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THE IMPACT OF ARTIFICIAL INTELLIGENCE ON LEGAL DECISION-MAKING

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Abstract. This research paper aims to explore the growing influence of artificial intelligence (AI) on legal decision-making processes. The increasing availability of AI technologies and their potential to analyse large volumes of legal data have sparked debates and raised questions regarding their role in shaping the future of the legal profession. This study investigates the implications of AI for various aspects of legal decision-making, including case analysis, the prediction of outcomes, and legal research. By employing a multidisciplinary approach that combines legal analysis, technological assessment, and ethical considerations, the research examines the benefits and challenges associated with integrating AI into the legal system. The methods employed in this study include a comprehensive review of existing literature, an analysis of case studies, and an exploration of the ethical implications of AI adoption in legal decision-making processes. The findings of this research contribute to the understanding of the potential benefits and limitations of AI in the legal field, as well as the safeguards and ethical guidelines required to ensure its responsible and effective use.

Keywords: artificial intelligence, legal decision-making, machine learning, legal research, ethical considerations.

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Introduction

Modern artificial intelligence (AI) is widely recognised as a powerful force capable of influencing various fields, including the legal profession. The spread and development of AI technology makes it possible to bring judicial processes to a new level of efficiency and accuracy. Analysing this impact and understanding its facets is a task before the community. One intriguing research direction is the influence of AI on legal decision-making. This aspect is so crucial that it warrants a separate section of research. By utilising AI in the decision-making process, a range of questions arises that demands our attention and analysis.

Legal systems worldwide are grappling with novel challenges and prospects arising from the integration of AI into judicial processes. Delving into specific legal cases not only facilitates a grasp of the tangible outcomes of AI utilisation, but also unveils its merits and constraints. This scrutiny enhances our comprehension of both the affirmative and adverse facets of employing AI in legal precedents.

A pivotal consideration involves the comparative exploration of how different nations incorporate AI into the realm of legal decision-making. This is because each jurisdiction is governed by distinctive legal and ethical principles that influence the adoption of such technologies. By scrutinising practices across diverse countries, one can uncover shared trends and divergent strategies, thus gleaning invaluable insights.

The aforementioned scholarly endeavour aims to probe the ramifications of AI on the process of legal decision-making. Through the examination of the application of AI in various countries, the objective is to fathom the impact of AI on judicial proceedings, the opportunities it affords, the challenges it poses, and the ethical and legal considerations inherent in its implementation. Contemporary AI continually shapes numerous domains, including the legal sector, ushering in fresh changes and objectives annually. The ever-evolving landscape of AI technologies is actively reshaping the fabric of legal judgments, demanding meticulous analysis and dedicated attention.

Addressing the profound impact of AI on legal decision-making constitutes the focal point of this investigation. The infusion of AI into judiciaries worldwide presents novel prospects and challenges. By scrutinising specific case studies and their outcomes, the tangible ramifications of this technological leap forward come to light, revealing both affirmative and adverse facets. These empirical analyses offer insights into the potentialities and confines entwined with AI adoption in adjudication.

Of particular significance is the comparative evaluation of diverse jurisdictions' approaches towards AI integration in judicial determinations. Distinct legal, ethical, and regulatory frameworks within each jurisdiction shape the deployment of AI technologies. Delving into the adoption of AI across various nations not only unearths shared patterns, but also unveils disparate strategies and invaluable insights. This endeavour is instrumental in cultivating a comprehensive panorama of AI utilisation in legal verdicts on a global scale.

The objective of this scholarly undertaking is to probe the influence of AI on legal decision-making, leveraging authentic cases spanning diverse nations. Through meticulous comparative analysis, the exploration will unearth both the possibilities and impediments linked with AI implementation. Additionally, the moral and legal dimensions that underpin AI utilisation within different legal systems will be meticulously examined.

The ascendancy of AI possesses the potential to wield substantial sway over legal decision-making mechanisms. However, this technological leap simultaneously ushers in a constellation of pivotal quandaries. Foremost among these concerns is the attribution of accountability for verdicts that wield direct sway over individual liberties and lives. The rapid data processing capabilities of AI hold promise for enhancing the precision and efficacy of legal determinations. Nevertheless, the resilience of algorithms against fallacies and predispositions necessitates meticulous scrutiny, while the indispensable role of human elements demands acknowledgment.

When considering the application of AI in legal processes, it is crucial to take ethical aspects into account. Questions of AI accountability, the preservation of social justice, and transparency come to the forefront. Many AI systems, such as neural networks, possess complex structures that complicate people's ability to understand their functions and make decisions based on them.

Confidentiality is particularly important. The use of AI in legal processes raises questions about adapting legislation to new technological realities. Ensuring data confidentiality, protecting human rights, and preserving the authorship of decisions are significant aspects. However, alongside its positive potentials, AI can also be used and abused for negative purposes, such as manipulating justice or violating human rights. This underscores the importance of effectiveness, ethics, transparency, and the legal context in the application of AI in legal decisions.

To gain a more realistic understanding of the impact of AI, researchers meticulously analyse existing cases in the practices of different countries. The United Kingdom and the United States are leaders in the development of technology and innovation, including AI. Legal practice in these countries is extensive and diverse, which creates different scenarios for the use of AI. For instance, in the United States, AI is used to analyse legal information, aiding attorneys in finding precedents and arguments. In the United Kingdom, AI assists lawyers in extracting data from legal documents for effective analysis. The solutions and technologies developed in these countries often have an international impact, which is why the analysis of these countries in the context of the use of AI in legal practice is important.

This scientific work aims to achieve a deep analysis of the impact of AI on legal decision-making. Its goal is to reveal the advantages and challenges associated with this technology, study crucial ethical aspects, and foster active discussions about the optimal use of AI in judicial processes. By examining real cases from various countries, researchers can attain a profound understanding of the real impact of AI on legal decision-making and identify key factors for the successful integration of this technology.

This research employs a comprehensive and multidisciplinary methodological framework to study the impact of AI on legal decision-making processes. This framework integrates legal analysis, technological assessment, and ethical considerations to provide a holistic understanding of the subject.

The study encompasses an analysis of cases that have occurred in the practices of various countries. Investigating specific examples of AI usage in legal decision-making processes offers valuable insights into its practical implications, including challenges and potential outcomes. Through such cases, a comparative analysis of different jurisdictions can be conducted, accounting for their legal frameworks and approaches.

In this research, legal analysis plays a significant role in revealing legal consequences and regulatory aspects of AI utilisation in legal decision-making. This involves scrutinising laws, regulations, and ethical principles across different jurisdictions. This approach helps identify legal aspects, research gaps, and potential directions for further refinement. Additionally, an evaluation of the technological capabilities and limitations of AI in legal decision-making is undertaken. Various methodologies, algorithms, and AI tools are examined, including machine learning, natural language processing, and predictive analysis. This assessment aims to ascertain potential benefits and challenges associated with AI implementation.

Furthermore, ethical aspects of AI usage in legal decision-making are explored. Consequences, in terms of fairness, transparency, accountability, and bias, are analysed. Ethical dilemmas linked to AI application are investigated, and ethical principles and recommendations for responsible implementation are considered. This research approach is geared towards achieving a profound understanding of the impact of AI on legal decision-making processes. It amalgamates legal analysis, technological assessment, and ethical considerations to offer insights into advantages, challenges, and necessary steps for the successful integration of AI into the realm of legal practice.

1. The examination of the influence of AI on the process of legal decision-making

The examination of the influence of AI on the process of legal decision-making represents a vibrant and extensively debated topic within the realm of jurisprudence. AI encompasses a diverse array of technologies and algorithms capable of efficiently parsing substantial volumes of legal information, executing automated tasks, and, in specific scenarios, even making determinations.

A pivotal avenue of AI utilisation in the legal sphere lies in decision support systems. These systems meticulously scrutinise judicial practices, legislative enactments, precedents, and other repositories of legal data to furnish counsel and judges with recommendations. Moreover, they can facilitate the identification of analogous cases, the evaluation of risks, and, notably, the prognostication of judicial verdicts.

The merits inherent in employing AI during legal decision-making encompass:

- Efficiency and celerity –
  AI expeditiously processes copious amounts of legal data and tenders recommendations promptly, thereby expediting decision-making processes and optimising resource allocation;
- Objectivity –
  AI is rooted in data analysis and logical algorithms, thus fostering a more impartial decision-making process that remains insulated from emotional or subjective variables;
- Error mitigation –
  The implementation of AI mitigates the likelihood of human error, particularly in intricate analytical undertakings demanding precision and exacting attention to minutiae;
- Enhanced access to judicial redress –
  The incorporation of AI serves to curtail the expenses associated with legal services while concurrently broadening the spectrum of individuals with access to legal aid (Boucher, 2020).

Nevertheless, it is imperative to contemplate whether the employment of automated AI may engender inquiries concerning the attribution of responsibility for rendered determinations. This quandary is particularly salient in scenarios wherein AI exerts an influence on individuals' lives, such as adjudicating criminal penalties or conferring refugee status.

The necessity of carefully considering potential risks and challenges associated with the utilisation of AI in legal decision-making comes to the forefront. There exists a risk of erroneous or unjust conclusions stemming from the programmatic nature of AI, which relies on algorithms and statistical data analysis. During the streamlining of routine tasks, such a system may also exhibit algorithmic deficiencies or biases, leading to unfair consequences (Scherer, 2019).

Specifically, the issue of social justice becomes exceptionally pertinent in the context of AI deployment in legal decisions. Often, AI systems are grounded in data that could be improperly collected or bear discriminatory traits. Consequently, this could result in inequalities and injustices in decision outcomes.

In order to ensure the responsible and equitable usage of AI in the legal decision-making process, additional mechanisms and control procedures are imperative. The development of standards and norms mandating algorithmic transparency, the elucidation of decisions made, and the detection of possible data distortions are key aspects. Notably, the fact that the discourse on resolving these matters is currently evolving holds significant promise in rectifying identified shortcomings (Amelin, 2021).

Furthermore, particular attention should be devoted to matters of legal accountability for companies and organisations involved in the development and deployment of AI systems. This could incentivise the cultivation of ethical approaches and adherence to fairness principles in the creation and implementation of such technologies (Proposal for a Regulation, 2021).

Considering all of these aspects, it becomes obvious that the use of AI in legal decision-making requires a comprehensive approach and cooperation between specialists from different fields. This will help ensure efficiency, ethics and fairness in the process.

A pivotal concern revolves around the transparency and interpretability of AI algorithms, especially within legal contexts. This complexity is notably prominent in intricate models such as neural networks, which are known for their remarkable accuracy yet baffling solution explanations (LawGeex, 2018).

Neural networks, inspired by biological neural systems, are proficient machine learning tools. Their adeptness at autonomous learning from extensive data enables them to tackle various tasks, such as object classification, result prediction, and text generation. Nevertheless, their internal mechanisms often remain inscrutable to human understanding.

This intricacy poses significant challenges, particularly in legal proceedings, where elucidating and justifying AI-driven decisions holds paramount importance. Imagine, for instance, an algorithm endorsing a specific legal strategy; attorneys and judges may rightfully seek a lucid grasp of how that verdict was reached to ensure its validity and equity (Curle & Obenski, 2020; Yeung & Lodge, 2019).

Elevating the transparency and interpretability of AI in judicial processes should primarily align with the requisites and entitlements of the individuals impacted by these determinations. This concern transcends mere technicalities; it is deeply rooted in the bedrock of trust. The cloud of uncertainty enveloping decision-making procedures can erode this trust and lead to misconstrued perceptions from those within the legal ecosystem (Michurin, 2020).

Across the globe, numerous nations have enacted legislation mandating explications for decisions made by AI systems, particularly in domains encompassing human rights and liberties. This underscores an inherent urgency for crafting methodologies adept not only at discerning, but also elucidating the intricate mechanics underlying complex models such as neural networks and similar algorithms (Gazeta Sądowa, 2023).

The gradual advancement of these methods can contribute to preserving trust in AI not only in judicial processes, but also in various other critical domains. Nevertheless, despite numerous accomplishments, confidentiality remains one of the most crucial issues in the use of AI (The European Judicial Network (EJN) in Civil and Commercial Matters, 2022).

Growing technological progress, especially in the context of social media, amplifies the necessity of maintaining confidentiality. The increase in the volume of personal data that AI systems can collect and process necessitates robust protection against unauthorised access and usage. Safeguarding confidentiality is not just a technical task; it is a fundamental undertaking in order to uphold users' rights and freedoms.

Hence, it is essential to direct legal attention to the confidentiality of personal data when utilising AI, not just technical considerations. The development of algorithms that ensure data security and confidentiality should meet elevated requirements and standards to ensure the reliability of these systems in all aspects of their application.

In the field of law, practitioners sometimes have to deal with confidential documents, data from criminal cases, and legal advice, and it is important that any AI used to this end guarantees privacy and prevents unauthorised access.

Encryption is an effective data protection tool that ensures secure exchange between systems and prevents unauthorised access. It is important to create reliable mechanisms for encrypting data processed by AI.

Controlling access to information is a key aspect of ensuring privacy. AI should regulate access to data based on users' roles and rights. For example, not all employees should have access to all data, but only those for whom it is necessary for the performance of their duties.

To avoid the inadvertent leakage of confidential information, it is important to delete data from the system after the processing of the data is complete or after the purposes of its use have been achieved. Ensuring data privacy is of great importance in the development and use of AI in the field of law. Effective privacy measures help establish trust in AI systems and preserve individual rights and freedoms during automated decision-making (Prohaska, 2022).

That is why the use of AI in jurisprudence is an urgent direction that is rapidly developing and gaining recognition and interest at the international level. Different countries around the world are studying and implementing AI in judicial processes.

2. Global experiences of introducing AI into court processes

Several countries around the world are actively introducing AI into court proceedings, trying to improve the efficiency, accessibility and fairness of justice. The countries leading in the use of AI in court proceedings have the potential to change the traditional approach to justice by introducing innovations that can improve the quality and speed of decision-making. The United States, Canada and the United Kingdom are distinguished not only by their high levels of technological development, but also by their ambitious strategies for introducing AI into the judicial system. These countries are interesting for the analysis of judicial systems and the direct use of AI in litigation.

Therefore, existing cases of the use of AI in legal practice in these countries are analysed. AI has already become an integral part of legal practice in the United States, bringing innovation and improvement to various aspects of the legal field. The introduction of AI into legal practice in the United States allows the country to increase the efficiency of court proceedings, reduce costs and ensure faster and more accurate decision-making.

Companies such as *IBM Watson*, *COMPAS*, *eDiscovery*, *ROSS Intelligence* and *LegalZoom* provide decision support systems that use AI to analyse large amounts of legal data and provide advice to lawyers in the United States. Such systems help lawyers to quickly search for information, identify legal precedents and provide legal advice.

IBM Watson's capability to analyse vast amounts of data and perform rapid information retrieval has assisted lawyers in making well-founded decisions. The essence of one case revolved around the utilisation of the IBM Watson system to support lawyers in searching for precedents, court judgments, and recommendations related to alimony distribution. This had significant implications given the substantial volume of court rulings and legal documents concerning alimony, which could prove challenging for lawyers to study and analyse (IBM, n.d.).

Leveraging IBM Watson, lawyers could promptly locate relevant precedents and decisions crucial to the specific case. This enabled them to bolster their arguments based on past court judgments and obtain recommendations regarding the most likely alimony distribution (IBM, 2021). The approach involving IBM Watson offered numerous advantages. Notably, the system effectively analysed extensive data and swiftly located essential information. This approach also contributed to achieving more objective outcomes in alimony distribution cases, considering prior decisions and precedents (Awati & Burns, 2023).

It is worth noting that this case raised a series of ethical questions and necessitated the establishment of appropriate legal norms. Specifically, addressing the preservation of the confidentiality of personal data and ensuring its protection during the application of AI in legal processes was essential. This case illustrates the possibilities of applying AI, such as IBM Watson, in legal proceedings to enhance analysis and legal decision-making. However, the use of AI in judicial matters demands careful consideration of

ethical aspects and the development of adequate legal frameworks to ensure responsible and appropriate utilisation.

With the help of AI, Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) managed to implement a system for predicting the risk of recidivism in the field of American justice. **COMPAS** is a comprehensive algorithm that determines a person's likelihood of reoffending after conviction.

This innovative technology has found use in the United States in the field of criminal cases, where it provides an assessment of the likelihood of recidivism and the selection of optimal alternative sanctions or supervision of convicts. The system analyses a variety of indicators, including criminal history, social status and other factors, to provide a forecast of possible repeat offending (State of Wisconsin Department of Corrections, n.d.).

However, the use of the COMPAS system in trials in the United States has given rise to a number of ethical and fairness debates. Some critics emphasise the possibility of systemic biases and inequalities in the determination of risk depending on the racial or social characteristics of the individuals who have become the object of the assessment (Northpointe, 2015).

This situation emphasises the importance of careful analysis and control of AI algorithms implemented in the legal field. This is important in order to guarantee fairness, avoid discrimination and protect human rights.

EDiscovery has proven its usefulness in the processing of electronic evidence in legal proceedings in the United States. The process of eDiscovery means the discovery, collection, analysis and processing of electronic evidence such as emails, documents, files and other electronic data that have legal weight.

In the United States, the eDiscovery system plays a crucial role in streamlining and enhancing court procedures by effectively managing vast amounts of electronic evidence. Powered by AI and machine learning, this system exhibits the ability to automatically identify and categorise documents, emphasise key terms, conduct information searches, apply filters, and generate comprehensive analytical reports along with evidence-backed recommendations.

The incorporation of eDiscovery within the framework of US litigation carries immense potential for diminishing the amount of manual labour and time traditionally involved in handling electronic evidence (Yaroshenko, Lutsenko et al., 2023). Moreover, it fosters precision and uniformity in evidence management, thereby expediting the retrieval of essential information for case parties and facilitating efficient preparation for courtroom proceedings (Bougnague, 2023).

This instance serves as a prominent illustration of how AI has been integrated into the American legal landscape to enhance the treatment of electronic evidence. The utilisation of eDiscovery not only enhances the efficacy and impartiality of court proceedings, but also necessitates the meticulous consideration of ethical and confidentiality considerations related to the acquisition, processing, and utilisation of electronic evidence within US legal scenarios (Conrad, 2010).

The escalating impact of AI on decision-making processes within the legal domain in the United States is increasingly conspicuous, precipitating a transformation in the very essence of the legal sector. The revolutionary influence of AI in legal practice is marked by its capability to automate mundane tasks, undertake thorough document analysis, probe into legal precedents, and even draft documents. As a result, legal professionals are unburdened from tedious routines, enabling the judicious allocation of resources and substantial time savings.

The use of data analysis and machine learning makes it possible to predict the possible outcomes of court cases. Lawyers and judges can now better understand previous decisions and analyse statistics to

make informed predictions about outcomes. This approach contributes to more objective and more broadly accepted decisions.

AI also improves access to legal information by quickly and accurately analysing case law, laws and precedents. It provides lawyers with relevant and important information that contributes to their high competence.

The growing influence of AI also brings with it risks and ethical issues. There is a risk that algorithms may be subject to hidden influences that may cause unwanted bias in decisions, or even discrimination. This is a significant problem and is why AI is only assisting human lawyers thus far.

The use of AI in the legal field requires highly qualified specialists who understand exactly how these systems work. Knowledge of technology and law becomes key to the effective use of these tools.

In general, the impact of AI on legal decision-making in the United States is already enormous. This technology opens up new opportunities for increasing productivity and the validity of decisions (Vishnya, 2021).

In the field of jurisprudence, Canada actively uses AI. It can be observed that today there is a revolution in court processes with the help of AI in Canada.

The field of law and jurisprudence is undergoing a significant phase of transformation thanks to the introduction of AI in judicial processes in Canada. These artificial systems are achieving significant changes in many aspects of legal practice and procedures (Rissland et al, 2003).

Expert analysis and verification of documents is one of the key areas where AI has been able to significantly simplify and speed up processes. Deep machine learning algorithms have made it possible to sift through and select the most important documents from a large volume, which has become an important advantage during court proceedings.

Predictive analytics is another extremely useful area of the application of AI. Based on historical data and court practice, AI is able to predict options for the development of court cases. Such analysis helps lawyers strategise and prepare for various possible scenarios.

Another important aspect is the analysis and review of contracts. AI-powered tools identify terms, clauses and potential issues in contracts, making the review process more efficient and helping to avoid potential risks.

The use of AI in mergers and the enlarging of companies has a great impact. Thanks to this, the identification of legal risks and inconsistencies in the documentation has become fast and effective (Yaroshenko, Chanysheva et al., 2023).

AI-powered chatbots and virtual assistants are also an incredible tool for improving customer communication and providing prompt responses to legal inquiries.

The successful implementation of AI also brings ethical and regulatory issues to the fore. The use of algorithms in legal decision-making raises questions about transparency, accountability, and bias. Canadian lawyers and regulators are actively researching these aspects to ensure the responsible and ethical use of these technologies.

Blue **J Legal** (https://www.bluej.com) has an AI system that helps lawyers conduct legal research, analyse legislation and precedents, and predict court outcomes.

Blue J Legal specialises in using AI to analyse legal cases and predict court decisions. It primarily operates in the domain of tax law, where it provides tools for lawyers and tax advisors.

Among the products of Blue J Legal is, for example, the Tax Foresight system, which allows specialists to analyse tax cases and obtain forecasts of court decisions. Thanks to AI and data analysis, the system can estimate the probability of obtaining a positive decision or identify possible risks (Blue J, n.d.).

Blue J Legal's case analysis process includes gathering the facts of a tax case and analysing them in the context of relevant legislation, precedents and court decisions. Based on this analysis, the system provides a forecast regarding the possible decision and approach of the court to the tax case.

Evaluating a potential judgment and analysing the case helps lawyers and tax consultants understand the possible consequences and make informed decisions. This contributes to the reduction of uncertainty and risks in tax planning, providing an additional level of awareness regarding court decisions in the tax field (Alarie et al., 2023).

However, it is important to note that Blue J Legal's case analysis is based on available legal information and the methodology used by the company. The actual outcome of the trial may depend significantly on the specific circumstances of each case and other factors that may influence the court's decision.

Another important area of the application of AI is UK jurisprudence, where it helps to solve legal problems and set new legal precedents. One of the key components of the legal system is the system of precedents, built on the concept of age and authority. According to this principle, decisions made by courts in similar cases in the past have legal weight and become the basis for solving new legal issues.

Significant authority in this system rests with the Supreme Court of the United Kingdom, which makes decisions for the entire country. The concept of a case becomes vital for the interpretation of legislation and the resolution of issues that do not have a clear legislative solution. Courts analyse such cases, study previous decisions and apply them to support their arguments. This approach is aimed at forming and strengthening legal precedents that dictate future decisions in similar cases.

The role of cases in jurisprudence is important for ensuring the stability and predictability of the legal system, as well as for the precise and repeated interpretation of laws. They contribute to maintaining the consistency of decisions and preventing deviations from established norms.

It is worth noting that the system of precedents is constantly evolving. Courts have the ability to review previous decisions and change legal precedents, adapting them to changes in society, values and needs. At the same time, the use of AI in UK jurisprudence continues to develop actively. This process is dynamic, and AI technologies are constantly evolving. Professionals implement these technologies to improve the efficiency, accuracy and affordability of legal services. This approach allows for the more efficient use of resources and ensures the high-quality operation of the legal system.

Some courts in the UK are aiming to explore the possibilities of using AI to optimise administrative tasks and manage cases. This includes the use of AI-based case management systems that address scheduling, document management and other routine processes.

Legal professionals and firms are increasingly interested in using AI to analyse legal strategies and predict case outcomes. This leads to the creation of predictive analytics tools that rely on historical data and legal precedents to predict possible outcomes.

The use of AI for document review and e-search is becoming a standard in the legal field, helping to efficiently review large volumes of information and find required data faster.

Research platforms based on AI have been introduced, which facilitate the quick search of relevant cases, statutes and legal articles. These platforms use natural language processing to understand queries and provide accurate results.

Despite the numerous advantages of using AI in the legal decision-making process, which concerns not only the UK but also other countries, there are challenges associated with its implementation. AI algorithms can harbour biases that are present in training data, which can influence legal decisions. Ensuring fairness and minimising bias in the use of AI algorithms for legal decision-making is an important task.

Many AI algorithms work under biases, making it difficult to understand the decision-making process. This may raise concerns about transparency and the ability to challenge decisions. The use of AI in legal decision-making raises ethical questions regarding the level of human involvement, responsibility for mistakes, and the possibility of automation, which may affect the role of lawyers (Bell et al., 2022).

As AI becomes an integral part of legal processes, it is important to establish clear norms for its responsible and ethical use. The accuracy and reliability of AI in the legal context remain issues of concern. Even small errors in recommendations or predictions made by AI can have serious consequences.

There are a number of systems in the UK that use AI to improve legal work. One example is **Kira Systems** (https://kirasystems.com), which specialises in legal document analysis. Thanks to the use of AI methods, especially machine learning, Kira Systems is able to automatically analyse and extract key information from texts.

The use of Kira Systems in UK legal practice allows lawyers and paralegals to efficiently process a large volume of various legal documents such as contracts, agreements, judgments, etc. The system is able to identify and highlight key details such as articles, deadlines, dates, party names and other important information, which simplifies the process of analysis and extraction of the necessary information.

Using Kira Systems in legal practice helps achieve several important benefits. First, it increases the speed and accuracy of document analysis, helping lawyers to do their jobs more efficiently. Secondly, it reduces the risk of losing important information and mistakes that can affect the outcome of cases. In addition, the system can be used to create automatic reports, review documents and accomplish other routine tasks, which facilitates the routine work of lawyers.

However, the use of AI in the legal field also creates problems. It is necessary to address the issues of accuracy and reliability of the results, as well as guarantee the confidentiality of information and compliance with ethical standards.

The use of Kira Systems in the legal practice of the UK is an important step in the direction of improving the processes of the analysis and extraction of data with the help of AI.

The **ROSS Intelligence** (https://rossintelligence.com) AI system has proven its usefulness in pretrial investigation in the field of jurisprudence. ROSS Intelligence offers an innovative approach based on large volumes of textual information to analyse legal issues and provide professional legal advice.

In UK, the ROSS Intelligence system is used to support lawyers and advocates during pre-trial investigations. Thanks to its ability to quickly analyse large volumes of legal documents, court decisions, laws and other legal sources, the system ensures the speed of the search for relevant information, legal precedents and arguments important for a specific case.

The use of the ROSS Intelligence system in pretrial investigations brings many benefits. This helps lawyers efficiently gather the necessary information and legal basis to prepare for trial. It also ensures the accuracy and speed of the analysis of legal issues that may affect the outcome of a case (Houlihan, 2017).

However, the use of AI in pretrial investigation requires careful consideration of ethical issues, ensuring the confidentiality and protection of personal data, as well as taking into account possible errors or system limitations.

The use of the ROSS Intelligence system highlights the importance of AI in pretrial investigations and legal support. However, to ensure the responsible and effective use of AI in the field of law, appropriate regulatory standards and codes of ethics need to be developed.

The **Predictice** system (https://predictice.com) is one of the most popular platforms for predicting court decisions. Designed to analyse large volumes of court documents, this platform uses machine learning algorithms to help lawyers understand potential court rulings.

The UK uses the Predictice system to support lawyers' strategic decisions during legal proceedings. Based on data analysis, the platform takes into account various factors such as previous precedents, case characteristics, and information about judges to predict possible court sentences. With this data, Predictice provides case-specific predictions.

The use of the Predictice system significantly improves lawyers' understanding of possible court decisions, which in turn affects the defence strategy and positions taken during court proceedings. The platform helps to make informed decisions, taking into account the analysis of judicial trends and previous decisions.

However, the use of Predictice to predict court decisions may face the problem of insufficient accuracy and reliability of the results. Even with a large amount of data, algorithms may not take into account complex cases that previously had no similar precedents. In addition, the ethical aspect of using AI to predict court decisions is of great importance. Court decisions affect people's lives, and decisions based on predictions can significantly affect their fate. Therefore, it is very important to maintain high standards of ethics and reliability when using such systems.

Given these potential challenges, care must be exercised when using AI to ensure appropriate levels of effectiveness, scrutiny, and ethical compliance in all legal processes. These cases are just a few examples of how AI is being used in different legal systems. These examples show the potential of AI, but it will take time and incredible effort to convince everyone of the benefits of AI. Thus, for the time being, AI can be implemented when it comes to performing everyday tasks, but no matter how much information it contains, it cannot decide the fate of human beings. For now, there are too many disadvantages and too few advantages. These facets of AI represent incredible things for lawyers, but not yet for people generally.

3. The practical application of AI in legal scenarios

The impact of AI on legal decision-making has several advantages and disadvantages, and should be treated with caution and carefully analysed. True success lies in maintaining a balance between the technological capabilities of AI and the values of protection and regulation by the legal system.

The practical application of AI in legal scenarios is considered in various aspects, from analysing documents to supporting decision-making by judges. When using machine learning algorithms for automated processing and analysis of a large volume of legal documents, such as contracts, claims and other legal materials, there is a reduction in the documents' processing time, increasing accuracy and the ability to identify key aspects. Forecasting the results of cases reduces the time spent on the preliminary analysis of cases, and can act as impartial method of support for judges and lawyers in making justified decisions.

Another practical application of AI in legal scenarios is the introduction of electronic systems for managing trials, including electronic filing, online access to information and virtual court hearings. In the case of the electronic implementation system, there is a decrease in paper circulation, which in turn

not only reduces the bureaucratic aspect of the judiciary, but also positively affects globalisation aspects in the context of environmental care.

The use of facial recognition technologies and biometric data to identify persons involved in court proceedings will ensure the safety and accuracy of the identification of participants in court hearings. Using AI for the automated search and analysis of legal information, including precedents, regulations and court decisions, will help to increase the effectiveness of legal research and ensure accurate and complete information.

Case studies that illustrate the practical application of AI in legal scenarios include, but are not limited to, such aspects as research effectiveness, analysis of legal documents, ethical aspects, and impact on access to justice. They help form an understanding and resolve issues related to the use of AI technologies in the legal field. The following case studies are highly influential in this regard:

- An analysis of the impact of AI on legal research, focusing on the effectiveness of searching for legal information and using algorithms to analyse precedents (Paul, 2023; Sopilko, 2022);
- A consideration of the use of AI for automated analysis and the review of legal documents, including contracts and other legal materials (Kaveti, 2023; Cherniavskyi et al., 2019);
- An analysis of the impact of AI on law enforcement practices, including the identification of risks and ethical aspects of using algorithms to predict crimes (Kabir & Alam, 2023; Derevyanko et al., 2023);
- A consideration of ethical issues related to the use of AI in litigation, with a focus on decision-making by judges (Patel, 2023);
- An exploration of how AI can improve accessibility and equality in justice, particularly through virtual assistants and online systems (Osiejewicz, 2017).

The practices used in these case studies demonstrate how AI influences legal scenarios by simplifying routine tasks, increasing the accuracy and speed of decision-making in the judicial system.

Conclusions

The findings of this study shed more light on the potential benefits and limitations of applying AI in law, as well as providing important steps to ensure its safety and ethics for responsible and effective use. The following specific benefits that AI can bring to the legal field are highlighted: increased speed, flawless accuracy, and efficiency in solving legal problems. It is also possible to emphasise the analytical potential of AI and its ability to predict based on the processing of huge volumes of legal data, providing meaningful information and predictions.

The modern world is working extremely actively on this topic, as every year new AI platforms, regulations and technologies are being created (Yaroshenko, Shapoval et al., 2023). Countries interact, compete and cooperate, creating a dynamic environment, and development takes place not only in the field of AI, but also in the legal field, which leads to the mutual influence of both.

Ensuring the responsible and effective use of AI in the legal context requires important safeguards. This article emphasises the need to implement measures to preserve the confidentiality of legal information and ensure the transparency and comprehensibility of AI algorithms. In addition, it emphasises the importance of continuous monitoring and accountability in order to identify and eliminate possible errors or biases.

From the above cases, it is clear that AI is becoming an increasingly actively used tool in the legal field around the world. Countries such as the United States, Canada, and the United Kingdom are actively exploring and implementing AI to improve various aspects of legal work, but this is all formulaic and needs to be double-checked by stringent compliance mechanisms.

Conducting an analysis of AI utilisation in various countries within the legal domain yields a clear conclusion: AI has not yet reached full development for extensive use in the legal field. Several nuances have been identified that overshadow the positive aspects of this technology.

A wealth of research highlights ethical issues associated with AI application. The implementation of automated systems can undermine public trust in decision-making and raise questions about accountability for AI actions. Addressing ethical dilemmas arising in the context of automated legal decision-making thus becomes a pivotal aspect. The research findings in this paper underscore the significance of the transparency and interpretability of decisions made by AI. Clarity in the logic and motives behind these decisions is critically important in order to establish trust in automated systems within a legal context.

The conclusions presented in this study aid in recognising the potential advantages and limitations of applying AI in jurisprudence. The successful integration of AI into the legal system requires considering not only technological solutions, but also the legal context and ethical principles. Additionally, ensuring an adequate level of security is crucial. This will enable AI to become a valuable tool for enhancing legal decision-making processes, provided proper control mechanisms are implemented.

Furthermore, a salient point underscored in this research highlights the necessity of ongoing vigilance and adaptation in the utilisation of AI technologies within judicial proceedings. Given the rapid pace of technological advancement, the legal system must remain agile in order to embrace novel prospects and surmount emerging challenges. The evolving roles and responsibilities of legal professionals, including lawyers, judges, and advocates, necessitate thoughtful consideration and resolution as AI is integrated into the judicial framework.

Moreover, a pivotal factor in the fruitful adoption of AI in the legal sector is a nuanced grasp of effective data utilisation. The acquisition, safekeeping, and safeguarding of legal data warrant special attention, as they serve as the bedrock for sound and well-informed decisions. Mitigating data misinterpretation and misuse is equally paramount in fostering trust in AI within the legal realm.

It is crucial to highlight that the involvement of AI in legal determinations should complement rather than supplant human expertise, serving as a robust complementary tool to enhance the quality and efficiency of the relevant processes. This synergy between human experts and intelligent systems holds the promise of more informed and rational decision-making.

In summary, the outcomes of this study unveil promising potential for the integration of AI into judicial proceedings, while simultaneously underscoring the need for the meticulous contemplation of ethical, legal, and security issues. These considerations are pivotal in nurturing the conscientious and efficacious employment of this technology. The study thus charts a path for the future exploration and pragmatic application of AI within the legal sphere, thereby contributing to increasing fairness, accessibility, and efficiency within the legal system.

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FREEDOM OF CONSCIENCE IN A GLOBALISED WORLD – RESPECT FOR OR A THREAT TO RELIGIOUS BOOKS?

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Abstract. The aim of this article is to examine the scope of freedom of conscience in the globalised world and whether it could be classified as a serious threat to peace and security or a safeguard for the sanctity of religious books. Freedom of conscience is a human right that is essential in the modern world as it allows individuals to hold and express their beliefs and values, regardless of their origin. However, the globalisation process has created challenges to the exercise of this right. Therefore, while freedom of conscience remains an essential human right in a globalised world, it is important that governments and civil societies take precautionary steps to ensure that this constitutional right is maintained and respected, and that individuals are able to exercise their conscience freely, without fear of discrimination or persecution. This may also include measures relating to the promotion of education and public dialogue on diversity and tolerance, the enactment of laws that protect freedom of religion, and holding accountable those who violate these rights.

Keywords: freedom of conscience, international principles of human rights, globalisation of human rights, respect of religious books.

Introduction

The right to freedom of conscience is the cornerstone of the body of rights that are required for an ordinary society to be maintained. It is one of the human rights most commonly exposed to misunderstanding and violation due to the fact that communities consist of variation and diversity at the social and religious levels. This right is also connected to the rights to religion and faith, which are considered red lines in various human societies that people cannot overstep (Brown, 2016).

Guarantees of freedom of conscience are closely related to other substantive rights. For instance, the rights to freedom of expression, assembly and association are fundamental to holding religious beliefs and practising one's religion. Thoughts and views are intangible before they have been expressed, and convictions are valuable for a person only if they can express them (Icelandic Human Rights Centre , 2016).

However, the religious dimension in any constitution tends to make the right to freedom of religious belief depend on one's birth certificate, attributing the individual to a particular religion. Therefore, the prohibition not only falls on the expression of views and ideas about other religions, but is also extended to embracing and practising a certain religion. This divests the right to freedom of belief of its human spiritual significance that combines the human with their Creator, and renders it a mere restricted right imposed theoretically in national constitutions to be practised only within a limited scope of social customs that undermine its full enjoyment.

In many countries, the culture is based on the notion that converting religions is seen as a serious breach of all social norms and traditions, and brings shame and disgrace to the family and its extensions, since religion for some communities forms an essential part of the social honour system (Majumdar, 2019).
Thus, the aim of this paper is to define the boundaries for the best way of practising freedom of conscience, as it is closely related to the cultural norms of people, and to foster an atmosphere that values and respects freedom of

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conscience not only by enriching the learning experience, but also by preparing individuals to navigate the complexities of an interconnected and diverse global landscape.

To achieve this goal, the concept of freedom of conscience will be defined from the perspective of international and regional conventions and the criteria formed by the European Court of Human Rights in its practice, in order to decide whether or not it forms a threat to religious books in a globalized world. The analytical, descriptive, comparative, critique and other scientific research methods are common for such studies, and will be used in this paper.

Freedom of conscience is a complex issue as it intersects with religion, culture, and politics. Furthermore, there may be social and cultural pressures that limit the exercise of freedom of conscience. For example, individuals may face ostracism or rejection from their families or communities if they express beliefs or opinions that are perceived as deviant or contrary to religious norms.

At the same time, there are also efforts to promote freedom of conscience and tolerance for diverse beliefs and values. Most countries have signed international treaties that call for the national authorities to adopt legislative and executive measures for the promotion of freedom of conscience and belief. Scholars also call for greater respect for human rights and religious diversity, and there are initiatives aimed at promoting interfaith dialogue and understanding amongst people towards other nations of the world.

1. The Definition of the Right to Freedom of Conscience

The definition of freedom of conscience has never been problematic; it is essentially the right of an individual to hold and express their personal beliefs, values, and opinions, without fear of coercion or persecution. It is the ability to follow one's own moral and ethical principles and to act in accordance with them. This concept is often linked to freedom of religion, as religious beliefs are a fundamental part of an individual's conscience.

Freedom of conscience also includes the right to express one's beliefs, whether through speech, writing, or other forms of expression, as long as this does not infringe on the rights of others or cause harm (Assaf, 1999). This includes the right to express dissenting views and to challenge established beliefs and traditions.

Furthermore, freedom of conscience also includes the right to practice one's beliefs in private and in public, to engage in cultural and social activities that are based on one's beliefs, and to embrace what one wants from religious or non-religious ideas (Dhooge, 2017).

A comprehensive definition of freedom of conscience was provided by the Human Rights Committee, concluding that belief or religion includes belief in the existence of God or atheist beliefs, along with the right not to practice any religion or belief.

The Committee stated that:

> Article (18) protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms (belief) and (religion) are to be broadly construed. Article (18) is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community. (Human Rights Committee, 1993)

Freedom of conscience, on the other hand, represents an individual's freedom to choose the values that define their relationship with life, and the ability to embody them in a relatively independent society. Since religion is a fundamental dimension of the relationship of the individual with existence and the manifestation of their life in their community, freedom of conscience is often paired with freedom of religion, or is perceived as going along with it as if they are synonymous.

America's founders understood the gravity of protecting freedom of conscience; James Madison called conscience "the most sacred of all property", and Thomas Jefferson argued that no provision in the constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority (Neihart, 2022).
During the debate over what would become the First Amendment to the US Constitution, many lawmakers proposed protecting the rights of conscience. Although said amendment does not explicitly mention conscience, it protects its animating features: religious freedom and free speech (Dhooge, 2017). It reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press".

Freedom of conscience is located halfway between freedom of thought and freedom of religion. Jean Baubérot (2014) argued that freedom of thought gives the individual tools and intellectual mechanisms that allow them to apply their conscience and to freely exercise their choices regarding sentimental and religious convictions. Meanwhile, freedom of conscience refers to the right of an individual to crystallize their convictions, including religious convictions and faith or lack thereof, in full freedom and independence, allowing them to embrace the religion of their choice or choose not to recognize any religion without being vulnerable to punishment or exclusion and without detracting from citizenship.

However, freedom of conscience must be based primarily on the separation of citizenship and faith; this means that those who do not embrace the official state religion or do not believe in it are not bad citizens.

The most important characteristic of the right to freedom of conscience is that it relates to thought, belief and religion, which an individual adopts via an informed perspective and their religious faith. Consequently, this right is not biased towards a particular religion or ideological direction specifically, but is directed to all religions and religious beliefs. This right shall be established in the religious, secular and ideological realms as well as regarding religious principles and ideas.

Freedom of conscience is also related to other individual rights which are indivisible; it is closely linked to the right to freedom of opinion and expression, freedom of association and freedom to form political parties (Murdoch, 2012). Thus, any breach of freedom of conscience means a violation of all of these rights. If the state denies the category of freedom of thought and belief, it will turn individuals away from their right to be heard and express their opinions and to form associations and bodies dealing with the affairs of their ideas and their ideals, and adversely affect the right to education, which would cause these people to refrain from teaching their children their own beliefs, thus transferring them from one generation to another (Rehman & Breau, 2007).

Including the advantage of this right as an individual and collective right at the same time, the practicing of rituals and beliefs is associated with it and can be expressed collectively with others. This was asserted by the Human Rights Committee in 1993, concluding that:

> The freedom to manifest religion or belief may be exercised either individually or in community with others and in public or private. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest.

The advantage of the right to freedom of conscience is also based on the idea that conscience is individually specific to each person and cannot be controlled, and that every attempt to dominate it will lead one way or another to violent collision. Even if it was possible to monitor an individual's freedom of expression and opinion, it would be difficult for practical reality to restrict the right of an individual to freedom of conscience.

Here we recall Spinoza (2005), who concluded that if it was as easy to control the mind as it is the tongue, one would not find any government or authority in danger of using violence. However, this does not occur because the mind cannot be located under the control of any human being; one cannot authorize or volunteer any human against their will or natural right and ability to think with free judgment in everything (Spinoza, 2005).

Consequently, the limitations that may be imposed on the right to freedom of conscience should differ in their framework and scope from the other rights, in view of the fact that human doctrine is variable. Human beings may believe in an idea and then change their mind after a period of time, because faith may be variable rather than fixed.

2. Freedom of Conscience in International Human Rights Law

Freedom of conscience is recognized as a fundamental human right in several international human rights conventions. One of the most important conventions that identifies this right is the Universal Declaration of Human Rights of 1948 (UDHR), which states in Article 14 that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

The International Covenant on Civil and Political Rights of 1996 (ICCPR) also provides in Article (18) that "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching".

The difference between the UDHR and the ICCPR is that Article (18) of the UDHR clearly states the right to change one's religion, while the ICCPR is somewhat vague about changing religion as a result of objections from certain countries on the drafting of its provisions (Weissbrodt & de la Vega, 2007).

The ICCPR provides for the individual's right to condemn a religion, and the freedom to profess any religion or belief of their choice. In its comments on Article (18) of the ICCPR, the Human Rights Committee (1993) provided that everyone was entitled to "condemn or to adopt a religion, including the right to shift from a religion or belief to another, as well as the freedom of the individual to profess any religion or belief of his choice, including the right to withdraw from membership in the religious community to join another".

The Committee also emphasizes in its commentary that public education that includes instruction in a particular religion or belief is not consistent with respect for freedom of parents to educate their children in a manner which agrees with their religious beliefs, and that any restrictions on the freedom to manifest religion or belief for the purpose of protecting morals must not be based on principles derived exclusively from one religious tradition, but must include all religions. The Committee concludes that:

> Article 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18.4, is related to the guarantees of the freedom to teach a religion or belief stated in article 18.1. The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians. (Human Rights Committee, 1993)

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981 is another international convention that aims at protecting the right to freedom of belief. Article (3) concludes that discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the UDHR and enunciated in detail in the International Covenants on Human Rights.

Article (20) also asserts that everyone shall have the right to freedom of thought, conscience and religion, and that this right shall include the freedom to have a religion or belief of one's choice, and the freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching.

According to the Declaration, no one shall be subject to coercion which would impair their freedom to have a religion or belief of their choice; however, freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others (Tahzib, 1996).

Article (4) of the Declaration also calls on all states to take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the field of recognition of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life. They shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter (Ferrari, 2015).

Moreover, Article (5) of the Declaration stipulates the need for the parents or, as the case may be, legal guardians of a child to have the right to organize life within the family in accordance with their religion or belief, bearing in mind the moral education in which they believe the child should be brought up.

Another international standard related to the right to freedom of belief is the Convention Relating to the Status of Refugees of 1951, which includes the obligation of States parties to apply its provisions to refugees without discrimination as to race, religion or country of origin. It also requires States parties to provide for refugees within their territories at least the same care which is accorded to nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children (Zimmermann, Dörschner & Machts, 2011).

The Convention on the Prevention of Discrimination in Education of 1960 asserts that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations and racial or religious groups.

This Convention also suggests that the establishment and management of educational institutions with religious or educational purposes is not discriminatory if those institutions are consistent with the wishes of parents or guardians, and provided that those institutions are consistent with the educational requirements set by the competent authorities (Beiter , 2006).

The Convention on the Rights of the Child of 1989 demands that States parties respect the rights of the child to freedom of thought, conscience and religion, and that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

In states in which religious minorities exist, a child belonging to such a minority shall not be denied the right, in community with other members of their group, to profess and practise their own religion. The Convention also recognizes the right of the child to freedom of thought, conscience and religion, and calls for a limit to religious or ideological practices that may harm the child. A child, according to this agreement, is an individual no more than 18 years of age (Kaime, 2011).

In Europe, freedom of conscience was recognized by the European Convention on Human Rights, which reads in Article (9) that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance".

This right allows individuals to have their own beliefs and opinions, and to act according to those beliefs without interference from the state or other individuals.

The European Court of Human Rights (ECtHR) has made several rulings related to freedom of conscience. For example, in the case of *Kokkinakis v. Greece* (1993), the ECtHR stated that freedom of conscience includes the freedom to choose, change, or abandon one's religion or beliefs. In another case, *Leyla Şahin v. Turkey* (2005),

the ECtHR held that a ban on wearing a headscarf at a university violated the freedom of conscience of a student who wished to wear it as an expression of her religious beliefs.

The ECtHR has also affirmed that freedom of conscience is not an absolute right and may be subject to limitations in certain circumstances. For example, in the case of *Jehovah's Witnesses of Moscow v. Russia* (2010), the ECtHR held that the right to freedom of conscience could be restricted in order to protect the rights of others or for the protection of public order.

In the Arab world, the Arab Charter on Human Rights of 2004 emphasizes freedom of thought, conscience and religion by stating in Article (3) that "Each State Party to the present Charter undertakes to ensure that every person within its jurisdiction has the right to enjoy the rights and freedoms set forth in the present Charter without distinction as to race, colour, sex, language or religious belief or opinion, or thought, or national or social origin, property, birth or physical or mental disability".

The Charter also stipulates that everyone shall have the right to freedom of thought, conscience and religion without any restrictions except as provided for by the legislation in force, and that one's freedom to manifest one's religion or belief or practice their religion alone or with others shall be subjected only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms to protect public safety or public order, or public health or morals, or others' rights and fundamental freedoms.

Parents or guardians shall also have the freedom to provide for the religious and moral education of their children, and no persons belonging to minorities shall be deprived of the right to enjoy their own culture and use their own language and practise the teachings of their religion and law that regulates the enjoyment of those rights (Shelton & Carozza, 2013).

The Cairo Declaration on Human Rights in Islam of 1981 also includes provisions protecting the right to freedom of belief on the basis that all human beings form one family whose members are united by submission to God and descent from Adam, and that all people are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations (Brems, 2001).

Article (18) of the Declaration also provides that everyone shall have the right to live in security for themselves and their religion, and that every human being shall have the right to receive both religious and worldly education from the various institutions of education and guidance, including the family, the school, the university, the media, etc., and in such an integrated and balanced manner as to develop their personality, strengthen their faith in God and promote their respect for and defence of both rights and obligations.

3. Is Freedom of Conscience a Problem in a Globalised World?

Freedom of conscience itself is not a problem. On the contrary, it is a fundamental human right that allows individuals to express their own beliefs without any fear of persecution or discrimination. Globalisation can promote the free flow of ideas and information, and can provide opportunities for people to learn about and interact with different cultures and beliefs (Kumar, 2021). This can lead to greater tolerance and respect for diverse perspectives and lifestyles.

On the other hand, globalisation can also expose individuals to conflicting values and beliefs, which can create tensions and challenges for those who wish to hold and express their own opinions and beliefs. For example, an individual's conscience may be challenged when they encounter cultural practices or values that conflict with their own.

There is evidence which suggest that conflicts with a religious dimension tend to last longer, be costlier in terms of lives lost and damaged caused, and take longer to recover from than other forms of conflicts, and that once religion enters into a conflict situation, it is very difficult to remove it (Evans, 2017).

In addition, globalisation can also create economic and political pressures that can limit freedom of conscience. Economic globalisation can lead to exploitation and the denial of workers' rights, which can impact an individual's ability to express their beliefs or act according to their conscience. Similarly, political globalisation can lead to restrictions on freedom of expression and other civil liberties, which can impede the exercise of freedom of conscience (Imai, 2002).

However, the challenge in a globalised world is to balance freedom of conscience with the need for mutual respect and tolerance for different beliefs and values.

One potential problem is that increased exposure to diverse cultures and beliefs may lead to clashes between different groups, resulting in intolerance and discrimination. This can be exacerbated by political and ideological differences, economic competition, and social tensions, which can lead to polarization and conflict.

Furthermore, the globalisation of information and communication technologies has made it easier for individuals and groups to disseminate their beliefs and values to a global audience, which can create new challenges for protecting freedom of conscience (Verkuyten, Yogeeswaran & Adelman, 2019). For instance, the spread of extremist ideologies and hate speech through the internet can have a damaging impact on social cohesion and stability. In some cases, conflicts can also arise between the exercise of freedom of conscience and other rights or values, such as public safety, non-discrimination, or the protection of public order.

In a globalised world, freedom of conscience takes on a new dimension as individuals from diverse cultures and religions come into contact with each other. The increased interaction between people from different backgrounds can lead to conflicts and misunderstandings, particularly when it comes to beliefs and values. It could be seen that the relationship between culture and freedom of religion or belief is a negative one, as freedom of religion is often invoked to defend human rights violations.

In response, many human rights advocates draw a distinction between culture and religion, and what is insinuated is that culture is the problem, not religion. However, the reality is that in many cases, culture and religion are not so distinct, with cultural practices becoming "religionized" and religious ideas becoming part of the culture (Abdulla, 2018).

For example, some individuals may claim the right to discriminate against others based on their religious beliefs or moral convictions, such as refusing to serve customers based on their sexual orientation or gender identity. In such cases, the exercise of freedom of conscience may conflict with the principle of non-discrimination and the protection of human rights.

Similarly, some religious or cultural practices may pose a risk to public health or safety, such as refusing medical treatment or vaccination or engaging in harmful traditional practices (Chatters, 2000). In such cases, the exercise of freedom of conscience may conflict with the principle of public health and safety.

Moreover, in a globalised world, the exercise of freedom of conscience can have far-reaching consequences, both positive and negative. It can promote cultural exchange, tolerance, and mutual understanding, but it can also lead to the spread of extremist ideologies or the violation of human rights.

Therefore, it is important to balance the exercise of freedom of conscience with other values, such as respect for human rights, non-discrimination, and the promotion of social harmony and peace. This requires a willingness to engage in dialogue, to listen to different perspectives, and to find common ground based on shared values and aspirations.

There is also a need to promote greater understanding and respect for different beliefs and values. This can be achieved through education and public dialogue, as well as through the promotion of human rights and democratic values. It is also important to ensure that freedom of conscience is protected and promoted through legal and institutional frameworks that allow individuals to express their beliefs without fear of retaliation or persecution. The adjudication of the conflicts in question should be reasonable; reasonableness is presumed when "what is

objected to is something over which there is a history of dispute between recognised bodies of thought or over which reasonable people have disagreed or could disagree" (Murphy, 2022).

However, while freedom of conscience should be seen as a universal right that applies to all individuals regardless of their cultural or religious background, it is not an absolute right and may be subject to certain limitations in order to protect the rights and freedoms of others and to prevent harm to society as a whole.

These limitations are generally based on the need to protect the rights and freedoms of others or to prevent harm to society as a whole. Restrictions on the freedom to manifest religion or belief are permitted only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others (Evans, 2001).

Some examples of limitations on freedom of conscience include public safety and public health; that is, when an individual's beliefs and actions pose a threat to public safety, health or national security, they may be restricted or prohibited. Examples of this include hate speech, incitement to violence or refusing medical treatment or vaccination (Gunn, 2012).

Discrimination is also an element that justifies limitations on freedom of conscience. Freedom of conscience does not extend to beliefs or practices that discriminate against others based on their race, gender, sexuality, religion, or other protected characteristics.

In summary, while freedom of conscience is a fundamental right, it needs to be balanced with other rights and values in the globalised world order to ensure that it does not undermine the rights and freedoms of others or pose a risk to society as a whole.

4. Freedom of Conscience and Respect for Religious Books: Striking the Right Balance

One of the new dimensions of freedom of conscience in this era of globalisation is the notion of showing respect for religious books, and not allowing those who do not follow certain religions or faiths to perform offensive acts against these books. Religious books, such as the Bible, Quran, Torah, and others, are considered sacred texts by many people around the world as they contain the beliefs and values of particular religious traditions, and are seen by those who follow certain religions as a source of guidance and inspiration.

As such, while exercising freedom of conscience it is important that individuals are mindful of the feelings and beliefs of others, particularly when it comes to showing respect for religious books (Bird, 2013). This means that a person should refrain from taking any action that could be seen as disrespectful or offensive by other believers, such as burning, tearing, or desecrating religious texts.

These actions can be seen as deeply offensive and hurtful to those who hold these books as sacred, and can also lead to social unrest or conflict. Religious books are seen by many individuals and communities as holy, and are often seen as the embodiment of their beliefs and values.

Burning religious texts, such as the Quran or Bible, is particularly egregious because it is not just an act of disrespect, but also an act of destruction of the democratic values and civil nature of healthy public debates and human interaction (Knuth, 2006). It manifests a heinous urge for complete cultural destruction, and demonstrates a blatant and intentional disregard for the values of justice, equality, and liberty (Zeidan, 2023).

Respect for religious books stems from its deep association with the admiration of the diversity of religious beliefs and traditions in the modernised world. It requires recognizing that there are different ways of interpreting and understanding religious texts, and that individuals have the right to hold their own beliefs and values, without denying the right of others to embrace their own religious principles and rules, or even not to adopt any.

Moreover, respecting religious books is not only a matter of courtesy or sensitivity, but also a matter of upholding human rights and promoting social harmony. Freedom of conscience includes the right to hold and express one's

beliefs and values, but it also requires respect for the beliefs and values of others, as well as for the human dignity and rights of all individuals (Maclure & Taylor, 2011).

In a pluralistic society, respecting religious books is essential for promoting tolerance, mutual respect, and peaceful coexistence among people of different faiths and backgrounds. It requires recognizing that freedom of conscience is not only about expressing one's own beliefs and values, but also about respecting the beliefs and values of others.

Together with tolerance comes co-existence, which commonly refers not only to maintaining and promoting respect for differences in religion, religious traditions, ethnicities and culture, but also works to prevent communal conflict and to enhance peaceful living, and even to develop multiculturalism in society.

While tolerance requires diverse communities to respect each other and let other people implement their religious traditions as they believe, co-existence is more than that as it requires them to enhance togetherness, respect each other, work together in maintaining harmony, prevent communal conflict, and resolve conflict together (Rosyada, 2017).

Nevertheless, the recent acts that have been seen in Western countries, where people who call themselves human rights activists have burned copies of the Quran, should not be seen as exercises of freedom of conscience or expressions of personal beliefs or opinions. Such acts are highly offensive and disrespectful to those who hold the Quran as a sacred text, and can only be interpreted as an attack on the beliefs and values of a particular community, which can lead to feelings of anger, fear, and resentment.

While freedom of conscience allows individuals to express their beliefs and opinions, it is important to exercise this freedom with respect for the beliefs and values of others. Disrespecting religious books or symbols can be seen as an attack on the beliefs and values of a particular community, which can lead to feelings of anger, fear, and resentment.

The ECtHR has interpreted Article (9) of the European Convention relating to freedom of conscience as protecting not only religious beliefs but also philosophical and non-theistic convictions. The Court has recognized that the right to freedom of conscience is essential to the dignity and autonomy of the individual, and that the state has a duty to ensure that this right is respected and protected. On the other hand, the Court acknowledges that it is the right of states to regulate the right of conscience without being seen as infringing basic human rights. In the case of *Lautsi and Others v. Italy* (2005), relating to whether the display of crucifixes in public school classrooms violated the freedom of conscience of non-Christian students, the Court ultimately found that the display did not violate this right, as it was not imposed on students and did not amount to indoctrination or proselytism.

In cases involving the wearing of religious symbols or clothing, including the hijab, the ECtHR has emphasized the importance of balancing the rights of individuals to manifest their religion with the interests of secularism, equality, and non-discrimination. The Court has stated that individuals have the right to manifest their religion or beliefs in public, including through the wearing of religious clothing or symbols, as long as this does not interfere with the rights and freedoms of others or undermine public order, security, or morals (Lewis, 2007).

However, the ECtHR has also held that such restrictions must be proportionate to their aim and not amount to a blanket ban on the wearing of the hijab. It has also emphasized the importance of respecting the individual's choice to wear the hijab as an expression of their identity and beliefs. In the case of *S.A.S. v. France* (2014), the Court held that a law banning the wearing of a full-face veil in public did violate Article 9, as the restriction was not sufficiently justified and proportionate in the circumstances.

In the case of *Eweida and Others v. the United Kingdom* (2013), the Court ruled that a British Airways employee's right to wear a cross necklace at work was protected under the European Convention on Human Rights.

İ.A. v. Turkey (2005) is another case in which the court struck the right balance between freedom of conscience and respect for religious beliefs. It ruled that the conviction of a publisher for having published a novel considered an abusive attack on the Prophet of Islam should not be seen as violation of the right of freedom of conscience. It

concluded that "notwithstanding the fact that there was a certain tolerance of criticism of religious doctrine within Turkish society […], believers might legitimately feel themselves to be the object of unwarranted and offensive attacks" against Prophet Muhammad, and that the "measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims" (paras. 29–30).

In the prominent case of *E.S. v. Austria* (2018), the ECtHR affirmed that insulting Islam's Prophet Mohammed was not covered by freedom of expression and conscience, ruling that defaming the Prophet goes "beyond the permissible limits of an objective debate" and could stir up prejudice and put at risk religious peace; that the applicant's statements against the Prophet could not be covered by the freedom of expression; and that they had had been likely to arouse justified indignation in Muslims and "amounted to a generalization without factual basis" (para. 57).

However, most recently, in June 2023, the Administrative Appeals Court for Stockholm affirmed a lower court decision holding that the Stockholm police had been wrong to refuse permission for public gatherings to burn the Quran outside the Turkish and Iranian embassies, despite the risk of a terrorist response (Administrative Appeals Court Cases Nos. 2079-23 & 2080-23). The Court argued that the Swedish Constitution provides that freedom of assembly and the right to demonstrate can be limited only with reference to national security or to prevent epidemics, and thus the Swedish Police can refuse to allow demonstrations only in very limited circumstances.

In his 2015 report on violence carried out in the name of religion, the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, provided examples of different faith-based and secular civil society organizations working together and creating a common platform. Such cooperation demonstrates that a commitment to human rights can create and strengthen solidarity across all religious, cultural and philosophical divides. Examples of this can be seen in the initiatives undertaken by Christian civil society organizations in supporting atheists and Buddhists under threat, and public statements made by Bahá'í representatives against the persecution of Shia Muslims. Such acts of solidarity have a highly symbolic value (Annual Report to the UN Human Rights Council, 2015).

Therefore, exercising freedom of conscience with respect for religious books requires a willingness to engage in dialogue, to listen to different perspectives, and to find common ground based on shared values and aspirations. It also requires a recognition that while individuals have the right to express their beliefs and opinions, this right must be balanced with respect for the beliefs and values of others.

From a legal perspective, national criminal laws should be amended to the effect that any act seen as disrespectful or offensive to religious texts should be penalised and prosecuted as a hate crime or an incitement to violence. The interest beyond this penalization is that disrespecting religious books can lead to social disharmony and violence, particularly in societies where religion is a highly sensitive and emotionally charged issue.

In summary, respecting religious books is an important aspect of exercising freedom of conscience, which includes the right of individuals to interpret and practice their religion according to their own conscience, and to share their beliefs and practices with others who share their beliefs or who are interested in learning about them, without hatred or violence against them.

Conclusion

Freedom of conscience is a fundamental right that has been recognized and protected by international human rights law. It is the cornerstone of a democratic society that values diversity and pluralism, as it allows individuals to hold and express their own beliefs, thoughts, and opinions, and to act on them without fear of persecution or discrimination.

Therefore, it is important to exercise freedom of conscience in a way that is respectful and considerate of the beliefs and values of others, including their religious texts. This requires a willingness to listen to different perspectives, to engage in dialogue, and to find common ground based on shared values and aspirations.

However, the exercise of freedom of conscience in the modern world can give rise to tensions, conflicts, and challenges, particularly when it comes to balancing the rights of individuals and groups with different beliefs, values, and interests. In recent years, there have been increasing challenges to the right to freedom of conscience, particularly in relation to issues such as religious freedom and conscientious objection. In many cases, individuals may face pressure to conform to the beliefs and values of their community, and may experience discrimination, or even persecution if they hold minority views or beliefs.

Therefore, ensuring proper respect for freedom of religion or belief is an essential prerequisite for dealing with the mixed implications of globalisation in the modern world. Freedom of conscience should also be respected and upheld in all aspects of life, including education, healthcare, and public services. This can be achieved through laws, policies, and practices that protect the right to freedom of conscience, and that promote respect for diversity and the tolerance of different views and beliefs.

It is also essential to ensure that individuals who face violations of their right to freedom of conscience have access to effective remedies and redress, including through the courts and other mechanisms of justice.

By lessening the likelihood of conflicts occurring as a result of religious differences, the international community will become more capable of responding effectively to other serious challenges facing the modern world, such as poverty and climate change.

On the other hand, one should recognize that the right to freedom of conscience has never been absolute and should be subject to limitations which are necessary in a democratic and globalised society. For example, limitations may be necessary to protect the rights and freedoms of others, to maintain public order, or to protect public health or morals.

In summary, governments and societies should work to strike the right balance between freedom of conscience and respect for religious books. This could be achieved through several methods, including legislation, education, and public dialogue. This entails ensuring that individuals are free to express their beliefs without fear of retaliation or persecution, and that they are able to participate in the social, economic, and political life of the community, regardless of their beliefs or values.

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FREE, PRIOR, INFORMED CONSENT AS A LEGAL PRINCIPLE AND ITS LINK TO THE RIGHT TO FREEDOM OF CONSCIENCE

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Abstract. In two judgments on the judicial review of the Law Concerning Minerals and Coals and the Law Concerning Forestry that related to the existence of indigenous peoples, the Constitutional Court of Indonesia did not recognize free, prior, informed consent (FPIC) as a consideration, even though this concept was discussed in court. The Court emphasized the importance of first proving the existence of indigenous peoples and that indigenous peoples that no longer exist should not be revived. This argument carries the risk of putting aside the possibility to exist of indigenous peoples that may still try to exist after having been expelled or forced out of their territories. FPIC as a legal principle is rooted in the right to self-determination of indigenous peoples who are vulnerable to losing their living space when dealing with the State in the name of public interest and development. This right to self-determination is in line with freedom of conscience, where the recognition of indigenous and tribal peoples means the recognition of a set of expressions of values, beliefs, and ways of life of a community group. Thus, the aim of this article is to discuss the essence of free, prior, informed consent as a legal principle in Indonesian law and its link to the universal right to freedom of conscience as interpreted by the European Court of Human Rights. In the end, the paper concludes that both legal concepts are closely linked, particularly when it comes to indigenous communities and their rights. Both legal concepts are crucial to safeguarding the rights of these communities to preserve their identity, the ways of its expression, and other practices.

Keywords: freedom of conscience, free prior informed consent, FPIC, indigenous people, public participation, self-determination.

Introduction

In decision No. 32/PII-VIII/2010, the Constitutional Court of the Republic of Indonesia heard a case regarding the judicial review of Law No. 4/2009 on Mineral and Coal Mining petitioned by the Indonesian Environmental Watch (WALHI), the Indonesian Legal Aid and Human Rights Association (PBHI) and 19 other petitioners. There were several material review requests submitted – namely, Article 6 paragraph (1) letter juncto, Article 9 paragraph (2) juncto, Article 10 letter b, and Article 162, Article 136 paragraph (2) of Law Number 4 Year 2009 on Mineral and Coal Mining against the 1945 Constitution. The petition for judicial review questioned the constitutionality of the determination of the mining area, which involved the Regional Government, Central Government, and the House of Representatives of the Republic of Indonesia without involving the community. The community can only be subject to criminal sanctions because they are considered to have obstructed or disrupted the implementation of mining business activities that have obtained a mining permit.

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The Court stated in its consideration that the constitutional issue to be answered by it was whether the control by the State over the earth, water and natural resources contained therein, which is used for the greatest prosperity of the people through the government's authority to determine the mining area after coordinating with the local government and consulting with the House of Representatives, is contrary to the constitutional rights of citizens to obtain guarantees, protection, and legal certainty to reside, own property, and obtain a good and healthy environment. In addition, the Court also referred to Constitutional Court Decision No. 21-22/PUU-V/2007 on the review of Law No. 25/2007 on Capital Investment, dated March 25, 2008, which stated that

> ... in Article 33 of the 1945 Constitution there are economic and social rights of citizens as interests protected by the Constitution through the involvement or role of the State. In other words, Article 33 of the 1945 Constitution is a provision regulating the involvement or active role of the State to take action in the context of *respect*, *protection*, and *fulfillment* of citizens' economic and social rights. Therefore, to carry out the mandate of the 1945 Constitution in determining the mining area, the government cannot act arbitrarily, so it must first coordinate with the local government, consult with the People's Representatives Council (Parliament), and take into account the opinions of the community….

The implementation of the obligation to include public opinion must be concretely proven and facilitated by the government. This concrete evidence can prevent conflicts between mining business actors, the community and the state, c.q., the government, in the mining area. In addition, further mechanisms regarding the obligation to include community opinion, who is included in the community group whose territory or land will be included in the mining area, and the community that will be affected are fully under the authority of the government to regulate in accordance with applicable laws and regulations by referring to the legal considerations stated by the Court in Case Decision Number 25/PUU-VIII/2010 dated June 4, 2012, Case Decision Number 30/PUU-VIII/2010 dated June 4, 2012, and the decision in this case, while respecting and upholding human rights.

Another case was submitted by the Alliance of Indigenous Peoples (AMAN), the Indigenous People of Kenegerian Kuntu, Kampar, Riau, the Indigenous People of Masyarakat Hukum Adat Kasepuhan Cisitu, Lebak, Banten through case No. 35/PUU-X/2012. This case challenged the provisions of: Article 1 number 6; Article 4 paragraph (3); Article 5 paragraph (1), paragraph (2), paragraph (4); and Article 67 paragraph (1), paragraph (2), paragraph (3) of Law No. 41/1999 on Forestry (hereinafter referred to as the Forestry Law), which essentially questioned the constitutionality of the existence of customary forests and the conditional recognition of the existence of indigenous peoples.

The applicant argued that the enactment of provisions in the Forestry Law that place customary forests as part of state forests and the existence of provisions regarding conditional recognition of the existence of indigenous peoples have caused constitutional losses to the applicant in the form of loss of access to promote, assist and struggle for the rights of indigenous peoples, along with the loss of customary rights to forests, access to the use and management of customary forest areas, and criminalization for entering forest areas.

The phrase "pay attention" in Article 4 paragraph (3) of the Forestry Law must be interpreted more firmly, namely to suggest that the State recognizes and respects the unity of customary law communities and their traditional rights, in line with the intent of Article 18B paragraph (2) of the 1945 Constitution. As for the terms of recognition and respect for customary law communities, the phrase "as long as in reality they still exist and are recognized for their existence" must be interpreted to suggest "as long as they are still alive and in accordance with the development of society," because customary law is generally unwritten law and is a *living law,* meaning that it is a law that is *accepted*, *observed* and obeyed by the community concerned because it fulfils a sense of justice for them and is in accordance with and recognized by the Constitution.

With regard to the condition that as long as in reality it still exists and its existence is recognized, in reality the status and function of forests in customary law communities depend on the status of the existence of customary law communities. Thus, the possibilities are: (1) the reality still exists, but its existence is not recognized; or (2) the reality does not exist, but its existence is recognized. If the reality is that it still exists but is not recognized, then this can cause harm to the community concerned. For example, their customary land/forest may be used for other purposes without their permission through evictions, thus indigenous peoples can no longer benefit from the customary forests they control.

From the two decisions of the Constitutional Court of the Republic of Indonesia reviewed in this paper, the issue of community involvement, especially indigenous peoples, in government decision-making involves a central issue, namely the recognition of subjects in the participation process, which means the existence of indigenous peoples.

In Decision No. 32/PUU-VIII/2010, the Court emphasized that public opinion must be interpreted as *genuine* involvement (*as it is*). The mandate of "control by the state" carried out by the government and the existence of representative institutions do not necessarily replace the direct participation of communities affected by policies. Thus, in issuing a license covering a certain area, the community in that area has the right to be involved in the participation process.

In relation to the participation process, the Court also underlined the importance of a substantive rather than formalistic process. The substantive meaning is the implementation of the obligation to include a public opinion in the procedures provided by the government, not merely an administrative formality in the form of written consent that may not be given directly by the person concerned.

The issue is: Who is the community with the right to be involved? In the Forestry Law, this becomes problematic with the status of state forests that marginalize customary forests in which customary law communities exist. Therefore, the recognition and respect of customary law communities must also be explained, which in the legislation is interpreted in the phrase "as long as in reality they still exist and are recognized for their existence."

Implementing an accountable public participation process is impossible without identifying the correct subject. When the legal construction of the existence of indigenous peoples opens an arena of choice for the implementer of regulations, there is still the possibility of not involving indigenous peoples in participation. Important decisions on natural resource management are certainly very much related to the living space of indigenous peoples. Quoting I Nyoman Nurjaya's expert testimony, the relationship between the government and the people in natural resource management contains two important principles. First is the *precautionary principle*, namely, the forest as an ecological and living system. Second is *free, prior, and informed consent* (FPIC). Indigenous peoples are legal entities equal to the position of other legal subjects; in this case, indigenous peoples have environmental wisdom. The concept of FPIC was mentioned in the trials of decisions No. 32/PUU-VIII/2010 and No. 35/PUU-X/2012, although it was not directly the focus of the Court's consideration.

Regarding the phrase "as long as it still exists and its existence is recognized," in its decision, the Court still considered the need to prove the existence of indigenous peoples because customary law is generally unwritten law and is a *living law*, meaning that it is law that is *accepted, observed* and obeyed because there can be conditions where (1) it still exists, but its existence is not recognized; (2) it does not exist, but its existence is recognized. According to the Court, recognizing indigenous peoples' existence is not intended to preserve indigenous peoples at their current level of technological development. However, they must continue to obtain facilities in achieving prosperity, ensuring fair legal certainty for both the subject and the object of the law and, if necessary, obtaining special treatment (*affirmative action*).

Indigenous communities have a special bond with their ancestral lands, territories, and resources; their cultural heritage, language, and traditions are integral to their identity (*Saramaka v. Suriname*, 2007). They have the right to maintain, develop, and pass on their cultural heritage to future generations (*Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001). Therefore, freedom of conscience is crucial as it enables people to express their beliefs and values and practice their religion, customs, and traditions without external coercion (*Kokkinakis v. Greece*, 1993). Without freedom of conscience, people, especially indigenous people, may be compelled to adopt practices and beliefs that are incompatible with their cultural identity. Therefore, freedom of conscience is a vital aspect of indigenous peoples, allowing them to maintain their cultural heritage and make autonomous decisions for their future. As stated in Article 9 ILO Convention No. 169, it is the responsibility of states to safeguard the interests of indigenous peoples to ensure their right to self-determination and preserve their cultural heritage for future generations.

In light of such circumstances, this paper discusses the problem of how the FPIC as a legal concept should be understood in its essence and in relation to the right to freedom of conscience. The paper aims to assess the

interface between FPIC and freedom of conscience. While existing literature has explored the concept of FPIC, no research has specifically addressed its interplay with freedom of conscience. This article further differs from other existing research as it provides new insights into how both concepts may connect and details the standards as well as the implementation of FPIC in real-world cases, including those that have occurred in Indonesia. It subsequently provides a unique perspective on the essential roles of FPIC and freedom of conscience in protecting the values and cultures of stakeholders concerned, especially indigenous groups.

This paper argues that FPIC for indigenous people is not merely an obligatory procedure, but is closely related to freedom of conscience. The relationship between public involvement in governmental decision-making and freedom of conscience ensures that the public make choices based on their values, beliefs, and priorities. The public context in this study notably refers to parties frequently excluded from participation, such as indigenous peoples when interacting with the government and companies in natural resource regulations, particularly forests and mines.

To reach its conclusion, this paper utilizes descriptive, analytical, and comparative legal methods. Primary materials encompassing international conventions and Indonesian statutory laws are analyzed, along with secondary materials such as academic publications. Case laws will also be utilized, which are intended to illustrate how various courts have implemented FPIC. The aim is to provide guidance to Indonesian Courts on the application of such a concept. This article is divided into four main sections. The first section will address the concept of FPIC. Subsequently, the second section will delve into court judgements that have implemented the concept of FPIC. This is then followed by the third section, which puts into light FPIC-related problems and challenges in Indonesia by evaluating real-life cases. Lastly, the connection between FPIC and freedom of conscience is discussed.

1. FPIC as a Concept

1.1 The Definition and Scope of FPIC

FPIC, according to Anderson, means "a locally and culturally specific process in which the affected communities themselves determine the necessary steps" (Anderson, 2011). FPIC was originally used and developed in the context of indigenous peoples. However, in its development, this concept has also been linked to the rights of all people to land and territory based on their customary and historical relationships (Colchester & Ferrari, 2007).

As the name implies, FPIC consists of four elements that are interrelated and form a single unit (UN Permanent Forum on Indigenous Issues, 2005), namely:

1. free should mean without coercion, intimidation, or manipulation;
2. *prior* should mean that consent has been obtained with sufficient time prior to the authorization or commencement of activities, and respects the need for time for indigenous peoples to undertake consultation processes;
3. informed should mean that the information provided covers (at least) the following aspects:
    a. the nature, size, *reversibility*, and scope of the proposed project or activity;
    b. the reason for or purpose of the project and/or activity;
    c. the length of the above;
    d. the locations that will be affected;
    e. a preliminary assessment of the likely economic, social, cultural, and environmental impacts, including potential risks and fair and equitable benefit-sharing in the context of respecting the precautionary principle;
    f. the people who are likely to be involved in the implementation of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees, etc.); and
    g. the procedures that the project may require;
4. consent.

Consultation and participation are very important components of the consent process. Consultations need to be conducted in good faith. Parties should establish a dialogue that allows them to seek appropriate solutions in an

atmosphere of mutual respect based on goodwill and full and equal participation. Consultations require time and a system for stakeholders to communicate effectively. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women is essential, as is the participation of children and youth, as appropriate. This process may include the option to withhold consent. Consent to any agreement needs to be spelled out in language that is well-understood by the community.
FPIC is the collective right of indigenous peoples and local communities to give or withhold consent to any activity that may affect their lives. Any activity, whether it is infrastructure development by the government or business activities by corporations, can affect the rights, lands, natural resources, territories, livelihoods, and food security of indigenous peoples and local communities (Accountability Framework Initiative, 2019).

FPIC is important because it recognizes the right of indigenous peoples to negotiate all terms that may affect their lives. Furthermore, FPIC ensures that this process is carried out through local processes that are in accordance with local customs and cultures (RECOFT, 2014). This means that the right to give or withhold consent is exercised through their self-appointed representatives and in a manner that they determine in accordance with the customs, values, and norms within those indigenous peoples and local communities. FPIC is thus aimed at promoting, protecting, and ensuring the fulfilment of fundamental human rights; these include the right to property, culture, and self-determination.

The Ministry of National Development Planning of the Republic of Indonesia, in its 2012 Study Report, recognized that development and conservation activities imposed without consultation, participation, and negotiation on the rights of indigenous peoples and local communities often result in the loss of indigenous forests due to logging, the loss of livelihood lands due to mining, damage to ecosystems due to flooding, the narrowing of hunting areas due to boundary fences, and the humiliation of customary institutions. This happens because indigenous communities are not allowed to express their aspirations for development projects or the implementation of business activities (Ministry of National Development Planning of the Republic of Indonesia, 2012).

As a result, indigenous peoples or local communities are forced to relocate, leaving their lands behind for "retraining" which is completely incompatible with their ability to make ends meet. In the end, they become poorer and suffer more. There is a misperception of indigenous peoples that paints them as naive, innocent, poor and needing to be guided. This happens because outsiders do not know how indigenous peoples and local communities live and are unaware that they have the same rights and freedoms as other human beings. This misperception is even allowed to live on to enable outsiders to intervene and take advantage (Ministry of National Development Planning of the Republic of Indonesia, 2012).

While generally required for all projects and business activities that may affect the rights, lands, resources, territories, livelihoods, and food security of indigenous peoples and local communities, FPIC is important in at least the following three specific circumstances (Accountability Framework Initiative, 2019).

First, any expropriation, development, or new operations. FPIC is required before starting or expanding activities. This includes: (i) the acquisition of land or natural resource rights; (ii) new business operations, production, processing, or cultivation methods; (iii) the designation of land for conservation purposes; (iv) the expansion of activities i–iii; and (v) the issuance of permits, concessions, and approvals in the form of legislation or administrative decisions for activities i–iii.

Second, the remediation of past damage. A remedy is required when development projects or company operations have caused or contributed to the destruction of land, territories, and natural resources without first going through an FPIC process. Therefore, an FPIC process needs to be conducted to agree on appropriate remedial measures. These remedial measures include: (i) resuming or temporarily halting operations; (ii) land restitution; (iii) compensation to aggrieved parties; or (iv) new benefit-sharing arrangements.

Third, ongoing land conflicts. Where there is a conflict between indigenous peoples or local communities and an external party such as a corporation, concessionaire, or government, this external party must cease all activities related to the conflict until the conflict is resolved through an FPIC process. Where the conflict involves two or

more indigenous peoples with overlapping claims to land, territories, or resources, the outsider must wait until these issues are resolved to begin the FPIC process.

Generally, it can be explained that FPIC has two aspects: a process and an outcome. FPIC is a series of information exchange, consultation, internal deliberation, and negotiation steps taken to obtain the consent of indigenous peoples and affected local communities before a project or activity is carried out. The FPIC process can result in at least three things: unconditional consent; consent with conditional modifications to the activity proposal; or no consent (Accountability Framework Initiative, 2019).

To conclude this sub-section, the authors feel the need to quote Emil Salim, who describes FPIC as a form of social license as follows:

> "Free prior and informed consent" should not be understood as a one-off yes or no vote, nor as the veto power of an individual or group. Rather, it is a process that allows indigenous peoples, local communities, governments, and companies to come to a mutual agreement in a forum that gives affected communities sufficient power to negotiate the terms of an agreement that allows them to continue to live and prosper. The company must make a sufficiently attractive offer to the communities where the project is located to prefer the project to go ahead and negotiate an agreement on how the project can be implemented and thereby give the company a "social license" to operate. (Salim, 2003)

1.2 The Development of FPIC as a Legal Concept

FPIC has evolved into a legal concept at both the international and national levels, and in some countries it has even become a norm in national laws and regulations. This sub-section will further discuss several international and national legal instruments containing FPIC.

At the international level, FPIC is born out of "*the right* to self-determination," which is a fundamental principle of indigenous peoples' rights (Clavero, 2005). However, the modern concept of the right to self-determination for indigenous peoples does not necessarily include the right to secede from the State. Rather, it encompasses a number of rights, including the right to participate in state decision-making, including autonomy and *self-governance* (Daes, 2014). This right to self-determination is enshrined in Article 1 of the two main human rights covenants, namely: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states that: "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." Thus, as an extension and implementation of this right, indigenous peoples have the right to give or withhold their consent to development activities or projects in their territory, which may affect their natural resources (Daes, 2014).

The HRC (Human Rights Committee), in General Comments No. 23 to ICCPR Article 27 on the right of participation of indigenous peoples to lands, territories, and natural resources, stated that there are *positive duties* on the part of states to ensure the effective participation of members of minority groups in decisions affecting their lives (UN High Commission for Human Rights, 1994). Likewise, the Committee on Economic, Social and Cultural Rights (CESCR) in General Comments No. 21 interpreted Article 15 of the ICESCR, which provides cultural rights and restitution to lands, territories, and resources used for the livelihood of indigenous peoples that are taken without consent. In its interpretation, the CESCR encouraged Member States to respect the principle of the FPIC of indigenous peoples in all matters concerning their specific rights (UN Committee on Economic, Social and Cultural Rights, 2009).

ILO Convention No. 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169) is the only binding international instrument that specifically regulates the protection of indigenous groups. This convention regulates various forms of involvement of indigenous peoples, including in the form of consultation, participation, and the case of relocation – which must be with *informed consent* (MacKay, 2004). Article 6 paragraph (2) of the convention requires that any consultation efforts are undertaken in "good faith" and "in a form appropriate to the circumstances, to achieve agreement or *consent* to the proposed activity. There is, thus, a moral obligation to seek and obtain *consent*" (MacKay, 2004).

This article must be read in conjunction with Article 7(1), which provides that:

> the people concerned shall have the *right to decide their priorities* for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and *to exercise control*, to the extent possible, over their own economic, social and cultural development.

The two articles above show the spirit of *prior informed consent* and are to be applied to this convention's contents (Baluarte, 2004). This is evident in Article 16 and Article 17 of the Convention, which state that FPIC is required in the event of the relocation of indigenous peoples and outline the requirement to *consult* with indigenous peoples prior to land transfers, with replacement land outside the territory of indigenous peoples.

Another international instrument related to FPIC is, of course, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007. This declaration explicitly encourages the implementation of FPIC for indigenous peoples. Some of the provisions of the FPIC requirement in this declaration concern: the case of the relocation of indigenous peoples (Art. 10 UNDRIP); when the government creates legislation or takes administrative measures that affect the lives of indigenous peoples (Art. 19 UNDRIP); or making indigenous peoples' lands or territories hazardous or toxic waste disposal sites (Art. 27 UNDRIP). Furthermore, FPIC is also required in the case of "the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (Art. 32 UNDRIP).

According to Ward, the formulation of FPIC in UNDRIP 2007 is not intended to give indigenous peoples a veto over proposed projects, but to ensure that indigenous peoples are given the opportunity for *meaningful participation* in decisions that directly affect their lands, territories, and resources. Strictly speaking, FPIC in UNDRIP 2007 should be interpreted as a way to ensure that the right to *self-determination* is recognized and protected by the State (Ward, 2011). Ward also argues that the character of this declaration is non-binding; therefore, it is *soft law*. However, this *soft law* norm has been accepted by several human rights bodies under the United Nations, accepted by the human rights enforcement system in the Inter-American country mechanism, and adopted in one case by a country's Supreme Court. Of course, it takes a long time for FPIC to be accepted as *customary international law*. However, at least FPIC in UNDRIP 2007 will shape state practices and implementation more strongly to improve the position of indigenous peoples' right to participation in the form of an obligation to *consent* rather than just to *consultation* (Ward, 2011).

Another international legal instrument related to FPIC is the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The Committee on the Elimination of Racial Discrimination (CERD), in General Recommendation No. 23 paragraph 5, encourages member states to recognize and protect the rights of indigenous peoples. Suppose the rights of indigenous peoples to their lands and territories have been violated without a process of *free and informed consent*. In that case, the State must take steps to return the land or territory to the indigenous peoples. This is also the case in the 1993 instrument The Convention on Biological Diversity (CBD). This convention requires that traditional knowledge can only be used with the *approval of* indigenous peoples and local communities, which is interpreted as part of the implementation of FPIC.

At the national level, at least two national legislations explicitly adopt FPIC. The Philippines passed legislation under the Indigenous Peoples' Rights Act (IPRA) 1997. This act explicitly states that FPIC from indigenous peoples must be legally obtained for the following activities: exploration, development, and use of natural resources; displacement and relocation; archaeological exploration; policies affecting indigenous peoples; and entry into military service (Indigenous Peoples Rights Act 1997, sec. 59 (Phil.) and Mining Code 1995, sec. 16 (Phil.)). The IPRA also stipulates that the consensus of all members of an indigenous group shall be determined by the customary laws and practices of the indigenous community, free from external manipulation, interference, and coercion, and obtained after the purpose and scope of the activity have been fully disclosed in a language and process understood by the community (Indigenous Peoples Rights Act 1997, sec. 3(g) (Phil.)).

FPIC is also found in legislation governing mining activities in Australia's Northern Territory, which are conducted or will be conducted on the customary lands of Aboriginal peoples. This legislation is called the

Aboriginal Land Rights (Northern Territory) Act (ALRA) 1976. Similar legislation was subsequently adopted by other states in Australia. Under the ALRA, *consent* is obtained from a Land Council established and overseen by the Aboriginal community, which will approve mining licenses only if the traditional owners of the Aboriginal land understand the mining conditions and all terms and conditions. As a community, the traditional owners of the land must understand that the terms and conditions proposed by the mining company are *reasonable* and have agreed to these terms and conditions (Aboriginal Lands Rights (Northern Territory) Act 1976 (Austl.), sec. 42(6)). *Consent is* deemed given if it is based on a decision-making process operated by the traditional owners of Aboriginal land. Where such a decision-making process does not exist, it is based on the decision-making process agreed upon and adopted by the traditional owners of the Aboriginal land (Aboriginal Lands Rights (Northern Territory) Act 1976 (Austl.), sec. 77A).

To conclude this subsection, the concept of FPIC, or at least elements of this concept, have become part of both binding and *soft law* international instruments. This situation shows that FPIC has become a legal concept. Although this has not yet been widely accepted by countries, this fact does not reduce its value as a legal concept. Some countries have even incorporated the concept of FPIC as a norm in their national legislation. State acceptance shows that FPIC is more than just an abstract legal idea, but a legal concept that has strong roots supported by legal arguments on the *rights to self-determination* of indigenous peoples. Without FPIC, this right becomes less meaningful for the survival of indigenous peoples and local communities.

2. FPIC in Court Judgments

The court judgment most widely referenced to demonstrate recognition of the concept of FPIC is the 2001 judgment of the Inter-American Court of Human Rights (IACtHR) in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. In this case, the Court examined Article 21 of the Inter-American Convention on Human Rights (Convention) regarding the right to property. Although Article 21 of the Convention deals with the right to private ownership of property by individuals and companies, the Court held that it also protects the right of members of indigenous groups to collectively own *ancestral lands (Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001*). The Court further held that Nicaragua had violated indigenous peoples' property rights by granting logging concessions on indigenous peoples' lands. In reaching this decision, the Court cited the findings of the Inter-American Commission on Human Rights (IACHR) in 1999, which stated that Nicaragua "is actively responsible for violations of the right to property … by granting a concession … without the consent of the Awas Tingni indigenous community" (*Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001).

The decision in this case also became jurisprudence and was followed by IACHR judges in subsequent cases (*Comunidad Indigena Yakye Axa v. Paraguay*, 2005; *Sawhoyamaxa Indigenous community v. Paraguay*, 2006; *Saramaka v. Suriname*, 2007). Even in the *Saramaka People* case, the IACHR set a new standard for implementing Article 21 of the Convention on property rights. The Court stated that Article 21 of the Convention protects indigenous peoples' natural resources that are *necessary* for the survival of indigenous peoples, namely natural resources related to agriculture, fishing, and hunting. Article 21 of the Convention does not prevent the State from granting concessions for exploring and exploiting natural resources in indigenous peoples' territories (*Saramaka v. Suriname*, 2007). However, there are four conditions that the State must meet before granting such concessions. First, ensuring the effective participation of members of indigenous groups in any development or investment plans. Second, ensuring that affected communities receive a share of the profits. Third, conducting and supervising the implementation of environmental and social impact assessments prior to project implementation. Fourth, implementing appropriate safeguards and mechanisms to avoid significant impacts on land and natural resources (*Saramaka v. Suriname*, 2007). Barelli argues that this decision's first requirement of 'effective participation' is the most important requirement. The Court has recognized the importance of the elements of effective participation as embodied in FPIC, where it also cited Article 32 of UNDRIP (Barelli, 2012).

The next case is *Mary and Carrie Dann v. United States* (2002), examined by the IACHR. The Danns, members of the Western Shoshone Nation, brought this case, claiming that they had never extinguished their rights to land traditionally used for grazing domestic animals and other activities. The United States argued that the Western Shoshone traditional land rights had been extinguished through legal and administrative procedures; therefore, this case was a legal dispute and not a case of human rights violations (*Mary and Carie Dann v. United States*, 2002). In its decision, the IACHR stated that the State's rejection of the Danns' claim as members of the Western

Shoshone Nation meant that the State had neglected to "fulfill its particular obligation to ensure that the status of the Western Shoshone traditional lands was determined through a process of *informed and mutual consent* on the part of the Western Shoshone people as a whole" (*Mary and Carie Dann v. United States*, 2002). Thus, the interpretation of this case shows that the IACHR recognizes that determinations regarding indigenous peoples' land rights must be based on the *informed consent* of all community members, meaning that all members are fully informed and have the opportunity to participate (Page, 2004; *Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012).

The above decisions of the judiciary show that the concept of FPIC is accepted and has become the basis for decisions by judges. Although they do not mention and refer directly to the concept of FPIC, important elements of FPIC, such as *consent*, *effective participation,* and *informed consent* have become the basis for courts in making their decisions. Likewise, although court decisions are still limited to those available in the mechanism of the Inter-American Convention on Human Rights, courts at the international and regional levels will often assess each other and take considerations that are considered appropriate and in line with the values of human rights and justice.

2.1 The Case of Sarayaku v. Ecuador (2012)

This was a landmark case in which the IACHR recognized the rights of Indigenous communities and established specific measures to protect those rights (*Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012).

The case involved an Indigenous community in Ecuador, the Sarayaku people, who were protesting against oil exploration activities in their ancestral lands. The Kichwa People of Sarayaku are to be found in the tropical forest area of the Amazonian region of Ecuador, in different parts of the province of Pastaza, and along the banks of the Bobonaza River. Their territory is 400 meters above sea level and 65 kilometers from El Puyo. They subsist on collective family-based farming, hunting, fishing, and gathering within their territory following their ancestral customs and traditions. Around 90% of their nutritional needs are met by products from their own land, and the remaining 10% with goods from outside the community (*Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012).

Without the Sarayaku community's FPIC, the government authorized an oil corporation to conduct seismic testing in the region, which damaged their sacred places and terrified and distressed the locals.

The IACHR ruled that Ecuador had wrongfully authorized the oil exploration activities without the Sarayaku community's agreement and without taking into account its cultural and spiritual values. The Sarayaku community had to be consulted before any choices about the use of their lands and resources were made, according to the Court, which also recognized the value of preserving Indigenous peoples' ability to participate in decisions that impact them.

The Court elaborated on at least five issues of disagreement when talking about the Sarayaku people's consultation, noting the requirements of: a prior consultation; a sincere desire to come to a consensus; an environmental impact assessment; adequate and accessible consultation; and a thorough consultation.

A. Consultation must take place in advance

The Court considered Article 15 (2) of the ILO Convention No. 169, which provides that

> governments shall establish or maintain procedures through which they shall consult these peoples, to ascertain whether and to what degree their interests would be prejudiced, before undertaking or permitting any program for the exploration or exploitation of such resources on their lands.

From the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), an Individual Observation concerning Convention No. 169 in Argentina in 2005 established that prior consultation must take place before taking a measure or implementing a project that may affect these communities, including

legislative measures, and that the affected communities must be involved in the process as soon as possible (Anaya, 2009).

B. Good faith and the goal of reaching an agreement

ILO Convention No. 169 states that consultations must be "carried out … in good faith and a manner appropriate to the circumstances, to reach an agreement or obtain consent regarding the proposed measures" (*Saramaka v. Suriname*, 2007).

This means that the consultation must not serve as a mere formality, but rather must be conceived as "a true instrument for participation" (Federal District Engineers Union, 2006). Moreover, according to an ILO CEACR Individual Observation concerning Convention No. 169 in Bolivia in 2005, it "should respond to the ultimate purpose of establishing a dialogue between the parties based on principles of trust and mutual respect, and aimed at reaching a consensus between the parties." Thus, an inherent part of every consultation with indigenous communities is that "a climate of mutual trust be established" (Anaya, 2009), and good faith requires the absence of any form of coercion by the State, agents, or third parties acting with its authority or acquiescence (*Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012). Moreover, consulting in good faith is incompatible with actions that violate international norms, such as attempting to erode the social cohesiveness of the affected communities by bribing local leaders, establishing alternative leaders, or engaging in direct negotiations with individual community members.

In addition, it should be emphasized that the State is responsible for carrying out the consultation obligation; as a result, the planning and execution of the consultation process cannot be avoided by contracting with a private company or other parties, much less by contracting with a company that is interested in utilizing the resources on the community's territory that must be consulted (Anaya, 2009).

C. Adequate and accessible consultation

The Court has ruled in prior circumstances that discussions with indigenous peoples must be conducted according to their traditions and in accordance with culturally appropriate processes (*Saramaka v. Suriname*, 2007).

D. Environmental Impact Assessment

The Court has also determined that environmental impact assessments

> evaluate the possible damage or impact that a proposed development or investment project may have on the property and community. Their purpose is not only to have some objective measure of the possible impact on the land and the people but also … to ensure that the members of the community … are aware of the potential risks, including the environmental and health risks, so that they can decide whether to accept the proposed development or investment plan "knowingly and voluntarily" (*Saramaka v. Suriname*, 2007).

Additionally, the Court has ruled that environmental impact assessments must be made in accordance with the pertinent international standards and best practices (*Saramaka v. Suriname*, 2007), respect the traditions and culture of the indigenous peoples, and be finished before the concession is granted. This is because one of the goals of requiring such studies is to ensure that indigenous people have the right to understand any projects being considered for their territory (*Saramaka v. Suriname*, 2007).

E. The consultation must be informed

The indigenous peoples in this situation must be informed of all potential dangers associated with the planned development or investment plan, including any threats to their health and the environment. Hence, prior consultation entails ongoing communication (socialization) between the parties and demands that the State receive and supply information (*Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012).

The Court found that Ecuador violated domestic and international law when it granted an oil concession to a private corporation on indigenous grounds without first consulting the Sarayaku community. In order to ensure that indigenous peoples effectively participate in development and investment projects that impact their property rights, this ruling establishes stricter standards for governments.

The Court mandated several reparation actions, including the removal of all explosives from the Sarayaku territory, community consultation for all future projects, the adoption of necessary measures to uphold their right to consultation, the implementation of a training program for public officials, the payment of damages, and the acknowledgment of international responsibility through the publication of the ruling and performing a public act.

3. FPIC as a Recurring Conflict Between Companies and Indigenous Communities in Indonesia

The conflicts listed below illustrate various FPIC-related problems and challenges in Indonesia, specifically concerning its indigenous communities.

3.1 Moi Tribes v. PT. Sorong Global Lestari

The rise of the palm oil business is one of the elements driving the large transfer of rights. It is expected to contribute significant export value year after year, which fuels its expansion and acquisition of various facilities. The rate of land acquisition for economic interests increased in Papua Province between 1997 and 2017, during which 1,580,847 hectares of agricultural land were converted from serving indigenous peoples to 62 plantation firms (Malinda, 2021).

Among these instances of land use change is the Regent of Merauke, who issued a Decision of the Regent of Merauke on the Location Permit of PT Agrinusa Persada Mulia (APM) in the Muting and Ulilin Districts in January 2010. In the following month, the Regent of Merauke issued Decree No. 42/2010, granting PT Agriprima Cipta Persada (ACP) location permission encompassing 34,869 hectares in the Muting and Ulilin Districts (Indra Nugraha, 2019).

3.2 Hutan Adat Kinipan v. PT. Sawit Mandiri Lestari

This incident began in 2012, when PT. Sawit Mandiri Lestari (PT. SML) notified the indigenous Laman Kinipan community that they would invest in plantations in their village area. The indigenous village of Laman Kinipan then took a firm stand, rejecting the company in writing (WALHI Kalimantan Tengah, 2023). However, on March 19, 2015, PT. SML obtained a 19,091-hectare land release authorization from the Ministry of Environment and Forests (MoEF) via letter 1/I/PKH/PNBN/2015 (Baskoro, 2019).

The community and customary elders believe that the permit was granted without their permission. In this process, there was no FPIC. According to the local authority and customary elders, the approval for the entry of the oil palm plantation company was never signed (Nugraha, Marry, & Saturi, 2020).

The indigenous peoples of Laman Kinipan – in collaboration with the Aliansi Masyarakat Adat Nusantara (AMAN) and the Badan Registrasi Wilayah Adat (BRWA), a civil society organization that promotes the recognition of customary territories and forests – released and verified the results of the mapping of the Laman Kinipan customary territory in April 2016. The customary area of Laman Kinipan consists of 16,169.942 hectares, with 70% jungle forest coverage and 30% communal cultivated land and villages (WALHI Kalimantan Tengah, 2023).

Nevertheless, in February 2018, PT SML arrived with heavy equipment and evicted Laman Kinipan's traditional woodland to create space for a palm oil plantation. Kinipan villagers' requests and pressure on SML, the oil palm corporation, to cease operations were ignored. The conflict dragged on continuously without a settlement (WALHI Kalimantan Tengah, 2023).

The Kinipan Community reported to Jakarta in June 2018. They visited the Presidential Staff Office (KSP), Komnas HAM, and the Ministry of Environment and Forestry (KLHK) to complain about this problem (WALHI Kalimantan Tengah, 2023).

According to Amnesty International Indonesia's sources, from January to August 27, 2020, 29 indigenous rights defenders were attacked through arrests, physical assaults, and intimidation (Amnesty Internasional Indonesia, 2020).

Previously, several Kinipan indigenous people were arrested by police officers in connection with land disputes with PT: Riswan (Indigenous Youth); Yefli Desem (Indigenous Youth); Yusa (Indigenous Elder); Muhammad Ridwan; Embang; and Effendi Buhing, the head of the Laman Kinipan Indigenous community, who was arbitrarily arrested at his residence (Amnesty Internasional Indonesia, 2020).

3.3 Samin v. PT. Semen Indonesia

The Samin tribe is located in Central Java and inhabits parts of the Pati, Rembang, and Blora regencies. The Samin Community took action against PT. Semen Indonesia for the construction of a cement factory in the Kendeng Karst Mountains area, which is the residence of the Samin Tribe (Subekti, 2016).

The Kendeng Karst Mountains are limestone mountains that can be used as raw cement materials, so this area is a target for cement companies in Indonesia. However, on the other hand, this area is a water source and agricultural area for all Samin people. This then sparked a conflict between the Samin tribe and PT Semen Indonesia (Subekti, 2016).

In 2016, the Supreme Court cancelled the environmental permit from the Governor of Central Java related to the plan to build a cement factory of PT Semen Indonesia Tbk in Rembang and Pati. This decision was taken after WALHI (the Indonesian NGO forum for the environment) filed a lawsuit against the Supreme Court because the environmental permit was issued illegally and did not pay attention to the rights of indigenous peoples and the environmental impacts that would be caused. In its decision, the Supreme Court affirmed that the environmental permit issued by the Governor of Central Java did not meet the legal requirements and must be cancelled. This decision is expected to provide legal protection for the Samin indigenous people and the environment in the Rembang and Pati regions (Joko Prianto dkk, WALHI vs. I. Gubernur Jawa Tengah, II. PT. Semen Indonesia Persero Tbk., 2016).

The three examples above demonstrate that indigenous groups in Indonesia still frequently struggle for their rights because large corporations are intruding on their area and abusing them to access natural resources. These indigenous tribes, being the most impacted stakeholders, have witnessed their ancestral lands and forests destroyed to create room for huge mining and oil corporations without meaningful consent or discussion. The cases mentioned do not rule out the possibility of the existence of yet more oppressed groups that have gone unnoticed or are not in the media's attention. This further supports the notion that FPIC is still a recurring problem for indigenous people in Indonesia.

4. The Link Between Freedom of Conscience and FPIC

The connection between freedom of conscience and FPIC is tied with established fundamental concepts of conscience, self-determination, autonomy, and self-governance. Albeit distinct, these concepts share similarities which at times cause them to overlap. Conscience is in everything we do, as people live it externally on a daily basis (Macklem, 2006); it essentially reflects the ethical and moral values that each respective individual adopts. Conscience provides guidance on what is right and wrong, serving as a parameter for individuals when making choices. It comprises a larger scope than freedom of religion or belief as it encompasses all ethics and values cherished by humans, regardless of their religious nature. Self-determination, on the other hand, generally alludes to an individual's ability to make decisions and choices without any interference. As previously mentioned, such a concept is reflected in Article 1 of the ICCPR, allowing individuals to pursue their economic, social, and cultural development without any hindrance. Its realization is important for the effective guarantee and fulfilment of individual human rights and for the promotion of those rights (UN High Commission for Human Rights, 1984). One's self-determination is inseparable from the possession of autonomy that provides people the capacity to "organize and direct their lives, according to their own values, institutions and mechanisms, within the framework of the State of which they are part" (UN Human Rights Council, 2021). Such a concept subsequently intersects

with the idea of self-governance, which tends to apply in the context of politics, wherein individuals, including indigenous groups, are able to participate in decision-making processes conducted in national institutions or legislative bodies, or in political, economic, social, and cultural aspects of the State (UN Human Rights Council, 2021).

If one were to attempt to provide a picture of what freedom of conscience means in general, it goes to the heart of human autonomy and identity, as people, first of all, experience it internally (Alegre, 2023). The ideal of freedom of conscience refers to the right to independently re-examine beliefs and convictions received from family, social groups, and society. It implies rational self-determination, and points out the emancipation of the human mind from beliefs and personal prejudices (Laborde, 2011). At least two aspects of freedom of conscience need to be emphasized. From an internal perspective, it is an instinct which lies in the natural state of an individual. Looking externally, freedom of conscience is regarded as the free act of self-determination of an individual or of a community. Freedom of conscience combines both concepts, and consists of aspects of both.

In contemporary reality, the question of freedom of conscience is commonly equated with the practice of conscientious objection. "Here I stand, and I cannot act otherwise" – the words of Martin Luther are common in the vocabulary of contemporary supporters of exemptions on the grounds of conscience and duty. It is important to note that such an approach is too narrow, and does not enable us to reveal the full concept of freedom of conscience. Indeed, conscientious objection makes a person's conscience open and public in the sense that one is dissenting from what secular law expects them to do as an obligation. However, freedom of conscience is more than conscientious objection. True freedom of conscience, according to some scholars,

> depends on the development of an intellectual and cultural environment that is sympathetic to the exercise of conscience in all aspects, namely, an environment in which people are free to develop within themselves an idealized image of themselves as rational beings, reminding themselves of what rationality requires, committing themselves to some portion of what rationality permits, and only then conforming to or dissenting from the expectations of others as reason requires in their case. (Macklem, 2006)

Thus, Macklem claims that the first aspect of why freedom of conscience is a wider concept than conscientious objection is the private domain, as all internal operations of conscience are largely invisible. The other aspect is the conditions of freedom of conscience. Macklem explains that it is our capacity for freedom which depends on suitable conditions for development and here it is part of the role of a state to secure the conditions within which the capacity of freedom of conscience can reasonably be expected to develop (Macklem, 2006).

The legal relationship between FPIC and freedom of conscience stems from their common goal of safeguarding the independence and autonomy of individuals and communities. As in Article 9 of the European Convention on Human Rights, the right to freedom of conscience incorporates the right to choose, transform, or abandon one's beliefs or religion, as well as the freedom to express one's beliefs in worship, observance, practice, and instruction.

On the other hand, FPIC is a legal principle that necessitates that governments and other authorities acquire the voluntary, prior, and informed consent of indigenous peoples and other impacted communities before implementing activities that may infringe on their rights, lands, territories, and resources, and most importantly covers the aspect of identity.

Both freedom of conscience and FPIC are based on respect for individual and collective independence and self-respect. For instance, in the context of natural resource extraction, FPIC may be viewed as a mechanism for ensuring that affected communities are able to exercise their freedom of conscience and make informed decisions about the utilization of their lands and resources without being coerced or manipulated by external forces.

Conclusions

Freedom of conscience and FPIC have a close connection, particularly when it comes to indigenous communities. Both legal concepts are crucial to safeguarding the rights of these communities to preserve their identity, the ways of its expression, and other practices. This means that any plan or action that might impact indigenous communities must respect their cultural and spiritual beliefs and offer them meaningful opportunities to participate

in the decision-making process. This might involve consulting with indigenous communities, providing information in their own language, and taking measures to protect their traditional practices and beliefs. By honoring both freedom of conscience and FPIC, protection of the rights and cultural identities of indigenous communities may be upheld.

The concept of FPIC, or at least elements of this concept, have become part of both binding and *soft law* international instruments. This situation shows that FPIC has become a legal concept. Although it is not yet widely accepted by countries, this does not reduce its value as a legal concept. Some countries have even incorporated the concept of FPIC as a norm in their national legislation. State acceptance shows that FPIC is more than just an abstract legal idea, but a legal concept that has strong roots and that is supported by legal arguments on the *rights to self-determination* of indigenous peoples. Without FPIC, the right to self-determination would lose its meaning and become paralyzed in supporting the survival of indigenous peoples and local communities.

The above decisions of the judiciary show that the concept of FPIC is accepted and has become the basis of decisions by judges. Although these decisions do not mention or refer directly to the concept of FPIC, important elements of FPIC, such as *consent*, *effective participation*, and *informed consent*, become the basis for the courts in making their decisions. Likewise, although court decisions are still limited to those available in the mechanism of the Inter-American Convention on Human Rights, courts at the international and regional levels will often assess each other and permit considerations that are perceived as appropriate and in line with the values of human rights and justice. Sooner or later, the use of FPIC may become widespread in the practice of national, regional, and international courts. When this happens, FPIC may have the potential to transform into a *customary international law*.

In Constitutional Court Decision No. 32/PUU-VIII/2010, it is unfortunate that the Court did not use the FPIC standard even though it was conveyed by one of the expert witnesses when delivering his opinion at the hearing. Meanwhile, the Court's consideration that indigenous peoples that no longer exist should not be revived carries the risk of excluding the possibility of protecting indigenous peoples who may still exist but were expelled or forced out of their territory. Perhaps in the future, the Indonesian Constitutional Court can take an example from the decision in *Mary and Carrie Dann v. United States* (2002).

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EXPLORING THE IDEAL LEGAL MODEL OF STATE SUPERVISION FOR LOCAL SELF-GOVERNMENT AND MUNICIPAL RULEMAKING FOR UKRAINE: INSIGHTS FROM THE EU

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Abstract. This scholarly investigation conducts a comparative legal analysis to identify the optimal model for state supervision of local self-government and municipal rulemaking in Ukraine, with a focus on European Union (EU) practices. The study's dual objectives are to enhance theoretical understanding of local self-governance aligned with international legal norms, and to contribute to the jurisprudential development of local governance in Ukraine, particularly in the context of European integration. Employing a methodical approach, the research juxtaposes international standards with current literature to identify effective state supervision models. This involves analyzing legal and policy frameworks at both national and EU levels, alongside case studies from diverse governance systems, to evaluate their suitability for the Ukrainian context. The findings underscore the importance of a coherent, well-defined supervision model in improving the efficacy of local governance mechanisms in Ukraine. The study emphasizes the need for a legal framework that resonates with international standards, yet is tailored to Ukraine's unique legal and political landscape. In conclusion, the research advocates for Ukraine's adoption of an optimal state supervision model, incorporating best practices from the EU and considering domestic realities. Such a model is essential not only for advancing local governance but also for ensuring national resilience and stability amid ongoing reforms and external challenges, including economic and geopolitical pressures.

Keywords: local self-government, state supervision, municipal rulemaking, European Union, Ukraine.

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Introduction

The quest to delineate a robust framework for local self-governance invites scholarly inquiry into the nature and essence of this multifaceted political and legal phenomenon. Academic dialogues often encompass the intricacies of the regulatory landscape of this quest and the multifarious nature of stakeholder participation in its enactment. Central to these discourses is the development of an optimal legal model of supervision that is pertinent to local self-governance and municipal rulemaking within the Ukrainian context. To date, these dimensions have not been sufficiently explored or grounded in a rigorous scientific methodology. A notable gap in the regulatory and legal framework is the lack of a precise definition of "control" in the realm of local governance. This deficiency extends to its delineation from cognate concepts such as supervision and patronage, and the absence of a clearly defined legal mechanism for its enforcement. Thus, it becomes crucial to scrutinize the issue of scientifically substantiating and regulating municipal liability, an emergent institution, with rigorous precision.

In recent years, Ukraine's state structures and legal underpinnings have undergone considerable transformations, catalyzed by a confluence of factors with both domestic and international origins. Among these are the repercussions of a global economic recession, the territorial and sovereign implications resulting from the annexation of Crimea, and the pervasive disruptions caused by the COVID-19 pandemic, culminating in the onset of intensified military engagements.

The annexation of Crimea by the Russian Federation in 2014 has had profound and lasting effects on Ukraine's political landscape, particularly impeding the comprehensive implementation of decentralization reforms. While legislative frameworks for decentralization have been established, the practical execution of these reforms remained unattainable in the annexed region, thus leaving a gap between the *de jure* intent of policy and the *de facto* reality on the ground.

The advent of the COVID-19 pandemic further complicated the situation by necessitating the postponement of critical public consultations and discussions which are essential for the democratic process and for achieving consensus on the proposed systems of governance. The pandemic's disruption of the regular cadence of stakeholder engagement has resulted in significant delays in the progression of these reforms.

Moreover, the recent escalation of armed conflict has severely constrained the continued pursuit of the decentralization agenda. The exigencies of national security have necessitated a temporary regression to more centralized approaches to governance, particularly at the regional level (the transformation of local state administrations into local military administrations), as a means to ensure a coordinated and effective response to the threats posed by the conflict. Consequently, the reform efforts aimed at decentralization have been suspended, and in some aspects, reversed, as the nation prioritizes the immediate imperative of safeguarding territorial integrity and the welfare of its citizenry.

Collectively, these events have critically influenced the developmental trajectory of the nation. In parallel, the European Union (EU) Member States have demonstrated a heightened interest in this domain, with each state adopting divergent models of supervision at the legislative and practical junctures to ensure the congruence of local self-government and municipal rulemaking with the established legal frameworks.

The local self-government reform initiated in Ukraine in 2014, under the aegis of the "Concept for the Reform of Local Self-Government and Territorial Power Organization" (2014), aimed at recalibrating the distribution of powers between local governments and government bodies. Its accompanying Action Plan (2014) signaled a transition of the local state administrations from entities of general competency to focused control and supervisory bodies within the executive branch. This reformation vested them with the mandate to coordinate the functions of regional bodies of central executive authority within their jurisdictions. However, subsequent (even pre-war) legislative revisions have been inadequate, rendering the transformation of the state legal model of supervision in the domain of local self-governance and municipal rulemaking incomplete. There persists a pronounced need for a clearly

articulated legal and regulatory framework – one that espouses a unified concept of the national model of local self-government, integrating international standards and best practices to serve the country's interests.

This study adopts a comparative legal analysis approach to delineate the optimal legal framework for state oversight of local self-governance and municipal rulemaking in Ukraine, drawing upon insights from the European Union. It encompasses a comprehensive literature review to establish fundamental principles and an in-depth analysis of case studies from diverse governance systems, evaluating their applicability to the Ukrainian context. The methodology further entails a meticulous examination of legal frameworks and policies, with a focus on national legislation and reform initiatives, particularly within the Ukrainian context. An assessment of current practices and reforms evaluates their efficacy and alignment with international standards. Ultimately, the study conducts an empirical examination of various state supervision models, determining their suitability for the Ukrainian scenario.

Recent studies and publications in Ukraine have yet to fully address the formation of the domestic state and legal model of supervision (control) over local self-government and municipal rulemaking. Nonetheless, several scholars have highlighted various aspects of the issue. These include R. R. Dutchak, P. M. Liubchenko, O. I. Nalyvaiko, M. O. Pukhtynskyi, O. D. Skopych, O. A. Smolyar, and D. V. Sukhinin, among others. Although their works may need to be more comprehensive in scope, they offer valuable insights into the matter and serve as a basis for further research and analysis.

Recent domestic scholarly research in this field has yielded key results. These include: 1) an enhanced understanding of modern local self-government, which takes into account international legal standards (Petryshyn et al., 2015; Yakovyuk & Sheplyakova, 2018; Petryshyna, 2016); 2) theoretical and legal advancements in the formation and development of the domestic model of local self-government (Liubchenko, 2015; Petryshyna, 2019); and 3) the development of provisions emphasizing the necessity and importance of shaping municipal legal policy in the context of decentralization and European integration (Serohina et al., 2021).

However, further research is required in order to thoroughly examine and refine the transformation of the model of inter-agency relations in the context of municipal reform. This will help establish an efficient local self-government system in Ukraine after the abolition of martial law. One area that requires particular attention is balancing public authorities' control and supervisory functions to prevent unlawful activities under martial law. This must be done while also preserving the ability of local governments to exercise their functions and powers in providing for the vital needs of territorial communities at the corresponding level.

Given the context above, this paper **aims** to examine the experiences of other countries, primarily EU Member States, in forming state models of control over local self-government and municipal rulemaking. The **objective** is to identify potential opportunities to use specific developments and aspects of practical implementation in current Ukrainian legislation.

1. Overview of Supervision in Local Self-Government

Foreign studies on supervision (control) in local self-government and municipal rulemaking have highlighted several key findings. Firstly, these studies recognize the critical need for the comprehensive and unambiguous constitutional and legal regulation of these issues (Bachtler et al., 2021). Secondly, they note significant changes in the theory of public administration, including a shift towards augmenting the role of local self-government and diminishing state influence over it (Gurdon-Nagy, 2019). Thirdly, these studies highlight the possibility of developing capable local self-government closely tied to a legally established supervisory (control) model in local self-government and municipal rulemaking (Pál, 2018). Fourthly, they underscore the necessity of examining both positive and negative foreign experiences with municipal reforms, particularly in transforming the state-legal supervisory (control) model in local self-government and municipal rulemaking (Federal Office, 2020; Kiurienė,

2015). Finally, these studies identify the fundamental principles on which an optimal control model in local self-government and municipal rulemaking should be based (Sadowski & Mojski, 2020).

The restructuring and empowerment of local governments represent a critical issue that has attracted increasing scholarly scrutiny, particularly in light of the swift pace of technological innovation and prevailing global crises. The concepts of subsidiarity and decentralization are internationally acknowledged as fundamental tenets for bolstering the operational capacity of local governance structures. These doctrines are of significant pertinence to Ukraine as the nation seeks to chart a course through contemporary challenges, including the exigencies of the Fourth Industrial Revolution and the imperative of comprehensive digitalization. Such circumstances mandate a thorough modernization of Ukraine's legislative framework governing local self-government.

The current global economic downturn, compounded by the ramifications of the COVID-19 pandemic, has exerted unparalleled strain on local administrative bodies across the globe, prompting a reassessment of the distribution of authority at the municipal and regional echelons. For Ukraine, this translates into a recalibration of the oversight mechanisms within local governance, aiming to fortify public scrutiny – a pivotal element in our investigative focus on state supervision models.

2. Global Perspectives and Theoretical Developments

The constitutional and legal constructs that delineate state involvement in local self-government and municipal rulemaking within EU countries are intricately linked to the typologies of their respective local self-government systems. These systems have been shaped and continue to evolve under the influence of a diverse array of factors, including historical context, geographical positioning, socio-economic development, and political dynamics. It is commonly recognized that the predominant local self-government frameworks can be categorized into the Anglo-Saxon, Romano-Germanic (Continental), Iberian, Scandinavian, and Soviet (or post-Soviet) systems. The differentiation among these systems emerges from their unique interpretations and applications of principles such as subsidiarity, decentralization, and deconcentration, as well as the distinct legal and regulatory underpinnings that guide the practical realization of these principles.

In France, which has a continental system, local self-government was once characterized by unique "patronage" from the central government. However, significant changes have occurred in the status and powers of the state's prefect, who represents the state, since the late 1980s. According to French politicians, the country's form of government, which is complex and requires a strong and permanent institution like the prefect to ensure the effective functioning of the authorities at the local level, necessitates the prefect's continued role. The prefect, as an official who is adaptable to local conditions and able to meet real needs, has three primary areas of activity. The first area involves the affairs of the prefecture and associated services, such as the police and gendarmerie. The second area is focused on overseeing the activities of local ministerial authorities. The third is the most diplomatic aspect of the prefect's work, which relates to the local economy and business relations; it entails establishing contacts with local elected officials and other partners or associations in industry, agriculture, and craft production. Thus, the historical tendency towards constant conflict between the state and the individual in France has resulted in a balance between public power at the central and local levels and occasional attempts to diminish or question the necessity and expediency of the prefect's position.

The situation regarding exercising supervision (control) over local self-government and municipal lawmaking is distinct in countries with an Anglo-Saxon system. For example, the United Kingdom (not considering the loss of its EU Member State status) is characterized by the absence of central government officials who "patronize" representative bodies elected by the population. Instead, control over the activities of local self-government, referred to as "local government," is indirectly administered through central bodies or the courts. Moreover, recent reforms have revealed a significant expansion not only of the powers of the constituent authorities of the state through the devolution of the powers of the British Parliament, but also of self-governance powers, which implies the state's interest in the development of capable local government.

Compared to the systems mentioned above, the Scandinavian system is even more supportive of local government. For instance, the local government in Sweden consists of two elected levels: counties (*regioner*) and municipalities (*kommuner*). The relationship between these levels does not involve the subordination of the lower level to the higher, thereby precluding the exercise of corresponding powers of control. Swedish municipalities and county councils enjoy significant autonomy in managing their affairs. Moreover, local governments are responsible for providing various social services and exercising various public administration powers. The legislation allows significant administrative powers to be transferred to local governments, particularly in elderly care and healthcare. Additionally, this has resulted in the legislative consolidation of the possibility of transferring these and other powers to local governments and other entities, such as private companies or individuals.

On the other hand, the Iberian system is characterized by a significant degree of centralization. In this system of local self-government, elected representative bodies such as councils, juntas, and municipalities, as well as individual executive bodies like prefects, alcaldes, and regidors, elected by the population or the council, perform local government functions at all territorial levels. These officials become *ex officio* chairpersons of the respective councils and are approved by the central government as its representatives in the respective administrative-territorial units, thereby concentrating a significant amount of power in their hands.

A notable example of a country with an Iberian system of local self-government is Brazil, where the Constitution recognizes the existence of municipalities and local self-government and provides for the specifics of the division of powers between different levels of government. Despite over 20 years of military rule, Brazil's path to democratization and decentralization remained unhindered. However, not all municipalities in Brazil have effective and capable local self-government, despite the constitutional and legal provisions for the widespread use of direct democratic institutions. Despite ensuring constitutional and legal equality, inequality in the initial conditions for functioning and development among municipalities played a role in this outcome. The municipalization of public services, agrarian reform, and reforms in other areas of state and legal life have provided impetus toward the genuine autonomy of local self-government. However, several factors have complicated the construction of a model of state legal control in the field of local self-government and municipal rulemaking, including a significant share of state funding and the unequal distribution of funds between municipalities, among other issues.

The Soviet (or post-Soviet) system of local governance, which is still maintained in the People's Republic of China, the Democratic People's Republic of Korea, Vietnam, and Cuba (in certain aspects), is fundamentally distinct from the aforementioned systems. For instance, the 1976 Cuban Constitution, in Chapter XII, "Local Organs of People's Power," states in Article 103 that local people's power assemblies "are endowed with the highest authority to discharge the State functions within their respective demarcated areas; and, to this end, they exercise the government within the bounds of their authority and conforming to the law." Cuba's local self-government is also an intriguing example of foreign intervention in the country's life. Cuba's historical state traditions and the fact that it belongs to the oceanic region led to the development of a model based on the Iberian system. However, due to close international cooperation with the USSR and the influence of its policies on the country's development, the present system is more similar to the Soviet system, which essentially involves local management rather than local self-government.

Despite these challenges, some efforts have strengthened local self-government in Cuba in recent years. The 2019 Constitution recognized the need for greater decentralization and established new mechanisms for citizens' participation in local government decision-making. In addition, there have been some experiments with participatory budgeting and other forms of citizen engagement at the local level. However, it remains to be seen whether these efforts will significantly improve the performance of local self-government in Cuba. The country's political and economic situation, as well as its ongoing political tensions with the United States, will likely continue to shape the performance of local government bodies in the coming years.

The distinctive characteristics and idiosyncrasies of the principal local self-government systems manifest at the constitutional and legal levels across various nations, particularly within the EU. In this regard, most EU Member States have either instituted or reformed their local self-government frameworks in alignment with established models such as the continental, Anglo-Saxon, Iberian, or Scandinavian systems. The Soviet (or post-Soviet) system, which was pervasive among states under the USSR's influence after World War II, has also experienced substantial transformations subsequent to the declarations of independence of the states it once covered.

In the context of Ukraine, the nation's trajectory in reforming local self-government is deeply intertwined with its pursuit of European integration and its aspiration to align with EU standards – a process often referred to as Europeanization. This alignment is not only seen as a pathway to potential EU membership, but also as a strategic choice reflecting Ukraine's commitment to adopting European democratic norms, administrative practices, and governance standards. The evolution of Ukraine's local self-government is therefore being progressively shaped by this Europeanization trend, as it seeks to shed the remnants of the Soviet model and forge a system that resonates with its European aspirations.

Ukraine's endeavors to integrate with the EU have entailed the comprehensive reassessment and restructuring of its local governance, aiming to enhance administrative efficiency, promote local autonomy, and ensure responsiveness to the needs of its communities. The constitutional and legal reforms undertaken in this sphere reflect a clear orientation towards the principles underpinning the continental system, which emphasizes subsidiarity and the devolution of powers to local entities. As Ukraine continues on its path towards deeper European integration, the reformation of its local self-government system remains a cornerstone of its transformation, underscoring the nation's dedication to the standards of governance that are emblematic of the European community.

3. Global Trends in Municipalization and Ukraine's Unique Path to Decentralization

Global impetus towards municipalization emerged prominently in the late 1980s, a movement largely precipitated by the establishment and acknowledgment of nascent states, sweeping privatization efforts, and a critical reassessment of state oversight. Ukraine epitomizes such a state, having embarked on a complex journey towards democratization, an overhaul of the governmental apparatus, and the endorsement of a self-reliant municipal system of governance embodied in the institution of local self-government.

A paramount driver of municipalization across the globe is the proactive engagement of territorial communities and their representatives, bolstered by expansive support from the broader public sector and private enterprise. This evolution is incremental, as administrative cadres may at times view local governance more as a mechanism for consolidating regional influence in concert with local elites rather than as a means to elevate living standards and service quality and harness local capacities for national economic enhancement.

In nations such as the United States, Canada, and Germany, local authorities are instrumental in articulating and actualizing community aspirations, sculpting the living standards of community members, and fueling overall economic growth. Local edicts, investments in infrastructure, strategic development initiatives, and the provisioning of communal and social services are pivotal to fulfilling these objectives.

Nonetheless, the current trend has pivoted towards remunicipalization, a paradigm that extends beyond endowing local entities with significant autonomy and the prospect of financial and other forms of state support. Remunicipalization also grapples with the inability of local governance to foster competition within the service market, a deficiency that can engender broader socio-economic challenges and impede the development of specific territories and, potentially, the state at large. Thus, the municipalization movement that burgeoned at the close of the previous century has evolved into a renewed emphasis on

remunicipalization in the current epoch, necessitating a profound reconsideration of the role and scope of local self-governance.

The genesis of the municipalization process in Ukraine can be traced back to the dawn of the 1990s, concomitant with the nation's emergence as an independent state. The momentum of this process was significantly amplified by the enactment of the "Concept for the Reform of Local Self-Government and Territorial Power Organization" (2014), which was an ambitious endeavor to devolve power and enhance the autonomy of local governing entities. While this policy trajectory reflects a broader international tendency towards localized governance, the Ukrainian experience has been distinctly shaped by its own historical context and the exigencies posed by its geopolitical landscape.

The legislative backbone of Ukraine's local governance is encapsulated in the Law "On Local Self-Government in Ukraine" (1997), which is designed to be in concert with EU standards yet is tailored to confront and adapt to Ukraine's specific challenges. These challenges have been intensified by the military engagements initiated by Russia, resulting in the establishment of military administrations (during martial law) that present formidable obstacles to the decentralization agenda. In comparison with other post-communist nations such as Estonia, Lithuania, and Croatia, Ukraine's pursuit of municipalization is aligned with the shared objective of advancing decentralization. Nevertheless, Ukraine's strategy is further complicated by its ongoing geopolitical strife, necessitating a more intricate approach to the realization of local self-governance.

4. Municipalization and Decentralization: Comparative Perspectives and Challenges in Legal and Policy Reform

The processes of legal systems' interpenetration, globalization, and municipalization have led to the realization of the need for comprehensive reform of the territorial organization of power and local self-government. These reforms aim to bring about decentralization and involve several main areas, such as territorial reform, institutional reorganization, and procedural reorganization. Territorial reform consists of reorganizing the territorial structure, usually by consolidating administrative-territorial units, whether voluntary, compulsory or mixed. Institutional reorganization entails the transfer of powers and relevant resources. Procedural reorganization involves reforming the administrative service delivery system and introducing e-government at different levels and in other subsystems of public authorities. These reforms have been carried out comprehensively and meaningfully in various countries, including Poland, Latvia, Lithuania, the Czech Republic, Slovakia, Estonia, Italy, Portugal, Denmark, and Finland. EU Member States have considerable autonomy in deciding on the level, scope, and methods of administrative control in the domain of local self-government and municipal rule-making. Legal traditions, the stability of democratic institutions, administrative and territorial structures, the organization of local self-government, and the political situation are among the factors considered when implementing a specific control model.

Nevertheless, comprehensive reform measures have only sometimes achieved their intended goals. For instance, in Latvia, the state exercises oversight over the activities of local governments through several institutions, including the Ministry of Environmental Protection and Regional Development, which has limited authority over the autonomous local self-government bodies. Although local governments are granted significant autonomy, individual acts they adopt cannot be suspended or revoked by the Ministry. This is a reasonable approach, as such decisions may impact the interests of specific entities with the right to challenge them in court.

Under the regulatory procedures, the local government body must submit any proposed local regulatory act to the relevant Ministry for an opinion before adoption. The Ministry analyzes the draft for legal competence and compliance with both the Constitution and applicable legislation, within a specified timeframe that typically constitutes 30 days. Failure of the Ministry to provide a negative opinion within the stipulated period results in the decision being considered adopted and published in the official journal. Conversely, the resolution may be published only after the necessary amendments, based on the recommendations of the Ministry, have been made. The Minister may suspend the resolution through a

reasoned order if the local council declines to effect the proposed amendments. Consequently, the local council chairman is required to convene an extraordinary council meeting to discuss the situation and inform the minister. Suppose the council still needs to revoke or amend the act to comply with the minister's recommendations. In that case, the council must then apply to the Constitutional Court to cancel the minister's order. Despite being aimed at ensuring the legality of local self-government activities, such measures may be construed as impinging on the autonomy and independence of local self-government. It is notable, however, that comparable measures are employed in other EU and potential member countries, including Greece and Serbia. Additionally, the state is empowered to remove the chairman of the municipality council from office in the case of the consistent non-fulfillment of duties or behavioral inconsistencies, as well as to dissolve local councils upon adopting a relevant act at the behest of the Ministry.

When comparing Hungary's local government system to Latvia, it becomes clear that the former is far more complex and contentious. In recent years, local government reforms have led to a marked increase in the centralization of power and control over local self-government. Redistributing power towards the state has included managing local government property and financing. Changes in the local government system have included alterations to the electoral system of local elections and the boundaries and scope of local government powers, along with strengthening control over the activities of local self-government bodies. While the new Hungarian Constitution does cover local self-government issues more comprehensively than its predecessor, the reform process has been tilted towards centralization.

Since January 2011, local county governments have essentially become governmental bodies, which has created a parallel governance structure outside the elected county level of self-government. The status of county self-government bodies has been significantly altered. However, Art. 32 of the Basic Law provides for supervising local self-government acts to ensure that they comply with other laws. Local governments must send local government decisions to the capital or county government office immediately after they are promulgated. If a decision or its provisions violate any law, the metropolitan or county government office may initiate a judicial review of the local government decision. Failure to comply with the statutory obligation to make a decision may result in a lawsuit being brought against a local government by the metropolitan or county government office.

It is noteworthy that, despite generally negative assessments of the reform and the identification of inadequacies and inconsistencies with the European Charter of Local Self-Government, the monitoring mission of the Congress of Local and Regional Authorities of the Council of Europe viewed the provisions of the Basic Law positively.

In parallel with the centralization trends observed in Hungary's local government reforms, Ukraine presents a contrasting narrative – one that oscillates between centralization and decentralization in response to its internal and external challenges. The Ukrainian government has been undertaking significant reforms aimed at decentralizing power and enhancing local self-governance, in line with its European integration aspirations.

However, Ukraine's journey toward decentralization has encountered impediments, not least due to the ongoing conflict and geopolitical instability, which at times have necessitated a pivot back towards centralization, particularly in matters concerning national security and territorial integrity. The Ukrainian context underscores the delicate balance between empowering local self-governance and maintaining state cohesion in times of crisis. In this light, the Ukrainian reforms also encompass the conceptual grounds to ensure that local decisions adhere to national laws, potentially mirroring the Hungarian approach of subjecting local self-government acts to judicial review, but with no tangible legal and practical framework to put into force.

5. Balancing Autonomy and State Supervision in Wartime Ukraine: Progress and Challenges in Local Governance Reform

As Ukraine continues its journey towards robust local self-governance, it becomes imperative to closely examine the existing model of state supervision over local authorities. The impetus for reform is clear: to align local governance with the democratic principles espoused by the EU and encapsulated within the "Concept for the Reform of Local Self-Government and Territorial Power Organization." The current Ukrainian model, while having made significant strides, still requires nuanced refinements to fully embody the balance between autonomy and accountability – a balance that underpins the European Charter of Local Self-Government.

The principles and foundations of an optimal supervision (control) model for local self-government and municipal rulemaking are enshrined in the European Charter of Local Self-Government. The Charter obliges Member States to comply with basic rules guaranteeing the political, administrative and financial independence of local authorities. In it, the provision that self-government institutions are the subsidiary basis for the organization of every democratic order is established (Urmonas & Novikovas, 2011). Article 8 of the Charter, for instance, calls for administrative supervision to ensure compliance with the law and constitutional principles. In the Ukrainian context, this supervision must be delicately balanced to prevent the historical overreach of central authority into local affairs, which has been a point of contention and reform.

The Anglo-Saxon understanding of supervision differs markedly from the European conception, with the latter often encompassing a blend of governance and management that can potentially lead to state over-interference. In Ukraine's pursuit of aligning with European standards, it is essential to adopt a nuanced interpretation that fosters local self-reliance while ensuring legal conformity. The challenge lies in translating the Charter's principles into practical mechanisms that respect the fine line between necessary oversight and undue control.

Under Article 8, paragraph 2 of the Charter, higher authorities may exercise administrative supervision over the timeliness of tasks assigned to local governments while maintaining a balance between supervision over legality and control over expediency. Supervision over municipal authorities' powers is strictly based on legality. In contrast, supervision over legality and expediency is permissible for delegated powers if it adheres to legal certainty and does not oppose legality.

In addition to the European Charter of Local Self-Government, Recommendation No. R (98) 12 on Supervision of Local Authorities was adopted by the Committee of Ministers of the Council of Europe on September 18, 1998, to further implement the principles enshrined in Article 8 of the Charter. This recommendation considers other fundamental principles of local self-government, such as legal, organizational, material, and financial independence. The Annex to the Recommendation provides guidelines that outline the scope of administrative supervision, including: ensuring that local authorities exercise their powers following the law, promoting the definition of "own powers" through delegation, clearly listing the types of activities subject to supervision in statutory provisions, limiting mandatory administrative supervision to actions of particular importance in accordance with their official position, and reducing *a priori* administrative control. These guidelines aim to reduce the expediency of supervision, promote local autonomy, and enhance the accountability of local governments to their constituents.

It is crucial to investigate, identify, and adopt established practices from other nations. Take, for instance, the Republic of Lithuania, where an effective local self-government supervision system is operational. External supervision is conducted by institutions accountable to the government, such as the government's representatives in the counties. Under the Law on Administrative Supervision of Municipalities of the Republic of Lithuania (1998), these representatives possess extensive competencies in overseeing local governments. For example, government representatives scrutinize whether the legal acts of municipal administrative entities are consistent with laws, government

resolutions, and other legal acts enacted by central state administration bodies in relation to law implementation.

The internal supervision of local self-government is executed by residents through the election of municipal council members. The principle of accountability to the municipal community mandates that council members and the mayor remain answerable to the community for their conduct (Law on Local Self-Government, 1994). However, it is critical to note that municipal decisions are not subject to annulment by executive or legislative representatives, but rather by the judiciary through court decisions. Furthermore, the annex to this law outlines directives for the supervision procedure, recommending: (1) the establishment of a single supervisory body of first instance wherever feasible, and in cases where specialized supervisory bodies are necessitated by the nature of the activities being inspected, the clear delineation of their respective competencies to eliminate ambiguity over which body is to exercise supervision; and (2) the imposition of a statutory timeframe for the supervisory authority to conduct preliminary supervision, with the stipulation that a failure to issue a response within the prescribed period be construed as an affirmative response.

Practical examples from Ukraine's recent history can illuminate the interplay between the Charter's principles and local governance realities. One notable instance is the decentralization reform initiated in 2014, which aimed to empower local governments with greater fiscal autonomy and political authority. This reform, which aligns with the Charter's principles, has seen successes and challenges. For example, the amalgamation of communities has allowed for more substantial local self-governance in some regions, as evidenced by increased local budget revenues and enhanced administrative capabilities. However, these improvements have not been uniform, with some localities experiencing difficulties in managing newly granted powers, indicating a need for a more tailored approach to supervision that accounts for regional disparities.

Further examination of Ukraine's adaptation to the Charter's standards reveals a complex picture. Instances where local authorities have successfully managed to assert their independence and fulfill their responsibilities underscore the potential of effective state supervision. Conversely, cases where local entities have struggled due to either inadequate support or excessive state control demonstrate the critical need for a supervision model that is both flexible and robust. This delicate balance was particularly pronounced during the implementation of martial law, as articulated by the Law of Ukraine "On the Legal Regime of Martial Law" (2015). An illustrative example of this was observed in the city of Chernihiv, where the President's invocation of martial law led to the establishment of a military state administration. This executive action effectively relegated the elected mayor to a secondary role, thereby manifesting the profound impact of national security measures on local self-governance.

The "Concept for the Reform of Local Self-Government and Territorial Power Organization" provides a visionary blueprint for Ukraine's governance reforms. This Concept echoes the Charter by advocating for the principles of subsidiarity and a clear delineation of powers between state and local authorities. By examining the aforementioned case studies through the lens of the Concept, it is evident that the successes of local governance reforms are inextricably linked to adherence to these principles. Conversely, areas where the model falls short of the Concept's guidelines offer invaluable insights into the necessary directions for future reform.

A critical evaluation of Ukraine's current supervision model reveals a landscape marked by significant evolution and ongoing challenges, further complicated by the dire implications of full-scale war. While the decentralization reforms have charted a course towards greater autonomy for local governments, the disparities in local capacity and resources underscore the necessity of differentiated supervision strategies. Moreover, the exigencies of war have necessitated swift adaptations in governance structures, often requiring a centralized approach to ensure cohesive national defense and security. The pivotal task, then, is to develop a supervision model that is not rigidly uniform, but is instead a versatile framework capable of accommodating the varied needs and contexts of Ukrainian localities, all while maintaining the flexibility to respond to the immediate and long-term impacts of the conflict. This model must uphold

local governance within the context of national unity and resilience, ensuring that local authorities remain empowered agents of stability and reconstruction in a time of unprecedented national challenge. The onset of full-scale war in Ukraine and its attendant consequences have the potential to significantly broaden the scope of challenges in identifying an appropriate model of state supervision over local self-government. This expansion extends beyond the purview of administrative oversight to encompass pivotal issues of national security, regional recovery, and the mitigation of future risks, especially for regions in proximity to the aggressor state. Consequently, there arises an imperative to integrate considerations of territorial defense, socio-economic resilience, and strategic foresight into the supervision framework. The war necessitates that any supervisory model must be cognizant of the heightened vulnerabilities and unique exigencies of border areas, ensuring that governance mechanisms are robust enough to cope with immediate threats while also being sufficiently adaptable to facilitate post-conflict reconstruction and long-term regional stability. This complex interplay of factors demands a comprehensive approach that not only addresses the functional aspects of local self-governance, but also fortifies the region against potential security threats and fosters an environment conducive to recovery and sustainable development.

Conclusions

The study of models of state supervision over local self-government activities and rulemaking has revealed their deep interconnection with wider reform efforts aimed at strengthening local administrative bodies. The findings indicate that national governance models and their supervisory components are shaped by diverse factors that require careful consideration.

Administrative oversight across the EU varies, reflecting the distinct legal and societal contexts of Member States. Some countries, having undergone state reforms, have established systems to ensure local compliance, highlighting the diverse approaches to administrative oversight.

This analysis offers valuable perspectives for Ukraine's governance reforms amidst technological and societal changes. The current conflict adds a layer of complexity, suggesting the need for supervision models that address both administrative efficiency and broader national security concerns. Effective state supervision must align with both local conditions and national governance frameworks, incorporating international norms while recognizing Ukraine's unique challenges posed by conflict.

This research extends to policy implications, urging lawmakers to consider these insights in crafting regulations that support decentralization and address the multifaceted demands of security and regional stability. While laying the groundwork for understanding the role of state supervision in governance, this study also points to its limitations and the need for future empirical testing, especially under the current conditions of conflict.

In summary, an optimal supervision model for Ukraine should be adaptive, align with international standards, and be tailored to national circumstances, including the impact of war. Collaboration among academics, policymakers, and practitioners is essential in order to develop supervision models that are both theoretically robust and practical, with future research needed to evaluate their long-term effects in Ukraine's quest for stability and European integration.

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THE LEGAL FRAMEWORK ON SURROGACY IN UKRAINE: QUO VADIS?

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Abstract. Ukraine is one of the few countries in Europe that allows surrogacy for both its own citizens and foreigners. It is a very attractive destination for reproductive tourism because of its convenient geographical position, good level of medical services and moderate prices; moreover, legal regulation on surrogacy in Ukraine is fragmentary as no special law on human reproduction has yet been adopted.
This paper aims to uncover the conditions for surrogacy in Ukraine alongside the gaps in the current Ukrainian legislation and to compare the Ukrainian legislation on surrogacy with the legislation of European countries. The author also aspires to analyze the recent draft laws on assisted human reproduction that have been submitted for consideration to the Ukrainian parliament. Another purpose of the article is to formulate the legal problems of the surrogacy industry in the early wartime.
The principal result of the paper is that the need for detailed regulation surrounding surrogacy is pressing, and the adoption of special laws on assisted human reproduction by the Ukrainian parliament would be a significant step forward.
The author concludes that the regulation of surrogacy in Ukraine is very liberal in comparison with the rules of most of the countries of Western Europe, where surrogacy is banned. At the end of 2021 and during 2022–2023, four different draft laws dedicated to assisted human reproduction were considered by the Ukrainian parliament. Despite the fact that the legislative work calendar of the Ukrainian parliament provided that the relevant law should be adopted in 2023, on May 3, 2023, the Ukrainian parliament rejected all of the abovementioned drafts. It is expected that other drafts will be elaborated and submitted in the nearest future.
The war initiated by the Russian Federation against Ukraine, which began on February 24, 2022, has greatly affected the reality of surrogacy. The emergency evacuation of surrogates and difficulties in obtaining transportation documents and birth certificates for children born after surrogacy are just some of the problems faced by both intended parents and agencies. These problems will not cease until the war is over.

Keywords: surrogacy, surrogate, reproductive rights, assisted human reproduction.

Introduction

In the global press, Ukraine is seen as a world leader on surrogacy, with very liberal and fragmentary legal regulation (Coles, 2022). Several draft laws have recently been submitted to the Ukrainian parliament, and their adoption could begin to influence the surrogacy industry and medical tourism. Therefore, this paper aims to set out the current rules on surrogacy in Ukraine and discuss how these drafts could impact on the surrogacy industry.

The term *surrogacy* is defined by the Oxford Advanced Learner's Dictionary as the practice of giving birth to a baby for another person or couple, usually because they are unable to have babies themselves (Oxford

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Learner's Dictionaries, 2023). Surrogacy is a method of alternative human reproduction, which is as strongly supported as it is widely criticized.

Surrogacy can either be traditional, where the surrogate mother is also an egg donor of the child, or gestational, where the surrogate mother does not have any genetic connection with the child. Depending on the remuneration of the surrogate foreseen in the surrogacy contract, commercial and altruistic surrogacy can be differentiated.

Ukraine has some of the most liberal legal regulation surrounding surrogacy, as it permits commercial surrogacy and does not ban foreigners from benefiting from this procedure. Many other advantages, such as the convenient geographical location of the country, relatively low living costs and good medical services, have attracted foreign couples toward using surrogacy in Ukraine, resulting in Ukraine becoming a large surrogacy market for medical tourists. There exist no official state statistics on surrogacy contracts in Ukraine. However, according to the data provided by the Ministry of Healthcare of Ukraine, surrogacy was used 2,500 times as a method of assisted human reproduction in the country in 2020 (Centre of Medical Statistics, 2022).

The current regulation of surrogacy is criticized by feminist organizations in Ukraine. The main argument against surrogacy is the potential exploitation of women, who use their bodies as instruments to earn a living. Some feminist movements support the opinion that the surrogate should be protected under labor law, especially given that surrogates themselves consider the obligation to carry and give birth to a child as their work. Although the labor legislation does not currently regulate surrogacy at all, feminists are fighting to foresee guarantees for surrogates as employees (Gilevych, 2021). There are also sociological studies that show that in many cases surrogates opt for surrogacy because of financial reasons. In one survey of surrogates and egg donors, most of the 70 respondents appeared to be young mothers with small children that used surrogacy as means to improve their quality of life, pay rent, pay back loans, etc. (Stepaniv, 2019). Religious organizations in Ukraine are also against the use or surrogacy and any other in vitro fertilization technologies (Strebkova, 2020).

A number of foreign legal authors have studied different problems of surrogacy, including P. Rinda, who revealed legal and Islamic perspectives of surrogacy; K. O'Byrne, who researched surrogacy law and human rights; K. Burešová, who looked at surrogacy in the UK and the Czech Republic; H. Kaur, who researched comparative insights on surrogacy from India; C. Gracia, who studied the ethical and legal context of surrogacy in Ireland; G. Deharo, who analyzed surrogacy and COVID-19, and other authors.

The legal problems of surrogacy have also attracted the attention of a number of Ukrainian scholars, such as R. Maydanyk, A. Chernobaeva, O. Danchenko, Yu. Korenga, T. Kondrych, K. Grudieva, S. Mykytyuk, Yu. Remzhyna, A. Bugaiets, etc. These authors studied selected problems of the surrogacy contract, the legal status of the parties to surrogacy contract, private international aspects of surrogacy, etc. In the meantime, there are very few studies that consider the draft laws on assisted human reproduction submitted to the Ukrainian parliament at the end of 2021 and during 2022–2023 and the main trends of surrogacy in the early wartime. An analysis of the Ukrainian legislation in the broader context of the European legal framework is also in demand.

This article aims to uncover the conditions for surrogacy in Ukraine alongside the gaps in the current Ukrainian legislation and to compare the Ukrainian legislation on surrogacy with the legislation of European countries. The author also aspires to analyze the recent draft laws on assisted human reproduction that have been submitted for consideration to the Ukrainian parliament. Another purpose of the article is to formulate the legal problems of the surrogacy industry in early wartime.

The methodology used by the author includes dialectical, formal logical methods, methods of synthesis and analysis, the comparative legal method and the method of modelling. Dialectical, formal logical methods and methods of synthesis and analysis were used to study the draft laws on assisted human reproduction submitted to the Ukrainian parliament at the end of 2021 and during 2022–2023 alongside Ukrainian court practice. The comparative legal method was used to analyze the national legislation of European countries and Ukraine. The method of modelling was used to formulate the gaps in the current Ukrainian legislation and the legal problems faced by the surrogacy industry at the beginning of the war.

1. Surrogacy in Europe: No consensus

The Ukrainian legislation is part of the European landscape, which is why it is very interesting to view the entire picture of surrogacy regulation in Europe, where there is no consensus.

Most European legislators prohibit any form of surrogacy, whether commercial or altruistic. This is the case in Finland, France, Germany, Iceland, Italy, Spain, Switzerland and Sweden.

In *Finland*, there is no special regulation on surrogacy. However, following Section 7 of the Act on Assisted Fertility Treatments (1237/2006), assisted fertility treatment may not be provided if there is reason to presume that the child will be given up for adoption. Art. 16–7 of the *French* Civil Code states that any agreement to procreate or gestate for the benefit of others is void (Civil Code of France, 1803). Surrogacy is considered "improper use of reproduction technology" following para. 1 (7) of Art. 1 of the *German* Act for the Protection of Embryos (The Embryo Protection Act) (1990). This Act further details punishment of up to 3 years imprisonment or a fine for those who attempt to carry out the artificial fertilization of a woman who is prepared to give up her child permanently after birth (surrogate mother) or to transfer a human embryo into her. Section 5 of the Act on Artificial Fertilisation and the Use of Human Gametes and Embryos for Stem Cell Research No. 55/1996 of *Iceland* prohibits surrogacy. In *Italy*, para. 6, Art. 12 of Law 40/2004 on Medically Assisted Procreation punishes those who, in any form, produce, arrange or advertise the sale of gametes, embryos, or surrogacy, with imprisonment from 3 months to 2 years and a fine ranging from €600,000 to €1 million (Associazione Luca Coscioni et al., 2019). In *Spain*, the Law on Assisted Human Reproductive Techniques (section 10) prescribes that a paid or unpaid contract under which a woman waives maternal parentage in favor of a contractor or third party is null and void (LEY 14/2006, 2006). In *Switzerland*, surrogacy is banned by section 4 of the Federal Act of Medically Assisted Reproduction (1988) along with ovum and embryo donation. There is no direct prohibition of surrogacy in *Swedish* legislation, but "the rules of assisted reproduction state that it is not allowed to perform assisted reproduction within the Swedish health care system with the aim of implementing a surrogacy arrangement" (RFSL, 2019).

Such prohibition usually leads to reproductive tourism, a situation in which infertile couples go abroad to jurisdictions where surrogacy is allowed and come home with a newborn child. As a result, their home authorities refuse to recognize the child-parent relationship. Very often, such cases are heard by the European Court of Human Rights (ECtHR), which tends to recognize that the non-establishment of a legal child-parent connection when the two are biologically connected is a violation of the child's right to respect for private and family life, as illustrated by the cases of *Mennesson v. France* (2014) and *Labassee v. France* (2014). However, if the couple and the child are not genetically connected, there is no violation of Art. 8 of the European Convention of Human Rights (the right to respect for private and family life) if the country refuses to recognize the child-parent relationship (see, e.g., *Paradiso and Campanelli v. Italy* (2017), *Valdís Fjölnisdóttir and Others v. Iceland* (2021)).

Despite the existence of a trend towards prohibiting surrogacy, in some European jurisdictions surrogacy is allowed by law (for instance, in Greece, the Czech Republic, Georgia, the Netherlands, the United Kingdom, Ukraine, etc.).

In *Greece*, surrogacy is regulated by Art. 1458 of the Greek Civil Code, which allows altruistic gestational surrogacy for married couples and single women and requires court authorization for the procedure (Amoiridis Law Services, 2020). In the *Czech Republic*, surrogacy is unregulated but used in practice. Investigations show that single men and same-sex couples have used surrogacy in this jurisdiction (CNE News, 2022). In *Georgia*, surrogacy is permitted by Art. 143 of the Law of Georgia on Health Care; however, no detailed rules on surrogacy have been set out by the legislator. As a rule, commercial gestational surrogacy is practiced. In the *Netherlands*, only altruistic surrogacy is allowed, while the surrogate may only be reimbursed for her expenses (Government of the Netherlands, 2023). Surrogacy is allowed in *the United Kingdom* following the Surrogacy Arrangements Act (1985). It is unusual that the intended parents are not recognized as the legal parents of the child until a parental order is granted by the court, provided that: the surrogate consented to this; the application is filed between 6 weeks and 6 months after the child's birth; any payments to the surrogate did not exceed her reasonable expenses; the child must be living with the intended parents; and one or both of the intended parents must be domiciled in the United Kingdom (Nuffield Council on Bioethics, 2023).

While national legislators enjoy a wide margin of appreciation regarding the question of surrogacy, it is highly advisable to adopt an international instrument that protects the best interests of children born as a result of an international surrogacy arrangement. A possible convention covering the questions of legal parentage established as a result of any international surrogacy arrangement is now being drafted by the working group of the Hague Conference on Private International Law (2023).

2. The legal framework on surrogacy in Ukraine: General rules and existing problems

The main rules on surrogacy can be found in the Civil Code of Ukraine (2003), the Family Code of Ukraine (2002), the Law of Ukraine on "Fundamentals of the Legislation of Ukraine on Healthcare" (1992), the Law of Ukraine "On the State Registration of the Acts of Civil Status" (2010), the Order of the Ministry of Healthcare of Ukraine "On Adoption of the Order of Application of Assisted Reproductive Technologies in Ukraine" (2013), the Order of the Ministry of Justice of Ukraine "On Adoption of the Rules of the State Registration of the Civil Status in Ukraine" (2000), and other acts.

The Civil Code of Ukraine (2003) does not regulate surrogacy directly, but provides for the right of a woman and a man who have reached the age of majority to undergo medically assisted human reproduction programs if they have a medical condition as provided for in the legislation (para. 7 of Art. 281). The Civil Code also lays down freedom of contract as one of the general principles of Ukrainian civil law (para. 1 of Art. 3; Art. 627), although no mention is made of surrogacy contracts in the Civil Code.

Para. 2 of Art. 123 of the Family Code of Ukraine (2002) foresees that a child born as the result of assisted human reproduction by means of the transfer of an embryo conceived by a married couple is the fruit of said married couple.

In accordance with Art. 48 of the Ukrainian Law on "Fundamentals of the Legislation of Ukraine on Healthcare" (1992), the artificial insemination and implantation of an embryo is conducted in accordance with the procedure established by the central body of executive power that is in charge of forming the state policy in the sphere of healthcare. The relevant conditions applied are: the medical indications of the woman, her having reached the age of majority, the written approval of the married couple, donor anonymity, and the non-disclosure of medical secrets.

The order of the Ukrainian Ministry of Healthcare "On Approval of the Order on the Use of Assisted Reproductive Technologies in Ukraine" (2013) – hereinafter the ART Order – has direct norms on surrogacy and mainly provides for medical rules on surrogacy, general requirements for the intended parents and the surrogate, as well as general rules on the registration of the child. In line with the ART

Order, the necessary conditions for surrogacy are the following: *medical indications for surrogacy are present* (such as the absence of a womb; the deformation of the uterine cavity or neck as the result of a birth defect, surgery, or benign tumors, making pregnancy and delivery impossible; structural morphological or anatomical changes of the endometrium, leading to loss of receptivity; synechiae of the uterine cavity, which are not treatable; severe somatic diseases as a result of which pregnancy would threaten the further health or life of the recipient, but which would not affect the health of the unborn child; or repeated unsuccessful attempts at assisted human reproduction (four or more times) with the repeated production of high-quality embryos, the transfer of which did not lead to pregnancy); *the necessary documents for carrying out the program have been submitted by both the surrogate* (application form; copy of passport; copy of marriage certificate or divorce certificate (except for single women); copy of the child's birth certificate; if applicable, written consent of the husband of the surrogate to her participation in the surrogacy program) *and the intended parents* (application form of the patient/patients for the use of surrogacy; copies of passports for both parents; copy of their marriage certificate; notarized copy of the written common agreement between the surrogate and the woman (man) or couple); *the couple, or at least one of the intended parents, has a genetic connection with the future child*; *the surrogate has no direct genetic connection with the child* – a close relative of the intended parents (mother, sister, cousin, etc.) is permitted.

The ART Order also prescribes that a woman who has reached the age of majority can be a surrogate with the proviso that she has her own healthy child, she does not have medical contraindications, and she has given written voluntary consent to the procedure.

The ART Order also foresees the steps below for the procedure of surrogacy:

1) choice of the surrogate mother;
2) synchronization of the menstrual cycles of the recipient and the surrogate mother, preparation of the embryos, cryopreserved embryos;
3) procedure of transfer of the embryo into the womb of the surrogate;
4) cryopreservation of the non-used embryos;
5) diagnosis of the pregnancy;
6) observation of the surrogate's pregnancy;
7) agreement on the method and place of childbirth, and method of feeding of the newborn child.

Childbirth can be carried out in the presence of the intended parents. The ART Order provides that the information on the child borne by the surrogate is communicated to the child clinic at the child's place of residence by phone. If the intended parents are foreigners, they should provide the details of their temporary place of residence for patronage by the pediatrics specialists.

The ART Order and the rules on the child's registration can be found in the Rules on the State Registration of the Acts of Civil Status, adopted by the Ministry of Justice of Ukraine on October 18, 2000, which particularize the rules of the Law of Ukraine "On the State Registration of the Acts of the Civil Status" (2010). The Rules stipulate that, for the birth of a child as the result of the transfer of an embryo conceived by a couple into a surrogate, the state registration of the child has to be applied for by the couple that agreed to the transfer. In this case, in addition to the document that confirms the fact of the birth of the child, a notarized application of the surrogate that confirms her agreement to register the married couple as the parents of the child and a certificate of the genetic link of the parents (mother or father) with the child should be submitted.

Notably, the current Ukrainian legislation has very liberal and general regulation surrounding surrogacy, unsurprisingly creating such a fertile environment that it has attracted foreigners and Ukrainian couples to choose surrogacy in Ukraine for many years. Nonetheless, this regulation has a number of lacunas that should be outlined.

First of all, *there is no legislative definition of the participants of surrogacy relations*. *It is interesting that there are no requirements for intended parents provided by the current Ukrainian legislation*, even though, by analogy with adoption, the introduction of such requirements would be in the best interests of the future child. Art. 212 of the Family Code of Ukraine lays down the prohibition to adopt for persons that are medically incapable of taking care of a child, or, civilly, have perpetrated specific crimes, or whose interests contradict the interests of the child. Diseases that preclude adoption are included on a list of the central body of executive power that is in charge of forming state policy in the sphere of healthcare. Also excluded from adoption are those that require care because of a health condition. Finally, persons on the books of or being treated by the psychoneurological or drug abuse dispensary, or who have a drug or alcohol addiction, are also not permitted to adopt. Under the law, adoption is not allowed for persons that have limited civil capability; do not have civil capability; were deprived of parental rights when such rights were not granted again; had adopted (or were the legal representatives of) another child but the adoption was cancelled or recognized as invalid because of a fault on their part; do not have a permanent source of income or permanent residence; are unmarried foreigners, except in cases where they are relatives of the child; are married to a person that does not meet some criteria listed by this article; or are stateless. The conviction of the following crimes precludes adoption: crimes against life and health, will, honor and dignity, sexual freedom and sexual integrity, public safety, public order and morality; crimes related to the turnover of drugs, psychotropics, or their alternatives or precursors; and crimes foreseen by a number of articles of the Criminal Code of Ukraine (Arts. 148 (substitution of child); 150 (exploitation of children); 150-1 (usage of a minor for begging); 164 (defaulting on alimony payments); 166 (gross negligence in the care of the child or the person under guardianship); 167 (abuse of guardian rights); 169 (illegal actions related to adoption); 181 (violation of the health of other people, while pretending to carry out religious ceremony); 187 (robbery); 324 (inducing minors to stupefaction); 442 (genocide)). An outstanding conviction for other criminal offences also makes adoption impossible. Several Ukrainian legal scholars have proposed the introduction of the same criteria for intended parents (Korenga, 2015).

Another problem is that *LGBTQ+ couples are currently excluded from the possibility of using surrogacy*. However, in summer 2022 there was a petition submitted to the Ukrainian President which called for the legal recognition of same-sex partnerships. The president replied on August 2, 2022, by asking the government to analyze the petition and to inform him about their findings. Some Ukrainian legal scholars already dedicate their studies to the promotion of access to surrogacy for same-sex couples, recognizing its absence as discrimination (Pokalchuk, 2020). It seems that it is only a matter of time before lawmakers consider access to surrogacy for LGBTQ+ couples, especially following the recent judgement of the ECtHR in the case of *Maymulakhin and Markiv v. Ukraine* (2023; also Uda, 2022). In this case, the ECtHR concluded that "unjustifiable denial to the applicants as a same-sex couple of any form of legal recognition and protection as compared with different-sex couples, amounts to discrimination against the applicants on the grounds of their sexual orientation."

Thirdly, *the current Ukrainian legislation establishes a mechanism in which the state registration of the birth of the future child depends upon the will of the surrogate*. As previously mentioned, the surrogate's consent to register the intended parents as the parents of the child must be notarized. There is no guidance on what to do when the surrogate refuses to do so, or when the surrogate cannot grant consent due to their death or other reasons, as described in the legal doctrine (Danchenko, 2016). In practice, surrogacy contracts almost always contain the provision that the full sum of remuneration is paid to the surrogate after she has given the mentioned consent. It is suggested that, if the surrogate has agreed to surrogacy in the first place, her consent to register the intended parents as the parents of the child should be presumed and the submission of the copy of the surrogacy contract should be enough to achieve this.

Fourthly, the ART Order *contains only very vague regulation on the form of the surrogacy contract*: pursuant to para. 6.11, the married couple shall submit a notarized copy of the written contract with the surrogate. The current Ukrainian legislation provides for special rules in respect of storing the notarial

documents with the notary in line with the Order of the Ministry of Justice of Ukraine "On the Adoption of the Rules of Notarial Recordkeeping" (2010). Keeping a third copy of the contract at the notary's office is intended to serve as a guarantee that the contract itself will not be lost and can be presented as evidence in case of potential court proceedings. At the time of writing, no special law on reproductive rights exists in Ukraine, however crucial its adoption would be for the due regulation of reproductive rights and the use of surrogacy in particular. In the opinion of a number of legal scholars in Ukraine, surrogacy contracts should be notarized (Danchenko, 2016), and mandatory notarization must be foreseen by a special law on reproductive rights.

Lastly, *no requirements on the contents of the surrogacy contract are laid down in the legislation, making freedom of contract very extensive*. This state of affairs fails to serve to protect the best interests of the child, as situations may arise in which the interests of the future child or the rights of the newborn child are violated, e.g., situations in which the surrogate does not follow all of the medical prescriptions during pregnancy or illegally keeps the child after birth. The subject of the surrogacy contract is defined as the surrogate's duty to carry a child to term and give birth to it, to transfer the newborn child to the intended parents and give consent to the registration of the intended parents as the parents of the child, as well as the intended parents' duty to register and take custody of the child, pay remuneration to the surrogate, and compensate her expenses. As a rule, the price of the surrogacy contract includes the remuneration of the surrogate and her expenses, an exact list of which is provided for in the contract (normally provided for are the expenses for medical examinations, buying medical products, renting a residence, using transportation, buying special clothes, etc.). Of course, surrogacy contracts can be unpaid in case of altruistic surrogacy. Other provisions of the contract can be added by mutual agreement of the parties and may include regulation of the provision of the surrogate's medical information, as well as information on: the state of health of the future child; multifetal pregnancy; divorce of intended parents or death of one or both of them; birth of a disabled child; abortion; failure to become pregnant; confidentiality; parties' liability for contract violation, etc. In the author's view, all of these instances should be regulated by a special law to ensure the protection of all parties to surrogacy relations, especially the child.

3. Selected court cases on surrogacy heard by Ukrainian courts

Court cases on surrogacy do not occur often in Ukraine, yet there are some interesting examples that can be analyzed in order to show the practical problems arising in the surrogacy field.

The question *of the surrogate's liability* was considered in Case No. 150/628-16-ц, where the intended parents had concluded a surrogacy contract with the surrogate in Kyiv on July 26, 2016. The intended parents had covered a number of expenses for the surrogate mother, including medical services, transportation expenses and meals in the amount of UAH 115,352.17 (approximately USD 4,500). The surrogate did not become pregnant and the couple decided to call her to civil liability and make her compensate them for damages and pay a fine of UAH 124,352.17 (approximately USD 4,700) in total, and pay moral damages in the amount of UAH 30,000 (approximately USD 1,220) to the intended mother and in the amount of UAH 20,000 (approximately USD 816) to the intended father. The intended parents claimed that the surrogate had missed appointments in clinics, had not taken the necessary medicine and, despite her obligation to reside in Kyiv, had moved out of the city.

The court of the first instance rejected the claim. However, the court of appeal partially granted the claim and obliged the surrogate to return expenses in the amount of UAH 21,835.66 (approximately USD 890) to the intended parents. The decision was based on provision 4.16 of the surrogacy contract, pursuant to which the surrogate had to return all of the costs and expenses occurred during the surrogacy program to the intended parents, and also had to pay a fine, if she decided or acted (or failed to act) in a way that was not agreed with the intended parents and/or the doctor, or chosen by the intended parents, resulting in the termination of the pregnancy, and/or if she underwent an abortion, and/or if she intentionally performed

actions to terminate the pregnancy without medical indications. In its ruling on November 5, 2019, the Supreme Court revoked the judgement of the court of appeal on the grounds that provision 4.16 of the surrogate contract could only be applied in case of successful pregnancy. The Supreme Court further observed that the surrogate could not be liable for missing an appointment in the clinics because the surrogacy contract did not contain a schedule for such visits, and no evidence was presented to suggest that the surrogate had been informed about any schedule. Moreover, the contract only prescribed the surrogate's duty to reside in Kyiv during the pregnancy period; since the pregnancy never occurred, the surrogate could not be held liable. The Supreme Court also failed to satisfy the demand for moral harm compensation (Ruling of the Supreme Court, case No. 150/628/16-ц, 2019).

A situation *in which a surrogate tried to maintain custody over the child* has been decided on in other notable court cases. In the first, case No. 6-791св13 (2013), the Higher Specialized Court of Ukraine on Civil and Criminal Cases (hereinafter – the Higher Specialized Court) considered an instance where the surrogate indicated herself as the mother and her husband as the father of twins born through a surrogacy program in November, 2010. The intended parents had filed a claim with the court, asking to have the information in the state register changed to recognize them as the parents of the child. The claimants submitted a copy of the surrogate's informed consent to participate in the surrogacy program, a written copy of the consent to the embryos' transfer, a certificate from the clinic that the embryos conceived by the genetic parents had been transferred to the surrogate, testimony from the chief doctor of the clinic and testimony from the clinic where the twins were born. The court of the first instance and the court of appeal satisfied the claim's demands. The Higher Specialized Court observed that regardless of the term spent with the surrogate, the children had an inalienable right to live with their biological parents and upheld the decisions of the previous court instances.

In another court case, case No. 6-7887св14 (2014), the surrogate tried to have the surrogacy contract declared invalid because it had not been notarized and did not contain the date of its conclusion. The Higher Specialized Court ruled that Ukrainian legislation and the provisions of the surrogacy contract did not foresee its mandatory notarization and that the surrogate herself had never shown the will to notarize the contract. The surrogate had executed the contract by means of undergoing the pregnancy and thereby validated the conclusion of the contract. Mention should be made that the surrogacy in this case was carried out in accordance with the Order of the Ministry of Healthcare of Ukraine "On Adoption of the Instruction on the Order of Application of Assisted Reproductive Technologies," dated December 23, 2008, No. 771, which is now invalid. The court of first instance, the court of appeal and the Higher Specialised Court rejected the claim (the final ruling of the Higher Specialised Court of Ukraine on Civil and Criminal Cases in case No. 6-7887св14 was issued on July 2, 2014). It took almost 4 years until the case was decided in favor of the intended parents, causing suffering to the intended parents during the consideration of the case because of a lack of a legal connection between them and their biological children at the earliest stage of their development. The children had lived with the surrogate for almost 3 years. Such situations may be rare, but the possibility of the surrogate to register herself as the mother of the child should nevertheless be excluded by entering respective changes in the Ukrainian legislation.

4. Recent draft of laws on assisted human reproduction in Ukraine: Winds of change

In Ukrainian scholarship, advocacy for the necessity of the adoption of a special law on assisted human reproduction has been seen for many years (Moskalenko, 2018a, 2018b). Recent legislative initiatives were launched at the end of 2021 and the beginning of 2022 and 2023. A total of four draft laws on surrogacy were submitted to the Ukrainian parliament (Moskalenko, 2023), and it is interesting to study the legal ways to improve the legal regulation of surrogacy in Ukraine on this basis.

The first was presented by the Cabinet of Ministers of Ukraine on December 29, 2021: the draft Law "On Assisted Reproductive Technologies" No. 6475 (hereinafter – ART Draft No. 1). ART Draft No. 1 provides

the definitions of: *genetic parents*, *embryo*, *intermediary (agency)*, *surrogate*, and *surrogacy*. It stipulates that the Cabinet of Ministers would adopt a number of sub-laws, including on the transportation of reproductive cells and embryos into, from, and within the Ukrainian territory, along with their storage. Currently, no detailed regulation of this sphere exists in Ukrainian legislation. ART Draft No. 1 prescribes that the Ministry of Healthcare of Ukraine shall adopt sub-laws on surrogacy, on the period of storage of reproductive cells and embryos, and on nutrition norms for surrogates.

The conditions for surrogacy are laid down in ART Draft No. 1 and are as follows: written application of the patient; informed consent of the husband of the surrogate if she is married; presence of a genetic connection of the future child with one or both of the intended parents; and absence of a direct genetic connection with the surrogate, with relatives of the genetic parents being allowed to carry the child. The intended parents have to be present at the clinics before the start of the surrogacy contract and at the signing of the surrogacy contract.

In order to protect the best interests of the future child, ART Draft No. 1 excludes some categories of citizens from becoming intended parents. For instance, surrogacy is not allowed for: persons deprived of parental rights, or persons who adopted a child previously and the adoption was recognized as invalid or was cancelled in a way precluded by the current Ukrainian legislation; persons who are incapable or have limited civil capacity; and persons who have committed serious or especially serious crimes and have outstanding convictions for these crimes. It is the author's firm belief that this list should be extended, taking the provisions of the Family Code of Ukraine for persons who cannot adopt as an example.

ART Draft No. 1 defines the status and requirements for the surrogate: it should always be a woman with full legal capacity, who has her own healthy child and has given informed consent to the medical treatment. Traditional surrogacy is outlawed in this draft. The rights and duties of the surrogate are also regulated. The surrogate has the following rights under ART Draft No. 1: to obtain alimony from the genetic parents during the pregnancy and labor, compensation for carrying and giving birth to a child, compensation of loss profit in the period of pregnancy, labor and post-labor period, and compensation of medical services in case of damage to her health; to obtain full and accurate information on her health and pregnancy state; to obtain information on the procedure of surrogacy (duration, risks, side effects, complications, medical and legal consequences and also alternative methods of medical service); and to terminate the pregnancy in case of threat to her life and if there are medical indications. Under ART Draft No. 1, the surrogate is obliged to: give full information on her physical, psychological and reproductive health; follow the instructions and recommendations of the doctor during pregnancy and labor; inform the intended parents on pregnancy and labor; transfer the newborn to its genetic parents within two hours of birth, if another term is not stipulated in the surrogacy contract; hand over notarized consent to register the child (children) to the genetic parents; and not disclose confidential information about the surrogacy contract and its details.

Additionally, the form and content of the surrogacy contract are foreseen, and the contract shall be notarized. Essential provisions of the surrogacy contract shall be: the contract holder; the quantity of embryos to be transferred; an indication of the clinic that will be used; the duty of the surrogate to follow the instructions of the doctor, provide information on her health and the health of the fetus, and hand over the child to the genetic parents after the birth; the actions of the parties to the surrogacy contract in case of the divorce of the genetic parents, annulment of the marriage of the genetic parents, death of the genetic parents (or one of them), death of the surrogate, or the antenatal, intranatal, or perinatal death of the child; the actions of the genetic parents and the surrogate in case of the birth of a child with a genetic disease, disabilities or other diseases; the compensation of the surrogate (except for altruistic surrogacy); the mechanism of compensation for expenses related to medical services, nutrition, and living expenses of the surrogate; the compensation of lost income during the period of pregnancy, labor and post-labor; the compensation of expenses in case of health damage of the surrogate; the indication of the owner of donor reproduction cells and embryos (although embryos cannot be defined as property objects, notwithstanding

the fact that such a position contradicts the practice of the ECtHR (see *Parillo v. Italy*, 2015); and defining the party covering additional expenses to the child (children) in case the child (children) will need medical aid after birth.

Finally, the rights and duties of the intermediary, who acts on the basis of the contract with the couple and the clinics, are stated. The intermediary is obliged: to help the patients to fulfil their rights and duties; to create the necessary conditions to perform the medical treatment on assisted human reproduction; to simplify exchanging information between participants of negotiations connected with the medical treatment on assisted human reproduction; to obtain informed consent from the patient to disclose the patient's medical information; to act solely in the interest of the patient; and to represent the patient for effective implementation of the medical treatment on assisted human reproduction in accordance with the contract.

ART Draft No. 1 has numerous disadvantages. Firstly, Art. 2 of ART Draft No. 1, with the title "Legislation on assisted reproductive technologies," lists the exact titles of the relevant laws and international acts, and as such this article would require amendments if any changes were entered into the respective acts. Moreover, Art. 2 contains links to international acts that have not been ratified by Ukraine (e.g., the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine; Convention on Human Rights and Biomedicine). Secondly, the maximum age for intended parents is to be established by the doctor on a case-by-case basis. As ART Draft No. 1 fails to provide any objective criteria, the doctor is given an excessive amount of freedom. Thirdly, ART Draft No. 1 includes provisions that discriminate against same-sex couples, making them ineligible for surrogacy. Lastly, ART Draft No. 1 treats embryos as property, disregarding the fact that such a position contradicts the practice of the ECtHR (e.g., *Parillo v. Italy*, 2015).

Another draft Law "On Application of Assisted Reproductive Technologies" No. 6475-1 (hereinafter – ART Draft No. 2) was submitted to the Ukrainian parliament by one of its members, Oleksandr Danutsa, on January 11, 2022. This law also provides a number of legal rules on surrogacy.

ART Draft No. 2 provides a list of definitions for the following terms: *genetic parents*, *surrogate*, and *surrogacy*. Furthermore, it establishes the conditions for surrogacy. The first pre-condition for using surrogacy is the notarized consent of the husband of the surrogate-to-be, if the surrogate is married. The second is that the child should have a genetic connection with the genetic parents (or at least with one of them) and cannot have a genetic connection with the surrogate. The carrying of a child by a family member of the child's genetic parents is allowed. The final condition is that surrogacy is only allowed on medical indications, the list of which shall be determined by the Ministry of Healthcare of Ukraine. A very positive change can be observed here, serving the best interests of the child – that is, the obligation of the genetic parents to pick up the child from the clinic after birth and to register the child in accordance with the legislation of Ukraine. However, this provision contradicts para. 3 of Art. 143 of the Family Code of Ukraine, which allows the child not to be taken from the clinic when the child has severe disabilities or in other relevant circumstances.

In accordance with ART Draft No. 2, the surrogate is to be a woman who is of age and has full civil capacity, has a healthy child and does not have medical contraindications to pregnancy. The rights and duties of the surrogate are also outlined. The surrogate has the right to: information on the procedure of application of assisted human reproduction; information on possible risks and complications; medical aid; abortion in case of threats to her life; compensation for carrying and giving birth to the child; and compensation for the costs for the clinic, in case it is foreseen by the contract. The surrogate is obliged: to provide full information on her physical, psychological and reproductive health and the results of her genetic testing; to follow the instructions of the doctor while carrying and during the birth of the child; to take care of her health; to inform the genetic parents about the pregnancy; not to prevent the genetic parents from taking the child after birth; not to disclose confidential information on the surrogacy program, including information about

the genetic parents and the fact that she has carried and given birth to their child; to hand over all the necessary documents to register the child; and to give notarized consent for the registration of the parents as the genetic parents of the child.

Another provision that is considered to be very positive is that the surrogate would no longer have the right to unilaterally withdraw from the contract after the transfer of the embryo, except when carrying the baby to term would put her life at risk. Such a rule is not provided in the current Ukrainian legislation, even though this absence could lead to the violation of the rights of the intended parents. ART Draft No. 2 also sets the requirements for the nature and content of the surrogacy contract. The surrogacy contract may be altruistic in nature or it may be commercial. The contract shall contain the following: the contract holder; the quantity of embryos to be transferred; the clinic; the place of residence of the surrogate when carrying the child; the actions to be taken by the parties in case of multifetal pregnancy; the duty of the genetic parents to take the child in case it is born with genetic disabilities or other diseases; the actions to be taken by the parties in case of the death of one or both spouses, or their divorce; the amount of compensation to be paid to the surrogate for carrying and giving birth to the child; and the mechanism of compensation for medical services, nutrition, and living expenses of the surrogate while carrying the child, during labor and in the post-labor period.

This introduces very important changes to the Law of Ukraine "On the State Registration of the Acts of Civil Status" (2010) concerning the state registration of the child. First of all, the genetic parents are allowed to perform the state registration of the child personally or through a representative. The amended provision of the latter law allows the surrogate or clinic to submit the application on the state registration in case the genetic parents fail to file it, or if they are dead or missing. In the latter cases, the relatives of the genetic parents may also file an application for the registration of the child.

ART Draft No. 2 also has some disadvantages. For example, the maximum age of the surrogate and the genetic parents able to use assisted human reproduction is established by the individual doctor. ART Draft No. 2 fails to provide any objective criteria, leaving the doctor an excessive amount of freedom. ART Draft No. 2 only allows married heterosexual couples to use surrogacy, which is clearly discriminative towards same-sex couples, and it does not require mandatory notarization of the surrogacy contract. Like ART Draft No. 1, it also treats embryos as property in spite of such a position contradicting the practice of the ECtHR (e.g., the case of *Parillo v. Italy*, 2015).

On January 13, 2022, the draft of Law "On Application of Assisted Reproductive Technologies and Surrogacy" No. 6475-2 (hereinafter – ART Draft No. 3) was submitted to the Ukrainian parliament. ART Draft No. 3 has a separate chapter dedicated to surrogacy. It has a number of advantages, for example that the terms *genetic parents*, *surrogate*, and *surrogacy* are defined.

It is unusual and new that ART Draft No. 3 states that the Ministry of Social Politics of Ukraine will keep records of the foreigners that want to use surrogacy in Ukraine, and that it will additionally check the documents and information submitted to them to review whether there are grounds to reject the application for surrogacy.

ART Draft No. 3 includes a list of reasons to reject the application of assisted reproductive technologies. The list includes the following cases, where a man or woman: has applied for assisted reproductive technologies before and left the child; has adopted a child before, but the adoption was cancelled due to a fault on their part; was deprived of parental rights and these rights have not been renewed; is being treated by the psychoneurological or drug abuse dispensary; has a drug or alcohol addiction; does not have a permanent place of residence and permanent income; or is stateless. A criminal past, or outstanding convictions, are other reasons to be denied surrogacy, such as convictions for crimes against life and health, will, honor and dignity, sexual freedom and sexual integrity, against public safety, public order and

morality, or in the sphere of drugs, psychotropics their analogues or precursors. The crimes foreseen by Arts. 148 (substitution of child); 149 (people trafficking); 150 (exploitation of children), 150-1 (use of a minor for begging); 164 (defaulting on alimony payments); 166 (gross non-fulfilment of the duties on taking care of the child or the person under guardianship); 167 (abuse of guardian rights); 169 (illegal actions related to adoption); 181 (infringement of the health of other people while pretending to carry out religious ceremony); 324 (inducement of minors to become stupefied) of the Criminal Code of Ukraine also prohibit the application of assisted reproductive technologies. ART Draft No. 3 also establishes that only married couples, where both have full legal capacity, can use surrogacy. Surrogacy is also only permitted if the couple has medical indications. ART Draft No. 3 also does not allow surrogacy if the couples' *lex personalis* outlaws surrogacy. If the couple does not have a common *lex personalis*, the law which is applied to the legal consequences of marriage should not outlaw surrogacy.

ART Draft No. 3 contains requirements for the surrogate, and defines the rights and duties of the surrogate. The surrogate should be between 21 and 35 years old, should not have medical indications against surrogacy, should have her own healthy child, and should have given informed consent to surrogacy. In case the surrogate is a close genetic relative of the genetic parents, age limits are not applicable. Traditional surrogacy is forbidden. Those not allowed to become surrogates are women that: have been recognized as incapable or having a limited civil capacity through court; have been deprived of, or limited in parental rights; have adopted a child, and the adoption was cancelled or recognized as invalid because of a fault on their part; have been convicted for crimes against the rights and freedoms of the child, or were called to liability for family abuse; are being treated by the psychoneurological or drug abuse dispensary; suffer from drug or alcohol abuse; or are suspected or convicted in criminal proceedings. The surrogate has the right to: alimentation from the genetic parents during the pregnancy and labor; compensation for carrying and giving birth to a child, for any health damage, for rehabilitation after the birth, and for psychological help if necessary; and abortion in case the pregnancy threatens her life or health, or she has medical indications for abortion in accordance with the legislation. The surrogate is obliged: to give full information on her physical, psychiatric and reproductive health; to follow the instructions of the doctor during pregnancy and labor; to constantly take care of her health and have a healthy lifestyle; to inform the genetic parents on how the pregnancy and labor are proceeding; to hand over the child after birth to the genetic parents within the term set in the contract; not to disclose the data that became known to her as a result of the surrogacy contract, including the information on the genetic parents and the fact of carrying and giving birth to the child as a result of surrogacy; to inform the clinic where the labor takes place that she is a participant of the surrogacy program; to provide written notarized consent to the genetic parents to register themselves as parents of the newborn child(ren) in the state organs registering civil status; and to provide the genetic parents with any medical documentation, in particular the medical certificate on the birth of the child(ren) and other documents necessary for the registration of the child(ren).

ART Draft No. 3 prescribes that surrogacy is a service that is provided under contract. This contract is concluded between the surrogate and the genetic parents, whether foreseeing remuneration or not. The surrogacy contract is defined as a contract under which one party (surrogate) is obliged to carry and give birth to the child which has a genetic connection with one or both of the genetic parents (married couple), and relinquish it to its genetic parents after birth, and the other party (genetic parents, married couple) is obliged to take the child from the surrogate after birth and pay compensation to the surrogate (except in cases where the surrogacy contract does not foresee remuneration). The surrogacy contract cannot be concluded by a representative and should be in writing and notarized. A necessary precondition to conclude a surrogacy contract shall be the consent of the surrogate's husband, given in writing and notarized.

Essential provisions of the surrogacy contract are also defined. Essential items of the surrogacy contract shall be: the contract holder; the quantity of embryos to be transferred; the conditions to ensure due prenatal screening; and the surrogate's place of residence during pregnancy. The duties of the surrogate include the duty to follow all the instructions of the doctor, to disclose information on her health and the health of the

future child, and to relinquish the child to its genetic parents after birth within the term prescribed by the contract. The contract will prescribe the actions to be taken by the parties in case of: the divorce of the genetic parents, the annulment of their marriage, the death of (one of) the spouse(s), or (one of) the spouse(s) being declared to require constant care by a third person; the surrogate's death; antenatal, intranatal, or perinatal death of the child; and the birth of a child with a genetic disease or disabilities. The contract further establishes: the scope of compensation of the surrogate for the carrying and birth of the child, except when the surrogacy contract does not foresee remuneration; the compensation of expenses for medical services, nutrition, and living costs of the surrogate; compensation for lost income during pregnancy, labor and the post-labor period; and material compensation in case of health damage caused by the surrogacy. For cases of non-compliance with or non-fulfilment of the contract, the contract will stipulate the responsibility of the parties under it: the actions of both the genetic parents and the surrogate in case of not carrying the baby or abortion. It establishes: the compensation paid to the surrogate in case of dissolution of the contract by the genetic parents, invalidation of the marriage of the genetic parents, or conclusion of a new marriage with another partner by them; the conditions for the rehabilitation of the surrogate in case her functioning in daily life is negatively affected as a result of providing a service under the surrogacy contract; and the actions of the parties in case of the birth of a child/children which will require immediate medical assistance due to a health condition. Advertising to offer to be a surrogate and to supply reproductive cells is prohibited.

The disadvantages of ART Draft No. 3 can be listed as follows. First of all, ART Draft No. 3 contains a discriminatory provision that the couple shall use surrogacy only if they have been married for no less than 2 years. It seems that the criterion of requiring 2 years of marriage was intended to ensure that future parents had a stable family union, which would be favorable for their future child. However, the couple could have lived together in a close relationship, not considering official marriage as an option and only marrying to participate in the surrogacy program. Why should such couples be denied the ability to conclude surrogacy contracts? The prohibition of discrimination is guaranteed by Art. 14 of the European Convention of Human Rights, and it seems that ART Draft No. 3 places couples who have been married for 2 years in a more favorable position than recently married couples, i.e., by discriminating against the latter.

Secondly, ART Draft No. 3 also treats embryos as property, notwithstanding the fact that such a position contradicts the practice of the ECtHR (e.g., the case of *Parillo v. Italy*, 2015). ART Draft No. 3 imposes many restrictions and requirements on the genetic parents, yet these restrictions serve the main aim, which is to protect the best interests of the child.

On April 11, 2023, the draft of Law "On Application of Assisted Reproductive Technologies and Surrogacy" No. 6475-д (hereinafter – ART Draft No. 4) was submitted to the Ukrainian parliament. This was based on ART Draft No. 3, which was updated as a result of public discussions. In the author's opinion, these changes are not significant. ART Draft No. 4 states that patients older than 50 years of age will have access to assisted human reproduction upon the decision of the medical consultation commission of the clinic. The list of contraindications for the surrogate is narrowed in comparison with ART Draft No. 3 (e.g., now women that suffer from drug or alcohol abuse or are suspected or convicted in criminal proceedings can become surrogates). The list of obligations of the surrogate has been enlarged. The surrogate now has the obligation to provide the clinics with information on her vulnerable state, criminal proceedings against her, on the cancellation of adoption or the deprivation of parental rights, on certain criminal convictions against her, and on her drug/alcohol abuse, mental illnesses and treating them. The Cabinet of Ministers of Ukraine will adopt a ruling on the typical form of a surrogacy contract. Genetic connection between the intended parents (or one of them) will now be established by genetic examination. ART Draft No. 4 has the same disadvantages as ART Draft No. 3.

The legislative activity calendar of the Ukrainian parliament provides that the Law of Ukraine "On Assisted Human Reproduction" should be adopted in 2023 (National Assembly of Ukraine, 2023). Nevertheless, on

May 3, 2023, the Ukrainian parliament rejected all of the abovementioned drafts, and it is expected that other drafts will be elaborated and submitted in the nearest future.

5. Surrogacy during the war: The current state of affairs and problems

Among other effects, the outbreak of war in Ukraine in early 2022 has also impacted on the procedure of surrogacy, with many standard procedures being negatively affected.

The first and most pressing problem was the evacuation of surrogates from the territories at risk, and clinics, agencies and intended parents used all possible means to ensure the safety of surrogates. Some surrogates stayed in Ukraine until the birth of the child, while most crossed the border and went to other countries. In the former case, it remained possible to obtain a birth certificate that would list the genetic parents as the legal parents of the child. However, if the surrogate gave birth in another Western European country that does not allow surrogacy, the intended parents may encounter substantial difficulties or even find it impossible to attain such a certificate.

The second problem for any foreign intended parents was the matter of obtaining travel documents for their children born as a result of surrogacy. Many embassies were evacuated out of Kyiv or even Ukraine before February 24, 2022, which caused substantial difficulties and changes in procedure for obtaining said documents. Some embassies gave out emergency travel documents for future children for which the intended parents could apply for online as a rule. For example, the British embassy introduced such a procedure.[2]

Some intended parents who had concluded a surrogacy contract just before the start of the war wished to withdraw from contractual obligations and demanded a return of payments made. The fact that not all surrogacy contracts foresaw such a mechanism is problematic, and this is expected to lead to a number of court claims (Danchenko, 2022).

Finally, a tendency has developed to export the reproductive cells and embryos to other countries, with Georgia being a popular destination. However, the legal rules do not sufficiently govern the transportation of reproductive cells and embryos outside the customs territory of Ukraine. A sub-law is needed, which must be adopted by the Cabinet of Ministers of Ukraine and must detail the contents of the agreements to be concluded with patients and clinics (from and to which embryos are transported). Rules ensuring the safety of embryos during transportation should also be laid down (Danchenko, 2022).

Conclusions

The current Ukrainian legislation does not provide for detailed regulation of surrogacy. The only legal act containing special rules on surrogacy is the sub-law of the Ministry of Healthcare of Ukraine “On Adoption of the Order of Application of Assisted Reproductive Technologies in Ukraine” (2013) which mainly contains medical rules on surrogacy. The remaining rules on surrogacy can be found in different legal acts. Overall, the regulation of surrogacy in Ukraine is very liberal in comparison with the rules of most of the countries of Western Europe, where surrogacy is banned. Both commercial and altruistic surrogacy are allowed in Ukraine, while traditional surrogacy is banned.

At the end of 2021 and during 2022–2023, legislative reform began in Ukraine. Four different draft laws dedicated to assisted human reproduction were considered by the Ukrainian parliament. Despite the fact that the legislative work calendar of the Ukrainian parliament provides that the Law of Ukraine “On Assisted Human Reproduction” should be adopted in 2023, on May 3, 2023, the Ukrainian parliament

[2] An emergency travel document could be applied for on this website: https://www.gov.uk/emergency-travel-document.

rejected all of the abovementioned drafts. It is expected that other drafts will be elaborated and submitted in the nearest future. The need for detailed regulation surrounding surrogacy is pressing, and the adoption of any of the draft laws by the Ukrainian parliament would be a big step forward.

The war of the Russian Federation against Ukraine, which started on February 24, 2022, has greatly affected the reality of surrogacy. The emergency evacuation of surrogates and difficulties in obtaining transportation documents and birth certificates for children born after surrogacy are just some of the problems faced by both intended parents and agencies. These problems will not cease until the war is over.

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LEGISLATIVE PERSPECTIVES AND SOCIOMEDICAL IMPLICATIONS OF MEDICAL TOURISM IN EUROPE: A COMPREHENSIVE REVIEW

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Abstract. This research aims to intricately dissect the legal frameworks governing medical tourism in Europe, compare regulatory experiences across different countries, and highlight the legal nuances within the broader sociological and anthropological context. In the article, a multi-faceted methodology is employed to analyze legal aspects of medical tourism in European countries, focusing on the evolution, regulatory frameworks, and economic dynamics of the industry. This approach includes a comparative statistical analysis of national and EU regulation, historical perspectives, and legal hermeneutics to interpret laws affecting both domestic and foreign patients in the realm of medical tourism. The main research results are the clarification of the historical aspect of the development of medical tourism in the world, the distinction of its specific categories, and the provision of statistics regarding what specific types of medical care people migrate for. The way in which medical tourism is regulated in such European countries as Poland, Germany and France is explored. The research results can be used by lawyers, sociologists, and legislators to improve the effectiveness of legislation in regard to domestic and foreign medical tourism in the studied countries.

Keywords: migration, treatment, rehabilitation, foreign medical services, medical care.

Introduction

Medical tourism (or travel medicine) involves traveling to another country to receive medical treatment. This is usually done to take advantage of more affordable medical care or to gain access to specialized medical procedures that may not be available in the individual's country of citizenship. This type of tourism can include a wide range of procedures, from routine surgeries such as plastic surgery and dentistry to more complex procedures such as cancer therapy and organ transplants. This phenomenon is often driven by various factors, including the availability of advanced medical technologies, lower costs for certain procedures in other countries, shorter waiting times for treatments, and the opportunity for patients to combine medical care with leisure and tourism activities. Medical tourists may seek a wide range of services, such as elective procedures, complex specialized surgeries, dental care, and fertility treatments. The decision to engage in medical tourism can be influenced by factors such as the quality of care, cost savings, access to particular treatments or procedures not available in the patient's home country, or the perception of higher-quality care abroad (Rolfe et al., 2023).

One of the main drivers of medical tourism is the significant cost savings that can be achieved by seeking medical care in a foreign country. In addition, some countries have a higher concentration of medical knowledge in certain areas. However, there are also risks associated with medical tourism: patients may be unfamiliar with the healthcare system in a foreign country and may not speak the local language. There are

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also concerns about the quality of medical care and the qualifications of medical professionals providing treatment (Wilson, 2023).

It is possible to study this issue in more detail by analyzing the works of other authors and scholars in this area. Authors such as T. Bagga et al. (2020) have studied medical tourism as a non-traditional type of tourism that has developed as a result of globalization and the concept of open borders in some countries. Following several scholars, the main purpose of medical migration is the desire for treatment, rehabilitation, surgery and other medical measures that cannot be obtained in the country of citizenship or where the price for such services is high. It is also pointed out that Thailand, Malaysia and India are among the most commonly visited countries for medical tourism.

T. Ghosh and S. Mandal (2019) studied medical tourism as a new and rapidly developing phenomenon. They proposed a certain concept according to which a person can choose a country for migration to receive medical services. This concept includes several main dimensions: the quality of medical services, cost, the infrastructure of the destination, the culture of the country, and the complexity of the route. These authors, similarly to the aforementioned, also focused on medical tourism in Asia and Latin America.

H. Beladi et al. (2019) considered medical tourism as a factor in the economic development of countries. The authors also studied the impact of migration for medical purposes on the change of economic sectors in both Asia and Europe and concluded that it had a generally positive impact on this area. It was also noted that medical tourism is a useful practice not only for those countries that receive migrants, but also for the countries of origin of such persons, where the benefit lies in the possibility of preserving the healthy gene pool of the state along with offsetting the negative effects of the lack of medical personnel and the limited provision of medical services.

J. E. Dalen and J. S. Alpert (2019) emphasized the statistical study of medical tourism. According to their research, in 2017 the number of medical tourists worldwide was approximately 15 million, and this number can grow by 15%–20% annually. They also pointed out the annual expenditures of medical tourists, which amounted to around 60 billion dollars in 2017.

The analysis of the abovementioned works allows us to conclude that most authors consider the clarification of the theoretical component of medical tourism, as well as migration for medical purposes to Asian countries, but many do not study the experience of European countries in receiving medical tourists and providing medical services, nor do they assess the legal framework and how it regulates the possibility of European citizens to receive medical services abroad. Therefore, it is important to focus on European medical tourism and its specific aspects.

The methodology for this article involves a multi-faceted approach. Primarily, the research adopts a comparative statistical method to analyze the legal aspects of medical tourism in various European countries, such as Poland, Germany, and France. These countries were chosen for analysis in this study because they are among the most representative countries in Europe in terms of the development and regulation of medical tourism, offering a comprehensive overview of diverse legal frameworks, healthcare standards, and medical tourism practices prevalent across the continent. This involves a brief examination of the legal frameworks in place, including national laws, EU regulation, and accreditation standards such as those provided by the Joint Commission International (De la Hoz-Correa et al., 2018; Central Statistical Office of the Republic of Poland, 2023; German Medical Tourism Association, 2023; French National Tourist Office, 2023). The study also considers the impact of international conventions and agreements on medical tourism.

The historical and systematic methods are employed to trace the evolution of medical tourism and its current state in the European context. This involves looking at the origins, growth, and types of medical tourism, such as planned surgery, specialized treatment, wellness tourism, and medical reproduction. The research also examines the economic prospects and functional features of medical tourism, including the motivations driving people to seek medical care abroad.

A legal hermeneutical approach helps to interpret and clarify the development and implications of laws and regulations governing medical tourism. This includes an analysis of how legal acts, both international and

national, regulate medical tourism and protect the rights of both domestic and foreign patients. This research aims to intricately dissect the legal frameworks governing medical tourism in Europe, compare the regulatory experiences across different countries, and highlight the legal nuances within the broader sociological and anthropological context.

1. The development and main types of medical tourism

Historically, the roots of medical tourism can be traced back to ancient times, when individuals would travel long distances to seek healing. This practice was common in civilizations such as ancient Greece and Rome, where people traveled to distant lands to visit healing temples, spas, and thermal waters believed to possess curative properties. In the Middle Ages, people often undertook pilgrimages to shrines and places known for their healing miracles. The tradition of traveling for health purposes evolved over the centuries, with spa towns and sanitariums emerging in Europe during the 18th and 19th centuries. These locations became popular among the aristocracy and affluent classes for their therapeutic baths and treatments. The development of modern medical tourism, as we know it today, is built upon this historical foundation of seeking medical and health benefits beyond one's immediate environment (Wilks et al., 2021).

In modern history, medical tourism began to gain popularity in the 20th century as the development of transportation and communication made it easier to travel to other countries for treatment. The growth of medical tourism can also be attributed to the rising costs of medical services in developed countries and the availability of cheaper, high-quality medical services in developing countries. Medical tourism in European countries has a longer history than in other parts of the world. As the healthcare systems in Europe developed, medical tourism shifted more towards routine procedures and cosmetic surgery, as the cost of medical care in Western Europe began to rise. The most popular destinations for this type of medical tourism in Europe were countries such as Hungary, Poland, and the Czech Republic, which offered high-quality and affordable cosmetic procedures (Ghasemi et al., 2021).

In 2015–2020, the development of medical tourism in Europe was driven by the growing demand for specialized treatment, such as treatments for cancer and cardiovascular disease, as well as the availability of advanced medical technologies in countries such as Germany, Switzerland, and France (Lyzohub et al., 2013).

Medical tourism can be divided into several types under different criteria, such as the type of treatment, the patient's health status, and the destination and purpose of the trip. Some of the most common types of medical tourism include (Abbaspour et al., 2021):

1. Planned surgery: this type of medical tourism consists of having planned procedures such as cosmetic surgery, dental services, and surgical weight loss. These procedures are usually not covered by insurance and are considered optional rather than medically necessary.
2. Specialized treatment: patients travel to another country to receive specialized medical treatment that is not available or difficult to access in their home country, such as cancer treatment, stem cell therapy, and organ transplants.
3. Wellness tourism: spa services, yoga and meditation classes, and unorthodox treatments.
4. Medical reproduction: fertility treatments, such as artificial insemination or egg donation. Some countries have more lenient laws and regulations regarding these procedures, making them more accessible to patients.

In addition to these types of medical tourism, this type of travel can also be divided based on destination – for example, domestic medical tourism (travel within one's own country) and international medical tourism (travel to another country for treatment) (Abbaspour et al., 2021).

2. The main factors fostering medical tourism and the challenges it faces

It is important to identify the main factors that encourage people to use medical services abroad, including cost, accessibility, quality of medical care, confidentiality, the combination of tourism and treatment, and others. At the same time, it is also worth outlining the main risks of medical tourism that migrants may face when visiting a particular country (Taheri et al., 2021). For example, this may include a language barrier,

difficulties in communicating with healthcare professionals, the impact of the climate on a sick person, the questionable quality of the service provided, a possible lack of further coordination and care after returning home, which provokes the exacerbation of the disease or the end of remission, etc. In an unfamiliar environment for the patient, there is a high probability of problems in the protection of their human rights, and they are likely to be unable to obtain qualified legal assistance in the event of a medical error, etc. (Wilks et al., 2021).

Medical tourism can have a significant impact on the economies of countries that receive foreign patients for treatment, including by creating new jobs in healthcare and related industries, contributing additional revenues to the state budget, offering expanded investment opportunities in medical infrastructure and pharmaceutical development, etc. However, along with the positive aspects, there are a number of negative consequences, including: the priority treatment of foreign patients; higher prices for medical services, which discriminates against the ability of the country's citizens to receive affordable treatment; and a possible increase in the outflow of patients in search of more affordable medicine in other countries (Ushakova et al., 2021).

Additional challenges facing global medical tourism include the COVID-19 pandemic, which resulted in travel restrictions, quarantines, and border closures, making it difficult for patients to access treatment. In addition, many hospitals and clinics have had to prioritize care for patients with COVID-19, which has led to the cancellation or postponement of other procedures, resulting in a significant decrease in the number of medical tourists (Mahmud et al., 2021). However, despite the challenges posed by the pandemic, some countries providing medical tourism services have been able to adapt and continue to provide medical treatment to foreign patients by introducing mandatory testing for infectious diseases, etc.

3. The legal regulation of medical tourism in the EU and selected member countries

3.1. The EU legal framework and practice for medical tourism

It is advisable to focus on the legal aspects related to medical tourism. In Europe, medical tourism is regulated by various legislative acts, including European Union (EU) regulations and national laws. For example, the following are common to all European countries: The Medical Devices Directive (93/42/EEC, 1993) and the In Vitro Diagnostic Devices Directive (98/79/EC, 1998), which set out technical requirements for the safety and performance of the above-mentioned objects; and the EU Directive on Cross-border Healthcare (2011/24/EU, 2011), which establishes a legal framework for the provision of cross-border healthcare within the EU, including the rights of patients to receive healthcare in another EU country and the obligation of healthcare providers to provide accurate and transparent information about the services they provide. It is also advisable to add the national legislation of European countries to this system, as each EU country has its own laws and regulations governing medical tourism, which may include provisions related to patients' rights, healthcare providers' obligations, and the quality and safety of medical procedures. Another element of the legal framework for medical tourism is the range of accreditation and certification programs, such as the Joint Commission International (JCI) (n.d.), which is an independent, non-profit organization that provides accreditation and certification services to healthcare organizations around the world. The JCI is a division of the Joint Commission, which is located in the United States and is the oldest and largest accreditation body in the healthcare industry. The JCI evaluates healthcare organizations based on internationally recognized standards of quality and patient safety. These standards are designed to ensure that healthcare organizations provide safe and effective patient care; therefore, organizations that meet these standards receive accreditation that is valid for 3 years.

In the context of the EU, the legal regulation of medical tourism is comprehensive, covering various aspects of healthcare, patient rights, and safety standards. The Medical Devices Directive (93/42/EEC) of 1993, for instance, is crucial in setting technical requirements for the safety and performance of medical devices. This directive ensures that any medical device used within the EU adheres to strict standards, thus protecting the health and safety of patients. Similarly, the In Vitro Diagnostic Devices Directive (98/79/EC) of 1998 regulates devices used for in vitro examinations of specimens derived from the human body. This directive is essential in ensuring the reliability and accuracy of diagnostic tools, which are integral to medical treatments offered to tourists.

One of the most significant pieces of legislation in this context is the EU Directive on Cross-border Healthcare (2011/24/EU) from 2011. This directive establishes a clear legal framework for the provision of cross-border healthcare within the EU. It upholds the rights of patients to receive healthcare in another EU country and mandates healthcare providers to offer accurate and transparent information about their services. The directive also addresses the reimbursement of costs for cross-border healthcare, providing clarity and security for patients seeking medical treatment abroad. Furthermore, the national legislation of individual EU member countries complements these EU-wide regulations. Each country has its own laws governing medical tourism, which may include detailed provisions regarding patients' rights, the obligations of healthcare providers, and the quality and safety standards of medical procedures. These national laws ensure that medical tourism is not only regulated at the EU level, but is also tailored to the specific healthcare landscape of each Member State.

Lastly, the role of accreditation and certification programs like the JCI cannot be overstated. The JCI provides accreditation and certification services based on internationally recognized standards of quality and patient safety. This external validation by the JCI assures that healthcare organizations maintain high standards of patient care, which is a crucial aspect for medical tourists seeking quality treatment. Organizations accredited by the JCI are subject to rigorous evaluation and are recognized for their commitment to excellence in healthcare services, making them attractive destinations for medical tourists.

An in-depth examination of the legal aspects of medical tourism in Europe necessitates a thorough understanding of the jurisprudence of the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU). These courts have played pivotal roles in shaping the legal landscape of medical tourism through various landmark judgments.

The ECHR, which oversees the implementation of the European Convention on Human Rights in the Member States, has addressed medical tourism in several cases, thereby influencing policies and practices within Europe. A seminal case in this regard was *S. H. and Others v. Austria* (2011). This case revolved around the restrictions imposed by Austrian law on the use of in vitro fertilization techniques, prompting the applicants to consider medical services in other countries. The ECHR's judgment in this case was crucial in highlighting the balance between national regulations and individual rights under the Convention, particularly the right to respect for private and family life. This judgment underscored the complexities associated with cross-border reproductive healthcare and the need for coherent legal frameworks to address ethical and human rights concerns in medical tourism.

On the other hand, the CJEU, which interprets EU law to ensure its uniform application across EU Member States, has also contributed significantly to the legal discourse on medical tourism. The case of *Elena Petru v. Casa Judeţeană de Asigurări de Sănătate Sibiu and Casa Naţională de Asigurări de Sănătate* (2014) serves as an illustrative example. In this case, the CJEU examined the circumstances under which a person insured in one EU Member State is entitled to reimbursement for medical treatment received in another Member State. The Court's interpretation of EU directives related to cross-border healthcare was pivotal in clarifying the rights of EU citizens to seek medical treatment in other Member States and the corresponding obligations of national health insurance systems. This judgment had far-reaching implications for medical tourism within the EU, particularly in facilitating cross-border access to healthcare services and ensuring the protection of patients' rights.

These judgments by the ECHR and CJEU demonstrate the intricate relationship between legal principles, human rights considerations, and practical implications in the realm of medical tourism. They provide a legal framework that guides not only individual decisions but also the policies of European countries in managing cross-border healthcare services. Understanding these legal precedents is essential for any comprehensive analysis of medical tourism in Europe, as they significantly influence both national healthcare policies and the rights and responsibilities of individuals seeking medical services abroad.

3.2. National law perspectives: France, Germany and Poland

However, it is worth noting that the legal regulation of medical tourism may vary depending on the country that receives the foreign patient. For example, in France, medical tourism is regulated by the French Health Code (1953), which establishes the legal framework for the provision of medical care in France, including the

rights and obligations of healthcare providers and patients. It also establishes the regulatory framework for medical practice, including the qualifications and training of medical professionals, as well as the conditions for opening and operating medical facilities. The French Consumer Code (2008) defines the rights and obligations of consumers in France, including the right to receive accurate and transparent information about the services offered by healthcare providers, as well as the right to take legal action in case of breach of contract or consumer rights. Equally important are the international conventions and agreements to which France is a party. These agreements include the European Union Directive on cross-border health care (2011/24/EU, 2011), which establishes the rights of patients to receive medical care in another EU country.

As for Germany, medical tourism is regulated by the German Medical Profession Act (2000), which sets out the qualification requirements for the training of medical professionals, the conditions for opening and operating medical facilities, etc. As in France, Germany has the German Social Insurance Code (1990), which sets the conditions for financing and reimbursing the medical expenses of patients. The country also has regulations like those in France that define the safety criteria for medical supplies and devices. It is worth noting that Germany also has a practice of certification and accreditation, with its own body authorized to take appropriate actions – the German Medical Association (n.d.), which is responsible for accrediting medical schools and registering healthcare professionals, as well as for investigating complaints and disciplinary measures against healthcare providers.

As for Poland, the legal framework of medical tourism is similar to that of the above countries. For example, the Law of the Republic of Poland "On tourist events and related tourist services" (2017) regulates the protection of the rights of tourists and the provision of services to relevant persons at different levels – private, public, etc. Medical practice and the provision of quality medical services in Poland also depend on the activities of the National Chamber of Physicians and Dentists. The participation of Poland in international agreements, such as the International Health Regulations (IHR) of the World Health Organization (CDC, 2005), is also quite important.

It is also worth noting that in Germany, medical tourists have the right to access the same level of medical care as German citizens and have the same rights and protections under German law; a similar practice exists in France and in Poland (Guha Roy et al., 2022). Unlike in Poland, where medical tourists can freely choose between public and private healthcare services, the situations in France and Germany are more nuanced. In France, while there is no explicit prohibition against medical tourists choosing between public and private sectors, the accessibility and process for foreign patients might vary depending on their insurance status and their specific healthcare arrangements. The French healthcare system, renowned for its quality, does provide options for medical tourists, but these choices can be influenced by various factors including insurance coverage and the nature of the medical services sought. Similarly, in Germany, the healthcare system is designed to be universally accessible, but the choice between public and private sectors for medical tourists may not be as straightforward as in Poland. German law ensures that medical tourists have access to high-quality medical care, but their options can be influenced by the type of medical insurance they hold and specific regulations governing the provision of healthcare to non-residents. While there is no outright prohibition, the practicalities of navigating the healthcare system in Germany might mean that the choices available to medical tourists are more limited or complex compared to the more straightforward options in Poland.

As for the distinctive features, it is worth highlighting the following: in Germany, patients must register with a general practitioner and be assigned to a specific hospital; in Poland, medical tourists have the right to choose a healthcare provider, to receive information about the cost of their treatment, and to receive an estimate before starting treatment; in France, foreign patients also have the right to choose a healthcare provider, but they may be denied treatment if they do not have the legal right to stay in the country. According to M. Nakhaeinejad (2022), medical tourism can pose additional challenges in terms of confidentiality and informed consent, as patients may not be fully aware of the laws and regulations of the country in which they are being treated.

4. The legal challenges faced by medical tourism

It may be asserted that the regulation of medical tourism in European countries presents a unique and complex challenge. Medical tourism, characterized by the movement of individuals across borders to receive medical treatments, intersects with multiple facets of private international law, including jurisdictional issues, choice

of law, and the recognition and enforcement of judgments. One of the primary concerns in this context is the determination of jurisdiction in cases of medical malpractice or contractual disputes. Given the transnational nature of medical tourism, it is often challenging to ascertain which country's courts have jurisdiction over a dispute. European countries must strive for a harmonized approach to jurisdictional issues to ensure clarity and predictability for both patients and service providers. This could be achieved through multilateral agreements or the adoption of uniform rules within the EU framework (Seow et al., 2021; Wilson, 2023).

Another significant aspect is the choice of law. Patients engaging in medical tourism should have a clear understanding of which country's laws will govern their treatment contracts and potential disputes. Complexity here arises from the differing legal standards and medical regulations across European countries. The choice of law must balance the rights and expectations of medical tourists with the regulatory frameworks of the host countries. Adopting a more unified approach to choice of law in medical contracts could greatly benefit this sector, enhancing legal certainty and consumer protection. Furthermore, the recognition and enforcement of foreign judgments in cases related to medical tourism pose another challenge. There is a need for streamlined mechanisms within European countries to recognize and enforce judgments from other jurisdictions, especially in cases involving compensation for medical negligence or breach of contract. In conclusion, the private international law regulation of medical tourism in European countries requires a collaborative, harmonized approach that addresses jurisdictional issues, choice of law, and the recognition and enforcement of judgments. This would not only protect the rights of medical tourists, but would also foster a trustworthy and legally sound environment for the burgeoning medical tourism industry (de Miguel Beriain & Rueda, 2021; Guha Roy et al., 2022).

It is also worth noting that the prospects for medical tourism in Europe are dependent on technological advances, changes in healthcare regulations and demographic changes. Some of the main prospects for the future of medical tourism in Europe may include: a greater level of attention to accreditation and quality standards; more affordable and flexible healthcare options; and, with the introduction of telemedicine and other technological solutions, patients will have more options for medical care and will be able to receive medical treatment remotely. Greater attention to medical tourism safety is also possible. For example, with the COVID-19 pandemic, safety and hygiene measures have become more important than ever. Growth in medical travel insurance has also been observed: as more insurance companies offer medical travel coverage, this could make traveling abroad for treatment more affordable for patients, increasing the popularity of medical tourism in Europe.

5. Discussion

For a deeper analysis of the relevant topics, it is also necessary to analyze the works of other authors on the subject. For example, Polish authors A. Lubowiecki-Vikuk and D. Dryglas (2019) studied the reasons for choosing a particular country for medical services and medical tourism. They pointed out that the main factor is the absence of a language barrier, so tourists from Germany and the UK can choose Poland as a place to receive a certain type of treatment given the high level of English proficiency of medical staff and the population. Lubowiecki-Vikuk and Dryglas also pointed to the possibility of choosing between private and public medical institutions for tourists as an advantage of Polish medicine. The authors also pointed out the price advantage in the field of aesthetic and plastic surgery, as, according to the authors, the average price of dental implants in Poland is 65% lower than the same procedure in the UK.

It is worth noting that the authors' results only partially coincide with the results of this study in terms of the distribution of sectors of Polish medicine, but other data provided by Lubowiecki-Vikuk and Dryglas (2019) should be considered, and some statistics on the relevant topics should be added. For example, according to the Central Statistical Office of the Republic of Poland (2023), the number of foreign patients in Poland has been steadily increasing in recent years, and in 2018, around 600,000 foreign patients sought medical care in the country. According to a study by the French National Tourist Office (2023), the number of foreign patients in France also increased by 7.5% between 2018 and 2019, and reached approximately 1.5 million. According to the German Medical Tourism Association (2023), around 200,000 foreign patients seek medical care in Germany every year, with a significant number coming from neighboring countries such as Austria, Switzerland, and the Netherlands.

Greek authors L. Androutsou and T. Metaxas (2019) studied the effectiveness of the medical tourism industry in European countries. In particular, it was pointed out that the main criteria for effectiveness in the relevant sphere are patient outcomes, infection rates and readmission rates. In addition, patient satisfaction surveys can provide insight into the overall quality of care and the patient experience. Another important indicator noted by the authors is the comparison of the cost of treatment in different EU Member States, as well as the cost of travel and accommodation. In addition, the authors proposed to study this by comparing the cost of treatment in EU Member States with the cost of similar treatments in other countries where medical tourism is popular, such as the United States or India.

These findings do not coincide with the results of this research, but are an important addition to the topic of medical tourism, and therefore should be taken into account when forming a conclusion.

American authors L. Monaghan and J. Gabe (2022) studied the history of the origin and development of medical tourism, pointing out that this practice was known in the Middle Ages and gradually became popularized. Currently, medical tourism, as the authors point out, is an effective medical practice that allows patients to receive affordable treatment and rehabilitation services in another country. The authors also draw attention to such advantages of medical tourism as cost savings, cultural diversity, quality of medical services, etc. It is important to note that Monaghan and Gabe also pointed to the phenomenon of patient exchange, which is similar to the practice of medical tourism.

It is worth noting that the authors' results coincide with the results of this research, but it is advisable to supplement the thesis of Monaghan and Gabe (2022) on the practice of patient exchange. This process is becoming increasingly common in Europe, as one of the main advantages of cross-border treatment is that it allows patients to access medical procedures that may not be available in their home country. In addition, it can improve the quality of care by exposing healthcare providers to new treatments and technologies. However, patient exchange also has potential drawbacks. One problem is that patients may not have the same level of protection and rights when receiving medical care in another country.

Another American author, D. Horsfall (2020), studied the development of Polish medical tourism. Horsfall pointed out that medical tourism in Poland has been growing in recent years, and many British citizens travel to the country for medical procedures at a lower cost and higher quality. However, some critics, following the author, argue that this market masks a form of migration, as many UK citizens seek medical care in Poland due to a lack of access to medical services in the UK or because of their unaffordability. The medical tourism market in the EU is relatively unregulated, which raises concerns about patient safety, quality of care, and the potential for the exploitation of vulnerable populations.

Although the author's results do not coincide with the results of this research, they are an important contribution to the research topic. In particular, it is also worth adding possible solutions to the problem outlined by the author: for example, it is important for EU Member States to develop a coherent approach to regulating the relevant market and protecting the rights and interests of all parties involved, including patients, healthcare providers and governments (Pētersone et al., 2021a; Pētersone et al., 2021b; Jalilova et al., 2022). This may include measures such as ensuring patient safety, protecting patient data and informed consent, as well as ensuring that healthcare providers meet certain quality standards and enhancing the oversight of compliance with migration and residence rules.

T. Cham et al. (2020) studied the images of hospitals and how they interact with increased demand among medical tourists. Thus, one of the key components of a hospital's image is its reputation for providing high-quality medical care. Another important aspect of a hospital's image is its ability to provide a comfortable and welcoming environment for international patients. This includes providing services such as translation assistance, cultural sensitivity training for staff, as well as amenities such as comfortable accommodation, etc.

A similar study was conducted by Spanish authors A. De La Hoz-Correa and F. Muñoz-Leiva (2019), who pointed out that the role of information sources and images is a key aspect of the medical tourism industry. The authors' research in this area has shown that people's decision to seek treatment abroad is often influenced by the information they receive about the destination country, as well as their perception of the destination country's image. Cross-cultural analysis of medical tourism intentions has also shown that cultural differences

can influence how people perceive and seek information about medical tourism destinations. For example, according to the authors, a study conducted among medical tourists from the United States and South Korea showed that American tourists are more likely to rely on the Internet as a source of information, while South Korean tourists are more likely to rely on friends and family.

The authors' results differ from the results of this research but are nonetheless interesting within the relevant field. It is also worth pointing out that in addition to the above factors cited by the authors, the hospital's brand image can also be strengthened through effective marketing and promotion. This may include targeted advertising in international media, partnerships with international medical travel agencies, and social media campaigns.

Conclusions

This research revealed the complex historical, legal, and practical dimensions surrounding medical tourism in Europe. There are clear economic incentives and accessibility factors driving individuals to seek medical treatment abroad. However, balancing patient rights, quality of care, legal jurisdiction, and other ethical concerns remains an intricate challenge. The analysis found vital commonalities in the national legal frameworks governing medical tourism in Germany, France, and Poland. These include stringent protections for patient confidentiality, informed consent, and fundamental rights – irrespective of one's status as a medical tourist. Nevertheless, striking the right equilibrium between public health interests, on one hand, and individual liberties, on the other, necessitates coherent policymaking at both the EU and Member State levels.

This research demonstrates the need for multi-layered governance of the medical tourism sector through supranational regulations, national legislation, and independent accreditation mechanisms. The ECHR and CJEU have also profoundly shaped the legal contours of cross-border healthcare through seminal judgments. However, more coordinated efforts are imperative to streamline jurisdictional clarity, choice of law, and the recognition of foreign court decisions related to medical tourism disputes.

This study also uncovers some distinctive features of how individual countries approach medical tourism. For instance, Poland enables tourists to freely choose between public and private healthcare providers – a level of accessibility seldom matched across Western European states such as Germany and France. Ultimately, the research argues for judicious oversight, melding patient empowerment with improved safeguards to expand medical tourism sustainably. Further research could investigate patient exchange programs and their implications, comparing European and Asian models of medical tourism governance, addressing problems related to patient confidentiality, and enhancing accountability in the medical tourism sector through legal and policy reforms.

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THE DEVELOPMENT OF TRANSACTION AVOIDANCE IN EUROPEAN UNION INSOLVENCY LAW

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Abstract. Transaction avoidance is part of insolvency proceedings. The successful application of the rules on transaction avoidance allows the value of the debtor's assets to be maximised, and thus increases the satisfaction of creditors' claims. In the European Union, the substantive rules on insolvency law still are a matter of the national laws of Member States. However, trends in the policy-making actions of the European Union reveal that various initiatives have been proposed to establish certain rules on transaction avoidance which should increase recovery rates for creditors and contribute to the proper functioning of the domestic market. This article focuses on the general aims of transaction avoidance and provides a critical assessment of the proposed harmonisation of the rules on transaction avoidance in European Union law. The authors found that the proposed rules on the harmonisation of transaction avoidance rules in European Union insolvency law may actually discourage businesses regarding the exercise of the freedom of establishment, and may also intervene in the substantive insolvency and civil law regulations of Member States.

Keywords: transaction avoidance, insolvency law, European Union law.

Introduction

One of the main principles of insolvency proceedings is the maximisation of the value of the debtor's assets. This principle should facilitate higher distributions to creditors as a whole and reduce the burden of insolvency (UNCITRAL, 2004, p. 10). One of the means to accumulate (or recover) the debtor's assets in insolvency proceedings is setting aside unlawful transactions. The successful application of the rules on transaction avoidance allows creditors to be treated equally and increases the value of the debtors' assets. Though the application of the rules on transaction avoidance contributes to the attainment of these goals of insolvency proceedings, it also means direct intervention in pre-insolvency transactions concluded by a debtor and a third party before the opening of insolvency proceedings. Intervention in pre-insolvency contractual relations requires the careful assessment of whether setting aside a transaction is justified (Bork, 2020, p. 113). Striking a balance between the attainment of the goals of insolvency proceedings and the protection of legal certainty and stability in civil legal relations requires a well-crafted legal approach.

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This article focuses on transaction avoidance as a tool to increase the maximisation of the value of the debtors' assets and how it has been developed in EU insolvency law. There are no globally accepted definitions of the terms *transaction* and *avoidance*, but their broad interpretation seems to be suitable for the effectiveness of insolvency proceedings. *Transactions* (or, broadly speaking, legal acts) should cover all human acts which have legal consequences (Bork, 2020, p. 114). This term refers to the wide range of legal acts by which assets may be disposed of or obligations incurred, including by way of transfer, payment, encumbrance, set-off, guarantee, loan or release, and may include a composite series of such transactions. The term *avoidance* should refer to the court's power to declare a certain transaction invalid when the court applies the ground for invalidity of a transaction. Avoidance provisions permit transactions for the transfer of assets or the undertaking of obligations prior to the opening of insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value to be recovered, in the collective interest of creditors (UNCITRAL, 2004).

Insolvency law and the rules on transaction avoidance are part of national insolvency law. The grounds for transaction avoidance in insolvency law vary, but the three common grounds are preferential transactions, undervalue transactions and intentionally fraudulent transactions (Bork, 2020, pp. 120–132.). In some jurisdictions, there is a single set of avoiding powers that generally capture any transaction that is harmful to creditors. In others, particularly common law countries, these powers consist of a double set of avoiding powers, where some actions seek to avoid transactions in which the debtor received a lower (or even no) consideration, while other actions seek to avoid transactions in which the debtor put a particular creditor in a better position than other creditors (Martínez, 2018). However, despite the existence of different approaches, the aim of transaction avoidance is the same in all cases, namely to set aside unlawful transactions and maximise the value of the debtor's assets.

Currently, the two existing binding legal acts in EU insolvency law do not aim to harmonise the rules on transaction avoidance. The Regulation on Insolvency Proceedings (hereinafter – the EIR) harmonises only some of the rules of private international law when insolvency proceedings involve at least two different countries (cross-border insolvency proceedings) and does not seek to harmonise substantive insolvency law, except in a very limited way. Instead, it lays down the rules on jurisdiction, applicable law, and the recognition and enforcement of judgments in cross-border insolvency proceedings (Keay, 2018). However, the EIR establishes the rules on applicable law, which may be the *lex causae* law of the Member State in which the main insolvency proceedings are opened (Article 7(2)(m) of the EIR) as an exception (Article 16 of the EIR). The Directive on restructuring and insolvency (hereinafter – the Restructuring Directive) deals with the harmonisation of the rules on preventive restructuring mechanisms and the protection of transactions which provide new or interim financing (Article 18 of the Restructuring Directive); however, it does not establish any common rules for transaction avoidance.

The idea of the harmonisation of the substantive rules governing transaction avoidance has been looming in Europe for some time (European Parliament, 2010; European Commission, Directorate General Justice and Consumer Affairs 2016; Weijs, 2011; and others). The problems of transaction avoidance and asset recovery have attracted the attention of legal scholars in both the national and international insolvency contexts (CERIL, 2017; McCormack & Bork, 2017; Casasola, 2019; Keay, 2018; Bork & Veder, 2022). There are different positions in the legal literature regarding the harmonisation (to some extent) of transaction avoidance rules in EU insolvency law.

The suggestions and discussions regarding a harmonised approach to transaction avoidance in insolvency law resulted in the adoption of the Proposal for the Directive on harmonising certain aspects of insolvency Law (hereinafter – the Proposal), which was announced in December 2022. The Proposal proposes the rules harmonising transaction avoidance in Title II. These rules consist of general provisions regarding avoidance actions (Articles 4–5), specific conditions for avoidance actions (Articles 6–8) and the consequences of avoidance actions (Articles 9–12).

Before the Proposal was adopted, numerous methods of harmonising the rules on transaction avoidance were proposed in the legal doctrine. One proposal involved no harmonisation of transaction avoidance, suggesting that it should be left to the national laws of Member States. Another suggested that EU law should in essence substitute

transaction avoidance rules. Further, as a middle ground between full harmonisation and a complete absence, partial harmonisation was proposed, which could either involve the EU insolvency law regulating general aspects of avoidance and the national laws of the Member States regulating the questions not covered by EU law, or EU law regulating only cases which have a cross-border element with Member States maintaining their competence in domestic insolvency cases. Under partial harmonisation, a transaction is deemed to be cross-border when at least one of the parties involved have their habitual residence or centre of main interests in a Member State other than the one in which the proceedings are held, or the law applicable to the transaction is different from the law concerning the opening of the proceedings (Casasola, 2020). The partial harmonisation approach seems to be chosen in the Proposal.

The Proposal represents the first attempt to harmonise the national bankruptcy (liquidation) laws of the Member States. The proposed harmonisation of transaction avoidance seems to have a far-reaching aim, since it proposes to harmonise the grounds for three types of transactions and the legal consequences which arise when such unlawful transactions are declared void. Nevertheless, it raises a number of questions regarding whether such harmonisation is needed and whether it would really serve the goals which the rules on transaction avoidance seek to achieve. What type of transaction may be set aside? How should the grounds for transaction avoidance in the Proposal be applied in practice? How should the interests of the third party to a transaction be protected? Does the Proposal establish a fair balance between stability in civil relations and the market and the goals of insolvency proceedings?

This article aims to assess the application of transaction avoidance rules in EU insolvency law. It is structured as follows. First, it addresses the goal of transaction avoidance rules, which is to maximise the value of the debtor's assets. Second, it provides an analysis of the application of the *Actio Pauliana* rule as the main instrument for the recovery of assets and the rule of accumulation of claims (*vis attractiva concursus*) in EU insolvency law. Third, the new rules on transaction avoidance in EU insolvency law as set out in the Proposal are analysed. Fourth, the authors provide a critical assessment of the proposed harmonisation of transaction avoidance rules in EU insolvency law. The main sources used in the article are the relevant legal acts of EU insolvency law and the case law of the Court of Justice of the European Union (hereinafter – the CJEU) alongside articles and other sources of legal doctrine related to this subject. The authors rely on the scientific research methods which are common in such types of research, namely comparative and logical. The comparative analysis method is used for the assessment of the relevant rules which regulate the grounds for transaction avoidance in international soft law documents, EU insolvency law and national laws. The logical method is used to make conclusions and provide suggestions on the proposed rules on the harmonisation of transaction avoidance in EU insolvency law.

1. Transaction avoidance and the maximisation of the value of the debtor's assets

The maximisation of the value of the debtor's assets is closely linked with the application of the rules on transaction avoidance. The rules on transaction avoidance protect creditors and the insolvency estate from the debtor's unlawful transactions and contribute to the accumulation of the debtor's assets and the maximisation of their value (Commission Staff Working Document, 2022). For the effectiveness of insolvency proceedings, collective action is more efficient than creditors' individual remedies. Thus, the successful application of transaction avoidance rules results in the increase of the insolvency estate. After the tracing and identification of assets, an insolvency practitioner should consider whether pre-insolvency transactions are lawful or grounds may be raised to challenge them. By filing a claim for setting a transaction aside, an insolvency practitioner seeks to test the lawfulness of such a transaction, and if a transaction is found to be unlawful then this should result in the restitution of transferred assets and (or) compensation for the debtor (UNCITRAL, 2004, p. 136).

Avoidance actions might be seen as promoting collectivism and fairness among creditors, and the underlying purpose of avoidance provisions is usually seen as being to ensure that there is fairness. However, it is rightly pointed out that fairness does not translate into absolute equality between creditors, as the legislation in all Member States includes provisions embedding the right of priority to certain groups of creditors, such as employees, who usually receive priority in the satisfaction of their claims (Keay, 2018). The main policy arguments behind transaction avoidance rules in insolvency law are: protecting the general body of creditors from the unfair diminution of the insolvent's assets, stopping the dismemberment of the insolvent's estate, and deterring parties from entering into transactions with insolvents that could be avoided (Keay, 2018). Since the debtor's

property has to be distributed between creditors fairly, avoidance actions aim to recover property back to the insolvency estate and thus reflect the collective nature of insolvency proceedings and provide fairness among creditors. Avoidance actions also aim to prevent the dismemberment of the insolvency estate that occurs as a consequence of the insolvent's entry into a pre-insolvency transaction and deter entry into transactions that could be avoided if a company becomes subject to insolvency proceedings (Keay, 2017). One of the general tasks of the insolvency practitioner is to investigate the debtor's pre-insolvency transactions and evaluate whether they were detrimental to creditors or not (Casasola, 2020). The rules on transaction avoidance protect the general body of creditors from the unfair diminution of the insolvent's assets, which can be a consequence of a debtor giving an advantage to someone at some point before the opening of insolvency proceedings and therefore creating a distortion in the distribution of the property of the insolvent according to the statutory scheme (Keay, 2018).

A study on the harmonisation of transaction avoidance rules was published in 2011 (European Commission, Directorate General for Internal Policies, 2011). It was noted that though the national laws of the Member States do not essentially differ regarding the categories of contestable transactions, the rules on suspect period (the period preceding the opening of insolvency proceedings which defines whether transactions are contestable) differ. The issue is that, pursuant to the exception to the applicable law to detrimental acts, the legal system which least favours avoidance rights will take precedence, and in cross-border legal transactions the chances of successful avoidance actions are significantly reduced. The trust and foreseeability of the law applicable to transaction avoidance were also questioned, since in the area of avoidance actions in insolvency law so-called connected persons or stakeholders collaborating intentionally or fraudulently with the debtor should continue to enjoy such a protection of trust. A study on asset tracing and recovery by insolvency practitioners was presented in 2022 (European Commission, 2022b) which thoroughly analysed EU insolvency law and the national laws of the Member States related to the problems that insolvency practitioners encounter when searching for assets and recovering them for the insolvency estate. The importance of this topic is also confirmed by UNCITRAL Working Group V (2023), which has been working on the preparation of the guidelines on civil asset tracing and recovery in insolvency proceedings. Both studies acknowledged the importance of the effective application of the rules on transaction avoidance and the need to find a proper balance between the legitimate interests of the counterparty to the contract, the maximisation of the debtor's assets, and the protection of creditors' interests.

The recovery of assets may be also a challenging and expensive exercise which can incur financial and time costs. The importance of transaction avoidance in insolvency proceedings is recognised not only in national legal acts, but also in the international arena. For instance, Article 25 of the UNCITRAL Model Law on Cross-border Insolvency (1997) establishes that upon the recognition of a foreign proceeding, the foreign representative has the standing to initiate the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this state to a person or body administering a reorganisation or liquidation. When the foreign proceeding is a non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this state, should be administered in the foreign non-main proceeding. Thus, an insolvency practitioner has the right to invoke local laws on transactional avoidance and submit a claim to the court. This does not grant the right to an insolvency practitioner to file a claim for transaction avoidance; it does not create such a right or solve conflict of law problems. Instead, this Article merely requires that an insolvency practitioner, upon recognition of insolvency proceedings, would not be placed in a less favourable position regarding their standing only because they are appointed in foreign insolvency proceedings. The standing of an insolvency practitioner under this Article is applicable only to actions that are available to the local insolvency representative in the context of an insolvency proceeding, and the Article does not equate the foreign representative with individual creditors who may have similar rights under a different set of conditions (UNCITRAL, 2014, p. 92).

In summary, transaction avoidance as a legal instrument is primarily designed to maximise the value of the debtor's assets. The application of these rules on transaction avoidance also provides for the examination of the lawfulness of civil market transactions, and may also serve as a means of deterrence for the conclusion of transactions which are detrimental to creditors.

2. *Actio Pauliana* and the accumulation of related actions in the EIR

One of the main tools for the recovery of assets is filing an action for transaction avoidance, and the main legal tool for the recovery of assets in insolvency proceedings is *Actio Pauliana*, which is deeply rooted in European civil law (Keay, 2017; Bork, 2020, p. 112). This is a legal defence mechanism for the preservation of a creditor's rights over a debtor's assets which is used against a third party which acquired the disputes assets, and thus '<...> constitutes an exception to the principle of privity of contract and is contrary to the rule that a person who is not party to a contract may not benefit from or suffer its legal consequences' (Opinion of AG Ruiz-Jarabo Colomer, 2008, para. 26). In essence, *Actio Pauliana* allows for interference into the transactions concluded by a debtor before the opening of insolvency proceedings which the debtor was not obliged to conclude. The successful application of this legal instrument allows the situation of the insolvency estate to be improved and creditors' claims to be satisfied. The aim of the successful application of *Actio Pauliana* is the recovery of assets which were transferred by an unlawful transaction directed against the debtor and the person who benefits from the act (*Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v. Dresdner Bank AG*, 1992, para. 19). Thus, it aims to recover the debtor's assets from the third party which unlawfully received them from the debtor.

In the case of ordinary civil proceedings, the effects of the successful application of *Actio Pauliana* are confined to the individual creditors who have brought the action. When the property is returned to the debtor, a creditor can satisfy their claim from the returned property. However, in the case of insolvency proceedings, such effects apply to the entirety of the assets, and therefore benefit all creditors (Opinion of AG Ruiz-Jarabo Colomer, 2008, para. 27). Thus, an action for setting a transaction aside in insolvency proceedings aims to maximise the value of the debtor's assets and protect the common interests of all creditors. Even if *Actio Pauliana* is filed by a debtor's creditor and the action is satisfied, the asset is recovered not to that creditor, but to the creditors as a whole. After the successful challenge of an unlawful transaction, recovered assets should become part of the insolvency estate.

The rules on *Actio Pauliana*, as for all other grounds for transaction avoidance, are a matter of national law. A recent study on the tracing and recovery of assets suggests that a harmonised approach to *Actio Pauliana* is also needed in the EU. It has been suggested that the EIR should also have provisions '<…> concerning the creditor's power to use the *Actio Pauliana* during insolvency proceedings, as well as provide a tool for creditors to preserve assets which are in line with the freezing injunctions stipulated in common law jurisdictions' (European Commission, 2022b, p. 119). *Actio Pauliana* is often employed as a legal defence instrument in insolvency proceedings, and it contributes to the equal treatment of creditors. The proposed recommendation is that creditors should be allowed to bring this action forward only if the insolvency practitioner waives their right of action and is subject to the authorisation of the court opening the proceedings, and only if the result would be distribution for all creditors (European Commission, 2022b, p. 119).

The assessment of asset tracing also requires an analysis of the procedural aspects of the right of an insolvency practitioner to recover assets. In the *Seagon* case, the CJEU broadened the jurisdiction of the court which opened the main insolvency proceedings to also encompass the actions which directly derive from the insolvency proceedings and are closely related to them. This judgment acknowledged the *vis attractiva concursus* rule in EU insolvency law for *Actio Pauliana*, and similar actions for transaction avoidance. The main problem in this case was whether an insolvency court has jurisdiction to hear an action for transaction avoidance against a person located in another Member State. The court held that '<...> the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an Action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State' (*Christopher Seagon v. Deko Marty Belgium NV*, 2009, para. 28).

The findings in the *Seagon* case were codified in Article 6(1) of the EIR, which establishes a European *vis attractiva concursus* rule pursuant to which the forum which opened insolvency proceedings shall hear a claim for transaction avoidance. The wording of this provision and the relevant case law raises an important procedural question as to whether *vis attractiva concursus* under the EIR is mandatory or not for an insolvency practitioner challenging the transactions of the debtor based on the transaction avoidance rules. Article 6(1) of the EIR establishes that the court which has jurisdiction under Article 3 of the EIR *shall have jurisdiction* to hear avoidance actions. The question then becomes whether the jurisdiction to hear an action for transaction avoidance by the court which has jurisdiction under Article 3 of the EIR is exclusive or optional. Does an insolvency practitioner

have a right to choose in which forum an action for transaction avoidance should be submitted, or is no discretion provided in such a case?

As a rule, an insolvency forum should hear avoidance actions such as *Actio Pauliana*. This is justified under general arguments such as legal foreseeability, the reduction of litigation costs, the simplified gathering of evidence and others. However, does this mean that the jurisdiction of an insolvency forum to hear an action for transaction avoidance by an insolvency practitioner or another competent person is exclusive, or an option? Do the parties with the right to institute such proceedings have the right to choose whether to avail themselves of the jurisdiction of the insolvency forum, or can they also choose to commence the case in another jurisdiction, relying on the general rules on jurisdiction in cross-border civil cases (the Brussels Ibis Regulation)?

The nature of the competence (exclusive or optional) to hear an action for transaction avoidance was the subject matter of the *Wiemer & Trachte* case. The question in this case was whether the international jurisdiction of the court hearing insolvency proceedings is exclusive or optional, thus enabling an insolvency practitioner to bring an action to set aside before a court of the Member State in which the defendant has their registered office or habitual residence. The CJEU found that the concentration of actions for transaction avoidance contributes to the effectiveness and efficiency of insolvency proceedings, having a cross-border effect (*Wiemer & Trachte GmbH v. Zhan Oved Tadzher*, 2018, para. 33) on the avoidance of abusive forum shopping (paras. 34–35). The court concluded that the courts of the Member State within the territory of which insolvency proceedings have been opened enjoy exclusive jurisdiction to hear related actions including actions to set a transaction aside based on insolvency (para. 36). Thus, the court established that the jurisdiction to hear an action for transaction avoidance by the court which has jurisdiction under Article 3 of the EIR is exclusive.

The rationale of the *Wiemer & Trachte* case – i.e., that the jurisdiction to hear an action for transaction avoidance is exclusive for the courts having jurisdiction under Article 3 of the EIR – has already raised debates. Some authors strongly argue that the *vis attractiva concursus* rule in cross-border insolvency proceedings should be interpreted as an option for insolvency practitioners, but not as a mandatory rule. The main arguments for the opposition to the rationale of this judgment are that it would limit the options of the insolvency practitioner and that it may contravene the objective of Article 6(1) of the EIR to improve the efficiency of insolvency proceedings (Bork, & Veder 2022, pp. 238–239). Both arguments reveal debates as to the approach to the interpretation of the *vis attractiva concursus* rule in the *Wiemer & Trachte* case. Though the court focused on the avoidance of abusive forum shopping and the general effectiveness of cross-border insolvency proceedings, the possibility for an insolvency practitioner to choose the forum for such related actions should be one of the main criteria in determining questions related to jurisdiction in such cases. An insolvency practitioner acting as a representative of the creditors and the debtor should be provided with the possibility to consider in which countries the case should be submitted.

It is also debatable whether the argument of avoiding abusive forum shopping plays a role in the interpretation of the nature of the *vis attractiva concursus* rule. Forum shopping is related to the jurisdiction for the opening of insolvency proceedings when a debtor seeks to take advantage of more favourable rules of insolvency proceedings in order to reduce the creditors' costs. When an insolvency practitioner considers submitting a related action, it is unclear whether the idea of avoiding abusive forum shopping plays a significant role in such a regard since it is unclear which transactions may be challenged by an insolvency practitioner before the commencement of insolvency proceedings. The option of an insolvency practitioner to choose the forum for a transaction avoidance action as a means to seek the most effective solution and reduce expenses for litigation costs seems not to have been analysed in the *Wiemer & Trachte* case. Depending on the national laws of (civil) insolvency proceedings, an insolvency practitioner may prefer to submit an action in the forum of the defendant's domicile. Thus, the highly restrictive approach of the CJEU in this case raises doubts as to whether it indeed represents the most effective way of dealing with insolvency problems.

3. The new rules on transaction avoidance in EU insolvency law

Since the rules on transaction avoidance and their application have great impact on the effectiveness of insolvency proceedings, it is not surprising that EU policymakers have also shifted the focus of proposals for the harmonisation of this matter at the EU level. A number of new initiatives for the harmonisation of the rules of substantive insolvency law were proposed in the Proposal. One of the main goals of the Proposal is to increase the recovery value of the insolvency estate, which would translate to lower costs to liquidate companies and higher recovery rates for creditors and investors. It was established that the average recovery time in insolvency proceedings in Member States ranges from 0.6 to 7 years, and judicial costs range between 0 and over 10%. As of 2018, the average recovery value of corporate loans in the EU was 40% of the amount outstanding at the time of the default, and this figure was just 34% for small and medium-sized enterprises (European Commission, 2022a). The proposed rule on transaction avoidance seeks to increase recovery values for all creditors, including cross-border creditors in the EU, and enhance the effectiveness of transaction avoidance rules and subsequent asset tracing for asset recovery (Commission Staff Working Document, 2022).

The effective application of the rules on transaction avoidance can indeed contribute to the effectiveness of insolvency proceedings and increase recovery rates. However, transaction avoidance is a legal instrument which is deeply embedded into the national laws of the Member States and derives from the general rules of civil law. The harmonisation of the rules on transaction avoidance in insolvency law would mean intervention in the legal traditions of the Member States, and requires careful consideration of whether a European instrument on transaction avoidance in purely national insolvency proceedings would exceed the limits of the competence of EU law. This article further deals with the main elements of transaction avoidance harmonised by the Proposal.

3.1. The general provisions

The general provisions of the Proposal regarding avoidance actions establish the requirements that transactions concluded prior to the opening of insolvency proceedings detrimental to the general body of creditors can be declared void under the condition of this act. These rules should be regarded as minimum standards for the protection of creditors' interests, and the national laws of the Member States may adopt provisions in this area which provide greater protection of creditors' interests.

Pursuant to Article 4 of the Proposal, Member States shall ensure that legal acts which have been concluded prior to the opening of insolvency proceedings to the detriment of the general body of creditors can be declared void under the conditions laid down in Chapter 2 of this Title. Article 5 of the Proposal establishes that the national laws of Member States may provide even greater protection of the general body of creditors than that proposed in this legal act. Thus, the Proposal provides only minimum standards of protection of creditors' interests, and leaves the competence to the Member States to provide stricter rules in this matter.

This general requirement means that national laws should provide remedies in insolvency proceedings to challenge transactions detrimental to all creditors which are concluded before the opening of insolvency proceedings. The notion of a transaction 'detrimental to the general body of creditors' is a qualification which may be challenged under this provision. The Proposal does not define the detrimental effect. This notion, however, is also used in the EIR, which establishes that the law on the opening of the main insolvency proceedings (*lex concursus*) determines which law is applicable to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors (Article 7(2)(m) of the EIR). An exception to this rule on applicable law is established in Article 16 of the EIR. These rules concern actions to set aside based on the rules of insolvency proceedings, and not the rules of ordinary law (ordinary actions under civil and commercial law) (Opinion of AG Szpunar, 2014, para. 43). The indication that an act is detrimental to the general body of creditors means that the act should have a negative impact not on a certain creditor or a group of creditors, but all creditors. This negative impact is coupled with the decrease of the debtors' assets which would be used to satisfy creditors' claims.

One of the general problematic questions in the application of the rules on transaction avoidance is the time when a transaction was completed. This is important, since usually transactions may be challenged only when they were completed before a certain period prior to the opening of insolvency proceedings. The question of whether the relevant period of time in such a case should be calculated from the time when a transaction was concluded or

when it was executed then arises. Recital 5 of the Proposal solves this question by giving priority to the perfection of the legal act rather than to the execution of the performance, and provides an example of electronic money transfer, where the relevant point in time should not be when the debtor instructed the financial institution to transfer the money to a creditor (the performance of the legal act), but rather when the creditor's account was credited (the perfection of the legal act) (European Commission, 2022). Such a choice seems to be compatible with the requirement of legal foreseeability and legal certainty. In practice, it may also be complicated to determine exactly when a transaction was performed, especially when its performance depends on the actions of more than one party to the contract and/or the performance of the transaction may consist of several actions which may not be concluded at the same time.

A transaction may be defined as both an act or an omission. The Proposal suggests that transactions (actions) should be defined broadly in order to cover any human behaviour with legal effects. Pursuing the principle of equal treatment of creditors, legal acts should also include omissions, as it makes no significant difference whether creditors suffer a detriment as a consequence of an action or of the passivity of the party concerned. Such acts should also cover acts by the debtor, and should also include legal acts performed by the counterparty or by a third party (Recital 6 of the Proposal). The transaction avoidance rule should apply only to transactions which are detrimental to the general body of creditors (Recital 6 of the Proposal). Such an understanding of transactions is also broad, and should encompass how transactions are defined by Member States.

Attention is also paid to the interests of the third parties to the transaction. It is recognised that to secure the legitimate interests of the counterparty, transaction avoidance rules should be applied proportionately. Such circumstances should include the debtor's intent along with the knowledge of the counterparty or the time-span between the perfection of the legal act and the commencement of the insolvency proceedings. Therefore, it is necessary to distinguish between a variety of specific avoidance grounds that are based on common and typical fact patterns and that should complement the general prerequisites for avoidance actions. Any interference should also respect the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union (Recital 6 of the Proposal). The rules on transaction avoidance in the Proposal do not indicate whether they are applicable to transactions with cross-border elements (for instance, when parties to the transaction are located in different Member States), nor do they specifically mention transactions without such elements. Thus, it seems that the proposed rules on transaction avoidance are deemed to be applicable to all transactions which fall under the scope of the Proposal, irrespective of whether they have a cross-border element or not.

The general rules on transaction avoidance, though mentioned mostly in the recitals of the Proposal, suggest that the broad notion of a transaction is established: it should cover all legal acts (acts and omissions) which lead to the creation of legal consequences. The relevant rules on the time when a transaction was concluded are also important in order to decide whether the special rules on transaction avoidance should be applicable.

3.2. Types of transactions which may be declared void

The Proposal establishes three types of contracts detrimental to creditors which are subject to transaction avoidance rules, namely preference transactions, transactions with no or a manifestly inadequate consideration, and transactions which intentionally harm. The consequences of all three actions would be the declaration of the voidness of the challenged transactions. The subjective element (parties' knowledge about the unlawfulness of the transaction) varies depending on the specific grounds, and serves the purpose of protecting the interests of the third party.

One type of unlawful action are preference transactions, where a debtor gives some *unjustified preference* (payment or the creation of security) to another person without a legal basis (Keay, 2017). Preference transactions may be declared void if they benefit a creditor or a group of creditors by satisfaction, collateralisation, or in any other way, and can be declared void if they were perfected: (a) within 3 months prior to the submission of the request for the opening of insolvency proceedings, under the condition that the debtor was unable to pay their mature debts; or (b) after the submission of a request for the opening of insolvency proceedings (Article 6(1) of the Proposal). The general rule on preference transactions actually does not establish what preference actually constitutes. It is also noted that 'since this avoidance ground is triggered by the mere perfection of the legal act,

the suspect period is the shortest compared to the suspect periods of the other avoidance grounds' (European Commission, 2022a).

A special rule is established for transactions for which performance is secured. Pursuant to Article 6(2) of the Proposal, if a due claim of a creditor was satisfied or secured in the owed manner, Member States shall ensure that the legal act can be declared void only if: (a) the conditions laid down in paragraph 1 are met; and (b) the creditor knew, or should have known, that the debtor was unable to pay their mature debts or that a request for the opening of insolvency proceedings has been submitted. The creditor's knowledge referred to in the first subparagraph, point (b), shall be presumed if the creditor was a party closely related to the debtor. This exception seeks to protect the counterparty to the contract which received a security. The intent of such a protection is to protect the interests of a creditor who has already received satisfaction, or if the performance of the obligation is secured. In such cases, creditors' knowledge of the unlawfulness of the transaction is also relevant, since the debtor had already encountered insolvency problems before insolvency proceedings were initiated.

Exceptions to preference actions are also established. Pursuant to Article 6(3) of the Proposal, by way of derogation from paragraphs 1 and 2, Member States shall ensure that the following legal acts cannot be declared void: (a) legal acts performed directly against fair consideration to the benefit of the insolvency estate; (b) payments on bills of exchange or cheques where the law that governs bills of exchange or cheques bars the recipient's claims arising from the bill or cheque against other bill or cheque debtors such as endorsers, the drawer, or drawee if it refuses the debtor's payment; and (c) legal acts that are not subject to avoidance actions in accordance with Directive 98/26/EC and Directive 2002/47/EC. The exceptions in Article 6(3)(a) seem to be the most complicated to prove since they require consideration of the impact of the transaction on the insolvency estate. Such an assessment would require individual considerations of what legal effects were established by the transaction and whether it contributed to the interests of the creditors.

The second group of unlawful actions are those with *no or a manifestly inadequate consideration*. A so-called undervalue transaction usually mean that a counterparty of the transaction receives some goods under a low or insignificant value which would normally would not occur in the market, and that is thus unreasonable (Keay, 2017). Such transactions are also detrimental to the interests of the debtor's creditors, since when a debtor enters insolvency creditors receive less since unjustified advantage was given to the counterparty to the transaction by the debtor.

Pursuant to Article 7(1) of the Proposal, Member States shall ensure that legal acts of the debtor against no or a manifestly inadequate consideration can be declared void where they were perfected within a time period of 1 year prior to the submission of the request for the opening of insolvency proceedings or after the submission of such a request. The exceptions to this transaction are gifts and donations of symbolic value. The assessment of what is a manifestly inadequate consideration depends on each case and requires the assessment of all relevant circumstances. Such cases would require comparing what considerations were provided by the debtor and what was provided to the debtor under the conditions of the transaction. Article 7(2) of the Proposal establishes that where several persons have submitted a request for the opening of insolvency proceedings against the same debtor, the point in time when the first admissible request is submitted shall be considered the beginning of the 1-year period referred to in paragraph 1.

The third group of unlawful transactions are those which are *intentionally detrimental to creditors*. Such transactions are those in which a debtor deliberately put assets beyond the reach of creditors and thus sought to defraud creditors (Keay, 2017). According to Article 8(1) of the Proposal, Member States shall ensure that legal acts by which the debtor has intentionally caused detriment to the general body of creditors can be declared void where both of the following conditions are met: (a) those acts were perfected either within a time period of 4 years prior to the submission of the request for the opening of insolvency proceedings or after the submission of such a request; (b) the other party to the legal act knew or should have known of the debtor's intent to cause a detriment to the general body of creditors. The knowledge referred to in the first subparagraph, point (b), shall be presumed if the other party to the legal act was a party closely related to the debtor. Article 8(2) of the Proposal establishes that where several persons have submitted a request for the opening of insolvency proceedings against the same debtor, the point in time when the first admissible request is submitted shall be considered the beginning of the 4-year period referred to in paragraph 1, first subparagraph, point (a).

The suspect period for intentionally detrimental transactions to creditors is longer than other suspect periods. This longer suspect period is justified by the fact that such a transaction was deliberately concluded to harm creditors and the counterparty to the transactions had knowledge (i.e., should have been aware) that such a transaction would be detrimental to all creditors. In such a case, the protection of the counterparty's interests is weaker since it is presumed that the counterparty knew that the transaction was unlawful and would harm the interests of all creditors.

3.3. The legal consequences of unlawful transactions

For the maximisation of the debtor's assets and increasing their recovery for creditors, the crucial aspect is not the application of the rules challenging the transaction, but the legal consequences when these rules are applied. The successful challenge of a transaction should lead to the return of the assets which were unlawfully transferred to another party (restitution), and thus increase the insolvency estate. The assets should be administered and (or) later sold, and the proceeds received should be distributed among the creditors to satisfy their claims. Other legal consequences in such a case can also involve the payment of damages to the insolvent company when restitution is not available. In such a case, the insolvency estate is increased not by the value of the returned assets, but by the award of damages.

The consequences of the successful application of the rules on avoidance actions are numerous. First, the claims, rights or obligations resulting from legal acts that have been declared void may not be invoked to obtain satisfaction from the insolvency estate concerned. Second, the party which benefitted from the legal act that has been declared void is obliged to compensate in full the insolvency estate concerned for the detriment caused to creditors by that legal act. A claim to obtain full compensation may also be assigned to a creditor or a third party. The limitation period for all claims resulting from the legal act that can be declared void against the other party is 3 years from the date of the opening of insolvency proceedings. Moreover, these rules should be enforceable against an heir or another universal successor of the party which benefitted from the legal act that has been declared void. Furthermore, the party which benefitted from the legal act that has been declared void has to compensate the insolvency estate for the detriment caused by that legal act, and any claim of that party which was satisfied with that legal act revives. The rules on the consequences on transaction avoidance are divided into four parts: general consequences, consequences for the party which benefitted from the legal act that has been declared void, liability of third parties, and relationship with the rules protecting new and interim financing under the Restructuring Directive.

The general rules on the consequences of transaction avoidance suggest that when legal acts are declared void, the rights and obligations deriving from them may not be invoked to obtain satisfaction from the insolvency estate concerned (Article 9(1) of the Proposal). The party which caused detriment to the creditors shall pay compensation (Article 9(2) of the Proposal), which may be assigned to a creditor or a third party (Article 9(4) of the Proposal). There is also a prohibition noting that the party that has been obliged to compensate the insolvency estate cannot offset this obligation with its claims against the insolvency estate (Article 9(5) of the Proposal). The limitation period for all claims resulting from the legal act that can be declared void against the other party is 3 years from the date of the opening of insolvency proceedings (Article 9(3) of the Proposal). The general rules on the consequences do not prohibit the filing of actions based on general civil and commercial law for the compensation of damages suffered by creditors as a result of a legal act that can be declared void (Article 9(9) of the Proposal).

The protection against void actions is even extended to the successors of the party which benefited from the void legal act. Article 11(1) of the Proposal establishes that Member States shall ensure that the rights laid down in Article 9 are enforceable against an heir or another universal successor of the party which benefitted from the legal act that has been declared void.

Article 11(2) of the Proposal establishes that Member States shall ensure that the rights laid down in Article 9 are also enforceable against any individual successor of the other party to the legal act that has been declared void if one of the following conditions is fulfilled: (a) the successor acquired the asset against no or a manifestly inadequate consideration; (b) the successor knew or should have known the circumstances on which the avoidance

action is based. The knowledge referred to in the first subparagraph, point (b), shall be presumed if the individual successor is a party closely related to the party which benefitted from the legal act that has been declared void.

The special rules are proposed in relation to the party which benefited from the legal act. Member States shall ensure that if and to the extent that the party which benefitted from the legal act that has been declared void compensates the insolvency estate for the detriment caused by that legal act, any claim of that party which was satisfied with that legal act revives (Article 10(1) of the Proposal).

Article 10(2) of the Proposal establishes that Member States shall ensure that any counter-performance of the party which benefitted from the legal act that has been declared void performed after or in an instant exchange for the performance of the debtor under that legal act shall be refunded from the insolvency estate to the extent that the counter-performance is still available in the estate in a form that can be distinguished from the rest of the insolvency estate or the insolvency estate is still enriched by its value. In all cases not covered by the first subparagraph, the party which benefitted from the legal act that has been declared void may file claims for the compensation of the counter-performance. For the purposes of the ranking of claims in insolvency proceedings, this claim shall be deemed to have arisen before the opening of insolvency proceedings.

4. Criticism of the proposed harmonisation of transaction avoidance in the Proposal

The harmonisation of the rules on transaction avoidance in the Proposal first requires consideration of the harmonisation of the substantive laws on transaction avoidance under EU law, and can then be assessed from the view of the merits of these questions. First, insolvency law is part of national law, and thus part of policy regarding how insolvency proceedings should be governed. The different rules on the distribution of assets reflect different policy goals pursued by governments (Keay, 2017). The application of transaction avoidance rules often requires subjective and objective assessments of the factual circumstances surrounding the transaction and parties' will regarding it. Both subjective and objective tests have shortcomings which it would be even more difficult to address at the EU level. The application of transaction avoidance is also often based on rebuttable presumptions which reflect the peculiarities of the particular transaction (Keay, 2017).

The divergence of national rules on transaction avoidance, however, means a lack of harmonised solutions to insolvency problems and enables businesses to choose where their commercial interests are best served (i.e., the Member State of incorporation). The business regime and the national laws regulating business relations (of which insolvency law is a part) have a significant impact on how a business evolves. The peculiarities of the national laws applicable to insolvency proceedings may also be part of such considerations when deciding in which country a business should be incorporated. The principal idea of the harmonisation of the transaction avoidance rules may actually diminish the effective exercise of fundamental freedoms of EU law such as free movement and establishment, which are basic fundamentals for the proper functioning of the internal market.

The choice of establishment, and thus the rules applicable to business relations, are encouraged or prohibited only when they result in abuses of EU law. EU law cannot be invoked for abusive or fraudulent aims (*SICES and Others v. Agenzia Dogane Ufficio delle Dogane di Venezia*, 2014, para. 29.)

The development of EU insolvency law is also linked with the evolution of company law. It was established in the *Centros* case that a company's corporate laws will be determined by its domicile, even if most or all of its assets and operations are located elsewhere. The freedom of establishment allows companies established in one Member State to pursue activities in other Member States through an agency, branch or subsidiary (*Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, 1999, para. 26). Moreover, the mere fact that a person seeks to establish a company according to the rules of company law that seem to them the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment (para. 27). Thus, looking for a better regime for taxes or other corporate governance reasons should not itself constitute an abuse of EU law. The enjoyment of freedom of establishment opens the door for companies and traders to search for more favourable legal regulation. When forum shopping is employed for the optimisation of procedural possibilities, it should not be regarded as an abuse of the law. However, unlawfulness may arise when such a transfer of business leads to unjustified inequality between the parties to a dispute (Opinion of AG Ruiz-Jarabo Colomer, 2005, paras. 72–73.)

The longstanding approach in EU law has been that transfer of business is a lawful action and may be treated differently when the transfer of business from one Member State to another results in fraudulent forum shopping. Thus, the EIR only prohibits fraudulent forum shopping (Recital 29 of the EIR) and establishes the rules of jurisdiction based on the centre of main interests (Recital 31, Article 3 of the EIR), which should discourage abuse of EU law and protect the interests of creditors. The mere fact that a person chooses to move to the jurisdiction which best suits their business interests in the light of the procedural or substantive advantages it offers is not unlawful. Forum shopping is negative only when it turns into abuse of law (Opinion of AG Saugmandsgaard Øe, 2020, para. 87). Thus, even looking for a more favourable insolvency regime is not itself an example of fraudulent forum shopping in EU law.

Another important element related to transaction avoidance are safe harbour rules. Though the Proposal refers to special transactions in restructuring proceedings which provide new or interim financing which later enjoy immunity from the application of transaction avoidance rules, the national laws of the Member State provide other safe harbour rules for certain transactions in insolvency proceedings. For instance, German insolvency law provides 'restructuring privilege' when a transaction was concluded during the 3 months prior to the insolvency application where the legal prerequisites are met, but that these performances are not deemed to be made with the intention of disadvantaging creditors if they have been fulfilled on the basis of a serious restructuring attempt (European Law Institute, 2017, p. 279).

The safe harbour rules are justifiable exceptions to the general rules on transaction avoidance which recognise that in certain cases the advantage of the transaction to the debtor and even the whole body of creditors outweighs setting aside a transaction which would be void under the general rule. The special safe harbour rules are particularly relevant for the effectiveness of workouts and in pre-insolvency proceedings when a creditor already takes a risk by concluding a contract with a debtor encountering solvency problems. It is thus suggested that avoidance rules under insolvency law should not apply in subsequent formal proceedings if a transaction is objectively fair ex post, or justified ex ante (under the given circumstances) by serving the goal of restructuring a business which is at its core viable. The criteria for the lawfulness of the transaction may be the assessment of the value provided by the transaction. Another important assessment may be the comparison of the value of the transaction and the market price (European Law Institute, 2017, p. 282). There is also no indication of who has the right (*locus standi*) to apply to the court to challenge transactions. Normally, this right is designated to an insolvency practitioner. In some Member States, it is only an insolvency practitioner who has the right to file a claim for transaction avoidance, such as in Germany (Article 129 of Insolvency Law of Germany), while in other countries, such as Lithuania, this right is provided to both an insolvency practitioner and creditors. The question of who has the right to submit an action for transaction avoidance is not regulated in the Proposal.

Furthermore, the question of whether the proposed harmonisation of transaction avoidance is compatible with the special rules on the law applicable to acts detrimental to creditors arises. As a general rule, such actions fall under the scope of *lex concursus*, but to protect the legitimate interests of a counterparty, there is the possibility to demand the application of *lex causae* which would not establish the grounds for transaction avoidance. Pursuant to Article 16 of the EIR, Article 7(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and b) the law of that Member State does not allow any means of challenging that act in the relevant case. The application of this exception to *lex concursus* seems to suggest that the harmonisation of the transaction avoidance rules in the Proposal may not be applicable in a cross-border scenario when a counterparty proves that a transaction is lawful under *lex causae* (i.e.., there are no grounds for the challenge). Thus, the questions of the (in)compatibility of the rules on transaction avoidance in the Proposal and the rules of applicable law in the EIR may arise.

Conclusions

Transaction avoidance serves as an effective legal instrument to recover assets unlawfully transferred by a debtor and thus maximise the value of the debtor's assets in insolvency proceedings. However, the application of transaction avoidance rules should also not diminish legal certainty in the market and the legal expectations of the counterparty to the transaction regarding whether the effects created by the transaction would remain valid.

Though *Actio Pauliana* is one of the main grounds for transaction avoidance and the filing of related transactions in insolvency law, such *Actio Pauliana* in EU law raises the question of whether in cross-border insolvency proceedings an insolvency practitioner should have the right to choose whether to file such an action in the insolvency forum under Article 6(1) of the EIR, or should rely on the general rules on jurisdiction under the Brussels Ibis Regulation.

The Proposal establishes certain rules on the harmonisation of the rules on transaction avoidance in EU insolvency law. In essence, it establishes three grounds for transaction avoidance and the consequences of the declaration of the voidness of transactions which should substitute the relevant rules of the national insolvency law of Member States. The Proposal not only seeks to harmonise the grounds for such transaction avoidance, but also provides exceptions to their application and cases in which they are not applicable. The proposed rules reflect the common approach to understanding these transactions in general in insolvency law. However, the main question asked in this article is whether such harmonisation is indeed necessary, since the divergence of the national laws of Member States may actually provide more flexibility and a more beneficial approach to regulating how business activities should be pursued. The harmonisation of transaction avoidance rules in bankruptcy (liquidation) proceedings, together with the other rules proposed in the Proposal, may actually discourage businesses regarding the exercise of the freedom of establishment, and may also intervene substantially in the substantive insolvency and civil law regulations of Member States.

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