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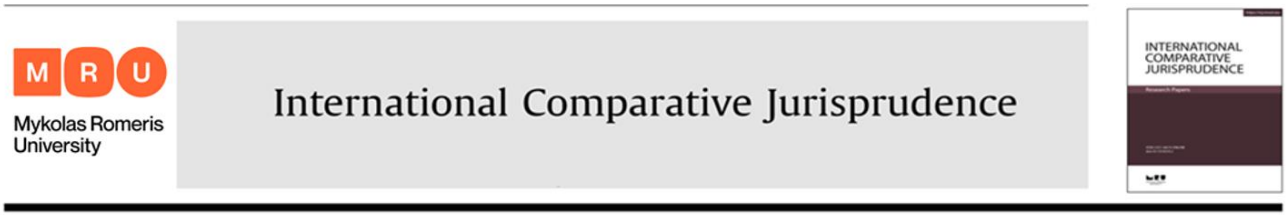

THE LEGAL POSITION OF THE TRUSTEE AND THE TERMS OF SUCCESSION TO FAMILIAL *FIDEICOMMISSA* IN LIGHT OF THE LITIGATION SURROUNDING THE RADZIWIŁŁ PRINCES' ENTAILED ESTATES DURING THE INTERWAR PERIOD[1]

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Abstract: This article is devoted to an institution of European civil law known as familial fideicommissa, through which the status of familial estates could be modified to protect a particular family's position and wealth. In this system, ownership of the estate was transferred to the whole family, and one male member was appointed as a 'trustee'. The assets of this property were not subjected to standard inheritance law provisions and were excluded from other general civil law rules, and the trustee was not allowed to sell the estate, burden it with debt, or include it in his will. The article focuses on practical aspects of the functioning of familial fideicommissa in the interwar period. The author analyses five court cases associated with three instances of fideicommissa from the Radziwłł family, which are reconstructed from historical archival documents deponed in the Lithuanian State Archive in Vilnius. The author focuses on highlighting problems in the interpretation and implementation of the legal provisions of the Third Lithuanian Statute (1588) and the Digest of Laws of the Russian Empire (1832) on familial fideicommissa by Polish courts.

Keywords: history of civil law, familial fideicommissa, Third Lithuanian Statute (1588), Digest of Laws of the Russian Empire (1832), court case files, case study, interwar Poland, Radziwiłł family.

Introduction

The subject matter of this article is the practical functioning of the familial fideicommissum (fee tail, entail or entailment, Polish: *ordynacja rodowa*), a specific institution of European civil law under the interwar Polish Republic. As a result of specific historical circumstances, different legal systems were in force in the various parts of the country: Prussian-German, Austrian, Russian, and French. Each of these systems regulated the institution in question in a somewhat different way. Notwithstanding the structural differences in the provisions of the various codes, fideicommissa constituted a homogeneous legal institution deeply rooted in the broad European civil law culture. Its typical characteristics included:
1) the purpose of preserving a family's holdings intact for future generations, guaranteeing that suitable social status is maintained;
2) a common procedure and form of creation – they were created by a legal act of the founder (founding charter), requiring the approval of the state authority;
3) a formula of ownership – the family as a whole was the owner. A fideicommissum always went to one particular male of the family in line with the founding charter. That person, however, was not the owner, but only a 'trustee' of the fideicommissum (holder, possessor, beneficial owner, the beneficiary of an *in-rem* right, etc.), with only the right to enjoy the use and the benefits (*fructus*) of the property;

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4) rules for the administration and alienation of the property – there were serious limitations on the trustee's freedom to divide, transfer, pledge, mortgage, or alter the use of the assets of the fideicommissum*;*
5) rules of succession – the assets were excluded from the statutory regime of testamentary and intestate succession. The assets passed from one trustee to the next according to separate rules of succession arising from the founding charter (Naworski et al., 2020).

The present article will analyse several specific legal and economic issues faced in practice by the three fideicommissa of the Radziwiłł family in the 1920s and 1930s. The paper will utilise various scientific methods, especially legal-analytical, legal-historical, and case study. The tenor of legal provisions and their general understanding in the legal doctrine of the first half of the 20th century will be confronted with interpretations formulated in a few concrete cases by professional legal counsels in the pleadings of disputing parties and by judges in court judgments. The basis for this discussion will be the detailed analysis of primary sources – the files of five civil cases litigated before Polish courts concerning the assets of a fideicommissum or involving the 'trustee' as a party in connection with the property. The social ('critical') approach to legal historical studies will be employed separately in this paper (see Sandberg, 2023, pp. 21–47). The legal interpretations of legal provisions will be evaluated against the practical consequences of the litigations for the economic and personal situations of members of fideicommissum families and other related parties (e.g., employees, business partners, and competitors).

1. The fideicommissa of the Radziwiłł family

The princely family of Radziwiłł was one of the oldest and most powerful aristocratic lineages of the Grand Duchy of Lithuania and, after 1569, the Polish-Lithuanian Commonwealth. Its representatives played an important role in the history of Poland and Lithuania – as military commanders, politicians, patrons of Catholic and Protestant religious communities, and sponsors of art. Their pre-eminent position was the product of vast landholdings amassed and retained for centuries through the ability and ingenuity of the family's various members, as well as by leveraging the institution of the familial fideicommissum. To strengthen and consolidate the position of their family, near the end of the 16th century, three brothers – Mikołaj Krzysztof (called 'the Orphan'), Stanisław, and Albrecht – established three fideicommissa on the estates of Nieśwież, Kleck, and Ołyka by one single joint act (Kempa, 2000, pp. 217–237). These fideicommissa were confirmed by the king and by the parliament of the Commonwealth – the General Diet (Grodziski, 2008, p. 115) – and survived until the enactment of a statute abolishing all fideicommissum constructs in Poland in 1939 (Filipiak, 2022, pp. 155–156).

To understand the litigation surrounding the Radziwiłł estates during the interwar period, one has to bear two issues in mind. Firstly, the fideicommissa founded by the three brothers were loosely modelled on analogous entailments established in the west of Europe, which Mikołaj Krzysztof had had the opportunity to observe during his many years of traveling abroad. In the Polish-Lithuanian Commonwealth, there had been very few institutions of this kind; the three princes, therefore, lacked the benefit of prior experiences, even concerning the technical drafting of the founding charter. In consequence, the contents were incomplete, and the lawyerly precision of the various clauses left much to be desired. Moreover, the fideicommissa functioned under a succession of three different regimes of private law: initially, the Third Lithuanian Statute (hereinafter the LS); after 1840, the Digest of Laws of the Russian Empire (Rymowicz & Święcicki, 1932; hereinafter the DLRE), Volume 10, Part 1; and ultimately, after World War I, the retained Russian Code, with successive narrow amendments introduced by native Polish legislation.

2. The litigation brought by Ferdynand Aleksander Radziwiłł – illegitimate birth and succession to a fideicommissum

To understand the first dispute over Radziwiłł fideicommissa heard by the civil courts of interwar Poland, we must go back to the turn of the 19th century. In February 1790, two of the three Radziwiłł Entailments – Nieśwież and Ołyka – were inherited by Dominik Radziwiłł, who was 4 years old at the time. The prince was 9 years old when his homeland – the Polish-Lithuanian Commonwealth – disappeared from the map of Europe due to its partitioning among the three neighbouring powers. The territories of both of his fideicommissa were

annexed by the Russian Empire. When the Emperor of the French, Napoleon Bonaparte established a non-sovereign ersatz of Polish statehood in the form of the (Grand) Duchy of Warsaw, the young aristocrat became involved in independence activism. He joined the Duchy's army in 1810 at the age of 24, and was directly commissioned as a colonel. His conduct in the Russian campaign of 1812 brought him the French Legion of Honour and the Order of St Hubert from the Bavarian crown for bravery. Following the retreat of French and allied armies from Russian territory, the prince fought at Leipzig and Hanau in 1813. In the latter battle, he suffered wounds ultimately leading to his death at the age of 27.

Prince Dominik's heroic military career was of only moderate consequence to the history of the Radziwiłł fideicommissa of Nieśwież and Ołyka. More significant was his turbulent personal life. In 1807, against his will, he married Countess Izabela Mniszchówna, a Polish aristocrat. The marriage was unhappy, and the young prince quickly began a scandalous affair with Teofilia Starzewska (married to Count Józef Starzeński), with whom he escaped to Graz after a few months. This flaming affair provoked a torrent of outrage because Dominik was a close relative of Teofila (he was formally her uncle, albeit 5 years younger). As early as the beginning of 1808, the fugitives had a child named Aleksander Dominik.

Though this story may appear to be nothing more than the stuff of a classical romance novel at first glance, it carries important legal ramifications. Prince Dominik's relationship with his paramour was a concubinage; a legally efficacious elopement required both lovers to establish the nullity of their prior marriages. Even this did not fully clear the path, as their close blood ties continued to pose a problem, which called for papal dispensation before the marriage could proceed. However, to a man of young Radziwiłł's stature and means, this was not an insurmountable hurdle – following the completion of the required procedures, the lovers said their vows in 1809. Nonetheless, even despite the subsequent matrimony, their son remained an illegitimate child from a legal point of view. While young Aleksander was already recognised as a fully qualified Radziwiłł by the Austrian authorities after Dominik's death, Russian heralds were not so liberal. As a result, by the decision of Tsar Alexander I, both fideicommissa passed to the Greater Poland line of Radziwiłł Princes. The next incumbent was Antoni Radziwiłł, talented musician and composer, husband to Princess Louise of Prussia, and *Statthalter* of the Grand Duchy of Poznań, created in 1815 within the Kingdom of Prussia in the aftermath of the Congress of Vienna (Szymańska, 2010, pp. 5–23).

Thus, the agnatic line of descent from the heroic adventurer Dominik Radziwiłł was removed from succession to the familial fideicommissa. However, their hopes of reinstatement were sparked by Poland's independence after World War I. Already before the enactment of the 1921 Constitution amid war with Bolshevik Russia, on a wave of patriotic sentiment, the Polish Parliament passed a radical resolution condemning the confiscation of property under the partitions as acts of 'violence and lawlessness' (Resolution of the Parliament of the Republic of Poland, 1920). This led to an avalanche of suits from former owners disenfranchised for their patriotic activities, such as participation in armed uprisings. Prince Dominik's great-grandson (the grandson of the illegitimate Aleksander) – Fryderyk Aleksander Radziwiłł – also sensed that the time had come to see 'justice' restored to him. On 22 November 1928, he petitioned the regional court in Łuck for his 'inheritance rights to the estates of Ołyka Entail', held at the time by Prince Janusz Radziwiłł, grandson of Antoni. The case took on a complicated course in 1933 with the petitioner's death, for he left no male progeny – only a daughter, Maria Olga, who, as a woman, was barred from claiming the fideicommissum. On 21 December 1933, she modified the claim, demanding the payment of a dowry to which she was entitled under the founding charter as the daughter of the lawful 'trustee'.

Whether on the facts or points of law, the case was not a difficult one to solve. Perhaps only emotions, family pride, and the enormous size of the proprietary stake inclined Prince Fryderyk Aleksander and Princess Maria Olga after him to fight their way through all possible court instances. Ultimately, on 20 October 1936, the Supreme Court affirmed the lower courts' decisions and dismissed the cassatory appeal, unequivocally upholding Prince Janusz's rights. Prince Aleksander Dominik's illegitimate birth proved a decisive bar to his descendants' civil rights of inheritance and claims to the estates composing the fideicommissum. From the perspective of the legal interpretation of the legal institution of fideicommissum, this case, or rather the collection of arguments expounded in the petition, is extraordinarily interesting and warrants a closer look.

Unfortunately, we do not have access to all court files. What we do have is an excellent legal analysis of the dispute, including the regional court's judgment in the first instance of 1928 offered by one of the legal journals (Kronika Cywilna, 1929a, 1929b), the decision of the court of appeals in Lublin of 12 October 1934 (Lithuanian Central State Archives, appeal court in Vilnius [LCSA, ACV], No. 4962, pp. 201–208), and, finally, the Supreme Court's judgment published in the official digest (Zbiór Orzeczeń Sądu Najwyższego, 1937, pp. 1110–1131). These sources will serve to reconstruct the parties' respective lines of argument. The petitioner relied primarily on emotion, emphasising the injustice done to a patriotic and well-deserving *line* of the family divested of succession rights to the fideicommissa by an unlawful act of revenge by the tyrannical Russian Tsar. The petition accordingly narrated the tragic and heroic fate of Prince Dominik, and drew far-reaching conclusions:

> The estates of Ołyka Entail found themselves in the respondent's hands (…) not by the course of law but out of political expediency and the Tsar's grace, to the detriment of Prince Dominik's heirs. For these reasons, accordingly, (…) it should be held that the respondent's possession of the estates of the fideicommissum (…) as grounded (…) in an act of violence and Tsarist oppression and contradictory to the course of descent set forth in the fideicommissum charter (…) is unlawful and should result in the petitioner's reinstatement in said estates. (LCSA, ACV, No. 4962, p. 201v)

This argument was not especially persuasive, either to the courts or public opinion. For example, celebrated Polish conservative columnist and amateur historian Stanisław Cat-Mackiewicz wrote that the matter of the descendants of Prince Dominik could not be 'explained by political expediency', for although he was a 'Napoleonic officer and ardent patriot', the court's decision, 'concerned itself (…) only with points of law' (Cat-Mackiewicz, 1990, p. 168).

The petitioning party had to deal with the exceedingly inconvenient fact of Aleksander Dominik Radziwiłł's extramarital origin. The counsels in Prince Fryderyk's employ advanced all possible arguments and assertions to if not subvert, then at least relativise this fact. They even embarked on a desperate and futile attempt to dispute the applicability to a Catholic marriage of both the rules of Catholic canon law and the ecclesiastical jurisdiction of Catholic tribunals, in whose purview the civil effects of marriage also fell at the time (LCSA, ACV, No. 4962, p. 214.). The most powerful of the petitioning party's arguments seemed to be Aleksander Dominik's legitimisation by the Emperor of Austria in 1822. The courts, however, decided that this legitimisation was an act of the Habsburg Monarchy, and thus its binding force did not extend to the fideicommissa's locations within the Russian Empire. This was all the more so considering that this form of legitimisation was incompatible with the LS and with Russian law:

> (…) in turn, the aforesaid decree of the Emperor of Austria of 30 April 1822 (…) recognising Aleksander Dominik without any reservations as a son of Prince Dominik cannot have any significance or legal effect in the territory of the Russian Empire, for in the said empire the Emperor of Austria's writ did not run. (LCSA, ACV, No. 4962, p. 214)

In designing their litigation strategy, Fryderyk's counsels had to be aware of the weakness of his position, especially after the crushing judgment of the regional court in the first instance. Any hope of winning on appeal hinged on strong additional arguments resting on solid legal foundations. Eventually, they decided that the very structure of the familial fideicommissum could operate to the benefit of Prince Dominik's progeny, especially considering that the judgment of the first instance omitted most of the arguments relating to the institution of fideicommissum (Kronika Cywilna, 1929b, p. 781).

Relying on the opinions of Franciszek Bossowski, the most eminent expert on property law and the law of obligation, Fryderyk's counsels argued that a line derived from an illegitimate descendant of a 'trustee' could not be excluded from succession on the basis of the general rules of civil law. Hence, to them, the disenfranchisement of Prince Dominik's line was unlawful:

> in light of the special legal structure of the legal institution of entailment, allowing, with the death of each legitimate or illegitimate trustee, the advancement of rights to the fideicommissum on the part of the person capable of demonstrating the most proximate descent from the fideicommissum's founder,

> is a principle which (…) is indisputable in scholarship and court decisions. (LCSA, ACV, No. 4962, p. 212v)

In Bossowski's (1915, 1929) prominent works analysing the essence of fideicommissum in the legislation of all post-partitioning statutory regimes of civil law, no direct statement could be found to the effect that, in fideicommissa, succession should pass to the next male scions of the family by operation of the law irrespective of their legitimacy. The formulation of such an opinion by this eminent jurist is improbable, as it would directly contradict the language of the codes and the majority of known fideicommissa founding charters (e.g., Ordynacyi Sułkowskiey Ustawa, 1908, and Statut Ordynacji Łańcuckiej, 1830; State Archive in Poznań, court of appeals in Poznań, 776, p. 11). The Radziwiłł charter is one of the few omitting the issue of the fideicommissary's legitimacy. In the clause dealing with the death of the fideicommissum trustee 'without male progeny, though (…) he may have left female progeny', the rights to the assets were to pass to his 'brothers by birth', with no mention of legitimacy (Radziwiłł, 1905, p. 15).

The petitioning party's position should not be seen solely as the cynical manipulation of a renowned legal authority by an industrious lawyer. The recourse to Bossowski's opinion was justified; he was the most prominent adherent to two views important to the descendants of Prince Dominik Radziwiłł. Firstly, Bossowski believed all forms of familial fideicommissa existing in Europe, not excluding Polish-Lithuanian ones, to constitute a homogeneous legal institution taking on only certain minuscule and non-essential differences in the legal orders of the various states. In one of his articles, he expressly emphasised that the purpose behind his research into familial fideicommissa was to 'recall the existence of one link among our legal institutions with the law of the Latin nations' (Bossowski, 1929, p. 222). Secondly, Bossowski accepted the thesis that each subsequent trustee was the direct legal successor of the founder and not of the previous trustee. This was derived from the general characteristic of a fideicommissum as the property not of the trustee, but of the family as a whole. According to this view, succession to a trustee should take place not on the basis of the general rules of civil law for inheritance procedures, but automatically by operation of the founding charter. Thus, Bossowski stated:

> The starting point in time for the rights of each trustee is the death of the preceding trustee or a different event entailing the loss of rights to the fideicommissum, such as a waiver. The ending point is the trustee's own death or other event entailing the loss of rights to the fideicommissum. Thus, every trustee (…) is the direct legal successor of the founder of the trustee and not of the previous trustee. (Bossowski, 1929, p. 222)

In the most important interwar synthesis analysing the Polish civil law of the late 1930s, the topic of fideicommissa was entrusted to Bossowski. This allowed him to summarise his many years of study and comprehensively voice his opinions on the subject. With regard directly to sections 485^{1}–486, 493^{21}, 493^{24}, 500, 503, 505, 509^{1}, 509^{4}, 1202 and 1203 of the DLRE, he appreciated the specificity of this codification, noting as follows: 'the Russian lawmaker formulated the entailment as an institution proximate to family estates, treating every successive holder as a complete owner' (Bossowski, 1936, p. 1227). Bossowski immediately went on to add, however, that some of the provisions of the DLRE were clearly not compatible with such a view, instead following a model derived from German legislation and scholarship. Here, Bossowski pointed directly to Article 485 of the DLRE, as modified by an 1861 amendment, which provided that a fideicommissum was to be understood as 'property not only of the current proprietor, but also of the entire family (…), i.e., all persons belong to the house, whether born or to be born' (Bossowski, 1936, p. 1227). He also added that the DLRE contained a set of rules governing the indebtedness of a fideicommissum, modelled after the solutions of the Prussian Landrecht and Austrian ABGB, which expressly stipulated that the trustee was 'not the legal successor of the previous trustee, but that of the founder' (Bossowski, 1936, p. 1227).

The counsels for Prince Radziwiłł's descendants hoped that the structural complication of the fideicommissum framework would allow them to minimise the weight carried by the argument of the illegitimacy of Prince Aleksander's birth. The goal was to dispute the general rules of inheritance law, or even civil law as a whole, with the effect of concluding that succession to a fideicommissum depended solely on descent from the right line of the house. The courts adamantly disputed this position, although the judges were at great pains to work out a cohesive and persuasive explanation. The courts' rationale could not stop at suggesting the inapplicability

of Bossowski's theses to the facts of the case; they had to embark on a radical criticism of the view of a fideicommissum as a universal pan-European construct. It is difficult to ascertain whether the position of the court of first-instance was an attempt to dispute the legal character of all fideicommissa existing within the territorial sphere of applicability of the DLRE or just the three relating to the Radziwiłł family. Even if we were to decide that the latter was the case, which appears most probable, the rationale of the regional court rightly appears to be quite revolutionary. It explicitly asserted that the Radziwiłł fideicommissa were not affected by the fundamental principles of: treating a fideicommissum as the property of the entire family; a succession regime separate from inheritance law; and the belief that the trustee succeeded not the previous trustee, but the founder himself.

The court found that this set of characteristic features '(…) ha[d] no basis either in the language of the charter of the fideicommissum under discussion or the applicable law (…). The charter, as follows from the above (…), makes the entailed estates the property of the trustee and not of the family (…) subjected to entailments (…)'. It went on to add: '(…) such a legal condition of the fideicommissum precludes the proposed legal concept of a pretender's succession to the entailment's founder as incompatible with the right of ownership accruing to each incumbent' (LSCA, ACV, No. 4692, pp. 212v–213).

This stance was only marginally softened by the Supreme Court. The latter focused mainly on demonstrating that the charter contained special provisions (*lex specialis*) overriding the semi-imperative Code provisions regulating fideicommissa. In the court's opinion, the effect was similar, however, because the language of the charter 'in nowise departs from the general principles of inheritance consisting in that the inheritance passes to the most proximate relatives of the deceased, one must not (…) invoke special rules of succession to an entailment, whether contained in vol. X pt 1 DLRE or existing in the legislations of other states or in theory' (Zbiór Orzeczeń Sądu Najwyższego, 1937, p. 1131).

The outcome of the action brought by the descendants of Prince Dominik Radziwiłł posed no doubts from the perspective of the merits of the case. The illegitimate origin of his son and therewith the illegitimacy of the entire line derived from him was decisive. The claim that the exclusion of the whole line from succession resulted from political Tsarist repression could not be sustained. What commands attention in the rationale of the court rulings issued in this case, however, is a tendency to interpret the legal construct of fideicommissum narrowly. In essence, the courts of the so-called Eastern Lands and the Supreme Court found that the Radziwiłł Entails were not fideicommissa within the meaning of the provisions of the DLRE, nor did they have anything to do with the constructs adhered to in the scholarship and legislation of the German states and the Habsburg Monarchy. Moreover, the courts disputed the existence of fideicommissum as an institution with fixed and universally accepted characteristics common to the European legal tradition.

3. The litigation brought by Karol Radziwiłł – testamentary succession to a fideicommissum bypassing primogeniture

On 18 December 1935, whilst only 50 years of age, Prince Albrecht Antoni Radziwiłł, the trustee of the Kleck and Nieśwież Radziwiłł Entails, died at his palace in Warsaw. He had been not only one of the wealthiest landowners in the reborn Polish state, but also a philanthropist, active public figure, and one of the political leaders of Polish conservative circles.

Albert had a long sojourn in London in the first decades of the 20th century (before succeeding to both fideicommissa). During that time, he became involved with American citizen Dorothy Parker Deacon, a woman of not-so-great repute, having no aristocratic pedigree or significant wealth. The young prince showed determination and made the marriage happen against his mother's intentions, caring little for the disappointment of part of the aristocracy, nor even for the degree of ostracism that he experienced. However, the marriage concluded in adverse circumstances, was short-lived, and fell apart within less than a decade.

From the perspective of succession to the fideicommissa, key significance belonged to the fact that his marriage to Deacon did not produce a male progeny but only a daughter, Elżbieta. Because of his influence and his family's position, the prince obtained an ecclesiastical decree of nullity without significant trouble. Of a relatively young age, he was not hampered from starting a new family and producing a male heir. He did,

however, decide against remarrying. At the time of his death, his closest male relatives capable of succeeding to the fideicommissa were his younger brothers, Karol and Leon. Acting in accordance with aristocratic custom and conscious of the necessity of mitigating potential family disputes, Albrecht wrote a last will. He devised practically all his property – not only his vast personal estates, but, above all, the fideicommissa of Nieśwież and Kleck – to the younger of the two brothers (LCSA, ACV, No. 5692, p. 11). This inspired the older brother, Karol, to petition for the partial annulment of the testament. Without disputing his brother's right to dispose of his personal estates, he demanded that the clauses by which the deceased arbitrarily disposed of the two Radziwiłł Entails to be struck from Albrecht's last will.

The importance of litigation over the two Radziwiłł fideicommissa was weighty on account of the great value in the dispute, as well as the juridical complexity of the controversy surrounding the institution of fideicommissum. Prince Karol, the petitioner, retained as many as three counsels of record. The petition was drafted and signed by Advocate Jan Anastasiu, but the quality of his pleading reveals that the conduct of such a large and difficult case was somewhat beyond his capability. For this reason, throughout the first-instance proceedings before the regional court in Nowogródek, Anastasiu was assisted by a lawyer with more expertise, Maksymilian Madaliński. As the record attests, Madaliński was the more active co-counsel, making the majority of statements and posing questions to witnesses. During the appellate proceedings before the court of appeals in Vilnius, Prince Karol dismissed Anastasiu altogether, and Madaliński was joined by Advocate Zygmunt Rymowicz. The latter was an eminent personality, a member of the Codification Committee, and one of the publishers of the Polish-language edition of the DLRE. The replacement of the counsels following the unfavourable decision at the court of first instance was neither adventitious nor premature. Though Madaliński and Rymowicz did not depart from the principal lines of argument in the drafting of their appeal, the pleading and the rationales reflected considerably higher substantive and linguistic value.

The key issue facing the petitioner's counsel was the lack of precision in several clauses of the charter, suggesting the divisibility of the estates of the fideicommissum. This was to be permissible, especially in the absence of the trustee's male progeny, in which case the estates were to pass to 'brothers (…) in equal partition' (Radziwiłł, 1905, p. 15). In several other places, the charter noted that the trustee's statements of will in the form of so-called 'devises' could exclude or modify the application of the charter's provisions. For example, the charter stated: 'And should there be devises, then descend according to such devises', or: '(…) should said estates (…) be turned over by some special devise'. As per another clause: 'should there be devises, then descend according to such devises'. In another passage of the charter, the incumbent's powers to dispose of the estates of the fideicommissa were articulated with even greater clarity: 'so that a brother among brothers, paternal uncle among nephews, as well as father among sons, may divide his estates according to his intention and understanding' (Radziwiłł, 1905, p. 15). The principle that the 'estates of Radziwiłł fideicommissa are divided among brothers in equal shares' was the product of the interpretative efforts of the highest Russian judicial instance – the Governing Senate – in 1877 (LCSA, ACV, No. 5692, p. 83). This was also confirmed by the courts in the abovementioned case of the descendants of Prince Dominik Radziwiłł (LSCA, ACV, No. 4692, pp. 212v–213). The petitioner's litigation strategy had to take this into account.

The petition's language voiced acceptance of the binding character of the general rule, allowing the trustee to dispose freely of the entailed estates. Advocate Anastasiu's argument on behalf of Prince Karol was grounded in a strictly formalistic interpretation of the legal terminology used in the charter. He pointed out that the acts through which the trustee was able to dispose of the property forming part of the fideicommissum were somewhat consistently referred to as 'devises'. Expounding on the meaning of that term, the counsel quoted from the provisions of the LS and a synthesis of civil law before 1795 (Dutkiewicz, 1870, pp. 107, 115). The findings of this inquiry were that: 'in the terminology of Polish law and the Lithuanian Statute, the terms "inscriptions – devises" never meant a testament or legacy, but only contracts made in Court' (LCSA, ACV, No. 4962, p. 3) (this sentence is a direct, though unmarked, quotation from Dutkiewicz). The conclusion was that the trustee had complete freedom to dispose of the entailed estates, but not in the legal form of a testament. Albrecht's disposition was accordingly irregular, and ought to be regarded as a nullity. The trial transcripts from the regional court in Nowogródek confirm the key role of this assertion in the petitioner's argument (LCSA, ACV, No. 4962, pp. 39–41). It was, however, firmly rejected by the first instance court. In his trial strategy, Anastasiu failed to take into account the obvious fact that both the LS and the charter were terminologically inconsistent. A literal reading of the provisions purporting to distinguish between terms used within a code

dating from the 16th century could not yield a credible outcome. The court had no trouble refuting it, or even making it look ridiculous. The rationale noted, for example, that the charter establishing the Radziwiłł fideicommissa contained one clause explicitly allowing the estates of the fideicommissum to be disposed of not only by 'devise', but also be 'testament'. This was the case if only one should remain among the male progeny of the three founders – the last of the family, leaving no offspring: 'such last descendant shall be free to dispose of all our aforesaid estates to him having descended, give out however and to whomever he will, by devise or testament, as he may see fit' (AUO, 1905, p. 21). At the same time, however, the provisions of general civil law (i.e., LS) substantially prohibited the testamentary disposal of real property. In the court's view, were the legal terms used in the two instruments to be interpreted strictly, one would have to surmise that the charter clause directly contradicted the statute. As a result, the judges concluded that the founders simply lacked precision in using legal terminology. The names of types of legal acts mentioned in the charter thus constituted a sort of guidance, rather than the deliberate use of the terms:

> Although the LS uses the word 'testament' with a different meaning than it does the word 'devise', the wording of the charter of the Radziwiłł Entail does not suggest the difference was paid any special attention by the drafters. When in expansive sentences they reiterate on several occasions the terms of inheritance, they provide no rules as to the method of testation or devising (…). Moreover, the charter's legal terminology is not rigorous (…). Therefore, the word 'devise' in the fideicommissum charter should be held to mean such an act as by which the right to the entailed estates may be transferred to heirs. Such an act, within the meaning of the provisions now in force, may even be a testament (…). (LCSA, ACV, No. 4962, pp. 110d v–110e)

In particular, the penultimate sentence of the passage cited above was of key importance to the outcome of the case. The court invoked a teleological interpretation of the intention of the fideicommissum founders, departing from the analysis of the literal wording of the charter's clauses. According to the court, the three founders intended to preclude the alienation of the estates to non-Radziwiłłs to the furthest possible extent. Simultaneously, they had no intention of imposing restrictions on male members of the family. Thus, under the charter, those members could enter among themselves into any transactions compatible with the applicable provisions of general civil law. Thus, if, as at the drafting of Prince Albrecht's testament, civil law permitted the disposal of real property by testament, such a form of disposal in the event of death had to be regarded as permissible and lawful in light of the charter. Only one additional condition was required: the recipient had to be a male member of the Radziwiłł family.

This had very important theoretical and practical ramifications. The very essence of the familial fideicommissum as a legal institution common to all European legal orders was at stake. It appeared that the existence of a fideicommissum did not exclude the rules of the statutory intestate and testamentary regime arising from the general provisions, but merely modified them to a slight extent. Moreover, the interpretation made a foregone conclusion of the absence of any prohibition against the disposal of the entailed estates by the trustee. Finally, in the court's view, the incumbent was a full owner, cosmetically limited by the charter in his method of administration of the estates.

This was disputed by Madaliński and Rymowicz in their appeal. They attempted to demonstrate, in a somewhat interesting way, that the rather imprecise Radziwiłł charter did, in fact, establish a typical European familial fideicommissum. They argued that although the founders permitted the disposal of the entailed estates by transactions within the family, they regarded such a situation as an altogether exceptional scenario, for with regard to succession to the fideicommissum, the charter was supposed to adhere to the principle of primogeniture, in line with a principle accepted throughout Europe. This was a succession model in which the entailed estates passed to the male descendants of the deceased trustee, always according to the seniority of the line and order of birth. Only in their absence were the estates to pass to collateral lines, i.e., the male descendants of the deceased fideicommissary's immediate predecessor, also according to seniority of line and birth. Prince Karol's counsel argued that the dispositions of entailed assets by legal acts, as allowed by the charter, were but a set of exceptions from this general rule. These exceptions were not to put a significant dent in the entailment's general character, including the estates' indivisibility: in the logical interpretation of the charter, the trustee was not allowed to split them. Disposition by a legal act was permissible only when the trustee held two or three fideicommissa. In such a case, he could adhere fully to the principle of primogeniture, settling all estates on a

single successor (the eldest son or, if having no sons, the eldest brother), but he was also empowered to pass each of the fideicommissa, in whole, to a different male relative as long as such recipients remained in the same degree of consanguinity (e.g., several sons or several brothers). He still had to comply with the general consequence of the principle of primogeniture: the order of birth. Thus, he was not free to settle the fideicommissa on younger sons or brothers, bypassing the elder ones. In support of this argument, the appeal invoked the example of the testament of Prince Fryderyk Wilhelm Antoni Radziwiłł of 1902. In the counsels' opinion, that testament was 'most wholly in accord with the charter of the Radziwiłł Entail. Since the father left several entails and two sons, he ought to have divided those among them, and he did' (LCSA, ACV, No. 4962, p. 135).

In their appeal, Madaliński and Rymowicz proceeded from the assumption that the familial fideicommissum was a pan-European institution with fixed characteristics irrespective of the regulation of the various specific civil codes or fideicommissum charters. Deciding on their appellate strategy, they came to the conclusion that the absence of such an assumption was the primary defect of the petition. Anastasiu devoted only marginal mention to the specificity of the fideicommissum, and only in the context of emphasising the family's responsibility ('moral duty') for the legacy of its forebears (LCSA, ACV, No. 4962, p. 2v). In the appeal, the pan-European nature of the institution and the Western inspiration in the shaping of the Radziwiłł Entail were the key points argued. Prince Karol's counsels interpreted the convoluted and imprecise terms of the charter as a bungling attempt at implementing the general principles of functioning of fideicommissa, including primogenitural succession. They loyally acknowledged that the founders' intention did not 'make explicit mention of the principle of primogeniture', explaining that this was the case 'because inspiration was taken from the West, where the system of primogeniture, often called majorate, was prevalent' (LCSA, ACV, No. 4962, p. 132). Clauses of the charter enabling the trustee to dispose of the estates of the fideicommissum constituted only a closed list of exceptions from the accepted general rule.

From this interpretation, a rather clear view of Prince Albrecht's testament and its effects emerges. The deceased was the holder of two fideicommissa, and his closest male relatives were his two brothers. He was given certain leeway to dispose of these fideicommissa intact – he could accept the taking over of both by the elder of the brothers, Karol, or, by a legal act, could settle one fideicommissum on the elder and one on the younger brother. As Karol's counsels commented:

> The Radziwiłł charter foresaw such a case as precedes Prince Albrecht's death (…). The trustee of (…) Nieśwież and Kleck parts this world, leaving only a daughter behind (…); the closest male relatives were his two birth brothers: Karol, the elder, and Leon, the younger. The Radziwiłł family charter provides: 'when the Lord God calls us from this wretched world with no offspring of the male sex (…) his property shall pass to his birth brothers (…) in equal partition. And should there be a devise, then descend according to the devise. (LCSA, ACV, No. 4962, pp. 135–136)

However, such an exceptional statement of will required Albrecht to avail himself of the special legal form of 'devise', i.e., judicially executed gifts *mortis causa*. A testamentary disposition, even notarised, was insufficient:

> A testament (…) may not repeal or amend an express provision of the entail charter as a special law not subject to wide construction, which may be amended solely by an express provision of the law, according to the principle of *lex generalis non derogat legi speciali*. A testament (…) contradictory to a provision of the charter (…) should be deemed a nullity in respect of the disposition of the entailed estates. (LCSA, ACV, No. 4962, pp. 135–136)

This theory is internally consistent and logical. From the perspective of Prince Karol's interests, it had the special benefit of reinforcing and giving a deeper sense to the formalistic argument expounded in the petition. However, the assertion that dispositions of the assets of the fideicommissum could be made, according to the charter, solely in the form of a 'devise', i.e., a contract registered in court, ceased to be grounded solely in the literal construction of imprecise and anachronistic terminology. Instead, it became the natural consequence of adhering to the conscious concept that the free disposition of the estates of the fideicommissum constituted an exception from the general rule. Accordingly, it had to be strictly delimited and admissible only in the special legal form prescribed by the charter.

Whether one would concur with this sophisticated argument is of no great import. For Madaliński and Rymowicz to be able to offer a logical line of reasoning in the case at hand required the adoption of a consistent general principle. The sole theory capable of properly serving that function had the following two components: (1) the Radziwiłł fideicommissa and the forms of fideicommissum existing under the DLRE constituted variants of the standard institution of familial fideicommissum; and (2) those fideicommissa were the subject matter of homogeneous regulation adhering to similar principles in the various civil codes throughout Europe.

As a marginal note, we can add that Madaliński and Rymowicz, being lawyers educated and trained in French and Russian law, struggled greatly to understand the essence of the institution of fideicommissum. Despite emphasising that fideicommissum was an institution common to European legal systems, they had studied the construct in somewhat of a cursory manner. In their appeal, they regularly confused and conflated two completely separate methods of succession to a fideicommissum – primogeniture and majorate. According to the Prussian Landrecht and ABGB, as well as the consistent position of German and Austrian scholarship, these were two different succession regimes. The former privileged the previous trustee's male descendants in the order of birth, while the latter favoured the founder's most senior male descendant, ignoring the line and degree of consanguinity with the previous trustee. It can thus be seen that the counsels did not go to the trouble of an in-depth study of writings concerning fideicommissa in other partitions. This, however, does not detract from the significance and logical soundness of their argument.

According to the same principle, the appeal also modified the argument dealing with the application of the provisions of the DLRE and the few scarce Polish provisions of the 1920s. Before the court of the first instance, Advocate Anastasiu tried to leverage the provisions governing fideicommissa in the Russian codification, especially those dealing with the indivisibility of entailed estates and the prohibition against disposing of them by legal acts, especially by testament. The petition expressly highlighted the importance of Article 1069 of the DLRE, which provided that fideicommissa: '[we]re not subject to testaments ordained for their inheritance contrary to legislation' (LCSA, ACV, No. 4962, p. 3v). Prince Karol's counsel also mentioned other such provisions of the Russian Code as were amenable to a construction favourable to his client's interests (Articles 1202, 1206, 1207, 1029 and 1066[2]) (LCSA, ACV, No. 4962, p. 3v). He also noted the provisions of two interwar statutes enacted by the Polish Parliament in 1926 – one on private international law, another on private interpartitional law. These provisions provided for the use of the estate's location (situs rei) as the 'link' to determine the legal regime applicable to a fideicommissum. In both enactments, fideicommissum estates were narrowed with the following descriptive formula: 'estates whereof the decedent may not dispose in the event of death' (Article 30 of the Resolution of the Parliament of the Republic of Poland on the Governing Law for Private International Relationships (1926) and Article 29 of the Resolution of the Parliament of the Republic of Poland on the Governing Law for Private Domestic Relationships (1926)). Accordingly, the petition reveals a clever attempt to harness these statutes, which, in the opinion of Anastasiu, 'confirm the principle that entails may not be the object of testamentary dispositions' (LCSA, ACV, No. 4962, p. 3). In the first-instance proceedings, the regional court made short work of such claims very simply. Referring to the invoked provisions of the DLRE, it correctly concluded that the Code had been enacted subsequently to the creation of the Radziwiłł Entails, and thus it could not apply to constructs dating back to before it came into force. In the court's view, the charter allowed the trustee to divide and dispose of the estates of the fideicommissum, and subsequent provisions of Russian civil law could not alter those rules. The court also found the interwar provisions of Polish private interpartitional law and private international law to be inapplicable for this purpose. Literally, they applied to such estates as could not 'be the object of testamentary dispositions', and were thus inapplicable to the Radziwiłł fideicommissa due to 'devises' being allowed by charter (LCSA, ACV, No. 4962, p. 110e v).

In drafting their appeal, Advocates Madaliński and Rymowicz essentially reiterated the original interpretation of the petition, citing the same provisions of the DLRE (emphasising the importance of Article 1069), as well as the Polish statutes of 1926. However, they added one small but incredibly important change, writing:

> (…) Article 1069 vol. X Pt 1 [DLRE] was cited in the petition not as the legal basis of the claim, but as an illustration of the principle that the general law of inheritance was not applicable to estates subjected to a special mode of succession in the territorial sphere of Russian civil law. (LCSA, ACV, No. 4962, p. 140)

In the appellant's view, Article 1069 of the DLRE, rather than finding direct application, ought to be regarded as a certain interpretative directive necessary for the correct understanding of the generally recognised characteristics of fideicommissa. Once again, this argument proceeded from the assumption that fideicommissa constituted a pan-European legal institution, always causing a particular estate to be excluded from the general rules of inheritance law and passed to successive male members of a family as trustees according to the principle of primogeniture.

The court of appeals rejected this argument and confirmed the correctness of the interpretation offered by the regional court, which is hardly surprising. However, Rymowicz and Madaliński's brilliant attempt prompted the appellate court to generalise and reinforce the assumptions of the first-instance judgment. The court's rationale asserted that the DLRE provisions could not apply to fideicommissa. However, whereas the first-instance judgment emphasised only the temporal aspect of their applicability, the appellate court additionally rejected the thesis of the homogeneity and universality of the institution of familial fideicommissum:

> (…) the institution of the Radziwiłł Entail must be identified neither with predicted estates [Polish: *majątki zapowiednie*] due to differences in regulating the alienation and divisibility of such estates, (…) nor with majorates (fideicommissa), due to the different method of derivation and formation of the estates. (LCSA, ACV, No. 4962, p. 256v)

The court stated that the Radziwiłł Entails were creations different and separate from the fideicommissa regulated by the Russian Code, which, in turn, should not be identified with the fideicommissa prevalent in Western Europe.

4. The cases of Princess Elżbieta Czartoryska *née* Radziwiłł – succession to a fideicommissum and the position of women

As noted above, the only child of Prince Albrecht Antoni Radziwiłł's marriage to Dorothy Deacon was a daughter named Elżbieta. In 1937, she married a wealthy aristocrat, Prince Witold Czartoryski. After his death in 1947, she married Jan d'Ornellas-Tomaszewski in Lisbon. Having lived to the venerable age of 103, she died in Warsaw in the summer of 2021.

We already know that Prince Albrecht devised and bequeathed almost all of his personal property and both of the fideicommissa of which he had been the incumbent to his younger brother, Leon. This does not mean that he left his only daughter without sufficient means. He left valuable legacies to her, especially in the form of several attractive landed estates. Separately, he instructed the new trustee to pay an annuity to Elżbieta from the incomes of the fideicommissum estates. The obligation to provide for daughters was a fixed element of fideicommissum charters in the European legal tradition (Kucharski, 2022). The unsophisticated Radziwiłł charter also prescribed this. Again, lacking precision, it provided as follows: 'a dowry and trousseau be given (…) according to voloks [an old area unit] (…) to all the maids, howsoever many of them, were there one only, such same dowry is to be given her' (Radziwiłł, 1905, pp. 16–17). Thus, in his testament, Albrecht had to specify the size and method of payment:

> According to family tradition and the fideicommissum charter, I oblige my brother Leon to pay to Elżbieta, my daughter, a lifetime annuity of 40,000 francs yearly in quarterly instalments, provided that in the case of defaulting on two consecutive instalments, my daughter will be entitled to demand the one-off payment of such an amount (…). (LCSA, ACV, No. 5692, p. 11v).

Initially, Leon made Elżbieta's payments regularly. Doing so was tactically expedient to him, as it corroborated the binding force of Albrecht's testament in the eyes of public opinion and the courts. A change came with the escalation of his dispute with his brother, Karol. During the litigation, the young princess declined to participate on Leon's behalf, exposing herself to her uncle's revenge of sorts. He ceased to pay the annuity, arguing cynically that the payments ought to wait until the courts' final decision on who is the true trustee. Leon went as far as claiming that Elżbieta's statement constituted a waiver of her claim to an annuity as it was against him personally (LCSA, ACV, No. 5692, pp. 8v, 76). Elżebieta was forced to try to play a game between arguing

brothers. At some point, through her counsel, she approached Prince Leon with an offer of collaboration against Prince Karol, so as to uphold the testament and her father's will. For reasons unknown, Leon ignored the proposal. Later, during the litigation, Elżbieta gained a statement by Karol, that in the event of prevailing in the litigation, he would honour the stipulations of Albrecht's testament with regard to the annuity (LCSA, ACV, No. 5692, pp. 59–61v).

The case was open and shut both legally and factually – Elżbieta's entitlement was beyond any doubt. The key importance belonged to the general rules of civil law, especially the express will of the testator. The evaluation of the nature of the annuity as the specific right of a female member of a fideicommissum family did not play any significant role. Prince Leon tried to leverage the institution of fideicommissum to downscale Elżbieta's claims. He argued that the payment of the amount claimed could 'ruin the substance of the entail'. The essence of the fideicommissum was to maintain the family property intact, whereas the need to pay enormous sums to Albrecht's daughter could jeopardise the financial stability of the fideicommissum (LCSA, ACV, No. 5692, pp. 64–65). Of course, this argument did not attract much credibility.

Elżbieta's situation was unfavourable for reasons beyond mere problems with the annuity. Contrary to Albrecht's last will, his creditors attempted to enforce their claims against Elżbieta, ignoring the testamentary heir and new trustee, Prince Leon. Materials exist from two cases of such kind brought against Elżbieta. The first was an action brought by Zachariasz Elkind for the payment of a debt secured by a promissory note. His position is of extraordinary interest, as he alleged that Elżbieta ought to be regarded as her father's true and sole heir. He based his argument on the general characteristics of fideicommissa in European legal tradition, arguing that 'fideicommissum estates d[id] not constitute the inheritance estate'. Thus, Prince Leon was not Albrecht's heir, but merely a 'specific legatee' – a beneficiary of a testamentary devise (LCSA, ACV, No. 5692, p. 40). In opposition to such a claim, Elżbieta's counsels had a full arsenal of legal arguments, of which they readily took advantage. Firstly, they were adamant that the succession, according to the Radziwiłł's charter, had to be regarded as inheritance within the meaning of civil law, and the trustee as the independent owner of the estate. For that, they could rely on the already published judgment of the Supreme Court entered in 1937 on the petition brought by the descendants of Dominik Radziwiłł (LCSA, ACV, No. 5692, pp. 39v–40). Secondly, they offered the sober observation that Albrecht's testament had given Leon only a 'general devise' – covering 'the totality of estates, rights, and obligations expressed in general form, without specific designation of the articles of the inheritance'. Thirdly, Elżbieta's counsels correctly estimated the risk of a different interpretation of the provisions of the applicable inheritance law. Thus, they protected themselves by suggesting that, 'at the most, one could say here (…) that Albrecht Radziwiłł had appointed two universal heirs, Leon Radziwiłł and Elżbieta Czartoryska'. In the event of the most unfavourable ruling – one recognising Leon as no more than a 'legatee' – they emphasised that, under Article 1259 of the DLRE, such a legatee was also liable for the debts of the inheritance estate, 'according to the assets inherited'. This was a brilliant move that relativised Elkind's claim that Elżbieta was her father's sole heir. Notwithstanding the determination of this matter and the legal title on which Prince Leon assumed the estates left by the deceased, it followed that the new trustee of both of the entails ought to pay his brother's debts either in whole or in significant part (having assumed the bulk of his assets, especially the most valuable estates of the two fideicommissa) (LCSA, ACV, No. 5692, pp. 40v–41). Fourthly, Elżbieta's counsels endeavoured to demonstrate that Elkind's promissory notes were not Albrecht's personal debts, but liabilities accruing against the assets of the fideicommissum. This is because they were 'payable at the office of the entail', affixed with 'the entail's stamps and numbering', and 'recorded in the entail's promissory note ledgers'. Accordingly, they could only be paid by the trustee (LCSA, ACV, No. 5692, pp. 31v–42).

This rationale was very logical. The first two arguments account for a tendency to dispute the legally separate status of the fideicommissum estates. It thus appears to be highly surprising that the court of first instance entered a judgment highly unfavourable to Elżbieta. She was found to be the sole heir and ordered to pay all of Elkind's promissory note claim – 21,250 zloties. Only the appellate court found both Leon and Elżbieta to be Albrecht's heirs. Simultaneously, since the bulk of the decedent's assets and the fideicommissa had gone to Leon, it reduced the payment adjudicated from Elżbieta five-fold (LCSA, ACV, No. 5692, pp. 35–36).

A similar action was brought against Elżbieta (jointly and severally with her uncle Leon) by another promissory note creditor of Albrecht's, an enterprise styled Amstelbank. This legal problem was analogous to the above,

but the argument touching on the essence of the institution of fideicommissum was articulated and substantiated in a more thorough fashion. In a preserved first-instance judgment, the regional court in Warsaw resolved two significant problems important to understanding the essence of familial fideicommissa. Firstly, the judges had to decide whether the trustee had been competent to assume an obligation secured with a promissory note against the assets of the fideicommissum and the next trustee. As we already know, Prince Albrecht issued his promissory notes with the 'stamp' of the fideicommissum administration. He recorded the resulting debts in the books and ledgers the entail's clerks kept. The Radziwiłłs' counsels attempted to take advantage of this fact in order to assert that the late prince had incurred the promissory note debt as a trustee. Simultaneously, they argued that incurring such debts violated the restrictions of the DLRE and the charter on indebting the fideicommissum. Accordingly, they could not be enforced against the civil heirs or even the new trustee. The resolution of this point was more categorical than profound. The court judgment mentions only that 'one must ignore the objections alleging the promissory notes on file not to be promissory notes due to the entail's status as a separate estate' (LCSA, ACV, No. 5692, p. 162v). Such an outcome was likely determined by the general principles of civil law – the protection of the creditor's interests and the abstract nature of a debt secured by a promissory note.

In its judgment, the court also had to decide whether succession to a fideicommissum was tantamount to civil inheritance. Once again, this interpretation was extremely unfavourable to Elżbieta. The court held that the fideicommissa were not part of the estate of the late Prince Albrecht. It took into account that, in line with a practice dating back to Russian times, no inheritance tax was levied on fideicommissum estates. Article 492 of the DLRE was invoked, in accordance with which the new trustee was not under an obligation to pay the predecessor's private debts. The court thus found the trustee not to be the predecessor's civil heir, and the fideicommissum not to be part of the inheritance estate, but a separate estate following a different succession regime. The court asserted simply that an entail could not constitute ordinary inheritance (LCSA, ACV, No. 5692, p. 162v). Similar to the outcome of Elkind's action, the court decided to ignore the stipulation in Albrecht's testament, imposing liability for debts solely on Prince Leon. This meant the recognition of Elżbieta as an aequiordinate heir to her father, provided that the scale of participation in the repayment of the decedent's debts was to be decided solely by the share of the inheritance estate comprising only Albrecht's personal assets. In assessing the percentage of shares in the estate between the daughter and the brother, the court automatically followed the portions of inheritance tax paid by each. Elżbieta was thus ordered to pay almost the entire claim (96.8% of the value of the debt) (LCSA, ACV, No. 5692, pp. 162–162v).

Both judgments against Elżbieta are highly interesting, for at least two reasons. Firstly, they demonstrate the unsteady nature of the courts' approach to separating the assets of a fideicommissum and recognising the specific characteristics of that institution. Contrary to the approach taken in the cases previously discussed, the courts' rulings in the actions brought against Elżbieta were inclined to view fideicommissa as not forming part of the inheritance estate and thus not part of the inheritance procedure. Secondly, the interpretations dealing with the fideicommissa in the two cases involving Albrecht's promissory note debts are surprising on account of the stance taken toward the decedent's daughter, who was precluded from succeeding to the fideicommissa. Each and every problem considered by the courts was decided unfavourably for Elżbieta. Studies in the territorial sphere of Prussian-German law have revealed that in its legal tradition, showing significantly more attachment to the fideicommissum institution, there was a tendency towards an equitable construction aiming to improve the situation of women from fideicommissum families (Kucharski, 2022, pp. 103–107). In the case of the judgments from the former Russian partition, this directive did not enjoy universal acceptance. However, this was probably not a conscious and deliberate concept, nor the giving of effect to an entrenched interpretation. The courts scrambled chaotically to resolve a problem involving an anachronistic and incomprehensible legal institution, giving rise to peculiar and unpredictable practical consequences.

Conclusions

The cases discussed above are interesting from the perspective of social mores and property affairs, painting a fascinating picture of family relations in the aristocratic Radziwiłł family during the first half of the 20th century. A somewhat surprising and multifaceted picture emerges of the attitudes taken by lawyerly elites to the institution of familial fideicommissum itself. We can formulate three general conclusions on this basis. Firstly, the legal construct of familial fideicommissum was incomprehensible to lawyers active in the former Russian

partition (governed by French and Russian law). The source of this lay primarily in the scarce proliferation of this institution in that territory. The legal rules governing fideicommissa sparked enormous interpretative difficulties; their understanding was not uniform, and their application was chaotic. Secondly, lawyers educated on French and Russian law did not perceive fideicommissa as a pan-European legal institution with fixed characteristics deeply rooted in the traditions of continental civil law. The counsels, therefore, made very liberal attempts to adapt the accepted characteristics of fideicommissa to the needs of their clients. The courts, in turn, gave the relevant provisions as narrow a construction as possible, disputing the legal specificity of fideicommissa (the latter trend is especially clear in the Radziwiłł cases). At times, judges recognised the exceptional characteristics of the institution of a fideicommissum, slavishly following the rationale of Russian courts (as is evident in Elżbieta's disputes with her father's creditors). Thirdly, the key element from the perspectives of both judges and trial counsels was the need to apply the obsolete legal monuments of the 16th century in the Radziwiłł litigation. The interpretation of the founding charter in light of the LS required the exegesis of anachronistic, pre-modern, pre-positivist law characterised by its rudimentary nature and its imprecision. An additional challenge came from linguistic aspects – the judges had to interpret instruments drafted in Old Polish, Latin, or Ruthenian in light of the terminology of contemporary Russian and Polish law. Such cases doubtless must have proven labour intensive to the lawyers of the 20th century, requiring them to leave their comfort zones and apply a different body of knowledge and skills compared to addressing typical points of law.

The aforementioned factors forced the judges assigned to the fideicommissum cases to rely on interpretations that were intuitive and as simplified as possible. Logical consistency and interpretative correctness were pushed decisively to the background. This allowed the lawyers and judges to avoid the necessity of risky decisions demanding intense intellectual effort.

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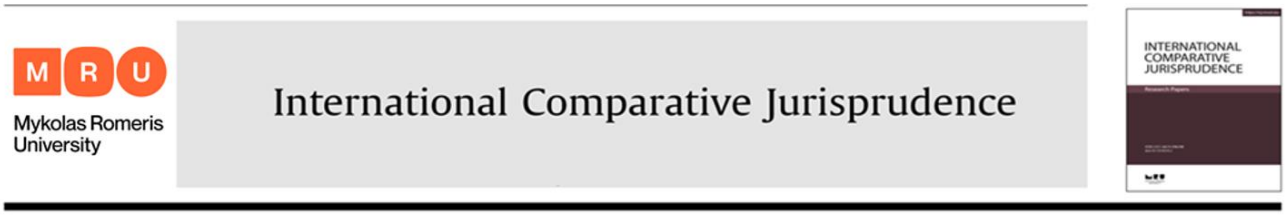

THE INSTITUTE OF TRADE SECRETS IN ENGLISH AND FRENCH LAW IN THE 19TH AND EARLY 20TH CENTURIES: DOCTRINE AND JURISPRUDENCE

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Abstract. This article examines the emergence of trade secrets law as a specific sub-branch of civil and industrial law which protects a trade secret regardless of whether or not it has been patented. In English law, this protection has been afforded by courts of equity since the judgment of *Yovatt v. Winyard* in 1820, whereas the development of French case law on trade secrets in the 19th and early 20th centuries was based upon Art. 418 of the Criminal Code of 1810, which pronounced the divulgation of a trade secret to be a misdemeanour. Thus, French case law was developed by correctional courts, as well as some cases that reached appellate courts and the Court of Cassation. The discussion of the history of trade secrets law will enable the institute of trade secrets to be more thoroughly understood, and will facilitate the examination of the legal grounds for courts affording protection to trade secrets.

Keywords: trade secrets, industrial law, property rights, breach of confidence.

Introduction

The development of the legal protection of trade secrets lies within almost the same time period as the protection of patents, trademarks and copyright, although the history of their protection is not very clear. For instance, Morison (1956, pp. 53–55) recalled examples of 17th-century cases which were prototypes of the tort of passing off. Vandevelde recognized trade secrets to be a creation of 19th-century law, since initially only patents received legal protection, whereas trade secrets did not. Despite their recognition in later decades, trade secrets did not become a subject of property rights (Vandevelde, 1980, pp. 340–341, 348–350). In the judgment of *Robb v. Green* (1895, pp. 16–17), the Court of Appeal of England found that regardless of the legal theory on which the lawsuit is grounded – i.e., whether it is a breach of contract or a breach of faith and confidence – an injunction should be imposed on the wrongdoer. According to the view of H. T. B. (1961, pp. 146–148), the recognition of the protection of trade secrets in law actually owes to the industrialization and competitiveness of the economy and the comprehension of the fact that the inability of the inventor to profit from the created product would cause a loss to the society of creativity and talent. According to Vickery (1982, p. 1451), the duty of confidentiality arises from societal norms and public policy upon a certain issue, and it is not necessary for this duty of confidentiality to be prescribed in a certain agreement or contract.

The Protection of Trade Secrets (1973, p. 7) report of the New Zealand Tort and General Law Reform Committee held that an employer may imply that a trade secret learned by an employee in the course of work must remain undisclosed for an indefinite time period, and this is an implied clause of a contract with said employee. In the American case of *Peabody v. Norfolk*, adjudicated by the Supreme Judicial Court of Massachusetts in 1868, one of the first American legal precedents on trade secrets was observed. Here the reasoning was substantially influenced by English law, as the court held that there is property in a trade secret which the court will protect (*Peabody v. Norfolk*, 1868, pp. 457–458). To return to *Robb v. Green* (1895, pp. 15–17, the court agreed that there was an implied trust placed in the employee that they would not use information obtained in the course of their employment with the plaintiff, which derives from the trust-based relationships between the master and servant, implying that the employee would behave honestly with their employer. In the contemporaneous case

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of *Portal v. Hine* (1891, pp. 330–331), there was an express customary rule previously agreed between the plaintiff and defendant: that the latter would not disclose anything connected to the business of the plaintiff.

In the history of common law, these societal norms can be demonstrated by the Scottish case of *AB v. CD*, adjudicated by the Court of Session in 1851. In this case, a physician revealed a birth certificate to a church meeting where the plaintiff was an elder, indicating that his child was conceived before his marriage. The court held that the relationship between client and medical attendant bore the characteristics of confidential relations, despite the fact that the doctor did not find so himself and there were no specific agreements between the physician and the plaintiff in relation to the confidentiality of the disputed certificate (*AB v. CD*, 1851, pp. 177–180). In a leading English case relating to banking confidentiality, *Tournier v. National Provincial and Union Bank of England* (1924, pp. 480–481), the court held that the duty of a bank employee (referred to as an implied term of a contract) not to disclose information on the bank account and transactions of a customer is similar to other confidential relations, such as those between solicitor and client, or doctor and a patient.

Some early trade secrets cases involved a specific obligation not to disclose a trade secret which was sold together with a business. This can be observed in cases in the United States such as *Vickery v. Welch* (1837, pp. 523–528), which was the first trade secrets case in the country decided based on a breach of bond, upon which the court held that the bond of promise not to disclose a secret chocolate recipe was permissible even if it could be considered a restraint of trade. To the same effect was the earlier English case of *Bryson v. Whitehead* (1822), where the plaintiff, about to retire, sold a business related to dyeing goods to the defendant together with a trade secret, executing a bond according to which, the defendant would not engage in the dyeing business within a distance of 50 miles from the locality in which he had acquired the business and would not disclose the secret for 20 years. The defendant thought that this bond was not sufficiently restrictive, finding that the plaintiff and his son-in-law could continue their business and demanded a more restrictive deed of covenant. The vice-chancellor held that, despite the law being against the restraint of trade in general terms, the trader may sell a trade secret and may restrain themselves from the use of it, and ruled that a specific performance may be decreed in this case (*Bryson v. Whitehead*, 1822, pp. 74–77). In common law jurisdictions, courts of equity restrain the defendant(s) from the use of trade secrets by means of an injunction that is based upon a breach of contract or confidence (Protection of Trade Secrets, 1973, pp. 7–10). In Canadian law, it was decided at an early stage that if an ex-employee uses their memory to apply to the same customers as they used to during the time that they were in the employment of the plaintiff without taking their list of customers, no injunction will be incurred (*Ice Delivery Co., Ltd. v. Peers & Campbell*, 1926, pp. 1177–1179).

This article is dedicated to a study of trade secrets law and its emergence in England and France. Hence, its foremost aims are to explore the development of trade secrets law in the 19th and early 20th centuries, to define trade secrets from the view of this legal institute, and to illustrate their protection by relevant jurisprudence originating from the above-mentioned time period. For the needs of the article, the author uses the comparative legal method (a comparison of French and English trade secrets law) and the historical-legal method, since the article is dedicated to the historical development of trade secrets law in England and France. The method of the interpretation of legal norms is also applied to Art. 418 of the 1810 Criminal Code of France.

Defining a trade secret is a fairly complicated task, and the scope of trade secrets is also quite broad. For instance, Barton (1939, pp. 124–125), after having examined the body of American case law on the subject from the early 20th century, found that a trade secret may be any secret which has some value to its owner and is not limited to the secrets of industrial processes, outlining that a considerable number of cases also concern lists of customers. From the French perspective, Rendu (1858), in his treatise on trademarks, commerce and competition, outlined that trade secrets do not necessarily include all of the manufacturing processes which are kept secret, but only those which explicitly belong to the industrialist, possess certain novelty, and are patentable. At the same time, a trade secret cannot be described as such after having been patented, regardless of its novelty (Rendu, 1858, p. 370). Poulliet (1875, pp. 626–627) seemed to disagree with this definition, finding that trade secrets should encompass all of the details of manufacturers, including sleight of hand (not being an actual invention) which was utilized in the manufacturing process and of which competing factories had no knowledge. According to C.C. (anonymous author), in a note to a judgment of the Paris Court of Appeals in 1908, it is impossible to give a precise and full definition of what is a trade secret. However, according to the position of the Paris Court of Appeals expressed in this judgment, a trade secret should be viewed as a part of the soul of a

factory, to be kept secret from third parties and viewed only by those who use it necessarily for the life and prosperity of the factory (Cour d'Appel Paris, 1908, pp. 323–325).

Regarding other civil law jurisdictions, in Belgian law, where the provisions of the Criminal Code (Art. 309) provide punishment for a wrongdoer who has disclosed a trade secret during current or past employment, a trade secret is considered to be a property right. Criminal law sanctions relate only to people once they are employed at a certain enterprise and have learned a certain trade secret therein. When a person has learned and disclosed a trade secret while not being an employee, such an act is considered a civil wrong – *unfair trade*, as was established by the Commercial Court of Liege in its 1914 judgment (Trib. comm. de Liege, 1914, pp. 255–256). In its 1987 judgment, the Supreme Court of Austria remarked that a trade secret exists: when the facts and the manufacturing processes are important for its competitiveness; if such facts are known only to a narrow group of people; if the craftsman desires to keep these facts secret, in which case they have to be kept so; and if there is a legitimate economic interest in retaining the trade secret (Oberster Gerichtshof, 1987).

1. Trade secrets in English law

Trade secrets have twofold legal protection in England – by a statute (The Trade Secrets (Enforcement, etc.) Regulations 2018*)* and common law, and resting upon the theory of breach of confidence or a breach of contract. In this article, we will examine the development of trade secrets theory in common law. While the first case in England in which an injunction to restrain a defendant from the use of confidentially obtained information in the course of their employment with a plaintiff was adjudicated on in 1820 (*Yovatt v. Winyard*, 1820, pp. 394–395), English courts have also imposed injunctions for: the unauthorized use of a list of agents (*Baker v. Gibbons and Others*, 1972, pp. 700–703); restraining the defendant's use of secret formulas and manufacturing processes (*Caribonum Company Limited v. Le Couch*, 1913, pp. 385–389); the secrets of preparing medicines, which were kept confidential within subsequent generations of the plaintiff's and defendant's families (*Morison v. Moat*, 1851, pp. 241–257); engine schematics (*Merryweather & Sons v. Moore*, 1892, p. 505–508); lists of customers (*Robb v. Green*, 1895, pp. 15–17); as well as copying client address directories as a breach of copyright (*Kelly v. Morris*, 1866, pp. 222–224; *Lamb v. Evans*, 1893, pp. 131–138).

Since a trade secret is itself *information*, it must be outlined here that English law recognizes the common law right to information as a property right. The legal precedent recognizing it as such is *Exchange Telegraph Company (Limited) v. Gregory & Co.*, adjudicated on in 1895. In this case, the plaintiffs contracted with the Stock Exchange committee to be furnished with information relating to the prices of stocks and shares, which was furnished to the plaintiffs by telegraph using Morse code, and then later telegraphed to subscribers. This information was simultaneously gathered by a clerk, who printed the sheets and later converted it to a newspaper. Later, the information was also given to the defendant, a legal entity which had subscribed to the plaintiff until 1894, and with whom the contract had come to an end. Later, the defendant continued to obtain the information from the plaintiff's other subscribers and use it on boards in his office, even though it was agreed that the obtained information should not be sold or given to entities which were not subscribers. The first instance granted an injunction against which the defendants appealed, claiming that they did not obtain the information from the newspaper and hence there was no copyright infringement, and holding that this printed list could not amount to what could constitute a "literary composition", noting that the plaintiff company did not sustain any damages because of such a use of information. The plaintiffs (the respondents in the case) argued that they held the copyright to the printed lists and that they had common law property in this unpublished information. The Court of Appeal of England ruled to dismiss the appeal. Lord Esher, M. R., held the following: "Now the information is a thing which can be sold. It is property, and, being sold to the plaintiffs, it was their property. The defendant has, therefore, wilfully invaded the plaintiffs' right of property in a very mean way". The defendant undoubtedly obtained the information for commercial use, and the defendant paid for the information to another subscriber, hence inducing said subscriber to commit a breach of faith and honour with regards to the plaintiff. It was also found that the damages were at large, the acts of the defendant were likely to cause damages to the plaintiff, and there was a concrete breach of copyright in the fact that the defendant used the information by writing it on a board in their office, some of which was taken from the plaintiff's newspaper. Kay, L. J., and Rigby, L. J., joined the reasoning of Lord Esher, M. R. (*Exchange Telegraph Company (Limited) v. Gregory & Co*, 1895, pp. 262–266). Hence, in such a view, there may be a proprietary interest in information which constitutes a trade secret from the side of the person or the legal entity which produced it.

In English law, *Yovatt v. Winyard* (1820) was the first recorded legal case in which the court issued an injunction to restrain the defendant from using confidential information in their own trade. This case is also famous for being cited as a prototype for the formation of the right to privacy (Elson, 1929, p. 307; Fague, 1967, p. 242; Dworkin, 1967, pp. 419–420; Seipp, 1983, pp. 358–359), even though it was a trade secrets case. Interestingly, *Pollard v. Photographic Company*, a distinctly privacy-based case adjudicated on in 1888, did not create a new tort, having being adjudicated on regarding a breach of implied contract and confidence. The facts of the *Yovatt v. Winyard* case were as follows: the defendant went into the employment of the plaintiff, a proprietor of veterinary medicines, as an assistant and a journeyman, who, according to an agreement, was not to be taught any of the manufacturing processes of the medicines used (that is, the trade secrets). Some time passed and the defendant then left the employment of the plaintiff, who later learned that during the course of their employment, the defendant had surreptitiously obtained access to the recipes recorded in his books, and had then begun selling them accompanied by the papers for administering said medicines, which were nearly identical to the plaintiff's. When the case was heard before the Court of Chancery, the vice-chancellor ruled to impose an injunction on the defendant on the basis of a breach of trust and confidence. The case was also distinguished from two earlier trade secrets cases – namely *Newberry v. James* (1817) and *Williams v. Williams* (1818), to which we will turn below – in that it was not the same as the first situation, in which the proprietor of the secret communicated it to the employee, or the second situation, in which the secret was surreptitiously obtained, as shown by the case circumstances of *Yovatt v. Winyard* (*Yovatt v. Winyard*, 1820, pp. 394–395), or later cases, such as *Robb v. Green* (1895, pp. 15–17) or *Exchange Telegraph Company (Limited) v. Gregory & Co*. (1895, pp. 262–266).

The case of *Williams v. Williams* (1818) was somewhat different in its circumstances as the plaintiff and defendant were father and son, with the former being engaged in the business of preparing and selling medicines for the treatment of eye diseases for several years. When his young son grew up, the plaintiff gave him the management of his dispensary and proposed that he engage in a partnership, which he accepted. Then, the defendant allowed him to control the stock of medicines and communicated the secret of their production to him. The defendant (as the plaintiff claimed) then took over the dominion of the property and communicated the secret to his wife and to another man, the co-defendant (who afterwards claimed he had been told nothing). The defendant later removed various articles from the plaintiff's custody, sold medicines, threatened to prepare and sell the same medicines, and divulged the secrets of their production. The plaintiff pleaded that the items removed should be returned and an injunction be enforced. The defendant and his wife, in their respective affidavits, denied that the plaintiff was the inventor of the secret, claiming that the defendant had learned it at an early age from his mother who learned it elsewhere, and that the defendant did not take over dominion of the property that the plaintiff entrusted to him and sold only what the plaintiff asked him to. The vice-chancellor granted an injunction, but the lord-chancellor of the High Court of Chancery ruled to dissolve it in part. Concerning the first part of the case (that the defendant took over dominion of the articles and began vending), the court found that the defendant acted in breach of the agreement that he and his father concluded and the injunction was properly imposed. However, regarding the trade secret, the court refused to protect it, finding that patents are already protected by law and if the secret had already been disclosed, then the injunction would be of no use. Moreover, the court also noted that, according to the defendant's affidavit, the secret was no secret at all. Under these considerations, the injunction was dissolved (*Williams v. Williams*, 1818, pp. 157–160).

Another case from the same era, *Newbery v. James and others* (1817), also published in Merivale's Reports alongside *Williams v. Williams*, featured a dispute relating to an ancient agreement regarding producing and vending medicines. The plaintiff and defendant were the sons of an artisan and a physician, and the defendant's father invented pills for gout, rheumatism and other diseases and engaged in an agreement to sell and deliver them to the plaintiff's father many years before the lawsuit – in 1747. The agreement was concluded for 21 years, but was extended to an indefinite period in 1755. In his will, the plaintiff's father bequeathed all interests and shares in the preparation and dissemination of medicines to him, and a similar agreement relating to an unpatented medicine called "Analeptic Pills" (the first medicine was patented) was concluded between the plaintiff and the defendant's father. They worked together for some time until the latter's demise, and the plaintiff and defendant later worked together for some time before the plaintiff lodged a lawsuit. The complaint was that the defendant and the other defendants (the defendant's co-workers) did not supply the plaintiff with the medicine as agreed, and the defendant threatened to communicate the secret of producing the medicine and insisted that the agreement (which the defendant claimed was obsolete) should be carried out indefinitely, pleading for specific performance and an injunction to prevent the defendants from disclosing the secret of preparing said medicines except to those designated for this purpose. The defendants claimed that it was the

plaintiff who abstained from fulfilling the agreement, and thus they thought that they were not bound to said agreement anymore. In this case, the court ruled that it would not impose an injunction so as to avert the violation of the covenant between the parties of the dispute, of which, according to the nature of the subject, there could be no specific performance. According to the court, the old patent, referred to above, had expired, and the agreement between the parties did not actually relate to the patent; independently of it, the parties agreed not to sell the subject of said patent, except to each other. The court continued that in order to support the patent, its specification had to be clear enough to let the world make use of this invention when the patent's term finished. The case record also suggested that it was seemingly not properly proved that the secret of producing medicines was really a secret or that it was disclosed to unauthorized persons. The injunction was thus not imposed (*Newberry v. James*, 1817, pp. 446–451). A further question then arises: Could the plaintiff have prevailed in an action for damages had such an action been commenced?

In *Morison v. Moat and Others* (1851), which became the central case for the formation of trade secrets law, the plaintiff and defendant were the sons of two men who engaged into a partnership in 1830, wherein one was the inventor of a medicine and the other was its distributor and seller. They conducted business under the name Morison, Moat, & Co, Hygeists, which lasted for over 20 years and was continued by their sons. When the two signed the partnership deed, two bonds were executed. Inter alia, the inventor communicated the secret of producing the medicines to his partner, and the condition of said bond was that the partner should never communicate it to anybody, and the same related to the inventor. Then, the two introduced their sons into the partnership, whom they supposed would continue the business. The partnership, having been arranged to last until 25 March 1851, expired, and the defendant began selling the medicines under another name and publicly advertising the medicine. The plaintiff discovered that the medicine was sold with the name of the plaintiff's family on the boxes of medicine, the medicines were made according to the recipe created by the plaintiff's father, and the medicine was sold as Morison's Universal Medicine, which the plaintiff found to be a fraud against him. Moreover, the plaintiff discovered that the defendant's father had disclosed the secret of producing the medicine to the defendant in 1835. In his bill, the plaintiff mentioned that the secret was never communicated to the defendant, and the defendant was not permitted to be present within the process of creating the medicine. The defendant held that he learned the ingredients while he was working with his father, admitted that the recipe was told to him by his father in view of him being a succeeding partner, and said that the plaintiff knew that defendant had learned the recipe, and the medicine was not patented. The plaintiff denied that the defendant was an active partner and that he had an opportunity to learn the process of creating and producing said medicine. The action was filed upon a breach of faith and a breach of contract. The vice-chancellor noted that there were several precedent cases resolved upon different theories, but all successful actions lead towards an injunction towards the tortfeasor. The court concluded that the defendant's father had indeed communicated the secret to the defendant in a breach of faith and contract, and said that the plaintiff was entitled to an injunction, but not to the extent that the defendant was prohibited from any use of the name of the plaintiff's family in the pills. The court underlined that this would depend on the mode in which the name of the plaintiff's family was used, and restrained the defendant from the production or creation of any medicines which derived from the secret of their preparation. It also prohibited the defendant from using the method of producing the medicine in accordance with the secret, and that the sale of two medicines which contained the plaintiff's family name in their titles be discontinued (*Morison v. Moat and Others*, 1851, p. 241–257).

The case of *Robb v. Green* (1895) is a classic of 19th-century trade secrets law in England, and also concerns the issue of the list of customers. According to the facts, the defendant entered the plaintiff's employment in 1890 as a farm manager and worked for him until 1893. During the course of his employment, the defendant had access to the plaintiff's business books, from which he managed to copy the names and addresses of the plaintiff's customers. Soon after leaving the employment of the plaintiff, the defendant started his own business as a game and egg dealer, using the information he had obtained from the books of the plaintiff. The Court of Queen's Bench ruled in favour of the plaintiff, estimating damages at £150, ordering the defendant to deliver to the plaintiff the list of names and addresses of customers that he had copied from the plaintiff's books, and imposing an injunction restraining the defendant from any further use of the documents mentioned above. The defendant's counsel argued that there was no specific clause in the defendant's contract in terms of inhibiting him from using the customers' names and addresses, against which the plaintiff's counsel argued that every contract for service would imply that the servant would act faithfully. Lord Esher, M. R., having stated the facts of the case, established that the defendant apparently copied the list of the plaintiff's customers to persuade them to deal with him rather than the plaintiff. This position agreed with that of Hawkins, L. J., who adjudicated the

case at the Queen's Bench Division and found that the acts of the defendant should be viewed as a *breach of the trust* which was imposed on him. Lord Esher, M. R., went on to interrogate whether there had been a *breach of contract* in the case. The contract between the plaintiff and defendant was a written one, but contained no actual clause in terms of the obligation of the defendant to act honestly towards the plaintiff, nor an obligation not to take and copy materials from his books. According to the view of Lord Esher, M. R., it should be implied that the servant will act honestly towards the master, and *faithful service* should be implied in any contract for service, holding that a master cannot employ a servant if they are not assured that the servant will act faithfully. Moreover, the servant should consider that the master relies on their faithful performance of their duties, which arise from the *confidential* legal relationships between said master and servant. Thus Lord Esher, M. R., came to the conclusion that there was both a breach of confidence and a breach of contract by the defendant, which caused damages to the plaintiff, and the plaintiff was entitled to an injunction which would restrain the defendant from further breaches of contract.

Kay, L. J., observed that an injunction in cases of this type is an old remedy, mentioning *Yovatt v. Winyard* and *Morison v. Moat*, both of which were adjudicated on upon the legal foundation of a breach of trust and confidence in similar trade secrets cases. Kay also found that, regardless of the legal foundation (property rights, breach of contract, breach of confidence), the court would exercise its jurisdiction and impose an injunction on the wrongdoer. In the case at stake, in the opinion of Kay, L. J., there was a breach of confidence, since the defendant copied the entries from the plaintiff's books surreptitiously. In terms of a breach of contract, Kay observed that there was an implied contract to act honestly and hence there was such breach, considering the defendant's acts. Smith, L. J., agreed that there was a *breach of contract*, agreeing that there is an implied term of a contract in that the servant has to act faithfully with regard to their master. Regarding whether the defendant acted faithfully, Smith mentioned that the defendant created the copies when nobody saw him and his aim was to use the information for himself. Moreover, the defendant confessed that he did not act faithfully, thinking that he would be fired had his master seen him copy the information from the books. Therefore, the appeal was dismissed (judgment for plaintiff) (*Robb v. Green*, 1895, pp. 15–17).

2. Trade secrets in French law

The legal protection of trade secrets in French law was anchored by Art. 418 of the Criminal Code of Napoleon in 1810–1995. This norm provided punishment in three different (originally two, until 1863) variants of a misdemeanour. The first provision held that a director, servant or worker of a factory who divulged, or attempted to divulge, information containing a trade secret to foreign citizens or to French citizens who are living abroad would be punished with a 2- to 5-year imprisonment sentence and a monetary fine totalling from 500 to 20,000 francs, and may be deprived of their rights for a term of 5 to 10 years as provided by Art. 42 of the Criminal Code. The second provision imposed a lighter punishment in cases where trade secrets were divulged to French citizens living in France – imprisonment from 3 months to 2 years and a fine from 16 to 200 francs (Bourguignon-Dumolard, 1811, p. 290; Rendu, 1858, p. 370). The third provision, enacted by the law of May 13, 1863 (Loi portant modification de plusieurs dispositions du code penal, 1863, p. 475), related to the trade secrets of arms manufacturers and military factories belonging to the state, imposing the highest sanction anchored in points 1 and 3 of Art. 418 of the Criminal Code (Code Napoleon, 1810). According to the judgment of the Court of Cassation of France of 1903, it is enough for the tortfeasor to commit a single act revealing a trade secret in France so that French courts can exercise jurisdiction to procure the matter against the defendant (Cour de Cassation (France), 1903, pp. 105–108).

Chauveau and Helie (1864) observed that according to the explanatory note of the 1810 Criminal Code, the norm of Art. 418 derived from times in which patriotism was especially relevant in matters relating to trade secrets. The situation changed with the novel character of international relations, new modes of competition in trade, and new conditions under which inventors had to work. To constitute a criminal misdemeanour, held Chauveau and Helie (1864, pp. 535–536), the divulged secrets should be truly secret; that is, solely attached to a certain manufacturer, invented or elaborated for them, and used especially at said factory. There is very little legacy regarding the existence of the institute of trade secrets in the Ancien Régime era. Mayer (1900, pp. 6–7) held that the roots of business secrets predominantly lie in the secrecy of trade books, since tradesmen were required by law to possess such books and said trade books contained all information regarding the affairs of the tradesperson, such as contracts, correspondence, expenditures, information relating to clients, creditors, debtors and many other details. Thus, tradesmen retained a property right and a right to maintain these books,

and this right, as Mayer outlined, was so great that in previous eras merchants would allow themselves to lose lawsuits rather allow their trade records to be published.

Such was the state of affairs until the Edict of King Louis XIV of 23 March 1673 (*Edit du Roy, servant de reglement pour le commerce des negocians & marchands, tant en gros qu'en detail*), which provided the regulation of trade for tradesmen and merchants. On the one hand, Title III Art. 1 of the Edict obliged tradesmen to maintain trade books (in fact, this was frequently done by tradesmen even without the official obligation); on the other hand, the court could not order or demand the production of trade books, except from in cases of succession, unification or the division of a company in cases of bankruptcy (Title III, Art. 9) (Bornier, 1744, p. 462). The comment to Title III, Art. 9 by Bornier (1744) provides that the reasons for adopting this provision were the disturbances which could arise, since by ruling otherwise, not only could secrets relating to the condition of affairs of merchants and tradesmen be unveiled, but also the affairs of the other families which had relationships with said tradespersons. In terms of the exception of succession, Bornier explained it through the joint interest of the parties (pp. 462–463).

The Correctional Court of Mulhouse, in its notable judgment of 1865, mentioned that Art. 418 of the Criminal Code was adopted with a high moral intention to impose the workers and employees of industrial enterprises a kind of professional secret akin to that [established] by Art. 378 of the same Code imposes to doctors, surgeons and others, and to guarantee them by the fear of severe penalties against their own weaknesses […] (Trib. corr. de Mulhouse, 1865, p. 643).

The case law indicates that it does not matter who reveals a trade secret in relation to the trade secret itself: for instance, even if a trade secret was co-invented and developed by the person who revealed the secret, this person nevertheless committed a misdemeanour (Cour d'Appel de Lyon, 1863, pp. 316–318). A tortfeasor who induces an employee to communicate a trade secret to them, for instance, by means of monetary benefit, also becomes complicit in the misdemeanour, punishable under Art. 418 of the Criminal Code (Cour d'Appel de Paris, 1856, pp. 90–96). The same could be said about an industrialist who induces the employees of another manufacturer to visit their home in order to benefit from trade secrets (Trib. corr. de la Seine, 7 juin 1872; Cour d'Appel de Paris, 31 juillet 1872 / Trib. corr. de la Seine, 28 avril 1876; Cour d'Appel de Paris, 30 juin 1876). According to the note to the judgment of the Paris Court of Appeals of 1856 and the Correctional Court of Lyon of 1925, there are three elements of the misdemeanour of divulging a trade secret, namely: 1) when the misdemeanour is committed by a director, employee or a servant of a certain enterprise; 2) when a trade secret is communicated; and 3) when a trade secret is communicated with a fraudulent intention (J.P. in Cour d'Appel de Paris, 1856, p. 96; anonymous author in Trib. corr. de Lyon, 1925, pp. 30–31).

French jurisprudence shows that aggrieved parties brought complaints by means of a private prosecution; that is, at the same time, it was also possible to institute civil proceedings against the tortfeasor under Art. 1382 of the Civil Code, which would be an ordinary civil lawsuit for damages, as clearly shown by the judgment of the Grenoble Court of Appeals in 1872 (Cour d'Appel de Grenoble, 1872, pp. 44–45). Rogron (1833) outlined that in case of the divulging of a trade secret by the tortfeasor to a foreign citizen, not only is a private interest violated, but a public interest as well, since by these illegal acts the tortfeasor would prevent the development of trade in France. However, if the trade secret is revealed in France and to French citizens, then only the interest of a private party is violated (Rogron, 1833, p. 316). Chauveau and Helie (1864, pp. 535–536) agreed with such a position, finding that if the tortfeasor reveals a trade secret in France to French citizens, only the private interest is violated, but in other cases outlined in the Criminal Code, both private and public interests are violated. The existence of a trade secret – which, according to Poulliet, has its novelty as its distinct feature – should presuppose the existence of an industry for its application, and thus the sphere of trade secrets lies only in industrial law. Poulliet provided an example, observing that if one scientist were to make a discovery and communicate it to another scientist who then applied it for his own purposes, this would not amount to a breach of a trade secret, despite being an indiscreet act. Thus, he concluded that a trade secret should belong to a factory and relate to manufacturing processes (Poulliet, 1875, pp. 626–630).

The definition of a trade secret and its features is fairly complicated in French law. Regarding definitions, Thaller (1910, p. 77) concluded that a trade secret is a means of manufacturing which the manufacturer secretly uses to obtain either a product or a result, and the institute of trade secrets should apply not only to manufacturing, but to every merchant. The courts, however, did not find that any detail an employee had learned while working for

an employer could constitute a trade secret. Indeed, in a distinct judgment of the Correctional Court of Seine (Paris) in 1869, an employee, the defendant, learned of plans detailing a table designed to resemble a Chinese chalet while working with his initial employer, the complainant, in September 1868. The defendant soon left for the employment of another craftsman, where they recreated the same table. However, the court found that the defendant was innocent, highlighting that Art. 418 of the Criminal Code imposed punishment for the divulging of manufacturing processes – that is, processes that are used in manufacture. Thus, this does not relate to the divulging of operations, even though this is indiscreet behaviour, and hence no violation of a trade secret took place (Trib. corr. de la Seine, 1869, pp. 316–318).

At the same time, means of manufacturing, being an important secret of a factory which could give an advantage to a manufacturer, regardless of not being an actual invention, were stringently considered to be a trade secret according to the judgment of the Paris Court of Appeals in 1861, which was affirmed by the Court of Cassation of France a year later (Cour d'Appel de Paris, 1861, pp. 221–223; Cour de Cassation (France), 1862, pp. 224–225). In its 1861 judgment, the Paris Court of Appeals noted that in order for a process to be considered a trade secret, it is enough to prove that the manufacturing process is concealed (Cour d'Appel de Paris, 1861, pp. 221–223). A. L. (anonymous author), in his note to the judgment of the Correctional Court of Seine, discussed the application of Art. 418 of the Criminal Code in cases when the employee who revealed the trade secret was already out of the employment of the factory where the trade secret was learned. In the view of A. L., it is enough for the tortfeasor to have had employee status when the trade secret was revealed. However, when said employee leaves the factory, they "turn into common law", which in the sense of industrial law means that they are free to use any manufacturing process not protected by a patent; hence, A. L. found that the manufacturer should undertake various measures in order to patent trade secrets so that they would not be available to third parties (Trib. corr. de la Seine, 1915, pp. 47–48). Roux, in his comment to the judgment of the Court of Cassation of France of 1903, held that the revelation of a trade secret is a compound criminal misdemeanour, since it encompasses not only the communication of the secret, but also the act of searching for it and transporting it abroad (if this occurs), and that the revelation of a trade secret is a form of a breach of trust which the employee commits in relation to the director. Roux outlined that prosecution for revealing trade secrets abroad began in 1866, 3 years after the latest amendments to the Criminal Code were enacted (Roux in Cour de Cassation, 1903, pp. 105–108). An anonymous author to the case note to the judgment of the Correctional Court of Lyon in 1925 argued that a trade secret may be any manufacturing process which is used in a certain branch of industry and which other manufacturers have no knowledge of, and this is not necessarily a new manufacturing process, but a process which is not used by other manufacturers (anonymous author in Trib. corr. de Lyon, 1925, p. 30). It is also notable that in French law, a violation of a trade secret does not always presuppose that a trade secret is divulged by one person to another: in the judgment of the Paris Court of Appeals of 1908, the court held that if a former employee leaves their employment and starts up a rival business and uses patents, manufacturing process reports and trade secrets, they are also guilty of a misdemeanour under Art. 418 of the Criminal Code (Cour d'Appel de Paris, 1908, p. 322). Notably, the Correctional Court of Lyon, in its 1925 judgment, held that a trade secret exists from the same moment as it begins to be applied in the manufacturing process, and is not equally available to all (Trib. corr. de Lyon, 1925, pp. 30–31). The same court held that it is not necessary for a manufacturer to use new methods which were completely unknown before them, and to constitute a trade secret it is enough that the manufacturer uses a more elaborate and practical process, even if its methods are generally known but are not available to others who are engaged in the same profession (Trib. corr. de Lyon, 1925, p. 31).

The Paris Court of Appeals provided an explanation of proving a trade secret and considered the question of complicity in the trade secret violation misdemeanour in an 1861 judgment. The facts of the case were related to the manufacturing of oil. The complainant owned a plant manufacturing oil extracted from resinous substances in Saint-Denis, while the defendants had a similar enterprise in the town of Bercy. One day, the director of the plant in Bercy, finding that the rival factory made better and clearer oil than they manufactured, asked an employee to find out which caustic lye the complainants used at their factory and to bring him an example of it. The employee accepted the task and travelled to Saint-Denis, where a man helped him to contact an employee of the complainant's factory, one of defendants in the case. They met at a local cabaret, and said employee, not without hesitation, agreed to deliver up two bottles of lye for a monetary reward. Due to the inaccuracy of the accomplices, the violation became known to the complainants, who brought a criminal complaint. The Correctional Court (the court report did not clarify what type of trial court it was), speaking of the defendants' liability, held that the method by which the complainant's factory manufactured the oil was a trade secret of high importance since it was an advantage over other enterprises. The defendant's employee acted

in the interests of his director, and the court underlined that Art. 418 of the Criminal Code did not distinguish regarding how the defendants intended to use the means of manufacture. The defendant's employee, by the means of presents and promises, provoked the complainant's employee to divulge the secret and hence commit the misdemeanour. The man who served as an intermediary between the complainant and defendant's employees knowingly made contact between the two men, who had also discussed the trade secrets of the complainant's factory. He also gave money to the complainant's employee, and thus convinced him to break the trade secret. Hence, the court found the defendants guilty: the defendant director (under Art. 418 and 463) for complicity; the defendant's employee for complicity (Art. 418); the intermediary for complicity (Art. 418); and the complainant's employee for a breach of a trade secret (Art. 418). The four defendants were ordered to pay the complainant 200 francs in damages jointly. Said judgment was appealed by the defendant's employee to the Paris Court of Appeals, but the appeal was rejected. The court held that in order to find the defendant (appellant in the case) guilty, the elements of the misdemeanour had to be clarified, which was performed by the trial court. The appellant clearly provoked the complainant's factory worker to divulge the secret, and the process was clearly a trade secret. Though the fraudulent intention of the appellant was not directly mentioned in the judgment, the court held that the acts of the defendant – or "manoeuvres", as wittily observed by the court of appeals – presupposed a fraudulent intention in the court's assessment. Thus, all elements of the misdemeanour were established, and the court rejected the appeal (Cour d'Appel Paris, 1862, pp. 222–226). The Court of Cassation, hearing this case on January 10, 1862, affirmed the judgment of the Paris Court of Appeals, rejecting the cassation complaint (Cour de Cassation (France), 1862, pp. 225–226).

The Correctional Court of Mulhouse, in an 1865 judgment, formulated the essence of what is a trade secret and what should be understood under this concept. The facts were as follows. One day in 1865, a master of an industrial enterprise told his director that he had previously worked at a plant where the looms (sewing machines) worked much better by means of a certain device, which was applied to tighten and relax the harnesses. The director then asked the master to obtain such a device. Later, said master managed to obtain the device, which was presented to him by a colleague and which was subsequently taken to the foundry to serve as a model. Later, a similar device was also obtained by another master of the factory. The director of the factory and the two masters were prosecuted: the first master was charged with theft, while the other was charged with complicity by proxy or by concealment, and all the three defendants were accused of a violation of a trade secret. The court dropped the charges, except from Art. 418; that is, a trade secret violation, which the court found to be clearly visible from the circumstances of the case. The counsel for the defendants stated two arguments: firstly, they argued that a manufacturing process belongs only to the inventor, and can be protected only within the framework of it being patented. Secondly, the manufacturing process needed to be a "real secret", so that, argued the counsel, even the workers would know nothing of it, which in fact was not so, since all weavers knew the system and were acquainted with it.

The court did not agree with these statements. First, held the court, a trade secret may exist independently from the patent of an invention, and in fact, a patent would guarantee its disclosure after a certain time and inhibit it from being used by anyone other than the owner of the patent, but in these terms, a trade secret belongs to the enterprise which used it first. The patent, said the court, guarantees that all industrial invention, regardless of whether it is a secret or not, is kept for the owner, whereas the trade secret institute protects the manufacturer from the negligence of the worker as long as it remains a trade secret. A violation of a trade secret presupposes that the information disclosed *contains* a trade secret. The court held that a trade secret lies in the explicit and secret use of a certain instrument (i.e., device) not known to the community, not how it is manufactured, regardless of whether the workers know about it and of the complexity of its manufacture. Hence, the law which protects trade secrets protects said trade secret until it is explicitly used at a certain enterprise and is not known to others. Moreover, the court emphasized that the easier it is to make such a device and the more it is accessible to workers, the stronger the necessity of legal protection. The court concluded that there is a trade secret when an enterprise uses these devices exclusively; the devices were invented at the enterprise and were earlier unknown to the trade. Based upon such arguments, the court ruled that there was a violation of a trade secret (Trib. corr. du Mulhouse, 1865, p. 643).

The Correctional Court of Seine dealt with the issue of disclosing a trade secret to a foreign enterprise in its 1873 judgment. The complainant was the owner of a factory in Saint-Denis which was manufacturing dye products, and the defendants were his former employees: the first defendant was a chemist at the factory engaged in the manufacturing of Rosaline, whereas the second defendant was a brigadier at said factory. The plant

manufactured the colour *Violet de Paris*, which rival factories were unable to reproduce. In late 1870, the first defendant left the employment of the complainant and travelled to Basel, Switzerland, where he engaged in business with a local chemical manufacturer which soon produced an identical product to *Violet de Paris* (seemingly, the chemist disclosed the chemical formula required to produce the colour); the brigadier was suspected of having revealed the trade secret. Soon after, chemists from the complainant's factory managed to produce a new colour, calling it light green, and many precautionary measures were enacted so as to avert any leak of the manufacturing process. Before long, the enterprise where the first defendant was working reproduced the same colour (and according to later expertise, the manufacturing process was identical in both cases). How could this happen again?

The owner of the factory lodged a complaint against the two defendants, and the brigadier was liable for the transfer of orders and the control for the work – a peculiar situation given that he was a disciplinary supervisor who was not engaged with nor given any precise knowledge of the manufacturing processes. However, the search indicated that even if he was not supposed to have such knowledge, he definitely had an interest, since notebooks found at his home contained considerable information relating to manufacturing processes, especially concerning the production of violet and light-green colours. The investigation showed that the second defendant had taken products containing the colour either from the closed store or from a chemical laboratory, to which he had the key. The two defendants were known to work together and lived close to one another; after the first defendant had moved abroad, the defendants maintained frequent letter correspondence, and the second defendant tried to invite several employees from the complainant's factory to leave and to produce *Violet de Paris* abroad. Charges were filed against the two defendants, as well as the first defendant's employer at the foreign factory, where the brigadier was charged with divulging a trade secret abroad and for an illegitimate misappropriation of some of the products of the complainant's factory, and the two other defendants were charged with complicity.

In its judgment, the court outlined that despite the complainant having received two patents for the aforementioned colours, the means of application of the manufacturing processes could not be in the public domain: when the matter concerns the dyeing process, it is not enough to know all of the necessary ingredients and their nature – the combination and mixing of the colours and their handling and the skill applied to it in production are, as the court observed, "important parts of the success and remain without any description". The manufacturing processes were upgraded after patenting, and hence the court deduced that patenting the colours did not deprive the complainant of the ability to maintain his trade secret. As the court reports continued, the investigation showed that the brigadier had repeatedly disclosed the trade secrets of the complainant's factory both to French and foreign citizens, and he had taken chemicals from the complainant's factory surreptitiously. Thus, the court ruled to condemn the brigadier to an 8-month imprisonment term and the first and third defendant to 6 months, ordering all of the defendants to repay a fine of 800 francs severally, as well as an additional fine to repay the damages for the civil party of the case (Trib. corr. de la Seine, 1873, pp. 181–186).

A judgment of the Paris Court of Appeals in 1908 considered the question of a violation of trade secrets not only by divulging trade secrets to other manufacturers or employees of these manufacturers, but also involving the wrongful use of information containing trade secrets for the defendant's own purposes. The facts were the following: the defendant, who had previously worked with the Bliss company in Brooklyn in 1902 as a designer and constructor, went to work in its French subsidiary at Saint-Ouen named *Société Bliss et Cie*, which was established in 1905, where he worked until early 1907; he then left to create his own business in France with a partner. While engaged in his own business, the defendant used hundreds of figures, drawings and special devices taken from the Bliss factory which were kept secret, never having been published elsewhere. Later, in 1907, a search was conducted at the defendant's enterprise, where 400 figures were seized and numerous figures and technical documents were found, including figures of manufacturing different stages of goods. All of these documents were considered to be trade secrets by the Correctional Court of Seine, which heard the case at first instance and ruled to condemn the defendant. The appellate court considered that the technical documentation given from Brooklyn to the French subsidiary, including trade secrets, should be considered its property, and that the intention of the defendant was trivial: he and his partner were both previous employees of Bliss, and intended to manufacture machines similar to those in the factory that they both used to work for, and the defendant managed to obtain the trade secrets for the purpose of the benefit of his own enterprise. Thus, the Paris Court of Appeals found the defendant to be guilty of violating Art. 418 of the Criminal Code by divulging

a trade secret to a French citizen (his partner) and condemned him to pay a 200-franc fine, as well as to repay damages to *Société Bliss et Cie* amounting to 3,000 francs (Cour d'Appel de Paris, 1908, pp. 322–325).

Conclusions

In summing up the material discussed above, it should be noted that the institute of protection of a trade secret is a relatively young institute in industrial law. This institute has similarities with the protection of patents, representing a certain protected manufacturing process which is unknown to other manufacturers and hence grants a certain advantage to its inventor over rival enterprises.

Deriving from a number of definitions in academic literature and case law, a trade secret should be understood as a means or process of manufacturing which is used at a certain factory or plant for producing specific goods and which is not known or used by other enterprises which specialize in a similar business. For the necessity of protecting the success of the manufacturing of goods, such means and processes are kept secret by their inventors, and all people who are engaged in the manufacturing process and are acquainted with this secret are bound to not disclose it elsewhere.

The legal regulation of protecting trade secrets in England has historically been based on common law, where the courts have imposed an injunction on wrongdoers to restrain them for the further use of the trade secrets they have learned – whether surreptitiously or during the course of employment at a certain enterprise. The courts have underlined that although there could be a number of legal grounds for bringing an action against a defendant (breach of contract, breach of faith and breach of trust and confidence), the outcome would be an injunction, accompanied by the repayment of damages in certain cases.

In French law, the roots of protecting trade secrets lie first in the use of specific merchant books and registers which traders have been obliged to maintain since the Royal Ordinance of 1673. This was then supplemented in the early 19th century when the Criminal Code of Napoleon was supplied with Art. 418, which prohibited any disclosure of trade secrets by factory employees, servants and directors, especially prohibiting divulging the trade secrets to foreign citizens. The impetus behind imposing this penal provision punishing the disclosure of trade secrets was the influence of changing societal relations and rules of competition in industry, and developing and protecting business and industry in France.

This article discussed the theory and practice of applying judicial mechanisms for protecting trade secrets, which included the comments accompanying a number of outstanding cases relating to the disclosure of trade secrets in English and French law. Both of these countries had already developed a considerable body of jurisprudence upon this subject in the 19th and early 20th centuries.

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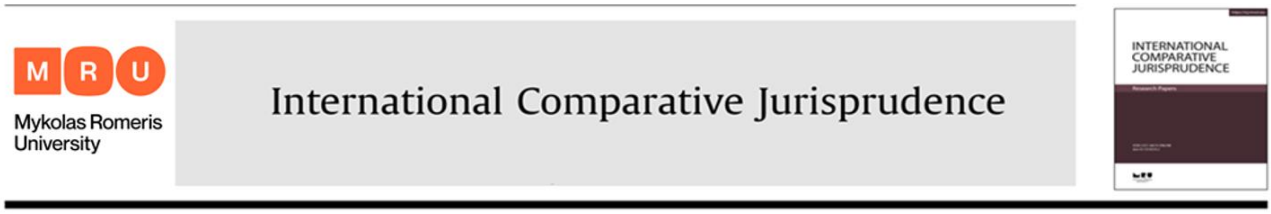

MECHANISMS FOR THE COMPENSATION OF WAR DAMAGES: TOWARD A FAIR SOLUTION FOR UKRAINE

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Abstract. Russia's audacious, unprecedented, illegal invasion of Ukraine, which began in a hybrid form in February 2014 before escalating into a full-scale invasion on February 24, 2022, has brought with it a significant amount of destruction, multibillion-dollar losses, and damage beyond measure – both to the whole state and to each individual Ukrainian resident. As a result of Russian aggression, thousands of civilians have been killed, dozens of cities have been damaged by shelling and airstrikes, and countless enterprises, medical institutions, educational institutions, cultural heritage monuments, kilometres of road, and residential buildings have been destroyed. The war continues, meaning that the damage caused to Ukraine by Russia is steadily increasing with each new day. Since the beginning of the full-scale war, one of the most important tasks has been to find ways and means for post-war reconstruction in Ukraine, as well as for the payment of compensation to the victims of the war. These compensation mechanisms should be implemented alongside those that come at the expense of the funds of the Russian Federation, which, accordingly, necessitates the lawful capture of these funds from an array of possible sources (sovereign assets of the Russian Federation, the assets of Russian oligarchs, etc.). After the Russian invasion of Ukraine, civilized countries froze the assets of the external foreign exchange reserve of the central bank of the Russian Federation, along with the private assets of Russian oligarchs. After freezing assets, the next step on the path towards transferring to Ukraine the assets and funds of the Russian Federation (both sovereign assets and those of private persons), which are located in many countries around the world, should be their confiscation, since freezing alone is not an effective measure. An important task is to help states take this step and develop appropriate confiscation mechanisms in their national legislation. This article is devoted to the study of this issue, as well as to the comparative analysis of that which has already been achieved in this field.

Keywords: war in Ukraine, frozen assets, war damages compensation, invasion of Ukraine, confiscation.

Introduction

Russia's audacious, unprecedented, illegal invasion of Ukraine, which began in a hybrid form in February 2014 before escalating into a full-scale invasion on February 24, 2022, has brought with it a significant amount of destruction, multibillion-dollar losses, and damage beyond measure – both to the whole state and to each individual Ukrainian resident. As a result of Russian aggression, thousands of civilians have been killed, dozens

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of cities have been damaged due to shelling and airstrikes, and countless enterprises, medical institutions, educational institutions, cultural heritage monuments, kilometres of road, and residential buildings have been destroyed.

The concept of hybrid warfare lacks a universally agreed definition in international law, leading to a plurality of interpretations. When discussing hybrid warfare in Ukraine, we refer to the combination of combat and information operations conducted by Russia since 2014, which aligns with the definition proposed by Arsalan Bilal (2021) in the *NATO Review*. According to Bilal, hybrid warfare entails the interplay between or fusion of conventional and unconventional instruments of power and tools of subversion. Bilal highlights two characteristics of hybrid warfare: the line between wartime and peacetime is rendered obscure, and hybrid attacks are generally marked by considerable vagueness. Russia invaded Crimea in 2014 and achieved its objectives by conflating deniable special forces, local armed actors, economic clout, disinformation, and the exploitation of socio-political polarization in Ukraine (Bilal, 2021). James K. Wither (2020) notes in his research that the term *hybrid warfare* attempts to capture the complexity of 21st-century warfare, which involves a multiplicity of actors and blurs the traditional distinctions between types of armed conflict, and even between war and peace. Although *hybrid warfare* is a Western term, not Russian, various hostile Russian activities – from the covert use of special forces to election manipulation and economic coercion – have been labelled hybrid, causing growing alarm in Western security establishments. Definitions of hybrid warfare emphasize the blending of conventional and irregular approaches across the full spectrum of conflict. Russia's actions in Ukraine in 2014 brought the concept of hybrid warfare to prominence. Western commentators found *hybrid* to be the most appropriate term to describe the variety of methods employed by Russia during its annexation of Crimea and its support for rebel militant groups in eastern Ukraine. Russian techniques included the traditional combination of conventional and irregular combat operations, along with the sponsorship of political protests, economic coercion, cyber operations, and, in particular, an intense disinformation campaign (Wither, 2020). Similar definitions are provided in the Cambridge Dictionary and by the Institute for the Study of War (Mason, 2020).

As of September 1, 2023, data from the Kyiv School of Economics revealed that the documented direct damage inflicted upon Ukraine's infrastructure by Russia's full-scale invasion had surged to a total of $151.2 billion (KSE Institute, 2023a). In turn, the amount of indirect damage caused to the assets of enterprises, industry, the agro-industrial complex and land resources, the energy sector, and infrastructure facilities (transport infrastructure, road facilities, railway infrastructure, as well as the aviation industry and the port industry) was $265.6 billion. This also included the cost of demining (around $41 billion, which is 15.4% of the total estimate of indirect damage) (KSE Institute, 2023b), because the total area of mined territories in Ukraine as a result of Russian aggression, as of March 2023, was over 174,000 km^2 – twice the area of Austria (Ukrinform, 2023a).

It is important to outline what exactly Ukraine considers to be subject to compensation, since this will also affect fluctuations in the overall assessment of damages and the amount sufficient for reconstruction to be completed. According to the information provided in the reports of the Kyiv School of Economics – which are developed jointly with Ukraine's Ministry of Communities, Territories and Infrastructure Development, the Ministry of Economy, the Ministry of Health, under the coordination of the Ministry of Reintegration of the temporarily occupied territories of Ukraine, and in cooperation with other relevant ministries and the National Bank – direct and indirect losses to the Ukrainian economy are subject to mandatory assessment and further compensation. Direct losses, as per the World Bank methodology, refer to the harm or destruction, either complete or partial, inflicted upon Ukraine's physical infrastructure by the war. On the other hand, indirect losses, also in accordance with the World Bank methodology, encompass alterations in economic flows resulting from the war. These include income decline across different economic sectors, additional expenses tied to the conflict, and prospective losses that the economy will endure due to the ongoing war (KSE Institute, 2023b).

The war continues, which means that the damage caused to Ukraine by Russia is steadily increasing with each new day.

Since the beginning of the full-scale war, one of the most important tasks has been to find ways and means for post-war reconstruction in Ukraine, as well as for the payment of compensation to the victims of the war. These compensation mechanisms should be implemented alongside those that come at the expense of the funds of the

Russian Federation, which, accordingly, necessitates the lawful capture of these funds from an array of possible sources (sovereign assets of the Russian Federation, the assets of Russian oligarchs, etc.). Obviously, voluntary reparations from Russia should not be expected at the moment. At the same time, the discovery and application of effective mechanisms for such forms of compensation may encourage representatives of the Russian Federation to change their intentions, including the cessation of active hostilities in Ukraine.

The issues of finding funds to compensate for the damage caused and the individual decisions of some countries regarding this mainly emerge due to the absence of a unified international mechanism sanctioned by a specific international organization, such as the United Nations (UN). However, certain progressive shifts have been observed within the European space, which are discussed in greater detail in this article. Additionally, alongside the issues of the compensation mechanism, there are ongoing discussions regarding Russia's immunity as a state and a subject of international public law, and the possibility of using its assets without direct consent. The issue of Russia's immunity was analyzed by the authors in another study, in which, based on international experience and the positions of international and national courts, it was concluded that Russia does not have immunity in cases related to compensation for war damages (Izarova et al., 2023).

After the Russian invasion of Ukraine, civilized countries froze the assets of the external foreign exchange reserve of the central bank of the Russian Federation, amounting to around $300 billion (Trib & Tolentino, 2023). The exact amount frozen is unknown, as the latest asset data comes from December 2021 (Hilgenstock, 2022). As part of the tenth package of sanctions, the European Union (EU) obliged all banks to indicate the exact amount of frozen Russian assets (Nardelli, 2023).

Along with the state assets of the Russian Federation, the private assets of accomplices of the war have also been frozen. This occurred after the adoption of international sanctions against citizens or legal entities that support the Kremlin and participate in the war in Ukraine (Khutor, 2023a). The joint G7, EU, and Australian task force on Russian Elites, Proxies, and Oligarchs (REPO) has identified Russian assets worth around $280 billion, according to a statement by G7 finance ministers and central bank leaders on October 12, 2023 (Radio Liberty, 2023b).

The lack of clear and systematic data on the total amount of frozen assets leads to the conclusion that it is necessary to audit these assets and create a special register containing open data on the main information about them (Khutor, 2023b). Taking these measures is critical, as they will allow assets to be monitored by stakeholders and will ensure their preservation.

After freezing assets, the next step on the path towards transferring to Ukraine the assets and funds of the Russian Federation (both sovereign assets and those of private persons), which are located in many countries around the world, should be their confiscation, since freezing alone is not an effective measure.

An important task is to help states take this step and develop appropriate confiscation mechanisms in their national legislation. In September 2023, Prime Minister Denys Shmyhal said that Ukraine had made progress in negotiations with the United States (US), Canada, and the EU on the confiscation of Russian assets, and although none of Ukraine's partners had doubts about the assets of Russian oligarchs, there was a difficult discussion about the sovereign assets of the Russian Federation (Ukrinform, 2023b). It is already possible to discuss certain achievements in this direction and the transfer of the first assets to Ukraine, which will be outlined below.

It is necessary to analyze each case in more detail – in particular, to dwell on the experience of several countries that have introduced mechanisms for confiscating the assets of the Russian Federation or are in the process of doing so. The practice of arbitration regarding compensation for damage caused by the actions of the Russian Federation as part of its occupation are studied separately in this paper, and include decisions in the following cases: *PJSC Ukrnafta v. The Russian Federation* (2019); *Stabil LLC et al. v. The Russian Federation* (2019); *Everest Estate LLC et al. v. The Russian Federation* (2018); *Oschadbank v. The Russian Federation* (2018); *PJSC DTEK Krymenergo v. The Russian Federation* (2023); and others. The study of these cases will allow conclusions to be drawn about the most effective ways to compensate for the damage caused by the war in Ukraine and restore justice for its victims.

Considering the above, it is necessary to emphasize the purpose of this research, which is primarily to identify the main trends in and approaches to the problem of confiscating Russian assets for the purpose of further compensating for the damage caused by Russia's war against Ukraine, using the confiscation of funds in certain countries – such as Canada, the USA, the United Kingdom, Belgium, Estonia, and Switzerland – as an example. These countries were chosen due to their positive experience in implementing special mechanisms for confiscation and compensation, and are studied alongside the concept proposed by the Council of Europe and its current implementation.

To achieve this goal, the following tasks were outlined. First of all, the legal regulation of confiscation issues in the selected countries and the background of the existing mechanisms for confiscating Russian assets were examined. As part of this, draft laws that are either in development, under consideration, or have already been adopted by parliament and are awaiting signature were investigated. The next task was to conduct a comparative analysis of the studied mechanisms and determine their prospects. An important part of this work involved searching for and analyzing precedents for these mechanisms in practice and their results for Ukraine. Additionally, attention was paid to historical factors and precedents that could serve as examples for the present. This also involved an attempt to propose and explore existing alternative compensation methods that do not require the creation of special procedures, such as resorting to international arbitration, and their success rates. In carrying out these tasks, an appropriate research methodology was utilized. The main methods applied in this research included the empirical method of description, which was implemented through the description of the key points of the legal acts studied. The comparative analysis method was applied through the comparison of the proposed documents, and the historical comparison method allowed parallels to be drawn between past and present. These methods enabled existing practices to be correlated and their positive and negative aspects to be highlighted, as well as providing an understanding of the trends in their further development. In the conclusions of this paper, the generalization method is used to briefly summarize the current situation and identify promising directions for future research.

1. Mechanisms for the confiscation of Russian assets abroad: First experiences

1.1. Canada's experience

Canada was the first to start down the path of asset confiscation, during which the possibility of using confiscated Russian assets, sanctioned due to the war, to support Ukraine was legally defined for the first time. Canada froze $16 billion of Russian sovereign assets and $400 million of private assets, which are relatively insignificant amounts compared to those frozen in other Western countries, but the signal this sent to other countries and the importance of this precedent cannot be overestimated (CBC News, 2022; Khutor, 2023a).

The relevant amendments to the Special Economic Measures Act (SEMA) were approved by the Senate of Canada on June 23, 2022 (Budget Implementation Act, 2022, Art. 436). According to these amendments, both property belonging to a foreign state and property belonging to private individuals are subject to confiscation. Property encompasses various forms, including real or personal, immovable or movable, tangible or intangible, and corporeal or incorporeal; it encompasses money, funds, currency, digital assets, and virtual currency.

The objective of this legislation was to empower the Canadian government to implement economic measures against specific individuals under certain conditions (SEMA, 2023). These circumstances arise when an international organization comprising states or an association of states, of which Canada is a member, issues a call for such actions. This response is prompted by instances involving a grave breach of international peace and security, the occurrence of gross and systematic human rights violations in a foreign state, or the commission of acts of significant corruption involving a national of a foreign state.

Although SEMA does not clearly define what exactly is meant by an "association of states," it is quite possible to assume that it concerns the G7 or another coalition of states formed within the framework of a multilateral international treaty concluded to provide compensation to war victims (Horodysky & Sherengovsky, 2022). In particular, this could potentially be a unification of states within the framework of the International Compensation Mechanism proposed by the Ministry of Justice of Ukraine, which will be considered below.

Other grounds – serious violations of international peace and security, and gross and systematic violations of human rights committed in a foreign country – are subject to confiscation only at the discretion of the Government of Canada. However, it is likely that due to the unprecedented nature of these situations, the Canadian government may seek appropriate advice from international partners.

The grounds proposed by the Canadian special mechanism for the confiscation of the property of the Russian Federation and its citizens were created to provide Canada with the widest possible discretion in the matter of confiscation on legal grounds. Therefore, Canada is expected to be active in this direction, despite the relatively small amount of property of the Russian Federation and Russians under its jurisdiction, which will serve as a powerful example for other international partners of Ukraine.

Under the proposed process, if the governor in council determines that certain circumstances have occurred, they can issue an order to seize or restrain any property in Canada owned, held, or controlled by a foreign state, a person in that foreign state, or a non-resident national of that foreign state. Upon application by the responsible minister, a judge of the Canadian Superior Court can order the forfeiture of such property to the Canadian government if it aligns with the specified circumstances. The minister, in consultation with the minister of finance and the minister of foreign affairs, may disburse amounts from the Proceeds Account, derived from forfeited property, for purposes such as reconstructing a foreign state affected by a breach of peace, restoring international peace and security, or compensating victims of gross and systematic human rights violations or acts of significant corruption (Budget Implementation Act, 2022, Art. 436).

The amendments to SEMA are universal and may apply not only to Ukraine, but also to other countries. However, we can confidently conclude that all three example purposes are applicable to the situation in Ukraine. The second purpose – restoring international peace and security – suggests that on its basis, funds can also be transferred to other states, or to Canada itself, which has directed its funds and weapons towards helping Ukraine. However, no official statements or explanations on this matter have been provided by the Canadian government, and therefore this thesis continues to remain at the level of an assumption.

In mid-December 2022, Canada issued its inaugural seizure order, targeting the forfeiture of $26 million from Granite Capital Holdings Ltd. (Global Affairs Canada, 2022), a company owned by Roman Abramovich – a Russian oligarch subject to sanctions under the Special Economic Measures (Russia) Regulations (2023). This marked the first utilization of Canada's new powers to pursue asset seizures against sanctioned individuals. If the assets are forfeited, the resulting proceeds could be allocated to Ukraine's reconstruction and to providing compensation for victims of the unlawful and unjustifiable invasion by the Putin regime. Ottawa has additionally declared its intent to seize a Russian-registered Antonov AN-124 aeroplane in Toronto, representing the second asset seizure order under the SEMA targeting Russian assets. This aircraft is alleged to be held or controlled, directly or indirectly, by Volga-Dnepr Airlines or the Volga-Dnepr Group, both designated persons under the Special Economic Measures (Russia) Regulations (Chase, 2023).

To date, no Russian assets have been forfeited by order of a Canadian court, and these procedures continue.

1.2. US experience

The US can confidently be called another Western pioneer country in the confiscation of Russian assets. In the US, $38 billion of the assets of the central bank of the Russian Federation have been frozen (Institute of Legislative Ideas, n.d.). There is no official information on the amount of private assets blocked, so the figure announced by the media – $1 billion – may be much higher (Khutor, 2023a).

Unlike Canada, the US has not yet adopted a separate special confiscation mechanism at the legislative level, but it already has one successful precedent for the confiscation and transfer of assets of a Russian oligarch to Ukraine (Cohen, 2023),[4] and is also in the process of recovering the assets of another representative.

[4] This concerns the case of oligarch K. Malafeev, who attempted to circumvent the sanctions imposed on him, according to which $5.4 million were recovered for Ukraine.

The US possesses comprehensive legislation concerning asset forfeiture, with particular significance attributed to the International Emergency Economic Powers Act (IEEPA). According to the IEEPA, the US president can utilize the authorities granted by the IEEPA to address any extraordinary threat originating outside the US, significantly impacting the national security, foreign policy, or economy of the US. This can occur if the president declares a national emergency pertaining to such a threat. Any use of these authorities to address a new threat necessitates a new declaration of national emergency specifically related to that threat (IEEPA, 2024).

After the events of 2014 in Ukraine, such a national emergency was declared by President Barack Obama's Executive Order No. 13660 of March 6, 2014 (Blocking Property of Certain Persons Contributing to the Situation in Ukraine). It stated that "the actions and policies of persons, including persons who have asserted governmental authority in the Crimean region without the authorization of the Government of Ukraine that undermine democratic processes and institutions in Ukraine; threaten its peace, security, stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets, constitute an unusual and extraordinary threat to the national security and foreign policy of the United States". The national emergency regime introduced by Executive Order No. 13660 in relation to the Russian-Ukrainian war has been constantly extended by decrees and continues to this day (Analytical Center "Institute of Legislative Idea", 2023).

Executive Order No. 13660 (2014) outlines specific criteria for freezing the assets of individuals and entities. According to Section 1(a), assets within or entering the US, or under the jurisdiction of the US, may be blocked if the person or entity is found to be involved in actions undermining democratic processes in Ukraine, threatening Ukraine's peace or security, or misappropriating state assets. This order also applies to those asserting authority over parts of Ukraine without authorization, holding leadership positions in entities engaged in prohibited activities, providing support to such activities, or acting on behalf of blocked entities. Prohibitions include making or receiving contributions, funds, goods, or services involving the blocked individuals or entities.

The executive order only defines the criteria on the basis of which sanction lists with specific persons are to be formed. Such an obligation shall be imposed on the Office of Foreign Assets Control (OFAC), and oligarch K. Malofeev was included in this sanction list on December 19, 2014.

The violation of any provisions arising out of or established under and in accordance with the IEEPA is criminalized in the US – that is, the violation of the prohibitions established by Executive Order No. 13660 by persons included in the sanction list formed by the OFAC must be criminalized by the state. Malofeev's criminal indictment is that he, after the OFAC included him in the list of sanctioned persons, committed actions that violated the established restrictions and, in collusion with others, tried to dispose of blocked assets (Analytical Center "Institute of Legislative Idea", 2023).

The legal charges against Malofeev triggered the civil forfeiture process outlined in Section 18 U.S.C. 981(a)(1)(C) (Civil Forfeiture, 2024). This provision allows for the forfeiture of any property, whether real or personal, that is connected to proceeds traceable to specified unlawful activities. A judicial officer in any district where a forfeiture action may be filed can issue a seizure warrant, executable in the district where the property is located or transmitted to a foreign state's central authority as per international agreements. Properties taken under this procedure are non-repleviable and are considered to be in the custody of the attorney general, the secretary of the Treasury, or the Postal Service, subject to court orders. These entities are authorized to retain the forfeited property or transfer it to a foreign country under specific conditions, provided the secretary of state agrees, an international agreement authorizes this, and the recipient country is certified under the Foreign Assistance Act of 1961, if applicable.

In case of civil forfeiture, the state acts as a plaintiff, the property as a defendant (the so-called property defendant), and any person who declares their interest in the property as an applicant. The procedure allows the court to gather all those who have an interest in the property in one case, and resolve all issues that arise regarding the property that is the subject of the claim (Khutor, 2023c).

According to the above procedure, the Federal Court of Manhattan allowed the prosecutor's office to confiscate Malofeev's funds totalling $5.4 million (Kovalenko, 2023). Malofeev did not appeal the decision on

confiscation. The US attorney general, in turn, said that the funds would be transferred to help Ukraine, which was later confirmed by Secretary of State Anthony Blinken.

The transfer of confiscated assets to Ukraine was enabled through an amendment to the Consolidated Appropriations Act (2023, §1708(a)), explicitly granting the attorney general the authority to transfer proceeds from covered forfeited property to the secretary of state. This is intended for use in providing assistance to Ukraine to address the repercussions of Russian aggression. Such transfers are categorized as foreign assistance under the Foreign Assistance Act (1961), encompassing the administrative authorities and reporting requirements stipulated in the Act. The term "covered forfeited property" refers to assets owned, possessed, or controlled by individuals subject to sanctions and designated by the secretary of the Treasury or the secretary of state. This includes property implicated in violations of sanctions established through Executive Order No. 14024 of April 15, 2021, expanded by Executive Order No. 14066 of March 8, 2022, and referenced in additional measures outlined in Executive Order No. 14039 of August 20, 2021, and Executive Order No. 14068 of March 11, 2022 (Asset Seizure for Ukraine Reconstruction Act, 2022). However, this amendment is limited in time and will be valid only until May 1, 2025.

The legal mechanism described above can be applied only in case of the detection of a criminal offense of a sanctioned person – first of all, attempts to circumvent the sanctions imposed on them. This approach testifies to the extreme importance of criminalizing violations and evasion of sanctions restrictions and prohibitions, as well as its effectiveness.

However, it is unlikely that civil confiscation – according to its prototype, which exists in the US – can be called a universal structure with the help of which it will be possible to recover all of the property of the Russian Federation. This is primarily due to its cumbersome nature and the need to carefully identify cases of violation of the sanction regime, although it is perhaps the only effective mechanism that is already working. However, the very fact of the first successful case regarding the recovery of assets of a citizen of the Russian Federation having been achieved by one of the main geopolitical players – the US – clearly strengthens the position of those who advocate for the need to confiscate Russian assets and direct them towards the reconstruction of Ukraine.

The civil forfeiture applied in Malofeev's case is an alternative to the traditional mechanism of confiscation in criminal proceedings. An important advantage of civil forfeiture is that it does not require a sentence that would find a person guilty of committing a crime. Property originating from criminal activity may thus be confiscated before the end of criminal proceedings for the relevant crime, as happened in the case of Malofeev. A guilty verdict has not yet been passed against Malofeev, and the criminal case is still ongoing (Analytical Center "Institute of Legislative Idea", 2023).

However, the US does not plan to stop there. On October 23, 2023, it became known that a lawsuit had been filed in the Federal Court of the State of New York on behalf of the US in civil forfeiture in connection with the violation of the sanctions regime for the seizure of the Amadea yacht, the value of which has been reported as between $300 million and $500 million, and the beneficial owner of which is considered to be sanctioned Russian oligarch S. Kerimov (*United States of America v. The m/y Amadea, a motor yacht bearing international maritime organization no. 1012531*, 2023). If a federal court authorizes the confiscation of the Amadea, the proceeds from its sale at auction are also planned to be transferred to Ukraine (Radio Liberty, 2023c).

In addition to the existing civil forfeiture procedure, the US is also developing a special mechanism for confiscating all assets of the Russian Federation and its citizens and transferring them to Ukraine.

On April 20th, 2024, the US Senate voted to pass the 21st Century Peace through Strength Act (2024). One of the most crucial components of this Act is the section entitled "Rebuilding Economic Prosperity and Opportunity for Ukrainians Act" or the "REPO for Ukrainians Act". This section aims to provide additional assistance to Ukraine using assets confiscated from the Central Bank of the Russian Federation and other sovereign assets of Russia, as outlined in the UN General Assembly Resolution adopted on November 14, 2022. The resolution acknowledged the necessity to establish, in collaboration with Ukraine, an international mechanism for compensating damage, loss, or injury resulting from the internationally wrongful acts committed by the Russian Federation within or against Ukraine. It recommended that Member States, in partnership with Ukraine, create

an international register of damage. This register would function as a documented record, containing evidence, claims, and information regarding damage, loss, or injury suffered by all relevant natural and legal entities, including the State of Ukraine, due to the internationally wrongful acts of the Russian Federation within or against Ukraine. The primary goal is to facilitate and coordinate the collection of evidence (Furtherance of remedy and reparation for aggression against Ukraine, 2022).

This bill provides a detailed vision of the confiscation mechanism and the procedure for its functioning. The proposal emphasizes the need for the US to collaborate with international allies and partners in a coordinated, multilateral effort, including G7 countries, the EU, Australia and other nations housing Russian sovereign assets, for the confiscation and repurposing of such assets. The bill specifies that any Russian sovereign asset blocked or immobilized by the Department of the Treasury cannot be released or mobilized until the US president certifies to the relevant congressional committees that hostilities between Russia and Ukraine have ceased. Additionally, full compensation must be provided to Ukraine for harm resulting from the invasion. Alternatively, Russia must engage in a legitimate international mechanism agreed upon to fulfil its obligation to compensate Ukraine for any amount owed.

It is important that the president may confiscate any Russian sovereign assets subject to the jurisdiction of the US. The president shall deposit any confiscated capital into the special Ukraine Support Fund established by the president, and liquidate or sell any other confiscated property and deposit the funds resulting from such liquidation or sale into the Ukraine Support Fund. At the same time, the method of confiscation still remains unspecified – the president shall confiscate Russian sovereign assets "through instructions or licenses or in any other manner the President determines appropriate" (21st Century Peace through Strength Act, 2024). The procedures – other than civil or criminal forfeiture, which have no basis for application in the circumstances described – that the US president may find appropriate remains an open question that awaits a special decision.

The Ukraine Support Fund is designated for the secretary of state, in consultation with the administrator of the US Agency for International Development. The purpose of this fund is to compensate Ukraine for damages resulting from the Russian Federation's unlawful invasion starting on February 24, 2022. This includes providing funds to the Government of Ukraine or any designated entity for the determination of compensation and assistance, reconstruction efforts, humanitarian aid, and other initiatives supporting Ukraine's recovery and the welfare of its people (21st Century Peace through Strength Act, 2024). At the same time, no funds can be transferred or utilized from the Ukraine Support Fund without the US president certifying to the relevant congressional committees the existence of a plan, ensuring transparency and accountability for all fund transfers to and from any designated account. Additionally, the president must transmit this plan in writing to the appropriate congressional committees. This underscores the transparency and accountability in the utilization of confiscated assets for their intended purposes. Funds from the Ukraine Support Fund may also be transferred to an international fund known as the Ukraine Compensation Fund as part of an international compensation mechanism once such a fund is established.

The clearly defined starting point from which the damage which will actually be subject to compensation at the expense of confiscated Russian property began allows us to conclude that the developers of this law did not take into account the damage that was caused to Ukraine from the beginning of the first phase of the invasion, which began in February 2014. Due to Russia's occupation of the eastern regions of Ukraine for more than 9 years, it is difficult to accurately assess and determine the total amount of damage caused, but it is quite clear that damage exists and must be compensated for in full. Ensuring an effective mechanism for such compensation is an important and urgent task (in this context, the authors' attention is drawn to arbitral awards that have recently been adopted in cases of compensation for such damage, and which will be separately examined in part 4 of this article).

The confiscation procedure proposed by this law is inevitable – i.e., the confiscated Russian assets and other property cannot be the subject of litigation. The only exception is situations in which, according to the plaintiff's belief, the action is alleged to deny rights under the US Constitution.

The bill also allows the transfer of funds deposited with the Ukraine Support Fund to the Common Ukraine Fund, which will be established within the framework of an international multilateral agreement. The Common

Ukraine Fund will be used to pay compensation to Ukraine for damage which will be determined and supported by relevant evidence in the International Register of Damages, created in cooperation with international partners. This vector of the compensation mechanism will also be considered in detail within the framework of our study.

The provision in the law ensuring its duration and enforcement is of the utmost importance. This provision stipulates that the powers outlined in the law, granted to the president and other competent authorities, may not be terminated sooner than 5 years after it takes effect. Alternatively, and this factor is significantly more important and relevant to Ukraine, the termination of these powers is contingent upon meeting the following conditions.

The described powers shall cease no earlier than 120 days after the president determines and certifies to the appropriate congressional committees that the Russian Federation has reached an agreement regarding the withdrawal of Russian forces and the cessation of military hostilities, an agreement accepted by the free and independent Government of Ukraine, and full compensation has been provided to Ukraine for damages resulting from the Russian Federation's invasion of Ukraine. Alternatively, if the Russian Federation participates in a genuine international mechanism that, by agreement, fulfils its obligations to compensate Ukraine for all determined amounts owed, or if the Russian Federation's obligation to compensate Ukraine for damages caused by its aggression has been resolved through an agreement between the Russian Federation and the Government of Ukraine.

However, all of these cases share one common goal – ending the war on terms satisfactory to Ukraine, and Russia providing full compensation for the damage it has caused.

In general, in the authors' opinion, the adoption of the REPO for Ukrainians Act lays a solid foundation for an effective mechanism for the payment of compensation to Ukraine. However, given the difficult and lengthy process of following this path, the rapid implementation of these mechanisms is unlikely.

Currently, one such bill is still under consideration in the US Congress. However, after the adoption of the REPO Act, it is foreseeable that there will no longer be a need to consider this bill. Understanding why this is the case prompts a brief analysis.

On April 27, 2022, the House of Representatives approved the Asset Seizure for Ukraine Reconstruction Act, which is currently still under consideration by the Senate (GovTrack.us, n.d.). This legislation mandates that the US president must employ constitutional measures to seize and confiscate assets within US jurisdiction belonging to foreign individuals whose wealth is, in part, linked to corruption or political support for Russian President Vladimir Putin, and against whom the US president has imposed sanctions.

Additionally, the president, through instructions, licenses, or other regulations adhering to due process, is directed to confiscate any property or accounts under US jurisdiction that are valued over $2 million and owned by Russian energy companies or foreign individuals meeting the specified conditions. The liquidated funds are to be utilized for the benefit of the people of Ukraine, encompassing post-conflict reconstruction, humanitarian aid, US government assistance to Ukrainian security forces, support for refugees and resettlement, and the provision of technology items and services ensuring the free flow of information to the Ukrainian people (Asset Seizure for Ukraine Reconstruction Act, 2022).

However, this list of areas to where confiscated funds can be directed is not exhaustive. The draft law also provides for the possibility of directing such funds for humanitarian and developmental assistance for the Russian people, including democracy and human rights programming and monitoring (Asset Seizure for Ukraine Reconstruction Act, 2022).

In the authors' opinion, this is a very controversial direction that rightly promotes discussion and the polarization of opinion in society. Indeed, without the establishment of a legitimate democratic government in Russia, one can hardly count on the normalization of relations, since it is a territory bordering Ukraine. At the same time, full compensation for losses from the war is an unconditional basis for the further establishment and maintenance

of such relations. It is thus worth considering the need to implement such compensation as a priority for which the use of such funds should be envisaged.

The Asset Seizure for Ukraine Reconstruction Act does not provide an answer to the question of how exactly Russian property that falls under certain criteria will be subject to recovery, nor what legal mechanism should be applied. Instead, it obliges the US president to form a special working group, which shall be headed by the secretary of state, to determine the constitutional mechanisms through which the president can take steps to seize and confiscate assets (Asset Seizure for Ukraine Reconstruction Act, 2022).

By adopting a more comprehensive law under the short title of REPO, the US has taken a significant step towards addressing the issue of confiscating Russian assets worldwide, particularly in Europe. This demonstrates that a legal method of confiscation can be identified and adapted to the relevant jurisdiction; it only requires the political will of the legislator.

1.3. The experience of the EU, Switzerland and the UK

Belgium was one of the first European countries to announce the creation of a special fund for the transfer of funds received from Russian assets (European Pravda, 2023). Although this does not relate to the Russian assets themselves, but rather the tax received from profits from them, this was the first real case of redirecting such funds towards Ukraine on the European continent.

The Euroclear international depository is under the jurisdiction of Belgium, and represents the accumulation, according to the Belgian government, of approximately $125 billion of frozen funds of the Central Bank of Russia (Reteurs, 2023). The depository's system of work is arranged in such a way that it not only holds this money, but also reinvests cash balances and receives profits from them. In 2022, Euroclear reported €821 million in revenues from frozen Russian funds (Euroclear, 2023a), and in the first half of 2023, these revenues reached €1.74 billion (Euroclear, 2023b). However, Belgian legislation does not allow the state to receive this profit and redistribute it to selected areas of use. Despite this, such income is equated to any other income derived from any other activity carried out in the territory and under the jurisdiction of Belgium, and is therefore subject to taxation. The corporate tax rate that is levied on this type of income is 25% (PwC, 2023). The expected amount that the Belgian government hopes to keep until the end of 2024 is €1.7 billion, which is roughly estimated to be a quarter of the total profits made from blocked Russian sovereign assets (European Pravda, 2023).

Funds withheld from corporate tax are directed to the state budget of Belgium, and therefore their only administrator is the state, which independently decides on how to use them without any third-party approval. However, in practice, such a step is a consistent consequence of many months of negotiations between the G7 countries on the use of profits from frozen Russian money (Khutor, 2023d).

Following reports from Belgium regarding the creation of a special fund within its own state budget, the funds from which will be directed to Ukraine, the US also announced support for taxing profits generated from hundreds of billions of dollars in Russian state assets frozen in G7 countries and using the funds to support Ukraine (Tamma, 2023). Although the procedure used by Belgium concerns the transfer of a relatively small amount to Ukraine compared to the billions of dollars in blocked Russian money, it actually allows additional funds received from profits from Russian assets to be sent to Ukraine without waiting for the establishment of international legal nuances and the approval of third countries. However, it is clear that this mechanism is only auxiliary, and is not able to cover the need for a special confiscation mechanism which would allow Ukraine to receive all assets belonging to Russia – including, above all, those of a sovereign nature.

Estonia plans to take a leading position in introducing the possibility of confiscating frozen assets of the aggressor state in its own legislation. In mid-October 2023, the Estonian government approved and submitted to parliament a draft law amending the International Sanctions Act, which provides for rules for the use of the assets of sanctioned persons that were blocked in Estonia to compensate Ukraine for the damage caused by the war (Government Communication Unit of the Republic of Estonia, 2023). The proposed act aims to enhance the overall coherence of the Estonian legal framework, providing clarity and efficacy in the competence and powers of authorities for the implementation and oversight of sanctions. Nonetheless, a key constant is that the activation

of this mechanism still necessitates an international agreement with Ukraine or the establishment of an international compensation mechanism. This approach is considered absolutely justified since the process under study is at least bilateral, and therefore requires the interaction of the parties with each other and its expression in a more concrete form.

Estonia's initiative, under development since December 2023, is expected to impact approximately $37 million EU-sanctioned financial assets owned by Russian businesses in Estonia. The proposal involves utilizing Ukraine's International Register of Damages as the foundation for expropriating sanctioned assets. Drafting the initiative in compliance with EU law proved challenging due to Estonia's robust safeguards for private ownership (Tammik, 2023).

The mechanism proposed by Estonia stipulates that the Ministry of Foreign Affairs of Estonia may decide to use the financial resources or other property of the subject of international sanctions as advance compensation for damage caused to a foreign state in connection with the violation of the prohibition on the use of armed force established by paragraph 4 of Article 2 of the UN Charter, or in connection with the illegal use of armed force in the course of hostilities. The prerequisites for such use are damage caused by the commission of unlawful acts, a claim for compensation filed by the injured foreign state against the foreign state that caused the damage, partial or complete failure to comply with this requirement within a reasonable time, and the corresponding request of the injured foreign state, international organization, or recognized international compensation mechanism with a demand for the transfer of such property.

Especially important for Ukraine is the list of entities whose property can be confiscated and transferred as compensation. Confiscation measures may be applied:

1) in respect of an entity or legal entity established in the aggressor country, which is under the control of this country or more than 50% of which belongs to this country, and which financially or materially supported the commission of an illegal act;
2) in respect of an individual or legal entity whose involvement in the commission of an unlawful act or in providing assistance to it has been established and sufficiently proven.

In order to recover funds or other property, the Ministry of Foreign Affairs must apply for the appropriate authorization from the administrative court. The administrative court is obliged to verify the existence of the above prerequisites and determine: whether the unlawful act caused damage which is proven and subject to compensation in accordance with international law, and the injured foreign state has presented a corresponding claim to the foreign state that caused the damage which has not been fulfilled within a reasonable time; whether the connection of the person whose funds will be confiscated with the commission of the illegal act, which became the basis for the application of international sanctions, has been duly proved, or their financial, material or other involvement in it has been demonstrated; and whether there are exceptional circumstances due to which the interests of a person prevail over the need to confiscate property. It should be noted that, in fact, all of the above circumstances in relation to Ukraine and Russia are generally recognized facts and do not require additional proof, so difficulties in establishing these interstate ties are not expected. Moreover, they will most likely be absent when the assets of Russian oligarchs are confiscated.

On the basis of a permit issued by an administrative court, the Ministry of Foreign Affairs becomes the temporary administrator of confiscated funds until they are transferred to the affected state, international organization, or within the framework of an international compensation mechanism. The remainder of the property is subject to sale at an open auction, and the funds received as a result of this are also subject to transfer to the entities specified in the draft Law, with the exception of the funds that were spent by the Estonian state on the maintenance of the property sold (Rahvusvahelise sanktsiooni seaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seadus 332 SE, 2023).

The mechanism developed by Estonia is universal and can be applied to any offending state that falls under the conditions defined by law. It is also fairly transparent and understandable, so it can serve as an example for implementation in the legal regulation of other European states. A somewhat similar procedure for the confiscation of assets operates in Ukraine, and is promising for further research and development. On May 15,

2024, the draft of this law was approved by the Estonian parliament, and it currently awaits the signature of the president. Thus, Estonia became the first EU country whose parliament adopted an internal procedure for the confiscation of the assets of the Russian Federation, marking a huge step and a breakthrough in the European legal space. The authors hope that this serves as an example for other EU Member States.

Confiscating Russian assets abroad does not imply their automatic transfer to Ukraine. According to Article 25 of the Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005), the state manages confiscated property in line with its domestic laws, unless otherwise agreed upon by the parties. Even after agreeing on the return of funds, the party making the request may retain some of the property and decide on its usage by the other party.

Another country that is looking for ways to confiscate Russian sovereign assets is the **United Kingdom**. On February 23, 2023, the Seizure of Russian State Assets and Support for Ukraine Bill was introduced in the British parliament. The bill mandates the secretary of state to present proposals for seizing Russian state assets to aid Ukraine. The key aspect involves establishing an authorized body (the trustee) for managing Russian state assets, including those of the Central Bank. The trustee is responsible for securing, detaining, and realizing the value of the assets for the benefit of the trust. Certificates are issued for seized Russian Central Bank assets and other Russian state assets held in the UK, enabling the trustee to act. The trustee utilizes the seized assets to fund repairs to Ukrainian civilian structures, support the Ukrainian government's response to Russian military actions, establish legal mechanisms for compensation, and address any outstanding international court orders, among other purposes supporting Ukraine (Seizure of Russian State Assets and Support for Ukraine Bill, 2023).

However, the scheme proposed by the draft law is too descriptive and does not contain specific legal details – in particular, it does not address how exactly the authorized body (the trustee) will collect assets, nor whether only the issuance of the relevant certificate by the minister will be considered a sufficient basis. The draft indicates the need for the secretary of state to make proposals on these issues, which will subsequently be considered in parliament. Currently, the draft law itself is at the second stage of reading in the Lower House of the British parliament, and it still has a long way to go before its final approval and entry into force. The British prime minister has also repeatedly announced that he is working on the creation of an independent fund to collect sanctioned Russian assets (UNN, 2023), but the specific legal details of its activities are still unknown.

Given the significant amount of assets of citizens of the aggressor country held in **Switzerland** and the resultant public outcry, active discussions about the fate of these funds are also taking place in the country. Swiss Foreign Minister Ignazio Cassis said at the World Economic Forum in Davos that the aggressor should compensate for the damage caused, but Switzerland does not have a law on the seizure of frozen funds for such purposes. However, in February 2023, the Swiss government abandoned the idea of confiscating Russian assets, as it allegedly violates the constitution and undermines law and order (Khutor, 2023a).

However, history provides an example of a case in which such a categorical position of Switzerland was overcome by a coalition of international partners. After the end of the Second World War, when the question arose of the payment of reparations by Germany and the disposal of its assets, most of which were in Switzerland, under pressure from an alliance of countries – where the main geopolitical players, the US, Great Britain and France, acted on behalf of 15 more countries (Albania, Australia, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Greece, India, Luxembourg, New Zealand, Norway, the Netherlands, South Africa, Yugoslavia) – the Washington Agreement was concluded on May 25, 1946. According to this agreement, Switzerland paid 250 million Swiss francs, which it had attained after acquiring gold from Germany, to the Allies. Subsequently, the Allies relinquished any claims, including those of their respective central banks, against the Swiss government or the Swiss National Bank concerning the gold obtained by Switzerland from Germany during the War. Additionally, Switzerland committed to liquidating German assets in Switzerland owned by individuals in Germany, with 50% of the proceeds transferred to the Allies and the remaining 50% retained by Switzerland. A joint commission and an appeal process oversaw the liquidation, managed by the Swiss Compensation Office. Originally, the Allies sought the uncompensated liquidation of German assets, but the settled agreement reflects a 50–50 split, underscoring the political nature of the Washington Agreement that is akin to today's process of seizing Russian assets (von Castelmur, 1999). Therefore, we can conclude that over time, Switzerland's position may change its vector, subject to the persistent and systematic diplomatic work of its international partners.

2. The International Register of Damages and the International Compensation Fund as elements of the mechanism for the compensation for damage caused to Ukraine by the war at the expense of the assets of the Russian Federation

The Council of Europe, after Russia's withdrawal from it, has repeatedly supported Ukraine's international legal initiatives, and in May 2023, within the framework of this organization, an agreement on the creation of a register of damages for Ukraine was concluded. The 4th Summit of Heads of State and Government of the Council of Europe occurred in Reykjavík on May 16–17, 2023. There, the leaders resolved to create a register of damage resulting from the Russian Federation's aggression against Ukraine. They also committed to enhancing the Council of Europe's role in human rights, democracy, and the rule of law. This involved adopting declarations on the situation of Ukrainian children, democratic principles, reaffirming the European Convention on Human Rights, and devising tools to address evolving challenges in technology and the environment. This agreement was also called the Reykjavik Declaration (Council of Europe, 2023).

This declaration materialized in Resolution CM/Res(2023)3, Establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Russian Federation's Aggression against Ukraine (2023) on May 16, 2023. The legal foundation for this resolution draws from the 2001 Articles on Responsibility of States for Internationally Wrongful Acts, the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, and the 2011 Guidelines of the Committee of Ministers on Eradicating impunity for serious human rights violations. Recent documents, including decisions from the Committee of Ministers and UN General Assembly Resolution A/RES/ES-11/5, influenced this initiative. The Parliamentary Assembly of the Council of Europe (hereinafter – PACE) also endorsed the establishment of an international compensation mechanism and an initial international register of damage through Resolution 2482 (2023) (Legal and Human Rights Aspects of the Russian Federation's Aggression against Ukraine, 2023).

Thus, on April 19, 2023, the Committee of Ministers authorized the creation of an Enlarged Partial Agreement within the Council of Europe, establishing a Register of Damage Caused by the Russian Federation's Aggression against Ukraine (2023, hereinafter – the Register). Subsequently, through the Committee of Ministers' Resolution on May 16, the Enlarged Partial Agreement on the Register, governed by the attached Statute, was established. This Register serves as a documented record of evidence and contains information on damage, loss, or injury caused within Ukraine's internationally recognized borders, including its territorial waters, by the Russian Federation's internationally wrongful acts since February 24, 2022. It should be noted that the proposed mechanism, which will be discussed later and of which this Register is a part, is based on proposals and concepts developed by the Ministry of Justice of Ukraine (Ministry of Justice of Ukraine, 2023).

This decision was the extremely important first step in the building of an internationally recognized compensation mechanism, which launched the process of work on the creation of this Register and the even more exhausting and difficult work of the Enlarged Partial Agreement, which is to be concluded between more than 40 countries.[5] However, some details of the functioning of the Register are known. These details are defined in Statute of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine, which became an annex to the above-mentioned Resolution. The Register is responsible for receiving and managing information regarding claims of damage and supporting evidence. It categorizes, classifies, and organizes these claims, evaluates their eligibility for inclusion in the Register, and records eligible claims for future examination. Importantly, the Register does not possess any adjudication functions related to these claims, including determining responsibility or allocating payments or compensation (Establishing the Enlarged Partial Agreement on the Register of Damage, 2023).

The purpose of this Register is only to accumulate data on damage caused. At the same time, in order for this recorded damage to be compensated, it is necessary to move to a new stage of compensation mechanism, which

[5] As of 18 December 2023, this list includes the following countries: Albania, Austria, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Republic of Moldova, Monaco, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, the Slovak Republic, Slovenia, Spain, Sweden, Ukraine, and the United Kingdom, as well as representatives of the EU, Canada, Japan, and US. This list is expected to grow.

currently needs to be developed. For example, this could take the form of a special compensation commission formed on the basis of the Council of Europe. The closest analogue to the Commission for the Consideration of Claims to the International Armed Conflict and Occupation of Ukraine is Iraq's invasion of Kuwait in 1990, where reparations were paid on the basis of aggression. This was the subject of a series of UN Security Council resolutions that ultimately authorized the creation of the United Nations Claims Commission (UNCC) and received guidance from the UN secretary-general on how exactly it would act. The UN Security Council thus established Iraq's responsibility for any direct damages. The UNCC was not established as an arbitral tribunal, but as a political body with a fact-finding role of assessing and verifying whether each claim alleged damage directly related to Iraq's unlawful invasion and occupation of Kuwait and to award monetary compensation, if applicable. In cases where claims were disputed, the commission also performed the quasi-judicial function of resolving them (Moffett, 2022). The formation of such a body would be a logical continuation of the set of actions initiated by the creation of the Register.

A brief description, without specific details and names, of the planned scheme of the compensation mechanism is enshrined in the Registry Charter, which provides us with a glimpse of what Ukraine should expect. The Register, along with its digital platform containing claim and evidence data, aims to constitute the initial element of an upcoming international compensation mechanism. This mechanism, to be established through a separate international instrument in collaboration with Ukraine, may involve a claims commission and a compensation fund. The Register, led by its executive director and supported by its secretariat, will actively contribute to and facilitate the establishment of this compensation mechanism. Necessary preparations will be undertaken to transition the Register into the proposed mechanism (Establishing the Enlarged Partial Agreement on the Register of Damage, 2023).

The repeated calls of the PACE for the use of the assets of Russian citizens subject to targeted sanctions for their responsibility in the war of aggression launched against Ukraine by the Russian Federation, once they are confiscated definitively, to compensate Ukraine and its citizens for any damage caused by the Russian Federation's war of aggression (Resolution 2436 (2022) Parliamentary Assembly of Council of Europe) give a clear understanding of the sources from which the compensation fund would be drawn (The Russian Federation's Aggression Against Ukraine: Ensuring Accountability, 2022).

Another step taken by the PACE which should significantly advance Ukraine's access to confiscated Russian assets was Resolution 2539 passed on April 16, 2024, which suggests "the confiscation of Russian state assets and their utilization" to aid in Ukraine's reconstruction. This approach is aimed at "bolstering Ukraine, ensuring Russia's accountability, and deterring future aggressions." The resolution emphasizes that the frozen Russian state financial assets across various nations, amounting to approximately $300 billion, should be directed towards Ukraine's reconstruction. It also highlights that the documented damages to Ukraine's infrastructure and economy due to Russian aggression amounted to $416 billion as of June 2023.

Furthermore, PACE proposed the establishment of "an international compensation mechanism" under the Council of Europe's oversight to address damages suffered by affected individuals and entities, including Ukraine itself. It also recommended the creation of an "international trust fund" to hold all Russian state assets from Council of Europe Member and non-Member States, along with an "impartial and effective international claims commission" to handle claims from Ukraine and those impacted by Russian aggression. PACE urged nations holding Russian state assets to cooperate actively in swiftly transferring these assets to the international compensation mechanism.

Lastly, PACE reaffirmed the Council of Europe's solidarity with Ukraine and its people, including the exclusion of Russia from membership. It mentioned the establishment of the Register by the Council of Europe to document losses incurred by Ukraine, marking an initial step towards holding Russia accountable for its actions (Support for the reconstruction of Ukraine, 2024).

In order for losses to be entered into the Register, they must simultaneously meet the following three main criteria:

- they must have been inflicted on or after February 24, 2022. This wording allows us to remain cautiously optimistic about the possibility of compensating for the damage caused by Russia even before the full-scale invasion, starting from February 2014, since as of February 24, 2022, such damage had already been caused;
- the damage must have been caused in the territory of Ukraine within its internationally recognised borders, extending to its territorial waters;
- the damage must have been caused by the Russian Federation's internationally wrongful acts in or against Ukraine.

The Register will be instituted as a platform for intergovernmental collaboration, operating within the institutional framework of the Council of Europe. Its primary location will be in the Hague, the Netherlands, with an additional satellite office in Ukraine. This satellite office aims to engage with the Government of Ukraine, enhance outreach, connect with potential claimants, and inform the public in Ukraine regarding the Register's existence and purpose and the procedure for submitting damage claims (Establishing the Enlarged Partial Agreement on the Register of Damage, 2023).

The PACE appreciates the creation of the Register and remains committed to its endeavours to establish an international compensation mechanism and a dedicated tribunal for the crime of aggression. This pursuit aligns with previous resolutions, including Resolution 2482 (2023) entitled "Legal and Human Rights Aspects of the Russian Federation's Aggression Against Ukraine" (2023). In addition, PACE has called on the countries participating in the creation of the Register to clarify the provisions in the rules of the Register, according to which it will also apply to acts committed by private military formations and paramilitary formations fighting on the side of the Russian Federation, in particular the Wagner PMC and Ramzan Kadyrov's army (Political Consequences of the Russian Federation's War of Aggression Against Ukraine, 2023). This is a completely reasonable decision, since it is aimed at collecting money from Russia to compensate for absolutely all damages, regardless of which of its subjects committed them, and will not allow these entities to avoid responsibility for this because the Register ensures the recording and preservation of all proven cases of damage that meet the criteria established by the Resolution of the Committee of Ministers of the Council of Europe.

3. The recovery of funds through the International Court of Arbitration

The occupation actions of the Russian Federation, which date back to the annexation of the Crimean Peninsula in February 2014, made it impossible to carry out investment activities in the occupied territories. Companies that have suffered the greatest losses and whose investments remained in the territories temporarily not controlled by the Ukrainian government have begun the practice of filing applications with the International Court of Arbitration with claims against the Russian Federation for the compensation of expropriated property. Decisively, the first application on such a subject was filed with the International Court of Arbitration back in 2015 by Ukrnafta, and concerned the ownership of 16 petrol stations in the Crimea region (*PJSC Ukrnafta v. The Russian Federation*, 2019). The subject of all subsequent applications was also property located on the annexed Crimean Peninsula. As of April 2024, 5 cases have been resolved in favour of investor applicants (*Everest Estate LLC et al. v. The Russian Federation*, 2018; *Oschadbank v. The Russian Federation*, 2018; *PJSC Ukrnafta v. The Russian Federation*, 2019; *Stabil LLC et al. v. The Russian Federation*, 2019; *PJSC DTEK Krymenergo v. The Russian Federation*, 2023), and 5 more cases are awaiting a final decision (*JSC CB PrivatBank v. The Russian federation*, 2015; *Lugzor LLC et al. v. The Russian Federation*, 2015; *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation*, 2015; *NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation*, 2016; *NPC Ukrenergo v. The Russian Federation*, 2019).

This method of compensation for losses incurred by investors is somewhat promising in its implementation, since the New York Convention provides for the enforcement of arbitral awards (UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958).

The practice of the International Court of Arbitration in this category of cases is developing in a positive direction for Ukrainian investors, since the court takes their side, as evidenced by the 5 satisfied applications out of the 10 that have been part of the court's proceedings thus far. Despite the lengthy (e.g., the final decision in the Ukrnafta case was made in 2019; the average duration of proceedings is 3–4 years but some have been ongoing for more than 8 years) (*PJSC Ukrnafta v. The Russian Federation*, 2019) and expensive (in the case of Stabil

LLC and other applicants, the court ordered the Russian Federation to reimburse the costs of arbitration in the amount of €687,085.01) (*Stabil LLC et al. v. The Russian Federation*, 2019) procedure for consideration by the arbitration court, Ukrainian companies hope to receive compensation for losses in this way. The above proves that compensation for damage by applying to the International Court of Arbitration does not meet the criteria of accessibility of such an appeal for everyone whose rights have been violated, and therefore this mechanism cannot be directed and used to compensate for damage to a wide range of persons due to its cost and duration.

Within the framework of this section, using the example of several cases, the concept according to which the appeals of Ukrainian investors were satisfied and the obligation to compensate for the damage caused by the expropriation of their property that was imposed on the Russian Federation can be examined in more detail. It should be noted right away that not all procedural documents, including decisions, in cases that have been and continue to be considered by the International Arbitration Court are publicly available, so this section focuses on those decisions that were available for access, as well as press releases on the progress of the case published in official sources.

Firstly, it is necessary to uncover the legal and factual basis for investors to apply to arbitration. If the factual basis was the illegitimate annexation of the Crimean peninsula and, accordingly, the inability to dispose of proper investments in this regard, then the legal basis for the application, according to the information posted on the website of the Permanent Court of Arbitration (https://pca-cpa.org), in all cases is that there was a violation of the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments (1998), dated 27 November 1998 (hereinafter – the Treaty or BIT). Having analyzed some of these decisions, the texts of which are available, it is possible to arrive at the generalized conclusion that the claimants seek compensation for a series of measures taken by the Russian Federation "that disrupted and eventually destroyed their Crimean operations," culminating in the dispossession and nationalization of their network of different properties (petrol stations, real estate, bank branches and all their funds and assets, objects of infrastructure, electricity/power stations, etc.) and associated assets in Crimea. The claimants submit that, by its conduct, the respondent has violated Articles 2, 3, and 5 of the BIT (*Stabil LLC et al. v. The Russian Federation*, 2019).

In accordance with Article 2 of the Treaty, each contracting party is obligated to ensure, in compliance with its domestic laws, comprehensive and unconditional legal protection for the investments made by investors from the other contracting party. Furthermore, the courts concurred with Ukrainian investors that establishing jurisdiction did not necessitate a determination on the sovereignty of Crimea or the validity of its incorporation into Russia. The key criterion for territorial jurisdiction was Russia's "settled, long-term control" over Crimea, making it accountable for the international relations of the region. Regarding the definitions of "investment" and "investor" under the BIT, the crucial factors were that the investments were within the territory controlled by Russia during the infringement and that the investors were legally eligible, as per Ukrainian laws, to make investments in Crimea (Antonovych, 2023).

In view of the above, there is a violation of Article 5 of the BIT, which provides for the prohibition of expropriation. This implies that investments made by investors of either contracting party on the territory of the other contracting party are protected from expropriation, nationalization, or any measures deemed equivalent in their consequences to expropriation.

The Tribunal determined that the Russian Federation unlawfully expropriated the Claimants' investments, violating Article 5 of the Treaty. This expropriation resulted from the physical seizure of the Claimants' property by Paramilitary Forces on April 22, 2014, and legislative acts by the Crimean State Council and the Sevastopol Government that nationalized the investments in Crimea and Sevastopol. Importantly, the Tribunal asserts that Russia's expropriation fails to meet any of the four cumulative requirements outlined in Article 5 of the Treaty, which demand non-discriminatory measures and prompt, adequate, and effective compensation (*Stabil LLC et al. v. The Russian Federation*, 2019).

The same article provides for the obligation to pay compensation in the event that expropriation has taken place. Taking into account the operative part of the decision in the case of *Stabil LLC et al. v. Russian Federation*, it can be seen that the arbitral tribunal used the concept of calculating the amount to be compensated defined in

Part 2 of Art. 5 of BIT. Compensation must align with the market value of the expropriated investments, determined immediately before the expropriation date or when officially acknowledged. Prompt payment is required, factoring in interest from the expropriation date to the payment date at the interest rate for 3 months' deposits in US Dollars at the London Interbank Offered Rate (LIBOR) plus 1%. Additionally, the compensation should be readily realizable and freely transferable (*Stabil LLC et al. v. The Russian Federation*, 2019). Moreover, the funds spent on arbitration and the legal assistance and representation of the applicants are subject to reimbursement, which is quite fair and justifies their expectations and efforts.

The initial definitive award in a "Crimea case" was rendered on May 2, 2018. In the case of *Everest Estate LLC et al. v. The Russian Federation*, investors were granted $150 million for the expropriation of multiple hotels and real estate properties (Soldatenko, 2018). In November 2018, the arbitral tribunal ordered Russia to reimburse $680 million in the case of *Oschadbank v. The Russian Federation* (2018) (instead of the $1.111 billion claimed by the applicant). In April 2019, the tribunal issued two final judgments at once – in the cases of *PJSC Ukrnafta v. The Russian Federation* (2019) and *Stabil LLC et al. v. The Russian Federation* (2019). According to the decisions in these cases, the applicants were awarded compensation in the amount of $44.5 million and $34.5 million, respectively.

During the full-scale invasion, the Permanent Court of Arbitration managed to make two final decisions at once. The first was issued in April 2023 in the case of *Naftogaz v. the Russian Federation*, and became a record figure for the amount to be recovered in favour of a Ukrainian company: $5 billion (Radio Liberty, 2023a). The most recent among the declared rulings in the "Crimean cases" occurred in November 2023, involving the case of *DTEK v. the Russian Federation*. In this decision, the International Arbitral Tribunal based in the Hague directed Russia to compensate DTEK in the amount of $267 million for the confiscation of company assets in the unlawfully occupied Crimea. Originating from a lawsuit initiated in 2017, the case pertains to the seizure of the DTEK Krymenergo business, a company engaged in energy distribution and supply (DTEK, 2023).

The authors are certain that this will not be the last award received from an arbitration procedure by Ukrainian investors. However, this decision itself is only a legal basis for the recovery of compensation, and must be implemented by enforcing it. To do this, Ukrainian applicant companies in whose favour compensation has been awarded must apply to a court in the jurisdiction of one or more of the 162 signatory states to the 1958 New York Convention with a claim for the enforcement of the arbitral award. That is, one of the most important stages of obtaining compensation at the expense of the assets of the Russian Federation – the execution of the decision to recover compensation – is subject to implementation on internationally recognized terms under these circumstances. It should be noted that as of the time of preparing this study (April 2024), public sources have not yet reported on the completion of the enforcement procedure for even one of the final decisions of the Permanent Court of Arbitration in the so-called Crimean cases.

Conclusions

The tragedies of the war in Ukraine have prompted the entire civilized world to consolidate and look for ways to counter the aggressor, ways to make them bear full responsibility for the damage that they have caused. One of the most important components of a comprehensive mechanism for bringing Russia to justice is the confiscation of its assets, their use for the reconstruction of Ukraine, and the payment of fair compensation to the victims of the war. Such a procedure is complicated and requires the coordination of actions and the political will of international partners, since, as has been substantiated in this study, the mechanism of compensation at the expense of the assets of the Russian Federation should become the subject of international agreements.

The analyzed experience of world leaders has shown that the international community is trying to develop an effective and enforceable procedure for the transfer of confiscated funds from the Russian Federation to the specific needs of Ukraine, which would serve as a solid legal basis for the legitimacy of such decisions. The leading positions in this direction are occupied by Canada, the US, Great Britain, Estonia, and Belgium.

One of the most significant sources of potential is the newly created Register and the Compensation Fund, designed to provide compensation in accordance with the deaths, injuries, destruction, damage, and other losses recorded in the Register. The quality of replenishment of the compensation fund directly depends on a clear

understanding of the number and location of blocked Russian assets around the world, which can be helped by conducting audits and creating a special register containing open data on basic information about such assets.

The fundamental issue is that absolutely all damages caused by Russia during the entire duration of its invasion, starting from its first phase in February 2014, should be subject to compensation within the framework of the developed international mechanisms. Otherwise, the reimbursement will be incomplete, and will not meet the expectations of Ukrainian society. This peremptory aspect must be taken into account by both international partners and authorized persons on the part of Ukraine when continuing work on the creation of an international compensation mechanism.

We should not forget about such pre-existing means of obtaining the foreign assets of the Russian Federation and its citizens as international arbitration, the confiscation of the assets of a terrorist state within the Council of Europe, as well as general confiscation procedures in accordance with the legislation of the countries in which the assets of the Russian Federation – both sovereign and private – are located, in connection with the observed violations of sanction regimes following the example of the US.

Undoubtedly, this damage must be compensated for, and it is evident to whom this invoice should be issued. The main challenge that we face is finding the most effective way for Ukraine and the world to do this.

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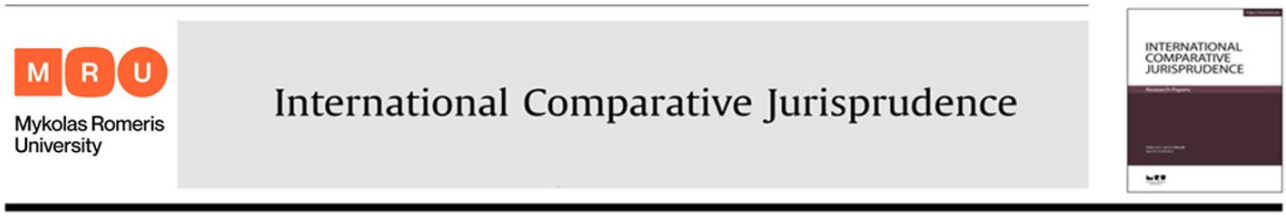

JUDICIAL INDEPENDENCE *DE JURE* AND *DE FACTO*: LESSONS FOR UKRAINE FROM THE CASE LAW OF THE ECtHR

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Abstract. The principle of judicial independence is a fundamental tenet of the rule of law and fair trial standards. The European Court of Human Rights (ECtHR) identifies four criteria for evaluating judicial independence: (a) the manner of a judge's appointment; (b) the duration of such an appointment; (c) safeguards against external influence; and (d) the appearance of independence. The ECtHR also distinguishes several dimensions of judicial independence, including independence vis-à-vis the executive, parliament, other courts, and parties, as well as independence from judicial councils. Nevertheless, despite the existence of shared European principles on judicial independence, certain countries, particularly those undergoing transitions, encounter challenges such as political interference, corruption, and insufficient safeguards against dismissal. This results in a discernible disjunction between de jure and de facto judicial independence. This article poses the following research questions: What are the main approaches and common challenges for judicial independence in European countries based on the latest case law of the ECtHR? What lessons can be learned by Ukraine, as an EU candidate, from this case law in order to mitigate the gap between de jure and de facto judicial independence?

Keywords: judicial independence, de jure judicial independence, de facto judicial independence, right to a fair trial, ECtHR.

Introduction

In contemporary legal discourse, judicial independence is regarded as an inherent tenet of the rule of law. The Magna Carta of Judges (2010) stipulates that the mission of the judiciary is 'to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner'. The Consultative Council of European Judges (CCEJ) defines judicial independence as 'not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice' (CCEJ, 2001).

Given the complexity of the phenomenon of judicial independence, we can observe numerous approaches to its study in both academic literature and at the level of international institutions. In most sources, the following types of judicial independence are distinguished: a) *external and internal independence*, where the former is concerned with the judiciary's independence from the legislative and executive branches of power, while the latter pertains to the independence of judges within the judicial system (CCEJ, 2001; Committee of Ministers, 2010; European Commission for Democracy Through Law, 2008); b) *institutional and individual (personal) independence*, which reflects the independence of the court as an institution from other state bodies and the personal independence of each individual judge during the trial (The Bangalore Principles of Judicial Conduct, 2002; CCEJ, 2002; Huq, 2021; Jackson, 2012); and c) *functional and organizational independence*, which

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correlates with the guarantees of judicial independence in the administration of justice in a particular case and organizational guarantees of their independence in obtaining and terminating their status, disciplinary proceedings, their removal, etc. (Bureau of the CCJE, 2020). The dual nature of judicial independence was also highlighted by the Venice Commission, which noted that the independence of the judiciary includes an 'objective component, as an indispensable quality of the Judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge' (European Commission for Democracy Through Law, 2010). In this context, judicial independence becomes an instrumental value.

International documents on the issue of judicial independence emphasize the necessity of enshrining its guarantees in the constitution and other legislative acts. Conversely, academic sources have indicated that the existence of legally enshrined guarantees of judicial independence does not necessarily lead to real judicial independence (Voigt, 2020; Linzer & Staton, 2015; Ginsburg & Melton, 2014) due to the influence of political pressure, unlawful interference in the administration of justice, the biases of individual judges, and other negative trends which have been repeatedly highlighted by international institutions (Secretary General of the Council of Europe, 2017; CCEJ, 2001). It appears that there is a growing consensus that new methodologies must be developed that not only examine the formal guarantees of judicial independence enshrined in legislation, but also assess the implementation of standards of judicial independence in real life. Thus, there are studies aimed at examining the perception of judicial independence among various stakeholder groups, which should be taken into account in terms of judicial reforms (Eurobarometer, 2023, 2024).

This article is an invitation to a broader international discussion initiated by one of its authors in previous publications on judicial independence in the context of fair trial guarantees (Tsuvina, 2015, 2021). The research methodology is based on a combination of general scientific methods (analysis, synthesis, abstraction, etc.), the system-structural and comparative law methods, as well as the methods of evaluative and autonomous interpretation developed in the practice of the European Court of Human Rights (ECtHR). This article employs a scholarly perspective to examine the dichotomy of *de jure* and *de facto* judicial independence, with particular attention paid to the challenges for both concepts in terms of the ECtHR case law. It also focuses on Ukraine's perspective as an EU candidate state. The article poses the following research questions: What are the main approaches and common challenges for *de jure* and *de facto* judicial independence in European countries based on the latest case law of the ECtHR? What lessons can be learned by Ukraine, as an EU candidate, from such case law in order to mitigate the gap between *de jure* and *de facto* judicial independence?

1. Judicial independence as a multifaced concept: *De jure* and *de facto*

One of the most productive approaches to researching judicial independence is to distinguish between its *de jure* and *de facto* dimensions (Gutmann & Voigt, 2018; Hayo & Voigt, 2007, 2014; Feld & Voigt, 2003; Ginsburg & Melton, 2014; van Dijk, 2021). *De jure* judicial independence refers to the legislative guarantees of court independence, whereas *de facto* judicial independence reflects the actual situation with respect to such guarantees, as well as the perception of courts as independent institutions among the public. This approach was first presented in a study by Feld and Voight (2003) on the independence of constitutional courts, and over time was extended to the judiciary in general. Although this approach was later criticized (Ríos-Figueroa & Staton, 2009), the dichotomy *de jure/de facto* judicial independence became a basis for other researchers.

Explaining the distinction between the two concepts, Voight et al. (2014) noted that *de jure* independence reflects the legal framework regarding judicial autonomy, whereas *de facto* independence represents the actual autonomy enjoyed by judges in practice. Ríos-Figueroa and Staton (2009) define *de jure* independence as the intention of judges to behave in a certain way, and *de facto* independence as their actual behaviour. In some sources, these types of independence are referred to as formal and perceived independence (van Dijk, 2021). For instance, the European Network of Councils of Justice (ENCJ) presented a comprehensive study on measuring judicial independence based on the distinction between formal and perceived judicial independence (ENCJ, 2023). Among the indicators of judicial independence, the ENCJ identified the following: 1) *indicators of formal independence of the judiciary as a whole* – a) the legal basis of independence, b) the organizational autonomy of the judiciary, c) financial independence, d) and the management of the court system; 2) *indicators of the formal independence of an individual judge* – a) human resource decisions regarding judges, b) disciplinary

measures, c) the non-transferability of judges, d) the allocation of cases, e) and the internal independence of judges; and 3) *indicators of the perceived independence of the judiciary and the individual judge*, which are carried out through surveys on the perception of judicial independence by the public, litigants, lawyers and judges, as well as by measuring corruption and the level of trust in the court compared to other institutions (ENCJ, 2023). In this study, judicial independence is analysed in connection with formal and perceived judicial accountability, which also have the same dimensions – the formal accountability of the judiciary as a whole, the formal accountability of the individual judge and their staff, and the perceived accountability of the judiciary and the individual judge. Each dimension also has particular indicators (ENCJ, 2023). Such an approach to studying the issues of the independence and accountability of judges together is widespread (Burbank, 2007; Geyh, 2003; Andenas, 2007; Keilitz, 2018; Shetreet & Turenne, 2013).

It should be mentioned that studies and international documents focus primarily on highlighting the set of guarantees of *de jure* judicial independence and its types. For instance, Ginsburg and Melton (2014) identified such guarantees as: the constitutional enshrinement of the requirement of judicial independence; the term of office of judges; guarantees of the selection and removal procedures, including limited grounds for removal from office; and salary insulation. Different levels of *de jure* judicial independence can also be distinguished: a) *the institutional independence of the judiciary*, which reflects the external independence of the judiciary from other branches of power; b) *the internal independence of courts*, which reflects the independence of courts and judges within the judicial system, i.e., between higher and lower courts, judges of such courts, and judges holding administrative positions in the court; and c) *the personal independence of a judge*, which is reflected in the independence of judges during the trial in a particular case (Tsuvina, 2021).

De facto judicial independence reflects the actual situation with the fulfilment of *de jure* guarantees, and reflects the perception of the public regarding the courts as independent institutions. The academic literature offers a variety of perspectives on this type of independence and different approaches to its measurement (Crabtree & Fariss, 2015; Ríos-Figueroa & Staton, 2014). Some scholars understand this type of judicial independence as *de facto* autonomy or the capacity of a judge to render a decision in a particular case without undue influence (Kornhauser, 2002). Others also associate it with the confidence that court decisions will be properly executed by all branches of government, i.e., this understanding reflects judicial independence as 'power', according to which a judge is not only autonomous in making a decision, but their decisions must be executed regardless of the will of other branches of government (Cameron, 2002). In many sources, this type of independence is identified in terms of the perception of court independence by various stakeholder groups (judges, jurors, lawyers, companies, and both ordinary citizens who have had interactions with the judicial system and those who have not) (van Dijk, 2021).

The disparate conceptualisations of *de facto* judicial impartiality give rise to two approaches to its measurement. The first approach is related to the fact that the measurement of *de facto* independence is carried out by studying the real situation with the actual implementation of *de jure* independence indicators. This approach was exemplified by Voight et al. (2014). Conversely, scholars who study the perceived independence of the court employ surveys of various stakeholder groups, including the public, lawyers, and judges, to assess this phenomenon. This approach to measuring the state of the perception of *de facto* judicial independence is represented by empirical studies by Eurobarometer (2023, 2024), the ENCJ (2023), and the EU Justice Scoreboard (2023) project.

For example, the annual measurement of judicial independence in EU countries among the general public and companies is conducted by Eurobarometer. In 2023 and 2024, among the indicators of judicial independence, respondents were offered the following for evaluation: a) the status and position of judges; b) the absence of interference or pressure from economic or other interests; and c) the absence of interference and influence from the executive and legislative branches of power (Eurobarometer, 2023, 2024).

The survey of the perception of the independence of national courts in the EU among ordinary citizens (involving 25,876 respondents in total) revealed the following: 11% assessed the state of judicial independence in their country as 'very good', 42% as 'fairly good', 24% as 'fairly bad', 12% as 'very bad', and 11% could not answer the question. At the same time, indicators were quite different by country. In general, judicial independence was evaluated as 'good' in Finland (86%), Denmark (86%, of which 40% assessed it as 'very good') and Austria

(82%), while in Hungary and Poland judicial independence was evaluated as 'good' by only 23% of respondents, and in Bulgaria by only 31% of respondents. At the same time, a significant proportion of respondents in Hungary (35%), Poland (30%) and Bulgaria (27%) assessed the state of judicial independence as 'very bad' (Eurobarometer, 2023).

It is noteworthy that, of the respondents from the general public who assessed the independence of the judiciary as 'very good' or 'fairly good': 79% attributed this primarily to the guarantees of the status of a judge; 63% did so due to the absence of interference or pressure from economic or other specific interests; and 62% held this view as a result of the absence of external influence from the executive and legislative branches of power. At the same time, the majority of respondents who rated the state of national judicial systems as 'bad' attributed this to similar factors – in particular, the existence of external pressure on the courts from the executive and legislative branches of government (77%) or from economic or other specific interests (60%) (Eurobarometer, 2023).

In 2024, Eurobarometer carried out the same survey among companies (14,621 respondents in total). The results of this survey were not vastly different from those of the general public survey. In particular, one in two companies in the EU rated the independence of courts and judges in their country as 'fairly good' (40%) or 'very good' (10%). At the same time, more than one in three companies rated the independence of their courts and judges as 'fairly bad' (22%) or 'very bad' (13%). In general, judicial independence was evaluated by companies as 'good' in Finland (91%, of which 38% assessed it as 'very good'), Denmark (88%, of which 49% assessed it as 'very good') and Ireland (78%, of which 39% assessed it as 'very good'), while judicial independence was evaluated as 'good' by only 22% of respondents in Poland, 25% in Bulgaria, and 28% in Hungary. At the same time, a significant number of companies in Bulgaria (30%), Poland (23%), and Hungary (26%) assessed judicial independence as 'very bad' (Eurobarometer, 2024).

Another interesting point is the correlation between the *de facto* and *de jure* independence of the court. For example, Hayo and Voight (2005) noted that indicators of *de facto* independence partly depend on indicators of *de jure* independence, and that *de jure* independence is one of the most influential factors in determining *de facto* independence, along with such factors as public confidence in the courts, the degree of democratization, freedom of the press, other cultural factors, etc. In the literature, the level of respect for human rights at the national level (Keith, 2002; Crabtree & Nelson, 2017; Abouharb et al., 2013) and the economic growth of the state (Feld & Voigt, 2003; Voigt et al., 2014) are also mentioned as crucial factors of *de facto* judicial independence. Consequently, increasing the *de jure* level of judicial independence should also lead to an improvement in *de facto* judicial independence. Other authors are sceptical about this (Ginsburg & Melton, 2014). For example, Ríos-Figueroa and Staton (2014) pointed out that the correlation between the two types of judicial independence is weak, and sometimes even negative. They stressed the weak correlation between different indicators of *de jure* independence and the strong correlation between different indicators of *de facto* independence.

In practice, some dissonance can be seen between legislative guarantees of judicial independence and the actual practice of ensuring of such guarantees, i.e., between *de jure* and *de facto* judicial independence. This observation caused a shift in research on judicial independence from studying its legal guarantees to examining the actual state of their implementation and fulfilment, which has been emphasised by the Council of Europe.

The report of the Secretary General of the Council of Europe (2018) on the state of democracy, human rights and the rule of law states that 'the judiciary is not immune from the environment in which it operates', and that 'in recent years, creeping populism and attempts to limit political freedoms among some member states have resulted in challenges to the judiciary's independence at home – and at the international level too'.

In particular, some States have drafted laws allowing political interference in the appointment of judges and in disciplinary proceedings against them, introduced politically motivated changes in the composition of judicial self-governing bodies, and made proposals to empower the executive to replace court presidents at its discretion (Secretary General of the Council of Europe, 2018). These and other challenges have become the subject of attention from the ECtHR and the Court of Justice of the European Union (CJEU), whose case law is of great

importance within the European region. It is essential to understand the challenges facing judicial independence and, consequently, the rule of law in order to ensure the continued stability and integrity of the European legal order. Assessing the real situation with judicial independence at the national level, measuring the gap between proclaimed guarantees of *de jure* judicial independence and *de facto* judicial independence, and taking steps towards minimizing this gap can all help in this regard.

2. Judicial independence in ECtHR case law

In terms of the European Convention on Human Rights (ECHR), judicial independence is interpreted through the prism of the guarantees of the right to a fair trial, according to which every person in the determination of their civil rights and obligations or of any criminal charge against them is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6(1) of the ECHR). This provision correlates with Article 47 of the EU Charter of Fundamental Rights, which enshrines the right to an effective remedy and a fair trial.

While international documents and scholars place greater emphasis on judicial independence at the institutional level, the ECtHR focuses on the observance of guarantees of the independence of judges in particular cases, evaluating the State's positive obligation to ensure the fairness of trials. In this context, it is possible to discuss the personal dimension of judicial independence. The ECtHR has repeatedly emphasized that 'the notion of the separation of powers between the political organs or government and the judiciary has assumed growing importance in its case law. At the same time, neither Article 6 nor any other provision of the Convention requires the States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction' (*Oleksandr Volkov v. Ukraine*, 2013; *Stafford v. the United Kingdom* [GC], 2002). The ECtHR assesses the independence of the court in each particular case by considering a number of criteria: a) the manner of appointment of its members; b) their term of office; c) the existence of safeguards against external pressure; and d) the existence of external guarantees of the court's independence (or the appearance of independence) (*Findlay v. the United Kingdom*, 1997; *Brudnicka and Others v. Poland*, 2005). Four further dimensions of judicial independence can be distinguished: a) judicial independence vis-à-vis legislative and executive authorities; b) judicial independence vis-à-vis the judicial council; c) judicial independence vis-à-vis other courts (internal judicial independence); and d) judicial independence vis-à-vis the parties of the case (ECtHR, 2017; Tsuvina 2021).

Although the main approaches to judicial independence were shaped by earlier practice, a number of so-called new ECtHR judgments have recently been identified which are driven by modern challenges in the field of judicial reform, and which thus deserve special attention.

The new era in the judicial independence-related case law of the ECtHR began with the judgement in *Guðmundur Andri Ástráðsson v. Iceland* (2020). In this case, the applicant alleged a violation of Article 6(1) of the ECHR on the grounds that one of the judges of the newly established Court of Appeal of Iceland, which heard the case, was appointed in violation of the applicable law. The selection process in this case, conducted by the Evaluation Committee, yielded a roster of the 15 most qualified candidates, which was subsequently forwarded to the Minister of Justice. Remarkably, the judge presiding over the petitioner's case held 18th place on this list, and was thus excluded from it. Nevertheless, the Minister of Justice elected to appoint only 11 candidates from the list, proposing the inclusion of the candidates ranked 17th, 18th, 23rd, and 30th (including the judge who presided over the petitioner's case), without providing justification for these replacements. Subsequently, the list of candidates was approved by Parliament as a general list, contrary to the applicable legislation which provided for a roll-call vote for each candidate. The individuals were then appointed by the president. This case is notable for its implications regarding the establishment of a three-part test to determine whether the procedure for appointing a judge meets the requirements of Article 6 of the ECHR in terms of judicial independence and the standard of a 'court, established by law'. In particular, the ECtHR emphasised that in such situations, it should ascertain: (a) 'whether there was a manifest breach of the domestic law'; (b) 'whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges'; and (c) 'whether the allegations regarding the right to a "tribunal established by law" were effectively reviewed and remedied by the domestic courts'. In evaluating the circumstances of the case under this test, the ECtHR observed that the applicant had consistently highlighted that the judge who had presided over their case

had been unlawfully appointed as a consequence of the unlawful actions of the Minister of Justice and the procedurally flawed vote of the Parliament. Furthermore, the Supreme Court has repeatedly acknowledged, including in the applicant's case, the illegality of the appointment of judges to the Court of Appeal due to violations of the appointment procedure by the minister of justice and Parliament. Concurrently, the Supreme Court, having acknowledged these violations, did not assess them in accordance with the case law of the ECtHR. Instead, they were deemed to be inconsequential and did not impact the fairness of the applicant's trial, despite the arguments presented. The ECtHR identified a 'flagrant breach of domestic law' by all three branches of power, which is contrary to the right to a fair trial (*Guðmundur Andri Ástráðsson v. Iceland*, 2020). As evidenced by this case, there is a clear correlation between the institutional independence of the judiciary, as defined by the necessity of adhering to the established procedure for the appointment of a judge, and the individual independence of a judge in the context of a specific case.

At the same time, the most notable example in this regard is the rule of law crisis caused by the violation of the guarantees of judicial independence in Poland through a series of political decisions which were in fact an attempt to bring the judiciary under the control of the government (Moliterno et al., 2018; Pech et al., 2021; Matczak, 2020; Mokrá & Juchniewicz, 2019; Gómez, 2021). In numerous cases, the ECtHR concluded regarding the violation of Article 6(1) of the ECHR due to violations of the procedure of appointment of judges, including judges of the Constitutional Court of Poland, and the National Council of the Judiciary.

The first case in this context was the judgement in *Xero Flor w Polsce Sp. z o.o. v. Poland* (2021), where the ECtHR found a violation of the right to a fair trial because the decision to close the proceeding under the Constitutional Court was rendered with the participation of a judge of the Constitutional Court appointed to their position via a breach of the law. In particular, the ECtHR was requested to assess the implications of appointing Constitutional Court judges in lieu of judges who had been elected by the previous Parliament, but whose appointment had been rejected by the president. This judgement was the first in which the ECtHR ruled that such actions of the Polish Parliament and president contravene international law.

Later, the ECtHR found violations contradictory to the guarantees of an independent court established by law in the appointment of almost all organs of the justice sector reformed or established as a result of judicial reform: the Disciplinary Chamber of the Supreme Court (*Reczkowichcz v. Poland*, 2021), the Chamber of Extraordinary Review and Public Affairs of the Supreme Court (*Dolińska-Ficek and Ozimek v. Poland*, 2022; *Wałęsa v. Poland*, 2023), the Civil Chamber of the Supreme Court (*Advance Pharma v. Poland*, 2022), and the National Council of the Judiciary (*Reczkowichcz v. Poland*, 2021; *Grzęda v. Poland*, 2022; *Żurek v. Poland*, 2022). The CJEU also came to the same conclusions when considering cases against Poland on similar issues, finding rule of law violations in: attempts to lower the retirement age of judges of the Supreme Court of Poland, including the president of the Court, with the president of Poland being empowered to decide on the extension of their terms of office (*Commission v. Poland*, 2019a); lowering the retirement age for judges by setting different age thresholds for men and women, which had a discriminatory effect as it led to a different approach to the calculation of judicial remuneration after retirement, while at the same time empowering the minister of justice of Poland to decide on the extension of the term of office of judges (*Commission v. Poland*, 2019b); the illegal replacement of members of the National Council of the Judiciary (*Commission v. Poland*, 2020); the creation of a new Disciplinary Chamber of the Supreme Court, with the introduction of new grounds for the disciplinary liability of judges (*Commission v. Poland*, 2020), etc. All of these judgements of the ECtHR and CJEU show that national reforms of the judiciary should be performed carefully and in a balanced manner, otherwise they can violate the distribution of powers between the three branches of justice and enlarge the gap between *de jure* and *de facto* judicial independence.

In summary, the recent case law of the ECtHR creates the following approaches to judicial independence in terms of Article 6(1) of the ECHR:

i) the evaluation of judicial independence should be conducted within such criteria as the manner of appointment of judges, their term of office, safeguards against external pressure, and the appearance of independence (external guarantees of independence) (*Findlay v. the United Kingdom*, 1997; *Brudnicka and Others v. Poland*, 2005);
ii) several dimensions of judicial independence should be taken into account during such an evaluation – in particular: a) judicial independence vis-à-vis the legislative and executive authorities; b) judicial

independence vis-à-vis the judicial council; c) judicial independence vis-à-vis other courts (internal judicial independence); and d) judicial independence vis-à-vis the parties of the case (ECtHR, 2017; Tsuvina 2021);

iii) disciplinary proceedings should meet the following criteria: a) they must be conducted by a body which can be considered a 'court' within the meaning of Article 6(1) of the ECHR, i.e., which is independent, impartial and established by law, and which is composed of at least 50 percent judges; b) the legislation should provide clear grounds for the disciplinary liability of judges which meet the criteria of 'quality of law' in terms of legal certainty; c) judges should be guaranteed the right to a fair trial in disciplinary proceedings, i.e., compliance with the minimum guarantees of Article 6(1) of the ECHR; and d) the legislation should provide for the possibility of appealing against the decisions of the judicial council to an authority which can be considered a 'court' within the meaning of Article 6(1) of the ECHR (*Olujić v. Croatia*, 2009; *Reczkowichcz v. Poland*, 2021; *Grzęda v. Poland*, 2022; *Żurek v. Poland*, 2022);

iv) there is a correlation between the independence of the judiciary and the procedure for the appointment of judges: in assessing the procedure for the appointment of judges, it is necessary to consider whether there has been a breach of the domestic law governing the appointment procedure, whether the breaches of domestic law relate to a fundamental rule of the appointment procedure, and whether there was an effective remedy at the national level for a breach of the appointment procedure (*Guðmundur Andri Ástráðsson v. Iceland*, 2020).

3. De jure and de facto judicial independence in Ukraine

Recent ECtHR case law demonstrates that any reform of the judiciary at the national level should be based on international standards of judicial independence and the rule of law (Komarov & Tsuvina, 2021), especially when it comes to radical measures involving the replacement of a significant number of judges or the establishment of new organs in the justice sector. As can be observed, despite the legislative consolidation of guarantees of the independence of the judiciary in general and of judges in particular cases, the actual implementation of such guarantees may become extremely difficult at the national level. All reforms and innovations aimed at introducing new *de jure* regulation of judicial independence may *de facto* lead to violations of judicial independence.

Many of the problems identified in foreign countries today are in line with those that are emerging in Ukraine. For example, the current unsatisfactory state of the independence of the judiciary in Ukraine is illustrated by a number of decisions of the Constitutional Court of Ukraine (CCU) concerning various aspects of judicial independence. For example, the principle of the irremovability of judges was emphasised by the CCU in a case on the constitutionality of the establishment of the new Supreme Court, introduced in 2017 (Constitutional Court of Ukraine, 2020a). In its judgement, the CCU noted that 'the removal of the word "Ukraine" – the name of the state – from the verbal construction "Supreme Court of Ukraine" did not affect the constitutional status of this public authority'; therefore, the relevant changes 'were not aimed at termination of activity and liquidation of the Supreme Court of Ukraine', and the highest judicial body after the relevant changes continues to operate under the name 'Supreme Court' (para. 7). On the basis of these provisions, the CCU further concluded that 'there are no differences between the legal status of a judge of the Supreme Court of Ukraine [the former highest judicial organ] and a judge of the Supreme Court [the new highest judicial organ]' (para. 13), and therefore the renaming of the highest judicial body could not be a ground for the dismissal of all Supreme Court of Ukraine judges or their transfer to lower courts (para. 13). On the basis of this, the CCU concluded that 'Supreme Court of Ukraine' (SCU) judges should continue to exercise their powers as 'Supreme Court' (SC) judges, and that the actual differentiation of the judges of these bodies was not in line with the principle of the irremovability of judges. The issue of these judges has not yet been resolved (Constitutional Court of Ukraine, 2020a).

Furthermore, eight former SCU judges also obtained ECtHR judgements in their favour in *Gumenyuk and Others v. Ukraine* (2023). In June 2016, amendments to the Constitution and the new Law 'On the Judiciary and Status of Judges' were adopted. They aimed to restructure the judiciary, including the establishment of a new SC, where judges would be appointed through competition. The former SCU contested the provisions of the new legislation before the CCU, arguing that its dissolution and the prevention of judges from exercising their functions were unconstitutional. Despite participating in a competition for the new SC, none of the applicants were successful, and the new SC began operating in December 2017. In February 2020, the CCU ruled that only

one supreme judicial body existed under the Constitution and affirmed the principle of irremovability, stating that judges of the old SCU should continue their functions in the new SC. However, a draft law proposing the enrolment of former SCU judges into the new SC were not adopted, and the applicants were not able to resume their duties as SC judges. The applicants raised two main questions before the ECtHR: 1) invoking Article 6(1) of the ECHR, they argued that they were unable to challenge the prevention of their judicial functions due to legislative amendments in 2016, thus violating their right of access to court; and 2) under Article 8 of the ECHR, they contended that their inability to exercise their judicial functions as SC judges constituted unlawful and groundless interference with their right to respect for private life. The ECtHR, taking into account the complex background and context of the judicial reform in Ukraine, stressed that the right of access to the courts was considered fundamental to the protection of members of the judiciary, and that the applicants should have been able to bring their claims before the courts on an individual basis. However, there was no mechanism for individual application to the CCU, the only body empowered to overturn legislation. Furthermore, the courts of general jurisdiction in Ukraine did not have the power to strike down laws as unconstitutional. The ECtHR thus concluded that by restricting the applicants' access to the courts, the objectives of the reorganisation of the high courts in Ukraine, including ensuring a fair national judiciary and speeding up proceedings, could not be achieved. Therefore, the ECtHR held that there had been a violation of the applicants' right of access to a court (*Gumenyuk and Others v. Ukraine*, 2023). At the same time, it should be mentioned that neither the judgement of the CCU nor the ECtHR judgement have been enforced at the national level as yet.

Other problems within Ukrainian judicial reforms can also be mentioned in this regard – for example, the attempt by the Verkhovna Rada of Ukraine to reduce the number of SC judges to 100, which was declared unconstitutional and indicates a certain politization of the appointment and tenure of judges and an attempt to put pressure on the judiciary (Constitutional Court of Ukraine, 2020a). It is also worth noting attempts to limit financial guarantees for the independence of the judiciary, which are linked to the general state of the underfunding of the judiciary and the challenges posed by the COVID-19 pandemic. For example, the provisions of the law limiting the salaries of SC judges during the COVID-19 pandemic were declared unconstitutional (Constitutional Court of Ukraine, 2020b). A further case saw a constitutional petition from the SCU regarding the conformity with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine 'On the Judiciary and the Status of Judges' of 2016. In this case, the CCU acknowledged that 'the monthly life allowance of a retired judge should be equal to the judicial remuneration received by a full-time judge'. The decision of the CCU concluded that in case of an increase in such remuneration, the recalculation of the judge's life allowance should be carried out automatically, since 'the establishment of different approaches to the procedure for calculating the amount of the monthly life allowance of judges violates the status of judges and guarantees of their independence' (Constitutional Court of Ukraine, 2020c, para. 16).

This practice – together with other problems such as the lack of powers of the High Qualification Commission for Judges for 3.5 years (from 2019), which has led to a critical decline in the number of judges in the country, corruption scandals involving judges, and populist slogans such as 'the need for all judges to undergo polygraph tests' (Draft Law on Amendments, 2023) – significantly undermines the public perception of the independence of the judiciary, especially from the point of view of people who have no experience of court proceedings.

National surveys show worrying trends in public perceptions of courts and judicial independence. For example, according to the 2020 Razumkov Centre study 'Attitudes of Ukrainian Citizens towards the Judiciary', only 20.4% of respondents believe that today's courts in Ukraine are completely or mostly independent, while 67.8% of respondents hold the opposite view (judges are mostly or completely not independent). Among those who have attended court proceedings in the last 2 years, the share of those who believe that judges are independent is slightly higher than among those who have not had such experiences (32.2% and 18.6%, respectively), although in both groups the vast majority holds the opposite view (60.0% and 69.1%, respectively). Among respondents interviewed on their way out of court, 42.3% believe that judges in Ukraine are independent today, while 43.4% hold the opposite view (Razumkov Center, 2020). This perception of judicial independence is directly related to the level of trust in the judiciary. For example, 78.0% of respondents said they mistrusted the judicial system, while 13.0% said they trusted it; 71.3% of respondents mistrusted local courts, while 16.0% trusted them; and 65.7% of citizens mistrusted the SC, while 18.8% of respondents trusted it. Despite this, the balance of trust in the judicial system among respondents who had interacted personally with courts recently was generally positive, i.e., the number of respondents who trusted the courts (48.0%) was higher than the

number of those who did not trust the judicial system (41.6%). The level of trust in local courts was even higher among citizens who had had contact with the courts: the majority of respondents – 54.4% – expressed trust in local courts, while 34.9% did not trust them (Razumkov Center, 2020). During wartime, 58.9% of respondents do not trust the judiciary: 19.7% of respondents said they 'totally mistrust' the judicial system, while 39.2% said they 'rather mistrust' it. In contrast, 18.2% of respondents 'rather trust' the judicial system, while 6.6% 'totally trust' it (Razumkov Center, 2023).

Conclusion

In the complex global landscape of legal systems, the concepts of *de facto* and *de jure* judicial independence stand as pillars of justice, ensuring the fair and impartial application of the law. This exploration reveals that while *de jure* independence provides a sound legal framework, it is the manifestation of *de facto* independence that truly ensures judicial integrity in practice. *De facto* independence, rooted in a culture of respect for the rule of law, institutional autonomy and societal support, is the driving force behind judicial decisions free from undue influence or interference.

Ukraine's EU candidate status requires further reform of the judiciary, which should be carried out in accordance with international standards of judicial independence and the rule of law. One of the next steps on this path should be the establishment of a Rule of Law Roadmap, as has been accomplished in other countries that have gone through or are going through this process. In this respect, ECtHR case law is the common international standard of *de jure* judicial independence that should be taken as a basis for further reforms. Meanwhile, the recent case law of the ECtHR involving decisions against various European states shows that it also identifies failures in judicial reforms at the national level that nullify *de facto* judicial independence. From this perspective, further reforms in Ukraine should be carried out taking into account the relevant case law of the ECtHR and the experience of foreign countries. In particular, this case law emphasizes: the need to comply with the non-regression principle; the principle of legality during the appointment of judges; the principle of the irremovability of judges and the impossibility of their dismissal from office; as well as the need to ensure minimum guarantees of the right to a fair trial that must be provided in disciplinary proceedings against judges. At the same time, in order to implement the rule of law in practice, the emphasis should also be shifted towards ensuring the *de facto* independence of courts and increasing the level of perceived independence of courts in Ukrainian society.

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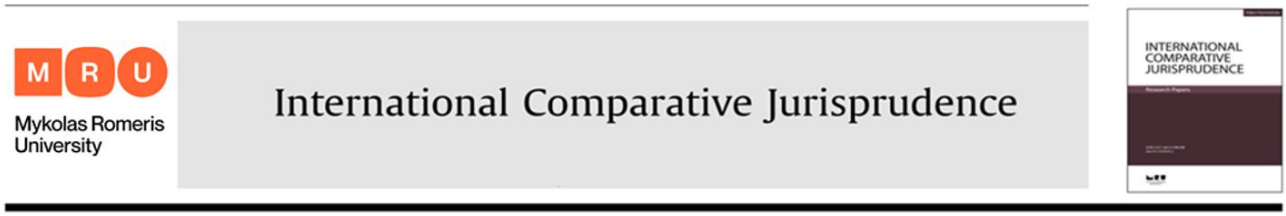

A REVIEW OF LEGAL REGULATION REGARDING THE USE OF UNMANNED AERIAL VEHICLES FOR BORDER SECURITY AND THE IMPACT OF GLOBAL TECHNOLOGIES

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Abstract. In the modern world, Unmanned Aerial Vehicles (UAVs) are becoming increasingly powerful tools for ensuring security and protecting national borders. Their monitoring and reconnaissance capabilities make them valuable assets for border services seeking to counteract smuggling, illegal migration, and other transborder crimes. However, the rapid development of UAV technologies also poses new challenges to the legal system, which require careful analysis and the adaptation of existing regulatory frameworks. This scientific article is dedicated to a comprehensive study of the legal aspects of using UAVs to ensure security and protect national borders. The research covers a wide range of issues, including: the legitimacy and ethical aspects of using UAVs for monitoring and protecting national borders; the right to privacy; freedom of movement; ethical principles of the use of force; and potential abuses of UAVs. The article also thoroughly examines international, intergovernmental, and national legal acts regulating the use of UAVs in the security sphere. An analysis of the conformity of modern technological achievements to existing norms is conducted, and areas requiring improvement are identified. In addition, practical aspects of implementing unmanned technology in border security systems are considered. Potential risks and benefits of using UAVs are identified, along with recommendations for minimizing risks and maximizing benefits. Geopolitical consequences of the rapid development of UAV technologies are explored, with attention paid to the influence of semiconductor geopolitics and technological progress in the field of UAVs through the lens of contemporary trends in global relations. The article concludes that UAVs have significant potential for ensuring security and protecting national borders. However, to fully realize this potential, it is necessary to improve the legal regulation of UAV usage. Alongside this, there is a need to develop effective strategies for utilizing UAVs in border security and enhance legislation in this regard. The scientific novelty of this study lies in its comprehensive analysis of the legal aspects of using UAVs for security and border protection, and in identifying and analyzing new challenges posed by modern technological advancements in the UAV field to the legal system. The research findings can be utilized to improve legislation regulating the use of UAVs in border security. General recommendations outlined in the conclusion, developed within the study, will assist border services worldwide in enhancing the use of UAVs for border protection. This research could contribute to the development of international cooperation in the legal regulation of UAV usage.

Keywords: Unmanned Aerial Vehicles, legal regulation, state borders, national security, international relations.

Introduction

This study aims to explore the legal aspects associated with the use of UAVs in border security. The main objective of the research is to conduct a review of the regulatory environment governing the use of these technological tools, taking into account their significant impact on global security and national sovereignty. The progress of modern technologies, especially in the field of UAVs, creates both new opportunities and challenges in border security. The use of UAVs for monitoring and ensuring security in border regions has become a pressing issue (State Border Guard Service of Ukraine, 2023), requiring deep understanding and legal regulation. The study aims to analyze and examine specific aspects of the legal regulation of UAV usage for border security, taking into account the latest advancements in this field (Militarnyi, 2021).

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In the context of ensuring security and border control, the use of UAVs can be an effective mechanism for detecting potential threats and supporting the surveillance of border territories (Klein, 2021). However, the implementation of such technology is associated with numerous challenges regarding the protection of the constitutional rights and freedoms of citizens, which requires the careful consideration and adaptation of existing regulatory frameworks (Lee et al., 2022).

Discussions regarding the observance of the constitutional rights and freedoms of citizens when using UAVs for border security often overlook the legal principle of necessity, which is key to ensuring security and preventing crime. Critics and scholars point out that UAV technology affects rights in various ways. In this context, the scope of analysis expands to indicate that UAVs can serve as tools for law enforcement agencies in combating crime, but at the same time, they can have military applications. Likely, there is a synthesis of both law enforcement and military aspects (Tyshchuk, 2023) in the use of UAVs for border security. Such an approach opens up a wide range of possibilities and risks associated with the application of these technologies, ensuring the necessary balance between security and the protection of fundamental human rights.

In the realm of military application, the use of UAVs is necessarily linked to international humanitarian law, which establishes rules for armed conflicts and the use of weapons, including UAVs. Countries have the right to self-defence, and may use UAVs as part of their strategy to ensure national security. However, they are also bound by international treaties and agreements regulating the use of weapons and military technologies. The use of UAVs is reflected in the strategic plans of the Armed Forces and is subject to control and authorization by military command, which includes mission management and coordination with other military assets (Haider, 2021).

The legal aspects of UAV usage demand careful study and regulation at both the international and national levels. International norms should address issues of classification and regulation of UAV usage, particularly in maritime border zones. National legislative acts should establish rules ensuring the protection of personal information, define responsibilities for rule violations, and regulate the use of UAVs for border security purposes.

The technological aspects of UAV usage require continuous improvement and the integration of advanced technologies to enhance their effectiveness and ensure security. This includes the application of advanced data processing algorithms, artificial intelligence (AI) systems, and information security measures. Such an approach will help ensure the efficient and secure use of UAVs in various fields.

The first section of this article provides an overview of the legal regulation regarding the use of UAVs at the international, intergovernmental, and national levels. Attention is paid to the correlation between the goal of ensuring public safety and the necessity of preserving fundamental human rights. Section 2 focuses on specific aspects of using UAVs for border security. Section 3 explores the application of AI for unmanned systems using the example of Australia as one of the main hubs of new technologies. Section 4 examines the relationship between semiconductor geopolitics and UAV technology progress, highlighting significant aspects of how these factors influence the geopolitical strategies of countries and the dynamics of global technological relations.

The aim of the article is to analyze various types of UAVs used for border security in selected countries, evaluate their effectiveness in performing border security tasks, identify challenges faced by border services when using UAVs, and develop recommendations for improving the use of these devices in ensuring border security.

The article has the following objectives: conduct a literature review on the use of UAVs for border security; provide a comparative analysis of different types of UAVs used for border security; analyze the effectiveness of UAVs in performing various border tasks, such as patrolling, surveillance, and the detection of violators; identify challenges faced by border services when using UAVs, including legal constraints, technical issues, and human factors; and develop recommendations for improving the use of UAVs in border operations, such as legislative enhancements, technical equipment upgrades, and personnel training.

The methodological approach to this article is based on collecting and analyzing data from various sources, including scientific publications, official reports from government agencies, informational resources, as well as electronic databases and websites. Various methods were used during the data collection process, such as content

analysis, the systematic evaluation of textual information, and the identification of key themes and issues. Adhering to ethical principles in the data collection process was an important component of the methodology. The results of the analysis were structured and classified using text editors and electronic spreadsheets. One of the challenges encountered during the research was the limited availability of information from some sources, which could affect the completeness and objectivity of the analysis.

The main approach involved systematic analysis and the identification of key aspects of UAV usage in the context of border security. This methodological approach was chosen based on its ability to provide a comprehensive analysis of information from various sources, taking into account the geographical location and the political and socio-economic situation in the selected countries – Australia, Brazil, China, European Union (EU) countries, Japan, Ukraine, and the United States (USA) – to ensure the objectivity and reliability of the research results. Other aspects – such as the fact that certain countries are essentially island nations (Australia, Japan), others occupy a significant portion of a continent (Brazil, China, EU, USA) or even constitute an entire continent (Australia), and some have practical experience in using UAVs in combat conditions (Ukraine, USA) – were also taken into consideration. Furthermore, the unique geography of Australia prompted the author to direct the most attention towards it. This approach allowed for a differentiated investigation using the abovementioned countries as examples. The conclusions drawn from applying this methodology will contribute to further research development in this area and the creation of effective regulatory mechanisms for the use of unmanned technologies in border security.

1. A general overview of international legal norms regulating the use of UAVs

1.1. Issues of international legal regulation of the use of UAVs

UAVs are rapidly being integrated into various aspects of life, from military and law enforcement activities to civilian applications such as goods delivery, agriculture, and mapping. However, the rapid advancement of UAV technology outpaces the development of a legal framework to regulate their use. This poses a range of challenges related to flight safety, the protection of confidentiality, and the potential for UAVs to be used for illicit purposes.

Given the rapid advancement of UAV technology, it is critically important to assess the current state of their legal regulation, especially in the context of their use for border security. Thanks to their capabilities, UAVs provide high-precision monitoring and rapid response to potential threats. Their usage includes tasks such as detecting illegal border crossings, monitoring the movement of vehicles and individuals, and gathering information for situational analysis (JOUAV, 2024).

Considering the above, the contradictions in legislation that arise during the legal regulation of the use of UAVs for border security pose a significant challenge for the legal system. Some of the main aspects of these contradictions are discussed below.

The use of UAVs for monitoring state borders raises serious concerns regarding the confidentiality and privacy of citizens. This creates a contradiction between the need for security and the risk of violating individual rights. Additional contradictions arise regarding the processing and storage of the large amount of data collected from UAVs, including issues of access, retention periods, and liability for use. International law questions the legislative regulation of the use of UAVs for border monitoring, especially considering potential deliberate or unconscious border crossings and violations of sovereignty. Additional uncertainties arise due to significant differences in the tasks performed by UAVs for law enforcement agencies and armed forces, leading to ambiguity regarding the legal status of such technological applications. Finally, questions of liability for potential events, such as accidents or breaches of confidentiality, remain unresolved, complicating the situation and highlighting the need for careful examination of the ethical and legal aspects of using UAVs for border monitoring.

Another key issue is adherence to the principle of non-refoulement, which is a cornerstone of international law concerning refugees and human rights. The use of UAVs in border control is defined by efficiency, technological innovations, and high productivity. However, some functions introduced or enhanced through UAVs do not exclude aspects of refugee rights and human rights in many maritime rescue operations. There is a real risk that

during the apprehension of illegal migrants, search and rescue operations may be perceived as unrelated to human rights and tragedies. Therefore, the use of advanced technology in border control should not overshadow the moral and legal consciousness of professionals (Garijo, 2020).

To address these contradictions, there is a need to develop clear, adaptive, and compromise-based legislation that balances the need for security with respect for human rights.

The international legal regulation of UAV usage is based on a combination of approaches from a number of documents, including:

- The Chicago Convention on International Civil Aviation (1944). This foundational document establishes general principles for international civil aviation, including airspace rules, flight safety, and licensing. UAVs used for civilian purposes must adhere to these rules just like manned aircraft. It is important to note that the Chicago Convention is not exhaustive and is supplemented over time with annexes and protocols reflecting new technologies and challenges. This document plays a crucial role in ensuring the safe, orderly, and efficient development of international civil aviation.
- The Rules of the Air (Annex 2 to the Chicago Convention; ICAO, 2013). This document establishes clear rules for UAV flights, ensuring their safety and integration into international airspace. This document also covers both general rules and visual and instrument flight rules, thus making UAVs accountable to the same standards as manned aircraft.
- Technical Instructions for the Operation of Unmanned Aircraft Systems (UAS). This ICAO (2015) document contains recommendations for the safe operation of UAVs, covering flight planning, pilot training, maintenance, and repair.

Although these documents contain recommendations for the safe operation of UAVs, they are not legally binding in Member States. Intergovernmental agreements, whether bilateral or multilateral, regulate the use of UAVs in the airspace of participating countries, establishing more detailed rules than ICAO regulations. National laws, varying from country to country, may be more or less stringent than ICAO rules or intergovernmental agreements. The fragmented nature of these international legal norms can create difficulties for UAV operators seeking to operate lawfully in different countries.

The general shortcomings of international UAV legal regulation are presented in Table 1, alongside brief descriptions, examples, consequences and possible solutions.

Table 1. The drawbacks of UAV regulation

Shortcoming	Description and Examples	Consequences and Possible Solutions
Fragmentation	Description: Inconsistency of sources leads to contradictions and ambiguity in interpreting rules	Consequences: Legal disputes, incidents, lack of clear understanding of rights and obligations
	Example: Differences in regulations complicate international flights	Solution: Standardization of international law norms, adoption of a framework convention regulating key aspects of UAV usage
Incompleteness	Description: Unaddressed aspects of liability for damages or the use of UAVs in armed conflicts	Consequences: Legal uncertainty, risk of abuse, lack of compensation mechanisms
	Example: Abuse due to impunity	Solution: Development of new norms of international law addressing gaps regarding the use of UAVs
Lag	Description: The pace of technological advancement outpaces attempts at legal regulation of UAV usage	Consequences: Lack of effective control over the use of UAVs, risk of new problems not addressed by international law emerging
	Example: Abuse due to impunity	Solution: Continuous updating of international law, adoption of flexible norms allowing regulation of new technologies

Inefficiency of control mechanisms	Description: Lack of effective mechanisms for monitoring compliance with the rules of UAV usage, which can lead to their violation	Consequences: Non-compliance with international norms, risk of conflicts arising, lack of accountability for violations
	Example: Countries may ignore international norms if they do not face sanctions	Solution: Establishing effective control mechanisms, such as monitoring systems and sanctions, involving international organizations in enforcing compliance
Insufficient international cooperation	Description: Countries are not always willing to cooperate with each other on regulating the use of UAVs, which can lead to the duplication of efforts	Consequences: Inability to address common issues, such as cross-border UAV flights. Risk of conflicts arising
	Example: The lack of a unified approach to regulating UAVs can complicate international cooperation in this area	Solution: Strengthening international cooperation, establishing joint regulatory and control mechanisms, exchanging information and experiences

1.2. Inter-governmental agreements and standards for the classification of UAVs

The growing popularity of UAVs in various fields such as border security, environmental monitoring, mapping, and delivery requires the clear regulation of their use at the international level. Inter-governmental agreements play an important role in this regard, establishing framework rules and principles for cooperation between countries regarding UAV operations. Examples of such agreements include: the Agreement on Joint Use of Airspace between Ukraine and Romania (2022), allowing the use of UAVs for joint monitoring and border protection; the Memorandum of Understanding between the United States and Canada on cooperation in the field of unmanned systems (2019), promoting cooperation in the research, development, and operation of UAVs; and the Cooperation Agreement between the European Aviation Safety Agency (EASA) and the International Civil Aviation Organization (ICAO) (2018), aimed at harmonizing UAV operation rules in Europe and worldwide.

Another, more recent example is the agreement signed between the United Kingdom and Northern Ireland and Frontex (Frontex and Home Office, 2024) regarding the deployment of border force officers and UAVs to help stem the flow of illegal migration. The uniqueness of this agreement lies in the fact that it cannot be fully characterized as intergovernmental, as it was signed on one side by a government (UK) and on the other by an intergovernmental special-focus organization (Frontex).

Intergovernmental agreements contribute to standardizing the rules for UAV operations across different countries, facilitating cross-border flights and collaboration. This opens the door to information exchange and joint projects, fostering innovation and the development of new technologies. Additionally, intergovernmental agreements allow for the establishment of stringent safety standards for UAV operation, significantly reducing the risk of accidents and incidents. This ensures the protection of people and property on the ground and enhances trust in UAVs overall. Moreover, intergovernmental agreements can substantially stimulate economic growth in various sectors, helping to safeguard the environment.

Thus, intergovernmental agreements regarding UAVs play a crucial role in creating a favourable environment for responsible and efficient UAV utilization. Their benefits encompass areas such as safety, innovation, economic growth, and UAV classification. As the popularity of UAVs continues to grow, the importance of intergovernmental agreements will only increase.

The general classification of UAVs is based on their functional characteristics, such as flight principles, mission, weight, thrust, control, altitude range, configuration, launch method, payload, size, flight duration, autonomy level, operational radius, ability to perform tasks in various weather conditions, and considering the specific requirements of each application field (target) (Telli et al., 2023).

NATO standards regulate the classification of military UAVs based on their maximum take-off weight. According to these standards, UAVs are divided into three classes: Class I, with a maximum take-off weight of up to 150 kg; Class II, with a maximum take-off weight of up to 600 kg; and Class III, with a maximum take-off weight of over 600 kg. Class I is further subdivided into the micro (up to 2 kg), mini (up to 15 kg), and small (over 15 kg) categories. According to the STANAG 4670 standard (NATO Standardization Office, 2019), UAV classification involves defining categories based on the level of military operations, operational altitude, operational radius, and other parameters. For example, Class III includes tactical and strategic strike UAVs such as Reaper and Global Hawk, while Class I encompasses small tactical units represented by platforms with compact sizes and limited operational radius, such as Scan Eagle and PD-2.

In the law enforcement sector, the classification of UAVs is also based on various criteria, taking into account the specific needs and tasks of law enforcement agencies. First and foremost, significant attention is given to the functional characteristics of UAVs, such as video surveillance capabilities, object detection and tracking abilities, as well as the capability to capture and store video material for further analysis. The level of autonomy is also an important criterion, as law enforcement agencies may use UAVs to carry out missions without constant operator intervention. The operational radius of UAVs in law enforcement agencies may be limited or expanded depending on the requirements of a specific operation, and the ability to operate in various weather conditions may be crucial for the successful completion of tasks. Additionally, it is important to consider specific requirements and limitations established by legal norms regarding the protection of personal information and ensuring human rights and fundamental freedoms in the process of using UAVs by law enforcement agencies. Such an approach allows for the effective and ethical use of UAVs in law enforcement activities (Haider, 2021).

The main functional characteristics of UAVs in the civil sector include their capabilities for aerial photography, geodetic surveys, the monitoring of transportation, control of agricultural lands, as well as for search and rescue operations. The level of autonomy of UAVs in the civil sector can be high, as this allows for the automation of processes and increases productivity. The operational radius of UAVs can vary depending on specific tasks, but is often limited to relatively short distances from the control point. It is also important for UAVs to be able to operate in various weather conditions, as many civil UAV applications require work even in inclement weather. In the civil sector, particular attention is paid to complying with flight safety requirements, protecting personal information, and adhering to legislation regarding the use of airspace. This approach ensures the effective and safe use of UAVs in the civil sector for various tasks and activities.

According to the classification system of the European Union Aviation Safety Agency (EASA), based on Regulations (EU) 2019/947 and 2019/945, there are three categories of civil UAVs: open (low risk, no pre-flight authorization required); specific (higher risk, pre-flight authorization required); and certified (significantly higher risk, certification and licensing required) (European Union Aviation Safety Agency, n.d.).

Dasom et al. (2022) propose a comprehensive set of recommendations to ensure the safety and confidentiality of civil UAVs. Their suggestions include user training, mandatory incident reporting, unique UAV identifiers, detailed rules, user control over data, transparency of data management methods, data transmission limitations, penalties for violations, the monitoring and certification of confidentiality practices, as well as the harmonization and standardization of the classification, registration, and certification of UAV usage cases. Implementing these recommendations can help minimize risks associated with UAV use and foster trust in this technology.

Therefore, the recommendations suggest that the classification of UAVs is a critical step in standardizing their use and establishing appropriate rules. Clear definitions based on functional characteristics, mission, weight, thrust, and range will allow the diversity of unmanned systems to be harmonized and their optimal sphere of application to be determined. This provides a foundation for setting standards and rules, promoting their effective use, and reducing potential conflicts.

1.3. Features of the national legislation of individual countries in the field of UAV use, with a focus on Ukraine

First and foremost, the use of UAVs is subject to legislation and standards established by national aviation authorities, such as those listed in Table 2 below.

Table 2. The national aviation authorities of selected countries

Country	National Aviation Authority	Website Link
Australia	Civil Aviation Safety Authority (CASA)	https://www.casa.gov.au/
Brazil	Agência Nacional de Aviação Civil (ANAC)	https://www.gov.br/anac/en
China	Civil Aviation Administration of China (CAAC)	http://www.caac.gov.cn/English/
EU countries	European Union Aviation Safety Agency (EASA)	https://www.easa.europa.eu/en
Japan	Civil Aviation Bureau (CAB)	https://www.mlit.go.jp/en/koku/index.html
Ukraine	State Aviation Administration of Ukraine (SAAU)	https://avia.gov.ua/
United States	Federal Aviation Administration (FAA)	https://www.faa.gov/

These authorities establish rules and restrictions for the safe operation of UAVs, covering aspects such as maximum flight altitude, distance from airports, no-fly zones, and other safety issues (Table 3). According to these rules, UAV operators, including border service personnel, must adhere to the established requirements to prevent accidents, ensure airspace safety, and protect confidentiality.

Table 3. The specifics of licensing and flight regulations

Countries	Licensing and permits	Main flight rules	Special features
Australia	Operator Category 1: Up to 250 g – registration, 0.25–2 kg – license, >2kg –license and certificate	Visual line of sight (VLOS), 120 m, restricted areas, confidentiality, no alcohol/drugs, no hazardous cargo	Registration for UAVs <250 g, categorization, extended certificate for >2 kg
Brazil	Class A1: Up to 250 g – no license, 0.25–2 kg – license, >2 kg – license and permit	VLOS, 400 m, restricted areas, confidentiality, no alcohol/drugs, no hazardous cargo	Classification, permit, no registration required for UAVs <250 g
China	Class C0: Up to 250 g – no license, 0.25–4kg – license, >4kg – license and permit	VLOS, 120 m, restricted areas, confidentiality, no alcohol/drugs, no hazardous cargo	Classification, permit, registration required for all UAVs
EU countries	EASA Drone Rule: Open (up to 250 g), Specific (0.25–2 kg), Certified (>2kg); requirements depend on category/operation	VLOS, altitude restrictions (depending on category), restricted areas, confidentiality, no alcohol/drugs, no hazardous cargo	Categorization and requirements of EASA Drone Rule, altitude limitations depending on category
Japan	Class 1: Up to 200 g – no license, 0.2–6kg – license, >6kg – license and permit	VLOS, 150 m, restricted areas, confidentiality, no alcohol/drugs, no hazardous cargo	Registration for all UAVs, license for commercial use, restrictions on flights over residential areas
Ukraine	Resolution No. 1389: Up to 250 g – no registration, 0.25–	VLOS, 400 m, restricted areas, confidentiality, no	Registration for UAVs >250 g, no categorization

	2 kg – registration, >2kg – registration and permit	alcohol/drugs, no hazardous cargo	
USA	FAA Part 107: Registration, UAV pilot license for commercial use	VLOS, 400 ft, restricted areas, confidentiality, no alcohol/drugs, no hazardous cargo	Registration for all UAVs, license for commercial use, altitude limitations in feet

In Ukraine, Khalymon et al. (2021) identified gaps in legislation and proposed amendments to law enforcement legislation regarding: additions to Article 20 of the Law of Ukraine 'On the State Border Guard Service of Ukraine' regarding the use of UAV flight monitoring results to ensure border security and security in the maritime economic zone; the recognition of information obtained through UAVs as official documents admissible as evidence in criminal, administrative, and civil cases; the confirmation of the legality of actions by the State Border Guard Service of Ukraine in border monitoring using UAVs, establishing flight conditions that do not violate human rights; the classification of UAVs by categories and restrictions on the use of Class I (micro and mini) UAVs for border monitoring without crossing borders; and the regulation of compensation issues for damage caused by UAVs, including accidents and collisions with other vehicles. These provisions are aimed at improving the legislative framework for the use of UAVs in border control, ensuring effective use and the protection of human rights.

Currently, Ukraine is in the process of developing rules regulating UAV operations. These draft rules adhere to relevant EU principles, ensuring aviation safety and development. It is important to note that the legislative regulation of UAV use is not unique to Ukraine. In most EU countries, UAV operation procedures are not yet fully defined. The USA is the most advanced in this regard, allowing small UAVs to fly freely up to 400 meters. However, even in the USA, questions remain about the safe use of UAVs, especially in densely populated areas and over urban territories. Legal uncertainties slow down the development of the UAV market, which is technically ready to launch many new services such as goods delivery, urgent aerial photography, and large-scale monitoring (Ivannikova & Ayrapetyan, 2021). Ultimately, similar rules which entered into force in the EU in 2023 (Regulations (EU) 2019/947 and 2019/945) will significantly simplify access to unmanned operations, regardless of the European country in which one plans to operate.

In many other countries, the use of UAVs sparks active debates among lawyers, focusing on potential privacy and security breaches (Bentley, 2019). It is important to emphasize the conflict between the task of ensuring public safety and the need to preserve fundamental human rights (Fox, 2022). Technological innovations in the field of UAVs open up new opportunities for information gathering (Lundgaard, 2023), with particular attention paid to remote control capabilities (Yaacoub et al., 2020). The legality of UAV use must be regulated within existing legal norms (Chen et al., 2024), except for the use of AI-based software, which introduces additional complexities (Kaplina et al., 2023).

Research by Tan et al. (2021) on the impact of UAVs on public opinion in Southeast Asia revealed that societal attitudes toward this technology vary depending on the context of use. Using the Knowledge, Attitude, and Practice model, the researchers identified differences in perception by zones: industrial zones had the highest level of acceptance, followed by recreational and commercial zones, while residential areas showed the lowest level. Important factors such as fear and concern influenced public perception differently in various contexts.

The use of UAVs by armed forces poses complex challenges for international law. Conducting strikes using UAVs requires the consideration of several legal frameworks, such as international humanitarian law and the law of war. A key aspect is not only compliance with individual norms, but also adherence to all relevant rules. Even a single violation can render an action illegal, regardless of compliance with other rules. It is important to understand that UAVs, as instruments of war, do not inherently violate international law; they can be used lawfully if they comply with applicable regulations. However, their use may increase legal disputes, especially in the realm of human rights and liability for civilian casualties. Additionally, extraterritorial use of UAVs may serve as a basis for expanding the interpretation of the law, which can impact international norms. Such expansion arises from a broad interpretation of the law that supports military actions using UAVs (Brookman-Byrne, 2018).

2. Specific aspects of using UAVs to ensure border security

2.1. The role of UAVs in ensuring border security

The border services of many countries recognize the relevance and potential of using UAVs to ensure security along national borders (the main advantages are summarized in Table 4). This initiative is considered necessary given rapid technological advancements and increasing security challenges. The active integration of these technologies becomes a crucial step in enhancing border security and the efficiency of border control, as well as improving the overall security systems of the country (Shah, 2023).

UAVs are utilized in border security to provide continuous surveillance and monitoring of territory. They enable the rapid detection of illegal border crossings, smuggling, and other breaches. Moreover, UAVs are employed for patrolling inaccessible areas, ensuring efficient control at minimal costs, and allowing rapid responses to events by providing crucial real-time information to operational services for decision-making. The use of AI technologies for image processing allows for the automatic detection of suspicious activity at the border, contributing to the more effective combatting of illegal crossings and other infringements. The advantages of using UAVs lie in their effectiveness, cost-efficiency, and ability to ensure personnel safety. Additionally, UAVs demonstrate flexibility and manoeuvrability in various conditions. Examples of successful implementation include programs in the USA (U.S. Customs and Border Protection, 2023; Davis, 2020; Sweet, 2023), Israel (Israel Economic Mission to South Africa, 2022), the EU (Frontex, 2023), and other countries or state associations utilizing UAVs to effectively monitor and ensure security along national borders.

Table 4. Key advantages of UAVs for border security

Advantage	Description
Comprehensive overview	UAVs cover significant areas in a short period of time, providing a wider picture of border activity compared to ground patrols
Increased precision	UAVs are equipped with high-resolution cameras and sensors, allowing them to capture details that may be missed by ground patrols
Risk reduction	UAVs can perform dangerous or complex tasks, such as flights over remote areas or in adverse weather conditions, without risking human lives
Cost reduction	Typically, UAVs are cheaper to operate than aeroplanes or helicopters, making them an economically advantageous solution for long-term surveillance
Flexibility	UAVs are quickly deployable in any terrain, even in hard-to-reach areas
Ability for 24/7 surveillance	UAVs can operate day and night, providing continuous border surveillance
Data collection	UAVs can collect various data types, such as photos, videos, thermal images, and sensor data, which can be used for analysis and reconnaissance
Support for ground patrols	UAVs can provide ground patrols with real-time information, coordination, and aerial assistance

2.2. Using UAVs for border security in selected countries

2.2.1. The experience of Australia

UAVs are actively utilized in Australia across various sectors including agriculture, healthcare, emergency response, arts, goods delivery, scientific research, environmental protection, and education. They contribute to increased efficiency, provide economic benefits, and improve quality of life for Australians. The Australian government and stakeholders seek public feedback for the further development and implementation of UAV technology (Department of Infrastructure, n.d.).

The Australian technology industry is filled with newcomers who emphasize the importance of their products in changing the world and their global significance. However, many of them encounter a less exciting reality. In

the case of Sypaq Systems (https://www.sypaq.com.au), an engineering and technology company from Melbourne, the development of the Precision Payload Delivery System (PPDS) has become a key component of Ukraine' s efforts in effectively countering the Russian army (Smith, 2023).

The uniqueness of the PPDS lies in its portability and ease of assembly. Thanks to its integrated design and independently developed mechanisms, the UAV can be assembled in field conditions with a minimal set of tools. This makes it an ideal choice for use in extreme scenarios where availability and mobilization speed are critically important factors (Nichigo Press, 2023).

Representatives from industry and the Ministry of Defence of the Commonwealth of Australia participate in congresses and conferences to discuss the role of UAVs and robotics in defence. This collaboration underscores the current partnership between government and industry aimed at developing innovative technologies in the field of UAVs. Additionally, this partnership is crucial for future defence capabilities and protecting the national interests of Australia across various security domains (Australian Government, 2023).

The Australian Army utilizes UAVs for reconnaissance, surveillance, target acquisition, and ground operations support. The primary UAV in the army's inventory is the RQ-7B Shadow 200, which features high-resolution capability and long-endurance flight capability. Australia also plans to introduce Small Unmanned Aerial Systems (SUAS) to enhance reconnaissance and surveillance capabilities at the tactical level (Australian Army, n.d.).

In addition, Australia has actively utilized UAVs over the past decade to enhance border security. UAVs offer flexibility, accessibility, and observational capabilities that cannot be achieved through traditional patrol methods.

With the increasing prevalence of UAV technology, there is growing potential for their use in all maritime fleets. UAVs such as the MQ-4C Triton (Royal Australian Air Force, n.d.) have become particularly popular for maritime surveillance to combat illegal, unreported, and unregulated fishing. However, it is important to note that international law does not contain clear classifications and conditions for the use of UAVs along maritime borders in pursuit of border violators. This could lead to increased UAV usage, significantly complicating law enforcement activities in the maritime domain. The shortcomings of existing legislation may be exploited by states employing UAVs to advance their use in the maritime environment within the grey zone of military operations, undermining existing international maritime law and order (McLoughlin, 2022).

To prevent the emergence of grey zones, Australia is establishing partnerships with island nations in the region. For example, the Sri Lanka Coast Guard (SLCG) utilizes UAVs and other equipment provided by the Australian Border Force (ABF). This significant enhancement improves surveillance and response capabilities in the coastal zone. The SLCG serves as a crucial partner to the ABF in combating human trafficking and other transnational crimes in the maritime waters of Sri Lanka (Sri Lanka Coast Guard, 2023).

Additionally, Australia offers the use of UAVs to enhance border security in the Philippines. As a strategic ally of the Philippines alongside the USA, Australia increases military and defence cooperation, aiding in countering China's influence in the Indian and Pacific Ocean regions. The use of UAVs underscores the strategic support of Australia and the importance of modern technologies for effective border control amidst growing security and defence challenges (Cepeda, 2023).

2.2.2. The use of UAVs in Brazil

In Brazil, a country with continental dimensions, detecting and monitoring various illegal activities poses a growing challenge for government agencies. Therefore, the Brazilian government actively utilizes UAVs to enhance the security of its land and maritime borders, which extend over 23,000 kilometres. UAVs offer flexibility, accessibility, and observational capabilities that are impossible to achieve using traditional patrolling methods (Silva, 2013). Table 5 highlights the uses of UAVs in Brazil.

Table 5. The use of UAVs in Brazil

Criteria for UAVs	Description
Potential	This is a promising solution for monitoring remote and hard-to-reach areas, capable of collecting high-resolution data in real-time at a lower cost
Challenges	Fighting illegal activities in the Amazon is challenging due to the large scale of the region and the complexity of access
Applications	Monitoring illegal deforestation, identifying airstrips, locating mines, and intercepting vessels
Examples (Types)	HERON 1, FALCAO, HERMES 450
Regulation	UAV operations in Brazil are regulated by ANAC and DECEA
Processing Systems	Data obtained from UAVs is processed using geographic information systems (GIS) for spatial analysis

The use of UAVs in combating illegal activities in the Amazon is a promising tool. However, for the successful large-scale implementation of this technology, careful consideration of regulation, privacy and data protection, and security issues is necessary. Moreover, the successful implementation of this technology requires wide cooperation among government agencies, the private sector, and international partners, as well as adherence to the highest standards of safety and ethical practice to ensure a balanced approach that achieves security goals and protects the rights and freedoms of citizens.

2.2.3. Chinese issues and prospects regarding the use of UAVs

Issues related to the use of UAVs by the National Border and Immigration Service (NBIS) of China include the complexity of models and their insufficient functionality. The variety of UAV models contributes to these challenges, including those related to servicing. Most used models have limited functionality, which reduces their effectiveness. There is also an issue around the lack of clear operational standards, leading to risks and the inefficient use of UAVs (Zhang, 2017).

In the future, the Chinese government plans to develop clear standards for the use of UAVs by the NBIS, which will contribute to improving their effectiveness and safety. Integrating UAVs with other systems, such as radars and sensors, will help enhance situational awareness and coordination. Additionally, the development of UAVs with expanded functional capabilities, such as surveillance, reconnaissance, and attack, will make them more versatile and useful for border security operations.

Thus, UAVs have the potential to significantly enhance border security in China, but addressing the challenges of their use is necessary. The development of standards, integration with other systems, and the expansion of functionality are identified by the Chinese government as key directions that will contribute to increasing the value of UAVs as tools for the NBIS.

2.2.4. European practice

The increasing use of UAVs in the EU opens up wide opportunities for various sectors, including agriculture, environmental monitoring, delivery, search and rescue operations, and law enforcement. However, this development is accompanied by challenges in the areas of legal regulation, safety, confidentiality, and ethics. At present, the use of UAVs in the EU is regulated unevenly, with different rules in each Member State, leading to legal uncertainty and complicating their cross-border use. The lack of a clear European legal framework in this area necessitates further implementation and supplementation at the national level to ensure the effective functioning of this technology in the EU.

The European Union has had positive experiences when conducting Maritime Air Surveillance (MAS), which is an essential component of their activities and a permanent Frontex service that is provided to national authorities. MAS utilizes surveillance aircraft and UAVs that transmit video and other data from the external borders of the EU and the Schengen area directly to headquarters in Warsaw and to national and European authorities. This enables real-time monitoring and timely responses to potential threats and events at borders (FRONTEX, n.d.).

The Eurosur information exchange system effectively complements maritime air surveillance by enhancing the management of Europe's external borders. It aims to support Member States by improving their situational awareness and ability to respond to transnational crime and illegal migration, and thus prevent loss of life at sea (Frontex, n.d.).

Eurosur is based on a network of National Coordination Centres (NCCs). Each Member State establishes an NCC, which brings together the agencies responsible for border control within that Member State. The main role of the NCC is to coordinate border surveillance activities at the national level and serve as the focal point for information exchange.

NCCs gather local and national information about border activities, including illegal border crossings and criminal activities. The data processed by NCC staff creates a national situational picture. NCCs are also responsible for exchanging relevant information with other Member States and Frontex. Based on this input data and information from other sources, Frontex creates the European situational picture and the Joint Border Surveillance Picture (focused on areas outside the Schengen zone and EU borders).

In recent years, there has been an increase in the militarization of EU borders through the use of UAVs and databases. This has resulted in significant financial and human costs, sparking debates among politicians and experts regarding the effectiveness and social consequences of such measures. Policymakers are considering plans to further strengthen this process (Statewatch, 2022).

2.2.5. The early stages of using UAVs for border security in Japan

The use of UAVs in Japan is growing, but it still remains at a relatively early stage concerning border security, offering greater potential in other areas which traditionally include agriculture, infrastructure monitoring, delivery, search and rescue operations, and law enforcement. Currently, the use of UAVs in Japan is regulated by the Civil Aviation Law and other regulations that restrict their application in populated areas, over people, and in flight-restricted zones. In 2020, the Japanese government announced a plan to liberalize UAV usage rules to stimulate innovation and economic growth, which involves expanding the scope of applications, streamlining permit procedures, and developing new technologies. However, there are challenges such as strict regulations, the need for infrastructure, and societal acceptance that limit the full potential of UAVs in the country. Nevertheless, the use of UAVs in Japan is expected to continue growing, with the government planning to invest in research, development, and infrastructure.

Even in the early stages of UAV usage, the Japanese government is determined not to fall behind other countries and has announced plans for data sharing between the Japan Coast Guard and the Japan Maritime Self-Defense Force (JMSDF), obtained from MQ-9B UAVs operated by each of the government agencies. This data exchange could be a step towards enhancing coordination and cooperation between various military and law enforcement agencies in Japan, helping to improve overall effectiveness and security in the region. Such information sharing could aid in responding to security threats by facilitating the timely exchange of data and collaborative problem-solving (Unmanned Systems Technology, 2023).

2.2.6. Ukrainian experience in using UAVs in wartime conditions

After the start of full-scale aggression on February 24, 2022, UAVs became an integral tool for protecting the Ukrainian border, providing round-the-clock monitoring of the border zone and helping to detect enemy reconnaissance and sabotage groups, adjust artillery fire, and save lives. The advantages of using UAVs are obvious: wide coverage, round-the-clock monitoring, accuracy and detail, mobility, and reduced risks for border guards. Despite significant advantages, the use of UAVs also faces challenges such as cost, dependence on technology, and the need for qualified personnel. However, in the long term, the role of UAVs in border protection will grow as the Ukrainian government plans to increase procurement and develop its own production of UAVs and related systems, as well as train more border guards to use them, in order to enhance the effectiveness of protecting state borders.

In response to the demands and restrictions created by the conditions of war in Ukraine, the use of UAVs is subject to a series of regulations. Civilians must obtain permission for their use, and the country's airspace has been closed to civilian users since February 24, 2022, with additional restrictions that vary by region. Prior approval from law enforcement agencies is required before using UAVs. Legislation also provides for the neutralization of UAVs posing a threat. Considering the above, the use of UAVs requires careful preparation and compliance with all requirements and restrictions (Institute of Mass Information, 2023).

2.2.7. USA's practice in the field of UAVs

UAVs, also known as drones, are an important and widely used tool in the USA for various applications in the civilian, law enforcement, and military sectors. The government, law enforcement agencies, private companies, and research institutions actively use UAVs to perform diverse tasks. In the civilian sector, UAVs find wide applications in fields such as land surveying, land management, agronomy, and environmental monitoring. In the law enforcement sector, drones are used for surveillance, patrolling, and crime detection. In the military sector, UAVs are crucial for conducting reconnaissance operations, as well as providing fire support and carrying out precision strikes on enemy targets.

The military applications of UAVs encompass various functions. In the realm of reconnaissance, they are used to gather intelligence on enemy forces and terrain, providing crucial information to military decision-makers. The monitoring of combat actions and frontline observation also becomes feasible through the use of UAVs, aiding in military operations management and enhancing the safety of military units. Some UAVs are equipped with weaponry and employed for striking enemy targets, ensuring precision and efficiency in military operations. In the logistics sphere, UAVs are utilized for delivering goods to the frontlines and evacuating the wounded, contributing to the support of combat units and reducing risks for military personnel. Additionally, UAVs are employed in electronic warfare to disrupt enemy radar signals and communication, providing vital support in counterintelligence and protection against electronic threats.

Looking ahead, the innovative approach suggested by Ahmadian et al. (2022) could be an intriguing prospect for the USA-Mexico border. This approach proposes the use electric lines (E-lines) to recharge UAV batteries. Instead of manually patrolling safety and danger zones, patrols could utilize UAVs to detect potential threats, and E-lines would allow UAVs to operate for longer periods without the need to return for recharging. This approach simplifies and enhances the effectiveness of border patrol operations, ensuring the security of national borders and reducing risks for patrol officers.

Rapid and accurate vessel detection using UAVs is crucial for maritime surveillance by the U.S. Coast Guard. Potential applications of UAVs include accident prevention and combating illegal fishing and smuggling. Therefore, Cheng et al. (2023) highlight the challenges associated with vessel detection in photographs obtained from UAVs, such as complex backgrounds and the need for high, real-time performance. To address these tasks, the aforementioned researchers propose the YOLOv5-ODConvNeXt enhanced deep learning model, which improves the accuracy and speed of vessel detection.

Research by Kumar et al. (2023) points out the current technologies and challenges regarding the integration of Blockchain technology (Ravikiran, 2023) into real-world applications for UAVs. Scientists emphasize the importance of using Blockchain as an effective solution for ensuring data security and confidentiality by distributing data across multiple transactions (blocks) and recording information on various physical media.

Alongside this, due to the potential use of UAVs by adversaries or criminals, some companies are actively working on the development and implementation of advanced border security systems to counter UAV swarm intrusions. These systems, tested by the U.S. Department of Homeland Security (2024), provide control over national borders and help prevent various threats, including smuggling, reconnaissance, illegal crossings, and potentially dangerous attacks. Through analytical protocols and integrated counter-UAV solutions, an increase in border protection levels and border control effectiveness can be expected. This is critically important for maintaining territorial integrity and the inviolability of national borders (Sentrycs, n.d.).

Also critical is the strategy to combat military UAV swarms, which faces significant legal hurdles, especially on domestic soil. These restrictions complicate the ability of military agencies to defend infrastructure from UAV threats. For instance, the existing legislative framework in the USA does not allow for the timely detection of potential threats emerging outside military facilities. Additionally, distinguishing between hostile and friendly UAVs is challenging, and gathering information about them can pose legal difficulties. Even if a threat is identified, it is often challenging to implement effective measures due to legal constraints and complex inter-agency cooperation procedures. This may result in UAVs remaining undetected until the moment of attack. At the same time, private individuals and law enforcement agencies also encounter legal constraints and risks when attempting to employ countermeasures against UAVs (Bell, 2022).

3. AI in action: The Australian perspective

AI is a field of computer science concerned with creating systems equipped with analytical, recognition, and decision-making capabilities. It is defined as a process in which human intelligence is modelled in machines to mimic human action. From a scientific and technical standpoint, AI is an organized set of information technologies that utilize research methods and algorithms to perform complex tasks in the current era of the Fourth Industrial Revolution (Sarker, 2022). The legal definition of AI presents challenges, and regulation must constantly adapt to the rapid development of this field. Ukraine is already implementing legal frameworks, including the Concept of AI Development (The National Council, 2022), while the EU is developing the Artificial Intelligence Act, which contains detailed legal definitions and ethical principles for regulating the use of AI (European Parliament, 2023). A working group in Ukraine is analyzing legal issues and data protection in the context of AI.

AI, in the evolution of its algorithms, poses a potential threat to the protection of personal data and even global security, which has become a pressing issue for regulators in various countries (United Nations, 2023). Regulation (EU) 2016/679 – the General Data Protection Regulation (GDPR) – came into effect in 2018 and set standards for the collection, processing, and storage of personal information in the EU, playing a key role in ensuring confidentiality and user rights in the virtual environment. An example is Austria, which applies GDPR to AI systems such as Clearview AI, demonstrating that violations of personal data rules can lead to sanctions from regulators (European Data Protection Board, 2023). Another example is Italy, which restricted access to the ChatGPT system due to concerns about the processing of citizens' personal data (Rahman-Jones, 2024). The successful integration of AI and GDPR involves considering the principles of lawfulness, transparency, consent, and other GDPR requirements, ensuring a high level of protection of personal data when using AI (Think Tank, 2020).

As of 2024, Australia has joined international efforts in the field of AI by signing the Bletchley Declaration along with 28 other countries and the EU. This declaration, signed during the AI Security Summit in the UK, commits to the development of AI safely, ethically, and responsibly. Summit participants included governments, companies, NGOs, and researchers in the field of AI. The declaration underscores the potential of AI and the importance of governments working together to effectively manage risks, ensuring the safe use of this technology for the entire international community. The Bletchley Declaration also aligns with the current efforts of the Australian government to support the responsible implementation of AI (Department of Industry, Science, and Resources, 2023b).

As of 2024, the Australian government recognizes AI as a critical technology in serving national interests, and seeks to ensure comprehensive access for Australians to the benefits that AI can provide. This includes fostering economic growth, creating new jobs, and improving citizens' quality of life. AI technologies are utilized to support small businesses in understanding their customers, transforming local production into more competitive ventures, effectively managing the environment and resources, as well as addressing significant national issues such as forest fires and healthcare. The government places special emphasis on promoting and safeguarding AI technology, identifying it as part of a list of critical technologies that constitute national interests. Australia aims to become a global leader in the development and implementation of reliable, secure, and responsible AI, demonstrating its ambitions in this technological field (Department of Industry, Science, and Resources, n.d.).

Additionally, as part of the budget guidance for the 2023–2024 financial year, the Australian government plans significant investment in the development of quantum technologies and AI to support businesses and integrate these technologies into various sectors. Initiatives include the creation of programs and the provision of grants to support projects utilizing quantum computing, as well as measures for the responsible and safe implementation of AI. This investment will amount to $101.2 million USD in total, contributing to the development of critical technologies and fulfilling government commitments to create jobs and support small and medium-sized enterprises in these areas by 2030 (Department of Industry, Science, and Resources, 2023a).

Autonomous systems, robotics, positioning, synchronization, and sensors are key technological domains that unite robots and machines for autonomous task execution with minimal human intervention. These technologies encompass the development of various robots, ranging from UAVs and autonomous systems to advanced imaging and sensor technologies (Shakhatreh et al., 2019). Their applications span a wide spectrum and include mapping, navigation, security, manufacturing, and scientific research. Global research in these domains has surged in recent years, further increasing scientists' interest. China and the USA lead research efforts, while the Australian government (Department of Infrastructure, 2021) implements these technologies in agriculture, healthcare, and other sectors. Commercialization is gauged by patents, and the Australian government aims to establish international standards for these technologies. Significant challenges exist in the form of socio-legal barriers, which can be overcome through public education, effective governance, and legislation. Autonomous technologies are viewed as a promising avenue for productivity enhancement and the development of new economic sectors, and the Australian government sees them as an opportunity for economic growth.

In June 2023, the Australian government demonstrated the integration of various robotic and autonomous systems in a combat environment, organized by the Office of Robotics and Autonomous Systems Implementation and Coordination within the Army. This demonstration included the deployment of dozens of UAVs, providing real-time observation streams to commanders, supporting tank and mechanized platoons. Additionally, remotely controlled autonomous combat vehicles and unmanned transport vehicles were used to minimize risks to soldiers. This demonstration showcased the prospects and potential of merging humans and machines in combat conditions, as well as the opportunities for utilizing high-tech solutions to ensure the safety and effectiveness of military operations (Australian Government, 2023).

The use of a UAV swarm in military or law enforcement situations, including border control, is a highly effective and advanced approach to security. These UAVs interact as an organized team, collectively detecting potential threats and transmitting critical information to the command centre. Leveraging natural collective mechanisms in the operation of UAV swarms contributes to the development of cooperation theory and effective control methods. The intelligent swarm concept has been successfully implemented in the joint management of various types of UAV swarms, and interaction with human operators expands the functional capabilities of such systems (Duan et al., 2023). There is a trend towards the continuous development of intelligent swarm technology and corresponding systems, positioning them as promising directions for further scientific research in this field.

4. The interplay between the geopolitics of semiconductor technologies and advancements in drone technology

The interplay between the geopolitics of semiconductor technologies and progress in UAV technology defines modern trends in global politics and technological development. Semiconductor geopolitics, a key element in the production of modern electronic devices, including UAVs, influences countries' strategic decisions on the world stage (Sehgal, 2023).

In the context of semiconductor geopolitics, countries actively compete for access to advanced technologies, which affects their strategic position and economic potential. Ensuring access to modern semiconductor technologies allows countries to effectively develop and implement advanced UAV systems, thereby defining their power in the realm of security and military capabilities (Omelianenko, 2023).

Furthermore, the increasing importance of semiconductor technologies, which serve as the backbone of innovation, defines the competitiveness of nations in the key segment of the technological space. Of particular

significance is the impact of AI-based software, which acts as a catalyst for the development of unmanned systems (Inoshita, 2024).

The semiconductor industry, based on the unique properties of semiconductor materials, is a crucial component of the modern electronics sector, providing the foundation for the development and production of advanced electronic devices. Equipment and material suppliers play a vital role in this process by providing necessary resources and technologies. As chip components continue to decrease in size, the semiconductor industry evolves, contributing to the increased productivity and energy efficiency of electronic devices while opening up new prospects for their utilization. Thus, the semiconductor industry not only serves as a significant catalyst for technological progress, but also plays a strategic role in the modern electronics sector, fostering its growth and innovation, particularly in the development of AI (Inoshita, 2024).

The development and application of the abovementioned solutions for UAVs and AI are based on ASML (Advanced Semiconductor Materials Lithography) technologies – a Dutch company that manufactures high-precision lithographic equipment for semiconductor production. The impressive growth and innovation of this company in recent decades have transformed it from a competitive player into the world's sole producer of high-quality lithographic equipment for semiconductors. This successful transition from a competitive player to a monopolist reflects the high level of innovation and technical expertise of ASML in the field of lithography, which defines and shapes the modern semiconductor industry (Koc et al., 2023).

Thanks to the high-quality equipment produced by ASML, which manufactures microchips that can also be used in modern weapon systems and AI devices, the company is effectively considered critical infrastructure for U.S. national security and has become the target of industrial espionage from China. ASML, considered the most valuable tech firm in Europe, indeed finds itself at the centre of geopolitical and technological tension (Koc et al., 2023), especially considering competition between the U.S. and China in the use of UAV swarms, a technology that remains imperfect at present (U.S. Government Accountability Office, 2023).

One of the main challenges that urgently needs to be addressed to improve current UAV swarm technology is dynamic task allocation for ground targets, which plays a crucial role in ensuring the autonomy, efficiency, flexibility, and resilience of UAVs. The complexity of this process arises from high environmental demand, the resource constraints of UAVs, and the need for reliable communication. Challenges include algorithm development, processing large datasets, action coordination, and cybersecurity. Current research in this field focuses on the use of AI and machine learning methods, alongside the development of new UAV swarm control techniques. Prospects include a wide range of applications in various industries and enhanced collaboration with humans, opening up new opportunities to increase autonomy and efficiency. Overall, dynamic task allocation is an active research area with great potential for further development, although it is somewhat dependent on the computational capabilities of hardware (Peng, et al., 2021).

Quantum physics and advanced algorithm architectures for machine learning have the potential to redefine innovations in computer technology by reducing their reliance on hardware. However, the fact that China's computational capabilities rely on access to a single tool produced by one company (ASML) illustrates the central role that lithography plays in the global technology sector. This industry is highly complex and is the result of intensive research efforts by a global network of experts in optics and materials science, as well as billions of dollars in investment. Chinese domestic lithographic tools lag behind the leading edge by several generations, lacking many key components such as ultrathin mirrors, as well as experience in system integration (Miller, 2023).

In a few years, ASML (2024a) will release a new version of its extreme ultraviolet (EUV) technology with a high numerical aperture, allowing for even more precise lithography. Research is underway for future tools with even greater precision, although it is unclear whether this will ever be practically or commercially feasible due to physical limitations (with precision approaching the size of an atom). However, we should hope for this, as it is critical for the future of Moore's Law (ASML, 2024b) and the advancements in computational technology that it enables (Miller, 2023).

Conclusions

This research highlights a broad spectrum of current challenges and prospects for using UAVs to ensure border security, focusing on key aspects of their legal regulation. Technological innovations in the application of UAVs for border security significantly impact legal aspects. Algorithms used to predict the behaviour of individuals and border violators may create uncertainty and raise legal questions. Law enforcement agencies, including the border services of different countries, emphasize their high-tech capabilities, but insufficient transparency in their processes and the secrecy of surveillance programs may lead to abuses and may be used to justify human rights restrictions. The conditions of unmanned surveillance may lead to confusion, as this does not always accurately distinguish border violators from civilian populations. The use of UAVs entails constant monitoring and restriction at the border to prevent law violations and detain criminals.

Researchers view UAVs as observation systems that integrate technological and legal aspects and create new legal challenges as they differ from traditional means of information gathering. Thus, the analysis of the legal environment reveals significant challenges and gaps, especially in the areas of confidentiality, information processing, and liability. Emphasis is placed on the need to enhance the regulatory framework to ensure the effective and ethical use of UAVs. In particular, the importance of developing clear and adaptive rules aimed at balancing national security and human rights is underscored. The research findings indicate the relevance and importance of improving legal regulation for the implementation of unmanned technologies in the context of security and law enforcement.

Securing unmanned aerial vehicles (UAVs) against cyber threats is becoming increasingly crucial due to the rising prevalence of cyberattacks and their potential consequences. Malicious actors can gain unauthorized access to UAV systems, hijack control, alter flight paths, steal data, or even disable the aircraft altogether. Therefore, it is recommended to implement comprehensive cybersecurity measures, including: data encryption, authentication and authorization, regular software updates, system monitoring, and personnel training. This can help minimize financial losses, protect reputations, and prevent casualties, while also promoting trust in UAV use and regulatory compliance.

Regulating the use of UAVs requires a careful approach and clear rules. Developing international safety standards for unmanned systems, taking into account potential threats and risks to the public and infrastructure, is a step towards ensuring safety. However, it is also important to establish monitoring and control mechanisms for the use of unmanned systems, including restricting access to sensitive areas.

Another key aspect of successful UAV utilization is increasing public awareness. Public discussions and consultations with community representatives help identify the ethical, legal, and social aspects of UAV use, while also, creating favourable conditions for their responsible use.

The general recommendations of this paper are presented in Table 6, which includes various aspects of using UAVs for border security aimed at addressing complex issues and tackling challenges in this field.

Table 6. General recommendations of this paper

Directions	Recommendations
Legitimacy and Ethics	Develop transparent standards for the use of UAVs that ensure human rights and confidentiality
	Establish effective mechanisms for monitoring potential abuses and violations of rights
Legal Regulation	Adapt national and international regulatory frameworks to rapidly changing technological conditions
	Define clear procedures for the collection, storage, and processing of information, with attention paid to the protection of personal data
Cybersecurity	Conduct regular security audits and vulnerability assessments of UAV management systems
	Implement effective mechanisms for detecting and responding to cyberattacks to ensure reliability and continuity of operations

Monitoring and control	Develop monitoring and control systems for UAV activity to prevent unauthorized interventions and loss of control
	Establish mechanisms to restrict access to critical data and zones
Public awareness	Hold public discussions and consultations to engage the community in the decision-making process
	Develop educational programs and informational materials to raise public awareness about the ethical and legal aspects of UAV usage

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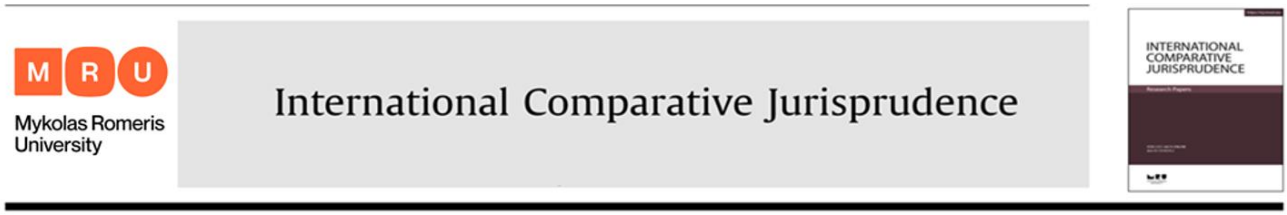

SOME CRITICAL REMARKS ON THE PRINCIPLES OF SOCIAL RESPONSIBILITY IN HEALTHCARE: THE INTERCONNECTION BETWEEN LEGAL RESEARCH AND INTERNATIONAL LAW

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Abstract. The implementation of the socially responsible and sustainable conduct of corporations has been widely researched; however, it has rarely been associated with the healthcare sector. Moreover, corporate social responsibility regarding hospitals has seldom been defined. The activities of hospitals have an undeniable impact on climate change, as hospitals emit huge amounts of CO_2 and are responsible for the management of medical waste. However, hospitals play a crucial role in contributing to the UN's Sustainable Development Goals, namely by ensuring healthy lives. Thus, they have an obligation to provide sustainable treatment for patients by implementing sustainability into their own activities and choosing suppliers that promote sustainability. This research article aims to define social responsibility or corporate social responsibility in the healthcare sector by connecting the definitions of social responsibility that arise from other articles with the objectives of corporate social responsibility that are incorporated into international legislation. The authors find that the definitions of social responsibility offered by other researchers are vague; therefore, it is necessary to consult international and EU legislation. Only by comparing several international legislative acts is it possible to deduce what constitutes the socially responsible conduct of a hospital.

Keywords: corporate social responsibility, international legislative framework, EU legislation, legal research, healthcare sector, hospital.

Introduction

Over the last decade, problems related to the prevention of the consequences of climate change have become increasingly relevant, and the socially responsible and sustainable activities of national institutions, companies, and other organizations in this area have been promoted. Several international and European normative legal acts have also been developed.

Research shows that healthcare facilities are a significant contributor to global carbon emissions. For example, in France, the healthcare sector produces over 46 million tons of CO_2 emissions, which is almost 8% of total emissions in the country. In the UK, the CO_2 emissions of institutions under the National Health Service account

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for around 25% of the total volume of CO_2 emissions from the public sector, or 18 million tons. Moreover, medical waste management costs are forecast to increase from $6.8 billion in 2020 to $9 billion in 2025 (Vallée, 2024).

The objects of this article are the international and European Union (EU) legal framework and the corresponding legal norms related to the implementation of social responsibility in healthcare institutions and hospitals. These documents contribute to the aim of this research article, which is to define social responsibility or corporate social responsibility (CSR) in the healthcare sector. At the time of writing, when searching for research papers indexed in the SCOPUS database that consider social responsibility, the healthcare sector and hospitals, almost 22,500 documents were found. However, social responsibility has rarely been defined. Instead, social responsibility is commonly viewed as a self-evident concept that hospitals should implement in their operations.

Within the scope of this article, research papers indexed in SCOPUS, JSTOR, WoS, and SageJournals were analysed to find a definition of social responsibility. In tandem, international and EU legislation was analysed and compared in order to understand what constitutes the socially responsible conduct of hospitals – namely, by outlining the objectives of CSR in the healthcare sector. On this basis, the authors demonstrate how the definition that emerges from these research articles interconnects with international and EU legislation.

This article employs a qualitative research methodology to examine the incorporation of social responsibility, particularly CSR, within the healthcare sector. Additionally, this paper emphasizes environmental obligations and relevant international legal frameworks. Data for this study was sourced from various materials, including international legislative documents, EU directives, and academic articles on CSR and healthcare sustainability. Key documents include the United Nations Sustainable Development Goals (SDGs), the Corporate Sustainability Due Diligence Directive, and relevant EU legislation. Further, the article engages in analysis to extract and categorize obligations and best practices related to environmental sustainability from legislative documents and academic articles. This process involves organizing information based on recurring themes and obligations to elucidate the social responsibility outlined in the academic and legislative documents examined. Comparative legal analysis is used for the assessment of the relevant international and EU legislation and norms which regulate the implementation of CSR in corporate operations. This analysis involves reviewing and comparing the legislative texts from different jurisdictions to identify common features and differences in their approach to CSR in healthcare. Lastly, logical analysis is used to form conclusions and summarize the objectives of CSR within the healthcare sector.

This article focuses on the healthcare sectors in Latvia and Denmark to illustrate the diverse approaches to CSR within the northern regions of the EU. These countries were chosen for specific reasons: Latvia, with its developing healthcare system and emerging CSR practices, offers insights into the challenges and opportunities of integrating CSR in healthcare. Conversely, Denmark is known for its strong healthcare system and progressive environmental policies, serving as a model for best practices in CSR implementation. Comparing these two countries provides a comprehensive understanding of how different legislative documents and healthcare policies can influence the adoption and effectiveness of CSR initiatives. This article aims to provide valuable lessons for international readers on the potential paths and strategies for implementing CSR in healthcare.

1. The definition of social responsibility in the healthcare sector

This part of the article explores the different approaches that various authors have used in defining social responsibility or explaining what socially responsible conduct involves. Studies used in this article focus on the healthcare sector and CSR, as hospitals should be viewed as corporations. According to the Cambridge Dictionary (n.d.), CSR is defined as the idea that a company should be interested in and willing to help society and the environment, as well as be concerned about the products and profits it makes. Considering hospitals as corporations and applying this definition to hospitals, CSR should be defined as the idea that a hospital should be interested in and willing to help society and the environment, as well as be concerned about providing treatment to patients and the profits it makes.

However, this definition is too general as it does not explain what helping society and the environment encompasses. Therefore, researchers' efforts to define social responsibility should be considered, compared and

analysed. As one research article noted, the differences between definitions of CSR point to significant conflicts in the most basic understanding of CSR. Does being socially responsible only refer to voluntary behaviour, or does it include corporations being compliant with government regulations? Does it represent a moral or ethical responsibility, or simply a new tool for branding and building corporate value (Berger-Walliser & Scott, 2018)?

Kelley et al. (2008) view the concept of social responsibility as 'closely connected with many professions, providing an important construct for guiding the overall development of these professions and their members'. The authors point out the importance of being socially responsible in the overall development of one's profession. When applied to hospitals, this definition implies that providing socially responsible treatment affects the overall development of medical personnel and their profession. Furthermore, Kelley et al. observe that social responsibility is closely related to several humanistic constructs, including human rights, social justice and community engagement.

Yu et al. (2023) define social responsibility as a set of pro-social values representing personal commitments to contributing to community and society. This definition, similarly to the definition given by the Cambridge Dictionary (n.d.), is too vague. It consists of the duty to contribute to community and society; however, this can only be viewed as a general clause that must be filled with content.

Takahashi et al. (2013) give a similar definition for CSR, describing it as the integration of social and environmental concerns within business operations. To determine a hospital's obligation to provide socially responsible treatment, it is necessary to include an explanation of social and environmental concerns in the definition of CSR.

Tyer-Viola et al. (2009) define social responsibility as 'advocacy for the needs of others and program implementation that reflects a focus on social issues affecting contemporary global societies and communities'. In addition to the vague definition given by this article, the involvement of nurses in providing socially responsible treatment is considered. As a science of human care, nursing holds expertise in the advancement of society. In addition, nursing, as a profession, has the capacity to focus on the well-being of society in advocating for social change. As nurses represent the largest number of healthcare providers, the profession of nursing could claim leadership in social responsibility. This could occur because nursing education programs prepare nurses to assume this responsibility, and because nursing involves a commitment to fulfilling a social care contract with the wider society. Tyer-Viola et al. believe that the nursing profession has a social responsibility to address issues affecting the health of the world's people, including concerns related to poverty, access to care in politically unstable areas, and environmental conditions affecting health. By exploring nurses' involvement in ensuring socially responsible healthcare, this article provides deeper insight into the definition of social responsibility – that is, socially responsible behaviour in healthcare focuses on ensuring inclusive treatment that tries to prevent patients from being refused treatment because of poverty or the inaccessibility of healthcare in unstable climates. Additionally, Tyer-Viola et al. take environmental conditions affecting patients' health into account when defining socially responsible treatment.

Brandão et al. (2013) indicate that CSR in healthcare means that there is an ethical obligation that requires hospitals and other organizations to do something beneficial in issues such as delivering quality healthcare to everyone who is entitled to it. This definition explains how to apply CSR to the healthcare sector; however, it does not specify from where social issues arise. When applying CSR to the healthcare sector, it is necessary to define the social issues that should be addressed – only then would it be possible to do something beneficial regarding these issues.
The aforementioned social issues stem from the objectives of sustainable global development. Therefore, Khurana defines the objective of CSR – namely, CSR aims to align businesses with the objectives of sustainable global development, and not merely profit (Khurana, 2022).

By comparing the definitions of social responsibility included in this article, it can be concluded that they are linked by a common vision: an indication to hospitals or similar organizations of the need to become socially responsible when providing healthcare, focusing on the well-being of society and the environment, and not just making a profit.

Each of these definitions highlights the contribution of socially responsible action to society through various means, such as the promotion of respect for human rights, the provision of access to healthcare, and the addressing of environmental issues.

The definitions used in this article provide a very general explanation of socially responsible behaviour, including a moral obligation to act in a socially responsible manner which can be achieved by providing fair and just healthcare, considering the impact of a hospital's activities on society and the environment. However, they do not address what constitutes fair and just behaviour by hospitals and how it differs from unfair behaviour. This indicates the complexity of the concept of social responsibility, which can be interpreted and implemented in different ways depending on the goals set by the hospital.

On the other hand, it can be concluded that the definitions in this article are different considering that they focus on different aspects of social responsibility, such as human rights, social justice, environmental sustainability, global development, etc. This indicates a diversity of opinions among authors regarding what constitutes socially responsible behaviour and the identification of the key areas that hospitals should prioritize in their CSR initiatives.

Some of these definitions – for example, those proposed by Kelley et al. (2008) and Yu et al. (2023) – emphasize the role of individuals or professionals in promoting social responsibility in the operation of hospitals, indicating that it is the activity of the individual that forms positive, socially responsible practice in the hospital environment. In contrast, other definitions highlight the responsibility of the hospital as an institution, ensuring social responsibility and integrating solutions to environmental problems into hospital operations.

Similarly, there is a difference of opinion among authors regarding the underlying reasons which motivate hospitals to ensure socially responsible behaviour – that is, whether hospitals should comply with regulatory legislation, or whether this should be a voluntary choice. Some of the definitions used in this article consider social responsibility as a moral and ethical obligation, while others see it as a strategic tool that improves the hospital's long-term reputation.

As has been indicated by a comprehensive review of CSR literature, the differences in the way that CSR is defined and the metrics used to assess it go beyond semantics to deeper, construct-level differences, spanning philanthropy, ethics, safety issues, and more composite measures assessed by external rating agencies (Aguinis & Glavas, 2012).

In conclusion, it can be deduced that the definitions provided by different authors are vague and do not specify the borders within which the conduct of hospitals becomes socially responsible. These open-ended definitions give hospitals freedom of interpretation and action regarding how they implement social responsibility and the extent to which it is implemented. However, it is essential to fill these definitions with content by exploring international regulations which determine the steps to be taken to achieve social responsibility in the healthcare sector.

Embracing socially responsible conduct can be seen as strategic in a global market, contributing to the competitiveness of a company, or in this case a hospital, and protecting its external image. However, social responsibility should be implemented voluntarily out of beneficence, and not only towards the goal of the private benefit of the hospital management by improving their own reputation (Brandão et al., 2013).

Brandão et al. (2013) also indicate that hospitals should define objectives (the mission) and social programs that integrate ethical principles – not only in strategic planning, but also in daily activity. Therefore, social responsibility is concerned with the way that a particular hospital manages its internal operations, as well as the impact of its activities on the social environment. From this perspective, a distinction can be drawn between passive and active social responsibility.

2. Social responsibility in international legislation

As most research articles give vague definitions of CSR – the idea that a company should be interested in and willing to help society and the environment as well as be concerned about the products and profits it makes – it is necessary to consider international and EU legislation to fill this open-ended definition with content as to what actually constitutes the socially responsible conduct of a hospital.

The concept of social responsibility is embedded within Article 29 of the Universal Declaration of Human Rights (1948), which states the following:

> 1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
> 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
> 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 29 summarizes the definitions of social responsibility given in the aforementioned research articles. Adjustments can be made in order to define social responsibility in the healthcare sector, as hospitals and similar organizations have duties towards the community and their activities regarding patient care and environmental issues should meet moral, public order, and general welfare requirements in a democratic society.

Additionally, Articles 37 and 38 of the Charter of Fundamental Rights of the European Union (2000) state that 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development' and 'Union policies shall ensure a high level of consumer protection'. These articles impose an obligation for hospitals to integrate measures of environmental protection to ensure sustainable development and a high level of patient protection.

When defining the objectives of social responsibility, the SDGs should be considered. The SDGs were adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity (United Nations, n.d.).

The resolution adopted by the General Assembly in 2015 set out 17 SDGs and 169 targets. The SDGs incorporated into the resolution aim to transform our world by the year 2030. These SDGs are intended to: end of poverty in all its forms; end hunger, improve nutrition and promote sustainable agriculture; ensure healthy lives; ensure inclusive and equitable quality education and promote lifelong learning opportunities; achieve gender equality; ensure the availability and sustainable management of water and sanitation; ensure access to affordable, reliable, sustainable and modern energy; promote sustained, inclusive and sustainable economic growth; build resilient infrastructure; reduce inequality; make human settlements inclusive, safe, resilient and sustainable; ensure sustainable consumption and production patterns; combat climate change and its impacts; conserve and sustainably use oceans, seas and marine resources; protect, restore and promote the sustainable use of terrestrial ecosystems; promote peaceful and inclusive societies; strengthen the means of implementation; and revitalize the Global Partnership for Sustainable Development (UN General Assembly, 2015).

While it is understandable that not all of the SDGs can be directly applied to the operations of hospitals, they are applicable in specific contexts. For example, hospitals might not be able to completely eradicate poverty, but they should not discriminate against patients based on their financial status. Therefore, it is necessary to adjust individual SDGs for the healthcare sector while defining corporate/hospital social responsibility. As another example, hospitals might not be able to end hunger, but they can promote sustainable agriculture by choosing caterers that opt for sustainably produced ingredients. Moreover, hospitals have the obligation to provide lifelong learning opportunities for their medical personnel and provide decent work conditions while promoting sustainable economic growth.

It is acutely important for hospitals to implement SDGs 5, 10 and 16 – that is, hospitals must achieve gender equality not only between hospital employees, but also regarding patients. Hospitals should contribute to reducing inequalities between patients in their access to and experience of healthcare, and promote peaceful and inclusive healthcare.

Hospitals are clearly not responsible for ensuring access to sustainable and modern energy; however, they should try to only consume affordable and reliable energy in order to assist in the achievement of the SDGs. Healthcare facilities should tend to their own infrastructure, for example, by providing disabled persons access to healthcare, etc. Hospitals should also develop waste management methodologies that ensure the availability of water, therefore aiding in the conservation of the oceans, seas and marine resources. Additionally, this would help to combat climate change and its impacts and protect terrestrial ecosystems.

Furthermore, the objectives of social responsibility include human rights. One of the UN's Foundational principles expresses that business enterprises – and hospitals, within the scope of this article – should respect human rights. This means that they should avoid infringing on the human rights of others and should address any adverse human rights impacts with which they are involved (UN Human Rights Office of the High Commissioner, 2011).

The Directive on Corporate Sustainability Due Diligence imposes reporting requirements on approximately 12,000 companies concerning environmental, social and human rights-related risks, impacts, measures and policies. Although this Directive has mainly been fostered indirectly, it should be considered when defining the objectives of social responsibility in healthcare. The Directive promotes respect for human rights and the integration of due diligence within institutional policies. It also mandates the identification, prevention and mitigation of actual or potential adverse impacts, while bringing actual adverse impacts to an end and minimizing their extent. Companies/hospitals should establish and maintain a complaints procedure and monitor the effectiveness of their due diligence policy and measures. Moreover, it is necessary to publicly communicate on due diligence (European Commission, 2022). Article 15 of the Directive determines the goals of combating climate change – namely, adopting a plan to ensure that the business model and the strategy of the company, or hospital in this case, are compatible with the transition to a sustainable economy and with limiting global warming to 1.5 °C in line with the Paris Agreement. It must also include emission reduction objectives. Article 22 of the Directive states that Member States shall ensure that companies are liable for damages if: they fail to comply with the obligations laid down in Articles 7 and 8 of the Directive; and if, as a result of this failure, an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimized through the appropriate measures laid down in Articles 7 and 8 occurred and caused damage. By ensuring civil liability, the Directive encourages companies to prevent potential adverse impacts and to bring actual adverse impacts to an end, which promotes social sustainability by reducing the damage that would have been caused to the environment.

The European Commission (2011) has defined CSR as 'the responsibility of enterprises for their impacts on society'. Furthermore, the Commission indicates that to fully meet CSR, enterprises should have in place a process to integrate social, environmental, ethical, and human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of: maximizing the creation of shared value for their owners/shareholders and for other stakeholders and society at large; and identifying, preventing and mitigating their possible adverse impacts. In addition, to maximize the creation of shared value, enterprises are encouraged to adopt a long-term, strategic approach to CSR, and to explore the opportunities for developing innovative products, services and business models that contribute to societal wellbeing and lead to higher quality and more productive jobs. Moreover, to identify, prevent and mitigate their possible adverse impacts, large enterprises, and enterprises at particular risk of having such impacts, are encouraged to carry out risk-based due diligence, including through their supply chains (European Commission, 2011).

The Commission's statements regarding its proposed definition of CSR help to highlight the steps that should be taken by healthcare institutions/hospitals to achieve CSR. It is understood that hospitals need to integrate social, environmental, ethical, human rights and patient concerns into their operations and core strategy by

identifying, preventing and mitigating their possible adverse impacts – not only in their own operations, but also through their supply chains. This goes in hand with the aforementioned SDGs, as while hospitals might not have the objective of providing food security or ensuring access to sustainable and modern energy, they have the obligation, if possible, to choose suppliers that promote sustainable agriculture or provide sustainable and modern energy.

In conclusion, social responsibility objectives arise from international or EU legislative acts. Social responsibility mainly consists of the SDGs, which must be applied to the daily operations of hospitals.

3. Denmark and Latvia: Differences in regulatory acts of social responsibility in the healthcare sector

Due to their social welfare, environmental protection and sustainable development, Nordic countries frequently top many global rankings – for example, the United Nations Human Development Index (HDI), which emphasizes that people and their capabilities should be the ultimate criteria for assessing the development of a country, not economic growth alone. Studies by the HDI indicate that since 1990 the Nordic countries have scored high or very high when summarizing national average achievements in key dimensions of human development, including: leading a long and healthy life, having access to education, and having a decent standard of living (United Nations, 2022).

Similar results are presented by the Global Green Economy Index (GGEI) and the Environmental Performance Index (EPI) (Yale Center for Environmental Law & Policy, n.d.). Both of these indexes show that the Nordic countries are leading in sustainability and green living initiatives. These countries have ambitious targets for reducing greenhouse gas emissions, increasing the use of renewable energy, and promoting sustainable transportation and waste management practices. Therefore, the Nordic countries often rank at the top for their environmental policies, climate action, and contributions to global environmental health (Tamanini, 2016).

As has often been represented, the Nordic countries – Denmark, Finland, Sweden, Norway and Iceland – are among the most socially responsible and environmentally friendly in the EU and globally. As such, their policies can be identified as sources of inspiration for other nations seeking good practices that might be adapted or improved upon when applicable. Therefore, legislation regulating the healthcare sector, social responsibility and sustainability should be compared between the Nordic countries and Latvia, which seeks to improve its performance in this regard. Within the scope of this article, the authors compared the laws of Denmark and Latvia in order to understand the key differences regarding social responsibility in healthcare.

3.1. Denmark

Within Danish policies, the idea of personal responsibility for health is built on two premises: first that the key factors determining health are facets of individuals' behaviour; and second, that individuals have both the ability and duty to influence their own behaviour (Vallgårda, 2011). The Danish government's health package of 2009 states that 'the government wishes that we each take responsibility for our own health and the health of our closest relatives. With the responsibility comes the freedom to make our own choices – while respecting those of others'. However, the government also takes an active role in encouraging and supporting healthy choices: 'The government finds that it is a personal responsibility to lead a healthy life. But the personal responsibility shall be supported with incentives to make the healthy choice the easy choice. The state, therefore, has an important role to play in contributing with frames that enable healthy choices for the individual citizen' (Vallgårda, 2011).

Denmark understands that it is not hospitals alone that determine patients' health, and that its citizens must make healthy choices themselves. Clearly, Denmark allows its citizens to make their own choices regarding their own health; however, it also guides them towards making more informed and healthier choices. The Danish government actively involves itself through food regulation, taxation laws tailored to discourage the consumption of excess processed sugars and salts, and other policies. Similar laws have been passed to encourage environmentally friendly lifestyles. These interlinked individual and governmental practices encapsulate social responsibility in practice within the Danish understanding.

Article 1 of the Danish Healthcare Act defines the purpose of the Danish healthcare system, indicating that the healthcare system aims to promote the health of the population as well as to prevent and treat illness, disorder and functional limitations for the individual (Danish Parliament, 2010). It can be inferred that the healthcare system in Denmark is broader than the mere treatment of patients, and extends to the promotion of a healthy and sustainable lifestyle. One can assume that the government of Denmark understands how unsustainable and socially irresponsible choices affect public health.

Furthermore, the Saltliste 2018 (Eng. 'the Salt List') policy plan was made to inspire manufacturers to strive for decreased salt content in food products for the benefit of public health. The Salt List consists of indicative reduction targets for salt content in 15 food categories and 77 subcategories. This policy is part of the Danish strategy to reduce Danes' daily salt intake by at least 16% in the following food groups: bread, cheese, ready meals, meat products and breakfast cereals (Danish Food and Drug Administration, 2018). This policy clearly indicates the desire to ensure a socially responsible lifestyle among Denmark's citizens.

Similarly, Act No. 414 of 13 December 1968 on tax on chocolate, sugar products, etc. tries to promote a healthy lifestyle by taxing goods that are not considered healthy, such as chocolate, liquorice, candies, candied fruit, cakes, biscuits etc. (Danish Ministry of Finance, 1968).

To encourage access to affordable healthcare and regular medical check-ups, Article 81 of the Danish Healthcare Act notes that without prejudice to paragraphs 2–4, hospital treatment in accordance with Titles VI, VII and VIII shall be free of charge for the patient. Furthermore, Article 85 notes that every 2 years, the regional council offers breast examinations to women aged 50–69 who reside in the region (Danish Parliament, 2010). These articles indicate the Danish government's willingness to do everything necessary to ensure affordable healthcare for everyone.

Article 119 of the Danish Healthcare Act determines that the municipal council is responsible for performing the municipality's tasks in relation to the citizens to create a framework for a healthy lifestyle. While the municipal council establishes preventive and health-promoting services for citizens, the regional council offers patient-oriented prevention in the hospital system and in the practice sector, as well as counselling, etc. (Danish Parliament, 2010). This article reiterates the two key prerequisites for socially responsible healthcare in Denmark: sustainable treatment and the promotion of a healthy and environmentally friendly lifestyle. It can also be deduced that the Danish healthcare system strongly emphasizes preventative care.

Chapters 40 and 41 of the Danish Healthcare Act include free treatment to alcohol and drug addicts. Article 88 sets out maximum waiting times for the treatment of life-threatening diseases (Danish Parliament, 2010). Therefore, Denmark is reducing inequality among its citizens and providing inclusive treatment.
Finally, to provide socially responsible treatment and to improve the healthcare system, Article 193 of the Danish Healthcare Act states that the regional council and the municipal council shall ensure the quality development of services. This also includes, as stated in Article 193a, the use of IT in the healthcare service. Additionally, Article 194 ensures development and research work so that services under this Act and the training of health professionals can be provided at a high professional level (Danish Parliament, 2010).

3.2. Latvia

The Medical Treatment Law of Latvia does not highlight preventative care. Although Article 1 states that this law uses the term 'medical treatment' – which is defined as professional and individual prophylaxis, the diagnosis and medical treatment of diseases, medical rehabilitation, and the care of patients (Latvijas Republikas Saeima, 1997) – prophylaxis cannot be considered the same as preventive care. Preventive care not only includes rapid diagnoses, but also the promotion of a healthy lifestyle even before patients reach hospital.

Regulation No. 555 on 'Procedures for the Organisation of and Payment for Health Care Services' determines the payment procedure for receiving health care. Even though Chapter 3 of Regulation No. 555 states that healthcare services are financed from the state budget as well as the medical treatment institutions which have entered into a contract with the National Health Service, thus being allowed to provide state-financed healthcare services, co-payment for some services is still required. Annex 13 of Regulation No. 555 provides the amount

of co-payment, which ranges from €2 to €35. Clause 7 dictates that the National Health Service shall provide state-organized screening on the basis of the contracts entered into regarding cervical cancer screening, mammography screening and colorectal cancer screening (Latvijas Republikas Ministru kabineta noteikumi, 2018). To summarize, Latvia provides free treatment in several fields of medicine; however, for some services there is still co-payment required from patients. Ultimately, the state does provide medical screenings.

Article 15 of the Law on the Rights of Patients, similarly to the Danish Health Care Act, sets out the obligation of patients to take care of their own health (Latvijas Republikas Saeima, 2009). However, it does not specify or elaborate on how one should take care of their health. The following part of the article regulates that if the state of health of the patient allows it, they have the obligation to actively participate in medical treatment and to provide the attending physician with information within the limits of their abilities and knowledge (Latvijas Republikas Saeima, 2009).

4. Discussion

In this article, the authors have analysed several research papers that try to define social responsibility or CSR. Additionally, the authors have analysed international and EU legislation that not only defines CSR, but also determines what conduct is socially responsible and what steps need to be taken for a corporation to achieve CSR.

As the definition of CSR can be vague and usually merely dictates that the corporation helps society and the environment and that it is concerned about the products and profits it makes, it is of the utmost importance to connect the definitions provided by other authors to the international legislative acts that determine what actually constitutes help to society and the environment. Furthermore, when CSR is examined and implied by any intergovernmental organization, it is usually directed at the agriculture, oil and gas, mining sectors, etc., and rarely is the healthcare sector involved. Therefore, when defining social responsibility in the healthcare sector, the conditions that dictate what constitutes socially responsible conduct should be applied to the activities of hospitals.

Social responsibility goes hand in hand with sustainability; consequently, the 17 UN SDGs can be considered a cornerstone in the definition of the socially responsible conduct of healthcare institutions/hospitals. As has been mentioned previously, not all of the SDGs can be directly applied to hospitals; however, they can be adjusted depending on the hospital's supply chain. Hospitals, if possible, have the obligation to choose suppliers that promote sustainable development.

The activities of hospitals include several aspects besides the treatment of patients. For example, they must provide patients with food, a place to stay while being treated, and accessibility to healthcare or even its facilities, and must develop medical waste management, etc. For this reason, hospitals cannot implement only SDG 3 – 'Ensure healthy lives and promote well-being for all at all ages' (UN General Assembly, 2015) – as they also must ensure the implementation of other SDGs into their everyday activities, facilities, waste management procedures, and the operations of their suppliers.

To ensure socially responsible healthcare, hospitals must integrate social, environmental, ethical, human rights and patient concerns into their operations and core strategy by identifying, preventing and mitigating their possible adverse impacts. Ready-to-implement standards have already been developed, such as ISO 26000 or Global Reporting Initiative (GRI) Sector standards.

ISO 26000 includes 7 core subjects: organizational governance; human rights; labour practices; the environment; fair operating practices; consumer issues; and community involvement and development (ISO, 2018). However, at the time of writing, GRI Sector standards have not yet been developed regarding the healthcare sector, and it is possible to implement the GRI Universal Standards until sector standards for managed healthcare and medical equipment and services are released. The GRI Universal Standards lay out key concepts and principles and list the requirements for the reporting process (GRI, n.d.). These standards help corporations by offering guidance regarding social responsibility, which hospitals might use within the relevant contexts of the healthcare sector.

Denmark's healthcare system is known for its high standards of environmental responsibility and sustainability. The country has implemented comprehensive policies that integrate CSR principles within healthcare operations, including stringent regulations on CO_2 emissions, waste management, and sustainable procurement practices. Denmark's success in these areas can serve as a high-level benchmark for other countries aiming to enhance their CSR in healthcare.

In contrast, Latvia is in the process of developing its CSR framework within the healthcare sector. Current legislation in Latvia focuses on general healthcare quality and patient safety, but lacks specific mandates on environmental sustainability. However, Latvia holds the potential to significantly improve its CSR practices by adopting and adapting successful strategies from Denmark.

The comparative analysis of Denmark and Latvia is relevant to an international audience as it highlights the varying stages of CSR implementation in healthcare systems across different socio-economic contexts. By understanding the legislative and practical differences between a leading and an emerging CSR framework, policymakers and healthcare administrators around the world can identify effective strategies and avoid common pitfalls in integrating CSR within healthcare.

Conclusions

By summarizing definitions of social responsibility or CSR, this article forms a definition of social responsibility in the healthcare sector as follows: social responsibility in the healthcare sector means that there is an ethical obligation that requires hospitals and other organizations to do something beneficial in issues such as delivering quality healthcare to everyone who is entitled to it by considering the well-being of society and the environment, rather than simply focusing on profits.

This open-ended definition must be filled with content that derives from international legislative acts and universal or sectoral standards developed by international organizations. Social responsibility closely relates to sustainability, or more precisely the 17 SDGs. The SDGs must be adjusted and applied to the healthcare sector. The concept of a socially responsible hospital not only concerns the sustainable, accessible and inclusive treatment of patients, but also extends to sustainable medical waste management, facility management, supplier selection, and other relevant operational activities.
For hospitals to identify, prevent and mitigate their possible adverse impacts, they are encouraged to carry out risk-based due diligence, including due diligence concerning elements of their supply chains.

In conclusion, social responsibility in healthcare can only be defined through an open-ended definition. As such, while ensuring social responsibility, hospitals must consider what actually constitutes help to society and the environment. To help with this, international standards have been developed that guide corporations on social responsibility, but sector-specific standards that focus on managed healthcare and medical equipment and services still require creation.

When comparing Denmark's healthcare regulation to that of Latvia, some similarities can be observed. For example, in both countries the patient has the obligation to take care of their health; however, Denmark's government nudges its citizens in a healthier direction with laws that regulate issues within the food industry that affect the health of citizens, where the citizen has very limited influence.

The main differences between the healthcare laws of Denmark and Latvia are that Denmark's healthcare system is known for its high level of public funding, ensuring comprehensive and free access to most medical services with a strong emphasis on preventative care and equality. Denmark has integrated sustainability and environmental considerations into healthcare practices, which reflects a much broader commitment to social responsibility. On the other hand, Latvia's healthcare system, while continuously improving, faces several challenges in ensuring equal access and comprehensive coverage, with co-payments and less emphasis on preventative care representing two problematic facets. Although social responsibility and sustainability are growing concerns, they are not yet as deeply integrated into the healthcare system in Latvia as they are in Denmark.

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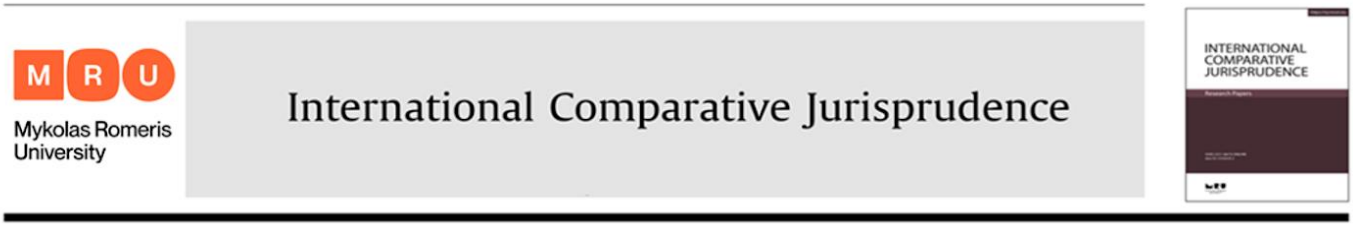

MANUFACTURING STATELESSNESS THROUGH EXCLUSIONARY CITIZENSHIP LAW: A COMPARATIVE STUDY ON KENYA AND SOUTH AFRICA

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Abstract. Citizenship is an essential aspect of nationality; it is formed by the laws of a country and influences an individual's rights and freedoms. This article compares statelessness within the Kenyan and South African legal systems, and discusses case law and the views of legal scholars on statelessness in these jurisdictions. The article also reviews international laws that are supposed to ensure citizenship and protect stateless people. Its aim is to strengthen the legal framework of these countries in delivering people's rights to citizenship or nationality. The reviewed legal framework includes the Constitution of the Republic of Kenya, Kenya's Citizenship and Immigration Act of 2011, the Constitution of the Republic of South Africa, and the Citizenship Act of 1995. The article also interrogates the memberships of Kenya and South Africa in various international treaties related to the fight against statelessness and ensuring human rights, including the rights of minorities. The article draws similarities between aspects of the Kenyan and South African legal systems which impact statelessness, including discrimination through colonial rule, ethnicity, and gender.

Keywords: citizenship, statelessness, minorities, exclusion, Kenya, South Africa

Introduction

Citizenship is an essential part of a person's identity as it not only defines their legal status in society, but also defines their participation in the political and economic spheres and provides autonomy (Dronkers & Vink, 2012). However, citizenship laws in some countries can be discriminatory and exclusionary, can deny individuals the opportunity to acquire nationality, and may prolong their statelessness.

A stateless person is subject to discrimination, which results in the infringement of their fundamental human rights (Blitz, 2009). This article focuses on the impact of citizenship legislation on stateless individuals in Kenya and South Africa. Both countries have constitutional provisions and legislation regarding the right to citizenship. Notwithstanding these provisions, there are instances of statelessness and discrimination regarding citizenship rights in both countries.

Discriminatory citizenship laws directly cause barriers to legal recognition and protection. Those without citizenship face numerous challenges due to their precarious legal standing: they have limited access to education, healthcare, and employment because they lack a recognized nationality (Goris et al., 2009). Moreover, discrimination, exploitation, and the violation of human rights are daily realities for stateless individuals. Their

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inability to obtain citizenship also prevents them from voting or participating in decision-making procedures within their host countries.

Global action to end statelessness – a campaign advocated for by the United Nations High Commissioner for Refugees (UNHCR), with 66 participating states including Kenya (UNHCR, 2020) – reflects global concern about the persistence of statelessness issues. The Global Plan for Action 2014–2024 was implemented in order to commit to ending statelessness by the end of this period (UNHCR, 2014). However, globally, the number of stateless persons has since increased, and a significant increase in displacement and forced relocation, a major cause of statelessness, was observed between 2011 and 2019 (UNHCR, 2019). The UNHCR has estimated the number of stateless persons to be 10 million (UNHCR, n.d.-a; see also, Rajan, 2023); however, some studies (Cole, 2017; Sköld, 2023) estimate the total number of stateless persons worldwide to be as high as 15 million. Although statelessness is a global issue common to many countries, the cause of the statelessness problem in African countries, such as Kenya and South Africa, has some similarities.

It is very difficult, if not impossible, to obtain demographic records from the region or country of origin. This is the first step in proving one's identity. For instance, in Kenya, many Makonde, Nubians, Galjeel, Pemba Waata, Coastal Arabs, and Shona descended from Somalia, Burundi, Congo, and Rwanda are second- or third-generation refugees fleeing from wars and conflicts in their countries of origin. In practice, these people are stateless since they are not entitled to citizenship in Kenya, notwithstanding the fact that they were born and raised there. This is because they cannot register their birth, or even their existence, in their parents or grandparents' country due to local instability, inaccessible local bureaucracy, and state succession or restoration. Moreover, their country of origin may no longer exist.

Article 14(1) of the Constitution of the Republic of Kenya (2010) guarantees the right to citizenship by descent to those born in Kenya, who must at least have one parent who is a citizen of Kenya. Article 15 of the Constitution outlines the acquisition of Kenyan citizenship through naturalization: a non-citizen of Kenya can register to become a Kenyan citizen if they have lived in the country for 7 years, or have been married to a Kenyan citizen for 7 years (see also, Kenya Citizenship Act, 2010; Kenya Citizenship and Immigration Act, 2011). However, Shona men and women who are married into other Kenyan ethnic groups cannot attain citizenship by naturalization because Shona is not a recognized Kenyan ethnic community (Wagalla, 2019), and applicants for naturalization must be from a recognized ethnic community. Many people from unrecognized ethnic communities, particularly those of Nubian and Shona descent, face significant challenges in obtaining Kenyan citizenship (Abuya, 2021).

Similarly to Kenya, birth within South Africa does not grant an automatic right to South African citizenship. For a person to be registered as a South African citizen at birth, at least one parent must be a South African citizen (South Africa Citizenship Act, 1995, Article 3(1)). Citizenship by naturalization requires one to have been a resident in the Republic for at least 8 years (Article 5(1)). While South Africa is a party to international agreements and regional protocols aimed at eradicating statelessness, there remains a pressing need for a comprehensive legislative framework to address the problem effectively. The country's citizenship regulations prioritize nationality based on bloodlines, making it difficult for stateless groups, such as children born to foreign parents, to obtain legal recognition. Therefore, stateless people in South Africa frequently risk arbitrary arrest, restricted access to healthcare and education, and significant challenges in finding and maintaining stable employment.

Through desktop research, this article reviews the legal frameworks in Kenya and South Africa that establish the exclusivity of the citizenship laws that contribute to statelessness. The implementation of the current legal systems in both countries leads to poor registration, discrimination, and exclusion. There are similarities when it comes to discrimination against gender, ethnicity, and historical colonial rule. The situations in Kenya and South Africa

highlight the urgent need for comprehensive legislative changes to address statelessness and ensure stateless individuals' protection and social inclusion. Making progress requires coordinated effort at the international, regional, and national levels.

Thus, the article focuses on how the existing laws in Kenya and South Africa discriminatively and exclusively contribute to statelessness, and in what ways they differ or are similar in their contribution.

1. Historical and theoretical background

Citizenship legislation has been shaped by historical, social, and political factors, and significant changes have been made to accommodate evolving notions of identity, belonging, and rights. Everyone possesses the right to choose their nationality, and the freedom to choose, alter, and keep one's nationality is implicit. States do not hold an absolute right to determine citizenship within their borders; they are bound by human rights obligations when granting or revoking citizenship. Discrimination based on minority status, religion or belief, age, gender identity or expression, disability, language, race, ethnicity, sex, sex traits, or sexual orientation is one of the leading causes of statelessness (Peden, 2021; Petersen, 2019; Kochovski, 2013; Lyapina, 2019; Akstinienė, 2017). More than three quarters of the projected global stateless population consists of members of minority groups, and the hardships currently faced by these groups are exacerbated by statelessness.

Inaccessibility and limitations in the acquisition, alteration, or retention of nationality and the passing of nationality to one's children may all be sources of discrimination for women from disadvantaged backgrounds (Lopez Oggier, 2022; Peden, 2021). While granting citizenship is crucial for ensuring the equal enjoyment of human rights and freedoms, it is not a panacea for the stigma and prejudice that stateless people endure. In the lead-up to the October 2021 Roundtable on Equality and Non-Discrimination in Nationality Matters to End Statelessness, the Office of the High Commissioner for Human Rights (OHCHR) and the UNHCR 'undertook a stocktaking on national laws, policies and practices in this area' (UNHCR, n.d.-b).

The situation of the Rohingya in Myanmar serves as an example of statelessness resulting from discriminatory citizenship rules. Parashar and Alam (2019) assert that the systematic religious discrimination against the minority Rohingya in the national laws of Myanmar has contributed to the formation of statelessness. The plight of the Rohingya demonstrates how citizenship rules may be exploited to prolong ethnic-based exclusion and statelessness via legal procedures such as the 1982 Citizenship Law, which denied them citizenship and subjected them to persecution (Ahsan Ullah, 2016; Kyaw, 2017). This example also shows how citizenship rules can be altered to exclude specific racial, religious, or political groups, further underscoring the potential for discriminatory practices within citizenship frameworks.

The concept of birthright citizenship finds its roots in ancient civilizations. As Ramsey (2020, p. 3) explains, birthright citizenship originates in the Roman legal doctrine, where it was known as jus soli, or the 'right of the soil'. Other civilizations later embraced this concept, including medieval England, where children born within its borders were considered English subjects. The emergence of nation-states in the 18th and 19th centuries brought significant changes to the concept of citizenship. The French Revolution was influential in popularizing citizenship as a fundamental right, emphasizing equality and universality over birthplace or social status (Siegelberg, 2020). However, while citizenship was expanding in specific ways, exclusionary citizenship rules also surfaced.

Birthright citizenship is the subject of ongoing legal interpretation and debate in the U.S. The concept of birthright citizenship was established by the U.S. Constitution's Fourteenth Amendment, enacted in 1868 (Ramsey, 2020, p. 5). According to the amendment, 'All persons born … in the United States, …, are citizens of the United States'.

However, differing interpretations of this clause have led to disagreements. Ramsey (2020, p. 7) charts the evolution of interpretations of birthright citizenship in the U.S. In *United States v. Wong Kim Ark* (1898), the Supreme Court upheld birthright citizenship for children of non-citizen residents. Based on the jus soli concept, the court ruled that children born to lawful permanent residents, regardless of their parents' citizenship, are entitled to birthright citizenship. The matter of birthright citizenship has remained controversial in recent years. Ramsey (2020) highlights the rise of originalist arguments, which claim that birthright citizenship should exclusively apply to individuals born to citizens or legal permanent residents. Proponents of this perspective argue that granting citizenship to the children of undocumented immigrants was not intended by the Fourteenth Amendment.

However, through these two doctrines, the majority of States have yet to come up with procedures, laws, and regulations that ensure that they protect stateless persons. The available laws and procedures are embedded with discriminatory rules that contain several gaps in attaining nationality. Stateless persons are thereby denied the right to citizenship (Songa, 2021). As was previously mentioned, citizenship by birth in Kenya and South Africa is not automatic; the child must have at least one parent entitled to citizenship in these countries.

Focusing on Alberta, Canada, Onciul's (2018) study examined the intersection of community involvement, curatorial practice, and museum ethos. While this material does not directly address citizenship regulations, it does shed light on the historical context of museum procedures. By examining the role of museums in local communities, we can gain insights into the evolving understanding of citizenship. Onciul (2018) argues that the effects of colonial history on Alberta museums have profoundly impacted indigenous people: 'Colonialism had a lasting impact on indigenous communities, as their citizenship rights were often suppressed, resulting in the marginalization of their cultural heritage within museum spaces' (p. 720). This underscores the historical power dynamics that have shaped indigenous groups' citizenship and cultural representation within mainstream Canadian society. As is highlighted below, colonialism also impacted the Nubian community of Sudanese descent who came to work in Kenya, where they experienced discrimination by the post-colonial government.

Mohsin (2020) highlights the indifference that stateless individuals encounter, emphasizing the importance of citizenship and its legal frameworks in preserving peoples' rights and well-being by arguing that 'the emergence of statelessness can be traced back to historical events such as the dissolution of empires, armed conflicts, and discriminatory citizenship laws' (p. 3). These historical factors have led to the creation of stateless communities, leaving them vulnerable to exclusion and discrimination and limiting their access to fundamental rights. In a similar vein, Latham-Sprinkle et al. (2019) explored the vulnerabilities of migrants, including their susceptibility to forced labour, modern-day slavery, and human trafficking. Understanding the systemic issues faced by migrant populations requires an examination of the historical background of migration and its relationship to citizenship legislation. The authors contend that 'historical migration patterns, economic disparities, and inadequate legal protections have created conditions that facilitate human trafficking, modern slavery, and forced labor' (p. 5). This demonstrates how historical events and changing legal systems have influenced immigrant experiences and citizenship status.

The roots of citizenship legislation can be traced back to ancient societies such as Athens and Rome, where membership in a political organization entailed certain rights and benefits. However, it was only in the modern era that citizenship became crucial for nation-state formation. Harpaz and Mateos (2019, p. 844) argue that 'citizenship has become a central field of struggle over the allocation of rights, privileges, and resources'. During the Enlightenment, with the development of liberal political theory, the concept of citizenship underwent significant transformation, becoming increasingly associated with fundamental rights, inclusion, and equality. Jelin (2019) affirms that 'Enlightenment thinking proclaimed the existence of universal natural rights, as well as the principle

that the people are the ultimate source of political power' (p. 103). This period laid the foundations for the development of contemporary citizenship legislation.

Citizenship and national identity have been closely interrelated since the emergence of nation-states in the 18th and 19th centuries. Citizenship has come to symbolize inclusion and belonging within a particular country. Harpaz and Mateos (2019) argue that 'citizenship has been the main tool for defining the boundaries of the political community, and as such, it has become an essential strategic resource in the era of globalization' (p. 843). Citizenship regulations during this time often exhibited exclusionary and discriminatory tendencies. Jelin (2019) points out that 'in many cases, citizenship was only granted to individuals who belonged to the dominant ethnic, cultural, or racial group' (p. 104). This exclusionary approach aimed to maintain the homogeneity and cultural cohesion of nation-states. However, in recent decades there has been a growing trend towards expanding citizenship rights and recognizing diverse national identities.

In the same study, Harpaz and Mateos (2019) also discuss the increasing prevalence of dual nationality as a strategic tool for individuals and nations. They observe that 'the growing incidence of dual nationality has facilitated the coexistence of multiple national identities, blurred the boundaries of national citizenship, and challenged the idea of exclusive allegiance' (p. 846). This development draws attention to the ways in which citizenship evolves and can threaten to undermine traditional ideas of allegiance and belonging. Jelin (2019) further highlights that citizenship encompasses civil and political rights as well as social, economic, and cultural rights; it is a multidimensional concept that goes beyond legal status, and 'citizenship must be defined not only in terms of civil and political rights but also as a set of social, economic, and cultural rights' (p. 105). Recognizing this broader perspective is essential in defending individual rights within democratic societies and promoting social inclusion.

Exclusionary citizenship regulations not only impact individuals directly, but also have far-reaching consequences for communities of stateless people. The intergenerational nature of statelessness, in which stateless parents are more likely to have stateless children, perpetuates cycles of vulnerability and marginalization. Stateless people may be unable to flourish socially and economically due to a lack of access to healthcare and education, leading to persistent socioeconomic inequalities. Recognizing the significance of resolving statelessness, international and regional organizations, such as the African Union and the UNHCR, have called for the revision of exclusionary citizenship laws and the protection of stateless individuals. In addition, international campaigns such as the UNHCR's Belong Campaign have attempted to eradicate statelessness by 2024 through legislative reforms, streamline nationality verification processes, and increase public awareness. Stateless individuals are impacted by adverse effects stemming from exclusionary citizenship policies, including limited access to basic necessities and heightened vulnerability.
Sutton (2018) discusses statelessness and the rights of stateless children in Kenya and South Africa, describing how children become stateless due to arbitrary laws that discriminate against them. These laws create a situation of trans-generational statelessness, which, if not addressed urgently, will ensure that vulnerable children have no remedy either today or in the future. The author observes that despite both countries being members of various international treaties that address statelessness, discrimination against stateless children is still present in these countries (Sutton, 2018, p. 1).

To summarize, various perspectives on individual rights and entitlements have significantly contributed to the development of citizenship law. However, despite these advances, the issue of statelessness persists for millions of people worldwide. Discriminatory and exclusive citizenship regulations and armed conflicts perpetuate statelessness. Urgent action is required from policymakers and practitioners to tackle this problem by implementing and enforcing inclusive citizenship laws and policies.

2. The human rights infringed by a lack of citizenship

The United Nations Universal Declaration of Human Rights (1948), the African Charter on Human and Peoples' Rights (1981; hereinafter – the African Charter), Chapter 4 of the Constitution of Kenya, and Chapter 2 of the Constitution of South Africa give various rights to all people, the infringement of which results in tangible life consequences for victims. Therefore, the protection of these rights is very important. The Universal Declaration of Human Rights provides for the protection of human rights and the substantial exercise of these rights in various aspects of life. To expound on this, the African Charter provides for the exercise of personal rights even to minority groups. The UN declaration also obligates member states to allow minorities to participate in the economic and political progress of a nation, while at the same time requiring that a state should provide an environment that allows the development of culture and heritage.

Stateless persons are denied the privileges set forth in the Universal Declaration of Human Rights. The rights provided for by international treaties are designed to protect the rights of minority groups, including stateless individuals. The enforcement of these rights is sometimes a challenge since the declarations do not bind non-member states. However, these statutes are important since they provide a basis in the implementation of human rights. The Universal Declaration on Human Rights allows countries to become aware of the minority groups within their borders and grant them their rights under the document.

Stateless people are faced with infringements of their basic rights. The most commonly infringed human rights include freedom from discrimination, which is provided for under Article 2 of the Universal Declaration of Human Rights, Article 2 of the African Charter, Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (1966) and Article 2 of the Discrimination (Employment and Occupation) Convention (1958). Under the Constitution of Kenya (2010), Article 27 gives all people the right to equality and freedom from discrimination, and the same applies to Articles 9–11 of the South African Constitution (1996). International law requires that every person is protected against discrimination, irrespective of their nationality. Subsequently, through the principles of international law, states parties are obliged to remove all discriminatory barriers and ensure the equality of all persons in all spheres of life (Opiyo, 2017). A core tenet of human rights is that, as a matter of principle, no human being should be rendered a stateless person, as statelessness limits the enjoyment of human rights. The vulnerability that comes from being stateless can lead to the expulsion of an individual from a country and from their habitual place of residence (Batchelor, 1998).

The statelessness of marginalized persons has been raised in courts of law in a number of cases that set precedents that contribute to the adjudication of such matters. This section discusses several cases that have been decided in Kenya and South Africa, and also reviews cases that have been discussed in international forums. Case law associated with human rights is crucial in the transformation and formulation of social progress. The litigation of these cases has become an important tool in the interpretation, promotion, and protection of fundamental human rights and freedoms.

The case of the *Nubian community in Kenya v. Kenya*, as referred to by Songa (2021), was fundamental for the parties concerned. This case was lodged by the Open Justice Initiative before the African Commission on Human and People's Rights (hereinafter – African Commission). The dispute revolved around the question of the origin of the Nubian community, despite them having lived in Kenya for over a century. Members of the Nubian community faced challenges in attaining citizenship and related identification documents despite having being born in Kenya. When the complaint was lodged, there were over 100,000 Nubians in Kenya (Open Society Justice Initiative, n.d.). The origins of the Nubian community are in Sudan, and they were brought to Kenya as soldiers by the British government under colonial rule. These community members were not taken back to their homes, and most ended

up residing in Kibera, Nairobi. Issues regarding their nationality were never resolved by the British government or the post-colonial Kenyan government. Members of the community were denied identification documents as well as political participation rights, and the same discriminatory and exclusive actions regarding their citizenship rights still apply today. The case was frustrated at the high court in Kenya on the grounds of procedure and on substantive grounds.

The frustration of this case was based on the exclusivity of Kenyan laws, as can be seen from the rules of civil procedure. After its institution in the high court in 2003, the case was objected to on grounds of administration and based on establishing the legality or capacity of the complainants. Secondly, in terms of the administrative powers of the court, high court judges lacked the capacity to address the matter since there had not been a response to correspondence sent to the chief justice on the administration of the case.
Other frustrations were met on substantive grounds, including that the constitution at the time only provided for individual rights and failed to provide for collective rights. Therefore, the grievances raised by the community did not have a remedy in law since they were group rights. In 2006, the case was brought to the African Commission, having failed in the Kenyan judicial system after the high court found the application to lack foundation under Kenyan law.

Ultimately, the Nubian case failed in the Kenyan courts due to the failure of the Constitution as it existed then to acknowledge cultural, social, and economic rights. These rights have since been recognized and established under Article 43 of the Constitution of Kenya (Songa, 2021, p. 258). The African Commission held that the Kenyan judicial system had violated various rights under the African Charter, including freedom from discrimination under Article 2, equal protection of the law, and equality under Article 3. Kenya had also breached Article 14, which provides for the right to property. The Commission held that the rights conferred to the Nubian community to use land in Kibera were sufficient to allow Nubians to hold property in Kenya; it was sufficient that the land was communal land, not government land. The African Commission held Kenya liable for subjecting the Nubian community to an arbitrary vetting process that lacked foundation in Kenyan law and for subjecting the community to marginalization, which was irrational and unjustifiable. In regards to identification documents, the Kenyan government was held liable for infringing the following rights of Nubian community members: movement, participation in political processes, work, education, protection of the family, and protection of vulnerable groups.

The second case related to statelessness in Kenya was the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative on behalf of children of *Nubian descent in Kenya v. Kenya*. The case was brought before the African Committee of Experts on the Rights and Welfare of Children of Nubian descent. The case was founded on the prejudice that Nubian parents experienced regarding the right to nationality for their children, a situation created by the exclusivity and discrimination of the laws of Kenya. Parents had difficulty obtaining birth certificates at birth, and Kenyan law also provides that a birth certificate is not proof of citizenship (Songa, 2021, p. 259). Since birth is not automatically a qualification for citizenship, there were additional requirements such as descent – at least one parent must be a qualified Kenyan citizen. This meant that the Nubian children also had to undergo a vetting process to attain citizenship. These acts and laws violated Article 6 of the African Charter on the Rights and Welfare of the Child (1990); the state was also found to have violated Article 3 of the same Charter in that the vetting process had failed to meet legitimate expectations and eroded the dignity of the Nubian children. Other rights the state was found to have violated include the right to health and the right to education. The Committee also set out several remedial measures, including requiring the Kenyan state to institute legislative and administrative strategies for ensuring that Nubian children who had been rendered stateless could attain citizenship. The legislation was thus to ensure that any discriminatory provision of the law was amended.

3. Kenyan citizenship laws and statelessness

A comprehensive understanding of Kenyan perceptions of citizenship laws and statelessness requires the consideration of historical, legal, and social factors. The legal framework for citizenship in Kenya was established by the Citizenship Act (2010) and amended by the Citizenship and Immigration Act (2011). Furthermore, academic works by Muimi (2021), Ng'weno and Aloo (2019), and Birkvad (2019) shed light on the intricate matrix of issues surrounding citizenship.

The complex history of Kenya's citizenship rules requires careful examination. Article 14 of the current Constitution of Kenya, ratified in 2010, guarantees citizenship at birth for individuals born in Kenya or to a Kenyan parent outside the country, provided that they do not acquire citizenship of another nation. However, this provision has repeatedly been challenged, and the Kenya Citizenship and Immigration Act was passed in 2011 to address these concerns. This Act provides detailed guidelines on citizenship and immigration matters in Kenya. Article 6 of the Act defines citizenship by birth, stipulating that at least one parent must be a Kenyan citizen at the time of the child's birth.

Nonetheless, the law acknowledges that a child born in Kenya may still be stateless and offers provisions for their registration as a Kenyan citizen in specific circumstances. According to Section 7 of the Act, 'a person born in Kenya after the effective date shall be a citizen by birth if, at the time of delivery, that person has at least one parent or grandparent who is or was a citizen of Kenya by birth' (see also, Constitution of Kenya, 2010, Article 14). These legal provisions demonstrate Kenya's efforts to address citizenship issues while recognizing the potential vulnerability of individuals at risk of statelessness.

The statute provides detailed guidelines for the registration and naturalization processes by which one may acquire Kenyan citizenship. As outlined in Section 8, the applicant must have been a permanent resident of Kenya for at least 7 years and have a valid work permit or exemption from requiring one. Similarly, Section 9 stipulates that an applicant must have been a resident of Kenya for at least 7 years, possess a valid work visa or exemption, and exhibit good character: 'A person who has been lawfully resident in Kenya for a continuous period of at least seven years and who satisfies the prescribed requirements may apply to be naturalized as a citizen of Kenya' (Citizenship and Immigration Act, 2011, Article 13). Despite these efforts, many individuals in Kenya remain without citizenship. Research conducted by the Kenya National Commission on Human Rights (KNCHR) reveals that approximately 18,500 people lack a nationality, with a further 6,000 individuals at critical risk of statelessness (Albarazi, 2014; KNCHR & UNHCR, 2010). This study brings to light various factors contributing to statelessness, including a lack of paperwork, inter-ethnic marriages, and a dearth of constitutional safeguards protecting citizenship rights.

The hardships faced by stateless individuals in Kenya extend beyond the absence of citizenship, as they are systematically denied access to vital services such as employment, healthcare, and education. Stripped of legal protections, stateless individuals are at risk of being detained and deported. The KNCHR study puts forth a range of actionable recommendations to address this pressing issue. These include the establishment of a formal process for determining statelessness, the provision of documentation to those affected, and the introduction of explicit provisions for citizenship within the constitutional framework.

Kenya has made commendable progress in addressing statelessness. In 2016, the government launched a campaign to identify stateless people and provide them with identification cards, thereby giving them access to essential services and protecting them from incarceration and deportation. Remarkably, the campaign successfully registered more than 12,000 stateless people. However, challenges persist, and further steps are required to solve Kenya's

statelessness issue. The KNCHR research underlines the necessity of establishing a clear and precise process for determining statelessness, as the lack of such a framework hampers stateless individuals' ability to assert their rights.

As highlighted above, the idea of descent, whereby citizenship is transferred via blood relations, is a significant feature of Kenyan citizenship legislation. According to the Citizenship and Immigration Act of 2011, a person born in Kenya is a citizen if 'at the time of the person's birth, at least one parent is a citizen'. This clause honours the heritage of colonial governance, wherein obtaining citizenship was often dependent on racial and ethnic factors. Ng'weno and Aloo (2019) state that such descent-based citizenship legislation may support discriminatory behaviours and further marginalize specific communities.

Kenya's approach to citizenship is shaped by its immigration history, with considerations extending beyond legal status to include social acceptance and a sense of belonging within the community, as highlighted by Birkvad (2019). The Kenyan viewpoint acknowledges the significance of mobility and stability for immigrants seeking citizenship. An essential component of integration is the capacity to settle and establish roots in a new nation. However, newcomers without ancestry in Kenya may face difficulties due to the state's inflexible, descent-based citizenship requirements. Moreover, the interplay between ethnicity, conflict, and citizenship is relevant in Kenyan contexts. Deng's (2018) examination of the experiences of South Sudanese refugees in Nairobi underscores the impact of internal conflict on their sense of identity and belonging. This analysis reveals tensions amongst the Nairobi refugee population, marked by competition and racial conflict. Due to the complexity of their claims to nationality, many South Sudanese refugees encounter challenges in pursuing Kenyan citizenship.

The denial of equal opportunities for stateless children has far-reaching consequences, as they are systematically excluded from accessing free education, healthcare, and unrestricted travel, as highlighted by Alfasi and Fenster (2014, p. 411). Such deprivation violates the fundamental principles enshrined in children's rights, leaving stateless children exceptionally vulnerable: 'It hinders their ability to find future employment that is both meaningful and significant' (see Article 2 of the African Charter). The right of children to express themselves without fear of reprisal should be universal. However, it is clear that governments routinely disregard the needs of children without citizenship. A state that does not take steps to end statelessness is, according to Rawls's view, founded on unfair institutions that are not working to rectify existing inequities (Convention on the Rights of the Child, 1989, Article 3; Preložnjak, 2021). Adopting this approach allows for a more comprehensive assessment of the progress made in Kenya concerning the implementation of nationality legislation and the protection of minority rights for stateless individuals.

The issue of statelessness in Kenya mainly affects ethnic minorities, who are unjustly labelled as 'un-Kenyan' due to their connections to other states, as noted by van Waas and De Chickera (2017, p. 32). The historical context reveals that the presence in Kenya of immigrants from various parts of the world can be traced back to the colonial era, when the British brought them to work in agriculture and factories (see, for example, the UNHCR study by Manby, 2018b, p. 47). As newly independent republics like Kenya emerged, they faced the challenge of defining citizenship criteria during the post-colonial transition period. According to the Second Schedule of the Kenya Citizenship Act of 1963, residents were required to register and pay a fee to be recognized as Kenyan citizens. Since many in the Nubian community are not Kenyan citizens, they are unjustly denied equal access to public healthcare and education. In addition to facing the challenge of statelessness, half of all Nubian households have an annual income of less than 10,000 Kenyan Shillings, making it difficult to afford even the most basic necessities such as shelter, food, and water. Furthermore, educational opportunities for the Nubian population are limited, with only 2% having completed post-secondary education (Balaton-Chrimes, 2013, p. 331).

The Kenyan Citizenship and Immigration Act of 2011 recognizes stateless persons under Article 15, and the Kenyan Constitution has taken steps to eliminate gender discrimination in the naturalization process. However, the Act is notable for the critical lack of information explaining the vetting process that must be completed in order to acquire citizenship. This omission has hindered the effective implementation of the law in dealing with the problem of stateless individuals. The Kenyan Citizenship and Immigration Regulations of 2012 also provide limited guidance on how to apply to the Cabinet Secretary when seeking citizenship through registration, as highlighted by the African Committee of Experts on the Rights and Welfare of the Child (2017, p. 8).

According to Masabo (2021), Kenya's citizenship laws are primarily based on the principle of jus soli, granting citizenship to those born on Kenyan land. For those who cannot prove that they were born on Kenyan land, determining their citizenship can be daunting. Masabo further argues that Kenya's lack of a comprehensive legislative framework for the prevention of statelessness and the protection of stateless people exposes many individuals to risks. He points out that 'Kenya's legal regime falls short of adopting international standards on the prevention of statelessness and the protection of stateless persons, as set out in various international and regional instruments' (p. 514). The historical legacy of an 'ancestor-centric' approach in Kenya's citizenship regulations, prioritizing lineage from Kenyan citizens over place of birth, continues to impact citizenship rights, particularly for vulnerable individuals. Masabo highlights the challenges faced by individuals born in Kenya to non-Kenyan parents, who often find themselves at risk of statelessness or who are themselves stateless. Hunter (2019) also examines the statelessness issue in Kenya, shedding light on the situation of undocumented nationals who have lived in Kenya for many generations but lack official citizenship. Hunter points out that the Kenyan government passed the 2011 Refugees Bill and the 2011 Citizenship and Immigration Act to combat statelessness. However, practical flaws and administrative delays have hindered the effective protection of stateless people. Hunter (2019) emphasizes that 'Kenyan law lacks the necessary clarity and specificity to provide sufficient protection to undocumented nationals, leading to their ongoing marginalization and exclusion' (p. 157).

The CESF Consortium (2021) conducted a study on the impact of the COVID-19 pandemic on stateless individuals in Kenya. The pandemic exposed the lack of access to healthcare, social security, and necessary documentation experienced by stateless people, rendering them even more vulnerable. The research revealed the inadequacies of Kenya's legal and administrative frameworks, which fail to provide meaningful assistance and recognition to stateless individuals. It also emphasized 'the urgent need for Kenya to address the legal and administrative barriers that perpetuate statelessness to ensure that stateless individuals can access healthcare, employment, and social protection' (p. 12). Lockdown measures and travel restrictions further marginalized these communities, leaving them without sufficient support and safety measures. It is crucial to include stateless people in national crisis response plans that safeguard against events such as the COVID-19 pandemic, and to implement legislative reforms urgently to protect their rights and well-being.

Kenya has undertaken efforts to address the issue of statelessness. Masabo (2021) highlighted that the passage of laws such as the 2011 Citizenship and Immigration Act and the 2011 Refugees Bill demonstrates Kenya's commitment to protecting and preventing statelessness. These legislative frameworks outline processes for birth registration, nationality determination, and, in some instances, granting citizenship. However, challenges related to administration, lack of awareness, and implementation flaws hinder the effectiveness of this legislation.

Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (2009; hereinafter – the Endorois case) is a pivotal legal battle that directly relates to the issue of statelessness and citizenship legislation in Kenya. This case brings to light the alleged violation of Articles 17(2) and 17(3) of the African Charter and highlights the disturbing reports of violations inflicted upon the Endorois community, an indigenous people, including forced displacement from their ancestral land, inadequate

compensation for the loss of their property, disruption of their community's pastoral activities, and infringements on their rights to practice their religion and culture.

In a similar case, the African Court on Human and People's Rights firmly rejected the notion put forth by the respondent that cultural rights would diminish in significance due to cultural change. It decisively dismissed the respondent's position that advocated for restricting minority rights for the common good. Indeed, the judges remained unconvinced by Kenya's argument that the Ogiek, another indigenous group, had evolved to such an extent that their distinct cultural identity had been lost. As stated in the Court's opinion, '[...] the Respondent has not sufficiently demonstrated that this alleged shift and transformation in the lifestyle of the Ogieks has entirely eliminated their cultural distinctiveness' (*African Commission on Human and People's Rights v. Kenya (merits)*, 2017, p. 53). Similarly, the Endorois case holds immense significance in the context of citizenship rights in Kenya, underscoring the critical need to protect the cultural rights of minority communities and the imperative of addressing statelessness as a fundamental issue.

Kenya is home to several groups of stateless individuals. Recently, progress has been made in granting citizenship to two of these groups. The first group consists of individuals who were rendered stateless by gender-discriminatory nationality laws. As written by Baird (2020), under the Constitution of Kenya, dating back to 12 December 1963 (and amended in 2008), although women could confer nationality to their children born in Kenya on an equal basis with men, if a child was born overseas, only a Kenyan father could confer nationality. Kenyan women who gave birth outside Kenya to a child with a non-Kenyan father were not able to transfer their nationality to their child. In practice, according to Baird (2020), this discriminatory approach to citizenship for children born outside Kenya 'contributed to discriminatory attitudes and restrictions on the transmission of nationality by women who gave birth inside Kenya'.

Furthermore, the 2010 Constitution introduced provisions allowing dual nationality, overturning the previous prohibition. Despite this constitutional amendment, practical barriers remain. These include a chronic 'lack of awareness of the new law among both potential beneficiaries and officials tasked with the implementation of the law' (van Waas et al., 2019, p. 198).

4. The legal framework in Kenya

4.1. The Registration of Persons Act of 2012

This is the most recent law in Kenya regarding citizenship and the rights of stateless people. The Act introduced a new digital system called the National Integrated Identification Management System (NIMS). This system was meant to be a single source of information for all Kenyans and foreigners in the country, and was therefore meant to include all persons resident in Kenya. The enactment of this law faced opposition from various human rights forums and like-minded individuals and institutions, with opponents arguing that it was in violation of the Constitution and in bad faith. The primary question concerned the safety of the data that could be collected and the assurance of the safety of the data under NIMS. The Act is crucial and material in the protection of data safety; however, the exclusivity of the data that the act requires is questionable in light of the fundamental rights of a human being. These rights include the right to privacy, the dignity of a person, the right to equality, and non-discrimination. This is based on the type of information that the act prescribed should be collected: identity cards, refugee cards, foreigner certificates, and several personal documents. This leaves open the question of whether people who lack such identifiable rights would be discriminated against in accessing government services, and thus remain stateless.

4.2. The Kenya Citizenship and Immigration Act of 2011

This act provides several channels for becoming a Kenyan citizen. Sections 6 and 7 provide for citizenship by birth, and sections 13 to 16 provide for citizenship by registration. Being born in the country is the easiest way in which stateless children born in Kenya can acquire citizenship. Article 14(4) gives protection to children born in Kenya when the nationality of their parents is unknown. These legal provisions protect the citizenship of stateless people. However, from this legal provision, there are other provisions that seem to limit the provision of nationality when it is applied to minority groups of people. An example of this is the Kenyan court case of *Hashmukh Devani v. Cabinet Secretary of Interior and Coordination and Others* (2016), where the court examined the petitioners' case regarding the Kenya Citizenship and Immigration Act as read together with Article 14 of the Constitution. The court held that every individual who approaches the court based on the interpretation of a human right should be heard. In this case, the petitioner was an Indian born to Indian parents who resided in Kenya. The petitioner's mother acquired Kenyan citizenship in 1969, and she died in 2005. The petitioner was born in 1949. The case was based on the provision of Article 14(2) of the Constitution of Kenya (2010): a person is a citizen of Kenya if, at the time of their birth, one of their parents was a citizen of Kenya. The court ruled against the petitioner because the Constitution was not in existence at the time of his birth, and he had already been born at the time of his mother's attainment of citizenship. The petitioner failed to acquire citizenship by both naturalization and by birth. His only remaining remedy was to gain citizenship by registration. In the question of statelessness, the court assumed that because the parents of the petitioners were Indian before they resided in Kenya, he automatically had Indian nationality, and thus his right to nationality was to be barred.

5. South African citizenship laws and statelessness

Since the end of apartheid in 1994, South Africa has undergone substantial changes to its citizenship regulations. Nevertheless, ensuring that stateless communities attain citizenship alongside the accompanying rights and protections remains challenging. The Citizenship Act of 1995 provides many routes to acquiring South African citizenship, including naturalization, descent, and birth. However, stateless individuals often encounter legal and practical obstacles in their pursuit of citizenship. Thus, a comprehensive examination of the nation's citizenship legislation and the consequences of statelessness is required to address these pressing issues.

Mbiyozo (2019) shed light on the urgent need to prevent statelessness rather than support it, emphasizing the violation of human rights that statelessness constitutes: 'Statelessness prevents individuals from enjoying fundamental human rights, including the right to education, healthcare, employment, and freedom of movement' (p. 4). To safeguard these rights, Mbiyozo advocates in favour of comprehensive citizenship regulations that ensure inclusivity and universal protection. Hobden's (2018) study of South African citizenship law reveals that the country has made great strides in redressing past citizenship injustices and promoting equality (p. 6), highlighting the country's perception of citizenship rules as a means to address historical inequities. Ndimurwimo and Jahnig (2022) examined the impact of climate change on statelessness in the Southern African region. They argue that climate change-induced displacement may increase statelessness, creating new categories of vulnerable individuals (p. 103). This viewpoint emphasizes the interconnection between environmental factors and statelessness, highlighting the importance of proactive and preventative measures.

Mbiyozo (2019) acknowledged the progress made by South Africa in combating statelessness while highlighting areas for improvement. The author commends the South African government's efforts to create legislation that streamlines the citizenship application process for disadvantaged groups, such as children born in South Africa to foreign parents. Mbiyozo also points to several areas where South Africa can improve its response to and treatment of statelessness. The author critiques the absence of a comprehensive national strategy to combat statelessness,

noting that South Africa lacks a national action plan or strategy on statelessness, which hinders the effective implementation of existing legislation (p. 3). This criticism reflects the South African viewpoint on the necessity of a deliberate and coordinated strategy to address statelessness effectively. In the context of climate change, Ndimurwimo and Jahnig (2022) emphasize the need for a regional approach to addressing statelessness. They contend that collaboration amongst nations in this area is required to create and put into effect comprehensive policies that address climate change-related displacement and the potential rise of statelessness (p. 120). This perspective underscores the significance of regional cooperation and collective efforts in tackling statelessness due to climate change.

While some African nations have enacted laws to prevent statelessness, the implementation of these laws remains inconsistent. Having well-developed legal and policy frameworks is essential; the application of these laws, however, determines their effectiveness. In many cases, nationality rules are applied arbitrarily despite provisions in legislation designed to prevent such practices. Access to the necessary documents to prove or obtain nationality is often intentionally withheld or hindered throughout the region. Consequently, the authorities frequently disregard legitimate claims, perpetuating an endless cycle of denial. Like other regions, Southern Africa faces numerous legal gaps that contribute to the prevalence of statelessness. However, it is equally vital to address issues related to civil registration. The challenges often lie not in a formal denial of nationality, but in the practical difficulties of obtaining documentation.

As Mbiyozo (2019) writes,

> statelessness across Southern Africa is primarily linked to colonial histories, border changes, migration, gender, ethnic and religious discrimination, and poor civil registry systems. Colonial occupiers across Africa established arbitrary borders that frequently divided communities. Their need for labor, and their policy of land dispossession resulted in the movement of unprecedented numbers of people (p. 11).

Documentation has been utilized as a means of population control in various countries, with South Africa serving as a prominent example. Under colonial and apartheid authority, indigenous people were denationalized and sent to ‘homelands’, with the thinly disguised pretence that these regions were sovereign territories. Through extensive paperwork, such as registrations and permits, the mobility of these native peoples was tightly restricted, leading to the curtailment of their rights. The legacy of immense inequality and dispossession left by colonial powers led to deep-rooted anger during post-colonial transitions. The impact of this historical context is evident in the citizenship legislation enacted after the end of colonial rule. Despite the fact that many post-colonial states in Southern Africa modelled their nationality laws after those of their previous colonial masters, several also attempted to undo the system of discrimination. Mozambique is only one country that has implemented citizenship laws that give precedence to independence fighters and penalize those who oppose it (Manby, 2018a, p. 11).

The tightening of government restrictions regarding claims in other countries has had significant consequences. Stringent requirements have been imposed for the submission of citizenship renunciation statements, and rigid deadlines have been set for submitting foreign evidence to prove ineligibility for citizenship. Unfortunately, these rules have disproportionately affected individuals born in or with parents born in neighbouring countries, making it nearly impossible for them to comply. The gulf between the law and its implementation in South African administration remains substantial. Despite relatively liberal legal immigration regulations, the formal representation of these policies falls short. Migrants in South Africa have reported widespread bigotry and corruption inside the Department of Home Affairs, which has been accused of purposefully erecting bureaucratic hurdles to hinder and dissuade illegal immigrants.

Erasmus (2022, p. 293) sheds light on the profound impact of statelessness on the right to health in South Africa. According to her study, stateless individuals face significant barriers when seeking healthcare services due to their lack of legal status. She argues that without the necessary identification documents, stateless people cannot access vital healthcare services. This impediment restricts their ability to receive essential medical treatment, including medication, therapy, and preventive care.

The South African government has acknowledged and taken steps to address the issue of statelessness. Mahleza (2022) writes about the South African legal system and its compliance with international commitments regarding statelessness. Their study focuses on the South African Citizenship Act, which established a legal framework for obtaining citizenship. As Mahleza (2022) writes, the South African Citizenship Act contains provisions for the acquisition and loss of citizenship, which indirectly aims to prevent and reduce statelessness. The legal developments in South Africa underscore the importance of addressing statelessness and ensuring the protection of the rights of stateless individuals in South Africa. Efforts to prevent and reduce statelessness through legal provisions and constitutional obligations are crucial in promoting equitable access to healthcare and upholding human rights.

Despite these initiatives, South Africa still needs help in order to address statelessness successfully. As Erasmus (2022) points out, there is a need for a comprehensive legal framework to explicitly define statelessness and establish a clear procedure for determining statelessness (p. 293). Ensuring precise standards for proving statelessness and facilitating access to citizenship rights and privileges is crucial for stateless individuals. However, South Africa's legal system falls short of adequately addressing gender bias within its citizenship regulations. Particularly concerning is the disparity in treatment based on gender for children born outside of marriage, where the acquisition of citizenship through ancestry depends on whether the father or mother is South African. This gender-based disparity raises concerns of fairness and discrimination. Mahleza (2022) states that South Africa's legal reforms regarding citizenship law should be aiming for the elimination of gender-based discrimination. Aligning South Africa's legislation with international obligations is essential, and the nation must establish transparent mechanisms for identifying and safeguarding stateless people. Signing the 1961 Convention on the Reduction of Statelessness and the 1954 Convention on the Status of Stateless Persons, as suggested by Erasmus, would be necessary steps towards addressing statelessness and upholding the rights of stateless individuals. In *Minister of Home Affairs v. Ali and Others* (2018), the court held that the biggest challenge in South Africa is in the implementation of the laws on acquiring citizenship.

Sutton (2018) explains that the two states have integrated international instruments meant to protect stateless individuals. However, the implementation of these laws and regulations has not been successful. The author outlines several groups of persons that are vulnerable to statelessness, including children from stateless parents, ethnic minority groups, people who have renounced their citizenship, and people seeking asylum in a state. The author goes on to describe South Africa, despite being a state with a democracy based on shared values and non-discrimination, as a place where the statelessness epidemic is felt most keenly by homeless children, most of whom are orphaned, and adult asylum seekers (p. 64).

Conclusions

Kenya and South Africa face challenges and concerns regarding their citizenship rules and definitions of statelessness, and have adopted distinct viewpoints and approaches. In Kenya, the Citizenship and Immigration Act of 2011 establishes citizenship based on birth and registration. Nonetheless, instances of statelessness persist, and birth is no guarantee of citizenship unless one parent is a Kenyan citizen. Conversely, South Africa's Citizenship Act outlines clear requirements for acquiring and losing citizenship, with the recognition of birthright citizenship

regardless of parental nationality. The divergent strategies employed by these nations underscore their differing approaches to citizenship.

Kenya and South Africa have recognized the issue of statelessness and have initiated measures to address it. In Kenya, a government initiative was launched in 2016 to find stateless individuals and provide them with identity cards so that they can receive essential services. Challenges remain, however, including the need for precise methods for identifying statelessness. While statelessness is less prevalent in South Africa than in Kenya, administrative hurdles and a lack of documentation can pose difficulties for immigrants and refugees.

Notably, gender plays a contrasting role in the legal frameworks of these nations. Kenya has taken steps to rectify gender discrimination, particularly concerning women's rights. Children born outside Kenya to non-Kenyan fathers could not previously be granted nationality by their mothers. However, this prejudice has been corrected by various constitutional revisions. South Africa, on the other hand, ensures equal citizenship rights for both sexes, irrespective of birthplace and parental nationality.

Despite their legislative frameworks, Kenya and South Africa encounter administrative and implementation-related challenges in enforcing their citizenship rules and addressing statelessness. Kenya would benefit from further support in translating legal requirements into effective practices, including enhancing understanding among authorities and prospective beneficiaries and establishing a clearly defined procedure for identifying statelessness. Similar administrative complexities might arise in South Africa, especially for immigrants and refugees who need help in order to obtain documents and navigate the system.

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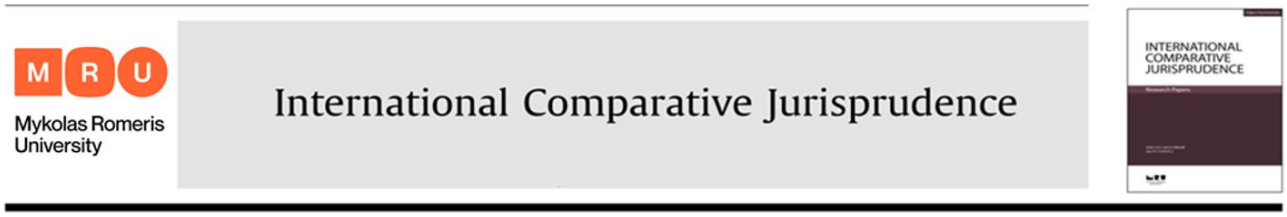

BEHIND THE BENCH: UNVEILING THE DYNAMIC INFLUENCE OF SCHOLARS ON THE DEVELOPMENT OF THE REASONING OF CONSTITUTIONAL COURTS

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Abstract. Constitutional courts, entrusted with the mission of protecting the supremacy of the constitution and having the power to eliminate legislative and executive acts from the legal system, play an important role in the law-making process. The official constitutional doctrine formulated in constitutional rulings becomes part of the living constitution, binding every state institution and individual. Therefore, the quality of constitutional reasoning must be beyond any doubt. This article argues that constitutional courts interpreting constitutional norms might benefit from the academic legal doctrine. The influence of academic research on constitutional case-law depends on the jurisdiction, the constitutional traditions, and the subject matter of each case. After comparing the constitutional jurisprudence of Romania and Lithuania, which feature entirely different attitudes towards the use of academic research in constitutional jurisprudence, the authors define different levels of scholarly impact on the resolution of constitutional justice cases, revealed through methods of judicial interpretation. The article concludes that the research-case-law partnership might contribute to the evolution of the legal system. High-quality research increases the quality of case-law, and its potential to be recognised as a source of law, even if indirect, increases through the authority that legislation based on it acquires.

Keywords: constitutional review, constitutional justice, rule of law, constitutional doctrine, academic doctrine, judicial reasoning.

Introduction

Recent debates regarding the place, role, ethical dilemmas and even usefulness of research in law, in conjunction with those regarding the quality of the reasoning of court decisions given the enhanced complexity of the law, have encouraged research into the way in which the legal doctrine might be used in the reasoning of constitutional courts (hereinafter – CCs). The term *legal doctrine* in this paper encompasses the legal science, including analyses, investigations, interpretations and other academic research undertaken by scholars in different fields of law. The notions of *academic doctrine* or *legal literature* might also be used as synonyms to define informal sources of law that might determine the development of constitutional jurisprudence.

The importance of constitutional justice and its impact on the law-making process determine the selection of this jurisdiction for this study over the traditional activities of courts of law. Legislation is, in part, the result of the actions of constitutional judges, often defined as negative legislators or specific co-legislators. Given this role, the use of the legal doctrine by CCs is relevant, both in view of the support given to the constitutional judge and, implicitly, the quality of the decisions they render, and in view of the legislator shaped by constitutional case-law. Taking this into consideration, one can elaborate on the role of the legal doctrine if not as a source of law, then at least as a source of inspiration when creating the law. Therefore, the role and profile of legal

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researchers in contemporary society might be revealed, being seen by certain authors as necessarily 'invisible' (Lafaille, 2022, or for insight on law activism, see Khaitan, 2022), and by other authors as 'involved in the life of the city' (Duțu, 2022a). Scholars can be conceived of as 'knowledge institutions' that 'help to provide the epistemic foundation for a successful democracy', as knowledge is needed to develop and evaluate policy positions, to be able to resist manipulations, to evaluate good-faith arguments and to engage in reasoned arguments (Jackson, 2019).

The legal researcher should not and cannot be a simple technician:

> The representation of legal experts as simple technicians, whose activity would consist only of interpreting and applying the law, refraining from any value judgment on its content and disregarding the philosophical or political beliefs that they may have as citizens; however, it appears as illusory in fact and in practice (Duțu, 2022a).

The legal researcher must be visible, credible, a 'total man of law' (Duțu, 2022a), with a 'deep and extensive knowledge of the field and a legal culture strongly rooted in the general and strongly humanistic one'. This is because the legal researcher does not project themselves into an ideal world, but one with concrete, tangible issues. This does not speak in favour of the kind of activism that raises the issue of academic ethics, which has been criticised in recent studies (Kaithan, 2022). However, this type of activism is inherently marginalised, to the effect that it is not given authentic valorisation by the judge or legislator.

The analysis of different constitutional jurisprudence that implicitly or explicitly reflects the works of scholars allows it to be observed that there is undoubtedly a dialogue between doctrine and case-law. The roots of this phenomenon might be found in antiquity or the medieval era, where in the absence of codification and given the importance of customary law, judges appealed to comments from scientific works. Consequently, the role of the doctrine decreased considerably in the modern era, as the written act became a source of law. Now, the growth of the role of the legal doctrine to the extent of the exponential expansion of the normative framework and the enhanced specialisation of the fields of law can be observed. Alongside this is the continuous and rapid emergence of new realities to which the legislator must respond and the judge must adapt, settling disputes arising from these rules or in which these rules apply.

The recent Congress of the World Conference on Constitutional Justice, the international platform for global discussions among constitutional judges, illustrates these current trends. As one comment regarding this global event noted, 'the academic dimension of such a judges' conference is less surprising when considering that it is not unusual for CC judges to hail from academia, and even continue academic activities during their career as judges' (Steuer, 2022). The same author concluded that

> similarly to judges reaching out to academia (including via calls to share expertise in particular domains of law and practices of legal pluralism), academics should actively approach judges, particularly if they hope the results of their research to reach beyond the 'ivory towers'. The recognition of the value but also challenges of both professions might help generate mutual trust and the development of more nuanced ideas for enhancing constitutional court resilience vis-à-vis autocratization.

Therefore, it is important to use academic-judicial cooperation for mutual enrichment and strengthening. How can this goal be achieved, and what insights can be revealed? No systematic study comprehensively answers this question. In trying to fill this gap, the authors analyse the constitutional jurisprudence of the Romanian and Lithuanian CCs. Being of a similar age, both courts were established in the early 1990s, but are very different in terms of their use of the academic doctrine, although neither can fully escape its influence. This paper begins by identifying the normative framework for the use of the legal doctrine in the resolution of constitutional justice cases, and then selects decisions from the corresponding CC that explicitly refer to the legal doctrine or literature, as in the Romanian case, or implicitly contain hints that the legal doctrine was used while resolving the case, as in the Lithuanian court.

The paper offers a classification of constitutional decisions based on the degree of valorisation of the doctrine

in terms of its importance within the reasoning of the decisions. Preliminary conclusions (in terms of establishing grounds for wider research) are formulated, with reference to the reasoning of the constitutional decisions and the role of the doctrine in the development of the normative system, with particular emphasis on the responsibility and accountability required on both levels.

1. The legal framework of constitutional courts invoking scholarly research

The legal framework of the organisation and functioning of CCs consists of constitutional provisions, specialised law and internal procedural regulation. While the provisions regulating the constitutional procedure are sufficiently detailed, the preparation of cases for examination (pre-examination stage) and the rules of drafting a constitutional decision are not usually reflected in the laws (or, if they are, it is only in a very laconic manner), and are instead regulated by well-established practices and traditions. However, the need to rely on different sources of law arises at the preparation of the case for examination in the hearing stage.

The Romanian legal regulation concerning the possibility of referring to the academic doctrine is more explicit than the Lithuanian. This might explain why the CC of Romania is more ambitious in relying on academic sources when resolving cases compared to Lithuanian constitutional jurisprudence, in which there are only hints of traces of academic research. Therefore, it might be meaningful to first compare the legal provisions regulating the preparation stage of constitutional justice cases in these states.

The competence, composition and functioning of the CC of Romania is regulated by the provisions of Articles 142–147 of the Constitution of Romania (1991) and the Law on the Organisation and Functioning of the Constitutional Court (2010). In the application of these provisions, the Regulations on the Organisation and Functioning of the Court (2012; hereinafter – the Regulations) were adopted, approved by Plenum of the CC. The Regulations detail, *inter alia*, the activity prior to the hearing session, during the hearing session and following the session of the pronouncement of the decisions of the CC of Romania.

The Regulations refer to the doctrine in the section dedicated to the *activity prior to the hearing session*, where it is held, in Article 47 (5), that the judge rapporteur, while preparing a written report on a case, has a duty, among other things, to examine Romanian and foreign literature relevant to the case topic.[3] Accordingly, among the tasks of the assistant-magistrates, while preparing the draft report, is to ensure necessary documentation for the judge-rapporteur in regard to the relevant conclusions in Romanian and foreign case-law and/or literature in the cases assigned to them (Article 12 (c). Likewise, Article 47 (4) of the Regulations stipulates that 'the Judge-Rapporteur may solicit expert advice from individual persons or institutions, with prior approval by the President of the Constitutional Court.' As the case-law of the CC of Romania reveals, this expert advice may consist of legal opinions from reputable specialists or professors in the field, but this is an isolated practice.[4]

Therefore, even the internal rules of the Court compel it to study the legal doctrine in the matter, inducing the idea of an exhaustive examination in order to ensure as solid a foundation as possible for each case. However, there is no standardised format of the report in terms of express rules regarding its structure from a formal point of view, nor any obligation to draw up a separate doctrinal sheet (as in the case of legislation and case-law[5]), nor even sanctions regarding the lack of mention of the legal doctrine in the report. In practice, the consistency of references to the legal doctrine is highly dependent on the judge-rapporteur and/or the assistant-magistrate

[3] Article 47 (5) of the Regulations: 'The Judge-Rapporteur, having examined the draft report [drawn up by the assistant-magistrate], the viewpoints and other information made available, or conclusions from Romanian and foreign case-law and/or literature, as well as other elements that appear to be necessary for debate, shall prepare a written report on the case.'
[4] For example, in Decision No. 9/1994 of 25 November 1994, '… it was also requested the viewpoint of Professor Gheorghe Beleiu, PhD, from the Faculty of Law of Bucharest' or Decision No. 123/2013 of 16 April 2013, '… it was requested the expert advice of Ms. Brânduşa Ştefănescu, university professor and doctor emeritus.'
[5] See Article 19 of the Regulations, regarding the specialised legal staff assimilated to assistant-magistrates, who 'has the following tasks: a) to prepare the information sheet on domestic legislation and Constitutional Court case-law and their updates for the cases assigned to Judges whose office is not staffed with legally trained personnel; b) to prepare the information sheet on international legislation and case-law as well as other documentation, upon request by the Assistant-Magistrate assigned to the case'.

assigned to the case. During the hearing sessions, the Plenum of the CC of Romania may request the completion of the report, including with the doctrine, when the issue examined is not clear. As long as there is no obligation to record the legal doctrine in the pronounced decisions, it is not possible to truly verify the way in which the judge-rapporteur or assistant-magistrate and then the Plenum of the CC proceeded to examine the doctrine in the matter.

The Lithuanian legal regulation is even less explicit regarding the use of the legal doctrine in the preparation of constitutional justice cases for hearings. Chapter VIII of the Constitution is dedicated to the composition and competence of the CC of Lithuania and the guarantees of constitutional judges. The Law on the Constitutional Court (1993; hereinafter – the Law on the CC) details the tasks, powers, and work procedure of the CC of Lithuania.

Article 27 of the Law on the CC regulates the preparation of cases for the hearings of the CC of Lithuania, and provides a list of actions that the judge-rapporteur can perform in order to prepare the case. It stems from the provisions of this article that the aim of the preparation of a case for a hearing is to gather as much information relevant to the case as possible (ask questions to the petitioner and concerned person, hear witnesses, consult experts or ask opinions of impartial specialists, etc.).

The Law on the CC does not mention *expressis verbis* that researchers can be consulted for their opinions or summoned to the hearing, but Article 27 is provided as a legal basis to address academics, as professors and researchers are seen as the most impartial specialists. This is due to the nature of scholarly expertise, which is protected by academic freedom and is publicly recognised as an authority within democratic discourse beyond the internal academic audience (Lazarus, 2020, p. 495). The case-law of the CC of Lithuania shows that, depending on the topic and complexity of the case, the legal opinions of researchers are welcomed in the preparation of constitutional justice cases in different fields of law. The practice of contacting academics for their opinions regarding the subject matter of cases can be observed since the beginning of the activities of the CC of Lithuania. When academics are consulted, they are referred to by name in the establishing part of the ruling,[6] and sometimes their main arguments are also summarised in the text of the ruling (for instance, the ruling of 12 February 2021 on the right of scientists and lecturers over 65 years of age to work in Vilnius University). This means that the CC took them into consideration and most often resolved the case accordingly, although this rule is not absolute.[7] In Lithuanian constitutional jurisprudence, this is the only point at which researchers can be *expressis verbis* mentioned by their names in the rulings of the CC of Lithuania, and this can

[6] For example, in the ruling of the CC of Lithuania of 1 June 1998 on compensation for damage done to forests it is noted that 'in the course of the preparation of the case for the judicial investigation, the conclusions of the specialists – Prof. Habil. Dr. V. Mikelėnas, head of the Department of Civil Law and Proceedings at the Law Faculty of Vilnius University and … were received'; in the ruling of 9 July 1998 on the manufacture, storage, transport, sale and realisation of alcohol of various kinds, where the explanations of specialists – Dr. A. Vileita, assoc. prof. at the Department of Civil Law and Procedure at the Law Faculty at Vilnius University, Assoc. Prof. Dr. A. Vaišvila, head of the Department of the Philosophy of Law at the Law Academy – were received. This practice continues to today: in the ruling of 5 July 2023 on the writing of personal names using Latin alphabet characters in documents certifying the identity of a person, part of the case material contained the opinions of higher education institutions and individual scholars conducting research on various aspects of Lithuanian linguistics related to the tradition of writing personal names and changes in their spelling and the impact of the contested legal regulation on the generic Lithuanian language. The opinions of the following specialists were consulted: Associate Professor A. S. Smetona from the Department of the Lithuanian Language at the Institute of Applied Linguistics at the Faculty of Philology at Vilnius University; Prof. D. Sinkevičiūtė, head of the Department of Baltic Languages and Culture at the Baltic Languages and Cultures Institute at Vilnius University; and the written opinion of the Institute of the Lithuanian Language, submitted by its director, Dr. A. Auksoriūtė.

[7] In the ruling of the CC of Lithuania of 30 July 2020 on the adoption of constitutional laws, an opinion prepared by Prof. Dr. Vytautas Sinkevičius was submitted (point 3) and his position regarding the subject of the case was revealed, explaining that the Constitution does not forbid the adoption of ordinary regulation (even its new wording) when the regulation of a particular relationship is provided in the list of constitutional laws. However, the CC of Lithuania took the opposite position, recognising the new wording of the Law on Referendums to be in conflict with the Constitution because this law had to be adopted as a constitutional, and not ordinary, law. Similarly, in the ruling of 15 April 2022 on the dismissal of the judges of the Supreme Court of Lithuania and the Court of Appeal of Lithuania, prof. V. Sinkevičius published an opinion different to that which the Court decided to pursue prior to the examination of the case.

only take place specifically in the format of an opinion provided upon the request of a constitutional judge.

The Rules of the Constitutional Court of the Republic of Lithuania (2019; hereinafter – the Rules) adopted by a decision of the CC of Lithuania regulate, among other things, the organisation of the work of the CC and the preparation and consideration of constitutional justice cases. Section II of Chapter VII of the Rules regulates the procedure of preparation of a constitutional case for consideration and hearing, but is silent on the specific methods, measures and means to be used for the preparation of the case. Differently from the Romanian example, the acts regulating the work of the CC do not include provisions on the work of judicial assistants. Only from the Regulations of the Office of the Constitutional Court, approved by a decision of the CC of Lithuania (2019), can it be seen that judicial assistants, helping the judges to implement their functions related to the preparation of constitutional justice cases for judicial consideration, prepare notes comprehensively introducing the judges to the issues of the constitutional justice case under preparation and offering a reasoned legal position on the questions to be resolved in the case (point 21.2). No further regulation on what information should be included in the notes is provided. Usually, the task of the assistant is to gather as many relevant sources as possible. The consultation of the CC of Lithuania archives and the analysis of the materials of numerous constitutional cases reveal that academic articles and research often join the supplementary unofficial material to the case, and references to those that are considered by the judges before drafting the ruling are made in the notes of the case.

Hence, similarly to the Romanian example, the laconic Lithuanian legislation concerning the preparation of the case does not provide for the obligation to study the academic material and does not mention its inclusion in the case or the notes to the case, which, contrary to the French example of the publication of the *Dossier documentaire* (2022), are never published. However, it is obvious that the case cannot be properly prepared if all of the sources relevant to the topic of the case are not examined. It is the responsibility of the judge-rapporteur to take all necessary steps to prepare the case, without imposing on them the duty to seek the opinions of academics or to study their previous works. Thus, it might be concluded that it remains under the discretion of the judge preparing the case and the judges considering the case in the next step of preparation to decide which sources, including those of an academic nature, might be relevant to its resolution. The practice of studying academic works while preparing a case for a hearing is consistent; however, as will be shown later, in most cases these endeavours remain latent and are not revealed in the text of the constitutional ruling.

2. The use of the academic doctrine in constitutional case-law: Approaches and Strategies

As there are no official statistics on the topic of this paper and the search engines offered on the websites of CCs do not allow us to filter out the acts in which the academic doctrine is mentioned, a search of the Romanian case-law using the keywords ‘doctrine’ or ‘literature’ was undertaken. The Lithuanian case was more complicated, as the word ‘doctrine’ also leads to the ‘official constitutional doctrine’ encountered in every ruling, and the word ‘literature’ might be used citing legal regulation containing this word. Therefore, when performing the Lithuanian search, various synonyms were used, such as ‘scientific doctrine’, ‘specialised literature’, ‘doctrine of …’ [criminal law, criminology], etc.

This allowed the visible use (in terms of express mention) of the legal doctrine in the case-law of the CCs to be detected. The expression ‘visible use’ describes the personal experience of actually working with these case files for almost two decades, as well as the legal framework that sets up the jurisdictional activity of the court (referred to above). This leads to the conclusion of whether or not the use of the academic doctrine may be visible. In other words, the study of the legal doctrine selected while preparing the report or the notes on the case that are the basis of the constitutional decision can have an explicit use in the final constitutional text (whether referring to the author or the particular research), or can simply serve as the research of the judge/judges of the court, without being mentioned in the final decision. The invisible impact of academia on constitutional jurisprudence is much more difficult to detect, as this requires not only a study of the constitutional text, but also of the preparatory material of the case, which is usually accessible in the archives of CCs.

Taking into account that some examples of judicial-academic cooperation might be hidden under this invisible use of scientific literature, another method of detecting the appropriate rulings was used. In order to identify

constitutional rulings possibly influenced by academia, the descriptive part of the ruling in which the experts or specialists who have contributed to the case with their opinions are listed was taken into account. Very often, academics providing opinions in constitutional justice cases rely on their own works, which are later studied by judges and assistants in more detail than they are referred to in the opinion.

In some decisions, a form of middle ground is occupied, in the sense that the analysis of the constitutional text allows the reader to understand that the legal doctrine was taken into account, as long as the existence of 'different interpretations in the doctrine' (CC of Romania, Decision of 11 April 1995) or 'doctrinal controversies' (CC of Romania, Decision of 24 September 1996) or the 'scientific literature' (CC of Lithuania, Ruling of 13 December 2004) is mentioned in the recitals of the decisions, but without making their presence explicit or giving them any effect/importance in the statement of reasons.

As indicated above, there is no legal obligation to mention the legal doctrine in the final text of constitutional decisions, even if it has contributed to the resolution of the case, and there are no clear criteria limiting the option to use it explicitly or not. The principle that the CC resolves cases relying only on the provisions of the constitution and the official constitutional doctrine (Kūris, 2003), being the core element of the constitution-centric legal system, is not relevant anymore, or should at least be regarded with moderation. Being part of a global constitutional order sharing common fundamental values of the rule of law (Suchocka, 2016, p. 6), CCs cannot ignore the international context and the large variety of international instruments determining the understanding of the national constitution. The fact that the content and meaning of national constitutional norms are revealed by relying on universal international treaties does not come as a surprise any longer. However, revealing the significant number of explicit and implicit references to the legal doctrine in constitutional decisions, one might identify a preliminary ascertainment in the sense that the constitutional judge feels the need for the broader, more consistent or more credible substantiation of their decisions.

It is unsurprising that academics play a significant role in shaping the development of the constitutional doctrine, particularly in reconstituted democracies such as Lithuania or Romania, where constitutional frameworks are frequently drafted by professors and researchers. Given their involvement in the initial drafting stages, scholars possess an intimate understanding of the underlying principles and nuances embedded within constitutional texts. Moreover, especially in the years after the establishment of constitutional control institutions, the official constitutional doctrine was often drafted on a blank page. Nonetheless, the engagement of scholars in shaping legal frameworks is characteristic not only of emerging democracies, but also of established systems. The constitutive role of scholarship has also had implications across European constitutional cultures with greater or smaller interventions (Lazarus, 2020, p. 491), invoking as a random example the *R (Miller) v. Secretary of State for Exiting the European Union* (2017) case of the Supreme Court of the United Kingdom, where the argumentation of academics was accepted by the Court (UCL, 2017). In the discourse regarding the role of constitutional scholars, it is argued that 'the society itself increasingly expects greater and more pertinent contributions from academics' (Alemanno, 2022, p. 561), thus the CCs referring to scholars' work reflects society's expectations in some sense.

From its establishment (1992) to the date of the drafting of this the paper (31 January 2023), Romanian constitutional jurisprudence has counted 973 decisions allowing referrals of unconstitutionality. In 116 decisions, the word 'doctrine' was used, and in 32 the phrase 'specialist literature' was employed. Taking into account repetitive cases (with the same subject-matter or the same challenges) where the CC invoked its own case-law for the resolution of the case, the visible use (in terms of express mention) of the academic doctrine covers a quite significant proportion of these decisions. Compared with the Lithuanian example, where only several cases containing the word 'literature' or its synonyms were found, Romanian constitutional judges seem more confident with researchers' input into the development of constitutional jurisprudence. However, while in Lithuanian constitutional jurisprudence there are only some traces of evidence indicating that scientific research was consulted in the solution of constitutional justice cases, it cannot be ruled out that the real influence of the scientific doctrine is much larger. The study of case materials shows that the CC of Lithuania takes into account scientific research while preparing cases but does not refer to it in the final decision, and its impact remains latent. Therefore, it is not possible to determine the number of cases influenced by academics. The fact that scientific opinions are delivered in the preparatory stage of the case also allows us to confirm the interest of the

judiciary in academia. Taking into account all of this, the absence of explicit references does not jeopardise the ability of this research to verify the link between case-law and academic discourse.

In constitutional jurisprudence, the legal doctrine can be used in different parts of the constitutional text. It can be used not only by the CC itself in the establishment of the statement of reasons, but also by the parties to the case who express their viewpoints (Decisions of CC of Romania No. 66/1998, 1009/2009, 459/2014, 542/2015, 308/2016, 361/2016, 432/2016, 624/2016, 710/2016, 61/2017, 258/2017, 118/2018, 354/2018, 452/2018, 534/2018, 537/2018, 560/2018, 802/2018, 26/2019, 139/2019, 466/2019, 58/2020, 85/2020, 235/2020, 238/2020, 239/2020 (where the Government also refers to academic works), 643/2020, 648/2020, 776/2020, 875/2020, 907/2020, 69/2021) or by the judges who draft dissenting opinions, often more accurately than in the recitals of the decision, in the sense of referring to the author or work (Decisions No. 45/1998, 234/1999, 15/2000; 969/2007, 732/2009, 1202/2010, 748/2015, 759/2017, 297/2018 (also in reasoning), 136/2018, 518/2018, 26/2019, 504/2019 (also in reasoning), 818/2019).

When the legal doctrine is mentioned by the parties to the case and is reflected in the descriptive part of the constitutional decision, the scope for discussing the influence of academic works on the reasoning of the CC appears limited. Nevertheless, this enables the assertion that the CC, at a minimum, possessed an awareness of the referenced research. The opinions of the researchers which were consulted while preparing the case for the hearing and the statements of academics summoned to the hearing as part of the case material also find their place in the descriptive part of the decision. Their value and weight in the constitutional decision might be revealed when the CC decides to follow their path in the interpretation of the constitutional norms and the reasoning of the decision.

When expressly referring to the doctrine in holding part of the decision, both CCs of reference seem to prefer general expressions (such as ‘doctrine’, ‘specialised literature’ or ‘academic literature’), without specifying which authors or works are taken into consideration. The avoidance of the mention of specialised, and particularly national, authors or works is based on the (perhaps objectionable) idea of a certain level of neutrality, in the sense of not judging it by reference to or in favour of supporting one author/law school or another, and ignoring others. Such a strategy allows the anticipated justification of the choice of authors to be avoided. This might also be considered as representing willingness to show the general tendencies pursued in most of the academic works in the field, just as the CC of Lithuania pointed to the fact that the legal doctrine not only emphasises the tendencies of the regulation, but also discloses the particular legal regulation of foreign states (Ruling of 11 November 1998) or relies on ‘the constitutional tradition of Europe’, as the Court expressed itself (Ruling of 10 January 1998).

This position is supported by the example of the Belgian jurisdiction and the explanation of the president of the CC of Belgium, Jean Spreutels, given on the occasion of an international conference. Spreutels observed that the Belgian CC never cites the doctrine, a position explained by the aim of avoiding subsequent controversies where one author or another was used, or one theory or another was preferred or neglected. However, exceptions to the rule of not citing a particular author can found in the case-law of both courts, referring to foreign authors and their specific works (Ruling of 9 December 1998 of CC of Lithuania, analysed below, and Decision No. 683/2012 of CC of Romania).

On the other hand, there are examples of other CCs in which the doctrine is considered as a secondary source of law and is cited accordingly in their decisions (CC of Latvia, Judgement of 4 June 2021), sometimes in footnotes. This is also used in the practice of other courts – for example, the Supreme Court of the United States (*Dobbs v. Jackson Women’s Health Organisation*, 2022). These decisions seem neither more subjective nor less authoritative than those where the authors are not referred to; moreover, the path followed by the CC to the conclusion of the case is more transparent. This demonstrates that the lack of specification regarding the author or work might be considered as open to criticism. Comparative law can be a source of good practice, as at least the well-known examples of impactful court decisions accurately cite authors and the works they refer to.

As a compromise between explicit, precise referrals in constitutional texts and the tacit use of the wisdom of academics, the practice of the Constitutional Council of France of publishing on its website not only the

pronounced decision, but also a *Dossier documentaire* (2022) with the references used in the drafting of the decision might be considered. This may even be an alternative to citing the authors in the recitals, to the extent that the doctrine examined by the court would be accurately mentioned in the documentary file. Alongside this, one must note that the aforementioned might not be possible in cases in which the preparation for the case encompasses alternative solutions to consider along with their legal argumentation, which might reduce confidence in constitutional decisions.

Despite the constrained opportunity to delve extensively into the direct impact of academic literature on judicial decision-making, the recognition of such scholarly contributions underscores the court's engagement with prevailing academic discourse. This acknowledgment suggests a potential awareness of scholarly analyses and perspectives, which may inform the court's deliberations and interpretations, albeit mostly indirectly (not ignoring the classic sources of interpretation of constitutional provisions). As Williams (2002) points out, the authority of academics is 'rooted in their truthfulness in both respects: they take care and they do not lie'. Therefore, while the direct manifestation of academic influence may not be readily discernible within the court's reasoning, the court's familiarity with pertinent research signifies a foundational understanding of scholarly insights within its jurisprudential framework.

3. Levels of impact of the academic doctrine on judicial interpretation

Firstly, distinct from the use of the doctrine as an element with greater or lesser importance in the amalgam of the legal creation of the court's reasoning, the option for legal doctrines or philosophies that serve as methods of judicial interpretation might be noted. In this light, it is worth noting the use of a diversity of interpretive methods, sometimes conceptualised in the sense that the method used is specified, while other times it is applied without any thorough revelation in this regard. The multiplicity of methods of interpretation has become part of the official constitutional doctrine in Lithuanian jurisprudence, where it is explicitly stated that any method of constitutional interpretation is absolute and that in construing the Constitution, various methods of construction of law must be applied: systemic, as one of the general principles of law, logical, teleological, as one of the intentions of the legislature, as a precedent, historical, comparative, etc. (Ruling of 6 June 2006).

Thus, the CC's decisions might be founded: on a literal interpretation of the constitution (literalism),[8] via an originalist approach (originalism), using the works of the drafters of the constitution (who often themselves were academics), via inference from the general context of the adoption of the Constitution based on the settled case-law (the doctrinal approach, overwhelmingly found in decisions rejecting referrals in which the same criticisms regarding the same legal texts are invoked, but also present in admission decisions where, for the same reasons, similar legislative solutions are sanctioned (Toader & Safta, 2016), based on the weighing of competing interests, or in a systematic manner (structuralism, based on larger relationships within the Constitution). Again, the argumentation technique and the methods used seem to relate more to the profile of the judge-rapporteur/assistant-magistrate assigned to the case (the decision being, as a rule, a mirror image of the report or notes to the case) and not to a clear or coherent universal methodological approach of the CC.

From the perspective of the analysis in this paper, one of the methods that both the CC of Lithuania and the CC of Romania have conceptualised more clearly in the structure of the argumentation of their decisions, usually to substantiate or motivate jurisprudential upturns, is the so-called doctrine of living law or the living Constitution, giving meaning to constitutional dynamism, evolution, and the potential to adapt to permanent sociological changes. When social relations change, the content of legal norms also changes, regardless of the fact that they are not formally changed (Barak, 1989, p. 141). On this point, originalism and interpretivism might be even compatible with one another. This coexistence allows a balance to be created, granting the ability to keep the

[8] For a combination of methods see, for example, Decision of 11 December 2020: 'The Court considers that the phrase "autonomous administration and public institutions" contained in Article 136 (4) of the Constitution cannot be interpreted exclusively literally, ad litteram, especially in the context of the evolution of the socio-economic life after 2003 – the year of the revision of the Constitution (in this sense it is relevant, for example, that many of the former autonomous administrations were reorganised and became national companies), but the spirit of the law must be taken into account, namely the intention of the framer, that the right of administration over the public property belongs to a State entity or over which the State can have control.'

Constitution stable: originalism prevents courts from deviating from the initial constitutional sense, while interpretivism ensures the flexibility and adaptability of the Constitution to the changing social reality, without interfering directly with the text of the Constitution. The idea of a living constitution is not just a matter of constitutional law theory. Since the *Weems v. U.S*. case in 1910, this conception has been widely accepted and applied both at the level of CCs (Safjan, 2006) and supranational courts (*Soering v. the United Kingdom*, 1989; *Pretty v. the United Kingdom*, 2002). The concept of a living Constitution surely opens the door for different sources of interpretation of constitutional norms vis-à-vis the current conditions, including referral to academic works.

The analysis of the constitutional jurisprudence of the jurisdictions chosen for this research reveals that academic research and the legal doctrine appear as a source of inspiration for the interpretation of legal regulation (for instance, contributing to explaining theoretical notions or institutes) or the formulation of new concepts not yet revealed, offer support for judges' reasoning, serve as an objective benchmark, and supply guidance alongside the court's own case-law or that of other CCs, the European Court of Human Rights, or the Court of Justice of the European Union. The latent use of scholarly works is more difficult to detect and prove; however, when academic opinions are requested, it might be presumed that the other works of other academics are also analysed. This research does not provide an exhaustive set of decisions where the impact of academic research might be detected, but rather introduces the most typical examples of how the constitutional jurisprudence evolved in each country as a result of indirect cooperation between researchers and the courts.

3.1. The legal doctrine as an ally of the CC of Romania

3.1.1. The role of explaining the legal concepts used

In many decisions of the CC of Romania, the invocation of the doctrine appears when the meaning of certain legal concepts used in the recitals is presented, with the doctrine being used to facilitate the understanding of the legal concepts. The Court uses doctrinal terminology, definitions, characterisations and classifications when it refers, for example, to: the 'traditional administrative litigation institutions, referred to in the doctrine as administrative litigation and administrative guardianship' (Decision No. 137/1994); principles such as 'nominalism' (Decision No. 62/2017) or 'the majority decides, the opposition expresses itself' (Decision No. 442/2014, Decision No. 137/2022); legal concepts such as adversariality (Decision No. 641/2014; Decision No. 404/2022); sanctions in civil procedural matters (Decision No. 377/2017); the defendant's status in the administrative litigation trials (Decision No. 889/2015); judicial precedent (Decision No. 838/2009); 'national security' (Decision No. 91/2018); taxes and fees (Decision No. 900/2020); 'public official' and 'official' (Decision No. 2/2014); procedural deadlines with reference to the use of appeals (Decision No. 501/2016); 'court' (Decision No. 21/1995); 'incompatibility' (Decision No. 87/2019); 'decentralized public services' (Decision No. 1257/2009); the phrase 'set of relationships regarding the social coexistence' used by the criminal law (Decision No. 451/2018); 'through other places than those established for customs control' within the regulation of black market crime (Decision No. 176/2022); the concept of judicial individualization of the sanction (Decision No. 536/2016; Decision No. 582/2016); the competent courts within the procedure of annulment of a document (Decision No. 166/2015); the characterisation of a measure on asset confiscation (Decision No. 356/2014); the difference between phrases such as 'damage caused' and 'claims of the civil party' (Decision No. 867/2021); or the characterisation of the right of appeal (Decision No. 244/2017).

As a rule, these decisions are established by starting from specifying the legal framework including the impugned norm or legislative solution, in relation to which the CC of Romania then establishes its constitutionality analysis. In these types of decisions, the doctrine does not seem to assume 'weight' in the decision-making process in terms of the argument on which the constitutional judge relies, instead being used in an explanatory role to specify the normative context.

3.1.2. The premise of the objective benchmark of constitutional reasoning

In a register of examples of higher valorisation of the doctrine, the decisions in which the CC of Romania uses doctrinal explanations, definitions, developments of certain legal notions or concepts are entered, placing them

in the position of premises of reasoning. This means that the doctrine appears characterised, along with the case-law, as representing an objective benchmark. The key difference here is emphasised in the sense of the weight of the doctrine in the reasoning of the constitutional judge. The doctrinal assessment, forming a common body with the interpreted legal norms, substantiates the assessment of the constitutionality of the norm that takes account of that interpretation, taking the doctrine as its ally more or less explicitly.

Thus, the CC of Romania held in one case that the legislator used a phrase in the regulation protecting social relationships regarding occupational health and safety, namely 'special consequences', the definition of which is not disclosed in the law nor the judicial doctrine nor the case-law, observing that this 'in the matter developed an enshrined meaning for the impugned concept that would establish *an objective benchmark according to which its content could be assessed* [emphasis added]' (Decision No. 513/2017). *Per a contrario*, is it possible to consider that if the doctrine had developed an enshrined meaning of the criticised phrase, the legislator's intervention to define it would no longer have been necessary, and therefore the criticisms would have lacked support? It can be considered that, rather, a difficulty encountered in the doctrine is emphasised, which seems to be used as a decisive argument for ascertaining the unconstitutionality of the norm criticised for its lack of clarity and precision.

A similar assessment seems to result from another decision in which, analysing the drafting of a text from the civil procedure regarding the provision of the solution to the parties through the mediation of the court registry, the CC held that the academic doctrine can sometimes disclose a constructive critical review of the actions of legislator.[9]

In one decision, the CC begins from the premise of the fact that while interpreting the Civil Code of 1864, both the doctrine and the practice recognised the possibility of applying the theory of unforeseeability in the event that an exceptional case outside the will of the parties that could not reasonably be foreseen by them at the date of the conclusion of the agreement would make the enforcement of the debtor's obligation excessively onerous (Decision No. 623/2016). In another case, the Court started from the premise established in the doctrine regarding the qualification of a procedural term regarding the reasoning of their decisions, a decisive premise in the guidance of the CC of Romania's solution which derived, *inter alia*, from the doctrine.[10]

In other cases, the CC supports its reasoning by bringing the doctrine as an argument or ally – for example, when it confirms a court's statement[11] or when it notes that 'the doctrine allows the existence of positive discrimination, even regulated by certain constitutional texts, which impose certain social protection measures' (Decision No. 646/2020). Although the wording is rather imprecise, one notes an authority recognised by the doctrine equally regarding the interpretation of the constitutional texts.

The doctrine may appear to be placed in line with the case-law of the courts or even with greater authority, in the sense that the latter was established on the doctrine, as was explicitly held in a decision by which the CC of Romania argued that

> both in doctrine and in practice the courts were asked what can be done in situations where there is a legal impediment that makes it impossible to pronounce a criminal judgment for establishing these crimes. The solution, foreseen by the legal literature and appropriated in the case-law, was that the determination of the commission of the crimes should be made by the review court itself. (Decision No. 66/2008)

[9] The CC of Romania has held: 'the doctrine of the civil procedural law itself was surprised by the limitation of the assumptions in which this means of communicating the decision was regulated by way of exception only in the case of postponement of the pronouncement regulated by Article 396 (2) of the Civil Procedure Code' (Decision No. 454/2018).
[10] The CC stated that: 'the decision shall be drawn up within 30 days at most from the pronouncement … . The judicial practice and doctrine have ruled that the mentioned term is a recommended term' (Decision No. 233/2021).
[11] When the CC 'finds that the adoption of the law, as part of the legislative process, refers to the final vote exercised by the Parliament on the whole law. In this regard, both Romanian and foreign legal doctrine is pronounced' (Decision No. 730/2017).

In certain cases, the CC emphasises that it established its case-law based on the doctrine.[12] At other times, the Court places the doctrine in line with its own case-law (which is generally binding), such as when it notes, for example, that 'both the specialised doctrine and the case-law of the Constitutional Court … are in the sense that the limits of the referral to the Parliament for the re-examination of the laws shall be defined by the request for re-examination' (Decision No. 30/2016; Decision No. 31/2016).

Likewise, the CC of Romania brings the doctrine as an ally when formulating recommendations, which denotes, again, the special authority given to it, as in one case in which the Court held that its decision to procced to the re-examination of the law as a whole, which would answer all of the observations formulated, was determined by the criticisms of that law expressed in the doctrine with reference to some of its provisions (Decision No. 472/2008), which meant, as it can be understood, that the legislator must also respond to the observations of the doctrine.

3.1.3. Reasoning closely guided by the doctrine

While in the previous section decisions established on a qualitative criterion involving the weight of the doctrine in the motivation were considered, within this section a quantitative criterion is added. The examples selected in this section differ from those in the previous sections in that the doctrine marks the reasoning, serving as a blueprint or supporting structure on which the Court then develops its recitals.

For example, in the decision by which it found that the legislative solution contained in Article 118 of the Code of Criminal Procedure, which does not regulate the right of the witness to remain silent and not to incriminate oneself, is unconstitutional (Decision No. 236/2020), the CC of Romania used doctrinal references in paragraphs 25 (the *ultima ratio* principle in criminal matters), 36 (the Court held the doctrinal opinions according to which the right to remain silent and the right not to contribute to self-incrimination derive from the observance of the presumption of innocence, being guarantees of it), 61 (cited the doctrine), and 73 (where it emphasised the unanimity of the case-law and the legal doctrine, stating that the obligation of finding the judicial truth is imposed on a judicial body that on the basis of the evidence with respect for the fairness of the procedure, regarding the facts and circumstances of the case, etc., should find the proper solution). In the same decision, the doctrine was also invoked in the dissenting opinion.

Similarly, the CC of Romania also established its reasoning in a decision by which it found that the provisions of Article 5 of the Criminal Code are constitutional to the extent that they do not allow the combination of the provisions of successive laws in the establishment and enforcement of the more favourable criminal law – a decision also extensively debated, which placed the CC of Romania in a position opposite to that of the High Court of Cassation and Justice (Decision No. 265/2014). Thus, the CC proceeded to its analysis, noting in paragraph 23 that 'in the specialised doctrine and the judicial practice, two opinions were expressed regarding the enforcement mechanism of the more favourable criminal law'. It then continued in paragraphs 24–26 to develop doctrinal opinions, identifying in paragraph 28 the majority doctrine before referring in paragraphs 35 and 46 to the notion of 'autonomous concepts' with reference to its doctrinal enshrinement. In paragraph 49, based on the arguments presented on the violation of certain constitutional texts, it concluded that 'since by combining the criminal provisions from several successive laws, a third law is created, judicially, which denies the rationale of the criminal policy formulated by the legislator'. Accordingly, it then considered that 'only the interpretation of the provisions of Article 5 of the Criminal Code in the sense that the more favourable criminal law applied in its entirety is the only one that can remove the flaw of unconstitutionality'.

Another decision by which the CC of Romania sanctioned the provisions of Law No. 78/2000 on preventing, discovering and sanctioning corruption offences for lack of clarity and precision is established on a veritable 'red line' of doctrine, which is mentioned in nine of the paragraphs of the statement of reasons (Decision No. 458/2017). To the same effect, other examples (Decision No. 302/2017; Decision No. 392/2017; Decision No.

[12] The Court argued that 'in the case-law of the constitutional court, making use of what was retained in the doctrine, the content of Article 136 (2) and (3) of the Fundamental Law was defined, by reference to the provisions of the Civil Code, under the aspect of the normative act …'. (Decision No. 406 /2016)

405/2016) can be given in which the judge allowed themselves, practically, to be guided by the researcher, thus becoming a partner in the reasoning of the court's decision. This is the most visible way in which the doctrine exerts its influence on judges who, resorting to the authority of theoreticians in the matter, substantiate their reasoning for their solutions.

Perhaps these decisions are best suited to the comment of a renowned Romanian professor, according to whom 'the chorus of two voices – of case-law and, respectively, doctrine – has often been celebrated, but in the end only their meeting and confusion on the lasting common notes of the legal progress managed to discern and impose the norm' (Duțu, 2022b), in this case managing to lead to the admission of a solution that will result in the amendment of the legislation.

3.2. Academic input in the development of Lithuanian constitutional jurisprudence

3.2.1. The source of interpretation of impugned legal provisions

References to the academic doctrine, especially when they are used in moderation, as in the case of the CC of Lithuania, serve as indicators that, within judicial discourse, scientific literature plays a specific role in aiding the CC to delineate the substance of a legal norm, unveil intricate legal phenomena, and introduce novel principles inherent to specific branches of law, otherwise there would be no need to call on it. This level of impact of the academic doctrine when it is invoked while interpreting ordinary legal legislation is similar to the explanatory role of the legal doctrine previously revealed in the Romanian example. Through such references, the court not only acknowledges scholarly contributions, but also leverages these insights to refine its understanding of legal principles. In essence, the incorporation of the academic doctrine underscores the court's commitment to drawing upon scholarly expertise to inform its deliberations and shape the trajectory of the interpretation of ordinary laws given by the CC.

Especially in the early years of the activities of the CC of Lithuania, judges searched for understanding in the academic doctrine to the new concepts enshrined in the law. In the ruling on land reform (Ruling of 19 January 1994), the Court was compelled to elucidate a definition of what program laws are, and referred to research and foreign regulation in a very general manner without going into specifics (or distinguishing one from the other), holding that 'in legal science and in legislative practice of other states, the so-called program laws are well-known'. Taking the definition of program laws as well as the method of their functioning from those sources (Ruling of 14 February 1994), the Court had to explain issues of the validity and compliance of legal acts adopted earlier with the new Constitution. Similarly, the Court turned to the science, stating that 'various legal means of settling this issue are known in legal science as well as in history' while being willing to emphasise that several solutions to the compatibility of earlier legal regulation with the Constitution might be found, and these solutions were described in the continuation of the ruling, allowing discretion to the legislator to choose the most appropriate approach.

Another example of the interpretation of a notion enshrined in the law with a constitutionality that was challenged by making reference to the science can be found in the ruling of 6 December 2013 on the liability of the possessor of a potentially dangerous object. The CC explained what is understood as an object of increased danger and referred to the 'civil law' (which cannot be confused with the legislation concerning civil law, as the legislation was to be interpreted). The reference to the jurisprudence of the Supreme Court of Lithuania followed the civil law doctrine, serving as the confirmation of the former (taking the priority position in the rank of sources of interpretation).

The CC of Lithuania also drew upon legal doctrine (in terms of civil law, criminal law, etc.) pertaining to the content of the subjective right of the owner (Ruling of 23 June 1999) and tenant of a dwelling unit (Ruling of 15 June 1994), qualifying features of crime (Ruling of 4 June 2012), criminalisation or decriminalisation of deeds, purpose of punishment under comparative criminal law (Ruling of 13 November 1997), etc.

The abovementioned ruling of 6 December 2013 on a potentially dangerous object contains another interesting passage, this time not in the part where the challenged legal regulation is interpreted, but in the constitutional

reasoning. While assessing the constitutionality of the impugned legal norm, the CC referred to the principle of civil law, which did not exist in the official constitutional doctrine. Therefore, one cannot argue that it stems directly from the Constitution, and as such it was never used again in any other case. The principle of *bonus pater familias* determining the duty to behave in a reasonable, wary, and careful manner was used as an argument to explain the case in which the guilt of the possessor of a potentially dangerous object arises. Yet this revelation leads the research to the next section, where the impact of academics and researchers might be detected in the development of official constitutional doctrine having the power of the Constitution itself.

3.2.2. The inspiration for the interpretation of underdeveloped constitutional aspects and the invisible though undeniable use of academic sources

References to the legal doctrine that might have impacted the development of constitutional jurisprudence are usually provided in the part of the ruling where the CC gives their interpretation of constitutional provisions or in the part where the constitutional reasoning is construed. One has to admit that such cases are quite exceptional; however, they are no less compelling due to the significance of these references made by the court. Mostly, these references appear when a new constitutional concept has to be developed. Naturally, references, almost always in a general form, are more likely to be found in earlier constitutional jurisprudence, as all constitutional shape has to be built on empty ground. The court refers to the academic doctrine or a particular field of law (presuming, as the context allows, that it concerns literature and not the legislation) as an introduction to a new development or serving as the background to the formulation of official constitutional doctrine.

A tribute to comparative constitutional law is paid in the ruling of 10 January 1998, revealing for the first time a form of Lithuanian state. This ruling is considered one of the most significant in Lithuanian constitutional history, and is studied in detail in academic works (Kūris, 1998). While explaining the system of state power institutions, the CC of Lithuania relied on the forms of states developed in comparative constitutional law (‘in comparative constitutional law various forms of state governance are known’), distinguishing that, ‘as a rule, republics are categorised as parliamentary, presidential, and thus termed mixed (half-presidential)’, while also looking at the reasons for the particular choice of a certain form of state (‘the variety of forms of state governance has been determined by national, historical, political and cultural traditions’). The Court continues then on the different models of forming a government, and the reader maintains the impression that this is the research of someone else (without particular indication) and not the interpretation of constitutional provisions. Having assessed all the possibilities, the Court concludes that the Lithuanian Constitution determines the state of Lithuania as a parliamentary republic with certain peculiarities, thus termed a mixed (half-presidential) form of governance, and that this stems directly from the Constitution. Thus, the preceding paragraphs come from the external sources, most likely from academic works.

In the ruling on state service, the CC of Lithuania formulated an exhaustive official constitutional doctrine on state governance and determined the constitutional concept of state service (Ruling of 13 December 2004). While doing so, the Court, among other things, noted that ‘no single, universally recognised concept of the state service exists in the scientific literature on law, political sciences or public administration’, and then proceeded to the revelation of aspects related to state service and the requirements for it. The introduction stemming from the ‘scientific literature’ in a way enabled the Court to develop the official constitutional doctrine, stating that in this field the legislator has broad discretion to choose and consolidate in laws a certain model of organisation of state service. Would the new constitutional doctrine have been so exhaustive if the Court did not perceive that there was a lack of discourse on this topic in the scientific literature? In any case, it filled this gap and allowed researchers to work on it later in academic studies.

Interestingly, the statement about the absence of the notion of state service in the scientific literature was used also in another case (Ruling of 20 March 2007) quoting the previous example. This led to the continuation of the formulation of the constitutional doctrine of state service and the remuneration of state servants.

There are also cases of the invisible use of the academic doctrine, which are no less significant than those where explicit references are made. These cases are more difficult to detect, as readers have to be familiar with both the doctrine and the ruling (and even the circumstances of its adoption). However, when the new official

constitutional doctrine goes hand in hand with established academic opinion and theory, it is hardly believable that the academic research was not among the material of the case during the preparation stage – even if the final text is tacit about the doctrine. As a rule, scientific opinions are also usually requested in such cases containing references to the academic works themselves. This is another factor, besides direct search via keywords, that allows us to detect and analyse rulings influenced by scholars. As a general rule, the scholars are referred to in the constructive part of the ruling; they will never be referred to while construing the official constitutional doctrine or argumentation. However, their impact might be visible, sometimes even in an expression used by the CC.

A perfect example of this is the ruling of the CC of Lithuania on the requirement that a cassation appeal must be drawn up by an advocate (Ruling of 30 December 2021). While interpreting constitutional provisions related to the right to court and to the judicial system enshrined in the Constitution, the CC explained the nature and purpose of a cassation procedure and its differences from the other stages of a trial by using almost the exact words found in scientific articles or textbooks. For example, the development that 'only on fundamental legal issues in order to ensure, inter alia, the public interest in the uniform interpretation and application of law and the formation of uniform (coherent, consistent) case law' is almost the same wording as that which might be found in several scientific articles (e.g., Stripeikienė, 2010; Nekrošius, 2006). The fact that the researchers' opinions were requested in this case also points to the efforts of the judge rapporteur to become acquainted with the academic background of the case.

The impact of researchers' opinions on the formulation of constitutional doctrine might also be assumed in a recent case that serves as one of the numerous examples in which prominent lawyers from different universities were summoned to express their views concerning a case. In the ruling of 1 March 2019 on the right to apply to a court of appeal instance without the assistance of a lawyer, scholars unanimously rejected the requirement to address a lawyer for drafting an appeal. Unsurprisingly, the verdict of the CC of Lithuania was to repeal the relevant provision of the Civil Code. Similarly, in the ruling of 24 February 2017, the concept of impeachment proceedings enshrined in the Seimas Statute was interpreted while taking into account the explanations of scholars who presented their opinions, although in the reasoning the CC spoke as if from itself.

3.2.3. Exceptional methods of reasoning for exceptional cases

The role and mission of the CC, being the supreme guardian of the constitution, sometimes makes it the last resort in resolving difficult, sensitive issues that cannot be dealt with by the legislator because of the lack of political will or the presence of political disagreements. Litigation is often brought before the CC, which is composed of "*les sages*" whose decisions cannot be doubted as they have the power of the constitution itself. Such cases are not related to a particular timeframe, but rather to the social reality of the state. When faced with such a crossroads, the CC uses all of the instruments it can find to substantiate its reasoning for solutions that might be met with hostility in some parts of society. There, academics might become sources of answers and partners to support a chosen solution.

One of the most commonly referred-to rulings of the CC of Lithuania concerns the abolition of the death penalty (Ruling of 9 December 1998). At the moment at which the decision should have been taken (as it was one of the informal conditions of joining the EU, which was Lithuania's chief desire after regaining independence), society was divided, Parliament could not find the courage to amend the provision, and the issue was left to the Court. Therefore, knowing that all arguments for and against had to be discussed and the ruling should be as convincing as possible, while construing the Constitution in decision the Court relied on different theories developed in the academic doctrine. Here the Court emphasised trends from the doctrine of criminology concerning the use of different measures intended for the reduction of crime, and used trends from the doctrine of criminal law describing the essence of punishment, the degrees of its severity and the impact on the person who committed the crime, even citing its general principles: 'The modern theory of criminal law, however, categorically dissociates itself from the talion principle (an eye for an eye, a tooth for a tooth) which existed in ancient societies and states.' In this case, passages of the legal doctrine were literally used as extra arguments to prove the unconstitutionality of the impugned norm, bringing together the constitutional spirit and the concept of legal theory. However, no clear indication as to the authors of these academic doctrines were provided in the

text of the constitutional ruling.

This is not the only insight that this case brings to the topic of this research. Paraphrasing the famous proverb, one might note that exceptional cases call for exceptional measures, as in this case a reference to the particular research work and another particular author were given. After discussing the role of severe punishments in the experiences of foreign countries, the CC made explicit reference to the source of this information, indicating a recent Lithuanian publication entitled "Crime and the Activity of the Institutions of Law and Order", with specific pages in which the relevant information could be found. Perhaps more surprisingly, the Court referred to the specific author – Cesare Beccaria, a classic of criminal law, as the Court called him – and his revelation regarding capital punishment, that 'severe punishments make society itself more severe'. After reading this, one might not need any further evidence of how academic research can enrich constitutional jurisprudence. While referring to particular publications, the judges of the CC of Lithuania did not show themselves to be any less competent regarding their knowledge of how to resolve the case; on the contrary, they proved that all relevant sources of information were considered while searching for solutions, and the legal heritage was taken into account.

Unfortunately, this one of only very few examples of the CC paying tribute to particular scientists' works, proving that the Court prefers not to indicate its sources while researching material relevant to a case.

Moreover, one might agree that similar structures of constitutional reasoning are rather an exception, and are more typical (if they still exist at all) of early jurisprudence, when the official constitutional doctrine had not yet been so extensively developed. Now, 30 years after the establishment of the CC of Lithuania, this practice is extremely rare, or perhaps an appropriate case in which the need to again rely on researchers has not yet been examined.

Conclusions

The impact of the academic doctrine on the development of constitutional jurisprudence might be determined by assessing different aspects: the formalisation of prior research; the selection of the relevant academic doctrine; the mode of its reflection in the final text, starting from its insertion in the recitals; or the citation, or lack thereof, of the selected authors or works. The legal tradition and the custom practice of the CC allows the visible and invisible use of the scholarly doctrine to be distinguished in constitutional judgements. Despite variations in the forms of its appearance, the influence of academic research on constitutional developments is obvious.

The extent of the influence exerted by the academic doctrine on the evolution of constitutional jurisprudence is contingent upon several factors, such as the amount of pre-existing constitutional doctrine, the need to develop novel concepts within the contexts of specific cases, the sensitivity of the problem analysed and the need for additional convincing support, etc. The analysis of both Romanian and Lithuanian constitutional case-law allows us to note that judges are more willing to resort to the doctrine (whether explicitly or implicitly) when dealing with new or more complex issues. The number of references found in constitutional texts differs, whether due to the different numbers of decisions on constitutionality adopted in general (the CC of Romania, which sits in panels, decides on twice as many decisions on the merits as the CC of Lithuania, where all cases are heard by the entire composition of the Court), different constitutional traditions (mentioning or not mentioning all sources used), the need to consolidate the decision adopted, etc.

Therefore, the use of academic works in constitutional reasoning allows the famous phenomenon of the 'migration of constitutional ideas' (Choudhry, 2007) to be expanded to include transmission not only from jurisdiction to jurisdiction, which is certainly nothing new, but also from the academic world to the judicial dimension. The inverse is also true, as constitutional decisions often become material to analyse and from which to generate new scientific revelations. The theoretician appears as a partner of the judge, and their credibility and reputation support the credibility of the judge's decision. In this way, even if consulting the academic legal doctrine is not mandatory, it is imposed by the persuasive power of the reasoning on which a decision rests. On the other hand, the judge's work can serve as an inspiration for academic research.

The role of both the judge and the legal researcher in ensuring the evolution of law and legal certainty, creating a 'well-functioning constitutionalism' (Tushnet, 2016, p. 108), acquires new approaches. To some extent, both judges and researchers have a role as mediator or creator in interpreting and updating the law, understanding the law and adapting it to the evolution of the society. Judges and researchers alike cannot be ignorant or passive, and must be aware of the mutual support that they can provide and the significant advantages of coordinating their efforts.

Another facet of the doctrine-case-law partnership refers to researchers' need to know that their work is necessary, recognised and produces effects on the evolution of the legal system. Of course, this conclusion imposes responsibility, accountability and adherence to academic ethics, but it also creates an optimistic view of their work and its valorisation. High-quality research increases the quality of case-law, and the authority thus acquired by the latter increases the chances of the former being recognised as an informal source of law.

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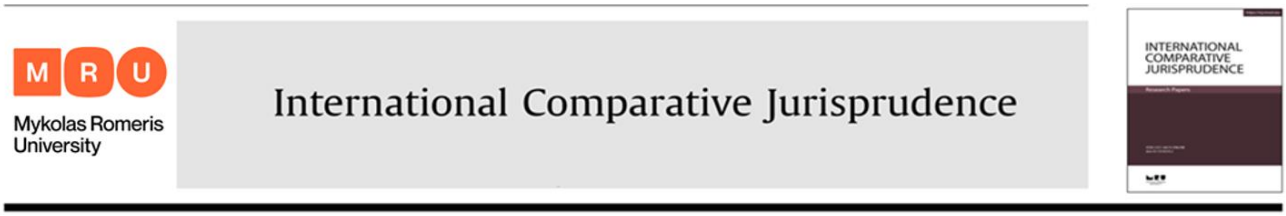

GEOPOLITICAL FACTORS IN THE FORMATION OF A NEW SCHOOL OF CRIMINALISTICS IN THE INTERMARIUM REGION OF EUROPE

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Abstract. The idea of an alliance between Central and Eastern Europe and parts of the Balkans, otherwise known as the Intermarium or the Three Seas Initiative, is not a new one, but it has been given new impetus in our time as this region has developed substantial common interests – not only in the political and economic spheres, but also in other areas. If we look at the idea of the Intermarium, or more specifically the Three Seas concept, we see that 12 European Union countries are formally involved (Austria, Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia). Greece was admitted to the Alliance in Bucharest in September 2023, while Ukraine and Moldova became associate members. In April 2024, an Intermarium Summit took place in Vilnius where important resolutions were adopted, including on security. The division of criminalistics into four main traditional schools (Germanic, Romance, Anglo-Saxon and Eastern European) which emerged in the second stage of its development in the 20th century is well known. There are no purely national 'schools of criminalistics', since each country is in the process of analysing the positive experiences (scientific and applied) of other countries and adapting them to its own purposes. This scientific term is therefore significant first and foremost as a basis for scientific classification, but also reflects the geopolitical vectors of each country. In regard to the development of a specific science such as criminalistics in the context of public security, we need to consider the influence of various factors on this process. In each country, criminalistics, as both a science and an applied field, begins based on the paradigms of one of the main schools before being further saturated with national content. The latter process depends not only on the existing law and its doctrine, the functioning system of law enforcement institutions, and the economic and social conditions, but also on the history, culture, traditions, and geopolitics of the country. The aim of this article, written by authors from three Intermarium countries, is to show, on the basis of an analysis of the most important developments in the forensic sciences of the countries of Eastern and Central Europe in recent

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decades, the prerequisites for the formation of a new school of criminalistics in the Intermarium countries. It also seeks to provide insights into the future directions of this process in the context of geopolitical changes.

Keywords: criminalistics, public security, geopolitics, Lithuania, Eastern and Central Europe, Intermarium, The Three Seas Initiative, criminalistics schools, new school of criminalistics.

Introduction

We first began discussing the possibility of a new school of criminalistics in Lithuania several years ago, when the concept of our criminalistics model started to move away from the Eastern European school of criminalistics. Although our model acquired new features, it did not identify itself with other schools, and we also observed similar processes taking place in neighbouring countries. These reflections led us to prepare this article and to invite colleagues from Central and Eastern European countries to speak on this issue. The idea underlying this article was conceived in 2020, and we hope that it will lead to broader discussion at our 20th Congress on Criminalistics and Forensic Expertology: Science, Studies, Practice, which will take place in September 2024 in Vilnius.

In today's globalised world, where key decisions in politics, economics and other areas depend on several centres of power, it is virtually impossible for most countries to pursue their national interests independently. The only way forward is to seek like-mindedness and to build regional alliances that can ensure common problems and interests are publicly raised and made visible. Even within the European Union, the voices of small, individual states are not heard when their interests are not aligned with those of Germany or France. The most relevant example is Nord Stream 2, which is opposed by the Baltic States and Poland. The idea of an alliance between Central and Eastern Europe and parts of the Balkans, otherwise known as the Intermarium or the Three Seas Initiative, is not a new one, but it has been given new impetus in our time as this region has developed substantial common interests – not only in the political and economic spheres, but also in other areas. If we look at the idea of the Intermarium, or more specifically the Three Seas concept, we see that 12 European Union countries are formally involved (Austria, Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia). We see this concept from the perspective of criminalistics and public security in a broader context, with the strong potential to include the Eastern Partnership countries: Ukraine, Moldova and Georgia in the first instance, before other Balkan countries seeking integration with the EU become involved in this informal structure. We would like to point out that on 18 November 2020, the US House of Representatives adopted by consensus a resolution supporting the Intermarium idea, including recommending the inclusion of not only EU countries, but also Ukraine, Moldova and the countries of the Western Balkans region in this act of cooperation. US President Joe Biden and his administration also support the Intermarium idea. Recently, the Intermarium Alliance has attracted even more interest, with the participation of representatives of the US, German and EU institutions as observers, as well as Greece, France, the UK and Japan. It is also important to note that Greece was admitted as a full member at the Bucharest Summit in 2023, and Ukraine and Moldova were granted associate status.

Other areas requiring closer cooperation in the region include public security issues, of which criminalistics (both its science and application), broadly defined, is one of the key elements. Criminalistics science began to emerge in the second half of the 19th century in Europe, and from the outset had several main epicentres (the Austro-Hungarian Empire, France, Germany and Great Britain). In the scientific literature, we come across various criminalistics theories that explain these processes. The division of criminalistics into four main traditional schools (Germanic, Romance, Anglo-Saxon and Eastern European) which emerged during its second stage of development in the 20th century following World War I (Malevski, 2009, 2010) is well known. Among the pioneers who contributed to the formation of these schools are the Austrian Hans Gross, the Frenchmen Alphonse Bertillon and Edmond Locard, the German Robert Heindl, the Swiss Rudolph Archibald Reiss, and the Englishman Francis Galton. It should be stressed that the concept of schools of criminalistics is a scientific category that allows different countries to be grouped according to the complex of paradigms of criminalistics theory that they use and the application of recommendations, methods and tools based on them in the processes of interpreting, investigating and preventing criminal offences. There are no purely national schools of criminalistics, since each country is in the process of analysing and adapting the positive experiences (both scientific and applied) of other countries to its own purposes. This category is therefore significant first and foremost as a basis for scientific classification, but also reflects the geopolitical vectors of each country. The models of criminalistics schools chosen by different countries are linked not only to the methods, techniques and tools applied for the interpretation, investigation and prevention of crime, but also to research (conceptual

issues of theory and methodology) and didactics in this field. In regard to the development of a specific science such as criminalistics in the context of public security, we need to consider the influence of various factors on this process. In each country, criminalistics, as both a science and an applied field, was first based on the paradigms of one of the main schools before being further saturated with national content. The latter process has depended not only on the existing law and its doctrine, the functioning system of law enforcement institutions, and the economic and social conditions, but also on the history, culture, traditions, and geopolitics of the country.

The changes in criminalistics in these countries may have reached a critical mass, where we can say that the existing national models do not fit into the established framework of the general paradigms of the Eastern European school of criminalistics While acknowledging the achievements of the Eastern European school of criminalistics, representatives of Central European countries have also hinted at its weaknesses and the need, in the context of new geopolitical conditions, to debate its paradigms. For example, some authors in Poland emphasise the need to revise existing theoretical paradigms of criminalistics theory (Kasprzak et al., 2006, p. 46; Kasprzak, 2015). It should also be noted that in countries such as Russia, Kazakhstan or Belarus, which traditionally belong to the Eastern European school of criminalistics and are considered to be its bastion, there is an increasing number of opinions regarding the necessity of looking at the established paradigms of criminalistics theory and methodology from new positions (Aleksandrov, 2011; Filippov, 2010; Zorin, 2017; Sokol, 2017).

Therefore, are we not **already at the stage of the formation** (or evolution) **of a new Intermarium school of criminalistics**? The answer to this question is not straightforward, as the countries in the region have different cultural (civilisational), religious and historical (including criminalistics) memories and experiences. During and prior to the 19th century, these peoples often did not have their own states or had lost their independence due to the aggression of powerful neighbouring empires. For centuries, the regions of Central and Eastern Europe and the Balkans were seen by the Turks, Russians and Germans as targets of expansion, or at least spheres of influence. We must not forget that even between these wars the countries of this region experienced a number of problems, disagreements, territorial disputes and conflicts with each other at different levels, including those of a military nature. This prevented the Intermarium alliance from materialising in those days, which was supposed to be a response to the aggressive policies of neighbours from either side. After the Second World War, some of these countries were directly occupied by the USSR, while others (indeed, most, with the exception of Austria) were more or less integrated into the so-called community of socialist countries. At the end of the 20th and beginning of the 21st century, following the collapse of the USSR and the disintegration of the so-called union of socialist countries, a completely new geopolitical environment emerged which enabled the countries of the region to choose their own independent paths of development, including in the field of criminalistics. It may be noted that US geopolitician and visionary George Friedman, who devoted considerable attention to Eastern and Central Europe, did not overlook the processes involved in the revival of the Intermarium idea when he wrote the following:

> *The Interzone* (also known as the *Intermarium*) is a concept – or rather a possibility – that I have been talking about for almost a decade. I have been predicting that this concept will be revived when Russia inevitably re-emerges as a major regional power. This is logical, given that the Interzone concept would consist of the former Soviet Union or its satellite states in Eastern Europe: the Baltic States, Poland, Slovakia, Hungary, Romania and perhaps Bulgaria. Its aim would be to contain any potential Russian movement westwards. The United States would support it. The rest of Europe would suffer for it.' (Friedman, 2017)

To extend and clarify Friedman's point, it is necessary to state that it is not only the countries of the European Union mentioned above that are promoting the idea of an Interzone, but also some of the countries of the Balkans and the Eastern Partnership.

The aim of our paper is to highlight, on the basis of an analysis of the most important developments in the forensic sciences of the Eastern and Central European countries over the last few decades, the prerequisites for the formation of a new school of criminalistics in the Intermarium countries, and to provide insights into the future directions of this process in the context of geopolitical changes.

To achieve this, the main objectives are:

- to assess the main historical preconditions and causes of this process, to show the vector of development taken by the Central and (some) Eastern European countries at the end of the 20th century, and to carry out a pilot survey of the opinions of Central and Eastern European scholars (interviews);
- to highlight trends and provide insights into the formation of this school through a study of the influence of geopolitical factors on public security and the development of forensic science in the Intermarium countries.

The methods used in this paper are historical, comparative, systematic, content analysis, and interview. The historical method is used to highlight the genesis of forensic science and its individual schools. The comparative method is used to assess changes in the content of security in light of contemporary threats, their nature, and the influence of forensic science. The systematic analysis method is used to construct the conceptual content of the future Intermarium School of criminalistics. The content analysis method is used to clarify important concepts and analyse scientific sources and legislation. The method of interviews with eminent forensic scientists from eleven countries is of great value in demonstrating the relevance and reality of the scientific idea of the Intermarium School of criminalistics.

1. Geopolitical factors of public security and the development of criminalistics in Intermarium countries

Ensuring national security is one of the main priorities of every country, and this includes not only military, economic and energy security, but also other areas, including public security. In dealing with the general issues of ensuring the public security of the people, we are dealing with the science of criminalistics, which studies the functional side of crime as a social phenomenon, the ways, methods and means of committing crimes, and the forms, ways, methods and means of the relevant state institutions that respond to these processes. Criminalistics is not only a cognitive and theoretical, but also an applied (practical) activity aimed at the explanation, investigation and prevention of criminal offences. It must be said that in some countries (e.g., in Western Europe or the USA), the theoretical and methodological aspects of criminalistics are not considered as independent parts of the science. This fact is linked to the underdevelopment of academic criminalistics in comparison with the countries of the Eastern European school of criminalistics. The cognitive praxeological function of criminalistics theory is aimed at introducing scientific methodology into the field of fighting crime. The applied tasks of criminalistics are directed towards the development of recommendations, methods and tools for the investigation of crime, ensuring the effectiveness of the activities of certain state institutions (prosecutor's offices, interrogation and quarantine, or, as is currently the case in Lithuania, pre-trial investigation institutions, expert bodies, etc.). This is the methodological field of criminalistics, which combines science with practical activities. The methodological function of criminalistics can be realised, first of all, through criminalistics didactics during the course of studies and through the development of professional competences. In the era of globalisation, crime has become not only a hazard of daily life for the statistically average citizen, but also a factor that threatens national security, and its new forms of manifestation require closer international cooperation, which is linked to the political decisions of states (Malevski, 2013; Malevski et al., 2016; Malewski et al., 2017; Kurapka & Malevski, 2019). Ensuring public security requires not only appropriate decisions in national and international politics, but also the active involvement of non-governmental organisations in these processes (Ackermann et al., 2020).

Each state adopts appropriate strategies and programmes to address national security issues. Thus, in 2021, the Seimas of the Republic of Lithuania revised the National Security Strategy, stating that the national security interests of the Republic of Lithuania are:

> 11.1. state sovereignty, territorial integrity and democratic constitutional order.
> 11.2. peace, the well-being of the population and a secure environment for the development of the State.
> 11.3. the viability and unity of the Euro-Atlantic community.

The implementation of this strategy involves the use of various instruments, including the potential of criminalistics. In addressing public security issues, there is a need for ever closer international cooperation, including the coordination of cooperation between the countries of our region in the field of criminalistics, both in its theory and its applied components. We need to find a common denominator to achieve these goals.

Winnicki formulated the following question: Is there a territorial-cultural, civilisational, economic formula for a commonwealth that we can apply to the East-Central European region? Winnicki offered the following answer: 'Yes, there is, as a category which sociology calls the "Commonality of Destiny". From the Middle Ages to the present day, the countries (states) and peoples of Eastern and Central Europe have had similar experiences, most often involving external interference, and particularly significant have been the experiences associated with the totalitarianisms of the twentieth century' (Winnicki, 2017, p. 17).

As far as the modern world is concerned, the processes of finding one's own way were particularly pronounced at the turn of the 20th and 21st centuries, when the geopolitical changes that had taken place redrew the European map. Geopolitical changes, the restructuring of the institutions of the states that regained their sovereignty and the reform of the legal system could not help but leave their mark on the field of public security, including criminalistics. It is impossible to understand the logic of certain processes without at least a simple schematic historical assessment of them in light of civilisational, geopolitical, economic, cultural and religious factors. We can safely say that since the end of the Middle Ages, most of the peoples and states of our region have been subject to the destructive effects of several powerful neighbouring empires (Wirpsza, 2018). Only relatively recently – in the 16th and partly in the 17th centuries – was the Polish–Lithuanian Commonwealth, which then had an area of around 1 million km² and a population of approximately 11 million, a powerful political, military and economic entity in Europe, capable of influencing the political processes of the region. Later, the Polish-Lithuanian Commonwealth gradually lost its power (and territory) and was overshadowed by the rise of the Ottoman Empire, the Russian Empire, the Holy Roman Empire (which was based in Germany, and even its name emphasised its German origin – *Heiliges Römisches Reich Deutscher Nation*) and the Habsburg monarchy. These negative processes culminated in the loss of the independence of the Polish–Lithuanian Commonwealth at the end of the 18th century. The Balkans and Southern Europe in general were heavily influenced by the Habsburg monarchy and especially the Ottoman Empire, which flourished in the 14th and 17th centuries, while some of the peoples of the Southern European region were enslaved and remained part of the Empire for almost five centuries. The geopolitical processes of the 19th century and especially the first decades of the 20th century showed that the conflicting interests of these and other empires were growing, often giving rise to serious conflicts, including those of a military nature. The territories of the Central European nations have often been the focus of these conflicts, as the main geopolitical players have considered these countries to be their spheres of influence. In 1914–1918, the First World War was the culmination of this confrontation. However, the collapse of empires and the regaining of independence in a number of enslaved nations after World War I did not fundamentally change the geopolitical strategic doctrines of the USSR and Germany, which continued to regard the East-Central European region as their sphere of influence. Even in the immediate post-war years, attempts were already being made to implement the idea of an Intermarium alliance as a counterweight to powerful neighbours, but due to serious disagreements and conflicts, this was not possible (Kornat, 2013; Paruch, 2016).

The emergence of the Eastern European school of criminalistics (rather than the term *criminalistics* itself, which came much later) is associated first with Russia and then with the Soviet Union, and was often referred to as *Russian criminalistics* or *Soviet criminalistics*. It should be noted that the emergence of criminalistics can be traced back to Western Europe, while its development in the Russian Empire came later. Before the beginning of World War I, according to well-known Russian criminalists, there were no major scientific works in this country, except those by Burinsky and Brazol (Averyanova et al., 2007, p. 6).

Then, after the Second World War, the term *socialist criminalistics* was used to reflect the specificity of the science of criminalistics in the USSR and its satellites (Koldin, 1986). After the collapse of the so-called socialist Commonwealth at the end of the Cold War, there was an opportunity to take stock of a new reality, when the liberated countries were seeking their place in the new geopolitical climate and looking to the West (the process of westernisation), including in criminalistics. We then began to use the term *Eastern European school of criminalistics* more broadly, to mark a distinction from the former Soviet or socialist criminalistics while emphasising that it was developed not only by scientists from the USSR (later Russia), but also by scientists from other countries in the region. The Eastern European school of criminalistics was (and to some extent still is) represented not only by Russian and Belarusian criminalists, but also by criminalists from some of the other republics of the former USSR (Ginzburg & Rossinskaya, 2007). In the past, this school included all criminalists from the republics of the USSR and, more often than not, the socialist countries (and, to some extent, also from the socialist-oriented countries). This is because the socialist commonwealth system, offered little room for manoeuvre, even in a science such as criminalistics.

The official established system of the Eastern European school of criminalistics consists of a fourfold structure: the theory (and methodology) of criminalistics, the technique of criminalistics, the tactics of criminalistics, and the crime investigation methodology. It must be acknowledged that the separation of theory and methodology into a separate part of the science of criminalistics is one of the key achievements and distinctive features of this school, and not only allows knowledge to be consolidated and the perspectives of the development of science to be predicted, but also enables the priorities of research to be selected. Theory and methodology have become a kind of strategic tool for assessing the needs of practice and the development of criminalistics. The distinction between criminalistics theory and methodology avoids the haphazard and eclectic incorporation into the discipline of at least some of the methods, techniques and tools that can be applied to the investigation of criminal offences and the pursuit of preventive objectives (as we see in other schools of criminalistics). Thus, not all methods or tools that are used in the interpretation and investigation of crime should be considered part of criminalistics and included in its framework. We can therefore speak of a bloc of ancillary criminalistics disciplines that use the paradigms of criminalistics theory and the achievements of other sciences to solve the tasks of explaining, investigating and preventing crime. For example, Professor Hubert Kołecki (2009, pp. 27–36), on the basis of an analysis of the works of foreign scholars, mentioned around forty auxiliary criminalistics disciplines, which he divided into traditional criminalistics disciplines such as forensic anthropology, forensic biology, forensic phonoscopy, etc. On the other hand, scientific theory must constantly be verified by life, as certain processes of suspension and the emergence of dogmatism can be detrimental to the development of science. Some old dogmas, enshrined in scientific publications and textbooks, may be out of step with the needs of real life. **Therefore, not only because of the change in our axiological hierarchy of values, but also because of the new situation brought about by civilisational progress (including Industry 4.0), it is necessary to look at the theory and methodology of criminalistics from a new perspective.**

After regaining independence, the former republics and satellites of the USSR began an intensive search for ways to integrate with Western democracies. This was also evident in criminalistics (Kurapka & Malewski, 2000; Malevski, 2012). Since then, fundamental changes have taken place in criminalistics in the countries of the region, and this has not been limited only to the sphere of application. In this way, the countries of the Intermarium area are moving away from their former epicentre – Russia. At the same time, it must be stressed that the orientation of the countries that regained their independence towards the West did not mean the mechanical abandonment of the achievements of the Eastern European (and Russian) school of criminalistics, especially in the fields of the theory and methodology of criminalistics. When analysing any process, we must first take into account its place and links in a much wider context and then demonstrate them. This is the only way to understand its essence and causes. Thus, we must ask: What factors have been important for the development of criminalistics in different European countries?

Geographically, the European continent is divided into Western, Central, Eastern, Northern and Southern regions. In civilisational, cultural and even legal terms, this geographical division of European countries is not sufficient. It must be stressed that the geopolitical factor has been particularly important for the development of criminalistics and its application in different European countries at different times – especially at the end of the 20th century, when there was even talk of 'the end of history' (Fukuyama, 1992). Fukuyama's primary thesis was linked to the end of the Cold War and his optimistic vision that the world's states would move towards a universal, global and modern civilisation. Unfortunately, the reality was (and is) much more complex, as we are confronted with different interests, contradictions and conflicts between individual states or groups of states (Huntington, 1996). Contrary to Fukuyama's thesis, a number of conflicts have emerged in the 21st century, including those of a military nature. One such conflict that is causing great concern in our part of Europe is the annexation of Crimea and the war in eastern Ukraine. The Eastern Partnership project has been and remains very important for the countries of our region, and that is why the idea of the Intermarium is being revived. This idea is vital not only for Ukraine (Zagrebelnyi, 2019), but also for the other countries in the region, because even such an informal commonwealth can become a stronger voice without ever threatening to fragment the European Union. The informality of such a commonwealth makes it possible for countries from outside the EU or the Eastern Partnership to be part of it (EFNSI is a good example of this). The realisation of economic projects such as Via Baltica and Via Carpathia can also stimulate cooperation in other fields. The close – and, in some cases, common – geopolitical, economic, legal and other interests of these countries encourage us to look at public security in the region, including through the prism of fighting and preventing crime. In times of globalisation where crime (and its various transnational manifestations in particular) is becoming a prominent factor affecting public security, the importance of criminalistics and its applied recommendations in ensuring the security of

society and people is becoming one of the highest-priority objectives of states. Are the geopolitical interests of the Intermarium states a sufficient factor for the emergence of a new school of criminalistics? In our opinion, the existence of common goals and interests in the economic and political spheres will naturally lead to the search for closer cooperation in the field of public security, which is not possible without the harmonisation of theoretical paradigms and applied methods and tools of criminalistics.

Changes in the national security concepts of most of the states that regained independence or autonomy in Eastern, Central and Southern Europe at the end of the 20th century emphasised the goal of integration into the EU and NATO. Public security concepts naturally evolved alongside this transition, with the Western vector also becoming central. Criminalistics and its applications are thus also on the verge of serious change. The attractive vision of westernisation encouraged the rapid introduction of Western standards into practical areas of fighting crime. On the other hand, the desire to distance oneself from the dominant position of the Russian school of criminalistics and the paternalistic attitude of some of its scholars towards post-independence countries required a rethinking of the situation, an assessment of the dominant concepts of criminalistics in the West, a comparison of them with the paradigms of the Eastern European school of criminalistics, and the elaboration of ideas for the development of a model of criminalistics for one's own country. Eminent Russian criminalist Rafael S. Belkin regretted that the links between Russia and the former republics of the USSR that had regained independence had been broken in the 1990s. He wrote that the problems in criminalistics had become much worse with the disintegration of the USSR, when the joint allied scientific centres ceased their activities, direct scientific contacts were cut off, and the Baltic countries, Kyrgyzstan, Turkmenistan, Georgia, Armenia and other republics, which no longer had support from the centre (i.e., Russia), practically ceased their scientific research in criminalistics (Belkin, 2001b, pp. 17–18). Belkin perhaps did not want to understand certain laws that govern the development of societies. For example, in the face of a critical complex of contradictions, institutional and structural separation is necessary to understand the essence of certain deep processes and to gain the perspective of harmonising the criminalistics of different countries in the future at a new stage in history.

In independent Ukraine, significant changes have taken place in society, including the abandonment of totalitarian (repressive) methods of state governance, the elimination of the ideological component of science, and a shift from 'criminalistics in the service of investigation' to 'adversarial criminalistics'. The Constitution of Ukraine speaks of 'the European identity of the Ukrainian people and the irreversibility of Ukraine's course of European and Euro-Atlantic integration'. Russian aggression and the war in Ukraine have forced Russian and Belarusian researchers to withdraw from the process of the formation of a common European criminalistics space and step back from the scientific debate on changes and new trends in the Eastern European school of criminalistics. This role was successfully taken up by Ukrainian scientists as some of the strongest representatives of the Eastern European school of criminalistics, who actively engage in the scientific debate on the possibilities and trends of the formation of a new school of criminalistics.

In the current context, the development of Ukrainian forensic science is characterised by the change in its course of development and its approximation to the common European criminalistics space. The formation of a common European space in the field of criminalistics and forensics requires the application of the latest methods and technologies, the introduction of international standards of evidence in criminal proceedings, and the improvement of the scientific language and the unification of terminological apparatus. At the same time, we can observe the necessity of discussing the need for a new interdisciplinary school of criminalistics.

There are two further key points to note:
1. The Three Seas Initiative Summit in Vilnius on 11 April 2024 resulted in a declaration aiming at a more resilient Europe and a stronger transatlantic partnership. Security issues were a major focus. Lithuanian President Gitanas Nausėda observed the following:

> The Three Seas Summit adopted a declaration that I hope will be a catalyst for moving forward in all priority areas. In the Declaration, we expressed our strong commitment to the fundamental objective of the Three Seas Initiative: to strengthen regional cooperation for a more resilient Europe and a stronger transatlantic partnership. (Pikelytė, 2024)

2. On 16 May 2023, the Three Seas Universities Network (3SUN) was established in Lublin. Thirteen universities from ten countries, including two Ukrainian universities and Mykolas Romeris University, signed the declaration affirming this network. The aim of the initiative is to strengthen international cooperation

between universities, intensify exchanges and develop research. Such cooperation will result in prestigious publications, major projects and European grants (MRU, 2023).

In our view, these are recent additional factors that not only encourage the development of the idea of an Intermarium school of criminalistic, but that also see its realisation as a reality that will help to achieve the main objectives of the Intermarium. In a networked world, security is increasingly based on a new understanding of the interactions between all the elements involved. This requires a common and systemic understanding of security and new common strategies to deal with risk and uncertainty. The new security culture must therefore be agile, mobile and flexible; it must provide quick answers to, for example, new cyber (in)security challenges. Lithuanian researchers have already begun to explore the links between security and the criminal sciences, including forensic science, and it would be logical to continue this research. University researchers will find their place here too.

2. Contemporary features of Intermarium criminalistics

If we look at the criminalistics of these countries from a purely national perspective, it is difficult to identify any common features of the Intermarium region through the enormous mosaic of elements. One of the most important factors is the geopolitical context, which unites many of the countries in the region, as some are already members of the European Union and others are striving for membership. The verification of the hypothesis put forward regarding the creation of an Intermarium school of criminalistics requires extensive work by an international team of researchers. Our aim is to stimulate such a debate. We will try to carry out an initial analysis and to verify a number of milestones that are significant for the evaluation of the scientific paradigms of criminalistics and their application in the interpretation, investigation and prevention of criminal acts.

As we have already mentioned, one of the strengths of the Eastern European school of criminalistics is its theory and methodology, which was and continues to be linked to a strongly developed academic doctrine and the didactics of criminalistics. Therefore, in Lithuania (Kurapka & Matulienė, 2012), Latvia, Estonia and Ukraine (Shepitko, 2019), we possess a similar concept and system of criminalistics, and its doctrinal achievements are similarly perceived (Malevski & Shepitko, 2016). It should be emphasised that the scientific theory and methodology of criminalistics has been developed in particular by the scientific community of the former USSR, led by Belkin (2001a). Although the post-war doctrines of criminalistics in Slovakia, Czechia, Romania, Bulgaria (Belensky, 2006) and other countries in the region were also strongly influenced by so-called socialist science, they retained certain elements that were present in the interwar period and did not feel the process of unification that was being imposed as strongly as it was felt elsewhere. The doctrine of criminalistics in these countries concentrated more on the applied aspects of the fight against crime, and their criminalistics paid less attention to purely theoretical issues. As a result, their definitions of criminalistics and the system of criminalistics they presented had certain differences from the system prevailing in the USSR. In most of these countries, there is no independent theoretical component of the criminalistics system, although the importance of theory and methodology is emphasised by all, as can be seen from their criminalistics textbooks. Polish criminalistics has its own specificity, not only because of the size of the country, but also because of certain historical consequences. After gaining independence in 1918, Poland had to merge the parts of the country that had been seized and occupied by the three empires into a single viable organism, to establish a national legal system and to set up a unified system of law enforcement institutions after 123 years of fragmentation (Hołyst, 2018, pp. 31–49). In Poland, we have concepts almost identical to the classical Eastern European school of criminalistics, concepts which are close to the Germanic school of criminalistics, and our own original concepts.

On the one hand, the development of criminalistics incorporates into its field of knowledge the methods, techniques and tools of other sciences. On the other hand, it gives these apparatus the status of an autonomous theory or scientific discipline, in which a certain critical body of ideas and concepts is formed that contradicts the fundamental principles of this science. Thus, a new scientific discipline has emerged from criminalistics: forensic science (Averyanova, 2006; Volchetskaya, 2016; Rossinskaya et al., 2019). Forensic science as an independent scientific discipline was first discussed by criminalists of the former USSR, and this opinion is now shared not only by criminalists from Russia and Ukraine, but also those of other countries, including Lithuania. The concept of criminalistics policy is beginning to emerge on the basis of criminalistics, although criminal policy as an element of the criminal science system was first mentioned by Hans Gross at the turn of the 19th and 20th centuries (Gross, 1908/2002).

In Western countries, criminalistics has often been considered as a police discipline, although this has changed in recent times, as Europe has come to realise that without a solid scientific foundation, it is impossible to fight crime effectively. Taking into account the significance of this declaration for the development of criminalistics, Mykolas Romeris University researchers conducted a study and evaluated the steps taken by the country's institutions in realising the goals set (for more information see Kurapka et al., 2016).

The creation of a common European criminalistics (or rather forensic expertology) space was only presented to the EU as a form of declaration in 2011, although public security issues, and in particular the fight against organised crime, had been emphasised much earlier. European institutions were set up to fight crime (ENFSI, Europol, OLAF, Eurojust, etc.). At the same time, it must be stressed that in Western countries there is a very strong emphasis on the applied aspect of criminalistics, with insufficient attention paid to its theory and methodology. In Germany, for example, the criminalistics system is now generally understood as a triad: technique, tactics and criminal activity (or strategy). In some cases, criminal diagnostics (the diagnosis of criminal activity) is also referred to. In a new textbook on criminalistics, an interesting and original approach to the criminalistics system can be found, where criminalistics is divided into (Ackermann et al., 2019, p. 22):

1) theory/methodology/history;
2) criminalistics tactics;
3) criminalistics techniques (natural science criminalistics);
4) special criminalistics (resembling the methodology of criminalistics as we understand it in Lithuania);
5) criminalistics psychology/logic/thinking;
6) criminal strategy.

Renowned criminalistics scientist Prof. Rolf Ackermann has repeatedly stated, with some regret, that at the end of the 20th century in Germany, criminalistics was 'pushed out' of universities and existed only in police schools as an applied discipline. At the same time, Ackermann observed that criminalistics has an established status as an independent science in Europe, and especially in Eastern Europe (Ackermann, 2009–2010). The Roman school of criminalistics usually refers to field criminalistics (*police technique*) and scientific criminalistics (*police scientifique*), and in some cases also uses the term *criminalistique* (criminalistics). Scientific criminalistics is often understood in the Roman school of criminalistics as the laboratory-based investigation of certain traces (evidence). Academic criminalistics, with the exception of didactics in police schools, has no independent place in this concept, and exists more as a means of ensuring laboratory research and, more often than not, as a tool for adapting the methods of other sciences. Here, the focus is on the development of certain skills and competences of officers, primarily the police. Academic criminalistics exists fully within the school of criminalistics in Eastern and Central European countries. In the Intermarium region, academic criminalistics is closely linked to the legal sciences, which is, in our opinion, a great advantage. In the Germanic school, this has been the case since the beginning. In the Anglo-Saxon school, criminalistics is first and foremost related to the natural sciences.

Returning to the criminalistics of the Intermarium countries in recent decades, it is necessary to emphasise that its applied components, especially in the field of forensic expertology, are becoming increasingly similar to Western models, which is linked not only to the westernisation of these countries, but also to their accession to European structures such as ENFSI, Europol, etc., and to the support they receive from Western countries for the modernisation of the relevant national criminalistics institutions. For example, the financial support provided to the Lithuanian Police Criminalistics Investigation Centre has enabled it to become a modern criminalistics expert institution capable of providing methodological and practical assistance in the reform of other countries' criminalistics institutions. An example of this is the support provided to the Croatian police expert service (CILC, 2016).

In the era of globalisation, we are not only experiencing the positive effects of this phenomenon, such as modernisation in various areas of life, free access to virtually unlimited sources of information, etc., but are also facing new challenges, dangers and threats. Globalisation has facilitated organised crime and international terrorism, drug and human trafficking, and a rapid increase in cybercrime. In light of these processes, Lithuanian criminalists were well aware at the turn of the millennium that without deeper international cooperation it would be impossible to effectively combat manifestations of crime and ensure public security. Lithuanian criminalists not only saw, but also took steps to improve this situation. Realising that public security, the prevention of crime and, above all, the fight against various forms of crime are not possible without comprehensive knowledge of these phenomena and effectiveness in the activities of state institutions and NGOs, they have long searched for

various forms of international cooperation in this field. The Lithuanian Society of Criminalists, with the involvement of representatives of the academic community, proposed an effective platform for communication between scientists and practitioners in various fields: the ongoing international scientific practical conference entitled 'Criminalistics and Forensic Expertology: Science, Studies, Practice', which has been held in various Lithuanian cities since 2001 and has been held abroad every second year since 2012.

3. Initiating a discussion on insights into the developments of Intermarium countries towards the creation of a new school of criminalistics

We have already observed that the concept of a school of criminalistics is a scientific category that allows different countries to be grouped according to the set of paradigms of criminalistics that they employ and the application of recommendations, methods and tools based on these paradigms in the processes of interpreting, investigating and preventing criminal offences. Until now, we have been able to classify all countries under one of the main schools of criminalistics, in spite of the specific features of each of them. We have observed on more than one occasion that the processes of globalisation are encouraging us to follow the path of modernisation and to strive for the convergence of theoretical paradigms in criminalistics and the harmonisation of the processes of investigating and preventing crime in Europe. Unfortunately, for a variety of reasons (political, legal, economic and even historical or psychological), this will not be possible immediately, but must be done gradually, with harmonisation starting in certain regions and with the aim of synchronising the entire system. The emergence of a new school of criminalistics requires certain motivating factors and preconditions. We have already written about the research undertaken in 2019 by conducting interviews (50 respondents, including 44 with a scientific degree) on the issue of international cooperation with scientists from 11 countries (Azerbaijan, Russia, Belarus, Greece, Latvia, Lithuania, Poland, Slovakia, Ukraine, Estonia, and Czechia) (Ackermann, et al., 2020, pp. 358–359).

Additionally, in 2020 we carried out a further study, and are now presenting in parallel the opinions of 50 academics from Ukraine, Lithuania, Latvia, Estonia, Poland and Slovakia as potential Intermarium countries. This study assessed the directions that need to be pursued at present in order to establish a common European criminalistics space (not only forensic expertology), including problems and trends in the development of schools of criminalistics.

Table 1. Key findings from the benchmark study on what should be done next

Statement	Number of affirmative responses, 2019 study	Number of affirmative responses, 2020 study
Activate existing international law enforcement structures.	24	19
Prepare a new EU Directive on a common European criminalistics space.	13	27
Strengthen cooperation between scientists in order to converge the theoretical and methodological paradigms of the different national schools and to harmonise the processes of investigating criminal offences.	29	30
Promote cooperation between criminalistics NGOs and integrate these organisations into European structures.	31	31
Develop mechanisms based on criminalistics policy to improve the performance of law enforcement agencies in order to ensure public security.	19	31
Foster joint international research projects.	34	33

These studies reinforce our view that the search for new platforms for international cooperation on the basis of scientific discussions – and, in the future, scientific projects – is long overdue due to the protracted nature of the search for mechanisms for the creation of a common European criminalistics space.

This influenced our next initiative: to use the format of forensic congresses to launch a study of the opinions of scientists on the possible formation of an Intermarium school of criminalistics, its preconditions, the factors that affect it, and its significance for the development of criminology. To this end, further steps were taken.

In 2022 in Vilnius, at the 18th International Congress on Criminalistics and Forensic Expertology: Science, Studies, Practice, interviews were conducted with 22 scientists from 6 countries (Czechia, Poland, Lithuania, Slovakia, Ukraine and Germany). One question in this study was as follows: 'Can it be said that in the countries of the Mediterranean region (Intermarium), between the Eastern European and Germanic schools of criminalistics, a new school of criminalistics is being formed, which combines the theoretical and methodological achievements of the Eastern European school of criminalistics with the technological and IT achievements of other schools?' Half of the respondents said that such assumptions exist, three responded negatively to this question, and three noted that they do not have the competence to answer this question. Interestingly, five emphasised that the paradigms of forensic science are converging in the global world, but considered whether this serves as a basis for talking about the emergence of a new school. In their opinion, there is insufficient data for this conclusion. Therefore, we extended the survey of scientists' opinions to 2023, with an additional survey conducted during and immediately after the 19th Congress in Brno (Czechia). This survey of well-known criminalistics scientists was conducted regarding the assumptions and possibilities surrounding the formation of a new school of criminalistics: such assumptions were positively evaluated by two thirds of the respondents. Taking into account the results of these studies, on the agenda of the 20th Congress in 2024, a separate topic on the Intermarium issue is included.

What are the factors and preconditions that indicate, or could indicate, that we are in the process of establishing a new Intermarium school of criminalistics? Is there a niche in which a new school of criminalistics may be formed? In our view, it is worthwhile to open a scientific debate on what factors could lead to this:

- the incomplete development of a strategy for criminalistics within EU institutions, alongside the declarative and one-sided nature of the Common European Criminalistics Space 2020, which is now particularly pronounced in 2024;
- new geopolitical formations and the ambitions underlying them as a reaction to inflections in common EU policy;
- the formation of regional crime control policy and the related possibilities for the emergence of a real criminalistics policy (research on criminalistics policy in the strategies of law enforcement agencies is planned in Lithuania);
- the development of criminalistics and the strengthening of academic criminalistics in individual regions, in response to a science-based understanding of the importance of criminalistics;
- the weakening of the influence of the traditional schools of criminalistics and the factors behind it, ranging from the trajectories of political regimes from sovereignty to shared solutions, the manifestations of authoritarianism and the instability of political solutions (Brexit; Make America Great Again; etc.), to errors in the assessment of the relevance and significance of criminalistics, the lack of attention paid to the didactics of criminalistics, and the training of researchers, which could be the starting point for the stagnation of criminalistics;
- the unmet need for scientific communication, the suspension of traditional communication platforms and over-commercialisation;
- the generation of new ideas in criminalistics and the emergence of attractive, high-quality communication formats in non-traditional regions (20 annual international scientific-practical congresses including Criminalistics and Forensic Expertology: Science, Studies, Practice, International Days of the Archibald Reis, etc.);
- the emergence of non-governmental criminalistics organisations and their initiatives in establishing regional associations – the International Criminalistics Association in Zagreb, the Lithuanian Society of Criminalists, the Polish Society of Criminalists, the initiative of the Ukrainian International Forum on Criminalistics – to set up a Federation of National European Criminalistics Organisations, and possible others;
- pilot studies on the need, prospects and directions for the creation of a common European space for criminalistics and not only for forensic science, and the need for a criminalistics policy concept.

At the close of this article, we would like to point out that this topic is widely known and is becoming increasingly important in the current international scientific discourse of criminology, which is evident from the

statement of the editor-in-chief of the *Problemy współczesnej kryminalistyki* [Problems of Contemporary Criminology] journal, Prof. Tadeusz Tomaszewski (2023), who observed the following:

> However, before we briefly review the content of this issue, we would like to draw attention to the contributions of the Lithuanian authors H. Malewski, S. Matulienė, and V. E. Kurapka, who write about the growing cooperation between Lithuanian, Polish and Ukrainian forensic scientists in recent years and about the plans to create a broad platform enabling such cooperation in scientific, didactic and practical fields between scientific institutions and non-governmental forensic organisations from many countries in our region, which would even allow us to talk about the emergence of a new school of criminalistics in the future. (p. 11.)

Conclusions

The current geopolitical background of Europe; the research and development of forensic science in the Intermarium countries; the scientific potential and the ideas it generates; the level of academic forensic science; the original platforms for international cooperation in the region and the extent to which they have been developed; and the consolidation of nongovernmental activities – all of these factors make it possible to envisage the organisation of the forensic science sector and the perspectives that lie ahead, enabling the creation of an Intermarium school of criminalistics.

The main assumptions and factors behind this are:

- The unfinished strategy for the development of forensic science in EU institutions, the declarative and one-sided nature of the Common European Criminalistics Space 2020, which is now especially pronounced in 2024, new geopolitical formations and their ambitions in response to EU common policy, the formation of regional crime-control policies, and the related possibilities regarding the emergence of a realistic forensic science policy (in Lithuania, research on forensic science policy in the strategies of law-enforcement institutions is foreseen).
- The development of forensic science, the strengthening of academic forensic science in individual regions in response to a science-based understanding of the importance of forensic science, the weakening of the influence of traditional forensic science schools and the factors behind it. These factors range from the trajectories of political regimes, from sovereignty to shared solutions, the manifestation of authoritarianism and the volatility of political solutions (Brexit; Make America Great Again; etc.), to errors in the assessment of the relevance and significance of forensic science, the lack of attention paid to the didactics of forensic science and the training of investigators, which could be the starting point for the stagnation of forensic science.
- The generation of new ideas in forensic science, the emergence of attractive, high-quality communication formats in non-traditional regions (20 annual international scientific-practical congresses including Criminalistics and Forensic Expertise: Science, Studies, Practice, International Days of Archibald Reiss, etc.), the emergence of non-governmental forensic organisations and their initiatives in establishing regional associations – such as the International Association of Criminalists in Zagreb, the initiative of the Criminalists Association of Lithuania, the Polish Forensic Association and the Ukrainian International Congress of Criminalists – to establish a Federation of National European Criminalistics Organisations.

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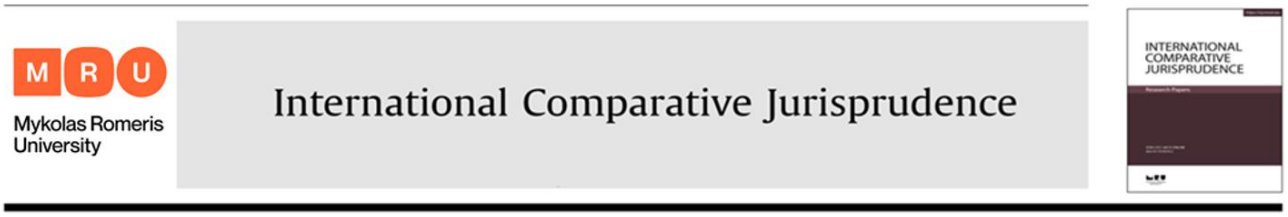

THE STATUTORY EXIT RIGHT OF A MINORITY SHAREHOLDER IN A PRIVATE LIMITED COMPANY UNDER LITHUANIAN AND BULGARIAN COMPANY LAW

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Abstract: This article focuses on the statutory exit right of a minority shareholder in a private limited company in two countries – Lithuania and Bulgaria – by exploring two interconnected aspects with equal practical significance: conditions for its exercise and the terms for the calculation of the exit payment. The paper emphasises that both legal frameworks employ conceptually different legal techniques that limit withdrawal from a private limited company, i.e., by providing either for a narrowly drafted exit right and therefore directly limiting the exit of the minority shareholder, as is the case in Lithuania, or by establishing a general right of exit against limited cash compensation which impedes withdrawal in an indirect way, as is the case in Bulgaria. The article concludes that there is room for significant improvement in both countries when it comes to regulating the exit right of a minority shareholder in a private limited company.

Keywords: *private limited company, minority shareholder, exit right, exit in no-conflict situation, shareholder disputes.*

Introduction

For decades, there has been lively discussion on the *ex lege* protection of the investments of minority shareholders in private limited companies with no liquid share market by permitting minority shareholders to withdraw from a solvent company. The legal form of a private limited company that is used by small and medium-sized businesses is often a place for investor cooperation, which is based on their personal characteristics and relationships rather than on invested capital. However, a different business approach can emerge over time between shareholders, alongside dynamic changes in their personal relationships for a variety of reasons (due to succession, divorce, corporate divisions, changes to the share capital of the company, etc.). This may have a negative impact on smooth cooperation between shareholders, which was the basis of the business initially. In private limited companies, shareholder agreements are not always in place to deal with the withdrawal of a minority shareholder, and agreements are not always structured in such a way that a minority shareholder can recover their investments on reasonable and fair terms. It can at times be neither efficient nor cost-effective when a minority shareholder voices their opinion to influence a company's activities or act as a gatekeeper, and in certain particular situations the most optimal solution is for them to leave the company, relying on statutory exit mechanisms that are designed for the protection of both minority shareholders' ownership and investments. Recent regulatory developments extending this exit right to minority shareholders in private limited companies in some countries, such as Lithuania , as well as the intensive growth of case law in other countries, such as Bulgaria, raise the question of whether the current legal framework as a whole is sufficient to ensure that minority shareholders' investments are returned on fair terms.

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Therefore, this article addresses the statutory exit right of minority shareholders in private limited companies by exploring two interconnected aspects with equal practical significance: conditions for its exercise and the terms for the calculation of the exit payment. It examines *ex lege* mechanisms that permit a minority shareholder to recover their investments, either by the company redeeming their shares or other fellow shareholders or third parties buying out their shares. This process may concern shareholder disputes as well as other cases in which there are no shareholder conflicts, although the statutory minority shareholder's right to withdraw is aimed at preventing conflicts in cases where minority shareholders' ownership can be materially affected (hereinafter –the exit right).

To achieve a better understanding of how lawmakers tackle the difficult issue of ensuring that minority shareholders' investments are returned on fair terms, the article aims to analyse their exits from private limited companies on a comparative basis. Given that the authors of this article are affiliated with two partner universities united by common values and goals in research, teaching and institutional development under the framework of the European Reform University Alliance – Mykolas Romeris University and New Bulgarian University – the article focuses on the two civil-law legal jurisdictions of Lithuania and Bulgaria, and on the following types of private limited liability companies: *uždaroji akcinė bendrovė* (UAB) in Lithuania, and *дружество с ограничена отговорност* (ООД) in Bulgaria (hereinafter – private companies). This type of company, which, by its nature, is a legal form of capitalised company, is the most popular both in Lithuania (Official Statistics Portal, 2024) and in Bulgaria (Registry Agency, n.d.). The article makes intensive use of comparative legal analysis as well as applying the systemic, teleological and precedential methods in addressing both the issue of the minority shareholder's exit from a private company and the need for the modernisation of the legal regulation in both jurisdictions.

This article is divided into three parts. Parts one and two deal with the description of exit mechanisms for minority shareholders in private companies available under Lithuanian law and Bulgarian law, respectively. The third part then proceeds to identify the key results of the comparison of the exit right of minority shareholders under statutory law, which is followed by the conclusions.

The comparison between the approaches of the legislators towards the exit right in each country provides valuable insights into how to improve existing regulations in Lithuania and Bulgaria. In addition, this paper has the potential to initiate further comparative law analysis and discussions on the topic among company law scholars.

1. Minority shareholder exit: Lithuania

It has been long contended by Lithuanian scholars that the national legal framework does not sufficiently address either minority shareholders' protection in solvent private companies or, in particular, the shareholder exit right (Mikalonienė, 2015, pp. 195–225; Tikniūtė, 2017). The courts are reluctant to decide on the distribution of dividends, reserving such decisions for the exclusive competence of the general shareholders' meeting (e.g., the rulings of the Court of Appeal of Lithuania of 1 December 2022 in civil case no. e2A-803-912/2022 and of 4 March 2014 in civil case no. 2A-281/2014, and the judgement of Kaunas District Court of 7 March 2016 in civil case no. e2-1038-259/2016), and the concept of a minimum mandatory dividend as a statutory right of a minority shareholder in a private company is not known under Lithuanian legislation. Therefore, in private companies with no liquid share market (Fleischer, 2014, p. 35), in which there are no regular returns on investments for minority shareholders, statutory exit mechanisms can play a role in returning minority shareholders' investments on fair terms.

In Lithuania, a minority shareholder has no independent statutory remedy through which to demand the forced winding-up of a solvent private company as a tool to return investments made in the private company. However, although the court may apply the winding-up of a company when corporate misconduct is confirmed under special investigative proceedings (item 8 of part 1 and part 3 of Article 2.131 of the Civil Code; hereinafter – CC), it is likely that this legal measure as an *ultima ratio* legal tool has a minimal effect in practice (examples of the liquidation of a company under special investigative proceedings include the judgement of Klaipėda District Court of 8 December 2014 in civil case no. 2-752-253/2014, as upheld by the ruling of the Court of Appeal of Lithuania of 2 July 2015 in civil case no. 2A-520-196/2015, and the judgement of Panevėžys District Court of 2 April 2004, as upheld by the ruling of the Court of Appeal of Lithuania of 19 July 2004 in civil case no. 2A-269). At general

shareholders' meetings, a qualified majority of at least two thirds of the votes is required to approve the dissolution of the company. Therefore, voluntary winding-up is hardly feasible (item 1 of part 1 of Article 2.106 and part 1 of Article 2.107 of the CC; item 17 of part 1 of Article 28 of the Law on Stock Companies of the Republic of Lithuania; hereinafter – the LSC). In this context, it is worth mentioning that the law also provides for compulsory corporate dissolution on the grounds specified in the exhaustive list of part 1 of Article 2.70 of the CC, but at the initiative of the administrator of the Register of Legal Entities, not the minority shareholder. This provision is not linked to the exit right of minority shareholders, as it can only be applied, for example, when a company is not functioning and for a period lasting more than 6 months either: members of the managing organs of the company cannot be contacted at the corporate seat and at their addresses indicated in the Register of Legal Entities, or the corporate management bodies have not been formed and therefore are not capable of making corporate decisions.

However, there are other, less drastic exit mechanisms than the winding-up of a solvent private company that permit a minority shareholder to withdraw from it. The exit right of a minority shareholder, both in a no-conflict situation and in the event of shareholder disputes, will be addressed in the following sections of the article.

1.1. No-conflict as basis for minority shareholder exit

1.1.1 Dominant control by a shareholder

In November 2022, the Lithuanian Parliament adopted changes to the LSC by introducing both a statutory squeeze-out right and a sell-out right for shareholders of non-listed limited companies (including private limited companies) in which there is a controlling party with at least 95 percent of the votes (Article 46 of the LSC).[3] In principle, the newly introduced rules are similar legislative mechanisms to the contra-balancing squeeze-out right/sell-out right that are already applied to listed companies, in which the control threshold is at least 95 percent of the votes and share capital (Article 32 of the Law on Securities of the Republic of Lithuania; hereinafter – the Law on Securities).

Following the amendments to the LSC, a shareholder of a private company holding at least 95 percent of the votes at the general shareholders' meeting, alone or acting in concert on a contractual basis with others (hereinafter – a dominant shareholder) has the right to acquire the remaining voting shares in the company and thus demand that the remaining shareholders sell their voting shares (the squeeze-out right). In a similar vein, a minority shareholder in a private company with a dominant shareholder holding 95 percent of the votes has a contra-statutory sell-out right. The amendments of the LSC establish an exit right only for those minority shareholders who comply with the two cumulative criteria: a withdrawing shareholder owns voting shares and the holding does not exceed 5 percent of the votes.

Dominance is determined using voting power at the general shareholders' meeting. The control threshold of the dominant shareholder is calculated by adding the votes of those persons who act in concert with the shareholder holding the voting shares to the total number of votes. In order to determine situations in which a shareholder is deemed to be acting in concert with others, similar rules as those for listed companies in cases of mandatory bids apply (part 5 of Article 46 of the LSC refers to Article 16 of the Law on Securities; part 33 of Article 2 of the Law on Securities). For example, in the following situations votes would be added together with the votes of the shares owned by the shareholder: votes of other parties to the voting agreement for the implementation of a long-term management policy of the company; votes obtained under a temporary agreement on the transfer of votes; votes acquired under usufruct, pledge or financial collateral; votes to be exercised at the discretion of an agent or a holder of shares in a trust; and votes under the joint share ownership of spouses. In the aforementioned examples, votes should also be counted when obtained indirectly through the controlled company

The LSC sets a time frame by which to implement the sell-out right. After the threshold of the control of at least 95 percent of the votes is reached, there is a maximum 3-month timeframe within which a minority shareholder must declare to the company that they are exercising their exit right. Communication among shareholders is not

[3] The amendments to the LSC provided for a 1-year-transitional period that ended on 30 November 2023 to implement both a squeeze- and sell-out right in case of the dominant control of 95 percent of the votes of a non-listed limited company if the right was obtained before enacting the new rules (part 3 of Article 25 of the Law amending the LSC).

direct, but the dominant shareholder and the minority shareholder interact through the company. To ensure that the shareholder obtains information about the 95 percent control threshold on a timely basis, there is both a duty for the shareholder to inform the company within 5 business days of the threshold having been reached (or reduced), and a subsequent corporate duty to inform minority shareholders who have an exit right within 1 business day. A dominant shareholder has a duty to submit a notice on the share buy-out within 20 business days following the receipt of information on the demand to buy out the shares of the minority shareholders from the company. The notice of the dominant shareholder must include, among other things, a price for the shares subject to the buy-out and redemption procedure. The LSC establishes rather casuistic procedural requirements for exercising the mechanism for buying out shares. On the other hand, the LSC does not specifically sanction the dominant shareholder for non-compliance with the rule to disclose the control factor since, unlike the model for listed companies (part 10 of Article 15 of the Law on Securities), it does not prohibit the defaulting shareholder from voting at the general shareholders' meeting.

The share redemption price has to be fair, and must be paid by cash compensation. A mechanism involving an independent expert determining the share value is the key difference compared to the share pricing model used for listed companies. There are concerns that in practice it can be challenging to comply with a deadline to arrange the valuation of the shares by an independent expert within 20 days (Bank of Lithuania, 2022, p. 4). It is also worth mentioning that the LSC does not specifically address the question of who covers the cost of the share valuation of the independent expert. It could be implicitly interpreted that the valuation costs should be borne by the dominant shareholder, since the dominant shareholder has to attach documents to the notice that justify the valuation of the shares, as well as take into account the right of the withdrawing shareholder to dispute the proposed share redemption price which has to be resolved via court litigation.[4]

If the minority shareholder views the cash compensation proposed by the dominant shareholder to be inadequate, the withdrawing shareholder is entitled to dispute it in court. Therefore, the LSC sets forth a judicial protection mechanism in order to avoid potential abuses in determining the share price (Ministry of Economy and Innovation, 2022). There is a minimum 6-week period for the minority shareholder to either sell the shares or to lodge a suit, in which the court appoints an expert to evaluate the shares. In the latter case, both the share valuation mechanism and the buy-out procedure are the same as those used in case of serious shareholder conflicts under the judicial remedy for minority shareholder oppression. To ensure the fair treatment of minority shareholders, the LSC establishes an *erga omnes* effect of the final court decision to provide additional cash compensation to those shareholders who did not dispute the share redemption price in the court proceedings.

Overall, in private companies with no liquid share market, an exit right against cash compensation is aimed at enabling a minority shareholder holding weak voting powers and a very small portion of the share capital of a company (i.e., holding a maximum 5 percent of the votes) to leave the company when there is dominant control at the general shareholders' meeting and recoup their investments on fair terms.

In general, a sell-out right of a minority shareholder that is not tied up with oppression by a majority shareholder is considered to be a proper tool to defend minority shareholder rights (Andersen et al., 2017, pp. 264–265).[5] According to the *travaux preparatoires,* based on comparative examples (e.g., Denmark, Finland, Sweden), the new rules are aimed, *inter alia*, at increasing the protection of minority shareholders in non-listed companies (Ministry of Economy and Innovation, 2022).

Having said that, the limited scope of the statutory exit right that can be invoked by a minority shareholder holding a maximum of 5 percent of the votes has to be noted.

[4] Other scholars, however, share the view that payment for share valuation is not regulated by law, leaving it to the agreement of the parties (Bitė, 2022, p. 203).

[5] On the other hand, there are debates over the enactment of squeeze-outs and sell-outs in closed companies taking into account contractual arrangements to protect minority shareholders often used in these types of companies (High Level Group of Company Law Experts, 2002, p. 110). In a similar vein, associations representing the interests of start-ups have met the proposed legislation with criticism because of the corresponding squeeze-out right of the dominant shareholder, which may essentially change the legitimate expectations of the minority shareholders that have been created when they invested into the company before the amendments to the LSC were adopted (Lithuanian Private Equity and Venture Capital Association, 2021; Unicorns Lithuania, 2021; Lithuanian Business Angels Network, 2021).

Firstly, only a minority shareholder with very low voting powers in a private company – 5 percent of the votes or less – can benefit from the exit right. The arguments of lawmakers substantiating the 5-percent ceiling and refusing to increase it to 10 percent – which would have matched the ceiling used for listed companies – are not convincing for the following reasons. The shareholder exit right in private companies with no liquid share market cannot automatically be equated with a shareholder's right to withdraw from listed companies whose shares are freely transferable. Further, there is no conceptual and systematic consistency between setting a threshold for the minority sell-out right/squeeze-out right and for minority holdings to use certain other governance and economic rights. A shareholder holding more than 5 percent but less than 10 percent of votes has essentially similar *ex lege* governance rights as a shareholder holding 5 percent of the votes. However, shareholders possessing at least 10 percent of the share capital (votes) of the company are in a somewhat more powerful situation, and can exercise rights that allow them to intervene into corporate management. For example, shareholders holding 10 percent of the share capital who have reasonable doubts about corporate misconduct are entitled to request that special judicial investigative proceedings be conducted. Shareholders with at least 10 percent of votes also have certain procedural governance rights related to the general shareholders' meeting, such as the right to initiate the meeting, the right to demand remote attendance and voting at the meeting, and the right to approve voting in secret. A higher holding amounting to less than 10 percent of the votes when the exit right is exercised in no-conflict situations would have been systematically closer to the ceiling, i.e., when a shareholder holding up to 10 percent of the share capital is entitled to withdraw from the company during national reorganisation under certain circumstances (part 4 of Article 67 and Article 70^1 of the LSC).

The *travaux preparatoires* offer no evidence that demonstrates the overall statistics on the distribution of the shareholding (votes) in non-listed companies. Although a small holding can result from various circumstances (e.g., due to succession, divorce, corporate divisions, changes to the share capital of the company, etc.), it is not certain whether the new rules that establish an exit right for a shareholder holding a maximum of 5 percent of the votes are aimed at addressing the most typical and relevant situations as a practical need in the context of non-listed companies.

Finally, it is worth noting that there are comparative examples – which, *inter alia* have inspired a change of the LSC – that provide for a control threshold of 90 percent of the votes. For example, the European Model Company Act (Andersen et al., 2017) provides for a squeeze-out right of the majority shareholder if the shareholder holds more than 90 percent of the shares and votes in a limited liability company and a corresponding sell-out right of each minority shareholder (Sections 11.34 and 11.35; in a group context, Sections 15.11 and 15.15).

Secondly, a minority shareholder is only entitled to demand that a dominant shareholder buy out their shares if they own voting shares. At the stage in which the new exit right for minority shareholders in non-listed companies was introduced, lawmakers refused to broaden the scope of protection for minority shareholders by granting a similar exit right to the owners of non-voting shares. This legislative approach was justified by the need to firstly test the functioning of the new rules within their narrower scope.

Thirdly, it is also worth mentioning that due to the limited number of situations that exist to determine the dominant control of a shareholder who is deemed to be acting in concert with others, *de jure* and *de facto* control in situations other than those listed in law are not taken into account in the context of the exit right. For example, some authors highlight the overly narrow scope of the sell-out right of the minority shareholder of the subsidiary, as envisaged in Article 46^1 of the LSC, to properly tackle specific features of the group of companies (Bakanauskas, 2023, pp. 202–208). Others, in general, argue that a statutory exit right on the basis of the dominant threshold does not effectively address the problems associated with locking the investment of a minority shareholder in a private company, as the majority shareholder can act under arrangements that are not formalised (Tikniūtė, 2017, p. 246).

Although the dominant shareholder and other persons acting in concert will be jointly and severally liable for the performance of the obligation to buy out the shares of the minority shareholder who exercises their sell-out right, and annual interest of 10 percent is computed for a default payment (parts 5 and 18 of Article 46^1 of the LSC), it is questionable whether the statutory mechanism offers effective and balanced protection for minority shareholders when the dominant shareholder does not fulfil the obligation to buy out the shares and, as stated in

the *travaux preparatoires*, the minority shareholder seeking to obtain a settlement has to litigate in the courts (also see: Bank of Lithuania, 2022, p. 5).

1.1.2 A corporate decision as a basis for minority shareholder exit

Seeking to strike a fair balance between various affected interests – the company's autonomy to implement a sound commercial decision, majority shareholders' discretional power to decide on business transactions, and minority shareholders' legitimate interest in protecting their investments – the legislator provides an exit right for a minority shareholder under certain circumstances. In addition to the above-mentioned super-qualified control threshold as grounds for a minority shareholder to leave a company, the Lithuanian legal framework establishes the exit right of minority shareholders from a private company by recovering their investments on fair terms from the company when they disagree with the company's decisions concerning corporate reorganisations (mergers, divisions) and conversions. The scope of the exit right depends on the type of corporate operation, i.e., whether it is national or cross-border in the single market.

The law governing cross-border corporate mergers, divisions and conversions of limited liability companies (hereinafter – the Law Governing Cross-Border Operations)[6] implemented the provisions of Directive (EU) 2019/2121 on cross-border operations, which highlights that the cross-border nature of operations can pose specific problems for shareholders. In principle, in a cross-border conversion, a merger of a company being dissolved without going into liquidation, or a full or partial division, the Law Governing Cross-Border Operations enables minority shareholders who disagree with the cross-border operation to exercise their exit right against cash compensation (Article 7 (conversion), Article 19 (merger), Article 32 (division)). Since the general shareholders' meeting has to approve the draft terms of the cross-border operation with a qualified majority of no less than two thirds of votes, when all shares are of the same class, shareholders holding one third of the share capital (33.33 percent) with no blocking power may decide to exit the company (part 2 of Article 9 (conversion), Part 4 of Article 1 of the Law Governing Cross-Border Operations; items 14 and 15 of part 1 of Article 28 of the LSC). The draft terms of the cross-border operation must include details about cash compensation for the withdrawing shareholders, and this information is further detailed and substantiated in the company's management report and the independent expert report, unless all shareholders unanimously waive their right to receive these reports (Articles 3–5 (conversion), Article 15–17 (merger), Articles 28–30 (division) of the Law Governing Cross-Border Operations). If a minority shareholder who has informed the company about their exit deems the cash compensation proposed by the company to be inadequate, the shareholder is entitled to dispute it by claiming an additional amount. To ensure the fair treatment of minority shareholders, the LSC establishes an *erga omnes* effect of the final court decision to provide additional cash compensation to all shareholders who have declared to the company that they are exercising their exit right.

In the context of national reorganisations and conversions, the scope of the exit right of a minority shareholder is very narrow in comparison with that which is granted in relation to cross-border operations in the single market. The LSC enables shareholders holding a maximum of 10 percent of the share capital to demand the company to acquire their shares in only two cases.
Firstly, this can occur when shares are not allocated proportionally in each company in the corporate division. Corporate division cannot be carried out when the exit right is exercised by shareholders holding more than 10 percent of the share capital of the company being divided (part 4 of Article 67 of the LSC).

Secondly, a shareholder can exit in an intra-group upstream merger when a parent company which has a holding of at least 90 percent of the subsidiary's share capital acquires the subsidiary (Article 70^1 of the LSC). The LSC does not specifically address the shareholder's right to claim an additional amount of cash compensation. Although a cross-border operation poses its own risks to shareholders' investments in comparison with those arising in relation to a domestic operation, it remains to be seen whether the newly adopted rules for cross-border operations in the single market will shed light on the need to upgrade the rules governing the protection of minority shareholders under national corporate reorganisations (see Davies et al., 2019, pp. 210–211).

[6] The new rules do not apply to cross-border mergers that were initiated before the entry into force of the new law, i.e., 31 August 2023.

Given the above, it could be summarised that the LSC does not set forth a general right for minority shareholders to exit from a private company if they are dissatisfied with corporate decisions based on the majority principle that may substantially alter the investment environment. The exceptions to this are those decisions specifically linked to the abovementioned cross-border operations in the single market and domestic reorganisation, although the latter has a very narrow substantive scope.

1.2 Minority shareholder exit in the event of shareholder conflicts

There is a statutory judicial shareholder remedy which deals with extreme shareholder conflicts in a private company, and which in exceptional circumstances permits a shareholder either to withdraw from the company or to expel another shareholder. Under such a legal framework, the CC sets forth a shareholder oppression remedy as a judicial mechanism for a minority shareholder to leave the private company in the event of serious shareholder conflicts.

As far as it relates to the withdrawal of a minority shareholder, Article 2.123 of the CC provides for a forced buy-out remedy when a shareholder in a private limited company can no longer properly exercise their shareholder rights due to the actions of another shareholder and it cannot be reasonably expected that such actions will cease. The court obliges the other shareholder or shareholders who are responsible for such a situation to buy out the shares of the withdrawing shareholder. This remedy should apply in case of serious and permanent conflict between shareholders when the interest of the withdrawing shareholder is materially prejudiced, further cooperation between shareholders is no longer feasible, and other less drastic alternative measures cannot be applied. To determine the share price for the withdrawing shareholder, if the court finds the exit grounds justified then the judicial withdrawal procedure involves experts to evaluate the shares. The court must approve the party (which can be a private company) that should pay the costs of the share valuation.

The forced buy-out remedy can be used only by a shareholder or group of shareholders of a private limited company whose par value of shares amounts to no less than one third of the share capital (part 1 of Article 2.123 and item 1 of part 1 of Article 2.116 of the CC). In this context, it is worth mentioning that only a shareholder (or group of shareholders) of a private limited company whose par value of shares amounts to no less than one third of the share capital has the right to demand the exclusion of a shareholder whose actions contradict objects of the company if there are no grounds to reasonably expect any changes in said actions (Article 2.115 and item 1 of part 1 of Article 2.116 of the CC). Therefore, a shareholder holding a lower percentage of the share capital has neither the right to leave the company nor to expel another abusive shareholder.

The case law reveals that the expulsion of another shareholder by a shareholder (or a group of shareholders) holding at least one third of the share capital of a private company is used as a legal tool to solve shareholders' conflicts, both as an independent remedy and as a contra-claim (e.g., the rulings of the Supreme Court of Lithuania of 29 April 2008 in civil case no. 3K-3-258/2008 and 12 November 2007 in civil case no. 3K-3-483/2007; the rulings of the Court of Appeal of Lithuania of 13 January 2017 in civil case no. e2A-52-196/2017, 20 May 2021 in civil case no.e2A-356-302/2021, 20 January 2022 in civil case no. e2-22-302/2022, and 30 December 2019 civil case no. e2A-620-781/2019). A shareholder who elects to use an expulsion remedy assumes the risk of possible changes in the share price (increase or decrease) that can occur during the period between the point at which the court fixes the share price and the moment when the share sales purchase is actually enforced. Therefore, the court-approved price for shares that are subject to mandatory sale on the basis of the court decision cannot be adjusted following the principle of *rebus sic stantibus*, as used in contractual relationships (Article 6.204 of the CC). Accordingly, the price cannot be reduced due to the subsequent insolvency of the company which results in a decrease in the value of its shares (the ruling of the Supreme Court of Lithuania of 23 June 2022 in civil case no. e3K-3-180-403/2022).

Both the expulsion remedy and the exit remedy can be used in a deadlock situation (e.g., the ruling of the Supreme Court of Lithuania of 1 July 2020 in civil case no. e3K-3-214-219/2020; the rulings of the Court of Appeal of Lithuania of 20 October 2022 in civil case no. e2A-630-1120/2022, 22 October 2020 in civil case no. e2A-599-781/2020, and 10 December 2020 in civil case no. e2A-864-370/2020).

The withdrawal of a minority shareholder from a private company under the oppression remedy is not, however, used very often in practice (e.g., the ruling of the Supreme Court of Lithuania of 13 June 2008 in civil case no. 3K-3-323/2008; rulings of the Court of Appeal of Lithuania of 13 November 2014 in the civil case no. 2A-1355/2014, and 28 April 2022 in the civil case no.e2A-260-302/2022). There are different risks related to the use of this judicial exit remedy by a minority shareholder. For example, shareholders are often reluctant to use the exit remedy due to uncertainty regarding the potential value of the shares as determined by court-appointed experts, since the issue is vaguely regulated and a number of material aspects are left to be developed in the case law (e.g., on the adjustment of the price of the withdrawing shareholder's shares, which the abusive shareholder must purchase compulsorily, to take into account the reflective losses; on the need to better protect minority shareholder rights in the event of a default by the majority shareholder when an exit right is exercised by a minority shareholder (Mikalonienė, 2016, pp. 172–180)). On the other hand, it is likely that in case of serious conflicts between shareholders when the interest of a minority shareholder is materially prejudiced, a very high threshold requirement of holding one third of the share capital of the private company can serve as a major impediment in protecting minority shareholders' rights when withdrawing from the company on fair terms. The legal framework that prevents the exit of every shareholder whose interests are substantially harmed in the event of serious shareholder conflicts has long been criticized as not properly ensuring the protection of their ownership rights (e.g., Mikalonienė, 2015, pp. 212–213, 234–237; Tikniūtė, 2017, pp. 236–239).

In conclusion, the scope of the latest legislative developments that introduced the minority shareholder's right to leave a private company and retrieve their investments on fair terms in the case of dominant control or cross-border corporate operations in the single market has not eliminated the need to legally enable each shareholder whose interests are substantially harmed in the event of serious shareholder conflicts to withdraw from the private company (for similar discussions in relation to withdrawal in case of dominant control, see Bitė, 2023, p. 203).

2. Minority shareholder exit: Bulgaria

2.1. General exit right

The Bulgarian Commercial Act (hereinafter – the CA) provides each shareholder in a limited liability company a unilateral and unconditional exit right, i.e., each shareholder is entitled to leave the company and terminate its shareholding at any time for convenience, without providing their motivation or the specification of any grounds for their exit. This right is acquired by each shareholder, as the nominal value of the shares is not relevant, i.e., there is no minimum threshold as a precondition for the acquisition of this right.

The exit right is exercised under a simple and straightforward procedure. The withdrawing shareholder must submit to the company a written exit notice followed by the expiry of a 3-month notice period, beginning from the receipt by the company of the exit notice. Once the notice term expires, the shareholder must ensure the acquisition of the vacated shares by other shareholders or by a third party, or if such an acquisition is not possible, the share capital of the company must be decreased. In addition, since the articles of association contain the names of the shareholders, they must be updated by resolution of the remaining shareholders. The changes in the corporate status are subject to registration under the file of the company at the Commercial Register.

After the termination of the shareholding, the company is obliged to pay the withdrawing shareholder the monetary value of their shares. The main downside of the exit right is related to the valuation of the shares of the withdrawing shareholder. The CA provides that the value of the shares shall be calculated on the basis of the accounting balance sheet at the end of the month in which the notice period expired. According to the case law of the Supreme Cassation Court (hereinafter – the SCC), the withdrawing shareholder is entitled to receive the net asset value of their shares, calculated according to the balance sheet value of the assets minus the liabilities (own capital, reserves and financial results, i.e., profit or loss, are excluded from the equation) (SCC Decision No. 466 of 30.06.2008 under commercial case No. 112/2008; Decision No. 224 of 10.09.2010 under commercial case No. 765/2008; Decision No. 200 of 19.01.2018 under commercial case No. 592/2016; Decision No. 180 of 26.03.2021 under commercial case No. 2602/2019; Decision No. 10 of 10.09.2012 under commercial case No. 502/2010; Decision No. 71 of 18.12.2017 under commercial case No. 2899/2015). The balance sheet value is significantly lower than the market value of the assets of the company, but the market value is disregarded and hence the withdrawing shareholder loses a significant portion of their investment (Stefanov, 2014, p. 350; see also SCC

Decision No. 64 of 09.06.2009 under commercial case No. 504/2008; Decision No. 61 of 30.04.2010 under commercial case No. 741/2009; Decision No. 224 of 10.09.2010 under commercial case No. 765/2008; Decision No. 81 of 18.07.2011 under commercial case No. 809/2010; Decision No. 87 of 06.06.2012 under commercial case No. 468/2011; Decision No. 10 of 10.09.2012 under commercial case No. 502/2010). If the other shareholders and the management decide to act in bad faith, they have 3 months until the expiry of the notice period to re-direct the business and assets of the company to another company, and in this way to ensure that the balance sheet value of the shares shall be a negative figure at the end of the exit notice term, in which case the withdrawing shareholder is not entitled to receive any payment (Stefanov, 2014, p. 351; Grigorov, 1994, pp. 191–192; Goleva, 2014, p. 285; as well as SCC Decision No. 10 of 10.09.2012 under commercial case No. 502/2010; Decision No. 100 of 7.02.2013 under commercial case No. 665/2011; Decision No. 200 of 19.01.2018 under commercial case No. 592/2016; Decision No. 206 of 06.08.2018 under commercial case No. 1108/2017), even for the nominal value of their shares (Stefanov, 2014, p. 351, as well as SCC Decision No. 100 of 07.02.2013 under commercial case No. 665/2011; Decision No. 405 of 25.06.2007 under commercial case No. 144/2007).

The effect of the exit notice is immediate, because the shareholding is terminated automatically upon the expiry of the notice period (e.g., SCC Decision No. 991 of 29.11.2006 under commercial case No. 566/2006; Decision No. 46 of 22.04.2010 under commercial case No. 500/2009; Decision No. 515 of 20.03.2002 under civil case No. 1312/2001; Decision No. 223 of 18.03.2004 under civil case No. 892/2003; Decision No. 6 of 31.01.2005 under civil case No. 293/2004; Decision No. 1091 of 1.07.2003 under civil case No. 1857/2002; Decision No. 74 of 18.07.2016 under commercial case No. 1113/2015; Decision No. 7 of 14.03.2018 under commercial case No. 926/2017). The termination effect is not postponed, and is neither conditional on the passing of shareholder resolutions for the approval of the corporate changes resulting from the terminated shareholding of the withdrawing shareholder (e.g., SCC Decision No. 46 of 22.04.2010 under commercial case No. 500/2009; Decision No. 74 of 18.07.2016 under commercial case No. 1113/2015; Decision No. 7 of 14.03.2018 under commercial case No. 926/2017; Ruling No. 124 of 25.02.2015 under private commercial case No. 3390/2014), nor on the registration of such corporate changes at the Commercial Register, nor on payment to the withdrawing shareholder of the monetary value of their shares (Decision No. 46 of 22.04.2010 under commercial case No. 500/2009; Decision No. 515 of 20.03.2002 under civil case No. 1312/2001; Decision No. 223 of 18.03.2004 under civil case No. 892/2003; Decision No. 6 of 31.01.2005 under civil case No. 293/2004; Decision No. 1091 of 1.07.2003 under civil case No. 1857/2002; Decision No. 74 of 18.07.2016 under commercial case No. 1113/2015; Decision No. 7 of 14.03.2018 under commercial case No. 926/2017).

The regulation of the exit right is imperative, since it is designed to protect the minority shareholders, and the exit right cannot be excluded by the articles of association or by virtue of a decision of the shareholders' general meeting. It is permitted, on the other hand, for the articles of association to modify the conditions for the exercise or consequences of the exit right, for instance to provide a longer or shorter notice period (Decision No. 46 of 22.04.2010 under commercial case No. 500/2009; Decision No. 10 of 28.01.2004 under civil case No. 426/2003; Decision No. 223 of 18.03.2004 under civil case No. 892/2003; Ruling No. 124 of 25.02.2015 under private commercial case No. 3390/2014; Decision No. 74 of 18.07.2016 under commercial case No. 1113/2015). The articles of association may provide that the withdrawing shareholder shall be entitled only to payment equal to the nominal value of their shares instead of their balance sheet value, or the lesser amount of these two figures (Stefanov, 2014, p. 351; as well as Decision No. 405 of 25.06.2007 under commercial case No. 144/2007; Decision No. 1106 of 09.07.1999 under civil case No. 75/1999); they may also provide for a different date by which the accounting balance must be prepared for the calculation of the balance sheet value of the shares (Kalajdzhiev, 2014, pp. 267–268), or that the net asset value of the shares shall be calculated taking into account the market value of the company's assets (Decision No. 126 of 5.10.2011 under commercial case No. 889/2010; Decision No. 16 of 24.03.2011 under commercial case No. 354/2010). In principle, the payment to the withdrawing shareholder shall correspond to their share capital quota, but the articles of association may stipulate a different proportion (Article 127 of the CA) (Kalajdzhiev, 2014, pp. 267–268). Furthermore, the payment to the withdrawing shareholder could be subject to a settlement agreement between the shareholder, the company and the other shareholders. For instance, instead of cash compensation, the withdrawing shareholder (or their nominee) could acquire specific assets of the company (Decision No. 112 of 26.01.2012 under commercial case No. 638/2010; Decision No. 359 of 25.10.2011 under civil case No. 1220/2010), or the settlement agreement may provide for different monetary rights instead of or in addition to the payment of the monetary value of the shares. This may include receiving part of the net profit of the company for a certain period of time after the exit (Decision

No. 126 of 5.10.2011 under commercial case No. 889/2010; Decision No. 16 of 24.03.2011 under commercial case No. 354/2010).

In conclusion, Bulgarian law provides for a very strong general exit right to each shareholder, exercisable at any time and without any specific preconditions, even if there is no shareholder dispute, although in practice it is exercised mainly in the context of such disputes. The exit right significantly compensates for the lack of market for the shares of private companies. The main downside, related to the calculation of the value of the shares according to the balance sheet value of the assets and liabilities, could be overcome by the articles of association.

2.2. Other exit options

2.2.1 Special exit right in case of corporate reorganisation

The CA also provides for a special exit right in case of corporate reorganisation (e.g. fusion, merger, spin-off). A shareholder in an LLC whose legal status changes after reorganisation and who has voted against the decision for reorganisation has the right to leave the company in which they received shares after reorganisation. There is no minimum nominal value of the shares owned by such a shareholder in order to exercise their exit right. Their exit is effected by a notarised notification provided to the company within 3 months of the date of transformation. The withdrawing shareholder is entitled to receive payment of the monetary value of the shares owned before the reorganisation, calculated in accordance with the exchange ratio provided for in the transformation contract. This special exit right is applicable only in the event of reorganisation and is very rarely used, thus it has limited practical relevance.

Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions has not yet been implemented in Bulgaria; hence, no special exit right is provided in case of cross-border conversions, mergers and divisions.

2.2.2 Shareholder expulsion

The CA also contains other mechanisms for the resolution of corporate disputes, such as compulsory shareholder expulsion in a situation in which two battling (groups of) shareholders both wish to keep the company for themselves.

Beside the non-payment of the share capital contribution, which rarely occurs in practice, the grounds for shareholder expulsion include the actions as well as inactions of the shareholder against the interests of the company or their lack of support for the company's activity. Expulsion occurs after sending a warning letter to the shareholder and following their failure to remedy the grounds for expulsion within a reasonable term specified in the warning letter. If the breaches are not remedied by the shareholder within such a term, the shareholder meeting is able to expel the shareholder. The applicable majority for passing a shareholder decision for expulsion is more than three quarters of the total share capital, but the voting right of the shareholder proposed for expulsion is suspended, which means that the majority shareholder could even be expelled by the minority shareholder(s).

Shareholder expulsion can be challenged in court and is amongst the main sources of corporate litigation. However, shareholder expulsion is seen as the nuclear option for any company or enterprise because the shareholder dispute almost always leads to the simultaneous mutual expulsion of shareholders, which blocks corporate bodies and the activity of the enterprise, and its value is thus significantly decreased within a short period of time.

2.2.3 Termination of the company by the court

The last resort for the resolution of a shareholder dispute is the compulsory termination of the company by the court. This can occur on the grounds of a claim by a shareholder (or group of shareholders) with more than one fifth of the share capital motivated by good reasons for the termination, or by the prosecutor if the company has

lacked a registered manager for more than 3 months or if the activity of the company violates the legal regulations applicable to it.

The scope of application of compulsory termination is significantly limited by the exit right and shareholder expulsion, because the case law of the SCC allows the compulsory termination of a company by the court only if the enterprise of the company and/or its management bodies are not functioning. Therefore, the shareholder dispute by itself is not sufficient grounds for the termination of the company by the court (Goleva, 2014, p. 302; Tadjer et al., 2011, pp. 120–121; Stefanov, 2014, pp. 411–412; Gerdjikov, 2000, pp. 621–623; Kalajdzhiev & Bobatinov, 1998, pp. 139–140; Kalajdzhiev, 2014, p. 253; Grigorov, 1994, pp. 168, 209–210; as well as SCC Decision No. 159 of 15.12.2009 under commercial case No. 389/2009; Decision No. 21 of 02.03.2010 under commercial case No. 471/2009; Decision No. 4887 of 16.05.2005 under civil case No. 786/2004; Decision No. 532 of 14.10.2008 under commercial case No. 258/2008; Decision No. 182 of 08.05.2008 under commercial case No. 801/2007; Decision of 21.03.2006 under commercial case No. 724/2005; Decision No. 30 of 10.09.2010 under commercial case No. 320/2009).

3. Key aspects of the comparative analysis

The exit right of minority shareholders in a private company has two interconnected aspects with equal practical significance: (i) the conditions for its exercise, and (ii) the terms for the calculation of cash compensation. The present article suggests that there is room for significant improvement, both in Lithuania and Bulgaria.

In Lithuania, although at the first glance the legislative amendments that enable shareholders with 5 percent or less of the votes to exit the company suggest a significant improvement in terms of protecting minority shareholder rights in private companies, a systematic overview of the legislative framework raises reasonable doubts as to whether the protection of minority shareholders is sufficient when they are oppressed by the majority.

When there is no fair return on investments from a private company on a regular basis, minority shareholders holding more than 5 percent but less than 10 percent of votes are in a very weak position in using their *ex lege* governance rights. Although minority shareholders possessing at least 10 percent of the votes (share capital) of the company are in a somewhat more powerful situation and can exercise rights that permit them to intervene in the management of the company (e.g., to request the court to initiate a special investigation into corporate affairs), they need to obey the majority decision-making. Shareholders holding one third or less of the votes are not in a position to block a number of decisions made by the general shareholders' meeting that essentially impact shareholder ownership.[7] Oppressed minority shareholders holding more than 5 percent, but less than or equal to one third of votes cannot make their voices heard in an efficient or cost-effective way.

Given the overall legal framework for minority shareholder exit in Lithuania, there is no general right to exit for a minority shareholder in a private company. Lithuanian law provides for a very narrow exit option in non-conflict situations by establishing a statutory squeeze-out and sell-out right for a shareholder of a private company in which there is a controlling party with at least 95 percent of the votes at the general shareholders' meeting, and this is applicable only to a withdrawing shareholder with voting shares. This mechanism has limited use in the most common situations, in which minority shareholders seek to withdraw from a private company when their interests are substantially harmed in the event of serious shareholder conflicts. For example, this mechanism cannot be used when: minority shareholders hold more than 5 percent of the votes but less than one third of the share capital; minority shareholders hold non-voting shares and less than one third of the share capital; or minority shareholders hold a small portion of the holding (less than one third of the share capital), but a dominant

[7] Although there are exceptional cases in which decisions have to be made unanimously by all shareholders (e.g., shareholders as holders of the governance membership rights that are exercised at their forum can opt out of a physical meeting through the articles of association and replace it with a purely virtual meeting instead if agreed unanimously as per part 4 of Article 21 of the LSC), the primary principle is a majority rule for decision-making at the general shareholders' meeting. The general shareholders' meeting has to make decisions by a qualified majority of two thirds of votes on such issues as amendments to the articles of association, increases or decreases of the share capital of the company, changes of the legal status of the company, classes of shares, the approval of profits for distribution, etc. (part 1 of Article 28 of the LSC). A higher super majority of three quarters of votes is required to withdraw the pre-emptive right to subscribe for new shares when the share capital of the company is increased by additional contributions (part 2 of Article 28 of the LSC). However, a simple majority of votes is sufficient, e.g., when appointing a general manager who is a single corporate managing organ.

controlling party has not reached the established threshold due to its narrow statutory definition. In addition, there is a minimal probability for a minority shareholder (or group of shareholders) holding one tenth but less than one third of the share capital of the private company to withdraw when corporate misconduct is confirmed under special investigative proceedings, since it is unlikely that the company will be liquidated via the court decision. The exit right of minority shareholders when they disagree with the company's decisions concerning corporate mergers, divisions and conversions has limited practical relevance, as they are specific to targeted corporate operations. Only a shareholder or group of shareholders of a private company whose par value of shares amounts to at least one third of the share capital has the right to demand from the court the forced buy out of their shares in case of a serious shareholder conflict when such a shareholder cannot properly exercise their shareholder rights due to the actions of another shareholder and it cannot be reasonably expected that such actions will terminate. Alternatively, minority shareholders holding at least one third of the share capital may demand the exclusion of such a shareholder whose actions contradict the objectives of the company if there are no grounds to reasonably expect any changes in said actions. Therefore, even though minority shareholder interest is substantially harmed in the event of serious shareholder conflicts, the investments of minority shareholders holding less than one third of the share capital can still be locked within private companies, and there may be no *ex lege* solutions to the minority shareholders' exit and the return of their investment on fair terms in case of their oppression by majority.

In this respect, the Bulgarian legislation is one step ahead because each shareholder has an unconditional and irrevocable statutory exit right from a private limited company, in addition to a special exit right in case of corporate reorganisation and a strong right to expel a defaulting shareholder in case of a shareholder conflict, which is exercised by the general shareholders' meeting. Thus, in order to protect the ownership rights of minority shareholders against oppression by the majority, the Lithuanian legislation should provide an exit right for every shareholder whose interests are substantially harmed in the event of serious shareholder conflicts in a private company, and not only to a minority shareholder (or group of shareholders) who holds at least one third of the share capital of the company.

The roles are reversed when it comes to assessing the legal regime of the exit payment for the withdrawing minority shareholder. The Lithuanian legislation requires the payment of fair cash compensation, as the value of the compensation is determined by an independent expert appointed by the court both in the case of forced buy out ruled by the court in case of a serious shareholder conflict, as well as when the withdrawing shareholder challenges the exit compensation proposed to them in the statutory squeeze-out or sell-out scenario, with the dominant shareholder holding 95 percent of the votes.

In comparison, Bulgarian law ties the calculation of the cash consideration to the balance sheet value of the company's assets and liabilities, which may even be a negative figure at the end of the relatively long 3-month exit notice period as a result of bad faith actions by the majority shareholder and the management, controlled by them. Although there are contra-arguments against giving generous statutory exit rights to minority shareholders from private companies (Fleischer, 2014, pp. 66–68, 82), in the author's view, the protection of the investments of the withdrawing minority shareholder has to be strengthened under Bulgarian law. The latter should provide that the monetary payment owed to a minority shareholder in exchange for their shares shall be equal to the fair value of such shares to be determined by an independent valuator (auditor) selected with the consent of the withdrawing shareholder or appointed by the court. Simultaneously, if the withdrawal from the company may adversely affect corporate creditors when the share capital of the company is reduced and funds are distributed to the withdrawing minority shareholder, the protection of creditors must also be considered.

The foregoing demonstrates that in both Lithuania and Bulgaria, lawmakers take into account the specific features of private companies to tackle problems regarding the return of investments due to illiquidity of shares, and the legal framework provides an exit right for a minority shareholder. The exit right of the minority shareholder is not, however, unlimited under statutory law. In both countries, the legal framework establishes certain measures to limit the statutory exit right, although conceptually different techniques are employed.

Conclusions

In both Lithuania and Bulgaria, the legal framework establishes certain measures to limit the exit of a minority shareholder from a private company. However, conceptually different techniques are employed in relation to the

conditions for the exercise of this right and the terms for the calculation of the exit payment, with equal practical significance. The Lithuanian legal framework provides a narrowly drafted exit right, and therefore directly limits the exit of a minority shareholder from a private company. The Bulgarian legislation has a conceptually different approach to that employed in Lithuania, and establishes the general exit right against limited cash compensation with the result that it prevents the withdrawal of the minority shareholder in an indirect way.

Furthermore, there is room for significant improvement both in Lithuanian and Bulgarian law:

- The Lithuanian legal framework provides for the protection of shareholders' interests by involving an independent expert to estimate cash compensation for the withdrawing shareholder, although it does not establish a general exit right as such. In order to protect the ownership rights of minority shareholders against oppression by the majority shareholder, the Lithuanian legislation should provide an exit right for every shareholder whose interests are substantially harmed in the event of serious shareholder conflicts in a private company, and not only to minority shareholders (or group of shareholders) who hold at least one third of the share capital of the company.
- The Bulgarian legislation establishes an unconditional and irrevocable general exit right for each shareholder from a private company. However, this is not without its own drawbacks, since the withdrawing shareholder is entitled only to cash compensation which is calculated from the net book value of the company rather than as the fair value of the shares. In order to protect the investments of the withdrawing minority shareholder, Bulgarian law should provide that cash compensation is based on the fair value of the shares of the withdrawing shareholder to be determined by an independent expert selected with the consent of the withdrawing shareholder or appointed by the court, with adequate safeguards in place for corporate creditors.

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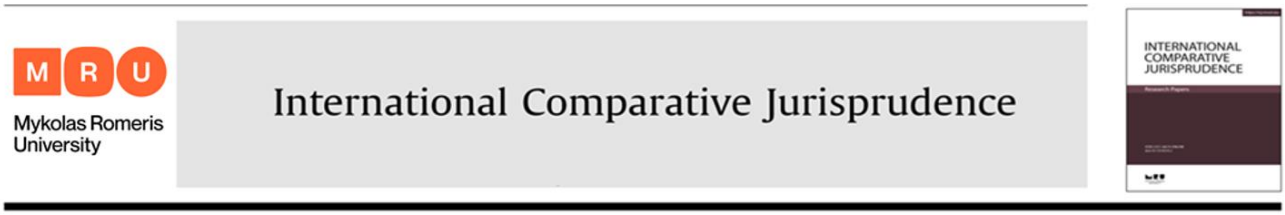

THE IMPLEMENTATION OF MANDATORY FAMILY MEDIATION SCHEMES IN THE CONTEXT OF THE ISTANBUL CONVENTION

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Abstract. The global rise in domestic violence has promted international preventive efforts such as the Istanbul Convention, which bans mandatory alternative dispute resolution for all forms of violence. This created a challenge in aligning public justice policies and balancing mandatory mediation schemes with adequate victim protection. This article seeks to offer an in-depth analysis of the main concerns in the implementation of mandatory family mediation in domestic violence cases in the context of the Istanbul Convention, and to provide an overview of some of the practical solutions that can be deployed to overcome these issues. This research commences with a review of the existing scientific literature and an overview of international regulation in the field of the application of mediation in the context of domestic violence, focusing primarily on the provisions of the Istanbul Convention. This is followed by a comparative study that considers the national legislation of Lithuania, Bulgaria and Ukraine in order to highlight differences in the application of mediation in domestic violence cases and to determine how the Istanbul Convention has influenced mediation practices in the selected countries. This reveals that compliance with the prohibition on mandatory mediation in the Istanbul Convention has an impact on the level of protection afforded to domestic violence victims, but does not guarantee it *per se*, thus contributing to uncertainty regarding how victims will be treated during mediation. Additional guidelines, standards or protocols should be employed to assist mediators in determining domestic violence and in tailoring the mediation process accordingly. It is therefore strongly suggested that, to ensure effective measures for the protection of victims of violence, additional national legislation should be adopted to screen for signs of violence in mandatory mediation and to propose specific approaches to the necessary steps to be taken in mediation in the context of domestic violence.

Keywords: family mediation, mandatory mediation, domestic violence, screening, Istanbul Convention.

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Introduction

Mediation is considered to be particularly suitable for resolving family disputes due to their personal nature and emotional context, as well as their complexity and the inability, or even futility, of deciding who is 'right' and who is 'wrong' (Boulle et al., 2023). It is also commonly recognized as an effective tool for solving family conflicts by improving communication between parties and lowering the socio-economic costs of separation and divorce. EU institutions are demonstrating increasing institutional support for mediation in family matters. The institutionalization of mediation as an alternative dispute resolution method can be considered to have begun in 2002 with the release of the Commission's Green Paper on alternative dispute resolution in civil and commercial law (COM(2002)196), where the importance and effectiveness of mediation was acknowledged for the first time. Another significant step in expressing institutional support for mediation within the EU was Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (hereinafter, the Mediation Directive). Although the scope of the Mediation Directive was aimed mainly at applying to mediation in cross-border disputes, para. 8 of the preamble indicated that its application can also encompass internal mediation processes, including family disputes. Later, in 2017, the European Parliament emphasised in its Resolution on the implementation of the Mediation Directive (2016/2066(INI)) the importance of mediation in the field of family law, where it can create a constructive atmosphere for discussions and ensure fair dealings between parents. It also invited all Member States to proactively encourage judges and lawyers to refer parties to mediation for resolving family disputes and to establish more effective tools to expand the use of mediation. One of the instruments employed to promote the use of mediation in a specific dispute area is mandatory mediation, where the disputants are compelled to mediate or to participate in an initial informational mediation session before applying to court, either by law or at a judge's discretion. Naturally, the mandatory application of mediation in family disputes has grown to become a trend in the European Union as a means for improving effective access to justice for family disputes. One recent study (Korsakoviene et al., 2023) established that 20 of the 27 EU Member States already enjoy one or several models of fostering family mediation in its mandatory form, while at least 9 Member States are in the process of adopting or improving mandatory family mediation. Such movements indicate the gradual transition from purely voluntary mediation towards mandatory dispute resolution models which compel parties to engage with a mediator in order to gain an in-depth understanding of mediation and its application to their particular case.

The spread of mediation in different areas of life would make it difficult, if not impossible, to establish a comprehensive list of disputes eligible for mediation (Boulle et al., 2023). On the one hand, mediation is considered to be a 'one-size-fits-all' solution, which means that there is in effect no specific list of disputes that are considered unsuitable for mediation. On the other hand, some scholars have identified factors that make mediation impossible or extremely complicated, and that require more commitment and effort from both the mediator and the parties concerned. One such factor is the existence of a power imbalance due to previous or ongoing forms of domestic violence (Murphy & Rubinson, 2005). Some authors state that the element of domestic violence may be treated as an important predictor of failure to reach an agreement (Ballard et al., 2011), or reaching biased agreements that overly favour the aggressor. Others point out that obligatory participation in mediation for victims of abuse causes them to experience intimidation and control to such an extent that they cannot safely participate (Cleak et al., 2018). Krieger (2002), for example, recognizes the setback caused by mandatory mediation regarding gender relations, and the hindrance that it may impose on the protection of the legislative rights of abused women. Other researchers share the belief that no mediation can take place if the parties are enmeshed in an abusive relationship (Steegh, 2003).

Levels of domestic violence are increasing globally according to a report by the World Health Organization et al. (2014), becoming a serious social problem which often remains hidden. At the EU level, domestic violence is defined as any act of physical, sexual, psychological or economic violence that occurs within a family or domestic unit, irrespective of biological or legal family ties, or between former or current spouses or partners, irrespective of whether or not the offender shares or has shared a residence with the victim (Directive (EU) 2024/1385 on combating violence against women and domestic violence). According to a report by the European Union Agency for Fundamental Rights (2014) on an EU-wide survey on violence against women, at least two women are killed every day in the EU as a result of this problem. At the same time, two in every ten women have experienced physical and/or sexual violence committed by a partner or a friend, whereas three in ten are victims of such violence perpetrated directly by a family member. These

alarming numbers put forth in the context of mandatory mediation pose the question of how domestic violence concerns are addressed in mandatory mediation processes, the prime objective of which is to preserve and restore communication between parties.

Amidst this debate, the Convention on preventing and combating violence against women and domestic violence (2011; hereinafter, the Istanbul Convention) was adopted as the first legally binding European regulation that creates a comprehensive framework of protection. Although the scope of the Istanbul Convention was the creation of a framework to protect women and children against domestic violence, Article 48 of the Convention explicitly prohibits mandatory alternative dispute resolution methods, including mediation, in cases where abuse is reported by one of the partners. Such a principled prohibition assumes, however, that the victim identifies themselves as such and has already taken proactive steps in seeking protection. This therefore places a burden on the abused party to come forward with allegations of abuse and, in some instances, prove those allegations in order to be able to justify why mandatory mediation would not apply to the case at hand. Therefore, some scholars share doubts as to whether victims of domestic violence have the willingness or ability to reject mandatory mediation, as in some case victims are not able to identify or prove abuse themselves, or might simply be afraid to admit it (Murphy & Rubinson, 2005). The Istanbul Convention, as much as it differentiates mandatory mediation models from purely voluntary mediation, still fails to provide clarity on how to proceed with mediation if domestic violence is revealed during the process. This is further coupled with the fact that various mandatory mediation models are being deployed on a national basis in the context of family disputes without embodying a uniform systematic approach to domestic violence concerns. The following question therefore arises: How can mandatory family mediation schemes be conducted while extending a sufficient level of protection for victims of domestic violence, and while at the same time enabling victims to choose mediation voluntarily if and when they are willing?

Therefore, this article delves into the differing treatment of domestic violence cases in mandatory mediation models in the context of the Istanbul Convention and the obligations stemming therefrom. Previous research on the topic has either sought to analyse the problem of domestic violence in the context of mediation, or has merely focused on the nature and implications of the Istanbul Convention. The current paper, however, seeks to reconcile these two issues and to offer some guidance to EU Member States with respect to the benefits and drawbacks of the mandatory family mediation models emerging in the context of the ratification of the Convention as of 1 June 2023. To achieve this, the article is structured into several chapters that seek to achieve the objective outlined above. The first chapter aims to provide a general overview of the legal background of the application of mediation in family disputes with a history of domestic violence between the parties. The following chapter provides a comparative analysis between three different states – Lithuania, Bulgaria and Ukraine. The choice of these countries was based on whether the particular state applies a mandatory mediation model or not, and whether the Istanbul Convention has been signed and/or ratified. Lithuania has not ratified the Istanbul Convention and offers a mandatory model of mediation in family cases; Ukraine has ratified the Istanbul Convention and offers non-mandatory mediation; whilst Bulgaria has declared the Istanbul Convention unconstitutional and exhibits an emerging mandatory mediation model. Based on this, conclusions are drawn in the third chapter as to the pros and cons of the various models that are being developed and their compliance with the requirements under the Istanbul Convention.

To achieve these objectives, the research process commenced with a review of the existing scientific literature and an overview of international regulation in the field of the applicability of mediation in the context of domestic violence in both voluntary and mandatory mediation models. This was followed by a comparative analysis of the national legislation of Lithuania, Bulgaria and Ukraine in order to highlight some of the main differences in approaching mediation cases where indicators of existing domestic violence are recorded. Desk research was also conducted to systematize the various practices being deployed in each of the examined jurisdictions. The analyses deployed sought to systematize some of the existing methods of addressing cases involving domestic violence in mediation and how the Istanbul Convention has impacted the mediation practices that have been established in the selected countries. This, along with the generalization method, enabled conclusions to be drawn regarding the pros and cons of mediation in the context of domestic violence, and key lessons learned were thus outlined.

1. The legal background of the application of mediation in family disputes with a history of domestic violence between parties

Currently, with the exception of the Istanbul Convention, there are no specific international or European standards or legal requirements that regulate the application of mediation in the context of domestic violence. The existing legal regulations are mainly country-specific, and vary from numerous extremes: from the adoption of mandatory mediation programs that subject family disputes to mediation while providing for an absolute exemption in cases of domestic violence, such as in the UK (Justice, n.d., para. 20); to other programs with conditional domestic violence exemption, as in the example of Lithuania; or those that leave this question fully at the discretion of the judge, as in Bulgaria.

1.1 The relevant international legal framework

Before the adoption of the Istanbul Convention, the only international instrument addressing domestic violence was the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979, which did not include provisions on mediation in the context of domestic violence. The same approach was adopted in the U.N. Declaration on the Elimination of Violence against Women, which also failed to address the concept of mediation in the presence of domestic violence.

Thus, although these two international conventions have acquired special significance in the field of protection against gender-based violence, they do not include any references to mediation as a tool for addressing the underlying issues in domestic violence cases. In this respect, however, it is worth clarifying that domestic violence is not gender specific or limited to women *per se*, as it encompasses all genders. Thus, with the exception of the Istanbul Convention, no treaties or protocols have been adopted that tackle the problem of mediation in the context of domestic violence.

With reference to the EU regulations on the matter, currently, the only specific EU legislation explicitly addressing domestic violence is the recently adopted Directive (EU) 2024/1385 on preventing and combating violence against women and domestic violence. Its prime objective is to harmonise penalties and limitation periods that apply towards acts of domestic violence and to call for stronger laws against cyberviolence, better assistance for victims, and steps to prevent rape. Again, however, the new rules do not explicitly tackle the problem of mediation in the context of domestic violence.

The same approach is also deployed in other EU directives and regulations adopted in the field, in particular in the areas of judicial cooperation in criminal matters, equality between women and men, and asylum policy,[4] based on the premise that mediation is an effective tool to improve justice (Elnegahy, 2017). However, neither the newly adopted Directive (EU) 2024/1385 nor any of the aforementioned acts make any reference to mediation proceedings and what may be required from a mediator if they become aware of any violent incidents as part of ongoing family mediation. Worth mentioning in this respect is Article 16 of the new Directive (EU) 2024/1385, which stipulates through a general requirement that Member States ensure that no confidentiality provisions should be deemed to constitute an obstacle for professionals to report to competent authorities if they have reasonable grounds to believe that there is an imminent risk that serious physical harm will be inflicted upon a person. Applying the above to mediation would ultimately mean that family mediators in the EU would be required to report any concerns that they may have with reference to the safety of the family members that they encounter as part of the mediation procedure. However, there are no further prerequisites towards family mediators that might require them to screen for

[4] These Directives are: Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; Directive 2011/99/EU on the European protection order; Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters; Directive 2011/93/EU of the European Parliament on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA; Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims; Directive 2004/80/EC relating to compensation to crime victims; Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

any signs of domestic violence or undertake specific actions if establishing concerns of such a nature. The lack of such obligations is further reconfirmed by the Mediation Directive, which does not include provisions on the need to adopt a different approach if domestic violence is revealed in the context of family mediation. The above ultimately leads to the conclusion that when it comes to domestic violence, no particular international or EU requirements exist governing the mediation process.

1.2 The Istanbul Convention and its approach to mediation

Within this context, in 2011 the Council of Europe adopted the Istanbul Convention, which is a landmark treaty creating a legal framework at the pan-European level to protect women against all forms of violence and prevent, prosecute and eliminate violence against women and domestic violence. This Convention officially entered into force on 1 August 2014 after its 10th ratification, 8 of which came from Member States of the Council of Europe. To date, the Istanbul Convention has been signed and ratified by 39 Member States, including the European Union, while 6 countries have not ratified the Convention since signing it (Bulgaria, Czechia, Hungary, Latvia, Lithuania and Slovakia). The text of the Convention has triggered conflicting opinions, particularly in Croatia, Bulgaria, Poland and Hungary (Đurković, 2022). In Poland, for example, resistance began as early as 2012, and intensified after the return of the Law and Justice Party to power. In Croatia, similar movements were recognized in 2016, which spread the following year to Hungary and Bulgaria. At the same time, the EU signed the Convention on 13 June 2017, but uncertainty around the legal basis and the Council's reluctance to proceed with ratification in the absence of a common accord among Member States blocked the process for several years. Upon receiving an opinion from the European Court of Justice clarifying the legal basis for the EU's ratification of the Istanbul Convention, the EU Parliament adopted a decision in favour of its ratification in May 2023, which was finalized on 1 June 2023. However, this ratification of the Convention concerns only matters falling under its exclusive competences following from agreed common rules in the area of judicial cooperation, asylum, and non-refoulement, as well as with regard to the institutions and public administration of the Union. Thus, on 1 October 2023, the Istanbul Convention entered into force for the European Union, which ultimately means that the six remaining EU Member States that still have not ratified the instrument will have to implement and follow the Convention. However, this notion of implementation can be presumed to fall only within the field of judicial cooperation, asylum, and non-refoulment, as suggested above, and should not be deemed to additionally encompass the ban on mandatory mediation in cases of domestic violence.

Regardless of the different discussions triggered by the text of the Convention, its role was to acknowledge that violence against women, including domestic violence, is one of the most serious forms of gender-based violations of human rights in Europe, which remains shrouded in silence and which calls for urgent measures on a national basis. The seriousness of the problem of domestic violence is further supported by the empirical data in the Council of Europe's Explanatory Report on the Convention (2011), the analysis of which shows that approximately 12%–15% of all women over the age of 16 have experienced domestic abuse in a relationship. Many more continue to suffer physical and sexual violence from former partners even after the end of the relationship, indicating that, for many women, ending an abusive relationship does not necessarily mean physical safety. Given the worldwide nature of this phenomenon and the lack of effective measures to combat it, the Istanbul Convention seeks to offer legally binding standards on preventing, protecting against, and prosecuting the most severe and widespread forms of gender-based violence, all of which were previously recognized as missing.

In the context of mediation, it is worth mentioning Article 48 of the Istanbul Convention, which clearly bans mandatory mediation in cases of violence. The rationale behind such a ban is elucidated further in para. 251 and 252 of the Explanatory Report to the Convention (2011), which stipulate that while the benefits of alternative methods are not questionable, their application in cases of violence may have a negative effect, in particular if participation in such alternative dispute resolution methods is mandatory and replaces adversarial court proceedings. This notion is rooted in the concept that 'victims of such violence can never enter alternative dispute resolution processes on a level equal to that of the perpetrator' (Explanatory Report to the Convention, 2011), thus arguing that in order to avoid the re-privatisation of domestic violence, it is the responsibility of the state to provide access to adversarial court proceedings presided over by a neutral judge. Consequently, Article 48(1) of the Convention requires parties to prohibit mandatory participation in any alternative dispute resolution processes in domestic criminal and civil law.

The importance of this provision as an integral part of the protection of victims of domestic violence has been reaffirmed by annual reports of the Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (hereinafter, GREVIO; Council of Europe, 2021). GREVIO has expressed its concerns in the case of Slovenia, where courts often encourage parties to conclude a settlement even if serious violence has occurred between them. Moreover, it found the system in Denmark to be inappropriate for couples whose relationships have been marred by violence with respect to decisions taken on custody and visitation, where it noted that family courts did not exist and that conflicts about custody and visitation were presided over through a system of joint meetings between the two parents, guided or mediated by the state administration. GREVIO's position is only strengthened by the conclusions of studies on the compliance of particular countries with the Istanbul Convention, where Italy was praised for the measures taken and progress achieved – in particular, the amendments made to family law proceedings within the civil procedure code to address cases of domestic and gender-based violence, including the prohibition of mediation in cases of domestic violence and the requirement for family judges to request information on pending proceedings against the perpetrator or on previous convictions (Conclusions on the implementation of Recommendations in respect of Italy, 2023). However, Norway and certain other countries were urged to take immediate action to recognise the power imbalances in relationships marred by violence and ensure that all offers of mediation are accepted entirely voluntarily and through all available means. These means include guidelines and training offered to mediators that focus on the gendered dynamics of domestic violence and its impact on the ability of victims to enter the mediation process on a par with the perpetrator (Recommendation on the implementation of Istanbul Convention, 2021).

Except for the above, however, no further references are made to the nature of the mandatory family mediation process and its intricacies as a tool for screening domestic violence cases. This aspect is of particular importance in the context of the evolution of mandatory mediation models in Europe, which often takes place with domestic violence in the background. Even if it is undeniable that the countries that ratified the Convention shall exempt cases where there are signs of domestic violence, the question remains as to how it is to be ensured that signs of domestic violence are acknowledged and addressed by a mediator or a judge hearing a family case in a manner that allows the process to continue only if participants are willing, truly empowered, and self-determined in the procedure, and if it is possible to ensure the safety of such a process. Elaborating on the above, the question of what type of screening is required for domestic violence protection measures should be considered and integrated as part of mandatory family mediation processes. However, the Istanbul Convention leaves this question without a unanimous solution, and it is for the national legislation and the practices that apply therein to handle this matter.

2. A comparative study of mediation practices in Lithuania, Ukraine and Bulgaria in the context of domestic violence

2.1 Lithuania

Lithuania is among the Istanbul Convention signatories, but has not yet ratified it. Since the country's president signed a decree on the ratification of the Convention in 2018, the impact of the Convention on Lithuania's legal system has been the subject of debate within both politics and broader society (Miliuvienė, 2023). While there are no doubts regarding the Convention's aim of eliminating discrimination and violence from human relations by all possible means, it is still assumed that national legislative measures will be sufficient to achieve this aim in Lithuania. On 14 March 2023, the Constitutional Court of the Republic of Lithuania declared that the Convention is in compliance with the Constitution of the Republic of Lithuania. While this decision does not guarantee that the Convention will be ratified, this should serve to dispel the doubts that prevail in society and stimulate a positive political movement in the future.

In Lithuania, as in many countries that have followed a similar path, the question of the compliance of the Convention with the Constitution was not about denying that the issue of domestic violence requires effective combating, but rather questioning whether the definitions used in the Convention would not distort the existing concept of gender, infringe on citizens' beliefs and freedom of expression, and affect their right to educate their children in accordance with these beliefs. Thus, the effort to accomplish the ratification of the Istanbul Convention in synergy with other initiatives in the field of the protection of domestic violence victims has stimulated a debate among the public. This has certainly been an impetus for the upcoming

changes to the existing framework of family mediation by excluding mandatory mediation provisions in cases involving elements of domestic violence.

In addition, changes concerning the scope of mandatory mediation were influenced by the Concluding Observations of the Sixth Periodic Report on Lithuania, produced by the United Nations Committee on the Elimination of Discrimination against Women (2019). The document mentions that while the Committee welcomes legislative measures adopted by Lithuania regarding gender-based violence against women, including sexual violence and domestic violence, it is still concerned by the failure to ratify the Istanbul Convention and the amended version of the Mediation Law. The latter law envisages mandatory family mediation, putting women and girls who are victims of domestic and gender-based violence at risk of being subjected to secondary victimisation. The Committee urged Lithuania to prioritise prosecution over reconciliation or mediation in cases of domestic violence, and to evaluate the potential negative impact of new mediation legislation on both victims of domestic violence and the criminal justice system.

At the same time, mediation development initiatives in Lithuania have resulted in a well-structured and explicitly regulated mediation framework (Tvaronavičienė et al., 2022), which has become a strong basis for the further development of respected professional mediators. The process described above reached breaking point on 29 June 2017 with the adoption of the new Mediation Law, which: stipulated the clear institutional functions in the field of mediation administration; established the mediator profession; set the requirements for individuals seeking to become mediators; established the mediator's disciplinary liability; and provided the background for upcoming mandatory family mediation requirements. By 1 January 2020, out-of-court mediation had become a mandatory pre-litigation dispute resolution procedure for family disputes. The Lithuanian mandatory mediation model requires that, before going to court to resolve a family dispute, the plaintiff must offer the resolution of the dispute through mediation to the opposing party. The counterparty is given 14 days to accept the invitation or is deemed to have refused it. Therefore, the parties are not obliged to participate in mediation, but only to initiate it. A disputant who fails to comply with the mandatory mediation procedure imposed by law is deprived of the possibility of going to court to resolve the family dispute. Either by mutual agreement or at the initiative of one of the parties, a chosen mediator listed in the List of Mediators of the Republic of Lithuania may be applied to privately, with the costs borne by the applicant. Alternatively, the State Guaranteed Legal Aid Service may be applied to for the execution of state-funded mandatory mediation. Four hours of free mediation are available to all residents of Lithuania, with no exceptions.

As a result, from 2020, mandatory out-of-court mediation has been applied to all family disputes that are subject to litigation – i.e., disputes concerning: divorce in case of fault; the maintenance of children; the determination of children's places of residence or custody arrangements with a separated parent; as well as any other family disputes envisaged by the Code of Civil Procedure of the Republic of Lithuania (2002). In total, 2,751 family disputes were mediated in 2020[5] – 18.3% of all family cases brought to courts of first instance in Lithuania. However, as in many countries, the introduction of mandatory mediation provisions was met with mixed feelings, either gaining public support or facing strong opposition. Among the most intense debates in the public arena is that which surrounds the potential harm of mandatory mediation in cases where a potential victim of domestic violence seeks to settle a family dispute through the courts (STRATA, 2022). The main concern here lies in the emerging power imbalance between the couple affected by domestic violence, which makes mediation a no longer appropriate and potentially endangering dispute resolution process.

As a response to a robust debate – influenced, inter alia, by the above-mentioned concerns emerging in society regarding the ratification of the Istanbul Convention as a consequence of the CEDAW recommendations – the decision was made to exclude the application of mandatory mediation requirements when the parties to a family dispute are the victims of domestic violence. Thus, the Law on Amendments to Articles 20 and 21 of the Law on Mediation of the Republic of Lithuania No. X-1702 was adopted on 22 April 2021, providing an exception to initiating mediation for potential victims of domestic violence. Consequently, since the amendments came into force, the requirement to use mandatory mediation is no

[5] This data reflects only the number of cases of state-funded mandatory mediation, as no official data is available on private mediation.

longer applicable when a person who has experienced domestic violence and the other party is the alleged perpetrator seeks to bring the dispute to a court.

In order to minimise the potential negative impact on a potential victim of domestic violence of being confronted with their abuser during mediation proceedings, the obligation to initiate mandatory mediation is waived. It should be noted that the existing legal framework is not gender specific. However, this exemption can only be applied if the case meets at least 1 of the 4 necessary preconditions: the person who is the alleged perpetrator must already be the subject of a pre-trial investigation related to domestic violence; the case of domestic violence between those persons must already be pending at court; a conviction for domestic violence must already have been obtained against the potential defendant before the mandatory mediation obligation is raised; or there must be a certificate witnessing specialised comprehensive assistance to the person who may have suffered domestic violence issued by an entity authorised to provide such services. Where it is possible to prove one or more of the preceding conditions, the victim of domestic violence is not obliged to initiate mediation and can take the family dispute directly to court in accordance with the procedures laid down in the Civil Procedure Code. However, if a domestic violence victim voluntarily decides to initiate mediation, they have the right to obtain state-funded free mediation services. Therefore, only the victim, not the perpetrator, is exempt from the obligation to initiate mandatory mediation.

This shift in mediation regulation can be perceived in two ways. On the one hand, it could be viewed as an obstacle to the development of the legal mediation framework, as it reduces the opportunities for mediation to be carried out as often as possible. However, the ex-post evaluation report (STRATA, 2022) on the impact of the current legal framework for mandatory mediation in family disputes in Lithuania (Article 20(1) of the Mediation Law of the Republic of Lithuania) revealed that the application of this exception does not have a major impact on the overall use of mediation, and judges hearing family cases have observed that the number of cases brought before the court using this exception is decreasing. On the other hand, the legal regulation cannot be merely pragmatic whilst aiming to ensure that it does not undermine fundamental human rights. Therefore, the exemption from mandatory mediation for victims of domestic violence was not only 'a response by the legislator to the public debate, but also a way of protecting fundamental human rights' (STRATA, 2022).

It should be noted that in addition to categorical mandatory mediation, Lithuania also applies the discretionary mandatory mediation model. Article 231^1 (3) of the Code of Civil Procedure of the Republic of Lithuania (2002) provides for the possibility for the judge hearing a civil case, thus including a family case, to refer the parties to mediation on a mandatory basis (Article 231^1 (3) of a Code of Civil Procedure of the Republic of Lithuania). When a judge refers litigants to mandatory court mediation, no exceptions are envisaged, but the legislation instead obliges the judge to determine a high probability of an amicable settlement to the dispute being achieved. As in pre-trial mandatory mediation, either party may exercise the right to withdraw from the mediation at any time, and this does not prejudice the legal status of the disputants as the case is already pending before the court. Thus, the existence of domestic violence may influence whether the judge will exercise the discretion vested in them, but the law does not provide an explicit obligation to take this fact into consideration. However, from a systemic point of view, it would be appropriate to extend the scope of the exception beyond pre-trial mediation to judicial mediation. This would avoid the distinction between victims of domestic violence who have already entered into court proceedings and those who have not, and would allow them to decide whether they wish to engage in mediation regardless of the moment at which it becomes mandatory.

Therefore, the current legal regulation of mediation in Lithuania is in line with Article 48 of the Istanbul Convention, although the country has not yet ratified the latter document. A victim of domestic violence is not obliged to comply with the mandatory pre-litigation dispute resolution procedure, but may initiate pre-trial mediation voluntarily. However, this exemption provides only a partial solution to the problem under study. In Lithuania, 20% of citizens (24% of women and 14% of men) admit to having experienced domestic violence, and 59% of those who have experienced domestic violence have never sought help (Cibarauskienė et al., 2023). Thus, a significant number of domestic violence victims do not have the possibility to utilize this exception because they do not have the formal evidence necessary to prove that they have suffered from domestic violence. In addition, as mentioned in the previous chapter, victims do

not always identify themselves as such because of their lack of understanding of domestic violence, and in some cases they are even unwilling to acknowledge that they are suffering from domestic violence due to fear of repercussions from the perpetrator. In all cases – whether the domestic violence victim engages in mediation voluntarily, is not aware of the existence of the exception due to their lack of a legal representative, or is unable to use it because of the absence of evidence of domestic violence – the necessity for the mediator to use reliable domestic violence screening techniques to ensure that mediation is conducted safely is undisputed. However, the existing legal regulation of mediation in Lithuania neither specifies how the mediator should identify the elements of domestic violence nor envisages how mediation should be conducted to ensure the safety of the parties involved in mediation. Moreover, mediators in Lithuania are not obliged to specialize as family mediators or participate in specialized training to be able to conduct proper violence screening and later adapt the dynamics of mediation accordingly. In the absence of national or international guidelines regulating how mediation should be conducted in cases of domestic violence, the course of mediation is exclusively left to the competence and discretion of mediators. This leaves the parties with no guarantee that, in such cases, the mediation process will be conducted in a safe manner and will ensure the protection of domestic violence victims.

2.2. Ukraine

Ukraine's path towards the ratification of the Istanbul Convention was fairly long due to the lack of understanding of the norms of the Convention and the ambiguous attitude of society to the provisions contained therein. Ukraine signed the Convention on 7 November 2011, and ratified on 20 June 2022 (Law of Ukraine 'On Ratification of the Council of Europe Convention', 2022). The date of entry into force for the Convention in Ukraine was 1 November 2022. The country's ratification of the Convention complies with para. 22 of the Action Plan for the Implementation of the Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their member states, of the other part (2017). Ukraine recognized that the aims of the Convention are to protect women from all forms of violence and to prevent, prosecute and eliminate violence against women and domestic violence, which is also committed against men and children (both boys and girls).

Notwithstanding the above, the Istanbul Convention was ratified by Ukraine with certain caveats. In particular, Ukraine stated that it does not consider any of the provisions of the Convention as measures that oblige it to change the Constitution of Ukraine, the Family Code of Ukraine, or other laws of Ukraine on the institutions of marriage, family and adoption, nor may the Convention interfere with the right of parents to raise their children in accordance with their own beliefs. Ukraine stated that it will apply the Convention in accordance with the values, principles and norms defined by the Constitution of Ukraine – in particular, on the protection of human rights and fundamental freedoms, equal rights and opportunities for men and women, gender identity, the formation of responsible motherhood and fatherhood, family support and child protection.

According to the current Ukrainian legislation, mediation is a fully voluntary procedure, with no form of mandate or coercion envisaged for one or more parties to the process. Obtaining mediation can be achieved via payment, on a pro bono basis, or as a social service. Its delivery in cases of domestic violence at the request of the affected party, however, is considered not to violate the provisions of Article 48(1) of the Convention prohibiting mandatory alternative dispute resolution processes, including mediation and reconciliation. The Law of Ukraine 'On Mediation' does not define the legal framework and procedure for mediation in the context of domestic violence, instead merely emphasizing its voluntary nature, the general principles for its conduct, the status of the mediator, and other issues related to mediation. Having said that, the law does not define criteria for the non-mediation of disputes in the presence of domestic violence, and does not define a list of actions to be performed by the mediator in conflicts (or disputes) aggravated by violence in family relations.

In cases where mediation is conducted as a social service, however, the State Standard of the Social Service of Mediation (2016) specifies restrictions on mediation, highlighting that mediation is not applicable between a victim of domestic violence and the perpetrator. Legislatively defined actions for entities providing mediation services include the recognition of the perpetrator, establishing the facts of domestic violence through relevant state authorities, and documenting these facts in appropriate court decisions or

the decisions of relevant entities regarding measures for preventing and counteracting domestic violence. However, challenges arise for the mediator if allegations of domestic violence are revealed during the mediation process and there is no way to verify the accuracy of this information. Currently, recommendations for such situations exist only within mediator communities, highlighting the need for research and generalization to establish these practices at the legislative level.

Examples of the additional practices that are being deployed in the country in the field of mediation are developed by the Association of Family Mediators of Ukraine, which unites mediators who specialize and provide mediation services in resolving family conflicts (or disputes). The abovementioned association has developed training webinars and recommendations, including 'Domestic Violence. How to Act as a Family Mediator' (2023). As much as they are helpful, these measures do not represent part of the regulatory framework. According to the aforementioned document, the association recommends that mediators do not commence the mediation procedure if one of the parties to the dispute: 1) has been issued a restraining order against the offender by the authorized units of the police of Ukraine in the event of an immediate threat to the life or health of the victim in order to immediately stop domestic violence; 2) has been issued with a restraining order in court against the offender, which is aimed at temporarily restricting rights or imposing obligations on the person who committed domestic violence and is aimed at ensuring the safety of the victim; 3) the party has been referred by the court and is registered as an abuser whose behaviour is monitored by authorized units of the National Police of Ukraine in order to prevent repeated domestic violence; or 4) the party has been referred by the court and is undergoing a program for the offender aimed at changing their violent behaviour and developing a new model of behaviour in family relationships. In addition, the recommendations highlight the signs that will help the mediator identify domestic violence and make a decision on whether the conflict (or dispute) addressed by the parties is eligible for mediation. These signs include include: 1) the client indicates that domestic violence is taking place; 2) the client is generally concerned about the safety or life of themselves, their children, or other family members; 3) the client is worried that mediation may worsen their relationships or make them more dangerous; 4) the client does not feel that mediation is safe for them or their family; or 5) the mediator notes the presence of signs of domestic violence. If the mediator identifies signs of domestic violence, their further actions depend on the age of the client. If the client is a minor, the mediator is recommended to: 1) stop the mediation; 2) report in writing to the police; and 3) report to the Service for Children and Families, which is responsible for ensuring and observing the rights of the child. If the client is over 18 years of age and has legal capacity, the mediator is recommended to inform the client about support services and centres for victims of domestic violence, along with their right to file a written report of domestic violence to the police or court.

At the same time, mediators understand that in addition to domestic violence in families, family members may have separate legal conflicts (or disputes) – such as the division of marital property, alimony obligations in respect of children or another family member, deciding on how to participate in the upbringing and maintenance of a child, the deprivation of parental rights, etc. – in which the affected party may apply for family mediation services. In these cases, if the benefits of mediation and its results prevail over other means of resolving these disputes and the clients insist and wish to conduct or continue the procedure, then the mediator may decide to mediate.

In terms of the practical application of mediation in cases involving domestic violence, some mediators report that in many cases they learned about the existence of such violence after the procedure had begun, as the parties themselves could not always identify violence against themselves or against children or other family members (Zalar, 2019). At the same time, mediators noted that they worked in terms of cases, namely in terms of resolving specific legal issues that caused legal conflicts (or disputes), and did not address the issue of the reconciliation or restoration of relationships (Maan et al., 2020).

Notwithstanding the above, there is currently no statistical data in the country regarding the quantity or results of mediation in conflicts (or disputes) involving domestic violence, either at the state level or at the level of mediators' associations. Thus, in the event of the introduction of mandatory mediation in Ukraine, careful consideration should be given to determining its possible form and implementation procedure (such as procedural consultations or pre-mediation meetings with the parties) in order to avoid potential conflicts between national and international legislation on the issues examined in this article.

2.3. Bulgaria

Bulgaria signed the Istanbul Convention on 21 June 2016. However, its ratification was blocked in 2018 when 75 members of the Bulgarian Parliament launched an initiative to assess its constitutionality. The arguments raised claimed that the Convention aimed to encourage homosexuality, which in its turn may lead 'to calling into question the traditional values of the Bulgarian society' (Vassileva, 2018). In its ruling, dated 27 July 2018, the Constitutional Court ruled that the Convention contradicts the Constitution because it uses 'gender' as a social construct, which is against the binary understanding of 'sex' as determined by birth enshrined in the basic law. The above ultimately resulted in the discontinuation of the process of ratification of the Convention, effectively blocking any prospect of a future change in attitudes that would first necessitate another interpretation to be passed on by the Constitutional Court (Ilcheva, 2020).

At the same time, mediation practices in Bulgaria have been developing for the last 20 years, with their official up-take marked by the adoption of the Mediation Act of Bulgaria back in 2004. However, in spite of the 20 years of application of mediation, the percentage of cases being mediated has not soared. These moderate results, coupled with measures to counter the negative effects of the COVID-19 pandemic, led to amendments to the Mediation Act and the Civil Procedure Code of Bulgaria in February 2023. Pursuant to these amendments, the country has transitioned to a mandatory mediation model effective as of 1 July 2024 for a listed number of cases. This implies that the court shall oblige parties to conduct a first session in a mediation procedure after court proceedings have been initiated and the deadline for the submission of an answer to the statement of claims has expired. In this way, the plaintiff receives initial protection related to the filing of the statement of claim (e.g., the suspension of the limitation periods, the meeting of preclusive deadlines, etc.), while at the same time, at this point, the initial positions of the parties under the dispute are stated (in the statement of claim and in the answer). According to the newly introduced legislation, the court is expected in most cases to oblige the parties to take part in a first session in a mediation procedure before the first oral hearing of the case. In this way, if an agreement is reached, further costs and time for the hearing of the case will be saved. Family cases are not included in the list of cases which shall be referred to mediation on an obligatory basis, but are included in a different, stand-alone category, for which the judge reserves full discretion to oblige parties to attend the first information mediation sessions. After the court receives the plaintiff's claim concerning a family dispute[6] and the defendant's counterclaim, the parties will be referred to court-annexed mediation centres, where mediators with a legal education who have passed special training by the Supreme Judicial Council are in charge of the process. At the same time, Article 140a(4) of the Bulgarian Civil Procedure Code explicitly provides that if there is convincing evidence of violence against one of the parties or there is a risk to the life or health of a child or its best interests, the judge shall not refer parties to mediation. The quoted provision does not specify what is understood by 'convincing evidence' and the type of violence thereby depicted, hence leaving this question entirely open to the interpretation of the judiciary. At the same time, the newly introduced legislative provisions do not provide for any requirements for the specialization of the court mediators who would handle family matters, nor is there any need for them to follow a particular protocol for screening cases for domestic violence. This is coupled with the lack of guidance or protocols for the behaviour expected by mediators in cases where domestic violence concerns are raised in the course of the mediation procedure. Considering that the problem of domestic violence in Bulgaria is reaching alarming levels, with 1,400 official cases of domestic violence in 2023 alone, and 20 women having been killed as a result of domestic violence (Radio Bulgaria, 2024), the lack of coherent and unified policy measures in this field is alarming and may need to be reconsidered. This is especially valid when acknowledging that the ratification of the Istanbul Convention has been declared unconstitutional, and that the number of family cases expected to be coerced into attending a first mandatory mediation information session is high.

Even if it may be concluded that the existing legal regulation of mediation in Bulgaria is in line with Article 48 of the Istanbul Convention – despite the fact that the Constitutional Court declared the Convention

[6] Family disputes that may be subjected to mandatory first information sessions under Article 140a(2) of the Bulgarian Civil Procedure Code include divorce proceedings, custody disputes, visitation rights, place of residence of a child, child maintenance, measures concerning the personal relations between a child and their grandparents, along with the procedures for all interim measures that may be adopted as part of this process.

unconstitutional – the problem of how to effectively treat cases of domestic violence during mediation remains.

2.4. The advantages and disadvantages of the approaches to domestic violence in mediation deployed in Lithuania, Ukraine and Bulgaria

2.4.1. The advantages of the approaches undertaken in Lithuania, Ukraine and Bulgaria with respect to domestic violence in the context of mediation proceedings

It may be concluded that domestic violence concerns are deemed to be an exception for waiving the requirement for parties to attend a first mandatory mediation session or initiate the mediation process. This is based on the analysis of both the Lithuanian and Bulgarian mandatory mediation models, which provide victims of violence with the chance to avoid the need to take part in the mediation process alongside the perpetrator of the act of violence. This can occur either at the victim's own initiative, as in the Lithuanian model, or at the discretion of the judge, as is the case in Bulgaria, where the judge may refrain from ordering the disputants into mediation in case of evidence of domestic violence. Through effecting such exceptions, victims are afforded a higher level of protection by not being coerced into a process that may endanger their physical or emotional well-being. While such an approach may be deemed positive, it also shares some downsides, as the existing legal framework in both countries does not foresee a time limit for using domestic violence records as a waiver for this obligation. This may lead to a situation where domestic violence appeared much earlier and does not have any relevance to the current divorce or other family dispute for which mandatory mediation would otherwise apply. Thus, even though the fact of domestic violence does not lead to a power imbalance between the parties, the person who previously experienced it still acquires an advantage and is exempted from the mandatory use of mediation. Nevertheless, the existence of such an exemption does not deprive the parties of the possibility to enter mediation voluntarily. In Lithuania, for example, a victim of domestic violence is not subject to mandatory mediation, but if a victim chooses to do so voluntarily, they are able to access state-funded mediation. A similar approach has been adopted in Bulgaria, where a judge would withhold from referring parties to mandatory family mediation if the victim has submitted sufficient evidence to substantiate pre-existing violence hindering the conduct of mediation. Thus, in all three countries, the existing legal framework, among other things, empowers victims of violence to decide and select the nature of dispute resolution between them and the perpetrator, according to their needs and best interests.

The mediation practices of Lithuania, Ukraine and Bulgaria also enable the continuation of mediation even if the fact or concern of previous or ongoing domestic violence between the parties becomes apparent during the process. This is achieved by focusing the attention of the disputants on solutions to the other problems that they face in their relationship, while ensuring that the procedure does not aim to decide whether or not an act of violence occurred and what sanctions should be imposed in this respect. The analysis of the existing mediation practices established that none of these countries have introduced an explicit requirement to discontinue the mediation process if an act of domestic violence is revealed during the process. Through such approaches, i.e., by not explicitly providing a requirement to cease the mediation procedure, the countries are *de facto* tacitly supporting the notion that mediation may still be an effective way to resolve other topics of discussions beyond the act of violence that remain outstanding between the participants. This leads to the ultimate conclusion that mediation may still offer participants viable solutions to the consequences of the termination of their relationship, even if there are concerns of violence which do not endanger parties' self-determination.

2.4.2. The disadvantages of the approaches undertaken in Lithuania, Ukraine and Bulgaria with respect to domestic violence in the context of mediation proceedings

While all three of the countries under analysis strongly support family mediation, none of the three have stipulated additional requirements towards practicing family mediators who may encounter a history of violence between partners, especially in the course of mandatory mediation. The lack of such further requirements regarding the expertise and additional qualifications that family mediators should hold, particularly with respect to screening for and recognizing underlying acts of violence, could endanger

parties and fails to ensure that the mediation process is designed in a manner that ensures both parties' equal treatment and self-determination.

Moreover, this raises concerns regarding the preparation of the individual mediator to mediate in cases with elements of domestic violence. The principle of voluntariness in mediation implies, among other aspects, the right of the mediator to decide which cases to mediate. Thus, considering that cases involving domestic violence may fall within the scope of mandatory mediation, in the absence of clear guidelines on how to identify them, an ethical dilemma arises as to whether the mediator, upon becoming aware of such a fact during the process of mediation, has the right to refuse to mediate such a case. Article 1 of the European Code of Conduct for Mediators (2004) obliges mediators to evaluate their competence and knowledge before engaging in a particular mediation process. Thus, in the absence of specific training, practicing mediators may not all be willing and able to mediate cases involving domestic violence. Moreover, their withdrawal from mediation when this fact becomes evident during the mediation process only leaves the parties confused, and certainly discredits the mediation process and reduces trust in it. This is particularly relevant in the context of domestic violence. If a victim of domestic violence has decided to engage in mediation voluntarily, they will naturally expect that the mediator to whom they refer, or who is appointed by an authorised body, will have the relevant competences and will be able to properly organise and conduct the mediation process, considering the potential risks and ensuring the safety of it.

Another issue to be overcome is the lack of a single methodology regulating the approach that should be taken in cases where domestic violence is revealed as part of the mediation process. Neither Lithuania, Ukraine nor Bulgaria hold a single methodology or provide at least a minimal amount of guidance on how the mediator should proceed or how the dynamics of mediation should change after the fact of domestic violence has become apparent during mediation. This effectively leads to a lack of clarity and standards on the expected conduct of mediators, and ultimately results in the development of individual practices that are scattered in their nature and may not be inclusive of the best practices available in the field. Mediators, like other professionals, are often convinced that domestic violence is not a significant issue in the cases they mediate. However, the experience of health professions and psychologists has revealed that up to 39% of such cases are identified when beginning to use screening tools designed to identify domestic violence (Holtzworth-Munroe et al., 2010). Mediators, even those reluctant or unwilling to mediate cases featuring elements of domestic violence, should screen for signs of domestic violence between the parties in order to be able to make informed decisions and adjust the mediation process accordingly (Rossi et al., 2024). Several screening protocols for identifying domestic violence are applied in practice. Some of these protocols, such as the Mediator's Assessment of Safety Issues and Concerns (MASIC), are designed to be conducted as an interview, are based on years of practice in working with family disputants who have experienced domestic violence, are freely available, and do not require special training for mediators (Rossi et al., 2024). Another example is the Domestic Violence Evaluation (DOVE) method, a 19-item instrument designed to assess and manage the risk of domestic violence during and following participation in divorce mediation (Ellis & Stuckless, 2006). It is considered that increasing the safety of the victim must be the primary purpose and outcome of any screening, especially if the parties are not represented by lawyers. It is therefore essential to follow the practice of other countries in using screening tools tailored for family mediators to enable mediators facing such cases to be capable of making timely and proper decisions on how to adjust the mediation process to the needs of the parties involved.

The severity of this problem is further highlighted by the lack of domestic violence screening mechanisms in family mediation in Europe. This is especially relevant for mandatory mediation, where the victim may not have revealed themselves. Unlike in Europe, the practice of screening for domestic violence in divorce mediation processes is has been widely known and implemented in the United States of America (US) and Australia since the 1990s (Thoennes et al., 1995; Clerck, 2017). In 1993, a survey of 200 mediation programs was conducted in the US, which concluded that as many as 80% of programs were reported to have screened for domestic violence (Thoennes et al., 1995). These results were confirmed in 2007 by a survey on 94 mediation programs in community centres in the US and Canada, which established that 69% of these centres utilized some sort of domestic violence screening (Clemants & Gross, 2007). In Australia, screening is a common practice in most states, but detection rates vary (Clerck, 2017). Conversely to the US, Canada and Australia, the mediation frameworks in Lithuania, Ukraine and Bulgaria lack unanimity in their approaches to initial and ongoing screening tools and mechanisms that should be deployed by family

mediators. This leads to differences in the treatment that victims of violence receive during mediation, and effectively contributes to the limited possibility of identifying victims during mediation. This problem is particularly important in the context of mandatory mediation models, where couples with a hidden history of domestic violence may be coerced into participating in a procedure without the mediator being able to identify the signals that a potential victim is transmitting, thus preventing the mediator from being able to truly afford victims adequate measures of support and self-determination. Consequently, without clear guidelines on how to interact with victims of domestic violence, the mediation process may become a process of secondary victimization.

One significant challenge in the context of the mediation of domestic violence cases is the potential misuse of the exemption clause for mandatory family mediation by individuals seeking to manipulate the legal process. This misuse can undermine the fairness of divorce proceedings and the integrity of the legal system, as it is often used as a strategy to undermine the reputation of the opponent. In an ex post evaluation report on the impact of the current legal framework for mandatory mediation in family disputes in Lithuania, a quarter of the lawyers interviewed noted that the introduction of the domestic violence exception created an environment for the manipulation of the mandatory mediation process. If a disputing party is seeking to settle a dispute as soon as possible, the current legislation allows the parties to formally invoke the exception. Later on, when it becomes apparent that the allegation of violence has not been proven, the parties are left with no recourse to mandatory mediation, and lose the opportunity to attempt to resolve the dispute amicably (STRATA, 2022). The legal framework on domestic violence is aimed at protecting and defending victims of violence, but in some cases it can also enable individuals to manipulate the situation and seek to initiate a pre-trial investigation, the findings of which may only later reveal that the allegations were not substantiated. Thus, besides undermining the presumption of the innocence of the person accused of committing domestic violence, even if the charges are later dismissed, the latter is deprived of the right to use the pre-court dispute resolution procedure, contributing to additional costs and depriving them of the opportunity to reach an amicable settlement. However, if the allegations of violence are not proven in court, the presiding judge may offer the parties the possibility to use court mediation, which is also free of charge for the parties, or may refer the parties to court mediation on a mandatory basis. The judge may also apply procedural sanctions, such as by derogating from the standard rule on the allocation of costs.

Family judges who took part in the aforementioned study highlighted that domestic violence is particularly common in divorce cases. Most of the respondents noted that violence, as part of a future dispute resolution strategy, tends to be recorded as a starting point during the planning of the divorce or during the proceedings, and is used as a strategic instrument to undermine the other person's reputation in order to better serve one's own interests. If allegations of violence are not proven, then the parties are deprived of the opportunity to settle the dispute amicably and save time and money (STRATA, 2022). The existing legal framework should protect victims of domestic violence while allowing them to decide whether and when to engage in mediation voluntarily, but the problem needs to be tackled in a holistic way that minimizes the possibility of manipulation by dishonest parties seeking to escape the mediation process, thereby depriving the other party of all of the advantages of mediation and the possibility of evading litigation.

It is important to note that the exception to mandatory mediation in cases of domestic violence does not automatically ensure its applicability in all situations. This is primarily because statistical records of such cases do not fully capture the reality of all instances of domestic violence. Victims often avoid, are afraid of, or are unable to approach the legal authorities or other institutions providing assistance to victims of violence, and as a consequence they do not possess evidence and thus lose the possibility of utilizing the exemption. This issue highlights concerns of discrepancies in legal status and the awareness of the existence of the exemption. Firstly, the legal status of an individual possessing evidence of domestic violence differs from that of a person without such evidence, despite the fact that the impact and consequences of violence are often the same for both individuals. Secondly, victims of domestic violence are not always aware of the existence of this exception. If a victim has legal representation, their lawyer will likely inform them of the exception, and together they will decide whether it is useful to apply it or whether they would rather attempt mediation and try to resolve the dispute amicably. However, in the absence of legal counsel, the prior screening for violence by the mediator or mediation service administrator becomes crucial in determining to what extent eligible individuals can benefit from the exemption.

These issues underscore the need for better clarity and communication regarding what constitutes a case of domestic violence and the existence of exemptions, in order to ensure that all victims can access the protection they need. Overall, however, the introduction of the exception to mediation in case of domestic violence is seen as a timely and positive measure by judges, lawyers, mediators and those involved in mandatory mediation (STRATA, 2022). The experience of domestic violence leads to the higher than usual escalation of the conflict between parties, greater confrontation between them, and more significant power imbalance. Thus, the rejection of any coercive element means that a survivor of domestic violence is not forced to interact with the perpetrator, thereby preventing re-victimisation and secondary victimisation, and preserving their psychological well-being. Moreover, such a legal framework creates the stigmatisation of the victims of domestic violence, as they are assumed to be weaker, unable to express or defend their interests properly, and *de facto* require protection, while the perpetrator remains aggressive, manipulative, and dangerous to the victim.

Conclusions

The explicit obligation of the Istanbul Convention signatories to take immediate action to prohibit mandatory mediation in cases where concerns related to domestic violence are raised put to an end the debate as to whether mandatory out-of-court approaches should be permitted in cases with a history of domestic violence. However, in the context of the growing trend towards adopting various mandatory mediation models, particularly in the field of family conflicts, the question of how to balance such public policy goals as the protection of domestic violence victims and the pursuit of peaceful dispute resolution with the possibility of maximising the benefits of mediation remains open. This article has sought to analyze the national legislative framework of different countries which have taken a diverse stance with respect to the Istanbul Convention – i.e., have either ratified it or not – while at the same time applying various forms of mandatory mediation. The analysis showed that the problem of domestic violence and its impact on mandatory mediation lacks uniform treatment, leading to differences in the perception of domestic violence victims who may be coerced into participating in mediation alongside the perpetrator. One way to tackle the above issue is the adoption of an exception in the mandatory mediation procedure if evidence of previous violence is identified. To date, the approaches adopted at the national level in the three countries under study lack synchronicity, and should be reconsidered in light of the fact that the EU has ratified the Istanbul Convention, which prohibits mandatory mediation.

This research allowed the advantages of the current situation to be identified, as well as the challenges posed by Article 48 of the Istanbul Convention. Based on the research, the benefits of the models that were studied include providing for the element of domestic violence as a factor that allows for an exception to otherwise mandatory family mediation. This creates an opportunity for victims of domestic violence to engage in mediation voluntarily only if they trust in a process that ensures sufficient safety measures and the self-determination of parties. Such an approach offers genuine victims of violence protection by not forcing them into a potentially harmful mediation process with their abuser, while also allowing them to choose mediation if they feel sufficiently empowered to be on equal footing with the abusive partner.

The disadvantages that were identified include the absence of screening mechanisms and a unified methodology for addressing cases of domestic violence within mediation, which can result in victims being coerced into mediation without appropriate support and safety measures. This is further coupled with the notable lack of additional qualifications and multidisciplinary expertise which is required for mediators tasked with mandatory family mediation. Separately, the mandatory mediation exemption clause can be misused as a strategy in divorce proceedings to manipulate the legal process and undermine the opponent's reputation, which can lead to additional costs and missed opportunities for an amicable settlement. The criteria for a case of domestic violence to qualify as an exception are not always clear, and may vary according to the individual case. Moreover, not all instances are statistically recorded, and victims may avoid reporting domestic violence or lack evidence thereof, thereby losing the possibility to apply for exemption. This discrepancy creates inequality between the legal statuses of those with and without evidence, despite the similar impacts of violence on victims. At the same time, domestic violence victims may not always be aware of the exemption from mandatory mediation. Legal representatives can inform victims, but in the absence of a lawyer, prior screening by mediators or service administrators is crucial in order to ensure that eligible individuals can benefit from the exemption.

This analysis led to the conclusion that there is a substantial gap between the different treatments of domestic violence cases in mediation across the European countries under study. This necessitates additional regulation, particularly in the context of mandatory mediation models in the presence of indicators of domestic violence. The compliance of the existing legal framework with Article 48 of the Istanbul Convention can be considered as an appropriate example and a significant first step towards ensuring the protection of victims of domestic violence in the context of mediation. However, beyond the advantages identified in this paper, this legislative setting is not sufficient to address the challenges that have emerged. In light of the pros and cons discussed above, it is advisable for the EU to follow the best practices of other countries in the application of screening tools developed specifically for mediation. It would also be pertinent to consider the adoption of additional guidance, standards or protocols that govern the peculiarities of cases of this nature, which would enable mediators to identify domestic violence and adjust the mediation process in the context of different forms of domestic violence, particularly in relation to mandatory mediation.

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