the proceedings, in particular, would allow the Court to restore the violated rights and freedoms of the person and prevent negative individual consequences of a possible miscarriage of justice (p. 2.4)[34].

Thus, in the opinion of the CCU, the provisions of the second part of Art. 392 of the Code regarding the impossibility of a separate appeal against the decision of the court of first instance to extend detention do not guarantee a person effective exercise of his/her constitutional right to judicial protection, do not ensure a fair balance of interests of the individual and society and therefore contradict the requirements of Arts. 1, 3, 8, 21, 29, part one of Art. 55 of the Basic Law of Ukraine (p. 2.4)[35].

Thus, the purpose of proportionality as a component of the rule of law is manifested in limiting state interference in human rights and balancing public and private interests, so the goals of human rights restrictions must be substantial, and the means to achieve them must be reasonable and minimally burdensome for those whose rights are limited.

As mentioned above, one of the elements of the formal concept of the rule of law is the principle of legal certainty. The CCU also reveals the content of legal certainty in its legal positions. From the content of the constitutional principles of equality and justice follows the requirement of certainty, clarity, and unambiguity of the rule of law. Otherwise, uniform application is not ensured, unrestricted interpretation in law enforcement practice is not precluded, and this inevitably leads to arbitrariness (p. 5.4).[36]

The principle of legal certainty as an element of the rule of law states that the restriction of fundamental human rights and the implementation of these restrictions in practice is possible only if the predictability of the application of legal norms established by such restrictions is ensured. In the Court's view, this means that the restriction of any right must be based on criteria that will enable a person to distinguish lawful conduct from unlawful conduct and to anticipate the legal consequences of his/her conduct (p 3.1).[37]

4 THE RULE OF LAW AND THE PRINCIPLE OF DIRECT ACTION OF THE CONSTITUTIONAL NORMS

One of the key elements of the rule of law is the principle of direct action of the constitutional norms. It was embodied in the third part of Art. 8 of the Basic Law of Ukraine, which states

34 Judgment of the Constitutional Court of Ukraine 13 June 2019 № 4-r/2019 https://zakononline.com.ua/documents/show/380283___380348 accessed 10 November 2021.

35 Judgment of the Constitutional Court of Ukraine 13 June 2019 № 4-r/2019 https://zakononline.com.ua/documents/show/380283___380348 accessed 10 November 2021.

36 Judgment of the Constitutional Court of Ukraine in the case on the constitutional petition of 51 people's deputies of Ukraine on the constitutionality of the provisions of Art. 92, para. 6 of Section X 'Transitional Provisions' of the Land Code of Ukraine (case on permanent land use) of 22 September 2005 no 5 -rp / 2005 <https://zakon.rada.gov.ua/laws/show/v005p710-05#Text> accessed 10 November 2021.

37 Judgment of the Constitutional Court of Ukraine in the case on the constitutional petition of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights regarding the compliance of the Constitution of Ukraine (constitutionality) with the eighth paragraph of item 8 of part one of Art. 11 of the Law of Ukraine 'On the Police' of 29 June 2010 no 17-rp / 2010 <https://zakon.rada.gov.ua/laws/show/v017p710-10#Text> accessed 10 November 2021.

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that the provisions of the Constitution of Ukraine are the norms of direct action. Thus, recourse to the court for the protection of constitutional rights and freedoms directly on the basis of the Constitution of Ukraine is guaranteed.

The direct action of the norms of the constitution is a multifaceted category and is considered an element of the principle of the rule of law,[38] a legal property of the Constitution of Ukraine,[39] and a constitutional principle or the principle of constitutional order.

In our opinion, the direct action of the Constitution of Ukraine is addressed primarily to ordinary people and allows them to require the state to provide the opportunity using the norm included in the text of the Constitution, and the state is obliged to comply with this requirement. After all, according to Art. 3 of the Basic Law of Ukraine, it is human rights and freedoms and their guarantees that determine the content and direction of the state, and their approval and provision is the main duty of the state. At the same time, the key role in approving the direct action of the Constitution belongs to the court, the appeal to which is guaranteed for the protection of constitutional rights and freedoms (Part 3 of Art. 8 of the Constitution). According to V. Rechytsky, the direct effect of the Constitution means that the implementation of the Basic Law must be ensured both in the presence and in the absence of indirect legislation. And this takes place even when the Constitution of Ukraine directly indicates such indirect legislation (laws). If there is no relevant procedural law, the necessary actions must be taken on the basis of the Constitution. 'Straight' means without an intermediary at the level of law.[40]

The CCU adheres to a broad approach to the interpretation of the principle of direct effect of the Constitution and tends to consider all provisions of the Constitution of Ukraine, including those on the status of special entities – public authorities and their officials, specific subjects of power – as having a direct effect.

Thus, the decision draws attention to the fact that the absence of a legislative procedure for consideration of urgent bills 'cannot be the basis for non-compliance with the second part of Art. 93 of the Constitution of Ukraine since the norms of the Constitution of Ukraine are the norms of direct action (part three of Art. 8 of the Constitution of Ukraine)' (p. 3)[41]. In a decision of January 25, 2009 no. 2-rp / 2009, the Court granted the provisions of the Constitution of Ukraine, which establish the powers of the President of Ukraine and other subjects of foreign policy, the nature of the rules of direct action (p. 3.1)[42]. The Court tends to consider all provisions of the Constitution of Ukraine, including those devoted to the status of special subjects – public authorities and their officials, specific subjects of power – as having direct effect.

In another decision, the Court granted the provisions of the Constitution of Ukraine, which establish the powers of the President of Ukraine and other subjects of foreign policy, the nature of the rules of direct action (p. 3.1)[43]. According to the Basic Law of Ukraine, the provision 'everyone has the right to legal aid' (Part 1 of Art. 59) is a rule of direct action

38 Pogrebnyak (n 19).

39 O. Onishchenko, 'Direct effect of the norms of the Constitution of Ukraine' (2004) 5 Entrepreneurship, Economy and Law 90-93; O Nikolskaya, 'Direct effect of the Constitution of Ukraine as its legal property' (2009) 7 Legal Ukraine 40-44.

40 V Butkevych, V Rechytsky, 'Implementation of constitutional reform: the vision of experts' (2015) 4-5 Rights and freedoms and responsibilities of man and citizen. National Security and Defense 44-48.

41 Judgment of the Constitutional Court of Ukraine 28 March 2001 №2-рп https://zakon.rada.gov.ua/laws/show/v002p710-01#Text accessed 10 November 2021.

42 Judgment of the Constitutional Court of Ukraine 25 January 2009 №2-рп/2009 https://zakon.rada.gov.ua/laws/show/v002p710-09#Text accessed 10 November 2021.

43 Judgment of the Constitutional Court of Ukraine 25 January 2009 №2-рп/2009 https://zakon.rada.gov.ua/laws/show/v002p710-09#Text accessed 10 November 2021.

(Part 3 of Art. 8), and even if this right is not provided by relevant laws of Ukraine or other legal acts, a person cannot be restricted in its implementation. This applies, in particular, to the right of a witness to receive legal assistance during interrogation in criminal proceedings and the right of a person to provide explanations in state bodies (p. 4 (case on the right to legal aid))[44]. The direct effect of the norms of the Constitution of Ukraine means that these norms are directly applicable.

Laws of Ukraine and other normative legal acts are applied only in the part that does not contradict the Constitution of Ukraine (p. 2.1)[45].

The ideal of human rights and freedoms was the following decision: 'Constitutional norms could not be applied in resolving the issue of accepting the relevant complaint due to the fact that the Constitution of Ukraine was published on July 13, 1996'. This interpreted human rights and freedoms embodied by the Constitution as a directly applicable right and, at the same time, the source of the Constitution of Ukraine itself, the implementation of which in this part was direct. This interpretation of the Constitution of Ukraine corresponded to the classical notion of the rule of law, according to which human rights are the source and not the consequence of the Constitution.

A notable step aimed at establishing the principle of direct effect of the Constitution of Ukraine in the courts was the legislative amendment, which was reflected in the new edition of Procedural Codes.[46]

Art. 4 7 of the new Code of Administrative Procedure of Ukraine says:

> If a court concludes that a law or other legal act contradicts the Constitution of Ukraine, the court should not apply such law or other legal act, but should apply the norms of the Constitution of Ukraine as norms of direct action. In such a case, the court, after making a decision in the case, appeals to the Supreme Court to resolve the issue of submitting to the Constitutional Court of Ukraine a petition on the constitutionality of a law or other legal act under the jurisdiction of the Constitutional Court of Ukraine. Thus, this norm encourages courts of general jurisdiction to take initiative, responsibility and creativity in the direct implementation of the Constitution of Ukraine in a particular case, and only then apply to the Supreme Court to submit a petition to the Court to resolve the constitutionality of the applicable legal act.

The practical implementation of the direct action of constitutional norms on constitutional rights and freedoms must take into account the different legal nature of civil and political rights and freedoms, on the one hand, and social, economic, and cultural, on the other. The first group of constitutional rights and freedoms interpreted in the literature as 'natural' must be exercised and defended in court under any circumstances, and the full realisation and protection of the second group of rights depend on the socio-economic situation in the country and the financial and material capabilities.

A striking example of the direct effect of constitutional norms on civil and political rights is the implementation by citizens of Ukraine of the guaranteed in Art. 39 of the right to assemble peacefully and weapon-free and to hold meetings, rallies, marches, and demonstrations, regarding which the executive authorities or local self-government bodies should be notified in advance. A law defining the procedural mechanism for exercising this right has not yet been

44 Judgment of the Constitutional Court of Ukraine 30 September 2009 №23-рп / 2009 https://zakon.rada.gov.ua/laws/show/v023p710-09#Text accessed 10 November 2021.

45 Judgment of the Constitutional Court of Ukraine 8 September 2016 № 6-рп https://zakon.rada.gov.ua/laws/show/v006p710-16#Text accessed 10 November 2021.

46 Civil Procedure Code, Commercial Procedure Code and Code of Administrative Procedure of Ukraine, approved by the Parliament of Ukraine on 3 October 2017.

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adopted. On the other hand, the peculiarity of the nature of social, economic, and cultural rights and freedoms was taken into account by the CCU in decisions, according to which 'statutory socio-economic rights are not absolute', 'the exercise of socio-economic human rights largely depends on the situation in states, especially financial one', and 'courts are guided, in particular, by the principle of legality when deciding on social protection cases'.

This principle provides for the application by courts of the laws of Ukraine, as well as normative legal acts of the relevant state authorities – including normative legal acts of the Cabinet of Ministers of Ukraine issued within its competence.

5 CONCLUSIONS

The study allows us to draw the following conclusions. The fundamental principle (criterion of constitutionality of regulations) that governs the Constitutional Court of Ukraine, exercising constitutional control is the principle of the rule of law, which is embodied in the rule of the constitution. In particular, the Constitutional Court of Ukraine emphasises the latter thesis, pointing out that by adopting the Law of Ukraine 'On the All-Ukrainian Referendum', the Verkhovna Rada of Ukraine of the sixth convocation went beyond its constitutional powers, which is inconsistent with the rule of law. The Constitution of Ukraine has the highest level of legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and must meet it by resolving issues raised in the constitutional petition.

Based on the analysis of the works of national and international scholars and the legal positions of the Constitutional Court of Ukraine, it is concluded that the understanding of the criteria of the constitutionality of acts of public authorities should be based on the main material and procedural components of the rule of law (constitutional legality, legal certainty, access to justice, observance of fundamental human freedoms).

It should also be noted that one of the components of the criterion of 'respect for human rights' is the principle of proportionality, which is fundamental in determining the limits of human rights. The content of this fundamental principle is manifested in the proportionally reasonable relationship between the purpose of restricting a particular human right and the means used by the state to limit it.

The following provisions belong to the constitutional and legal mechanisms: a) the norms of direct action in the Constitution are mainly the provisions concerning the constitutional rights and freedoms of man and citizen; b) recourse to the courts directly on the basis of constitutional norms of direct action must be guaranteed, first and foremost, for the protection of human and civil rights and freedoms; c) direct action of the Constitution of Ukraine, if the court concludes that a law or other legal act contradicts the Constitution of Ukraine; d) appeal to the Supreme Court for further decision by the Court on the constitutionality of the relevant act.

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Case Note

REASONABLENESS OF NOTARIAL ACTS AS A COMPONENT OF ENSURING STANDARDS OF LATIN NOTARIES: THE EXPERIENCE OF UKRAINE

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ABSTRACT

Background: *This article is devoted to the study of the rules of notarial acts, the observance of which ensures the reasonableness of notarial acts as exemplified by Ukraine as a state belonging to the countries with Latin notaries. At the same time, the standardisation of Latin notary standards in Ukrainian legislation is associated with certain problems that do not fully reveal the potential of the notary and its functions as a body of undisputed civil jurisdiction. In this regard,*

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the purpose of the work is to determine the components of the procedural mechanism to ensure the reasonableness of notarial acts, identify those shortcomings in their standardisation that lead to litigation, and formulate proposals for further improvement of notarial law on this basis.

Methods: *In the present research, we used the following methods: logical, systemic, specific sociological, hermeneutic, and modelling. It is established that the reasonableness of notarial acts is ensured by compliance with the rules on submission of evidence documents, requests for evidence documents by a notary, the signing of notarial documents, sending documents for examination, the compliance of documents submitted for notarial acts with statutory requests, and clarifying the will of the persons concerned.*

Results and Conclusions: *It is proved that a notarial act issued based on the actual circumstances established within the notarial case, confirmed by the relevant evidence provided by the notarial legislation, should be considered reasonable. The grounds for exercising the powers of a notary to demand documents are determined, and the need to differentiate the order of recovery depending on the subjects in which such information is requested is emphasised. The content of the notary's powers to request documents is clarified, and the conditions under which the exercise of such powers should be considered the notary's duty are determined.*

The necessity of extending the duties of a notary to establish the will and real intentions of the persons concerned to all notarial acts and, in this regard, the standardisation of such a duty as a general rule of notarial acts is substantiated.

It is concluded that the distinction between documents for which the originals are subject to preservation in the notarial file and those that are photocopied then returned to interested persons should be made, taking into account the loss or preservation of their validity and legal significance after said notarial action. The author determines the grounds and conditions for sending a document for examination, which is a procedural action of a notary that can be made only at the initiative or consent of the person who submitted the document. The proposals on the tendencies of standardisation of the content of the requirements of the validity of notarial acts and the consequences of their violation are formulated.

1 INTRODUCTION

Ukraine is one of the countries where a Latin notary has been formed to solve the problem of reducing the number of cases heard by courts and where the special importance of written evidence, which fixes the legal conditions for concluding various transactions, is recognised. In the system of Latin notaries, the resolution with the help of the judiciary of legal conflicts that arise after notarisation should be exceptions because, during the notarial activity, all the conditions for the proper realisation of the rights and interests of individuals and legal entities are created according to the law.

Notarial activity has a preventive character, protecting the rights and legitimate interests of subjects from possible violations in the future, giving notarial documents an indisputable character. As a result of notarisation, civil law relations are given a legal, stable, conflict-free, and predictable nature. The execution of the tasks and functions of a notary is possible only under the condition of a lawful and substantiated notarial act as a legal document that fixes the decision of the notary in a particular notarial case. Violation of the requirements of reasonableness undermines the validity of the notarial act, makes it impossible to protect the rights of interested persons, and entails the emergence of appropriate litigation.

The disposition of the notarial act is preceded by a set of procedural actions of the notary aimed at verifying the actual composition. These duties are performed by the notary within

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the requirements of the notarial procedural form, which creates a specific legal mechanism that can guarantee the compliance of the conclusions enshrined in the notarial act – the true circumstances of the notarial case. The components of this mechanism are several rules of notarial acts provided by the Law of Ukraine 'On Notaries'[2] (hereinafter – the Law), which has not yet received sufficient scientific attention in Ukrainian legal studies.

A significant problem of modern law enforcement is the lack of proper legal regulation of the concept and the content of the reasonableness of a notarial act in Ukraine, as well as insufficient legal regulation of rules concerning the requisition of documents by a notary and establishing the will and true intentions of notaries, for example. These rules, their interaction, and their interdependence are the object of this research.

The purpose of the work is to determine the components of the procedural mechanism used to ensure the validity of notarial acts, to identify shortcomings in their standardisation that lead to litigation, and, on this basis, to formulate proposals for further improvement of the notarial legislation of Ukraine.

The need to address this goal has led to the use of general scientific and special research methods. First of all, it is a question of applying the logical method, which allows us to analyse the essence and purpose of the rules being researched, along with their interrelation and interaction. In addition, the specific sociological method allowed us to substantiate scientific conclusions based on acquaintance with the case law, and the hermeneutic method and modelling method were used as a basis for formulating proposals for changes in notarial law.

2 THE CONTENT OF THE PRINCIPLE OF REASONABLENESS OF NOTARIAL ACTS

A clear division of functions between the participants in the notarial process and their public law nature necessitate delineating the actions taken during the consideration of a notarial case and its results. A notarial act-document is a legal form endowed with procedural decisions made by a notary in the exercise of his or her powers. A notarial act-document is a procedural decision of a notary on the application of law in a particular legal situation, with the participation of certain persons who are subject to the legal force of this act.[3] Notarial act-documents are legally binding, as notaries act on behalf of the state. Only the court can cancel notarial acts. The official nature of these documents is due to the fact that they are issued by specially authorised entities, and their essence, structure, and details are enshrined in law.

When considering a notarial case, notaries and other persons authorised by law to perform notarial acts shall act within the framework of a notarial procedural form, compliance with the requirements of which ensures the issuance of lawful and reasonable notarial acts. Compliance with the requirement of reasonableness allows people in the future, outside the notarial case, to consider a notarial act as written evidence, created in advance in a calm atmosphere with the assistance of the parties.[4]

Notarial act-documents have the same legal value as a court decision, with the following differences. First, their legal effect is formed and distributed only in the field of undisputed legal relations. Therefore, they secure not the notary's instructions but the officiality and state recognition of the content of the will of the interested persons – participants in the notarial act, as given by the notary. Secondly, as a result, a notarial act-document has legal force and creates certain legal consequences until the interested parties take the initiative to change or

2 Law of Ukraine 'On Notaries', Bulletin of the Verkhovna Rada of Ukraine (VVR) (1993) No 39, 383.
3 VV Komarov, VV Barankova, Notary (Kharkiv Law 2019) 143.
4 J-F Piepu, 'Professional notarial law' in J-F Piepu, M Jagr (eds), Lawyer (Jurist 2001) 116.

cancel it. In this case, the decision of the notary is preceded by the establishment of the range of facts provided by the rule to be applied in the case; the collection, study, and evaluation of evidence documents in the case; checking the compliance of the performed actions with the requirements of the law and the actual intentions of the parties, etc. Despite these specifics, notarial act-documents, like court decisions, record the results of law enforcement, which, in turn, provides for the opportunity of the existence of the principle of reasonableness of notarial acts in the notarial process.[5]

The following proposals have been formulated in the literature to determine the main elements of the reasonableness of notarial acts: a notarial act is reasonable if the notary comprehensively, fully, objectively, and directly clarifies the actual circumstances of the notarial act, and its conclusions correspond to the actual relationship of the parties.[6]

We believe that the immediacy of the facts is part of the rules of another principle of the notarial process – the principle of immediacy, and within it, given the specifics of law enforcement in the notarial process, it is advisable to separate the requirements of the immediacy of evidence and establishing circumstances of legal significance. In addition, for a notarial act-document, the requirement of conformity of the notary's conclusions to the actual relationship of the parties is somewhat premature because within a notarial case (as opposed to civil litigation), legal relations of the parties do not exist – they only acquire a certain notarial document (for instance, a contract of sale). Thus, based on the specifics of the implementation of notarial powers and the scope of notarial jurisdiction, in the notarial process, the validity of notarial acts is that the notary's conclusions must correspond to the established circumstances, as well as the intentions and will of interested parties and not the relations between them, which do not exist at the time. It is the reasonableness of the notarial act that ensures its indisputable nature, as a result of which, as noted in the literature, it is much more difficult to refute its content than other actions committed in simple writing.[7]

The mechanism of implementation of the principle of reasonableness of notarial acts is provided by the need to comply with several general rules of notarial acts, which oblige the notary to verify the existence of certain facts for their commission and the issuance of a certain notarial act-documents. These, in our opinion, include: the submission of evidence documents (Part 1 of Art. 42 of the Law), the request of evidence documents by a notary (Art. 46 of the Law), the signing of notarial documents (Art. 45 of the Law), sending documents for examination (Part 2 of Art. 42 of the Law), establishing requirements for documents submitted for notarial acts (Art. 47 of the Law), clarifying the will of interested persons (Part 2 of Art. 54 of the Law, Chapter 6, Section 1 of the Procedure performance of notarial acts by notaries of Ukraine [hereinafter – the Procedure]). Identifying problematic aspects of their application will make it possible to formulate proposals for improving notarial legislation in this area.

3 REQUEST OF EVIDENCE DOCUMENTS BY A NOTARY

Submission by the interested person to the notary of all necessary documents for the performance of a notarial act is the most important condition for the correct resolution of

5 VV Komarov, 'Principles of the notarial process' (2003) 1 Small Encyclopedia of Notaries 6; IM Cherevatenko, 'The principle of legality and validity of notarial acts on the certification of undisputed rights' (2020) 1 Scientific Bulletin of Kherson State University 152; MS Dolynska, 'Basic principles of notarial procedural law of Ukraine' (2020) 4 Legal Scientific Electronic Journal 57.

6 LS Lysenko, 'Legality and validity of notarial acts' (2011) 1 (5) Bulletin of the High Council of Justice 177.

7 O Nelin, 'The legal nature of the notarial act in the latest paradigm of Ukrainian law' (2013) 11 Legal Ukraine 8.

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the notarial case – one of the guarantees of the absence of errors on the part of the notary. The composition of the necessary evidence documents, the submission of which is necessary to confirm the presence (absence) of a certain legal fact to be established within a particular notarial case, usually defined in notarial law, is a general and specific rule of evidence in the notarial process.[8] In this case, the notary or other person performing the notarial act shall not have the right to demand documents from the interested persons that do not relate to the essence of the performed notarial act, except as provided by law.

Art. 46 of the Law gives a notary or other official performing a notarial act the right to demand from individuals and legal entities the information and documents necessary for the performance of a notarial act. Relevant documents must be submitted within the period specified by the notary. This period may not exceed one month. Failure to submit information and documents at the request of a notary is grounds for postponement, the suspension of the notarial act, or refusal to perform it.

The implementation of these powers of the notary, which is part of the mechanism to ensure the principle of reasonableness of notarial acts, often acquires a debatable interpretation due to the imperfect wording of this article.

First of all, the current version of Art. 46 of the Law does not regulate the grounds for applying the powers of a notary to demand documents and does not differentiate the grounds and procedure for cases of such demand from different entities (interested persons who are participants in the notarial act and persons who do not participate in this notarial case). As a result, such powers are sometimes seen as a right and sometimes as a notary's duty in law enforcement practice. Due to this legal uncertainty regarding the grounds and procedure for applying the powers of the notary, the interested persons sometimes mistakenly believe that if the data provided by them are not enough to perform a notarial act, the notary should collect the necessary documents. Such a position in a notarial case cannot be considered legitimate, as the rules of Part 1 of Art. 42 of the Law 'On Notaries' clearly indicate that notarial acts are performed after their payment on the day of submission of all necessary documents, i.e., the obligation to provide documents for notarial acts is imposed on stakeholders by the law. Most scholars agree with this.[9] We consider it expedient to enshrine in law the rule that the submission of evidence documents required to perform a notarial act is the responsibility of the persons concerned.

Such actions should not be considered as requiring documents in the sense of applying the rules of Art. 46 of the Law, since the notary exercises his or her powers in the field of undisputed civil jurisdiction, and the initiative and desire of the relevant stakeholders must always be expressed for the commission of a certain notarial act. Failure to submit documents by the interested participants in the notarial process is their failure to fulfil their procedural obligations under Part 1 of Art. 42 of the Law, and the consequence in this case can only be a refusal to perform a notarial act. Other legal sanctions cannot be applied to such entities.

In addition, there are cases when it is very difficult or simply impossible for the applicant to obtain some documents that are in the possession of other persons who may not even be involved in the notarial case. This situation may be due to subjective or objective grounds: illegal refusal of any official to issue such certificates, prolonged delay in obtaining them, prohibition of obtaining confidential information, information constituting medical secrecy, and so on. According to the current legislation, certain documents are issued only to a limited number of designated entities or are not issued at all without the request of the competent authorities (certificates of the registry office, medical certificates, information from electronic registers, information on contributions, etc.). It is in such cases that the

8 VV Barankova, 'Proof in the notarial process' (2000) 42 Problems of Legality 98.

9 LS Lysenko, 'Legality and validity of notarial acts' (n 6) 178.

notary must exercise their authority to demand the materials of the notarial file, if the person concerned takes the initiative, as this may involve the need for additional notarial costs.

A different kind of legal situation, when the notary has an obligation to request information, concerns the application of the rules of Art. 46-1 of the Law 'On Notaries', according to which a notary must use information from the unified and state registers by directly accessing them when performing notarial acts. Failure to comply with this obligation indicates a violation of the law by a notary. The Luhansk Court of Appeal proceeded to overturn the decision of the Severodonetsk City Court of Luhansk region of 8 October 2020 in the case of *Person 1 vs the Limited Liability Company 'Car Service and Commerce'*, *the First Severodonetsk State Notary's Office* on declaring illegal and cancelling the decision to refuse to perform a notarial act. Thus, the Court of Appeal noted that the state notary refused to issue a certificate of the right to inheritance to Person 1 after the death of her husband (Person 4), citing the lack of right-establishing documents to the Limited Liability Company 'Car Service and Commerce'. However, the materials of the inheritance case show that the state notary did not use the information of the Unified State Register of Legal Entities, Private Entrepreneurs and Public Associations. In such circumstances, the court found that the state notary did not meet the requirements of the Law 'On Notaries', and the decision to refuse to issue a certificate of inheritance was illegal and subject to cancellation.[10]

In addition, the notary may have an obligation to request evidence documents in another case – when the evidence documents provided by interested parties contain contradictory data that prevents the establishment of the true circumstances of the notarial case. For example, in accordance with Part 3 of Art. 44 of the Law in case of doubt about the extent of the civil capacity of a natural person who applied for a notarial act, the notary is obliged to apply to the guardianship authority at the place of residence of the individual to establish the absence of guardianship or custody. Another example – the rules of Part 5 of Art. 44 of the Law: if a notary has doubts about the submitted documents to prove the civil capacity and legal capacity of a legal entity, they may require additional information or documents from this legal entity, state registrar and revenue, other bodies, entities, institutions, and individuals.

The exercise of the notary's powers to demand evidence documents in this case ensures the legality and validity of the notarial act and the performance of functions and tasks of notarial activities. The absence of parties with conflicting interests among the subjects of the notarial process or the absence of a dispute over the law makes it impossible to prove and establish the circumstances of the notarial case in the form of adversarial proceedings, and this requires specific powers of the notary as a law enforcement entity.

It should also be noted that Art. 46 of the Law stipulates the obligation to comply with the requirements of a notary to request documents but does not provide for legal sanctions for failure to comply with this obligation.

As already mentioned, the consequences of not submitting documents at the request of a notary should vary depending on the entity from which the documents were requested. In case of non-submission of documents by the interested persons, there is a refusal to perform a notarial act. If the notary's requisition for the provision of evidence has not been met by persons or bodies that are not participants in this notarial act, the law does not provide for the possibility of a notary to influence the behaviour of such persons. Unfortunately, the consequences of non-submission of documents in this case can only be applied by the court after consideration of the case on the claim of the interested person, in whose favour no notarial act can be performed due to non-submission of documents, to the person who did not provide these documents to the notary.

10 Resolution of the Luhansk Court of Appeal of 21 December 2020 <https://reyestr.court.gov.ua/Review/93771236> date accessed 27 October 2021.

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An example of such a situation is the lawsuit filed by Person 1 to the Main Department of the Pension Fund of Ukraine in the Chernihiv region, with the participation as a third party of a private notary of Kozelets notarial district for recognition of illegal inaction and obligation to take certain actions. Declaring the refusal to provide the notary with a certificate of accrued but unpaid pension illegal, the court ordered the defendant to provide information to the notary within fourteen days after the decision entered into force.[11]

Of course, the emergence of a lawsuit in this case is a justified and necessary step, but the task of the notary is still to reduce the burden on the judiciary and prevent litigation. In addition, a notary is a person authorised by the state (Part 1 of Art. 3 of the Law), and therefore we consider it appropriate to propose additions to the current version of Art. 46 of the Law, providing for the possibility of collecting a fine for failure to comply with the requisition of a notary. It would also be appropriate to provide for the suitable procedural registration of the procedural action of the notary to request documents.

Notaries are currently addressing the claimants with appropriate inquiry letters that have an arbitrary form and contain various details. We consider it expedient to provide for the need to issue a demand for evidence by a decision of a notary, which contains the following information: the date of the decision; the name of the notarial district and the address of the location of the workplace of a private notary or state notary office; last name, first name, patronymic of the notary; information about the subject from whom the information is requested; the content and form of presentation of the required information; deadline for submitting information to a notary; liability for non-compliance with the requisition of the notary (if established by law); signature and seal of the notary.

The next problem is that Part 3 of Art. 46 provides for the possibility of performing three different procedural actions due to failure to submit documents at the request of a notary: postponement, the suspension of the notarial act, and refusal to perform it. Yet, it does not specify the grounds on which each of these actions can be made, which is necessary because they are different in content and consequence.

The specification of the definition of such grounds is possible considering the requirements of Arts. 42 and 49 of the Law. Based on their content, we can conclude the following.

Failure to submit evidence documents at the request of a notary may entail the postponement of the notarial act when it is a temporary obstacle to its commission and must be removed within a specified period. Thus, Part 2 of Art. 42 of the Law stipulates that the performance of a notarial act may be postponed, in particular, if it is necessary to request additional information or documents from individuals and legal entities. The period for which the performance of a notarial act is postponed in such a case may not exceed one month. If the documents are not submitted within this period, the notarial act will be refused.

Thus, the current notarial legislation does not provide cases in which non-submission of evidence documents is fixed as the basis for suspension of notarial action. After all, the only basis for suspension according to Part 4 Art. 42 of the Law recognises the receipt in court of a statement of claim of a person disputing the right or fact, the certificate of which is requested by another interested person. Thus, the text of Part 3 of Art. 46 of the Law should exclude the assertion that failure to submit documents may be grounds for suspension of the notarial act.

Refusal to perform a notarial act occurs when the persons concerned have not submitted to the notary the documents necessary for the performance of the notarial act but require a decision of the notary on the impossibility of its performance, or when the notary is refused

11 Decision of the Chernihiv District Administrative Court of 30 January 2020. <https://reyestr.court.gov.ua/Review/87353314> date accessed 27 October 2021.

evidence documents by persons or bodies from which documents were required and which are not subjects of the notarial process.

4 CLARIFICATION OF EXPRESSION OF WILL AND SIGNING OF NOTARIAL DOCUMENTS

In accordance with Part 2 of Art. 54 of the Law and the rules of Ch. 6 of Section 1 of the Procedure, the notary is obliged to establish the will of the person who applied for a notarial act. The notary is obliged to establish the real intentions of each of the parties before the transaction, which he or she certifies, as well as the absence of objections of the parties to each of the terms of the transaction.

The establishment of the real intentions of each of the participants is carried out by the notary establishing the same understanding as the parties of the meaning, conditions, and legal consequences of the transaction for each of the parties. The establishment of the actual intentions of one of the parties to the transaction may be carried out by a notary in the absence of the other party.

Notarisation of the will of the persons concerned is one of the most important responsibilities, the performance of which ensures that the notary can perform their tasks and functions, as this rule protects the subjects of notarial acts from possible violations of their rights in the future. The mechanism of application of this rule allows for the implementation of one of the defining principles of the Latin notary, namely, that it is impossible to refute the observance of the order of notarial acts by the testimony of a witness who did not participate in it.[12]

For example, considering the appeal in the case of the claim of Person 1 to Person 2 for invalidation of agreements on a gift of real estate, the Kharkiv Court of Appeal confirmed the correctness of the Dzerzhinsky District Court of Kharkiv, which reasonably did not take into account the testimony of a witness (Person 5) concerning the deception by the defendant in concluding the disputed agreements, and assessed them critically, as the defendant's intention was known to the claimant from the words of the defendant. At the same time, the courts emphasised that the mentioned witness did not become acquainted with the content of the agreements during the signing.[13]

We note the fundamental significance of this court decision given the impossibility of proving the circumstances of the notarisation by the testimony of a person who was not a participant in the notarial act. Instead, the courts based their decisions on the observance of the procedure for performing a notarial act, in particular, the performance by the notary of the obligation to establish the will and intentions of the parties to the juristic act. In support of this fact, the courts examined the written evidence, namely, the texts of the agreements, which recorded the content of the actions committed during the certification of the contract, confirmed by the signatures of the parties. Thus, the validity of the identification inscriptions on the disputed agreements was conditioned by the signatures of the parties under the recording of the parties' assertions that at the time of concluding the agreements, they are aware of the consequences and understand the significance of their actions, confirm their intentions and manage them; do not act under duress, do not act under the influence of error, deception, or violence; entered into these agreements without intending to conceal other

12 V Komarov, V Barankova, 'Notary of Ukraine and prospects of its development' (2020) 9 Law of Ukraine 52.

13 Resolution of the Kharkiv Court of Appeal of 21 April 2021 <https://reyestr.court.gov.ua/Review/96550108> date accessed 27 October 2021.

transactions (actions); the contracts are not fictitious or fraudulent and do not contradict the rights and interests of underage, minors, and disabled persons.

In this regard, we note that in cases where the expression of will as a result of its challenge becomes the subject of judicial investigation, there are two ways to establish its authenticity: either the courts examine the circumstances that occurred outside the notarial process and indicate the existence of another intention than the one established by the notary, or, if such circumstances do not exist, the performance (non-performance) by the notary of the obligations to verify the conformity of intentions and expression of will is established.

In the first case, the behaviour of the notary is not discussed at all in court. In the second, the failure of the duty may indicate certain actions of the notary related to failure to ensure proper communication (or lack of such communication) with stakeholders, given that within the notarial process of expression of will must be direct.

Thus, in the case of the claim of Person 5 to Person 3 for invalidation of the will, the court found non-compliance with the rules of clarifying the will of the testator. Certification of a will due to the testator's illness took place at his home. At the same time, the secretary of Zelenogai village council of Novoselytsia district of Chernivtsi region, who certified this will, did not establish the testator's legal capacity before signing the will and did not check his real intentions by talking face-to-face, but immediately arrived with a printed will that was written based on an oral request of relatives of the testator. The court emphasised that the secretary could make a printed text of the will only after communicating with the testator.[14] In another court case, the courts of first and appellate instances based their decisions on invalidation of the contract of gift, confirmed in court the arguments of the plaintiff about the distortion of his will due to the fact that he did not speak enough Ukrainian, and a certified translator of the notarial action was not involved.[15]

The signatures of the parties on the document acquiring the notarial certificate are most often considered in judicial practice as confirmation of observance by the notary of requirements of the law. At the same time, signatures must also be executed according to the rules of notarial procedural form; otherwise, independent grounds are formed for declaring a notarial act unfounded and a notarial act illegal.

Thus, the authenticity of the signature of the participant of the notarial act is verified by a notary under the rules of Art. 45 of the Law. Notarised acts, as well as applications and other documents, are signed in the presence of a notary. If the application or other document is signed in the absence of a notary, the person who applied for a notarial act must personally confirm that the document is signed by them.

If a natural person due to a physical defect or illness cannot personally sign the document, then on his or her behalf in his or her presence and in the presence of a notary, this document may be signed by another person. The reasons for which the natural person who applied for a notarial act could not sign the document are indicated in the identification inscription. An act for a person who cannot sign it cannot be signed by a person in whose favour or with whose participation it is certified.

An essential guarantee of ensuring the authenticity of the will and compliance with its intentions of the persons concerned is the duty of the notary to ensure their acquaintance with the contents of the document before signing (para. 3 of Chapter 9 of the Procedure).

14 Decision of the Novoselytsky District Court of the Chernivtsi Region of 12 December 2019 <https://reyestr.court.gov.ua/Review/87011258> date accessed 27 October 2021.

15 Resolution of the Kharkiv Court of Appeal of 8 June 2021 <https://reyestr.court.gov.ua/Review/97558931> date accessed 27 October 2021.

Judicial practice contains many court cases that show that non-compliance with the rules of affixing a signature inevitably entails the recognition of a notarial act as illegal and the invalidation of a notarised transaction with such violations. For example, the Babushkinsky District Court of Dnipropetrovsk, in its decision from 2 February 2021, declared a will that did not contain the testator's signature invalid.[16] Sosnivskyi District Court of Cherkasy invalidated the power of attorney, finding that the private notary did not verify the authenticity of the authorising person's signature.[17]

Instead, compliance with the rules of signing notarised wills allows the court to recognise their legal validity and their legal consequences, even if the notarial authorities make minor technical errors.[18]

The current notarial legislation regulates the duties of the notary to establish the will and the actual intentions of the parties in a somewhat contradictory manner. Thus, Art. 54 of the Law provides for such obligations for a notary directly when certifying transactions, i.e., as special rules for performing this notarial act. The procedure for performing notarial acts by notaries of Ukraine, in turn, contains Chapter 6 of Section 1, the name and content of which necessitates the application of the rules of establishing the will for all notarial acts.

At the same time, the specific rules of notarial proceedings stipulate the need to clarify the will of even those who have not applied to a notary but whose rights may be affected by the commission of a notarial act. For example, a notary is obliged to verify the consent of the parent of the child to perform juristic acts in respect of vehicles and real estate by the other parent (para. 3.3. Chapter 1, Section II of the Procedure); with the consent of parents (adoptive parents) or guardians to certify transactions on behalf of minors or persons whose civil capacity is limited (para. 3.5. of Chapter 1, Section II of the Procedure); consent of the other spouse (para. 4.1. Chapter, 1 Section II of the Procedure); in ensuring the implementation of the pre-emptive right of purchase (para. 5 of Chapter 1, Section II of the Procedure), etc.

We consider it expedient to extend the duties of a notary to establish the will and actual intentions of the persons concerned to all notarial acts. In this regard, it is necessary to establish such an obligation as a general rule of notarial acts in Ch. 4 of the Law.

Analysis of case law shows that compliance with the rules for establishing the true intentions by convincing the notary in the same understanding of the meaning, conditions, and consequences of the transaction by the parties is not properly established by the current law. Therefore checking the due fulfilment of the notary's duties in the future, in case of dispute, is too problematic. It is seen that the solution to this problem could be a legally regulated *introduction of rules for recording the performance of a notarial act by means of video and audio recording.*

5 REQUEST OF EVIDENCE DOCUMENTS

According to the rules of Art. 42 of the Law, notarial acts are performed on the day of submission of all necessary documents. Failure to submit the relevant evidence documents, as already noted, makes it impossible to perform a notarial act. Judicial practice has repeatedly

16 Decision of the Babushkinsky District Court of Dnipropetrovsk dated 2 February 2021 <https://reyestr.court.gov.ua/Review/95750362> date accessed 27 October 2021.

17 Decision of the Sosnivsky District Court of Cherkasy of 29 March 2021 <https://reyestr.court.gov.ua/Review/96015052> date accessed 27 October 2021.

18 Decision of the Sumy District Court of the Sumy Region of 10 August 2020 <https://reyestr.court.gov.ua/Review/90924726> date accessed 27 October 2021; Decision of the Sumy District Court of the Sumy Region of 15 June 2021 <https://reyestr.court.gov.ua/Review/97647740> date accessed 27 October 2021.

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confirmed the fact that the submission of evidence documents is the responsibility of interested persons who have applied for a notarial act. For example, the Chernihiv Court of Appeal, reviewing the decision to dismiss the claim to the Minsk District State Notary's Office to declare the decision to refuse to perform a notarial act illegal, upheld it, noting that the notary had reasonably refused to issue a certificate of inheritance due to failure of the claimant to submit the relevant documents required to perform this notarial act.[19]

At the same time, the peculiarity of the notarial procedural form and the process of proving in the notarial process should be considered the statutory requirements for documents submitted for notarial acts (Art. 47 of the Law, Ch. 7 and 8 of the Procedure). Failure of the interested person to comply with such requirements also entails a refusal to perform a notarial act on the grounds provided for in para. 1, Part 1 of Art. 49 of the Law. Of course, the refusal occurs only when the shortcomings of the documents submitted for the performance of a notarial act cannot be corrected within the framework of its performance.

For example, the Pechersk District Court of Kyiv denied the claim of Person 1 to a private notary to declare the refusal to perform a notarial act illegal. Confirming the correctness of the notary's actions, in support of its decision, the court noted that for the issuance of a certificate of inheritance, the plaintiff notary filed a will that did not meet the requirements of the law, namely, it was not registered in the Inheritance Register.[20] In another court case, the Kyiv Court of Appeal ruled that a notary's actions regarding the improper legal assessment of an evidence document submitted for a notarial act to confirm the consent of another spouse to the alienation of real estate were illegal. The application for consent to the alienation of property submitted to the notary stated a form of certification inscription No. 64 (instead of form No. 44), which does not require establishing the fact of registration of marriage and does not meet the requirements of Annex No. 25 to the Rules of Notarial Records. Thus, the court recognised that the notary performed a notarial act on the basis of a document that did not meet the requirements of applicable law and had to refuse to perform a notarial act.[21]

The validity of a notarial act not only means the official recognition of a certain legal fact but also excludes the existence of other facts that cannot occur simultaneously, i.e., the appointment of validity requirements should be considered in terms of legal certainty of specific circumstances and relationships. For example, the stay of a certain individual in a certain place excludes his simultaneous stay in another; the acceptance of sums of money and securities on deposit indicates the absence of debt; proof of the time of presentation of the document by a certain person means that the same document at the same time could not be in possession of another person; notarised ownership of a certain person (or persons in the case of joint ownership) of property makes it impossible for other owners of the same property to exist.

Ensuring such consequences of notarisation is provided through the implementation of specific rules of notarial proceedings not only on the requisition for the submitted documents but also on their inclusion in the materials of the notarial case after the notarial act. The procedure for performing notarial acts provides for two options: either the documents are attached to a copy of the juristic act, certificate, etc., which remains in the notary's office (para. 3 of Chapter 7, Section 1 of the Procedure), or the original documents are returned to those who submitted them, and the notary is left with their copies (photocopies) or extracts from such documents (para. 4 of Chapter 7, Section 1 of the Procedure). The Procedure

19 Resolution of the Chernihiv Court of Appeal of 16 February 2021 <https://reyestr.court.gov.ua/Review/94957018> date accessed 27 October 2021.

20 Decision of the Pechersk District Court of Kyiv of 22 April 2020 <https://reyestr.court.gov.ua/Review/89204463> date accessed 27 October 2021.

21 Resolution of the Kyiv Court of Appeal of 16 February 2021 <https://reyestr.court.gov.ua/Review/94957018> date accessed 27 October 2021.

contains only examples of documents, the originals of which are returned to interested parties (birth, marriage, death, constituent documents, etc.), and the grounds for applying the rules of preservation or return of documents are not specified. Unfortunately, such legal uncertainty gives rise to litigation.

Thus, the Ternopil Court of Appeal confirmed the correctness of the decision of the Zalishchyk District Court in the case of the claim of Person 1 to the Zalishchyk State Notary Office to cancel the decision of the state notary to refuse to issue a certificate of inheritance, referring to the following. Person 1, applying to the notary for the issuance of a certificate of inheritance left after the death of her mother, refused to provide the notary with the original title documents to the inherited real estate to attach them to the case file. The heiress assumed that these documents were the property of her late mother and, in addition, the first copy of the contract of lifelong use, certified by a notary on 22 April 1972, was in the notary office. The courts recognised that when filing inheritance cases on real estate for a new owner (heir), the notary is obliged to attach documents confirming the ownership of the testator's property on the inherited property to the materials of the inheritance. An exception to this rule is provided only in para. 3 of Chapter 7 Section 1 of the Procedure. Given that the plaintiff had the original legal documents necessary to perform a notarial act, but she flatly refused to provide them for inclusion in the inheritance case, the contested decision of the notary met the requirements of law, and the notary's refusal was lawful.[22]

The distinction between documents subject to preservation in the materials of the notarial case and those that are photocopied and returned to interested persons should be made, taking into account the loss or preservation of their validity and legal value after the said notarial action.

Documents whose legal significance is lost should be withdrawn from legal circulation and kept in the relevant notarial files. For example, after the issuance of a certificate of inheritance, which confirms the transfer of ownership of the inherited property to the heir, the documents certifying the ownership of the property of the testator will no longer have any legal value. And precisely so that their possible use does not create legal uncertainty, their originals should be withdrawn from the interested persons and remain in the notary's files as proof of the validity of the relevant notarial act.

Documents that are valid and have legal significance in further legal relations with the participation of interested persons must be returned to them. For example, a birth or death certificate can be used repeatedly to confirm these facts in many legal relationships or legal cases. Thus, the above allows us to conclude that it is necessary to enshrine in law the relevant grounds for the notary to select the originals of the documents submitted to him or her or return them to interested parties.

The rules of examination of evidence documents provide for the need to convince the notary of their authenticity. In accordance with Part 2 of Art. 51 of the Law and item 2 of Chapter 15 Section 1 of the Procedure if the authenticity of the submitted document is in doubt, the notary has the right to leave this document and send it to the expert institution (expert) for examination.

We also have to mention the declarative nature of these rules and the complete lack of standardisation of the procedural order of their implementation. This shortcoming should be addressed with the following considerations in mind. Sending documents for examination is a notarial action that can be done only at the initiative or consent of the person concerned. First, the notarial act is performed on the initiative of the persons concerned, and, as already

22 Resolution of the Ternopil Court of Appeal of 24 December 2020 <https://reyestr.court.gov.ua/Review/93922343> date accessed 27 October 2021.

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mentioned, they are responsible for proving and submitting evidence, and the examination is aimed at removing doubts about the authenticity of the document that has the value of evidence. Second, the examination is associated with the need to pay for it, which is also entrusted to the person concerned. If the interested person does not agree to the examination, and other evidence to confirm a certain fact, the establishment of which ensures the validity of the notarial act, does not exist, the notary must refuse to perform a notarial act on the basis of para. 2 Part 1 of Art. 49 of the Law.

Expert examination in notarial proceedings should be provided with the corresponding procedural registration. The decision of the notary to conduct an examination, in our opinion, should be recorded in a special procedural decision document to transfer the document for examination, which should contain the following details: surname, name, patronymic of the notary; notarial district and address of the notary's workplace; description of the document sent for examination; statement of the notary's doubts that need to be eliminated; questions about the authenticity of the document; date of the resolution; signature and seal of the notary.

6 CONCLUSIONS

In the notarial process, the validity of notarial acts is based on the fact that the notary's conclusions must correspond to the established circumstances, as well as the intentions and will of the interested participants in the notarial case.

The rules that ensure the implementation of the principle of reasonableness of notarial acts and oblige the notary to verify the existence of certain facts and draw conclusions about them, in our opinion, include rules for determining: deadlines for notarial acts, the requisition of evidence documents by the notary, the signing notarial documents, referrals of documents for examination, the requisition for documents submitted for notarial acts, and the clarification of the will and intentions of interested persons.

We consider it expedient to legislate the rule that the submission of evidence documents necessary for the performance of a notarial act and is the duty of the persons concerned, the consequence of the failure of which can only be a refusal to perform a notarial act. The demand of documents in the sense of the adherence of Art. 46 of the Law in such situations is not mentioned.

The notary must exercise their powers to demand the materials of the notarial case in three cases: if the interested person, having difficulty in presenting evidence, shows the initiative or consent to such actions by the notary; when, in accordance with the rules of Art. 46-1 of the Law, the notary uses the information of the unified and state registers; and if the evidence documents provided by the interested persons contain contradictory data, which prevents the establishment of the true circumstances of the notarial case.

We propose to make additions to the current version of Art. 46 of the Law of Ukraine, providing for the possibility of issuing a fine for failure to comply with the requisition of the notary by those persons who do not participate in the notarial act. It will also be expedient to provide for the appropriate procedural registration of the procedural action of the notary to demand documents.

The grounds for application of such consequences of non-submission of evidence documents at the request of a notary is the refusal to perform a notarial act. The suspension and postponement of a notarial act are also subject to specification.

Failure to perform the duty of a notary to establish the will of the persons concerned may be

evidenced by failure to ensure proper communication (or lack of such communication) with the persons concerned, given that within the notarial process, the expression of will must be direct. The signatures of the parties on the document that acquires a notarised certificate, which must be performed according to the rules of notarial procedural form, is often considered by court practice to be the confirmation of the notary's compliance with the law.

We consider it expedient to extend the duties of a notary to establish the will and actual intentions of the parties to all notarial acts. In this regard, it is necessary to establish such an obligation as a general rule of notarial acts in Chapter 4 of the Law. A procedural guarantee of the possibility of proving the performance of this duty by a notary may be the introduction of rules for recording the performance of a notarial act by means of video and audio recording.

And, as was mentioned, a distinction should be made between documents that are subject to preservation in the materials of the notarial case and those that are returned to interested persons after being photocopied, considering the loss or preservation of their validity and legal value after the commitment of notarial action.

Sending documents for examination, which is carried out to verify their authenticity, should be recognised as a notarial action that can be done only on the initiative or consent of the person concerned. Lastly, the examination in notarial proceedings should be provided with an appropriate procedural design.

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Case Note

WHO IS THE OWNER? NEWLY DISCOVERED CIRCUMSTANCES AND THE PRINCIPLE OF LEGAL CERTAINTY IN A SINGLE CASE STUDY

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ABSTRACT

Background: *The protection of property rights is one of the cornerstones of legal order. If we were uncertain whether ownership would be protected from claims or whether contract obligations would be executed properly, we could not regulate relations effectively. Courts play a crucial role in this mechanism of protecting the owner's rights, giving parties possibilities for defence.*

This note is related to one of the last judgments of the European Court of Human Rights (ECtHR), the focus of which is on newly discovered circumstances and the principle of legal certainty. The facts of this case arose from a property sale contract with a condition, the validity of which led to the consideration of multiple cases by different Ukrainian courts.

Methods: *In light of the above, an analysis of this ECtHR judgment, as well as the final and interim decisions of Ukrainian courts, with regard to Ukrainian legislation and case law was prepared. The main challenge was the absence of the oldest decisions of national courts in the state register of court decisions, which contains only decisions from 2011. Even so, the facts of this case were described in detail in the latest courts decisions.*

Results and Conclusions: *The following analysis provides an argument against reopening procedure without proper grounds, which lead to the violation of the right to a fair trial in civil procedure in Ukraine.*

Keywords: *newly discovered circumstances; civil proceedings; principle of legal certainty; right to a fair trial; Ukrainian law.*

1 INTRODUCTION

The protection of property rights is one of the cornerstones of legal order. The certainty of every owner that their ownership is protected from any claims and that their contractual obligations will be executed properly is necessary if we are to regulate relations effectively. Courts play a crucial role in this mechanism of protecting owners' rights, giving the parties possibilities for defence.

This note is related to one of the last judgments of the European Court of Human Rights (ECtHR) in the case of *Mitsopoulos v. Ukraine* (App. no. 62006/09),[4] the focus of which was on newly discovered circumstances and the principle of legal certainty. The facts of this case concerned a property sale contract with a condition, the validity of which led to more than eight cases considered by different Ukrainian courts.

Logically, after the ECtHR judgment issued on 9 December 2021, this case may come back to Ukrainian courts. This note will discuss who the owner might be and when the title of ownership might become fully binding. The study will conclude with reflections about the principle of legal certainty and its impact on the protection of property rights in light of the right to a fair trial.

4 *Mitsopoulos v Ukraine* App no 62006/09 <https://hudoc.echr.coe.int/eng?i=001-214389> accessed 20 December 2021.

2 CASE FACTS

These case facts are contained not only in the ECtHR judgment but in several national court decisions. Ukraine retains a single state register of court decisions,[5] which contains only decisions from 2011 onward. Therefore, for discovering more facts of this case we have found the latest courts decisions, in which the details were found and described.

It was noted in the ECtHR judgment that 'on 23 September 2002 the applicant bought a house from a private individual' (p. 5). We would like to add an important point – this contract was concluded with a condition,[6] and the condition was of particular significance – this was a title of ownership of the land under the house.[7]

According to Ukrainian law, the right of ownership of a building does not always include the land plot under the building. When this case was under consideration, the law was very strict.

After several amendments, the provisions of Art. 377 of the Civil Code of Ukraine[8] made transferring the right to the land plot in cases of the right of the owner to the building placed on that plot an essential condition of the sale contract for a property.

The condition in this case was that the owner would receive official permission and the title to this land plot under the building. As far as the vendor was not able to get this permission, the buyer claims on the contract and terminate it.[9]

As was stated in the ECtHR judgment, civil proceedings were instituted by individuals challenging the validity of the sale contract (pp. 6-8). We would like to add some circumstances that played an important role in this case.

The court of first instance terminated the disputed contract in May 2003, and this decision was appealed to the appeal court of Kyiv. The decision of the appeal court in October 2003 upheld this decision, which came into force or became binding and enforceable. 'Coming into force', according to Ukrainian legislation, refers to the validity of the decision to be enforced and be binding.[10] In this case, it gave the first owner the possibility to sell the disputed ownership for a second time. Therefore, another party appeared – the second owner's title claimant.

Interestingly, the second round of challenging the sale contract challenging in 2007 was on the side of the side the first buyer – he won the original proceedings before the court of

5 Law of Ukraine On access to the judicial decisions <https://reyestr.court.gov.ua https://zakon.rada.gov.ua/laws/show/3262-15#Text> accessed 20 December 2021.

6 Resolution of the panel of judges of the Judicial Chamber of the Supreme Court of Ukraine on 27 April 2016 <https://reyestr.court.gov.ua/Review/57463339> accessed 20 December 2021.

7 It worth noting that the land relations in Ukraine regulates this in a specific manner. See OV Dzera, 'Institute of property law in new civil legislation and European standards of property rights protection' (2005) 1-2(13-14) University's Notes 69-75 <http://old.univer.km.ua/visnyk/730.pdf> accessed 20 December 2021.
Only in October 2021 was the Law of Ukraine on changes of some legislative acts of Ukraine concerning the uniform legal share of the land plot and the building placed on it adopted <https://zakon.rada.gov.ua/laws/show/1174-20#Text> accessed 20 December 2021.

8 Civil Code of Ukraine <https://zakon.rada.gov.ua/laws/show/435-15#Text> accessed 20 December 2021.

9 Decision of the Panel of Judges of the Civil Chamber of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases on 27 April 2016 <https://reyestr.court.gov.ua/Review/57463339> accessed 20 December 2021.

10 See K Gusarov, V Terekhov 'Finality of Judgments in Civil Cases and Related Considerations: The Experience of Ukraine and Lithuania' (2019) 4(5) Access to Justice in Eastern Europe 6-29 <http://ajee-journal.com/upload/attaches/att_1577085580.pdf> accessed 20 December 2021.

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first instance, the validity of the contract for the first sale was recognised, and the second sale contract was terminated. In the meantime, during these few years, the building was renovated and amended, but there was no claim from the second owner about this during the original proceedings before the court.

As was stated in the ECtHR judgment, on 7 November 2007, the Supreme Court upheld the judgment and, accordingly, it became binding and enforceable on that date (p. 9). The following disputes happened in 2009 and were related to challenging the legal certainty and right of a party to appeal the decision on the basis of newly discovered circumstances.

2.1 THE UKRAINIAN COURT'S POSITION

In our opinion, as was clearly stated in part two of this note, the most important thing in this case was the condition of the sale contract. According to the provisions of law in force at the time of this case, the contract may be recognized as valid in case of parties make this validity depends on some circumstances. If this circumstance was more beneficial for one party, it would make no sense for that party to challenge the contract on those grounds. In addition, we should note that the last payment for this contract was made on the deposit of notary, due to the avoiding of receiving this payment buy the vendor.

According to the law in force at the time of this case, the vendor was able to receive such permission, but she did not do this and later used this as a ground for making a claim in court. The Ukrainian courts rightly voided this particular provision of the sale contract without any substantial consequences for the buyer.

Even though the first vendor sold this building for a second time, a year after the first sale contract was signed.

The Ukrainian court's general position was that ownership of the disputed house arose from the moment of the notarisation of the sale contract concluded between the vendor and the buyer on 23 September 2002. Therefore, the last person should be recognized as the owner even though his right was not recognised and was challenged by the defendants in the case.

Regardless, the courts allowed the procedure to be reopened based on the disputed house renovation, which was later considered groundless.

2.2 THE ECTHR'S POSITION

According to the ECtHR's judgment in April 2009, an application for review of the judgment 'in light of newly discovered circumstances' was submitted (pp. 10-13). The ground for that was that the house had been renovated to such an extent that it could no longer be regarded as the object of the disputed contract of sale. According to the position of the applicant who challenged that application, during the proceedings, the disputed house had been in the possession and under the control of the claimant, who, consequently, had been aware of the renovation. The issue of time limits also arose since an application for review of the judgment of 22 January 2007 had been lodged outside the legal period (p. 11).

According to the court decision issued in May 2009, the court 'having examined the material of the case and having heard the parties, it considered that the application could be allowed', with no further explanation in that regard, and it reopened the procedure. Reopening proceedings caused several reconsiderations on the merits. Finally, the first buyer's rights to the building were upheld by the highest instance court seven years later.

3 NEWLY DISCOVERED CIRCUMSTANCES IN UKRAINIAN LEGISLATION AND DOCTRINE

The CPC of Ukraine provides a right to *review a court decision in case of newly discovered or exceptional circumstances* (Arts. 423-429). This is a proceeding according to which a decision of the court, which was final after the case consideration and has become binding and enforceable, may be revised according to *newly discovered or exceptional circumstances* specified in the law (Art. 423 of the CPC Code of Ukraine).

The finality of the decision, which may be challenged in this procedure, is essential in the Ukrainian legal doctrine.[11]

This proceeding of newly *discovered or exceptional circumstances* is also called 'out of instance', since the appealed court decision is reviewed by the court that ruled it, in contrast to the general rule for reviewing a court decision by a court of highest instance.

The procedure of newly discovered circumstances was introduced in civil proceedings in the middle of the last century to solve problems with decisions that were adopted on the basis of incomplete circumstances of the case, which were essential for its consideration. After the expiration of a certain time, these circumstances became known to the participants of the case, who applied respectively for revision of the decision. A classic example of such a newly discovered circumstance is a will that came to light after a case had been settled in a court and a decision had come into force. We should mention that the time run up from the middle of the last century make very rarely meet the obstacles in a case consideration, or circumstances which were not and could not be known at the time of case consideration. In the case of our classic example, wills are included in the register of the wills and inheritance cases.[12] Therefore, the situation of an undiscovered will is now difficult to imagine.

The essential difference between the procedure for newly discovered circumstances and general appeals of a court decision is the different basis for initiating it. The main focus of this procedure should be not the violation of the procedural or substantiative rules but circumstances that were not known and could not be known by the participants in the case and the court.[13]

During the period of Ukraine's independence, such grounds as the establishment by an international judicial body, whose jurisdiction is recognised by Ukraine, of a violation by Ukraine of international obligations in resolving a case by a court have also been added to the category of newly discovered and exceptional circumstances. This made it possible to change the decision that became the subject of criticism of the ECtHR.[14]

The newly discovered circumstances in the CPC include the following:

11 Kurs of Civil Procedure, ed by V Komarov (Pravo 2011); IO Izarova, Ryu Khanyk-Pospolitak, Civil procedure of Ukraine (VD 'Dakor' 2019).

12 Regulation on the Unified Register of Wills and Inheritance <https://nais.gov.ua/m/str_31> accessed 20 December 2021.

13 This is the most general view on the procedure in Ukrainian sources. See I Izarova, 'Problems of realization of the principle of collegial consideration of civil cases in proceedings in connection with newly discovered circumstances' in *Almanac of Law. Fundamental principles of law as its value dimensions. Scientific and practical legal journal.* Vip. 3 (V.M. Koretsky Inst. of State and Law NAS of Ukraine 2012) 332-336.

14 See IO Izarova, 'Grounds for review of court decisions due to newly discovered circumstances' (2012) 3 Scientific Bulletin of NULS 36-39; IO Izarova, 'Idea and novelty of newly discovered circumstances in civil proceedings' (2011) 3(22) Bulletin of the Bar Association of Ukraine 57-61.

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1) circumstances that are essential to the case (significant circumstances) that were not established by the court and were not and could not be known to the person submitting the application at the time of the consideration of the case (which were not and could not have been known, at the time when the case was being considered, to the person applying for such reconsideration);

2) circumstances established by a judgment or ruling on the closure of criminal proceedings and the release of a person from the legal liability of giving a knowingly incorrect expert opinion, knowingly false testimony of a witness, knowingly wrong translation, falsification of written, material, or electronic evidence that led to the adoption of an illegal decision in this case (the intentionally false testimony of a witness, intentionally incorrect expert conclusions, intentionally incorrect translations, or forged documentary or material evidence leading to the adoption of an unlawful or unsubstantiated judgment, as established by a final judgment in a criminal case);

3) the cancellation of the court decision, which became the basis for the adoption of a judicial decision that is subject to review[15] (the quashing of a judicial decision on which the judgment or ruling in issue was based);

4) a decision of the Constitutional Court declaring unconstitutional a law or another normative act or a part thereof, which had been applied by the court when deciding on the case, if its judgment had not already been enforced.

Reassessment of the evidence assessed by the court during the trial, as well as evidence not assessed by the court regarding the circumstances established by the court, *is no reason to review a court decision for newly discovered circumstances.*[16]

Our case study is particularly interesting because, in her appeal, the applicant claimed the fact that the house renovation happened under her representative supervision (see p. 10 of the ECtHR judgment). As far as was noted in para. 1 of Part 2 of Art. 423, the grounds for reopening and reconsidering a case should be circumstances that 1) are essential to the case, 2) were not established by the court, and 3) were not and could not be known to the applicant at the time of the consideration of the case.

As we can see from the above, the disputed house was in the possession of the vendor, who sold the disputed house for the second time in 2003. The second buyer limited or hindered the first buyer's right to possess this house. The fact of the supervision of the renovation was stated by the court and the appellant in this case. It is difficult to imagine that the proofs of these circumstances were not examined by the court when the case was considered. For

15 Civil Procedure Code of Ukraine No 2147-VIII wording of 3 October 2017 <http://zakon3.rada.gov.ua/laws/show/1618-15/print> accessed 20 December 2021.

16 Despite the widely known grounds for reopening the procedure with newly discovered evidence, in Ukraine, the doctrine and the law maintain the notion of 'newly discovered circumstances'. See RD Markovits, 'Federal Civil Procedure – Newly Discovered Evidence – Diligence Required in Order to Obtain New Trial' (1968) 44(2) North Dakota Law Review Article 7; Penny J White, 'Newly Available, Not Newly Discovered' (2000) 2 J. App. Prac. & Process 7 <https://lawrepository.ualr.edu/appellatepracticeprocess/vol2/iss1/3> accessed 20 December 2021; Mary Ellen Brennan, 'Interpreting the Phrase "Newly Discovered Evidence": May Previously Unavailable Exculpatory Testimony Serve as the Basis for a Motion for a New Trial Under Rule 33?' (2008) 77 Fordham L. Rev. 1095 <https://ir.lawnet.fordham.edu/flr/vol77/iss3/4> accessed 20 December 2021. Ukrainian tradition goes back to the Soviet past, where the institution of newly discovered circumstances were introduced first. See V Komarov (n 11); IO Izarova, Ryu Khanyk-Pospolitak (n 11); VV Komarov, DD Luspenik (eds), *Legal positions of the Supreme Court in civil, commercial and administrative cases* (2019).

instance, in another case, the Supreme Court noted that the Court of Appeal did not take into account that the newly discovered circumstances, as a legal fact relevant to the case and referred to in her application was not and could not have been known to the applicant at the time of the appealed judgment – the fact of invalidity of the insurance certificate 'Green Card', which existed at the time of the case and the court's decision and which the applicant requested to review, and not the documents themselves, which established the circumstances of invalidity of such an insurance certificate.[17]

In addition, we should be aware that in this case, the circumstances that were claimed as essential to this case were related to the transformation of the object– the house renovation, which may not be directly related to the contract obligations and condition assessment performed a few years earlier.

The newly discovered circumstances drew the attention of the highest courts of Ukraine at this time and prompted a generalisation and the Resolution of the High Specialized Court of Ukraine on Civil and Criminal Cases.[18] This document is very important for the definitions of 'newly discovered circumstances' and 'new circumstances' in a case. According to this Resolution, newly discovered circumstances are legal facts that are essential for the consideration of the case and existed at the time of the hearing but were not and could not be known to the applicant, as well as circumstances that arose after the court decision came into force and are classified by law as newly discovered circumstances.

We would like to highlight two very essential issues in the above-mentioned Resolution. The first thing is that newly discovered circumstances must be confirmed by factual data (evidence), which disprove the facts underlying the court decision in the prescribed manner. In our case, this renovation was considered an essential change of the disputed house to such an extent that it could no longer be considered an object of this case.

The second and very important thing is that the court has the right to overturn a court decision on the grounds of newly discovered circumstances only if these circumstances might affect the legal assessment of the circumstances made by the court in the court decision under review. This means that the renovation of the disputed house might affect the legal assessment of the decision on the validity of the sale contract, in other words.

As the ECtHR noted, the very essence of the procedure on newly discovered circumstances 'does not appear to be in itself incompatible with the requirements of a fair hearing' (p. 21). The ECtHR has found valid grounds for the requested review of this decision, with the further explanation that this should be added to the court decision to reopen the case.

We can only state that according to the register of court decisions in Ukraine, the tradition of reopening a case on vague grounds is widespread. The main problem we have found, as is evident in this case, is the mechanism of the court decision in issuing the application for reopening a case. According to Art. 427 of the CPC of Ukraine, initiation of proceedings on newly discovered or exceptional circumstances includes two stages. In the first stage, an application for such a review of a court decision on newly discovered circumstances must be submitted to a court, when the automatically a judge or a panel of judges determined in accordance with the law. In the second stage, a judge or a judge-rapporteur shall verify its compliance with the requirements of Art. 426 of the CPC within five days of the receipt of

17 The Supreme Court of Cassation clarified the grounds and conditions for reviewing the court decision based on newly discovered circumstances <https://supreme.court.gov.ua/supreme/pres-centr/news/1022658/> accessed 20 December 2021.

18 Resolution of the High Specialized Court of Ukraine on Civil and Criminal Cases on 30 March 2012 on the application of the civil procedure legislation within the review of the court decision on the ground of newly discovered circumstances <https://zakon.rada.gov.ua/laws/show/v0004740-12#Text> accessed 20 December 2021.

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the application by a court and decide on the opening of proceedings on newly discovered or exceptional circumstances.

Therefore, according to the above-mentioned provision, a judge should decide whether valid grounds for reopening a particular case exist, without any response from the opposite parties, without equal representation, and without other arguments against the claim.

In the above-mentioned resolution, an important note was made:

> The question of what circumstances may be considered material is evaluative and is decided by the court in each case, taking into account whether these circumstances could refute the facts underlying the judgment and influence the conclusions of the court during its adoption in such a way that if this circumstance was known to the persons involved in the case, the content of the court decision would be different (para. 2 part 7).

This means that a judge should be aware of both parties' positions not when the questions of the case initiating was already answered.

This is the real basis for the violation of the principle of legal certainty embodied in Art. 6 § 1 of the Convention and cannot lead to the discovery of 'circumstances of a substantial and compelling character'.

Further consideration of an application in a court session within thirty days from the date of opening proceedings for newly discovered circumstances by the court according to the rules of this court, and in the court of first instance, within a simplified proceeding with notification of the participants of the case. Therefore, the opposite parties may be heard by the court when the procedure has already been opened and challenged.

The ECtHR considers this an extraordinary procedure for appealing a final and enforceable decision – therefore, more attention should be paid to the validation of grounds for its reopening.

Keeping in mind that *in its decision, according to the results of review,* the court may refuse to accept the application for review of a court judgment in newly discovered circumstances and leave a corresponding judicial decision in force; *or* satisfy the application for review of a court decision in newly discovered circumstances, cancel the relevant court decision, and make a new decision or change the decision; *or* cancel the court decision and close the proceedings in the case or leave the claim without consideration; upon review of the court decision in newly discovered circumstances, the Supreme Court may also cancel the court decision (court decisions) in full or in part and refer the case for a fresh consideration to the court of first or appellate instance; issue or send a judicial decision to the participants of the case in accordance with the established procedure, provided by the CPC; approve the coming of a new court decision into force or the loss of the legal force of all other court decisions of other courts in this case.[19]

Though continuing the idea of the wrong first stage of the initiating of the newly discovered procedure we argues, that even the power to refuse of accepting the application for review of a court judgment in newly discovered circumstances and leave a corresponding judicial decision in force, challenging the legal certainty of the decision binding and enforceable is difficult due to the fact of opening the very procedure – to some extend the court recognised the valid grounds for open the procedure, therefore, more grounds for refusing the application should be discovered.

19 Civil Procedure Code of Ukraine No 2147-VIII wording of 3 October 2017 <http://zakon3.rada.gov.ua/laws/show/1618-15/print> accessed 20 December 2021.

In this case, after the case was reopened, it was sent to another court in Kyiv due to jurisdiction.

The vendor changed the grounds and subject of the claim. It is worth noting that this is now impossible according to the existing CPC because changing the grounds and the merit of the claim leads to another case. A few rounds of considering this case occurred from 2009-2016 until the High Specialized Court for civil and commercial matters put an end to it.

In addition, attention should be drawn to the timing of this application. The law restricts the timing of the application for such a review – it must be within thirty days from the day when the person learned or could learn about the circumstances that became the basis for the review of the court decision, but no later than three years from the date of entry into force of such a court decision (and no later than 10 years without the right to renew the term) (Art. 424 of the CPC).

4 CONCLUDING REMARKS

In its conclusion, the Court logically found that in this case, reopening the case on the grounds of newly discovered circumstances was a violation of Art. 6 § 1 of the Convention and Art. 1 of Protocol No. 1.

However, in this case, the ECtHR noted that the very essence of the procedure on newly discovered circumstances 'does not appear to be in itself incompatible with the requirements of a fair hearing' (p. 21). Therefore, the reopening of a case may be fair and benefit the general goals of justice.

In the meantime, this procedure of reopening the case on the grounds of the newly discovered circumstances plays an essential role in case of a serious judicial mistake or a miscarriage of justice. In Ukrainian legislation, there is the condition of essentiality of a circumstance for the case. In case law, the tradition of reopening a case without valid grounds according to the view of ECtHR is widely shared, unfortunately.

In other words, we should reconsider the procedure for validating the application for reopening a case in Ukrainian law in light of ECtHR practice and the right to a fair trial. The valid grounds of newly discovered circumstances should be given a further explanation and added to the court decision on reopening the case.

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Case Note

PECULIARITIES OF PROSECUTOR PARTICIPATION IN PRIVATE CRIMINAL CASES: THE UKRAINIAN EXPERIENCE

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ABSTRACT

Background: *Maintaining prosecution in criminal cases in court is a specific function of the prosecutor, which is enshrined in both the Constitution of Ukraine and the provisions of the Criminal Procedure Code of Ukraine. This function should meet not only the objectives of criminal justice but also international standards in the field of criminal justice. Criminal proceedings are divided into public and private, depending on the type of socially dangerous act. And depending on the type of accusation, the functions of the prosecutor in the exercise of their powers are different. Thus, in cases of private prosecution, the participation of the victim is crucial, and his/her refusal to prosecute may be grounds for closing the criminal proceedings. This note related to the study of the innovative approach of the Supreme Court's law enforcement practice shows the active role of the prosecutor in considering these categories of criminal cases in court.*

Methods: *We thoroughly analysed the case-law of the Supreme Court of Ukraine, as well as the provisions of the Criminal Procedure Code of Ukraine and other legislative acts. We also generalised and studied the case-law of Ukrainian courts, as well as recommendations of the CoE and the doctrine of the criminal procedural law of Ukraine.*

Results and Conclusions: *The authors drew several conclusions about various forms of private prosecution with their own specifics, which are manifested in the aspects mentioned in this note.*

Keywords: *prosecutor; criminal procedure; private criminal case; Ukraine*

1 INTRODUCTION. DISTINGUISHING BETWEEN PUBLIC AND PRIVATE PROSECUTION

The introduction and development of such an institution as the maintenance of public prosecution in court was due to evolutionary processes in society and associated with the introduction into national law of adversarial proceedings, which contributed to several judicial reforms and changes in independence in Ukraine.[4]

Arts. 129, 131-1 of the Constitution of Ukraine[5] stipulate that the constitutional function of the prosecutor and the basis of the proceedings is the support of the public prosecutor in court. However, the criminal procedure legislation operates with the concept of 'public

4 On the evolution of criminal procedure in Ukraine, see V Shybiko, 'The Evolution of Criminal Procedure in Ukraine over 30 Years of Independence' (2021) 3(11) Access to Justice in Eastern Europe 23-51. DOI: 10.33327/AJEE-18-4.3-a000069. A very interesting study related to the criminal procedure development and ECtHR case law is O Kaplina, A Tumanyants, 'ECtHR Decisions That Influenced the Criminal Procedure of Ukraine' (2021) 1(9) Access to Justice in Eastern Europe 102–121. DOI: 10.33327/AJEE-18-4.1-a000048.

5 The Constitution of Ukraine, adopted at the fifth session of the Verkhovna Rada of Ukraine on 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 24 October 2021.

prosecution', which, in accordance with para. 3 of Part 1 of Art. 3 of the CrPC of Ukraine[6] is a procedural activity of the prosecutor that consists of bringing charges to court to ensure the criminal responsibility of the person who committed a criminal offence.

According to V. Dolezhan, in the Constitution of Ukraine, the support of public prosecution in court is the first among the other functions of the prosecutor's office, which, to some extent, reflects the European Community's approach to the role of prosecutor, who is primarily considered a public prosecutor in criminal justice.[7] Para. 1 part 1 of Art. 2 of the Law of Ukraine 'On Prosecution' distinguishes the maintenance of public prosecution in court among the functions of the prosecutor's office.[8] Thus, one can see the difference between the definition of 'support of prosecution in court' in the Constitution of Ukraine and special rules of criminal procedure legislation.

The doctrine of criminal procedure is quite common, according to which the concept of 'public prosecution' is broader than the concept of 'public prosecution' because the prosecutor must still act not only on behalf of the state but also society as a whole, protecting the rights and interests of everyone. In cases when human rights and freedoms are not in the state's interests, such a state cannot be considered legal, social, and democratic, as Ukraine considers itself.

However, the protection of the interests of the individual and society who suffered during the commission of a criminal offence, as defined in Art. 2 of the CPC of Ukraine, as a task of criminal proceedings, is the main purpose of the prosecutor's office, which is enshrined in the Constitution of Ukraine as support for public prosecution in court. This approach certainly correlates with current trends in the rule of law and the principle of the rule of law.

At the same time, the terminological conflict regarding the constitutional and sectoral definition of the function of the prosecutor's office can be explained by the harmonisation of constitutional and legal regulation of the functioning of the prosecutor's office with relevant international standards.

Thus, according to para. 12 of the UN Guiding Principles on the Role of Prosecutors,[9] adopted by the Eighth UN Congress on Crime Prevention and Treatment (27 August-7 September 1990), in the performance of their duties, prosecutors protect state interests – effectively, they take due account of the situation of the suspect and the victim and pay attention to all circumstances relevant to the case, regardless of whether they are beneficial or unfavourable to the suspect. Therefore, the state interests, given the concept of common interest, human rights, and freedoms, are essentially identical to the public interest.

According to para. 1 of Recommendation REC (2000) 19 of the Committee of Ministers to member states 'On the role of the public prosecution service in the criminal justice system' (Adopted by the Committee of Ministers on 7 October 2000 at the 724th meeting of the Deputy Ministers)[10] the public prosecution service is a body that, on behalf of society and in the public interest, ensures law enforcement if a violation of the law results in criminal

6 The Criminal Procedure Code [2013] VVR 9-13 <https://zakon.rada.gov.ua/laws/show/4651% D0%B0-17/print1330026115579985#Text> accessed 24 October 2021.

7 YuE Polyansky (ed), *Support of public prosecution* (Odessa: Phoenix 2012).

8 Law of Ukraine 'On the Prosecutor's Office' of 5 November 1991 <https://zakon.rada.gov.ua/laws/show/1789-12#Text)> accessed 24 October 2021.

9 In Ukrainian, see the UN Guiding Principles on the Role of Prosecutors <https://zakon.rada.gov.ua/laws/show/995_859#Text> accessed 24 October 2021.

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punishment, taking into account, on the one hand, individual rights and, on the other, the necessary effectiveness of the criminal justice system.

In addition, the definition of 'public prosecution' is contained in the Decree of the President of Ukraine 'On the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023'.[11] Para. 4.4. of this Decree stipulates that in order to develop the prosecutor's office, it is necessary to improve the implementation of prosecutors' constitutional powers to support public prosecution, organisation, and procedural management of pre-trial investigations and representation of the state in court, in particular by introducing specialisation and the unification of prosecutorial and judicial practice.

Within legal literature, it is clear that a full understanding of the concept of 'public prosecution' can be obtained only by comparing it with such a concept as 'criminal prosecution'.[12]

It should be noted that in 2012, the CPC of Ukraine did not contain a definition of the category of 'criminal prosecution'. Currently, the legal definition of criminal prosecution is formulated only in the Concept of Criminal Justice Reform of Ukraine, approved by the Decree of the President of Ukraine.[13] The concept defines criminal prosecution as the exclusive procedural function of the prosecutor. As can be seen, the maintenance of public prosecution in court is considered by the concept as a form of criminal prosecution (along with prosecution on behalf of the state, participation in the review of court decisions in criminal cases in appellate and cassation instances). The doctrine that the prosecutor's activity in support of public prosecution is an integral part of the criminal prosecution of persons who have committed a crime is also expressed in the doctrine.[14]

2 THE LEGAL NATURE OF PRIVATE PROSECUTION

The Criminal Code of Ukraine[15] divides crimes into categories depending on their nature and degree of public danger. At the same time, any crime, even a minor one, is characterised by public danger. It encroaches not only on the specific victim but also on socially significant legal relations protected by the state. In other words, by committing even a single crime, the perpetrator demonstrates a negative attitude towards the values accepted in society, a willingness to violate them repeatedly, which is a potential threat to every member of society.

Criminal proceedings in Ukraine are public. They are carried out not by victims of crimes but by official competent state bodies and their officials, who in the process of relevant activities are entitled, in particular, to apply measures of criminal procedural coercion. Prosecution, which is the most important component of criminal proceedings, is generally public. In most crimes, criminal cases are instituted on the fact of committing a crime, regardless of the opinion of the victim and others, and are not subject to termination, even if the victim and the accused have reached reconciliation.

11 Decree of the President of Ukraine 'On the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023' <https://zakon.rada.gov.ua/laws/show/231/2021#Text> accessed 24 October 2021.

12 V Ostapets, 'Correlation of the concepts of "state prosecution" and "criminal prosecution" in the draft Criminal Procedure Code of Ukraine' (2009) 2 Bulletin of the National Academy of Prosecutors of Ukraine 114-119.

13 The Concept of Criminal Justice Reform of Ukraine, approved by the Decree of the President of Ukraine of 8 April 2008 <https://zakon.rada.gov.ua/laws/show/311/2008#Text> accessed 24 October 2021.

14 EM Blazhivsky, MK Yakymchuk, IM Kozyakov, MS Turkot et al., *Prosecutor's support of the public prosecution* (Kyiv: Nat. Acad. of Prosecutors of Ukraine 2014).

15 The Criminal Code of Ukraine <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 24 October 2021.

At the same time, Art. 477 of the CrPC of Ukraine, as an exception to the general rule, provides for a private procedure of criminal prosecution for several types of crimes. Given the definition of private prosecution as an institution of criminal procedural law aimed at protecting the purely personal interests of the victim, this type of prosecution cannot be equated with public prosecution.

Despite the fact that the theory of criminal procedure has repeatedly expressed views on the definition of such a procedural institution as private prosecution, scholars have not come to an agreement in this regard.[16] Some researchers define private prosecution in material terms as providing the victims with a request to the relevant body (requesting prosecution) and information about the facts of socially dangerous and unlawful encroachment, which falls under a specific crime, with the possibility of resolving it at its discretion. In the procedural aspect, private prosecution is a special type of criminal procedure conducted by a private prosecutor regulated by law, which includes appealing to state bodies alleging the guilt of a particular person, further support of the prosecution in court, gathering evidence of guilt, and the right to refuse the prosecutor's charges.[17]

In legal dictionaries, private prosecution is defined as

> a form of criminal proceedings that are initiated only on the complaint of the victim (or his representative) and are subject to closure upon reconciliation of the victim with the accused, or as one of the forms of criminal proceedings, guilty of a crime, to criminal responsibility only on the complaint of the victim, who is obliged to maintain the charges in court.[18]

Some scholars believe that the specifics of proceedings in private prosecution are due to the nature of the criminal offence, its severity, the fact of harm to a particular legal entity or individual, the relationship between the victim and the perpetrator, which allows for a high probability of their reconciliation, and finding a balance between the interests of the victim of a criminal offence and the state.[19]

Criminal proceedings in the form of private prosecution are special proceedings in the system of criminal proceedings, which provides for its separate legal settlement within an independent legal institution, which has a certain procedural originality.[20]

We must agree with S. Perepelytsia, who believes that 'public prosecution' is a broader concept than the category of 'state prosecution', as the latter (given the widespread perception of him as a prosecutor) is only one form of publicity in criminal proceedings.[21] Therefore, it is advisable to distinguish between these concepts, and it is necessary to take into account the semantic emphasis in the relevant contextual use.

16 O Kaplina, 'Conclusions and recommendations on the current topic' [Text]: [current topic of the issue 'National Doctrine of Criminal Procedural Law'] (2019) 9 Ukr Law 134-138; I Glovyuk, 'Prosecutor in criminal proceedings: constitutional and sectoral regulation of functional orientation Visnyk kryminalnoho sudochynstva' (2017) 4 Legal Norms 20-26; IA Titko, 'About the legal nature of the institute of private prosecution in criminal proceedings in National Academy of Legal Sciences of Ukraine' (2015) 2(81) Bulletin of the Nat. Acad. of Law Sciences of Ukraine: Coll. Science. etc. 109-120.

17 O Kostovska, 'Proof in cases of crimes of private prosecution' (Cand. science thesis, University of Kyiv, Law, 2010).

18 Yu Shemshuchenko (ed), *Great encyclopedic legal dictionary* (Kyiv: Yurydychna Dumka 2007).

19 V Tatsiya, Y Groshevoy, O Kaplina, O Shilo (eds), *Criminal procedure* (Kharkiv: Pravo 2013).

20 O Predmesnikov, 'The victim as a party to the prosecution in cases of private prosecution' (2009) 2 Law Forum 345-349

21 SI Perepelytsia, *Criminal proceedings in the form of private prosecution* (ed AR Tumanyants, Kharkiv: Pravo 2015).

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3 FEATURES OF PROSECUTOR PARTICIPATION IN PRIVATE CRIMINAL CASES: THE EXAMPLE OF THE SUPREME COURT GRAND CHAMBER DECISION[22]

The Grand Chamber of the Supreme Court considers that the refusal of the prosecutor to participate in the hearing by the court of first instance, as well as the appellate court during the review of this court decision, is a significant violation of criminal procedure law (para. 3 of Part 2 of Art. 412 of the CPC).

The specifics of criminal proceedings in the form of private prosecution are regulated by Chapter 36 of the CrPC of Ukraine. Thus, the features of criminal proceedings in the form of private prosecution are:

1) the basis for the pre-trial investigation of criminal proceedings in the form of private prosecution is the submission of the victim (individual or legal entity) to the investigator, prosecutor, on the commission of criminal offences, an exhaustive list of which is enshrined in Art. 477 of the CrPC of Ukraine;

2) the refusal of the victim, and in the cases provided for by the CPC of Ukraine, his/her representative, from the accusation is an unconditional ground for closing the criminal proceedings.

Thus, criminal proceedings in the form of private prosecution, as evidenced by the content of Chapter 36 of the CrPC of Ukraine, has a specific feature in relation to the beginning of such proceedings and their completion. Neither Chapter 36 of the CrPC of Ukraine nor other provisions of the CrPC of Ukraine provide for any other features of criminal proceedings in the form of private prosecution. That is, after the criminal proceedings are initiated on the application of the victim of a criminal offence, which is contained in the list of such offences in Art. 477 of the CrPC of Ukraine, the state power of the pre-trial investigation bodies and the prosecutor's office is used, which serves as a further driving force for the pre-trial investigation and support of the prosecution during the trial.

The procedural procedure of criminal proceedings in the form of private prosecution determined by the CrPC of Ukraine is by its legal nature a private-public type of criminal proceedings and should be considered a variation within the general form of such proceedings regulated by the CrPC of Ukraine.

The accusation may be supported by the victim and/or his/her representative only in the cases provided for in Part 3 of Art. 338 of the CrPC of Ukraine (change of charges by the prosecutor in court) and Part 2 of Art. 340 of the CrPC of Ukraine (refusal of the prosecutor to support the state prosecution). This conclusion correlates with para. 19 of Part 1 of Art. 3 of the CrPC of Ukraine on the prosecution of the victim, his/her representative, and legal representative only in cases established by the CPC of Ukraine, and para. 4 of Part 3 of Art. 56 of the CrPC of Ukraine, according to which. During the trial, the victim has the right to support the charges in court in case of the refusal of the prosecutor to support the state prosecution.

At the same time, Part 5 of Art. 340 of the CrPC of Ukraine stipulates that when the victim agrees to support the accusation in court, if the prosecutor refuses to support the state prosecution, the criminal proceedings on the relevant charge become private and are carried out under private prosecution.

Interpretation of the connections between norms of the CrPC of Ukraine allows us to

22 Resolution of the Grand Chamber of the Supreme Court of 26 June 2019 in case no 404/6160/16-k <https://reyestr.court.gov.ua/Review/82885531> accessed 24 October 2021.

conclude that it is necessary to distinguish between the concepts of 'criminal proceedings in the form of private prosecution' and 'support for victims of private prosecution'.

If 'criminal proceedings in the form of private prosecution' should be understood as proceedings that may be initiated by the investigator or the prosecutor on the basis of the victim's application for the prosecution of criminal offences from among those listed in Part 1 of Art. 477 of the CrPC of Ukraine and are carried out in the general order provided by the CrPC of Ukraine, the support of victims of private prosecution achieved only in case of refusal of the prosecutor to support the public prosecution.

That is, criminal proceedings under Part 5 of Art. 340 of the CrPC of Ukraine are a separate form of criminal proceedings, the features of which are:

> 1) support the prosecution of victims in court;
>
> 2) the refusal of the victim, and in cases provided by the CrPC of Ukraine, his/her representative from the accusation, is an unconditional ground for closing the criminal proceedings (Part 4 of Art. 26, para. 7 of Part 1 of Art. 284 of the CrPC of Ukraine).

The current criminal procedure legislation establishes that the judicial review of criminal proceedings is carried out with the obligatory participation of the parties to the criminal proceedings, except as provided by the CPC of Ukraine (Part 2 of Art. 318 of the CPC of Ukraine). In accordance with Part 3 of Art. 36 of the CPC of Ukraine, the participation of the prosecutor in court is mandatory, except in cases provided by the CPC of Ukraine (such a case is the prosecutor's refusal to support the prosecution). Part 2 of Art. 318 and Art. 324 of the CPC of Ukraine also do not contain exceptions under which the participation of the prosecutor would not be mandatory and does not contain such exceptions, nor does Chapter 36 of the CPC of Ukraine, which establishes the procedure for criminal proceedings in the form of private prosecution. In addition, Art. 5 of Law no. 1697-VII stipulates that the functions of the Prosecutor's Office of Ukraine are performed exclusively by prosecutors.

The fulfilment by the prosecution of the procedural duty to the pre-trial investigation of a criminal offence in proceedings in the form of private prosecution and maintenance of public prosecution in court is a guarantee of equality, adversarial proceedings, and freedom to present evidence and prove its persuasiveness before the court.

Also, the current CPC of Ukraine does not regulate the procedural procedure for transferring criminal proceedings from the prosecutor to the victim in cases of private prosecution in order to provide them with a court to investigate and make a lawful, reasonable, and reasoned court decision. As a result, the sense of gathering evidence by the prosecutor at the stage of pre-trial investigation is lost.

The European Court of Human Rights, in the case of *Ozerov v. Russia*,[23] considers

> that in cases where the oral hearing is assessed as a favorable factor for a court decision on "any criminal charge" of a person and in cases where, having received adequate opportunity to be present at the hearing, the defense did not refuse it, the presence of the prosecutor in court is usually necessary to avoid legitimate doubts that may arise about the impartiality of the court.

Ukrainian Supreme Court reiterated that based on the above, the absence of the prosecutor during the criminal proceedings in the form of private prosecution indicates:

23 *Ozerov v Russia* (App no 64962/01) <https://hudoc.echr.coe.int/eng?i=001-98531> accessed 24 October 2021.

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1) the absence of the prosecution, because the victim under Chapter 36 of the CPC of Ukraine is not authorized to support the prosecution unable to effectively gather evidence and support the prosecution on its own);
2) on violation of the principles of equality, adversarial proceedings and freedom in presenting their evidence to the court and in proving their persuasiveness before the court;
3) the lack of balance of private and public interests in such criminal proceedings.[24]

In this regard, the participation of the prosecutor in criminal proceedings in the form of private prosecution is an additional legal guarantee of the rights of the victim in criminal proceedings and also contributes to a full, comprehensive, and objective consideration of the case.

5 CONCLUDING REMARKS

In our opinion, criminal proceedings in the form of private prosecution have their own specifics, which are manifested in several aspects: the status of the applicant and the prosecutor, the procedure for opening criminal proceedings, features of evidence, and the ability to close proceedings at any time. Despite all the differences in the nature of the procedural form of such criminal proceedings, important questions about its legal nature, what criminal offences are included, and on what grounds they are classified as such, are investigated in the form of private prosecution.

Thus, by its legal nature, a private indictment is a means of protecting a person's private rights that have been violated because of a criminal act, which involves imposing on the prosecutor the obligation to support and prove the legality of the accusation.

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24 Decision of the Supreme Court of Ukraine, case no 404/6160/16-к 26 June 2019 <https://zakononline.com.ua/court-decisions/show/82885531> accessed 24 October 2021.

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BOOK REVIEW

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Book Review

REVIEW OF THE BOOK IMPLEMENTATION OF THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD IN MEDIATION IN MATTERS CONCERNING THE EXERCISE OF PARENTAL AUTHORITY AND CONTACTS, EDITED BY JOANNA MUCHA

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Summary: 1. Introduction. – 2. Main Ideas and Focus of the Book. – 3. Concluding Remarks.

ABSTRACT

The monograph is based on the thesis that in court proceedings in matters relating to a child and mediation in matters concerning the exercise of parental rights and contact with a child, the primary value to be protected should be the best interests of the child. The analysis and research allowed the researchers to determine the extent to which the applicable regulations and mediation practice implement this principle and what instruments adopted in legal regulations and used in mediation serve to respect it.

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The authors emphasised that in many acts of international law and the provision of Art. 72 of the Constitution of the Republic of Poland, the order to protect the best interests of the child is a fundamental and overriding principle of the Polish system of family law. All regulations in the sphere of relations between parents and children are subordinated to this principle. It signifies the primacy of the child's best interests over the interests of other people, especially parents, and is the purpose of exercising parental authority and contacts. This analysis was supplemented with positions based on other legal systems – Ukraine and Italy. In both cases, the importance of the best interests of the child was confirmed in the procedures for resolving conflicts related to the separation of parents.

Keywords: *the principle of the best interests of the child; mediation in family matters; Code of Civil Procedure; civil proceedings; alternative dispute resolution; access to justice*

1 INTRODUCTION

The reviewed book concerns the important issue, from the theoretical and practical point of view, of the implementation of the principle of the best interests of the child in mediation in matters concerning the exercise of parental authority and contacts.

The monograph consists of 13 chapters in which the following topics are discussed:

1) Parental breakup in a child's life – a psychological perspective;
2) Assessment of the usefulness of mediation as a form of resolving family conflicts – analysis from the perspective of family pedagogy;
3) The child's subjectivity in family mediation in matters of contact and care – axiology of the child's subjectivity in mediation;
4) The principle of the best interests of the child in mediation in selected legal systems of other countries;
5) The best interest of the child as a value subject to special protection in matters relating to the exercise of parental responsibility and contacts with the child;
6) The objective scope of court proceedings and mediation in matters relating to the exercise of parental authority and contacts;
7) The subjective scope of court proceedings and mediation in matters related to parental responsibility and contacts;
8) The process and psychological guarantees of the implementation of the principle of the best interests of the child in matters relating to the exercise of parental authority and contacts and mediation;
9) The participation of the child in mediation in matters relating to the exercise of parental authority and contacts and his/her representation;
10) The role of the mediator in mediation in matters relating to the exercise of parental authority and contacts;
11) The best interest of the child and the settlement concluded before the mediator in matters relating to the exercise of parental authority and contacts;
12) Surveys;
13) Summarising considerations (made in an exemplary manner).

The authors analysed the applicable legal regulations, including the Constitution of the Republic of Poland, the Family and Guardianship Code, the Code of Civil Procedure, and numerous acts of international law concerning court proceedings involving children or in matters relating to children. This analysis was supplemented with positions based on other legal systems, both those in which mediation was not regulated at the time of writing

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the book but was regulated after its publication[2] (Ukraine) and those where it is based on legal provisions (Italy). In both cases, the importance of the best interests of the child was confirmed in the procedures for resolving conflicts related to the separation of parents.

2 MAIN IDEAS AND FOCUS OF THE BOOK

The authors emphasised that in many acts of international law and the provision of Art. 72 of the Constitution of the Republic of Poland, the order to protect the best interests of the child is a fundamental and overriding principle of the Polish system of family law. All regulations in the sphere of relations between parents and children are subordinated to this principle.[3] It signifies the primacy of the child's best interests over the interests of other people, especially parents, and is the purpose of exercising parental authority and contacts. In a properly functioning family, this goal is already in line with the parents' interests. In the disturbed communication of parents who are separated or in the phase of separation, this goal remains unchanged. However,, the proper exercise of parental authority and contacts requires the interference of state authorities, e.g., a court, or other entities, e.g., a mediator.[4]

In mediation covering issues related to determining the manner of exercising parental responsibility and maintaining contacts, such as court proceedings relating to these matters, the value subject to special protection should be the best interests of the child and the related empowerment of the child. In terms of the legal relationship of parental authority, as well as contacts, the child is to be treated as their subject and not as a specific goal of parental 'managerial' activities carried out on the basis of legal norms.[5]

The empowerment of the child required an answer to the question of whether, in order to ensure the implementation of the principle of the best interests of the child in matters relating to the exercise of parental responsibility and contacts, its direct participation is necessary, and whether his/her welfare shall be fully protected only in this way. The analysis carried out in the reviewed study allowed the authors to draw a correct conclusion that neither the principles expressed in numerous provisions of international law acts concerning the participation of children in proceedings concerning them nor the provisions of the Constitution of the Republic of Poland require that the child have the status of a participant or party to the proceedings within the meaning of procedural law. At the same time, the authors concluded from the essence of parental authority and contacts that it is up to the parents to determine how they should be exercised, which means that the child not only does not have to, but cannot be, in light of the regulations, a party or a participant in proceedings concerning these matters, because the child is not a party to the dispute in this regard. This thesis is debatable and depends on the recognition whether, when deciding on parental authority, the guardianship court in its decision refers to the child or acts only in the sphere of parents' rights and obligations. The answer to this question requires an analysis of the concept of parental authority and clarification of the relationship in which parents and

2 The Mediation Act was passed 16 November 2021. The act entered into force 15 December 2021: Document 1875-IX <https://zakon.rada.gov.ua/laws/show/1875-IX#Text> accessed 13 December 2021.

3 Case No K 18/02 [2003] Judgment of the Constitutional Tribunal of The Republic of Poland (2003) (4) OTK-A, Case No IV CSK 442/17 [2018] The decision of the Supreme Court, the Republic of Poland, LEX no 2483681.

4 J Mucha, J Mucha (eds), 'Rozważania podsumowujące' in *Realizacja zasady dobra dziecka w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów* (Warsaw 2021) 455.

5 Ibid. 456.

children remain (until they reach the age of majority).[6] The doctrine distinguishes between three types of approaches to parental responsibility. According to one, parental responsibility is the subjective right of parents,[7] according to another, it is a set of subjective rights,[8] or finally, all obligations and rights that are imposed on parents towards their children.[9] As H. Dolecki notes, the first two terms of parental authority are not convincing due to the mechanical transfer of the concepts of subjective law to family law. The subjective right is primarily a right, and its exercise is left to the will of the entitled person, and the exercise of parental authority is the responsibility of the parents. Therefore, according to H. Dolecki, it is most accurate to define parental authority as a complex of interrelated rights and obligations. With this approach to parental responsibility, any changes to it (limitation, suspension, deprivation) directly affect the parents (because they affect the sphere of their rights and obligations) and, at the same time, affect the child[10] because it matters to the child who is entitled to parental responsibility for him/her, who will shape his/her psyche, and who he/she would stay with.[11] This means that the result of the case affects the legal sphere of the child who, as an interested party, should take part in the case as a participant.[12]

The thesis indicated by the authors that the child is not a participant in the proceedings in matters of parental responsibility and contact with the child also implies the conclusion that the child is not a party to a mediation settlement concluded in such cases (also when such a

6 H Dolecki, 'Sytuacja prawna małoletniego w postępowaniu przed sądem opiekuńczym w sprawach dotyczących władzy rodzicielskiej' (1976) 11 Nowe Prawo 1518-1519; A Gersdorf, 'Postępowanie sądowe w sprawach dotyczących władzy rodzicielskiej' (1972) 4 Palestra 46.

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10 H Dolecki (n 7) 1522; H Haak, *Ochrona prawna udzielana przez sąd opiekuńczy* (Toruń 2002) 202, 209, 211-213, 361, 366; F Zedler, *Sądy rodzinne. Wybrane zagadnienia organizacyjne i procesowe* (Warsaw 1984) 124; K Korzan, Postępowanie nieprocesowe (Warsaw 2004) 418; cf Z Świeboda, 'Wykonanie orzeczeń o odebranie osoby podlegającej władzy rodzicielskiej lub pozostającej pod opieką' (1976) 4 Zeszyty Naukowe Instytutu Badań Prawa Sądowego 112; E Wengerek, *Postępowanie zabezpieczające i egzekucyjne. Komentarz* (Warsaw 1972) 718; W Siedlecki, 'Przegląd orzecznictwa Sądu Najwyższego (Prawo procesowe cywilne – II półrocze 1973 r.)' (1974) 11 Państwo i Prawo 138; H Haak, *Władza rodzicielska. Komentarz* (Toruń 1995) 35; A Rydzewski, 'Problematyka uczestnictwa małoletnich w postępowaniu przed sądem opiekuńczym w sprawach z zakresu "władzy rodzicielskiej"' (1997) 11 Rejent 98; A Zieliński, 'O sądzie opiekuńczym' (1968) 7-8 Nowe Prawo 1108; A Zieliński, Sądownictwo opiekuńcze w sprawach małoletnich (Warsaw 1975) 102.

11 W Siedlecki, Z Świeboda, Postępowanie nieprocesowe (Warsaw 2001) 149; W Siedlecki (n 11) 139; F Zedler (n 11) 91; K Korzan, 'Glosa do postanowienia SN z 15.04.1971 r., I CZ 49/71' (1973) 4 OSPiKA 175; K Korzan (n 11) 103; K Korzan, 'Podmioty postępowania nieprocesowego (cz. I)' (2005) 2 Rejent 24; M Goettel, 'Wybrane zagadnienia z zakresu postępowania o pozbawienie władzy rodzicielskiej' (1981) 15 ZNIBPS 980100; justification of the Supreme Court's resolution 21 February 1968, III CZP 105/67, OSNCP 1968, no 10, pos 162; J Policzkiewicz, Z Siedlecki, E Wengerek, Postępowanie nieprocesowe (Warsaw 1973) 143; A Gersdorf (n 7) 46.

12 J Bodio, *Status dziecka jako uczestnika postępowania nieprocesowego* (Warsaw 2019) 335-337.

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settlement includes a parental agreement). However, in an unquestionable way – both at the level of international law and in the provisions of the Constitution of the Republic of Poland (Art. 72 para. 3), the Family and Guardianship Code (Art. 95 § 4), and the Code of Civil Procedure (Arts. 216[1] and 576 § 2) – under the right to be heard, the child is granted the right to express his/her opinion on matters relating to him/her, which is in line with the principle of the best interests of the child. Ensuring that a person is heard, and at the same time, limiting him/herself to this form is a sufficient guarantee of the child's welfare. However, the content of the right to expression in court proceedings and in mediation implemented through the institution of a hearing should not be equated with the right to decide about oneself, but only with the right to participate in the decision-making process.[13]

The authors rightly emphasise that the positioning of a child as a participant or party to court proceedings and assigning him/her an adequate position in mediation must be associated with the risk and responsibility of taking actions that result in their legal sphere. Hence, it was aptly pointed out in the reviewed work that

> the requirement of decision-making in one's own affairs and in matters of one's own family may not be an implementation, but a threat to the welfare of a child and may constitute a source of negative experiences for the child as a result of participation in activities relating to earlier situations in his life, including traumatic experiences (which, in turn, can be treated as a form of secondary victimization in the course of court procedures with reference to family matters). As a consequence, the shaping of dispute resolution procedures, including mediation, and legal institutions, including the hearing, should be treated as tools by which this psychological layer can be fully respected. A child in matters concerning him, in particular with regard to determining the methods of exercising parental authority and contacts, should be assigned a consultative role, possibly and to some extent opinion-forming, but not a decision-making role, regardless of whether these matters are the subject of court proceedings or mediation.[14]

This means that the child should also not be considered a party to a mediation settlement. The indicated conclusions result from the fact that, from the legal point of view, the principle of the best interests of the child is genetically related to the system of human rights protection and is firmly embedded in the axiology of law, its primary genesis has a psychological basis.[15]

The authors rightly emphasise that allowing a child to express his/her views in mediation may better protect his/her welfare, because as a rule, unlike in court proceedings, parents have an impact both on the conduct or resignation of the hearing and its scope. In the course of mediation, the implementation of the principle of the best interests of the child comes down to informing the child about the need to resolve the dispute regarding the exercise of parental authority and contacts and the results of the agreement reached as part of mediation, but also about the role of individual entities in mediation, including the mediator, and about the impact on the result of mediation so that he/she may express his/her own position through them. The parents should provide the child with relevant information. In this aspect – according to the authors – the superiority of mediation over court proceedings, in which the information obligation is rarely fulfilled, is manifested. In this sense, mediation can better serve the best interests of the child.[16] Therefore, the book proposes to introduce

13 J Mucha, J Mucha (n 5) 459-460.
14 Ibid. 459.
15 Ibid. 458.
16 Ibid. 461-462.

a provision to the Code of Civil Procedure regulating the hearing of a child in mediation in matters relating to him/her, including matters relating to the determination of the methods of exercising parental authority and maintaining contacts. However, the hearing conducted in the course of mediation in the current legal status, due to the principle of confidentiality, does not replace the hearing referred to in Arts. 216[1] and 576 § 2 of the Code of Civil Procedure as part of court proceedings – hence, if necessary, it will have to be repeated under the conditions set out by the provisions of the Code and court practice.[17]

Moreover, the reviewed book supports the draft law of introducing obligatory referral of parents to mediation by the court. At the same time, this 'obligatory' should only concern the meeting with the mediator in order to inform its participants about its advantages, course, and possible result, and not its obligatory conduct, because commencing mediation must – as in any case – be left to the will of the parties, only then may prove effective.[18]

Research on the role of the mediator in mediation on children's matters led the authors to the conclusion that protecting the child's welfare in the course of mediation should rest primarily with the parents and not with the mediator (due to a potential conflict with the principles of impartiality and neutrality). The role of the mediator should be to ensure that the child's perspective is included in mediation and to sensitise parents to their needs and the possible negative consequences of separation.[19]

Analysing the issue of how the principle of the best interests of the child is implemented in mediation in cases concerning the exercise of parental authority and contacts, the authors put forward some interesting *de lege ferenda* conclusions. The first is the introduction – modelled on the German regulation – of the institution of the representative of the child's interests (the child's advocate), whose task would be to ensure that the child's interests are taken into account in the final mediation agreement.

The second *de lege ferenda* conclusion is the possibility of introducing a parental agreement to the provisions of the family and guardianship code, which would not eliminate the possibility of concluding a mediation agreement. From the legal point of view, it was assumed that the parental agreement and the agreement concluded before the mediator constitute two separate institutions serving to make arrangements on similar issues. The choice of one of these forms would be left to the parents.

> If they prefer to agree on issues related to the exercise of parental responsibility or contacts without the help of a third party, their arrangements will take the form of a parental agreement referred to in the provisions of art. 58 § 1 and 107 § 1 of the Family and Guardianship Code. Then, assuming that it is not contrary to the best interests of the child, it will be taken over as an element of the facts to the divorce or separation judgment. It does not have an independent procedural nature and remains at most a settlement agreement (the so-called substantive law settlement). However, if the parents decide, on their own initiative or as a result of court actions, to use the help of a mediator, their joint arrangements will take the form of a mediation agreement, which, being a substantive law agreement, will also gain the value of causing procedural effects (and in the case of mediation will become a procedural step).[20]

The third *de lege ferenda* conclusion is the introduction to court proceedings involving issues relating to the person of a child (i.e., in divorce, separation, and marriage annulment proceedings in cases where the parties have minor children, as well as in proceedings before

17 Ibid. 460.
18 Ibid. 508.
19 Ibid.
20 Ibid. 468.

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the guardianship court, the subject of which is the regulation of the manner of exercising parental authority and contacts) the possibility of obligatory referral of parents to mediation by the court. However, this 'obligatory' should only concern the meeting with the mediator in order to inform its participants about its advantages, course, and possible result, and not its obligatory conduct, because commencing mediation must – as in any case – be left to the will of the parties.[21]

The fourth *de lege ferenda* conclusion is a clear indication of the child's best interests as a criterion for approval of the settlement by the court and the recognition that its violation should be a ground for refusing to approve a settlement concluded not only in cases for divorce or separation, but in every case concerning the child, including proceedings before the guardianship court, regarding the establishment or change of the methods of exercising parental authority and contacts.

The analysis led the authors to the correct conclusion that the applicable legal provisions seem, in principle, sufficient to guarantee the implementation of the principle of the best interests of the child in mediation.

The authors rightly concluded that

> in the current legal situation, the implementation of the principle of the best interests of the child in mediation in matters relating to the exercise of parental responsibility and contacts is guaranteed by:
> - allowing mediation in these matters, both in proceedings for divorce, separation, or marriage annulment, as well as in non-contentious proceedings before the guardianship court (awarding the mediation capacity),
> - the requirement of attempt to reach an out-of-court agreement (e.g., through mediation) prior to taking legal action,
> - the legal requirements as to the professional qualifications of the mediator, including a degree in psychology, pedagogy, sociology or law and their practical skills in the practice of mediation in family matters,
> - giving the child the opportunity to express his or her position on matters related to the mediation concerning him/her (mainly by listening to him/her),
> - giving priority to parental decisions regarding the exercise of parental rights and contact (in the form of a parental agreement or settlement agreement) over the judicial decision,
> - leaving to the court the role of the guarantor of the child's best interests at the stage of the approval of the parental agreement or mediation settlement worked out in the course of mediation and taking the child's best interests as the criterion for approving such an agreement or settlement.[22]

3 CONCLUDING REMARKS

The monograph is based on the thesis that not only in court proceedings in matters relating to a child but also in mediation in matters concerning the exercise of parental rights and contact with a child, the primary value to be protected should be the best interests of the child. The conducted analysis and research allowed us to determine to what extent the applicable regulations and mediation practice implement this principle and what instruments adopted in legal regulations and used in mediation serve to respect it.

21 Ibid. 471-472.
22 Ibid. 468-469.

When considering the indicated issue, the authors used not only theoretical analysis (juridical, pedagogical, psychological) but also conducted a survey among mediators, which illustrated the state of their knowledge on issues related to the participation of children in mediation, the importance of the principle of their well-being and the ability to conduct mediation with their participation, and also indicated their expectations in the field of instruments to protect the best interests of the child in mediation.

The substantive side of the work deserves a high rating. The authors undertook the analysis of an original issue. A reliable approach to the subject allowed for freedom in the systematisation of matter. The layout of the work is clear and logical, and the division of issues is consistently carried out – individual issues correspond to the content of the respective chapters. The dogmatic analysis is characterised by reliability. The work is written in communicative yet legal language.

The research also deserves recognition. The questionnaire research was carefully conducted, the questions were formulated in an accessible way, reflecting the subject of the research. The survey results were well interpreted. Insightful conclusions were drawn from them, which can certainly contribute to a practical change in regulations via the presented *de lege ferenda* conclusions.

The subject matter of the monograph under review is not only important but also original, which means that it fills the gap existing in the legal market. The subject of the study is topics of great importance – it is both theoretical and practical. The research problem presented in the monograph concerns the important issue of the implementation of the principle of the best interests of the child in mediation in matters relating to the exercise of parental authority and contacts. For these reasons, the reviewed publication may be of significant importance for mediators and family judges or advocates, especially 'child advocates'.

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Базелюк Вікторія, Дем'яненко Юлія, Маслова Олена

ОСОБЛИВОСТІ ПРОЦЕСУАЛЬНОЇ УЧАСТІ ПРОКУРОРА У СПРАВАХ ПРИВАТНОГО ОБВИНУВАЧЕННЯ: ДОСВІД УКРАЇНИ

Підтримання обвинувачення у кримінальних справах в суді є специфічною функцією прокурора, яка закріплена як в Конституції України, так і в положеннях Кримінального процесуального кодексу України. Ця функція повинна відповідати не лише цілям кримінального судочинства, а й міжнародним стандартам у сфері кримінального судочинства. Залежно від виду суспільно небезпечного діяння кримінальне провадження поділяється на публічне та приватне. І залежно від виду обвинувачення функції прокурора при здійсненні своїх повноважень різні. Таким чином, у справах приватного обвинувачення участь потерпілого має вирішальне значення і його відмова від переслідування може бути підставою для закриття кримінального провадження. В цій роботі досліджується інноваційний підхід правозастосовної практики Верховного Суду, що засвідчує активну роль прокурора у розгляді цих категорій кримінальних справ у суді.

Для цього було проаналізовано практика Верховного Суду України, а також положення Кримінального процесуального кодексу України, інших законодавчих актів. Узагальнено та досліджено практику українських судів, а також рекомендації Ради Європи, доктрину кримінального процесуального права України.

Викладене дало авторам можливість зробити висновок про різні форми приватного обвинувачення зі своєю специфікою, яка проявляється в аспектах, зазначених у цій роботі.

Ключові слова: прокурор; кримінальний процес; приватна кримінальна справа; Україна.

Баранкова Вікторія

ПРАВИЛА ВЧИНЕННЯ НОТАРІАЛЬНИХ ДІЙ, ЩО ЗАБЕЗПЕЧУЮТЬ ОБҐРУНТОВАНІСТЬ НОТАРІАЛЬНИХ АКТІВ

Статтю присвячено дослідженню правил вчинення нотаріальних дій, дотримання яких забезпечує обґрунтованість нотаріальних актів. Метою роботи є визначення складових процесуального механізму забезпечення обґрунтованості нотаріальних актів, з'ясування виявлення тих недоліків їх унормування, що тягнуть за собою виникнення судових спорів, та на цій підставі формулювання пропозицій щодо подальшого вдосконалення нотаріального законодавства.

Необхідність вирішення визначеної мети зумовила використання у роботі наступних методів: логічного, системного, конкретно-соціологічного, герменевтичного та моделювання.

Встановлено, що обґрунтованість нотаріальних актів зумовлюється отриманням правил щодо: подання документів - доказів, витребовування документів – доказів нотаріусом, підписання нотаріальних документів, направлення документів на експертизу, відповідності документів, які подаються для вчинення нотаріальних дій, встановленим законом вимогам, з'ясування волевиявлення заінтересованих осіб.

Доводиться, що обґрунтованим слід визнавати нотаріальний акт, постановлений з урахуванням встановлених в межах нотаріальної справи дійсних обставин, підтверджених відповідними, передбаченими нотаріальним законодавством, доказами.

Сформульовано пропозиції щодо тенденцій унормування змісту вимог обґрунтованості нотаріальних актів та наслідків їх порушення.

Ключові слова: нотаріат, нотаріальна діяльність, нотаріальні акти, нотаріальні дії, правила вчинення нотаріальних дій.

Вашко Адріан

РОЗВИТОК ЗАКОНОДАВСТВА В СФЕРІ КРИМІНАЛЬНОГО ПРОЦЕСУ ТА ДОКАЗУВАННЯ В СЛОВАЦЬКІЙ РЕСПУБЛІЦІ (1993-2021)

У статті автор акцентує увагу на законодавчому розвитку кримінального судочинства та доказування в період після утворення Словацької Республіки. У цій статті особлива увага приділяється питанню доказів і засобів доказування. Також окремо йдеться про правове регулювання використання інформаційно-технічних засобів. Коротко пропонуються можливі напрямки розвитку у сфері доказів, що відповідають сучасному стану розвитку науки і техніки, а також іншим змінам. Під час дослідження використано наукові методи історичного аналізу та порівняльно-правові методи. Розвиток у цій сфері здійснюється постійно, і правове регулювання в сфері доказування у кримінальному процесі Словацької Республіки неминуче підлягатиме оновленню.

Ключові слова: кримінальне провадження, докази, засоби доказування, інформаційно-технічні засоби, інформаційні технології.

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Шумило-Кульчицька Доброслава

ЕКОНОМІКА КРИМІНАЛЬНОГО СУДОЧИНСТВА В АСПЕКТІ ПРОЦЕСУАЛЬНИХ ПРИНЦИПІВ В ПОЛЬЩІ?

Ця стаття написана в рамках проекту «Costs of a criminal trial in view of an economic analysis of law».

Частина перша містить міркування щодо впливу економічних факторів на нормативно-правові акти, що стосуються кримінального процесу. Необхідно відповісти на питання, чи слід враховувати такі чинники, що впливають на принципи, на основі яких розробляється модель кримінального процесу, і чи є рішення, які були запроваджені саме через втрати, що пов'язані з притягненням до відповідальності винного. Частина друга зосереджена на фундаментальних результатах та висновках емпіричних досліджень, проведених щодо витрат Державного казначейства на кримінальні провадження, з урахуванням витрат, понесених у важких справах, тобто розглянутих у першій інстанції обласними судами, та в малозначних справах, які в першу чергу розглядаються районними судами.

У статті вказується на три основні чинники, що визначають розмір таких витрат, а саме: перебування обвинуваченого під час провадження під вартою, використання доказів (висновків експертів), участь державного захисника, оплачуваного державою.

Ключові слова: економіка права, кримінальний процес, витрати на провадження.

Ільницький Олег, Бойченюк Іван

ПРОБЛЕМИ ЕФЕКТИВНОСТІ СПОСОБІВ ЗАХИСТУ ПРАВ, СВОБОД ТА ІНТЕРЕСІВ ОСОБИ АДМІНІСТРАТИВНИМИ СУДАМИ У СПОРАХ ПРО ПРАВА НА ЗЕМЛЮ

Обрання ефективного та належного способу захисту є одним із важливих етапів судочинства, яке визначає досягнення поставленої мети. Процесуальне законодавство та практика його застосування невирішеним питанням мають межі способів захисту у справах про захист прав та інтересів осіб на землю судами різної юрисдикції та можливість їх перехресного застосування. Для отримання достовірних та обґрунтованих висновків були використані загальнонаукові та спеціальні методи дослідження, за допомогою яких опрацьовані результати теоретичних досліджень з проблем здійснення судочинства в Україні, земельного права та адміністративного процесу, матеріали юридичної практики у формі висновків міжнародних правозахисних установ та українських судів. В результаті дослідження встановлено, що при обранні способу захисту порушеного права, свободи чи інтересу суди повинні враховувати прямий взаємозв'язок вимоги про захист зі змістом такого права та характером правопорушення.

Ключові слова: судочиснтво, юрисдикція, речово-правові способи захисту, земельна ділянка, повноваження, публічне майно.

Калужна Оксана, Шевчук Марта

БЕЗУМОВНІ ПІДСТАВИ ДЛЯ ВІДВОДУ СУДДІ, СЛІДЧОГО СУДДІ, СУДУ У КРИМІНАЛЬНОМУ СУДОЧИНСТВІ УКРАЇНИ В КОНТЕКСТІ ЄВРОПЕЙСЬКИХ СТАНДАРТІВ ПРАВА НА СПРАВЕДЛИВИЙ СУД

Правильне вирішення судами заяв про відвід (самовідвід) судді (слідчого судді, суду) є важливим для подальшого кримінального провадження, оскільки судова помилка у цьому питанні може мати наслідком порушення права особи на «законний склад суду» або права на захист, що є підставами для скасування рішення суду у справі та її направлення на новий судовий розгляд (ст. 412 КПК). Своєю чергою помилкове вирішення заяв про відвід може, окрім зазначених наслідків, призвести і до порушення засад розумних строків та правової визначеності (остаточності) судових рішень як складової верховенства права. Водночас тема відводів не користується популярністю в науці. У практиці ж провадження про відводи належать до поширених окремих процесуальних проваджень, що завершуються переважно негативним їх вирішенням (відмовою в задоволенні відводу).

Мета даного дослідження: розкрити зміст підстав для відводу, з тим, щоб погляди на їх розуміння пройшли переосмислення і знайшли узгодження у професійному середовищі та сталість у судовій практиці.

У статті окреслено перелік підстав для відводу судді (слідчого судді, суду) за КПК України, подано їх класифікацію на безумовні та оцінні, яка є визначальною для підбору способів їх доказування. Показано співвідношення національної класифікації підстав для відводу та критеріїв визначення безсторонності суду у практиці ЄСПЛ. Головна увага зосереджена на аналізі ***безумовних підстав*** для відводу за національною класифікацією, розкрито їх зміст у прив'язці до позицій ЄСПЛ, а порівняльно-правовий метод дозволив упевнитись у висновках щодо дискусійних аспектів.

Ключові слова: відвід судді у кримінальному судочинстві, безсторонність суду; підстави для відводу судді, критерії безсторонності суду у практиці ЄСПЛ, конфлікт інтересів судді.

Малиновська Ірина, Яркіна Наталя, Філюк Олександра

«ПУБЛІЧНИЙ ПОРЯДОК» ЯК ПІДСТАВА ДЛЯ ВІДМОВИ ВИЗНАННЯ ТА ВИКОНАННЯ РІШЕННЯ У МІЖНАРОДНОМУ КОМЕРЦІЙНОМУ АРБІТРАЖІ: УКРАЇНСЬКІ РЕАЛІЇ ТА МІЖНАРОДНИЙ ДОСВІД

Питання про визнання та виконання рішень міжнародного комерційного арбітражу (МКА) як прототипу рішення іноземного суду знаходить кардинально протилежні відповіді в різних правових системах та в доктрині МКА. Так, у Регламенті про юрисдикцію, визнання та виконання рішень у цивільних і комерційних справах, раніше у Брюссельській конвенції 1968 року та Луганській конвенції 1988 року, поняття «арбітраж» було виключено зі сфери виконання та визнання рішень іноземних судів.

Проте процедура визнання та виконання рішення МКА має єдиний підхід у багатьох країнах світу. Таким чином, національні суди, вирішуючи питання про визнання та виконання рішення МКА, все частіше стикаються з такими проблемними питаннями, як підстави для відмови у визнанні та виконанні такого рішення. У цій статті пропонується висновок про те, що підстави для відмови у визнанні та виконанні рішення МКА є порушенням публічного порядку країни, де арбітражне рішення підлягає визнанню та виконанню. Особлива увага приділяється відмінності між «матеріальним» і «процесуальним» публічним порядком та практичним підходам національних судів деяких країн до цього питання.

Автори стверджують, що шлях подолання цієї невідповідності все ще полягає в єдиному підході до розуміння «громадського порядку» в усіх державах-учасницях Нью-Йоркської конвенції 1958 року та більш чіткому міжнародному регулюванні цього питання.

Ключові слова: публічний порядок; міжнародний комерційний арбітраж; визнання та виконання іноземного рішення.

Омарова Айсель, Власенко Сергій

МІЖНАРОДНІ СТАНДАРТИ ЮВЕНАЛЬНОЇ ЮСТИЦІЇ: РОЗБУДОВА ТА ВПЛИВ НА УКРАЇНСЬКЕ ЗАКОНОДАВСТВО

Права дитини завжди були у центрі уваги міжнародних організацій, у тому числі ООН. Про це свідчить той факт, що у 1979 р. Комісія ООН з прав людини створила Робочу групу з розробки конвенції про права дитини, яка з 1979 по 1989 рр. працювала над створенням універсального договору для дітей у всьому світі. Серед інших статей члени Робочої групи розробили положення про ювенальну юстицію. Результатом цієї наполегливої роботи стало встановлення міжнародних стандартів ювенальної юстиції.

Історико-правові методи були основними методами дослідження, що дозволило провести порівняння проектних текстів статей 37 і 40. Це порівняння дало нам можливість простежити розвиток думок у державах-учасницях щодо поводження з дітьми в кримінальних справах та покарань за скоєні злочини.

Сьогодні Україна намагається реформувати своє законодавство, зокрема у сфері ювенальної юстиції. Тому в заключних зауваженнях запропоновано декілька корисних рекомендацій для українського законодавства.

Ключові слова: Конвенція ООН про права дитини, ювенальна юстиція, провадження у кримінальних справах, права неповнолітніх, злочинність неповнолітніх.

Прилуцький Сергій, Стрельцова Ольга, Нурулаєв Ількін

СУДОВА СПЕЦІАЛІЗАЦІЯ ЧЕРЕЗ ПРИЗМУ ПРИНЦИПУ «ПРИРОДНОГО СУДУ»: КОМПАРАТИВНИЙ АНАЛІЗ

В сучасних умовах інтенсивного розвитку суспільних відносин та ускладнення їх правового регулювання, все частіше держави звертаються до інституту спеціалізації судоустрою та судочинства. В українських політичних колах розгорнулася гостра дискусія щодо конституційності антикорупційого суду й відповідно суб'єкт права на конституційне подання поставив під сумнів низку положень Закону «Про Вищий антикорупційний суд» і звернувся до Конституційного Суду України про визнання цього закону неконституційним. Конституційний Суд України розпочав судове конституційне провадження щодо цього питання. Ознайомлення із правовою позицією суб'єкта конституційного подання вказує на те, що ключове питання цього конституційного провадження стосується наявності ознак «особливого суду» (у розумінні ч. 6 ст. 125 Конституції України) у механізмі законодавчого регулювання правового статусу Вищого антикорупційного суду.

З метою пошуку об'єктивної відповіді на існуючу колізію виникла необхідність з'ясування правової природи судової спеціалізації та виокремлення ключових ознак «особливого суду». Для розв'язання такої прикладної проблеми автори статті звернулися до теоретичних і прикладних положень принципу природного суду, що і стало основою предмету дослідження цієї роботи.

Ключові слова: судова спеціалізація, спеціалізований, природний суд, право на справедливий суд, Вищий антикорупційний суд, особливий суд, надзвичайний суд.

Слинько Тетяна, Летнянчин Любомир, Байрачна Лариса, Ткаченко Євгеній

ПРИНЦИП ВЕРХОВЕНСТВА ПРАВУ В ПРАВОВИХ ПОЗИЦІЯХ КОНСТИТУЦІЙНОГО СУДУ УКРАЇНИ

Конституційний Суд України та суди загальної юрисдикції відіграють одну з головних ролей у реалізації верховенства права. Стаття присвячена дослідженню конституціоналізації принципу верховенства права, а також його складових елементів, зокрема принципу правової визначеності, пропорційності та прямої дії Конституції України. У статті аналізуються правові позиції Конституційного Суду України щодо змісту зазначених елементів верховенства права. Наголошується, що принцип пропорційності є основним для визначення меж прав людини. Зміст цього фундаментального принципу проявляється у пропорційно розумному співвідношенні між метою обмеження певного права людини та засобами, які держава використовує для його обмеження. Крім того, зазначається, що принцип прямої дії Конституції як елемент верховенства права має обмежену дію і стосується переважно положень про права і свободи людини і громадянина, а також положень нових процесуальних кодексів, що вводять новизною, які в цілому сприймаються позитивно.

Для дослідження основних підходів до визначення верховенства права та окремих його елементів у роботі використано такі методи аналізу та синтезу: системно-структурний метод, що дозволило дати структурну характеристику принципу норми права, а також проаналізувати зміст його елементів, та логіко-правовий метод, що дав можливість уточнити зміст правових позицій Конституційного Суду України щодо тлумачення норми права.

У висновках узагальнено теоретичні та практичні підходи до обґрунтування сутності верховенства права та змісту його структурних елементів у правових позиціях Конституційного Суду України.

Ключові слова: верховенство права, принцип пропорційності, пряма дія норм Конституції України, Конституційний Суд України.

Смирнов Георгій

ПОХІДНІ ПОЗОВИ В УКРАЇНІ: ПРОБЛЕМИ ТА ШЛЯХИ УДОСКОНАЛЕННЯ ПРАВОВОГО РЕГУЛЮВАННЯ

Більшість юрисдикцій передбачають право членів корпорації подавати позов від її імені та в її інтересах. Такий засіб правового захисту називається «похідним позовом» (a derivative action), і право подати такий позов надається учасникам товариства у випадку, якщо відповідачі знаходяться під його контролем, що перешкоджає компанії вчиняти дії для захисту своїх прав та інтересів, що завдає шкоди інтересам та правам міноритарних акціонерів. Однак правове регулювання похідного позову, незважаючи на спільні риси, відрізняється в кожній юрисдикції, що викликає безліч питань, які необхідно вирішити.

У цій статті автор вказує на декілька проблем та їх можливі рішення, які мають бути імплементовані в українському законодавстві: майновий ценз сам по собі не може запобігти зловживанням щодо подання похідного позову – має бути запроваджено розширене правосуддя; власникам привілейованих акцій має бути надано право подати позов до суду; майновий ценз необхідно замінити на представницьку квоту для учасників непідприємницьких корпорацій; коло відповідачів має включати основних учасників (більшість учасників) та третіх осіб тощо. Проаналізовано поняття превентивного похідного позову та похідного позову про визнання правочину товариства недійсним та можливі питання щодо них. Крім того, наголошується на необхідності впровадження «правила ділового судження».

Ключові слова: похідний позов, майновий ценз, locus standi, правило господарського суду, превентивний похідний позов; похідний позов про визнання правочину товариства недійсним.

Стрікайте-Латушинська Года

ЧИ МИ МОЖЕМО ВСІ ПРАВОВІ НОРМИ ВКАЗАТИ В ПРАВОВИЙ СИЛОГІЗМИ І ЧОМУ ЦЕ ВАЖЛИВО В ЧАСИ ШТУЧНОГО ІНТЕЛЕКТУ?

Об'єктом даної роботи є аналіз дихотомії «важких» і «легких» справ, а також обставин, пов'язаних з процесом ухвалення судових рішень у таких справах.

У статті аналізується, чи є рішення, засновані на правовому позитивізмі (наприклад, застосування силогізмів і прецедентів), достатніми для вирішення «легких» справ.

Досліджується, які чинники, визначені юридичними реалістами, впливають на суддів під час ухвалення рішень у «важких» справах (наприклад, такі психологічні фактори, як упередження, інтуїція, передчуття, лінь, небажання

брати на себе відповідальність або оману гравця як а також соціальні фактори, такі як виховання, життєвий досвід, соціальні стосунки, стать, вік, освіта тощо).

Також аналізується співвідношення між дихотомією «легких» і «важких» справ і штучним інтелектом, намагаючись підтримати головну ідею про те, що «легкі» справи в кінцевому підсумку повинні бути делеговані штучному інтелекту для вирішення, тоді як «важкі» справи повинні залишатися в компетенції людини-судді хоча б деякий час, поки технологічний розвиток не досягне певного рівня.

Ключові слова: важкі справи, правовий позитивізм, правовий реалізм, штучний інтелект.

Теодор Манея, Кателін Константинеску-Марунцель

ЗАХИСТ ОСНОВОПОЛОЖНИХ ПРАВ ДИТИНИ ШЛЯХОМ КРИМІНАЛІЗАЦІЇ ВІДНОСИН ІНЦЕСТУ

Уявлення про те, що інцест є надзвичайно поширеною проблемою в сучасному суспільстві, відкидалося більшістю наукового співтовариства до останніх кількох десятиліть. Тому юристи та національні законодавці лише нещодавно почали розуміти необхідність активно діяти з метою запобігання довготривалим шкідливим наслідкам, які такі відносини можуть мати на учасників.

Для досягнення основної мети даної роботи автори розглянули добірку першоджерел (переважно правових норм, включених до різних національних та міжнародних правових документів). Вони також зверталися до вторинних джерел, намагаючись отримати відповідні міждисциплінарні дані з правових, історичних та психологічних досліджень. Ця стаття не має на меті окреслити повний стан досліджень феномену інцесту, тому наведено лише найбільш релевантні дані щодо запобігання шляхом введення в дію конкретних норм про захист основних прав дітей.

Метою цієї роботи є дослідження зв'язку між реалізацією основних прав дитини та криміналізацією відносин інцесту між членами однієї сім'ї.

Результати цього короткого дослідження, щонайменше, викликають занепокоєння, оскільки було виявлено, що в державах, де активно пропагуються права дітей, одночасно дотримуються традиції заперечувати масштаби явища інцесту та активно або пасивно ігнорувати його небезпеку.

Ключові слова: інцест, кримінальне право, права дитини, захист прав дитини.

Уразова Ганна, Янишен Віктор, Баранова Людмила

ХТО ВЛАСНИК? НОВОВИЯВЛЕНІ ОБСТАВИНИ ТА ПРИНЦИП ПРАВОВОЇ ВИЗНАЧЕНОСТІ В ОДНІЙ СПРАВІ

Захист прав власності є одним із наріжних каменів будь-якого правопорядку. Якщо кожен громадянин не буде впевнений, що його право власності захищено від будь-яких претензій, а договірні зобов'язання будуть виконані належним чином, ми не зможемо ефективно регулювати відносини та забезпечити правопорядок. Суди відіграють вирішальну роль у механізмі захисту прав власника, надаючи правій стороні необхідні можливості для захисту.

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У світлі вищезазначеного здійснено аналіз зазначеного рішення ЄСПЛ, а також остаточних і проміжних рішень українських судів з урахуванням законодавства та судової практики України. Єдиною проблемою була відсутність найстаріших рішень національних судів у Єдиному державному реєстрі судових рішень, який містить в основному рішення від 2011 року. Так чи інакше, факти цієї справи були детально описані в останніх рішеннях судів.

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Ключові слова: нововиявлені обставини; цивільне судочинство; принцип правової визначеності; право на справедливий суд; українське право.

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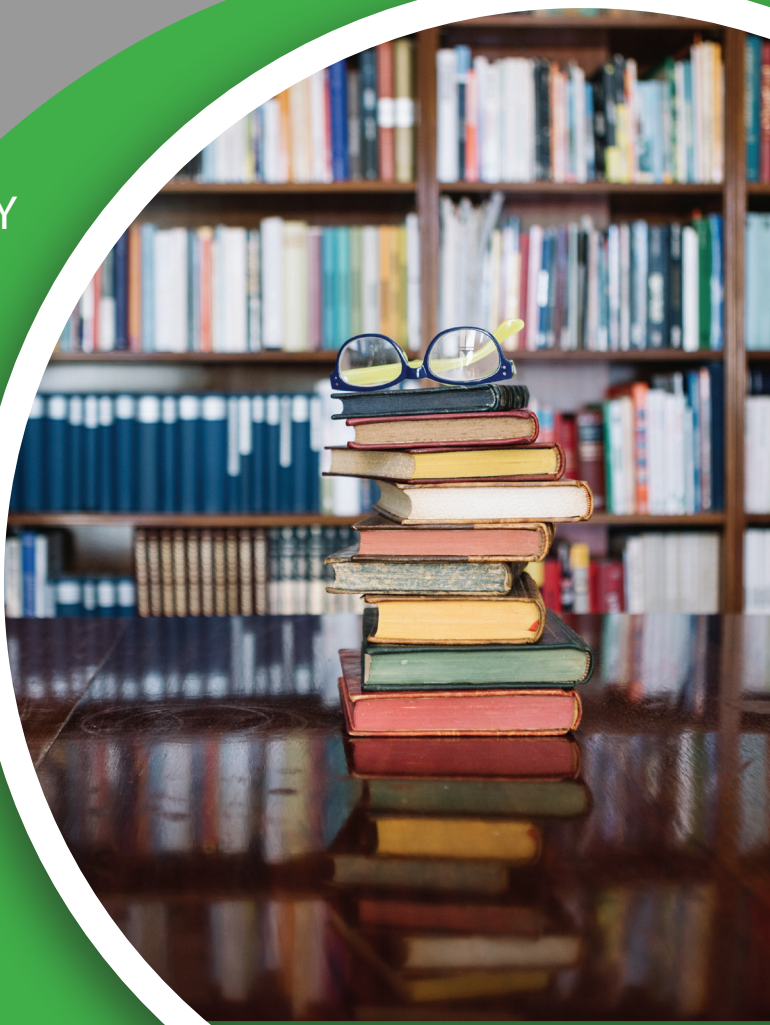

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