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ESTABLISHING THE OBLIGATIONS OF THE OCCUPIER CONCERNING THE EXPLOITATION OF NATURAL RESOURCES IN TERRITORIES UNDER OCCUPATION: BETWEEN LEX LATA AND LEX FERENDA

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Abstract. This article examines the legal regulation of the exploitation of natural resources in occupied territories to establish the obligations of the occupier. Consequently, the concept of usufruct as a cornerstone of this legal regime is analyzed considering its historical roots and civil law origins. The application of usufruct is also explored in various domains of international law. Examining usufruct in relation to the principles of the law of occupation clarifies the normative background that defines the obligations of the occupying power. The author concludes that the law of occupation should be updated to address the needs of local populations living under occupation and their right to development.

Keywords: occupation, natural resources, usufruct, sustainable use, protection of the environment.

Introduction

Natural resources have always been one of the main reasons for armed conflicts, both international and internal. Their potential exploitation in disputed territories often motivates states and other actors to commence military actions in order to occupy these areas. Beyond being a trigger for conflict, natural resources often serve as fuel for it, as they provide parties with the means to cover their military expenses. It has been suggested that natural resources were a significant factor in the 2022 Russian invasion of Ukraine, and a large portion of Ukraine's key natural resources is currently under the control of Russia in the occupied Ukrainian territories (Evans, 2022; Theise, 2023).

However, international law establishes limits on the actions of belligerents, particularly occupying powers, during armed conflicts. As set out in Art. 55 of the IV Hague Convention respecting the Laws and Customs of War on Land of 1907 (hereinafter the Hague Regulations), the occupying power is not entitled to explore and exploit resources in its own interests as if they were its property, but can do so only as an administrator and a usufructuary. However, the legal framework governing usufruct under international law is often ambiguous and outdated, which can lead to the abuse of power by the occupier and, in effect, the plundering of resources from the territory under its control.

Having been adopted at the beginning of the 20th century, the provisions of the Hague Regulations that are still considered to be a basis for the law of occupation do not correspond to the realities of modern conflict and do not satisfy the needs of the parties involved, namely the ousted government, the occupying power, and the local population living under occupation.

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The interests of the latter should be a paramount foundation for the occupier's decisions inasmuch as, in accordance with Art. 43 of the Hague Regulations, it is obliged to ensure public order and safety or even civil life in the territory under occupation. However, this principle, directed at the protection of the interests of the ousted government, not only prevents the occupier from the over-exploitation of the natural resources of the territory, but also impedes their development as a consequence of lack of investment. This is especially relevant in cases of prolonged occupation. Thus, the modern realities of armed conflict and the increased need for the protection of human rights in territories under occupation require the modification of the law of occupation, and in particular the legal regime of the exploitation of occupied territories' natural resources, to establish a list of the occupying power's obligations concerning these activities and to protect the interests of the displaced government and the local population. In this regard, the concept of usufruct must be better defined and interpreted in the context of modern international law, stressing the need for human rights and environmental protection.

In light of the above, this paper is dedicated to the analysis of the concept of usufruct in international law based on the exploration of its civil law origins and historical evolution. Several practical issues relate to the exploitation of newly discovered and non-renewable natural resources.

The study is based on doctrinal legal research, which has prepared the ground for the establishment of the occupier's rights and duties related to the administration of the occupied territory. Taking into account the lack of an international normative framework regarding the usufructuary status of the latter, the comparative method is applied so as to enrich and particularize the above rules. Guided by teleological reasoning, which suggests that such a framework shall be developed in order to protect the interests of the local population, the article provides a comprehensive analysis of the occupier's obligations regarding the exploitation of natural resources from the perspectives of *lex lata* and *lex ferenda*.

The paper is structured as follows. Section 1 offers an overview of the legal regime of the exploitation of natural resources under occupation according to the current state of its legal regulation by international humanitarian law (hereinafter IHL). Since usufruct is the cornerstone of this regime, Section 2 focuses on this concept. It begins with an examination of the historical evolution and civil law origins of usufruct, followed by an analysis of its application in the domestic legal orders of several states and some areas of international law beyond the framework of humanitarian law in order to establish the general characteristics of this legal instrument relevant to the law of occupation. Consequently, the principles outlined serve as a foundation for establishing the underlying precepts that should guide the legal regulation of usufruct in IHL. Finally, Section 3 aims to clarify the legal obligations of the occupying power as a usufructuary of the natural resources of the territory it controls under the law of occupation in line with the above-mentioned principles and characteristics. The paper concludes with some final remarks.

1. The legal regime of the exploitation of natural resources under occupation

Before proceeding with the analysis of the legal regime of natural resource exploitation under the law of occupation, it is worth considering general rules regarding property, assets and resources in territories under occupation.

Obviously, the rules for public and private property differ significantly. Art. 46 of the Hague Regulations prohibits the confiscation of private property by an occupying power. It also mandates respect for "family honour and rights, the lives of persons, and private property, as well as religious convictions and practices." Unfortunately, these norms are not absolute and may be subject to certain restrictions. For example, specific private property, such as means of communication and transportation, may be used for military purposes (Art. 53(1) of the Hague Regulations). However, after hostilities have been suspended, such property must be restored and compensated for (Art. 53(2) of the Hague Regulations). The same restriction is imposed on the requisition of goods and services for the needs of the occupying army, which can only be carried out "in proportion to the resources of the occupied region." Additionally, the occupying power is obligated to pay for these requisitions in cash as soon as possible (Art. 52 of the Hague Regulations). The scope and purposes of requisitions are framed by IHL – for instance, according to Art. 55 of the IV Geneva Convention, food and medical supplies may be requisitioned only if the needs of the civilian population have been met and exclusively for the use of the

occupation forces and administration personnel themselves, which excludes the possibility of their exportation and use by persons different from the personnel of the occupying authority.

The latter is also empowered to collect contributions (Art. 51 of the Hague Regulations) and taxes "as far as is possible, in accordance with the rules of assessment and incidence in force" in order to cover the expenses of the administration of the occupied territory (Art. 48 of the Hague Regulations). It is not fully established whether the occupying power can impose new taxes. However, the Israeli Court of Justice in *Abu 'Aita et al v. Commander of the Judea and Samaria Region et al.* (1983) recognized such a possibility. Military necessity can explain some other limitations imposed on private property under occupation; however, it is granted the maximum possible level of protection. At the same time, public property, to which natural resources mostly belong, may fall under more restrictions.

In conformity with Art. 53 of the Hague Regulations, the occupier is entitled to:

> take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

These rules can be considered in conjunction with the provisions of Art. 55, which sets out that:

> the occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.

Therefore, as stressed by Benvenisti (2009, para. 30), the utilization of public property by an occupier is constrained by two specific conditions. The first condition relates to the purpose of use, while the second establishes the status of the occupying power as administrator and usufructuary.

Regarding the purposes of public property utilization, occupation law stresses that it cannot be used in the interests of the occupier – e.g., for the needs of its domestic economy – but must be used exclusively to meet its security needs and to cover administration costs. It should also promote the needs of the local population (Institut de Droit International, 2003). For example, the occupants of Iraq in 2003 informed the President of the UN Security Council that they would "act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people" (Letter of the UK and US Representatives to the UN, 2003), even though, according to some experts, it would have amounted to pillage (Saadoun, 2017), which is directly prohibited by Art. 47 of the Hague Regulations and Art. 33 of the IV Geneva Convention.

Another condition establishing limits on the occupier's rights concerns public immovable property. As Benvenisti (2009) stated, "the usufructuary principle was interpreted as forbidding wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation" (para. 30). To better understand the occupier's usufructuary status, it should be stated that it is not the owner of immovable public property in the occupied territory, but only its temporary user and administrator. Nevertheless, it is entitled to make use of it, subject to the condition of safeguarding its capital value, in accordance with the law of usufruct.

Even though natural resources are not directly mentioned in the text of Art. 55 of the Hague Regulations, which cites "public buildings, real estate, forests, and agricultural estates," according to the majority of commentators they fall under its regulation (D'Aspremont, 2013, p. 4; Azarova, 2012; Benvenisti, 2009; Dam de Jong, 2015, p. 20). Their classification as movable or immovable property provokes a discussion, but as suggested by some (e.g., Saul, 2015), it seems reasonable to consider non-extracted natural resources (so-called *in situ* resources) as immovable property, while those resources that have already been processed as movable property (pp. 24–25). The case law also supports this approach, having considered crude oil to be immovable property (*N. V. De Bataafsche Petroleum Maatschappli & Ors. v. The War Damage Commission*, 1956, p. 809).

Thus, usufruct constitutes a basis for the international legal regime of the exploitation of occupied territories' natural resources. As a consequence, the first condition regarding the purposes of public property exploitation is equally valid for the utilization of natural resources. As Azarova (2012) emphasizes,

> an Occupying Power is required to safeguard the natural resources of the occupied territory, and permitted to exploit them only for the benefit of the local population, and exceptionally for the purpose of covering reasonable expenses of its military administration.

However, having been established at the beginning of the 20th century, the usufruct rule is clearly outdated and requires amendments that respect the political and economic realities of the present time. In this context, the rights and duties of the occupying power regarding the natural resources of territories under occupation must be better framed and defined.

As aforementioned, these rights stem from the provisions of Art. 55 of the Hague Regulations. According to legal scholarship, this rule is customary (D'Aspremont, 2013, p. 4), and is thus binding for all states. As D'Aspremont (2013) observed, there is a consensus among scholars about the applicability of Art. 55 of the Hague Regulations to the exploitation of natural resources in times of conflict, but it is emphasized that controversies have emerged in connection with the scarce content of its provisions that do not mention mines, oil, gas, or water, which are among those resources that are at the heart of contemporary conflicts (p. 4).

At the same time, Art. 43 of the Hague Regulations gives the occupying state the legitimate power to "take all the measures to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Moreover, the original French text of the convention contains a broader notion of "*l'ordre et la vie publics*" ("public order and civil life"), which potentially requires more efforts from the occupier in order to achieve this result (Sassoli, 2005, pp. 662–663). In truth, this can entail the need for the occupier to use the natural resources of the territory, but only in the interests of the local population. Benvenisti (2009) asserted that the occupying power is not only authorized, but obliged to assume control over natural resources, protect them against over-use and pollution, and allocate them equitably and reasonably among the various domestic users. He also suggested that "the utilization of these resources according to the above-mentioned guidelines would not constitute a violation of the principle of permanent sovereignty over its natural resources" (para. 31). This position was also taken by the ICJ in *Armed Activities on the Territory of the Congo* (2005, para. 244).

Despite this, according to D'Aspremont (2013), "the platform offered by IHL to develop a regulatory framework for natural resources brigandage has quickly shown its limits" (p. 8). It is difficult to disagree with this statement when considering the provisions of Art. 55 and 43, which, while limiting the authority of the occupier, also grant it discretion in decisions regarding the exploitation of public property.

The above provisions gave Longobardo (2016) reason to conclude that "the occupying power is not absolutely precluded from exploiting natural resources in the occupied territory. Rather, it may lawfully sustain its own occupation thanks to the exploitation of natural resources located in the occupied territory" (p. 255). However, this topic raises several practical questions, including: the understanding of the concept of usufruct; the classification of natural resources as movable or immovable property; the duty to safeguard capital, particularly concerning the exploitation of new oil wells; the legal purposes of natural resource exploitation and the mechanisms for verifying compliance; and the modification of the regulatory framework in cases of prolonged occupation. In the following sections, an attempt will be made to address some of these questions.

2. The concept of usufruct under international law

Due to the fact that usufruct as an international law concept has obviously been borrowed from national law, it seems that answers to the above-mentioned questions related to the status of the occupant as a usufructuary should also be sought from within the latter. Therefore, this study will encompass a brief overview of the historical roots of usufruct and its legal regulation under several jurisdictions pertaining mostly to the civil law system, based on a combination of the historical and comparative analytical approaches. Within the framework

of this paper, the focus will only be on the most relevant legal rules governing the relations concerning usufruct in these states.

2.1. Exploring the origins and domestic law experience of usufruct

In order to analyze the concept of usufruct in international law it seems reasonable to explore its origins, which can be traced back to Roman law. Here and in successive legal systems, usufruct had clear civil law characteristics, which can briefly be described through a few legal maxims: *iura in re aliena* (real rights on another's property), *ius rebus alienis utendi et fruendi, salva rerum substantia* (right to use and enjoy another's property, maintaining its substance), and *rei mutatione interit usufructus* (the total change of the asset extinguishes the usufruct).

Notwithstanding its long history, "the conception of usufruct has never yet been explained adequately" and "the *possessio* of the usufructuary has not yet been adequately determined" (Kopel, 1946, p. 159).

According to the Law Dictionary (n.d.), usufruct in civil law can be defined as:

> the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing.

Thus, one of the core duties of the usufructuary is so-called *salva rerum substantia.*

In Roman law-based legal systems, usufruct is understood as the temporary right to use and enjoy of the property of another person, but without changing the character of the property, and the Latin term *usufructus* can be literally translated as "use and enjoyment." This shows that usufruct lacks one of the three necessary elements constituting property rights – namely *abusus*, i.e., the right to encumber or transfer a title. However, this provides the usufructuary with the other two entitlements, namely *usus*, which means the right to use the property, and *fructus*, which means the right to receive its fruits (Segal & Whinston, 2013). Looking ahead, it should be stressed that the exact content of the latter is of great interest for the purposes of the law of occupation, because it can clarify some aspects of the exploitation of natural resources under occupation such as the utilization of non-renewable and newly found resources, e.g., new oil wells.

In this regard, it is interesting that in civil law countries, where usufruct covers both movables and immovables (McClean, 1963, p. 654), two types of usufruct can be distinguished: perfect usufruct and imperfect usufruct. The former is used only for those things that can be exploited without changes in their substance, e.g., land, buildings, or movable property, even though changes that happen naturally over time are acceptable. Imperfect (or quasi-) usufruct relates to property that is "consumable or expendable, such as money, agricultural products, and the like, which would be of no advantage to the usufructuary if he could not consume them, expend them, or change their substance" (Segal & Whinston, 2013). Thus, usufruct under civil law can potentially give the right to a usufructuary to exploit natural resources that are consumable.

This type of usufruct is recognized in French, Spanish, French Quebec and South African law, which also establishes an additional requirement of returning others things "of like quality and quantity or their value at the end of the usufruct" (Art. 482 of the Civil Code of Spain; Art. 587 of the Civil Code of France; McClean 1963, p. 652). However, normally, usufructuaries "may not, for example, mine or quarry, where this was a normal method of exploitation." At the same time, in South Africa they have no right to minerals produced even in existing mines, so their value must be made good after the termination of the usufruct (McClean, 1963, p. 663). Interestingly, by way of exception, trees may be cut down (p. 663).

Under Spanish civil law, "usufruct gives the right to enjoy another's property with the obligation to preserve its form and substance, unless the title of its constitution or the law authorizes otherwise" (Art. 476 of the Civil Code of Spain). This provision establishes the usufructuary's obligation to conserve not only the substance of the property, which is often related to the value of the property, but also its form, which is connected to its economic destination (Castan Tobeñas, 1978, p. 22). Notably, the last approach is adopted in the Civil Code of

Italy (Art. 981), meaning that the usufruct can derive from the thing any utility that it can provide, subject to the limits established by law.

As a default rule, the Civil Code of Spain excludes the exploitation of mines from the rights of the usufructuary. According to Art. 476,

> the usufructuary of a property in which there are mines does not have the rights to the products of those reported, granted or being worked at the beginning of the usufruct, unless they are expressly granted to him in the constitutive title of the latter, or it is universal. (para. 1)

This means the usufructuary has the right to receive profits derived from the exploitation of extracted minerals, but no right to the minerals themselves (Enciclopedia juridica, n.d.).

However, para. 2 of this article introduces an exception establishing that the usufructuary may extract stones, lime, and plaster from quarries for repairs or works that they are obliged to do or that are necessary. Moreover, Art. 477 of the Civil Code of Spain provides that in the legal usufruct of a widowed spouse, the usufructuary may exploit the reported, granted or working mines existing on the property, taking as their own half of the profits resulting after the deduction of expenses, of which they will pay half with the owner.

The above provisions suggest that mines usufruct as a special type of usufruct is not directly allowed in Spain, because the provisions establish "rather usufruct of a property in which there are mines whose concession has been obtained by the same owner," leaving mines usufruct without special legal regulation that modern commentators find anachronistic (Aznar Domingo, n.d.). This can be explained by the fact that case-law prior to codification (1889) considered mines' products (mineral resources), which are not reproducible, not to be fruits, and therefore no usufruct could be established on them. This position has been changed recently, which requires modifications in usufruct law (Aznar Domingo, n.d.). Some commentators stress that although minerals are not fruits in the strict sense, they can be assimilated to them for the purposes of usufruct (McCleary, 1960, p. 776).

According to other comments, in accordance with their economic destination, minerals can be supposed to be separate from mines, which does not alter the substance of the mine (Diez-Picazo y Ponce De León, 1954, p. 374). Clearly, this activity entails obligations for the explorer to adequately handle the extraction of the minerals, complying with the regulations imposed by the law, with the aim of safeguarding respective social and geographical areas (Haro Bocanegra, 2020, pp. 281–282).

Now, Spanish doctrine accepts the constitution of usufruct over mines, even though Spanish civil regulation remains confusing (Haro Bocanegra, 2020, p. 282). As in many other countries, it requires administrative authorization. As for the usufruct regime, it is suggested that it should be deduced from the above articles 476 and 477, that is to say that the beneficiary of the encumbrance will only take half of the net profits that result. As stated by Aznar Domingo (n.d.), "the legislator appreciated here the fact that mines are exhaustible and that the material obtained is only partly a fruit, but is also part of the substance of the mine."

In Spanish legislation, the question of the possibility of exploiting newly-found natural resources remains unanswered, while it is completely prohibited in the Civil Code of France, which sets out that the usufructuary:

> enjoys, in the same manner as the owner, the mines and quarries that are in operation at the opening of the usufruct; … the usufructuary may only enjoy it after having obtained permission from the President of the Republic. He has no right to mines and quarries not yet opened, nor to peat bogs whose exploitation has not yet begun, nor to the treasure that could be discovered during the duration of the usufruct. (Art. 598)

A similar approach is adopted in Art. 987 of the Civil Code of Italy, in conformity with which, while mines belong to the State's assets and can be exploited only under its concession, "the usufructuary enjoys the quarries and peat bogs already opened and in operation at the beginning of the usufruct. He is not entitled to open others without the consent of the owner." The same can be found in Art. 552 of the old version of the Louisiana Civil

Code of 1870 (McCleary, 1960, p. 776). For the moment, these activities fall under regulation of the US Mineral Code of 1976.

In more recent national legal acts, the tendency to provide the usufructuary with the right to exploit mines can be observed. Thus, the Mining Code of Argentina of 1997, which regulates the usufruct of mines, specifically states in Art. 338 that "the usufructuary has the right to use the products and benefits of the mine, just as the owner can use them." Meanwhile, the Chilean Civil Code, as amended up to 2000, states that:

> if the usufructuary property includes mines and quarries currently being worked, the usufructuary may benefit from them and shall not be liable for any decrease in products that may arise as a result, provided that he has observed the provisions of the respective ordinance. (Art. 784)

Both codes do not directly prohibit the exploitation of newly found mines.

Thus, even a brief overview of the historical roots and civil law origins of usufruct allows it to be concluded that this legal instrument, which encumbers property, does not preclude the possibility of exploiting non-renewable resources; however, such exploitation is subject to strict limitations. The existence of so-called imperfect usufruct indicates that property owners may permit the use of their property in ways that can lead to its natural consumption and deterioration in pursuit of their economic interests. However, adequate compensation is required to incentivize this permission. The exploitation of newly discovered natural resources is more restricted, though not entirely excluded, as it may conflict with the interests of the naked owner. Nonetheless, the naked owner can grant permission for such activities.

2.2. Usufruct in other international law domains

Returning to the realm of international law, it should be stressed that for the moment, the law of occupation is the only institute in which a positive legal regulation of usufruct can be found. Despite this, there are proposals to introduce it in other spheres falling under international legal regulation. Their short consideration seems useful in order to make this research more comprehensive.

One sphere in which a resort to the concept of usufruct has been proposed is international space law. This branch of public international law is one of the few where the principle of the common heritage of humankind has supposedly been introduced, although with

> the lack of such key elements of its concept as a joint management mechanism and a resource allocation mechanism… it can be concluded that the principle of the common heritage of mankind in relation to outer space did not receive the status of international custom ... Instead, the generally recognized norm of international space law is the principle of non-appropriation of space territory. (Nihreieva, 2022, p. 32)

In light of the above, it has been argued that the Moon Agreement does not seek to preclude usufruct and use rights (Goldie, 1985, p. 702). The recent tendency towards the legalization of the commercial exploitation of the natural resources of outer space in the national law of some states supports the abovementioned suggestion (for more, see Nihreieva, 2022).

Another domain in which a similar proposal has been put forward is the international law of the sea. In this sphere, the principle of the common heritage of humankind concerning the natural resources of the deep seabed was fully established and confirmed by the United Nations Convention on the Law of the Sea in 1982. However, against the background of the adoption of the US Deepsea Ventures Notice of Discovery and Claim in 1975 and the US Deep Seabed Hard Mineral Resources Act of 1980, another interpretation of the principle based on the concept of usufruct was proposed. According to it, the deep seabed, although protected by the above principle, is covered by usufruct, where every state – and, consequently, private companies and individuals authorized by it – is a usufructuary that:

> enjoys privilege without needing to assert any titular right to the seabed adverse to the common heritage of mankind and, finally, may take mineral resources there from in his capacity as a participant in and beneficiary of that common heritage. (Goldie, 1985, p. 713)

This approach, although lacking broad support, would provide private companies with a right of ownership over the fruits of mining activity after their extraction from the seabed.

Finally, the concept of usufruct has been discussed in relation to environmental protection. From this perspective, humankind is regarded as a usufructuary of nature and its resources. In doing so, it should combine "the right to use with the responsibility to preserve" (Drew, 2016, p. 196). Under this obligation, it is "a steward whose uses of land are limited by his responsibility to others with rightful claims, most particularly those who will inherit the property in the future" (p. 199). The latter directly connects the concept of usufruct with the concept of sustainable development. One commentator suggests that this approach:

> provides a paradigm of sustainability that presents mastery and deference, anthropocentric use and ecocentric care, as compatible rather than contradictory goals, and makes humans morally responsible to a higher power for the well-being of the non-human world on which they rely. (p. 207)

Surprisingly, the broader philosophical understanding of the relationship between humankind and nature based on the concept of usufruct finds more concrete expression in the sphere of the law of occupation, where the sustainable use of natural resources is proposed as a substitute for the traditional usufruct approach (Lehto, 2018, para. 96).

2.3. Usufruct through the principles of the law of occupation

As depicted above, the concept of usufruct lies at the core of the legal regime of governing the exploitation of natural resources under occupation. Beginning in the 19th century (Arai-Takahashi, 2012, p. 57), the development of usufruct in international law, from a conventional norm to a customary rule, has been extensively described by Askary and Hosseinnejad (2023, pp. 1525–1531).

While considering the content and precise obligations of the occupying power under it, the provisional and temporary nature of usufruct must be taken into account. Initially, as has been demonstrated, usufruct under civil law is a temporary encumbrance. However, the situation in international law differs significantly: unlike civil-law usufruct, which is normally based on the owner's consent, occupational usufruct is coercive and often undesirable for both the displaced government and the local population. At the same time, it must remain functional, meaning it should address the needs of all actors involved in this triad: the occupying power, which has gained military advantage and strives to retain it; the ousted government, which seeks to reestablish its authority over the occupied territory and desires that it remains as unchanged as possible; and the local population, which primarily needs protection from the perils of war and guarantees for its basic rights – conditions that would be unattainable in an administrative vacuum. Thus, it is true that the concept of usufruct strikes "a careful balance between the realities of armed conflict and the provisional character of the situation" (Dam de Jong, 2015, p. 20).

In order to achieve the above, the concept of usufruct in IHL is based on several basic principles. First, it is essential to emphasize the temporary nature of the occupying power's rights to exploit natural resources and other public property in the occupied territory. This is an inherent feature of this legal institute, which also stems from the temporary character of occupation. However, in situations of prolonged occupation, the time-limits of such activities are unclear, which is explained by the uncertain criteria for determining the end of occupation under international law (Ferraro, 2012, p. 26).

In addition, usufruct under international law is purpose-based, which means that the occupant cannot simply exploit the natural resources of the occupied territories in its own interests, but is obliged to do so for the benefit of the peoples of those territories taking into account the principle of their permanent sovereignty over their natural resources. The relevance of the latter within the law of occupation represents a difficult issue, which, in

the author's opinion, requires further study. Meanwhile, it can be stated that permitted purposes of natural resource exploitation by the occupant are provided in Art. 43 of the Hague Regulations, which is often considered in conjunction with Art. 64 of the IV Geneva Convention. Art. 43 establishes that the occupant should restore and ensure public order and safety, which implies expenses that can be covered by the proceeds from the exploitation of public property.

On the one hand, the above purposes provide the occupant with the right to exploit public property, and offer a certain amount of discretion in doing so. On the other hand, they impose limits on such exploitation, which, if transformed into excessive consumption, may amount to pillage that is directly prohibited under IHL (Askari & Hosseinnejad, 2023, p. 1530).

Paradoxically, when acting in the interests of the local population the occupier has no explicit obligation to consult them (Wrange, 2019, p. 20), even though, as stated by Wrange (2019), "dealings in natural resources by a sovereign, an administrator or an occupier are legitimate only if it is for the good of the people and with their consent" (p. 27). In this regard, Benvenisti (2012) goes even further, arguing that the occupant is only a trustee, and that attention is to be paid "more to the indigenous community under occupation rather than to the wishes of the ousted government" (p. 7). In order to ensure the correct, purpose-based exploitation of the natural resources of a territory under the control of an occupier, it seems that the decision-making of the latter should involve representatives of the local population and be additionally guaranteed by external control mechanisms.

Any undertakings by the occupying power as a usufructuary are conditioned, as everything else within the law of armed conflicts, by the principle of military necessity, which can explain the restrictiveness of the regime of economic activities in the occupied territory. Among the few normative definitions of this principle, it is worth mentioning that given by an American Military Tribunal in the *Hostage Case* (1948), which stated that "military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money" (para. 1253). However, under the conditions of occupation, it can be supposed that the enemy, at least in this territory, has already submitted, because to be occupied the territory must be under the effective control of the occupant, which means hostilities are minimized. Thus, military necessity for the purposes of occupation law requires a different definition. In this regard, the definition provided by Art. 14 of the 1863 Lieber Code looks more appropriate. According to it, military necessity "consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war" (Lieber, 1863).

Thus, the question to answer is: What are "the ends of war" that should be secured in the territory under occupation? Obviously, this principle and its application in the context of occupation necessitate further study. However, at this stage of the research, it can be suggested that restrictions imposed on the local population in the circumstances of occupation should be less significant. This is because the occupant has already established effective control over the population, and is presumably primarily interested in maintaining the *status quo* and preventing the ousted government from benefiting from the exploitation of the natural resources of the occupied territory through the local population in order to regain control.

Even though, as stressed by Schmitt (2010), military necessity is intended to be the IHL mechanism for guaranteeing "an ability to pursue and safeguard vital national interests" (p. 799), a balance between military necessity and humanity is to be maintained. This balance is not stable and is subject to general changes within "the normative edifice" upon which "IHL has been built and upon which its functionality depends in operational practice" (Melzer, 2010, p. 833). This means that in the context of occupation, especially where hostilities have calmed down, humanity should prevail over military necessity, which cannot be construed too broadly, as this could lead to unnecessary limitations on the economic activities of the local population.

Finally, the conservationist principle that "requires that [the] occupying power does not change the status quo of the occupied territory" (Carbonell Yanez, 2019, p. 40) should also be taken into consideration. As outlined by Arai-Takahashi (2012), "this is one of the general principles that have governed the entire normative edifice of the law of occupation" (p. 53).

The main idea of the conservationist principle explains the choice of usufruct for the purposes of the law of occupation. As a usufructuary, an occupant "is not the sovereign and, therefore, cannot introduce disproportionate changes in the occupied territory" (Carbonell Yanez, 2019, p. 40). However, this statement can be considered in two ways: on the one hand, it deters the occupant from making intentional changes in the occupied territory in its own interests; on the other hand, it can be interpreted as the requirement to restore the territory to the initial condition in which it existed before the invasion. This suggestion is quite controversial and has been the subject of extensive discussion about the need for the development of *jus post bellum* (law after war), which could include the victor's responsibility of reconstructing the occupied state (Bamigboye & Ayeni, 2022, p. 65). It should be noted that *jus post bellum* is a concept (for more see Stahn, 2006) that could be considered *lex ferenda* rather than *lex lata*. Moreover, this concept is closely related to the context of so-called transformative occupations such as those in Iraq, East Timor, Kosovo, and Afghanistan (for more see Roberts, 2006; Fox, 2012), and was also developed in relation to the just war theory (Williams & Caldwell, 2006). Therefore, it cannot be considered as a common framework that covers all situations of occupation. The author here agrees with De Brabandere's (2014) notion that "notwithstanding the possibility of having a moral obligation to engage in reconstruction after the armed conflict, the lex lata does not permit any transposition of post-conflict responsibilities to an intervening state" (p. 130). Nevertheless, the idea of the occupier's reconstructing obligations cannot be completely dismissed, given its responsibilities under Art. 43 of the Hague Regulations to maintain and restore safety and civil life. The latter may require the reconstruction of essential infrastructure in the occupied territory that could have been destroyed during the invasion. Consequently, this task may necessitate significant investments, for which the exploitation of natural resources would be indispensable. Thus, the occupier would need to go beyond the limits of the classic conservationist approach. It is important to note that this obligation of the occupier stems from *jus in bello* rather than from *jus post bellum*.

3. The content of the occupier's obligations as a usufructuary of the occupied state's natural resources

Considering the above legal framework, a range of rights and obligations of the occupier as a usufructuary of the occupied state's natural resources can be identified. Some of these require further clarification and should be examined against the backdrop of modern international law, which is substantially different from that of the early 20th century.

Before delving into this issue, the term *occupier* (occupant, occupying power) requires clarification. Neither the Hague Regulations nor the Geneva Conventions, including Additional Protocol I, contain a definition of this term. However, due to the fact that only states can be parties to these agreements, they are supposed to be occupants in the context of the legal regime of occupation. This is clearly provided, e.g., in the text of the Hague Regulations, where Art. 55 directly refers to "the occupying state." However, the term most commonly used in these documents is "the occupying power."

The peculiarities of armed conflicts and situations of occupation, which the world has faced for the last hundred years, give reason to submit that occupation could possibly be established by the UN, or even a non-state entity (Roberts, 1984, p. 261). Though these suggestions remain highly controversial, the relevance and applicability of occupation law or some its provisions to territories under UN administration (Ferraro, 2012, pp. 78–87) or the control of non-state armed groups (Askari & Hosseinnejad, 2023) are subject to considerable debate. A thorough analysis of these issues is beyond the scope of this study. However, it is worth proposing that some provisions of the law of occupation, particularly those relating to the exploitation of natural resources, could be applicable to the above situations.

The primary entitlement of the occupying power is the right to exploit the natural resources of the occupied territory. However, this right is limited by the purpose of exploitation; that is, it should be aimed at maintaining public order and civil life for the population of the occupied territories, which can be understood as an obligation to ensure not only security, but also welfare (Sassoli, 2005, p. 663). Thus, the occupier can cover its expenses by using the resources of the territory, but it cannot do so in its own interests – e.g., "to cover the costs associated with military operations" (Dam de Jong, 2015, p. 21), or "to benefit the occupying state's own economy or companies" (Saul, 2015, p. 25). Therefore, the extent of exploitation is to be limited by and directly related to the needs of the local population. This approach was confirmed by the International Military Tribunal at Nuremberg, which stated that "the economy of an occupied country can only be required to bear the expense(s)

of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear" (*Trial of the Major War Criminals*, 1947, p. 239). A lower tribunal in the *Krupp case* (1950) added that:

> as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner. (p. 1341)

Moreover, Saul (2015) suggests that resources *in situ*, which are supposed to be immovable public property, are to "be treated in accordance with the principle of trusteeship," i.e., the occupier as a trustee should use them for the benefit of the local inhabitants, safeguarding their capital. "It cannot appropriate, acquire title to, or sell such public assets, but has the right to utilize the proceeds thereof for the benefit of the inhabitants" (p. 25).

This also means that the occupying power is prohibited from undertaking exploitation activities in the occupied territory to the detriment of the local population (Azarova, 2012). The latter statement could be perceived in two ways: on the one hand, the occupier cannot utilize proceeds from the exploitation of natural resources in a way that limits developmental opportunities for the local population; on the other hand, it should not restrict the development of the occupied territory by limiting the use of its resources by the local population.

The rules for the exploitation of these resources imply that the occupying power also has a positive obligation to protect the natural resources under its administration. This includes the prohibition against destroying them, except when absolutely necessary for military operations. Extracted or produced private natural resources, considered movable private property, cannot be confiscated, while public resources may only be requisitioned if they comprise military material, are necessary for the occupying army's needs, or can be used for military operations (Saul, 2015, p. 24). Moreover, the obligation to protect the natural resources under the occupier's jurisdiction includes the duty to "take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory" (*Armed Activities on the Territory of the Congo*, 2005, para. 248). This duty applies not only to its officials and armed forces, but also to private individuals and companies under its jurisdiction.

The aforementioned conservationist principle requires that the occupying power respect, "unless absolutely prevented," the laws of the ousted government, including property laws. This implies that the occupier should not change the existing rules on the exploitation of natural resources that were in place before the occupation began. However, compliance with "international human rights law and other relevant international laws" is also emphasized (Saul, 2015, p. 25).

Moreover, the necessity of safeguarding the capital of properties covered by usufruct conditions the limits of exploitation. The occupier should act "subject to the principle of reasonableness, meaning usage must not lead to over-exploitation" (*Yesh Din – Volunteers for Human Rights, et. al. v. Commander of the IDF Forces in the West Bank*, 2018, para. 8). As Azarova (2012) emphasizes, the rule prohibiting the occupying power from making permanent changes in the occupied territory "forbids it from either exploiting a mine at a rate more rapid than the previous level of production or opening mines that were not in use prior to occupation." Thus, the occupier should adhere to the principle of continuity.

These rules raise several practical questions that have emerged against the backdrop of the growing energy needs of the global population and, consequently, the increasing levels of exploitation of oil, gas and other relevant natural resources. They concern the possibility of processing newly found natural resources and the distinction (if any) between the exploitation of renewable and non-renewable natural resources in territories under occupation, especially those of a protracted nature.

One notable case of occupation in which the extensive exploitation of natural resources has emerged is the Israeli occupation of Palestinian territory. In this context, multiple judgments have been issued by the Israeli High Court of Justice, addressing, among other issues, the exploitation of newly discovered resources. For example, in a 2011 case concerning quarrying activities in the occupied Palestinian territory, the court analyzed different approaches to this issue. Although it did not reach a definitive conclusion, the court's findings appeared favorable regarding the exploitation of newly discovered natural resources by the occupier. Specifically, it

emphasized that the laws of occupation require adjustment "to the reality of prolonged occupation," and acknowledged the relevance of the "unique circumstances" of the situation in Palestine for resolving this dispute (*Yesh Din – Volunteers for Human Rights, et. al. v. Commander of the IDF Forces in the West Bank*, 2018, para. 10).

The same approach is apparently upheld by the military manuals of the US and the UK, which provide the occupier with the right to conclude new leases and contracts or enter in other commitments regarding public immovable property in occupied territory, whose term, however, should not exceed the period of occupation (the American Military Manual of 1976; the U.K. Manual of the Law of Armed Conflict of 2004).

Legal scholarship also offers affirmative suggestions in this regard. For example, in Von Glahn's opinion (1957), "only the legitimate sovereign would seem to have the power to grant concessions, yet conditions in the territory make it desirable to have the occupant grant new concessions in the interest of the native population" (p. 209). Despite this, the issue of the exploitation of newly-found natural resources in territories under occupation remains highly controversial.

Regrettably, the ICJ did not express its position on the above issue in the Advisory Opinion on Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory (2024). While summarizing that "Israel's use of the natural resources in the Occupied Palestinian Territory is inconsistent with its obligations under international law" (para. 133), it particularly criticized the Israeli policy of granting mining concessions exclusively to Israeli-operated quarries in Area-C (para. 132). However, it did not specify whether these quarries are new and did not shed light on the legality of the exploitation of untapped resources.

Another scholarly discussion concerns the occupier's right to exploit non-renewable resources, such as oil and gas (Aruga, 2022). According to a significant proportion of legal scholarship, the usufructuary's obligation to give back property without altering its substance makes the exploitation of non-renewable natural resources more limited or, for some, doubtful in general (Wrange, 2019, p. 10). This is as a result of their exhaustibility, "particularly in cases of protracted occupation" (Saul, 2015, p. 25). For example, Saul suggests that "an occupying power may continue to extract non-renewable resources at the ordinary pre-occupation rate, but may not abusively increase production of existing assets or permit new resource developments" (Saul, 2015, p. 25). Askari and Hosseinnejad (2023) also propose to distinguish between the exploitation of renewable and non-renewable resources (p. 1542), and argue that from the beginning this is part of the occupier's obligations (p. 1527). However, Lehto (2018) posits that the occupier's right of usufruct "has traditionally been regarded as applicable to the exploitation of all kinds of natural resources, including non-renewable ones" (para. 30).

This discussion seems to closely relate to the possible abusive exploitation of such resources by the occupier. In fact, regarding non-renewable resources – and taking into consideration the increased need for resources such as oil, gas and other energy-based raw materials in many countries – the occupied territory could easily be deprived of its wealth due to the uncontrolled activities of the occupier and private companies under its jurisdiction. Nevertheless, the territory and its population may require these resources during the period of occupation. As stated in the report of the 2012 expert meeting on "Occupation and Other Forms of Administration of Foreign Territory," "a freeze on the natural development of an occupied territory would inevitably result in stagnation, which would ultimately be detrimental to the population of that territory" (Ferraro, 2012, p. 72). According to this report, slight deviations from the conservationist principle are accepted if they are "carried out to benefit the population of the occupied territory" (p. 73). At the same time, the fulfilment of the above purpose requires an external mechanism of control that would prevent the occupier from abusing its powers or misusing profit from the exploitation of natural resources.

Another approach to protecting natural resources from over-exploitation argues for their sustainable use (Legal Consequences arising from the Policies and Practices of Israel, 2024, para. 124). This notion is proposed to be "the modern equivalent of the concept of 'usufruct,' which is in essence a standard of good housekeeping," requiring the occupier not to use more resources than necessary. It also means that "the occupying power shall exercise caution in the exploitation of non-renewable resources, not exceeding preoccupation levels of

production, and exploit renewable resources in a way that ensures their long-term use and capacity for regeneration" (United Nations, 2022, p. 169, para. 8).

Being part of the principle of sustainable development (Beyerlin, 2013, para. 21), the sustainable use of natural resources imposes on the occupier an obligation to exploit them "in so far as this would not harm the options of future generations to exploit the natural resources for their development" (Dam de Jong, 2015, p. 20).

As stressed by Lehto (2018) in her first report on the protection of the environment in relation to armed conflicts, the obligations of the occupant under Art. 43 of the Hague Regulations include "sustainability as a major consideration to be taken into account in the administration and exploitation of the natural resources of an occupied territory" (para. 96). This is part of a broader circle of environmental obligations of the occupying power concerning the territory under its authority (Nihreieva, 2024). The occupier is expected not only to assume control over natural resources, but also to "protect them against over-use and pollution, and allocate them equitably and reasonably among the various domestic users" (Benvenisti, 2009, para. 31). Obligations to maintain the good condition of the environment while exploiting its natural resources are supposed to stem from a general duty of the occupier as a usufructuary to restitute property *salva rerum substantia*, i.e., without altering the substance of the thing. This is also confirmed at the level of national legislation, where legal acts often include rules about the usufructuary's responsibility to compensate for environmental harm caused to property encumbered by usufruct (Haro Bocanegra, 2020, p. 287). Thus, the environmental obligations of the occupier have to become an inalienable part of its legal status (*Leg*al Consequences arising from the Policies and Practices of Israel, 2024, para. 124).

Conclusions

The exploitation of natural resources has always been of primary interest to states and their populations. In the context of military occupation, these activities remain crucial, and they become even more significant for both the development of the local population and the fulfilment of the occupying power's obligations regarding the occupied territory. Eventually, the very existence and duration of occupation become closely connected with the occupier's ability to exploit the natural resources under its control.

It can be stated that the legal regulation of the exploitation of natural resources under occupation, as provided by IHL, is vague and outdated. The concept of usufruct, as a cornerstone of this regime, requires further development and clarification. This is especially relevant for establishing the precise obligations of occupying powers regarding the maintenance of public order and civil life in the occupied territory.

It appears that the regulations in force, primarily set out by Art. 55 and 43 of the Hague Regulations, are designed mainly to protect the interests of the occupier, providing the means to cover its expenses while ensuring that the ousted government retains the maximum conservation of its territory and resources. However, the interests of the third party in the occupation triad – namely the local population, which has a right to development – are not adequately considered. Protecting their interests may require greater economic investment and, consequently, the more intensive exploitation of natural resources in the occupied territory, particularly newly discovered resources that are at risk of depletion.

The examination of the historical evolution and civil law origins of usufruct has shown that, although it was primarily developed for the use of renewable resources that had already been found and identified at the time of encumbrance, recent national practice also provides examples of usufruct being applied to the exploitation of non-renewable and newly discovered resources. Thus, it can be concluded that, notwithstanding the traditional law of occupation, which did not entitle the occupier as a usufructuary to exploit resources that had not been processed at the time that the occupation commenced, current economic realities and the need for the rapid development of occupied territories may justify the exploitation of their newly-found natural resources.

Obviously, such activities should be limited by the provisional character of occupation and strictly related to the needs of the people living under it. Since the exploitation of natural resources by the occupier is directly connected to satisfying these needs, its scale should reflect a reasonable balance between military necessity and the conservationist principle. Assumedly, modifications to the legal regime governing the exploitation of natural

resources under occupation are of paramount importance in situations of prolonged occupation, such as the Israeli occupation of Palestinian territories, the Moroccan occupation of Western Sahara, and the Russian occupation of Ukrainian territories.

In this regard, some suggestions, albeit of a propositional nature, might be made so as to put the above ideas into practice. First, taking into account the specificity of international law-making, it is hardly possible for a new international convention or an amended version of those in force to be concluded soon. At the same time, customary international law, shaped, in particular, by *soft law* and case law, may reflect the above developments.

From a practical perspective, several aspects require further research. As is apparent, the obligations of the occupying power concerning the exploitation of natural resources should include a duty to involve representatives of the local population in decision-making related to these activities, the forms of which are worth additional consideration. Furthermore, to ensure that the occupier meets the criterion of purpose-based exploitation and does not over-exploit resources for its own interests, mechanisms for external control are to be developed. Finally, an updated conservationist approach might be strengthened by including environmental obligations for the occupying power to ensure the sustainable use of natural resources under occupation.

References

Abu 'Aita et al. v. Regional Commander of the Judea and Samaria Area et al. Supreme Court of Israel, Judgment No. 69/81 (1983, April 5).

Arai-Takahashi, Y. (2012). Preoccupied with occupation: Critical examinations of the historical development of the law of occupation. *International Review of the Red Cross*, *94*(885), 51–80. http://dx.doi.org/10.1017/S1816383112000495

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports, 168 (2005, December 19).

Aruga, K. (2022). Economics and non-renewable/renewable resources. In *Environmental and Natural Resource Economics* (pp. 115–149). Springer, Cham. https://doi.org/10.1007/978-3-030-95077-4_5

Askary, P., & Hosseinnejad, K. (2023). A possible legal framework for the exploitation of natural resources by non-state armed groups. *International Review of the Red Cross*, *105*(924), 1522–1542. https://doi.org/10.1017/S1816383123000243

Azarova, V. (2012, February 7). Exploiting a 'dynamic' interpretation? The Israeli High Court of Justice accepts the legality of Israel's quarrying activities in the occupied Palestinian territory. *Ejiltalk.* https://www.ejiltalk.org/exploiting-a-dynamic-interpretation-the-israeli-high-court-of-justice-accepts-the-legality-of-israels-quarrying-activities-in-the-occupied-palestinian-territory/

Aznar Domingo, A. (n.d.). *Los usufructos especiales. Los derechos de uso y habitación* [Special Usufructs. Rights of Use and Habitation]. Derecho civil [Civil Law]. Retrieved November 7, 2024. http://docencia.aznar-abogados.com/modules.php?name=News&file=article&sid=314

Bamigboye, E. P., & Ayeni, V. O. (2022). Laying the Foundations *for Jus Post Bellum*: The Conservationist Principle in the Law of Occupation as a Foundation for a Fourth Additional Protocol to the Geneva Conventions. *International Journal of Comparative Law and Legal Philosophy*, *4*(1), 61–67.

Benvenisti, E. (2009). Belligerent Occupation. *Max Planck Encyclopedia of International Law.*

Benvenisti, E. (2012). *The International Law of Occupation* (2nd ed.). Oxford University Press.

Beyerlin, U. (2013). Sustainable Development. *Max Planck Encyclopedia of Public International Law.*

Carbonell Yanez, M. H. (2019). The Conservationist Principle under International Humanitarian Law versus a Transformative Occupation in a Human Rights Context. *Padjadjaran Journal of Law*, *6*(1), 27–49. https://doi.org/10.22304/pjih.v6n1.a2

Castan Tobeñas, J. (1978). *Derecho Civil Español, común y foral: Derecho de* Cosas [Spanish Civil Law, Common and Regional: Law of Things] (Vol. II). Reus.

Dam de Jong, D. (2015). Armed Opposition Groups and the Right to Exercise Control over Public Natural Resources: A Legal Analysis of the Cases of Libya and Syria. *Netherlands International Law Review*, *62*, 3–24. https://doi.org/10.1007/s40802-015-0007-0

D'Aspremont, J. (2013). Towards an International Law of Brigandage: Interpretative Engineering for the Regulation of Natural Resources Exploitation. *Asian Journal of International Law*, *3*(1), 1–24. https://doi.org/10.1017/S2044251312000318

De Brabandere, E. (2014). The Concept of Jus Post Bellum in International Law: A Normative Critique. In C. Stahn, J. S. Easterday, & J. Iverson (Eds.), *Jus Post Bellum: Mapping the Normative Foundations* (pp. 124–141). Oxford Academic. https://doi.org/10.1093/acprof:oso/9780199685899.003.0008

Diez-Picazo y Ponce De León, L. (1954). Naturaleza jurídica de los minerales ¿Tienen o no la condición de frutos? [Legal Nature of Minerals: Do They Have the Status of Fruits or not?] *Anuario de Derecho Civil* [Civil Law Yearbook], *7*(II), 355–376.

Drew, E. (2016). Tis Prudence to Prevent th'Entire Decay: Usufruct and Environmental Thought Source. *Eighteenth-Century Studies*, *49*(2), 195–210.
Enciclopedia jurídica. (n.d.). *Usufructo de minas*. Retrieved November 15, 2024. www.enciclopedia-juridica.com/d/usufructo-de-minas/usufructo-de-minas.htm
Evans, B. (2022, August 11). *Russia Now Controls At Least $12.4 Trillion Worth of Ukraine's Energy, Metal and Mineral Deposits, Report Says*. Business Insider India. https://www.businessinsider.in/stock-market/news/russia-now-controls-at-least-12-4-trillion-worth-of-ukraines-energy-metal-and-mineral-deposits-report-says/articleshow/93507654.cms
Ferraro, T. (2012). *Occupation and Other Forms of Administration of Foreign Territory* [expert meeting report]. International Committee of the Red Cross.
Fox, G. (2012). Transformative occupation and the unilateralist impulse. *International Review of the Red Cross*, *94*(885), 237–266.
Haro Bocanegra, I. M. (2020). El contrato de explotación minera [The Mining Contract]. *Derecho y Cambio Social* [Law and Social Change], *59*, 248–329.
Hostage Case, United States v. List (Wilhelm) and ors, Trial Judgment, US Military Tribunal, Case No. 7 (1948).
Institut de Droit international. (2003). *Bruges Declaration on the Use of Force*. https://www.idi-iil.org/app/uploads/2017/06/2003_bru_en.pdf
Goldie, L. F. E. (1985). Title and Use (And Usufruct) - An Ancient Distinction Too Oft Forgot. *The American Journal of International Law*, *79*(3), 689–714.
Kopel, K. (1946). The Nature of Ususfructus. *The Cambridge Law Journal*, *9*(2), 159–170.
Krupp case (1950). Trials of War Criminals before the Nuremberg Tribunals under Control Council Law. Vol. IX (10). Washington: Government Printing Office.
Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, ICJ Advisory Opinion (2024, July19).
Letter from the UK and US Permanent Representatives to the UN, addressed to the President of the Security Council, 8 May 2003.
Lehto, M. (2018, April 30). *First report on protection of the environment in relation to armed conflicts*. International Law Commission (A/CN.4/720).
Lieber, F. (1863). U.S. War Department, General Orders No. 100: Instructions for the Government of Armies of the United States in the Field. https://ihl-databases.icrc.org/assets/treaties/110-IHL-L-Code-EN.pdf
Longobardo, M. (2016). State Responsibility for International Humanitarian Law Violations by Private Actors in Occupied Territories and the Exploitation of Natural Resources. *Netherlands International Law Review*, *63*, 251–254. https://doi.org/10.1007/s40802-016-0068-8
Melzer, N. (2010). Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities. *Journal of International Law and Politics*, *42*(3), 831–916.
McClean, A. J. (1963). The Common Law Life Estate and the Civil Law Usufruct: A Comparative Study. *The International and Comparative Law Quarterly*, *12*(2), 649–667.
McCleary, A. (1960). Mineral Rights - Rights of the Naked Owner and the Usufructuary. *Louisiana Law Review*, *20*(4), 773–780.
N. V. De Bataafsche Petroleum Maatschappli & Ors. v. The War Damage Commission, Judgment, Court of Appeal of Singapore (1956, April 13). *Malayan Law Journal*, *155*, 802–815.
Nihreieva, O. O. (2022). The International Legal Regime of Outer Space: Between Res Communis and Res Nullius [in Ukrainian]. *Social Sciences in Space Exploration*, *28*(1), 22–41. https://doi.org/10.15407/knit2022.01.023
Nihreieva, O. (2024). Protection of the Environment under Occupation: Scope and Content of Legal Obligations of the Occupier. Constitutional State, 54, 173–186.10.18524/2411-2054.2024.54.304891
Roberts, A. (1984). What Is a Military Occupation? *British Yearbook of International Law*, *55*(1), 249–305.
Roberts, A. (2006). Transformative Military Occupation: Applying the Laws of War and Human Rights. *The American Journal of International Law*, *100*(3), 580–622.
Saadoun, S. (2017, January 27). *Trump, Iraqi Oil and International Law*. Human Rights Watch. https://www.hrw.org/news/2017/01/27/trump-iraqi-oil-and-international-law
Sassòli, M. (2005). Legislation and Maintenance of Public Order and Civil Life by Occupying Powers. *European Journal of International Law*, *16*(4), 661–694. https://doi.org/10.1093/ejil/chi136
Saul, B. (2015). *The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources*. Sydney Law School, Legal Studies Research Paper No. 15/81. http://ssrn.com/abstract=2663843
Schmitt, M. N. (2010). Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance. *Virginia Journal of International Law*, *50*(4), 795–839.
Segal, I., & Whinston, M.D. (2013). Property Rights. In R. Gibbons & J. Roberts (eds.), *The Handbook of Organizational Economics* (pp. 100–158). Princeton University Press. https://doi.org/10.1515/9781400845354-005

Stahn, C. (2006). 'Jus ad bellum', 'jus in bello' . . . 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force. *European Journal of International Law*, *17*(5/1), 921– 943. https://doi.org/10.1093/ejil/chl037
Theise, E. (2023, August 28). *Russia Plundering Ukraine's Natural Resources*. DW. https://www.dw.com/en/russia-ukraine-war-natural-resources-grain/a-66639269
The Law Dictionary. (n.d.). *Usufruct Definition & Meaning*. Retrieved November 8, 2024. https://thelawdictionary.org/usufruct
Trial of the Major War Criminals. (1947). International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946.
United Nations. (2022). *Draft Principles on Protection of the Environment in Relation to Armed Conflicts, with commentaries*. International Law Commission, A/77/10. https://legal.un.org/ilc/texts/instruments/english/commentaries/8_7_2022.pdf
Von Glahn, G. (1957). *The Occupation of Enemy Territory*. The University of Minnesota Press.
Williams, R. E., & Caldwell, D. (2006). Jus Post Bellum: Just War Theory and the Principles of Just Peace. *International Studies Perspectives*, *7*(4), 309–320.
Wrange, P. (2019). Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara. *Israel Law Review*, *52*(1), 3–29. https://doi.org/10.1017/S0021223718000274
Yesh Din – Volunteers for Human Rights, et. al. v. Commander of the IDF Forces in the West Bank, et. al., Supreme Court of Israel, Judgment No. 3003/18 (2018, May 24).

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A COMPARATIVE ANALYSIS OF JUDICIAL DISSENT AND ITS CONTRIBUTION TO HUMAN RIGHTS LAW IN INDIA AND THE UNITED STATES OF AMERICA

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Abstract. *The independence of the judiciary is one of the most important aspects of a liberal democracy governed by the rule of law. The judiciary adjudicates on legal and constitutional disputes in accordance with the law, which is a difficult task in and of itself. There are various factors that the judiciary takes into account when deciding upon different legal matters. When a court decides on a case unanimously, it is known as a unanimous judgement. However, the bench may also be divided, where judges do not concur with each other, resulting in a minority judgement. Over time, minority judgements often come to be voiced by the majority. Although dissenting judicial opinions have been recognized through legislative enactments and constitutional amendments and often go on to become the law of the land, they remain a neglected area of legal theory and jurisprudence, and thus need to be explored.*
Dissent is a sign of a healthy democracy; it is one of the most important aspects of the right to freedom of speech and expression. Judicial dissent has been a regular feature of constitutional courts in both India and the United States of America. Therefore, in this paper, the author analyzes the notion of judicial dissent and its relevance in human rights law before interrogating the process through which a once-neglected dissenting opinion can become the majority opinion and the law of the land. Finally, this study highlights the importance and contribution of judicial dissent in human rights law in India and the United States of America.
Keywords: *judiciary, judicial review, judicial dissents, rule of law, jurisprudence and human rights.*

Introduction

The Constitution is a sacred document and the supreme law of the State; it empowers the government to run the country in accordance with the principles laid down in it. The judicial department of the government is the custodian of the rights of the citizen. Hence, an independent and impartial judiciary is the first condition of freedom and liberty in any democratic society (Singh & Shukla, 2013). The judiciary examines the validity of laws enacted by the parliament in light of constitutional laws. If any law enacted by the legislature jeopardizes the individual interest or offends the constitutional order, it is struck down by the judiciary. Judicial examination of the validity of laws is not as easy as one may presume – it is instead a very complicated task involving different legal dimensions.
"Law is to a very large extent what the judges say as it is" (Hart, 2012). Generally, judges adjudicate on legal matters with unanimity. However, benches have been divided on numerous occasions, leading to majority and

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minority rulings. Arithmetically, the majority wins these battles, and its views are accepted and implemented as binding law. At the same time, minority judgements provide an alternative route by which to approach different legal issues. Minority judgements help in understanding laws from different perspectives, ultimately contributing to human rights jurisprudence.

This study seeks to comprehend the concept of judicial dissent itself, as well as to investigate how it has evolved over time in India and the USA. The article also interrogates how dissenting rulings have strengthened human rights and broadened their scope in these two countries. For the purposes of this study, only rulings that have had an influence on human rights law and that have evolved over time into majority rulings to become the law of the respective jurisdiction are assessed. Dissenting judgements in India and the USA are also compared.

These nations were chosen for this study as India is the largest democracy in the world while the United States is one of the oldest, and their respective top courts have been actively involved in defining governmental boundaries and defending citizens' civil liberties and political rights. Furthermore, common law concepts have been embraced by both countries.

1. Understanding Judicial Dissent and its Importance

Judicial dissent means a dissenting opinion given by a judge who is part of a bench adjudicating on a legal or constitutional dispute. It is a practice deeply rooted in Anglo-American jurisprudence (Bergman, 1991). For example, questioning the absolute powers of the executive, Lord Atkin in his dissent in *Liversidge v. Anderson* (1941) stated that if a person is arrested by the executive on the grounds of being a threat to internal security, the House of Lords is lawfully empowered to determine the reasonableness of such executive actions. The majority, however, decided that it cannot interfere in matters pertaining to the internal security of the United Kingdom. Nonetheless, the minority opinion of Lord Atkin is now a well-established norm in many different countries and legal systems, especially those rooted in common law. Even the UK Supreme Court has partially relied upon the dissenting opinion of Lord Atkin, when it declared in *H. M. Treasury v. Ahmed (*2010) that the Terrorism Order (2006) is unlawful as it gives unchecked and arbitrary power to the executive.

India and the USA have also followed the same path, since both the countries were British colonies and their legal systems are, by and large, based upon common law. Judicial precedent is a notable feature of common law – unlike continental law, which is mainly based on the principle of codification and where previous judgements are not binding on the courts. Albeit slowly, the continental legal system has also begun to follow the practice of judicial dissent, and judges are expressing their individual opinions while differing from the view of the majority (Kelemen, 2013).

Judicial dissent enhances judgments by offering alternative viewpoints and contributing to a more comprehensive legal analysis. It also strengthens the independence of the judiciary, in particularly by providing space for the individual opinions of each judge. Celebrated constitutional lawyer Gautam Bhatia observed that "the dissenting tradition, is perhaps, the most important tradition that we have, indispensable to keeping the Constitution alive, and a thing of flesh, blood, and dreams" (Bhatia, 2017). The majority opinion is the basis of the law in India, and as such has a binding effect, while judicial dissent provides new insights into laws and their development.

Dissent is a symbol of a vibrant democracy (*Romila Thapar v. Union of India*, 2018). If dissent is not allowed, tolerated, or accepted, this may pose a threat to the very existence of democracy, and individual interests will be compromised. It is thus the very heart and very soul of democracy (Sorabjee, 2018). Judicial dissent also represents the prescription to maintain the independence of the judiciary. A dissenting judgement always gives free space to judges to express their independent and individual views.

Acknowledging the role and importance of dissenting opinion, Rajeev Dhavan pointed out that "to heed the conscience of the court, and hence the nation, we must honour dissenting judgements" (Dhavan, 2018). Dissent judgements thus represent the conscience not only of the court, but of the country itself and its entire

democratic apparatus. Judicial dissent has played an important role in protecting fundamental rights and defending civil liberties – especially in India and the USA.

2. Judicial Dissent and Indian Constitutional Jurisprudence

The independence of the judiciary is necessary in order to maintain a free society and a constitutional democracy (Singh, 2000), as is the case in India. Judges in India have been very outspoken in protecting the fundamental rights and civil liberties of citizens, and judicial dissents have been delivered on numerous occasions. Article 145 of the Constitution of India (1950) encourages judges to provide their independent opinions on matters involving constitutional conflicts. Under the aforementioned provision, judges are free to supply their personal opinions, and as such are not bound to accept the views of their colleagues.

In India, the history of judicial dissent reaches back into the pre-independence period. Justice Syed Mahmood, a very outspoken judge and who generally disagreed with his fellow justices, was known for expressing his independent views and delivered many dissenting opinions. In the famous case of *Queen Empress v. Phopi* (1889), he dissented from the majority view to opine that merely serving notice to a prisoner is not sufficient, and that the rule of law requires that the accused must be heard in person or through their defense counsel. Moreover, he postulated that before an appeal concerning the rights of the accused is disposed of, it is mandatory that the accused must be heard without any element of bias, and the inherent right – being inherent – cannot be denied. Though the majority did not acknowledge the views of Mahmood at the time, today they are very much reflected in Indian jurisprudence and the principles of natural justice – particularly *audi alteram partem*.

2.1. The Procedure Established by Law under Article 21 of the Indian Constitution, and the Judicial Dissent of Justice Fazal Ali

A person can be deprived of their life and personal liberty only in accordance with the procedure established by law. Interpreting the phrase "procedure established by law" and differing from the majority view, Justice Fazal Ali in *A. K. Gopalan v. State of Madras* (1950) declared that the word "procedure" under Article 21 of the Indian Constitution connotes a just, fair, and reasonable procedure. He further declared that a procedure established by law must include notice, the opportunity to be heard, an impartial tribunal, and the orderly course of the procedure. His dissenting opinion became the majority view in *Maneka Gandhi v. Union of India* (1978), where the apex court expanded on the interpretation of Article 21 and overruled *A. K. Gopalan v. State of Madras* (1950) by relying entirely upon the dissenting opinion delivered by Fazal Ali in the same judgement. The Parliament of India has also legislatively recognized this dissenting opinion by enacting various laws that follow it.

2.2. Human Rights in India and Justice H. R. Khanna's Dissent in *ADM Jabalpur v. Shivkant Shukla*

The most celebrated dissent in Indian legal history came from Justice H. R. Khanna in *ADM Jabalpur v. Shivkant Shukla* (1976), popularly known as the *Habeas Corpus Case*. Disagreeing with the majority opinion, Khanna declared that Article 21 of the Indian Constitution, being the most fundamental right, cannot be suspended even in times of emergency. The majority was of the view that citizens cannot approach the Constitutional Court during a time of emergency – even if their right to life or personal liberty has been violated. Justice Khanna thus protected life and liberty by opining that:

> The Constitution and the laws of India do not permit life and liberty to be at the mercy of the absolute power of the Executive … What is at stake is the rule of law. The question is whether the law speaking through the authority of the court shall be absolutely silenced and rendered mute … detention without trial is an anathema to all those who love personal liberty. (*ADM Jabalpur v. Shivkant Shukla*, 1976)

This minority opinion was constitutionally recognized to a great extent when the Parliament of India enacted the 44th Constitutional Amendment in 1978. Recently, in *K. S. Puttaswamy v. Union of India* (2017), the apex court accepted Justice Khanna's dissent and overruled the majority view in *ADM Jabalpur v. Shivkant Shukla*

(1976). His dissent and its contribution to human rights law has consistently been appreciated around the world by the entire legal fraternity– including lawyers, jurists, and legal scholars.

2.3. Capital Punishment and the Judicial Dissent of Justice Bhagwati in *Bachan Singh v. State of Punjab*

In *Bachan Singh v. State of Punjab* (1980), Justice P. N. Bhagwati disagreed with the majority view and declared section 302 of the Indian Penal Code (1860), as unconstitutional as long as it provides for the imposition of the death penalty as an alternative form of punishment to life imprisonment. He further opined that "this form of inhuman practice in its actual operation is discriminatory, for it strikes mostly against the poor and deprived strata of the society and the upper class usually escape, from its clutches." His dissent is increasingly relevant today, in an era during which demands for the abolition of the death penalty are being raised around the world, particularly in European countries. The 262nd report of the Law Commission of India (2021) has also recommended the abolition of the death penalty for all offences except those related to terrorism.

2.4. The Adhaar Judgement, Privacy Laws, and Judicial Dissent

Every person has their own personal space that must not be encroached upon by the State or any other individual without justification. With the advancement of technology in almost all domains of life, privacy has become a major concern for every individual – particularly at a time when data protection laws are not sufficient (Farooqui et al., 2022). Recently, in *K. S. Puttaswamy v. Union of India* (2017), the Indian Supreme court declared the right to privacy as intrinsic to Article 21 of the Indian Constitution (1950). The court relied upon the dissenting opinion of Justice Subba Rao in *Kharak Singh v. State of Uttar Pradesh* (1963), in which the majority judgement neglected the importance of privacy in an individual's life.

In the case of *Justice K. S. Puttaswamy v. Union of India* (2012), the constitutional bench declared the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act (2016) as constitutionally valid. At the same time, section 57 of the same act, which provides for the mandatory use of an individual's Adhaar number for various purposes, was struck down. Justice D. Y. Chandrachud disagreed with the majority view, observing rather remarkably that the Adhaar Program suffers from constitutional infirmities and that the Aadhaar Act is unconstitutional *in toto*, encroaching upon individual privacy, dignity, and autonomy. He further observed that the procedure of passing the Aadhaar Act as a money bill was unlawful, and represents a fraud upon the Indian Constitution (*Justice K. S. Puttaswamy v. Union of India*, 2012). Soli Sorabjee, former attorney general of India, supported Justice Chandrachud on his dissent, rightly asserting that the "dissenting judge's concerns about intrusion of right to privacy are legitimate" (Sorabjee, 2018). Chandrachud's dissent seems to be increasingly relevant today, when data protection laws are struggling to deal with privacy matters around the world.

For example, after taking note of the dissenting opinion of Justice Chandrachud, the Jamaican Supreme Court struck down a national biometric identification program in the country, demonstrating the far-reaching implications of this dissenting opinion. The National Identification and Registration Act (2017) mandated the collection of biometric information from all Jamaican residents and its storage in a centralized database, putting their privacy at stake (Sheriff, 2019). Jamaican Justice C. J. Sykes cited Justice Chandrachud's observation that "a fair data protection regime requires establishment of an independent authority to deal with the contraventions of the data protection framework as well as to proactively supervise its compliance," noting the following: "The point I take from this passage is the need for a strong independent and autonomous body which has the power to examine the operations of the Authority and report to an institution that is independent of the Authority."

2.5. Judicial Dissents and Personal Laws in India

India is essentially a religious country, where people of different faiths live together by maintaining religious harmony. Freedom of religion is considered the third most important civil liberty after the right to life and personal liberty and freedom of speech and expression (Mustafa & Sohi, 2017). The Constitution of India (1950) protects freedom of religion subject to public order, morality, and health. Recently, in *Shayara Bano*

v. Union of India (2017), the Indian Supreme Court declared the practice of instant divorce (*talaq-e-biddat*) as unconstitutional and un-Islamic.

Justice J. S. Kehar and Justice A. Nazeer disagreed with the majority view, declaring that privacy laws must be maintained as this practice is accepted by the followers of the religion, and any kind of interference in the matters of religious affairs is clearly beyond judicial scrutiny. Protecting personal laws, both dissenters further observed the following:

> We have arrived at the conclusion, that "talaq-e-biddat", is a matter of "personal law" of Sunni Muslims, belonging to the Hanafi School. It constitutes a matter of their faith … We have examined whether the practice satisfies the constraints provided for under article 25 of the Constitution, and have arrived at the conclusion, that it does not breach any of them. We have also come to the conclusion, that the practice being a component of "personal law", has the protection of article 25 of the Constitution. (*Shayara Bano v. Union of India*, 2017)

Considering the importance of religious affairs in an individual's life and the constitutional scheme of fundamental rights, including personal rights, the dissenting opinion seems to be more appropriate than the majority view.

Another landmark dissent in relation to personal laws came from Justice Indu Malhotra in *India Young Lawyers Association v. State of Kerala* (2019), otherwise known as the *Sabrimala case*, in which the majority judgement allowed women entry into the Sabrimala Temple. The constitutional bench, chaired by Justice Dipak Misra, observed that that the provision of the Kerala Hindu Places of Public Worship Rules (1965) which authorizes the restriction on the entry of women into the temple amounts to gender discrimination, and violates the rights of Hindu women to practice their religion. Justice Indu Malhotra, the lone dissenter, disagreed with the majority view, opining that the religious practice of restricting the entry of women of menstruating age represents a belief in a deity. This thus amounts to an essential religious practice to be protected under Article 25 of the Indian Constitution (1950).

2.6. Justice D. Y. Chandrachud's Dissent in the *Bhima Koregaon Case* and the Right of the Accused to Fair Investigation

A petition was filed in the Supreme Court in *Romila Thapar v. Union of India* (2018), otherwise known as the *Bhima Koregaon case*, seeking the appointment of a Special Investigation Team (SIT) to independently investigate the arrest of some activists in relation to a violent incident during the 2018 commemoration of the battle of Bhima Koregaon. The majority opinion of the Supreme Court rejected the petition. However, Justice Chandrachud dissented from the majority view and supported the appointment of an SIT in order for them to conduct an independent and impartial investigation. He observed that "voices in opposition cannot be muzzled by persecuting those who take up unpopular causes." He further declared that "fair investigation is seminal facet of right to life and liberty under article 21 of the Indian Constitution and the Court must stand by the principles which it has formulated" (*Romila Thapar v. Union of India*, 2018).

3. Judicial Dissent in the USA

The US Supreme Court explicitly explained the role and importance of the judiciary in defining what the law is in *Marbury v. Madison* (1803): "It is emphatically the province and duty of the Judicial Department to say what the law is." Article III, section I of the US Constitution deals with the organization, power, and functions of the judiciary. Generally, it is argued that the judicial department in the USA is supreme, and judges in the country have been very vocal in protecting and promoting civil liberties and the political rights of citizens.

3.1. No Scope for Dissenting Opinion During Justice John Marshall's Tenure as Chief Justice of the USA

Justice John Marshall served as chief justice of the USA for around three and a half decades (1801–1835), and no US Supreme Court judge provided a single dissenting opinion during his tenure. His lordship believed in the unanimity of the court, and the other judges were convinced by his views.

In the USA, judicial dissent is relatively a recent phenomenon. In his very first ruling as chief justice, Marshall used the term "in the opinion of the court," hence limiting the scope of dissenting opinions (*Talbot v. Seeman*, 1801). The practice of dissenting opinions thus began much later.

3.2. Justice Benjamin Curtis' Dissent in *Dred Scott v. Sandford* and the Rights of Black People in the USA

In *Dred Scott v. Sandford* (1857), Justice Benjamin Curtis disagreed with the majority view and recognized the rights of black people in the USA. While dissenting against the majority, he stated that:

> I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri compromise act, and the grounds and conclusions announced in their opinion. … I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court.

The majority judgement in this case denied American citizenship to people of African descent, and declared that those people had no *locus standi* before the court, whether enslaved or free. The majority view in this case has been strongly criticized, and former Chief Justice Charles Evans has described this ruling as "the court's greatest self-inflicted wound." After growing exasperated with the fraught environment in the Supreme Court engendered by this case, Justice Benjamin Curtis resigned from his post as associate judge. However, the Fourteenth Amendment to the US Constitution, which provided for the Equal Protection Clause, recognized Justice Curtis' dissenting judgement by offering US citizenship to all persons irrespective of race and place of birth. His outspoken views on citizenship law remain insightful for the global community even today.

3.3. Justice John Marshall Harlan's Dissent in *Plessy v. Ferguson* and Racial Segregation Laws in the USA

Justice John Marshall Harlan was the lone dissenter in *Plessy v. Ferguson* (1896), in which he disapproved of the majority view by declaring racial segregation laws (Louisiana Separate Car Act, 1890) as unconstitutional. In this case, the majority judgement upheld the validity of racial segregation and directed the railway department to provide equal but separate accommodation for white and black people. The majority further observed that "equal but separate" doctrine did not violate the Fourteenth Amendment of the US Constitution.

While disagreeing with the majority view, Harlan, also known as "The Great Dissenter," stated that "our constitution is colour-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before law." Justice Harlan eventually declared racial segregation laws as constitutionally invalid. Realizing the importance of his dissent, Harlan further wrote that "the judgement this day rendered, will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case.*"

Acknowledging the importance of Justice Harlan's dissenting opinion, the US Supreme Court finally declared racial segregation laws as constitutionally invalid and violative of the "equal protection clause" of the Fourteenth Amendment of the US Constitution through the majority judgement in *Brown v. Board of Education* (1954).

3.4. Justice Harlan Stone's Dissent in *Minersville School District v. Gobitis* and Freedom of Religion in the USA

The case of *Minersville School District v. Gobitis* (1940) surrounded the right to freedom of religion protected under the US Constitution. The US Supreme Court ruled that public schools are constitutionally empowered to compel students to salute the national flag of the USA and recite the pledge of allegiance, despite the fact that the practice of saluting the flag contradicts the religious faith of Jehovah's Witnesses. Justice Felix Frankfurter wrote the majority judgement, holding that "national cohesion is inferior to none in hierarchy of legal values." He further observed that the recitation of the pledge has advanced the cause of nationalism among US citizens.

Justice Harlan Stone was the lone dissenter in this case, and supported his view by observing that "the guarantees of civil liberty are but guarantees of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them … The very essence of the liberty which they guarantee is the freedom of the individual from compulsion as to what he shall think and what he shall say …" The majority view supplied by this judgement was rejected by the same court within the span of two years in *West Virginia State Board of Education v. Barnette* (1943), where the majority declared that the free speech clause provided under the first amendment of the US Constitution protects students from being forced to take a pledge of allegiance or salute the flag in public schools across the country.

Justice Robert H. Jackson handed down the majority judgment and defended civil liberties by noting that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Interestingly, this judgement was delivered on June 14, which is observed as flag day in the USA. Thus Justice Harlan Stone's dissenting opinion was finally accepted by majority judgement.

4. Comparative Analysis

Judicial dissent is one of the fundamental aspects of the legal systems of both India and the USA, having contributed immensely to human rights jurisprudence. In the USA, there no doubt that the judiciary is supreme. During the tenure of Chief Justice John Marshall, no dissenting judgements were recorded. Justice Benjamin Curtis arguably initiated the practice of dissenting judgements in *Dred Scott v. Sandford* (1857), where his lordship disagreed with the majority view and recognized the rights of black people in the US. Table 1 highlights how key dissenting judgements in the USA have contributed to the development of law and human rights.

Table 1. Notable dissenting judgement in the USA

Case	Dissenting Judge	Impact of Dissenting Judgement	Relevance of Dissenting Judgement in Human Rights Jurisprudence
Dred Scott v. Sandford (1857)	Justice Benjamin Curtis (right to citizenship and right to equality)	Dissenting Judgement was recognized through the Fourteenth Amendment.	Right to nationality and citizenship is considered to be a very important right given to every individual. Various international human rights instruments including the Universal Declaration of Human Rights have recognized this right.
Plessy v. Ferguson (1896)	Justice John Marshall Harlan (right to equality)	Dissenting Judgement was recognized through the Fourteenth Amendment. Majority Judgement in *Brown v. Board of Education* (1954) also recognized Justice John Marshall Harlan's Dissenting Judgement.	Right to equality without discrimination has become a fundamental element of international human rights law and has been accepted by various countries including India and the USA.
Minersville School District v. Gobitis (1940)	Justice Harlan Stone (freedom of religion)	Justice Harlan Stone's Dissenting Judgement on freedom of religion was accepted by majority judgement in *West Virginia State Board of Education v. Barnette* (1943).	Freedom of religion has also occupied an important place in the present era of Human Rights Jurisprudence.

All three cases in Table 1 represent minority judgements that have either been accepted as majority opinions of the court or that have been afforded constitutional recognition through amendments, contributing to the development of law in the USA. These three minority judgements have also all been recognised at the global level through various international human rights instruments, including the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), and the Universal Declaration of Human Rights (1948). In fact, these judgements have also worked as guiding principles for the judiciary across various countries, including India. Table 2 highlights key dissenting judgements and their impact on human rights in India.

Table 2. Notable dissenting judgements in India

Case	Dissenting Judges and Their Opinion	Impact of Dissenting Judgement	Relevance of Dissenting Judgement in Human Rights Jurisprudence
Queen Empress v. Phopi (1891)	Justice Syed Mehmood (principles of natural justice)	The principles of natural justice have been accepted by majority judgements on various occasions.	Principles of natural justice are at the core of any criminal or administrative proceedings.
A. K. Gopalan v. The State of Madras (1950)	Justice Fazal Ali (right to fair trial)	This right was accepted by majority judgement in *Maneka Gandhi v. Union of India* (1978).	Right to a fair trial has been codified in by the Parliament of India, especially in criminal law.
ADM Jabalpur v. Shivkant Shukla (1976)	Justice H. R. Khanna (no suspension of right to life during an emergency)	Parliament of India declared that the right to life cannot be suspended during an emergency via the 44th Amendment.	Limited government is the defining feature of a democracy governed by rule of law.
Bachan Singh v. State of Punjab (1890)	Justice P. N. Bhagwati (abolition of the death penalty)	In its 262nd report, the Law Commission of India recommended abolition of the death penalty.	Slowly, the world is moving towards the abolition of the death penalty.
Justice K S Puttaswamy v. Union of India (2012)	Justice D. Y. Chandrachud (right to privacy)	The Parliament of India enacted the Digital Personal Data Protection Act in 2023. The Jamaican Supreme Court has struck down a national biometric identification program.	The right to privacy has become more relevant in the present technologically driven society.
Shayara Bano v. Union of India (2017)	Justice J. S. Kehar and Justice A. Nazeer (religious and personal rights)	This judgement was passed recently.	People are religiously sensitive and the government must not interfere in these matters.
Romila Thapar v. Union of India (2018)	Justice D. Y. Chandrachud (right to a fair trial)	This very recent judgement acknowledges the right of the accused to a fair trial.	Right to a fair trial, including fair investigation, is very important for an effective criminal justice system.

Table 2 clearly shows that dissenting opinions are part of the history of the Indian Supreme Court. These judgements addressed various aspects of human rights, including the right to fair trail, the right to privacy, the right not to be subject to the death penalty, and religious and personal rights. Many judges have disagreed with majority judgements and provided their own interpretations regarding laws. A remarkable feature of these dissenting judgements is that, in the majority of cases, they have been accepted by majority judgement over the years. On numerous occasions, dissenting judgements have also been given legislative recognition. Sometimes, foreign courts have even taken note of dissenting judgments when issuing their own judgements

– as the ruling of the Jamaican Supreme Court striking down the national biometric identification program demonstrates. In India, judges in the apex court have been offering dissenting opinions since the pre-constitutional era, unlike in the USA where the top court only began to witness dissenting judgements when the country became a republic.

Conclusion

Judicial precedent is generally considered to be a source of law in common law countries, including India and the USA. Judicial dissent is a regular feature of the constitutional courts of India and the USA, yet it remains a neglected area of legal theory – particularly in India. In India, these judgements have been passed on human rights including the right to fair trail, the right to privacy, the right not to be subject to the death penalty, and religious and personal rights.

Undoubtedly, judicial dissent provides different perspectives on laws as it encourages judges to express their independent and personal views by applying their judicial minds. In India, dissenting judgements are often not paid attention to, and are sometimes taken for granted. However, it has been noted that these judgements, especially those which are related to human rights, have contributed immensely to the development of human rights in India.

As far as the USA is concerned, the impact of dissenting judgements is far more profound than in Indian courts. Being one of the world's oldest democracies, dissenting opinions, especially those related to human rights, have been passed again and again, and thus have been converted into majority judgements with the passage of time.

Therefore, in view of the above discussion, it can be concluded that once-neglected minority opinions have morphed into majority views before becoming the law of the land in both India and the USA. Moreover, minority views have also been legislatively incorporated on numerous occasions. Initially, dissenting opinions were absent in the American legal system, but this practice later evolved significantly to contribute towards the development of law, particularly human rights law.

References

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act (2016). India. https://uidai.gov.in/images/targeted_delivery_of_financial_and_other_subsidies_benefits_and_services_13072016.pdf
A. K. Gopalan v. The State of Madras, AIR 1950 SC 27.
ADM Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521.
Bachan Singh v. State of Punjab, AIR 1980 SC 898.
Bergman, M. P. (1991). Dissent in the judicial process: Discord in service of harmony. *Denver Law Review*, *68*(1), 79–90.
Bhatia, G. (2017, November 20). Dissenting judgments ensure that the constitution is a living, breathing document. *Hindustan Times*. https://www.hindustantimes.com/opinion/dissenting-judgments-ensure-that-the-constitution-is-a-living-breathing-document/story-3STSlzaom7vqTviQthsarK.html
Brown v. Board of Education, 347 U.S. 483 (1954).
Constitution (Forty-Fourth Amendment) Act (No. 88 of 1978). India.
Constitution of India (1950).
Dhavan, R. (2018, October 2). The algebra of dissent. *The Hindu*. https://www.thehindu.com/opinion/op-ed/the-algebra-of-dissent/article25099292.ece
Dred Scott v. Sandford, 60 U.S. 393 (1857).
Farooqui, M. O., Sharma, B., & Gupta, D. (2022). Inheritance of digital assets: Analyzing the concept of digital inheritance on social media platforms. *Novum Jus*, *16*(3), 413–435. https://doi.org/10.14718/novumjus.2022.16.3.15
H. M. Treasury v. Ahmed (2010) 4 All ER 829.
Hart, H. L. A. (2012). *The concept of law* (3rd ed.). Oxford University Press.
India Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1.
Indian Penal Code (Act No. 45 of 1860).
International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights
International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en

Justice K. S. Puttaswamy v. Union of India, Writ Petition (Civil) No 494 of 2012; (2017) 10 SCC 1; AIR 2017 SC 4161.
K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
Kelemen, K. (2013). Dissenting opinions in constitutional courts. *German Law Journal*, *18*(8), 1345–1371.
Kerala Hindu Places of Public Worship (Authorizations of Entry) Rules of India (Act 7 of 1965). https://indiankanoon.org/doc/144474018/
Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.
Law Commission of India. (2021). *262nd Report on the Death Penalty*. https://lawcommissionofindia.nic.in
Liversidge v. Anderson (1941) 3 All ER 338.
Louisiana Separate Car Act, No. 111, 1890 La. Acts 152.
Marbury v. Madison, 5 U.S. 137 (1803).
Minersville School District v. Gobitis, 310 U.S. 586 (1940).
Mustafa, F., & Sohi, J. S. (2017). Freedom of religion in India: Current issues and Supreme Court acting as clergy. *BYU Law Review*, *2017*(4), 915.
National Identification and Registration Act (2017). Jamaica. https://opm.gov.jm/wp-content/uploads/2017/06/The-National-Identification-and-Registration-Act-2017-final-passed.pdf
Plessy v. Ferguson, 163 U.S. 537 (1896).
Queen Empress v. Phopi, ILR XIII All. 171 (1891).
Romila Thapar v. Union of India, Writ Petition (Criminal) No. 260 of 2018.
Shayara Bano v. Union of India, AIR 2017 SC 4609.
Sheriff, M. K. (2019, April 17). How Justice Chandrachud's dissent on Aadhaar influenced Jamaica ruling. *The Indian Express*. https://indianexpress.com/article/explained/how-justice-chandrachuds-dissent-on-aadhaar-influenced-jamaica-ruling-5679338/
Singh, M. P. (2000). Securing the independence of judiciary—the Indian experience. *Indiana International and Comparative Law Review*, *10*(2), 245–292.
Singh, M. P., & Shukla, V. N. (2013). *Constitution of India* (12th ed.). Eastern Book Company.
Sorabjee, S. S. (2018, October 6). The noble dissenters. *The Indian Express*. https://indianexpress.com/article/opinion/columns/supreme-court-sabarimala-bhima-koregaon-dissent-judgments-5389012
Talbot v. Seeman, 5 U.S. 1 (1801).
The Terrorism (United Nations Measures) Order 2006, SI 2006/2657 (UK). https://www.legislation.gov.uk/uksi/2006/2657/contents/made
United Nations. (1948). *Universal Declaration of Human Rights*. https://www.un.org/en/about-us/universal-declaration-of-human-rights
U.S. Const. amend. XIV. (1868).
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

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THE POWER TO REMOVE: A COMPARATIVE INQUIRY INTO RECALL MECHANISMS IN INDONESIA AND THE PHILIPPINES

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Abstract. This study investigates the implementation of recall mechanisms in Indonesia and the Philippines, highlighting their roles in fostering political accountability and public participation. Recall, as a democratic tool, allows citizens to remove elected officials before the end of their term, ensuring responsiveness and integrity in governance. Utilizing a comparative legal approach, this research examines the distinct frameworks and political contexts of recall in the two countries. In Indonesia, recall is centralized and primarily applied at the national legislative level, reflecting efforts to maintain institutional stability amidst complex political dynamics. Conversely, the Philippines adopts a decentralized approach, with recall mechanisms empowering local communities to hold their leaders accountable. While both systems aim to enhance accountability, significant differences exist in their processes, actors, and outcomes. Indonesia's model emphasizes party control and institutional safeguards, often limiting public participation, whereas the Philippines prioritizes citizen involvement, albeit at the risk of politicization and instability. This comparative analysis underscores the interplay between political systems, cultural dynamics, and democratic values, offering critical insights for policymakers and scholars seeking to refine accountability frameworks.

Keywords: recall; local government units; house of representatives

Introduction

Recall is the process by which an elected official is removed from office before the end of their term (E. Rappard, 1912; Twomey, 2011a, 2011b; W. Guthrie, 1912; Welp & Whitehead, 2020). This process is distinct from routine elections, where voters elect officials for a specific term and must wait until the

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end of that term to replace them. The significance of recall in a democratic context lies in providing voters with direct control over their government (Welp & Whitehead, 2020). Recall, as an integral part of the political system, plays a crucial role in regulating and overseeing political representation in various countries.

With the continuous evolution of political dynamics, establishing a deep understanding of how recall provisions are implemented and executed in various countries has become an urgent need. Democracy, as the foundation of a government based on public participation, continually evolves in the forms and mechanisms used to maintain the accountability of elected officials (Inoguchi & Blondel, 2012). In this context, recall emerges as an instrument of considerable interest, allowing voters to remove elected officials before the end of their term (Huda, 2011; Yahya & Hufron, 2023). This research focuses on recall provisions in Indonesia and the Philippines, two countries with different political contexts. Indonesia and the Philippines have adopted democratic political systems that enable public participation in determining the fate of the nation. One mechanism that garners significant attention in this context is the recall provision. Recall provisions establish the legal foundation for submitting requests to revoke the mandate of elected officials or replace them before their terms end. A comparison between Indonesia and the Philippines in the context of recall provisions becomes relevant given the significant differences in their histories, cultures, and political dynamics. Although both Indonesia and the Philippines underwent democratic transitions in the late 20th century, differences in colonial legacies, political systems, and economic development create unique contexts for recall provisions in each country.

In the history of Indonesian politics, significant changes occurred post-Reformation in 1998. This period was marked by a shift towards a multiparty democracy and greater political freedom (Liddle, 2013). After the 1998 Reformation, Indonesia experienced significant political changes (Aspinall, 2005). For more than three decades, Indonesia was ruled by an authoritarian regime led by President Soeharto. However, mass protests and international pressure forced Soeharto to resign in May 1998, paving the way for a new era in Indonesian politics (Lee, 2018). The Reformation also brought significant changes to Indonesia's electoral system. Since 1999, Indonesia has held direct elections for the president and legislative members. This has increased political legitimacy by allowing direct public participation in choosing their leaders. The Reformation movement also included constitutional amendments. One of the most important changes was the establishment of recall provisions. Although the political dynamics surrounding recall provisions have evolved, this indicates that legislative members cannot act arbitrarily or simply obey the ruling authority.

The Philippines has a longer history of democracy, reaching its peak after the 1986 EDSA Revolution that ousted the authoritarian regime of Ferdinand Marcos (Nadeau, 2020). Since then, the Philippines has undergone several political changes, but challenges such as corruption and inequality remain part of its political dynamics. Post-EDSA, the Philippines adopted a new constitution in 1987 that reflects democratic principles, including the separation of powers, the protection of human rights, and the empowerment of independent government institutions (George, 2016). The Philippines also stands as one of the democratic countries in Asia that regularly holds general elections, where presidential, parliamentary, and local officials are directly elected by the people. This has provided opportunities for broader political participation and strengthened government legitimacy. Consequently, there has been an increased awareness of the importance of accountability in governance. Recall provisions provide a means for the people to periodically evaluate the performance of elected officials and remove them if they are deemed not to have met expectations or to have engaged in inappropriate behavior. Recall provisions can serve as instruments to address issues of corruption and inequality that continue to challenge the Philippines post-EDSA Revolution. By empowering the people to directly remove corrupt or underperforming officials, these provisions can help enhance transparency, minimize abuses of power, and strengthen government legitimacy.

Indonesia and the Philippines were selected for comparative analysis in this study due to their distinctive implementations of the recall mechanism within their democratic frameworks, despite notable differences in the levels of government to which the mechanism is applied. In Indonesia, recall is applied to national-level officials, particularly members of the legislature, reflecting an institutional approach to

political accountability at the national government level. Conversely, in the Philippines, recall is restricted to local officials, such as governors, mayors, and barangay councilors, thus situating the mechanism within a more localized, community-centered context. This divergence in the levels of government at which recall operates presents an opportunity to explore how democratic values and accountability are institutionalized within different political structures.

The relevance of this comparison is further underscored by the contrasting yet complementary historical trajectories of democracy in the two countries. Indonesia, with its transition to democracy following the 1998 Reformasi, has placed significant emphasis on the decentralization of power and legislative empowerment. Within this context, the recall mechanism has emerged as an instrument for enhancing political accountability, particularly in counteracting the potential dominance of political parties or oligarchic forces. On the other hand, the Philippines, with its longer-standing democratic tradition rooted in the post-EDSA 1986 Constitution, illustrates how recall functions as a direct means for local constituents to express dissatisfaction with public officials. This historical and contextual variation provides valuable insights into the relationship between recall mechanisms and political dynamics at different levels of government, with implications for governance stability and efficacy.

The primary objective of this study is to critically examine the recall mechanism in both Indonesia and the Philippines, with a particular focus on its effectiveness as a tool for political accountability and how it reflects divergent democratic values in each context. Specifically, this research seeks to answer several key questions: To what extent does the recall mechanism strengthen political accountability in each country? How do differences in the levels of government at which recall is applied affect its implementation? What cross-national lessons can be drawn to enhance the efficacy of this mechanism? In addition, the study aims to elucidate the institutional differences and similarities in the design and implementation of recall in both countries, as well as the potential political and social consequences that may arise from its use.

This study involves legal research employing the conceptual, statute analysis, and comparative methodologies. The study aims not only to provide a descriptive account of recall regulations, but also to offer a critical assessment of the political implications stemming from the structural and contextual differences in their application. By doing so, the study aspires to contribute to a deeper understanding of the interplay between recall, political accountability, and democratic dynamics, while also providing a basis for informed policy recommendations relevant to both countries.

1. The legal framework of recall

In Indonesia, Article 22B of the Constitution of the Republic of Indonesia of 1945 (hereinafter referred to as the 1945 Constitution) provides the constitutional basis for recall (Yahya & Hufron, 2023). This article pertains to members of the House of Representatives (DPR), the legislative body representing the Indonesian people. It states that DPR members can be dismissed from their positions or impeached (Hilmy & Marfiansyah, 2021; Rudianto & Purwanto, 2021). Furthermore, the article emphasizes that the conditions for the dismissal of DPR members and the procedures to be followed for such dismissal will be further regulated by law. This indicates that the dismissal process will be governed by clear and specific provisions in more detailed legislation.

The law regarding recall in Indonesia underwent several changes after the reform era. Recall regulations were explicitly governed by legislation during the Soeharto administration. However, in practice, the recall mechanism was rarely utilized. This was largely due to the strong political control exerted by President Soeharto during the New Order regime, where state affairs were under his command. Such was the dominance of President Soeharto at that time that recall was used to eliminate his political opponents who did not comply with his authority. Explicit recall regulations were introduced in Article 16 of Law Number 10 of 1966 concerning the Position of the House of Representatives Assembly and the People's Representative Council of Mutual Cooperation (hereinafter referred to as Law No. 10/1966). In these regulations, it was stated that legislative members can be replaced if they: die; submit a written request to the leader of the Provisional People's Consultative Assembly or the People's

Representative Council of Mutual Cooperation; are replaced; are found to have violated their oath/promises as members of the Provisional People's Consultative Assembly or the People's Representative Council of Mutual Cooperation, by decision of the Provisional People's Consultative Assembly or the People's Representative Council of Mutual Cooperation; no longer meet the requirements as a member of the People's Representative Council of Mutual Cooperation; or are subject to a prohibition on holding office. Subsequently, although the substance of recall regulations did not change significantly, many believed that during the New Order era, these regulations were used as instruments to suppress and threaten legislative members.

After the reform era and amid numerous pressures to eliminate recall regulations, recall provisions were initially not regulated. The reason for this lack of regulation was that representatives felt they did not truly represent the people; instead, they viewed themselves merely as agents of political parties within the legislature. However, the absence of recall regulations led to issues where members of the DPR could leave their political party while remaining in the DPR, and could even become non-party members of the DPR. As a result, political parties faced difficulties in disciplining and guiding their members who served as legislative representatives. These factors provided the background for the reintroduction of recall regulations.

After experiencing ups and downs, the regulation of recall was finally formalized, and remains in Article 239(1) of Law Number 17 of 2014 concerning the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and the Regional People's Representative Councils (hereinafter referred to as Law No. 17/2014). According to this article, a member of the DPR can cease to hold office for three main reasons. Firstly, if a DPR member passes away, they automatically cease to hold office. Secondly, a DPR member may also choose to resign from their position, in which case they must formally submit their resignation to the competent authority. Thirdly, a DPR member can be dismissed from office, with specific reasons outlined in paragraph (2) of the same article. Thus, this article provides provisions regarding the conditions under which a DPR member ceases to hold office before the end of their term, ensuring that the replacement process for DPR members is conducted according to the established mechanisms.

Article 239(2) of Law No. 17/2014 provides details on the conditions that can lead to the dismissal of a member of the DPR before the end of their term, as outlined in paragraph (1) subparagraph, First, if the DPR member is unable to perform their duties continuously or has persistent obstacles in carrying out their duties for three consecutive months without providing any explanation. Second, if the DPR member violates their oath or promises of office, as well as the DPR's code of ethics. Third, if the DPR member is found guilty by a court of committing a criminal offense punishable by imprisonment of at least five years, based on a final and binding court decision. A DPR member can also be dismissed if: this is proposed by their political party in accordance with legislation; they no longer qualify as a candidate for DPR membership; they violate prohibitions stipulated by law; they are dismissed from their political party; or they become a member of another political party. Article 239(2) of Law No. 17/2014 ensures that DPR members are accountable for the performance of their duties and that there are clear mechanisms to address violations or incapacity that may occur during their term of office.

In the Philippines, the regulation of recall differs significantly from that in Indonesia. The recall mechanism in the Philippines does not apply to members of the DPR, but rather to local/territorial officials as governed by Article 10 of the Philippine Constitution. Historically, similarly to Indonesia, the regulation of recall in the Philippines has experienced fluctuations. During the period of Spanish colonization in the Philippines, there was no regulation of recall. The governance system at that time was highly centralized and authoritarian. After the Philippines became a territory of the United States in the early 20th century, there were developments in governance and politics. The temporary government in the Philippines, known as the Philippine Commission, was established by the United States in 1900. However, the regulation of recall was still not part of this governmental structure. The Philippines gained independence from the United States in 1946. The struggle for independence involved various changes in the political and governance systems. However, the regulation of recall had not yet been formally adopted as part of the governmental system.

In 1987, the Philippines adopted a new Constitution after the authoritarian regime of Ferdinand Marcos was overthrown. This new Constitution provided the legal basis for various mechanisms of control and balance of power within the government. One provision of the Constitution is Article 10, which allows for the recall of local officials (Congress of the Philippines, Republic Act No. 9244, 2004). This means that in the Philippine political system, local officials can be removed from office if there are sufficient grounds and following the prescribed procedures. However, for such recalls to be carried out, specific procedures must be followed as stipulated in the Local Government Code, which has been amended. Officials subject to recall include provincial governors down to barangay council members. This encompasses local officials from the provincial level down to the lowest barangay level (Bueza, 2014).

The recall process typically begins with an initiative from the community or specific groups dissatisfied with the performance of an official (Pastarmadzhieva, 2020; Qvortrup, 2011; Spivak, 2020; Welp & Whitehead, 2020). This often involves initiating a petition calling for the official's recall. However, for such a petition to be considered valid, a specified number of signatures from the total electorate in the area must endorse it. These signatures also need to be verified to ensure their validity. Once the petition is collected and verified, the subsequent process will depend on the regulations in that particular locality, which may vary depending on local policies. Generally, there will be a process involving gathering evidence and hearings related to the reasons for the recall petition. Subsequently, the authorized body or institution will decide whether the recall will proceed.

Thus, the regulation of recall in Indonesia has undergone a long journey, from initially vague provisions to becoming clear and specific stipulations in Law No. 17/2014. Meanwhile, in the Philippines, although the recall mechanism applies to local officials, the process also involves the community in initiating such recalls. This underscores the importance of active public participation in maintaining accountability and quality of service from leaders.

2. Recall mechanisms

The recall mechanism is an important procedure in maintaining accountability and representation in governance, both in Indonesia and the Philippines. In Indonesia, rules regarding recall are detailed in laws such as Law No. 17/2014 and Law No. 7/2017. This process involves various stages from petition submission to the appointment of replacements, aiming to ensure that the interests of the public are well represented in the DPR. Meanwhile, in the Philippines, the recall mechanism is regulated under The Local Government Code of The Philippines Book I. This democratic step provides voters with the opportunity to take action against officials deemed no longer to be representing their interests adequately. The process includes signature collection, document verification, and special elections to determine the fate of the challenged officials.

2.1. Recall mechanisms in Indonesia

The history and evolution of the recall mechanism in Indonesia is inextricably linked to the political dynamics that have shaped the country's governmental system, particularly following the 1998 Reformasi. Under the New Order regime, political accountability was frequently overlooked due to authoritarian dominance and the centralization of power under President Soeharto (Fikri, 2021). During this period, the recall mechanism was primarily symbolic rather than operational, often serving as a political instrument to manage opposition within the legislature. However, with the fall of the New Order regime, the Reformasi marked a critical juncture for political and legal transformation in Indonesia, including the redefinition of the recall mechanism (Fikri, 2021). The Reformasi era ushered in a wave of democratic ideals and decentralization, making the political accountability of public officials a central concern. The recall mechanism was subsequently restructured to ensure that public officials who no longer represented the interests of their constituents could be removed before the completion of their term of office.

The historical impetus for the development of the recall mechanism in Indonesia is closely tied to the necessity of establishing more transparent and accountable political institutions. During the New Order

period, the absence of effective accountability mechanisms often facilitated the abuse of power by public officials. In the wake of the Reformasi, the recall mechanism was reinstituted within a legal framework designed to address the authoritarian legacy and to enhance the role of the public in the political decision-making process. Recall came to symbolize a shift from an elitist political system to one that is more participatory and responsive to popular demands. This mechanism was not only intended to empower citizens to evaluate and replace their representatives, but also to incentivize public officials to perform their duties with greater effectiveness and integrity.

The implications of implementing the recall mechanism in Indonesia can be analyzed from two main dimensions: political and institutional. Politically, recall offers the public a tool to monitor the performance of elected officials and ensures their ongoing commitment to the interests of their constituents (Dameanti et al., 2024). However, this mechanism also presents the risk of politicization, particularly in the context of Indonesia's multiparty system. Recall could be exploited by political parties to exert control over legislators deemed disloyal, thus undermining the independence of legislators in fulfilling their representational responsibilities. Institutionally, recall reflects efforts to bolster the legitimacy of the legislature and to strengthen public trust in the political system. Despite these aims, the implementation of the recall mechanism faces significant challenges, including bureaucratic complexities and a general lack of public awareness regarding the procedural aspects of recall itself (Dameanti et al., 2024).

As previously mentioned, the recall regulations are stipulated in Article 239(1) of Law No. 17/2014, where recall can occur due to death, resignation, or dismissal. Recall regulations can also be found in Article 426 paragraph (1) of Law No. 7/2017 on General Elections, where the reasons include: death; resignation; no longer meeting the qualifications to be a member of the DPR, Regional Representative Council (DPD), provincial Regional House of Representatives (DPRD), or regency/city DPRD; or being proven guilty of electoral crimes such as vote-buying or document forgery based on a court decision that has obtained legal force. The grounds for recall under Law No. 17/2014 and Law No. 7/2017 are substantively the same, albeit with different wording. The provision regarding death is one of the clearer and more commonly understood reasons for a DPR member to cease holding their position. When a DPR member passes away, it signifies the end of their career in the legislative body. This has significant implications, particularly concerning their role and contributions to the political decision-making process and service to constituents (Aliksan Rauf et al., 2018).

Resignation is one way in which a member of the DPR can cease to hold their position. This phenomenon reflects various political dynamics and underlying individual factors. This provision indicates that despite being elected as representatives of the people, members of the DPR still retain sovereignty over their personal decisions. Resignation is a manifestation of individual freedom to choose the direction and priorities of life, including the decision to leave political office. Besides personal reasons, resignation can also be triggered by political considerations. For instance, a DPR member might resign in protest against party or government policies, or in response to scandals or increasing public pressure. Resignation in a political context often becomes a strong statement and can lead to significant changes in political dynamics.

The reasons for recall due to termination are regulated under Article 239(2) of Law No. 17/2014, which states that a member of the DPR shall be terminated at any time if:

a. they are unable to perform their duties continuously or are permanently hindered as a member of the DPR for 3 consecutive months without providing any explanation;
b. they violate the oath of office and the DPR code of ethics;
c. they are declared guilty by a court decision that has obtained legal force for committing a crime punishable by imprisonment of 5 years or more;
d. this is proposed by their political party in accordance with the provisions of the legislation;
e. they no longer meet the requirements as a candidate for DPR members in accordance with the provisions of legislation regarding the general election of DPR, DPD, and DPRD members;
f. they violate prohibitions as regulated in this Law;

g. they are dismissed as a member of a political party in accordance with the provisions of legislation;
h. they become a member of another political party.

The inability to perform duties continuously or the fact of becoming permanently hindered is one of the reasons that can lead to the termination of a member of the DPR from their position. A member of the DPR is elected by the people to represent their interests and aspirations in the DPR. Therefore, the consistent and sustained involvement of DPR members in carrying out their duties is crucial in order to ensure that the voices of constituents are heard and well represented in the legislative process. Consistent attendance and participation in DPR sessions, committees, and other working meetings is essential for effective legislative function. Members of the DPR who are regularly absent or inactive in the legislative process can hinder progress in discussions and decision-making that are crucial for the public. Thus, the consistent absence or lack of participation of DPR members can affect the decision-making process in the DPR. This can disrupt debate dynamics, hinder legislative progress, and reduce the quality of the outcomes of policy discussions. The consistent involvement of DPR members is also important for maintaining the accountability and credibility of the legislative institution. Constituents expect their representatives to be present and active in carrying out their duties as members of the DPR, and repeated absences can damage public trust in the institution.

The importance of maintaining integrity and ethics in performing duties as representatives of the people cannot be overstated. The oath of office and the DPR's code of ethics serve as binding foundations that compel DPR members to act with integrity and uphold democratic principles. Violations of the oath of office, the code of ethics, and the DPR's code of ethics are not just moral issues, but also have the potential consequence of causing dismissal for DPR members. The oath of office taken by DPR members affirms their commitment to acting with integrity and high ethical standards in carrying out their duties as representatives of the people. This includes obligations to comply with laws, uphold democratic principles, and act with honesty and fairness. In addition to the oath of office, DPR members are also expected to adhere to the code of ethics established by the legislative body. This code regulates the behavior of DPR members in various aspects, including conflicts of interest, bribery, protection of personal data, and others. Violations of this code of ethics can encompass various unethical or inappropriate actions or behaviors. Compliance with the oath of office and the DPR's code of ethics is key to maintaining public trust in the legislative institution and its representatives. If DPR members violate the oath of office, code of ethics, or DPR's code of ethics, it can undermine the integrity of the legislative institution and affect public trust in political representation. Violations of the oath of office, code of ethics, and DPR's code of ethics not only have moral and ethical consequences but also legal and political repercussions. DPR members who violate the code of ethics may face internal disciplinary sanctions, such as warnings, suspensions, or dismissal from their positions. Moreover, specific ethical violations may also trigger legal investigations or criminal charges against the concerned DPR member.

The importance of maintaining the integrity and credibility of the DPR as a representative institution of society cannot be overstated. One serious factor that can undermine this integrity is when a member of the DPR is involved in criminal activities, which in turn damages the image and reputation of the legislative institution as a whole. In this context, the step to dismiss a DPR member who is proven guilty from their position is not just an action, but a manifestation of the institution's commitment to upholding rules and principles of the rule of law. By ensuring that there are no exceptions in legal consequences, including for DPR members, the legislative institution reaffirms the principle of equality before the law. Furthermore, the process of replacing members involved in criminal activities with better and more trustworthy representatives is an effort to ensure that the interests of the public continue to be well-represented in the DPR, and to restore public confidence in the integrity of the legislative institution.

Proposal from a political party or violation of party rules is another reason that can lead to a member of the DPR being dismissed from their position (Evendia, 2015; Rumokoy, 2012; Huda, 2011). Members of the DPR are often affiliated with a particular political party and receive political support from the party during election campaigns. The relationship between a DPR member and their political party is crucial because the party provides organizational support, resources, and a political platform to its

members. Political parties also have policies and standards that must be adhered to by their members, including DPR members. These policies may encompass various aspects such as political ideology, party platform, and specific political agendas. DPR members are expected to comply with these policies and standards as part of their affiliation with the political party. Political parties play a significant role in monitoring the performance of DPR members they support. Political parties also typically evaluate the performance of DPR members based on several criteria, including adherence to party policies, effectiveness in legislative duties, and responsiveness to constituent needs. If a DPR member fails to meet the standards or policies of their political party, the party may propose corrective actions, including dismissing the member. These steps are taken to ensure that DPR members remain loyal to the vision and mission of their political party and effectively represent the interests of the party and their constituents.

Members of the DPR may also be dismissed for reasons such as not meeting the qualifications to serve as a DPR member and violating prohibitions stipulated in the law. It is important to ensure that elected DPR members meet all the qualifications established by law to serve as representatives of the people. This is a fundamental principle in maintaining the validity of representation in a democratic system, where the people elect their representatives to sit in the legislative body. Furthermore, the principle of equality before the law applies to all citizens, including DPR members. No one is exempt from the consequences of violating the law, and DPR members should be no exception.Violations of prohibitions stipulated in the law must be taken seriously by the competent institutions, and appropriate law enforcement measures should be taken to ensure that DPR members who violate the law are duly sanctioned according to the severity of their offenses. Transparency in the law enforcement process against DPR members who violate prohibitions stipulated in the law is crucial in order to ensure proper accountability.

Finally, members of the DPR may also be dismissed for being dismissed from their political party and joining another political party. Political parties have the authority to regulate and supervise their members. Within this framework, political parties have rules and codes of ethics that must be followed by their members. By dismissing a DPR member from party membership, the party affirms its internal discipline and indicates that the member is no longer considered to represent the party in actions or decisions. The connection between DPR members and political parties demonstrates a relationship of mutual trust and loyalty. Political parties expect their members to support the party's policies and goals and to act in accordance with the party's directives in carrying out their duties as DPR members. If a DPR member fails to comply with the rules or policies of their political party, their dismissal from party membership can be considered a consequential action.

Regarding party switching, when a DPR member switches to another political party, it can alter the political representation chosen by voters without further consultation or approval. This move can also shift the balance of political power in the DPR without corresponding changes in election results. This can result in an imbalance in political representation in the DPR. Elected DPR members representing a particular political party should be committed to that party's policies and the political platform they represent. Switching to another political party demonstrates disloyalty to the political party that supported them during the elections.

In Indonesia, recall does not lead directly to replacement; instead, there is a preliminary application process that proceeds through several stages: the submission of an Early Replacement Application by the respective DPR leadership, the verification of the replacement candidate by the Election Commission (KPU), the appointment of the replacement candidate, and the swearing-in of the replacement. According to Article 6 of the General Election Commission Regulation Number 6 Year 2017 concerning Early Replacement (hereinafter referred to as PKPU No. 6/2017), the dismissal of DPR members is proposed by the DPR leadership. However, if a DPR member is dismissed upon the proposal of a political party or dismissed from political party membership, it is proposed by the party leadership to the DPR leadership with a copy to the President as regulated in Article 8 of PKPU No. 6/2017. Seven days after receiving the proposal for dismissal, the DPR leadership will submit the proposal to the President for official dismissal approval. If approved, the President will formalize it within 14 (fourteen)

days of receiving the proposal for dismissal from the DPR leadership. For the appointment of replacement candidates, Article 9 of PKPU No. 6/2017 states that replacement candidates are derived from the highest number of valid votes in the subsequent ranking on the list of vote acquisition from the same political party in the same electoral district. After the submission of the replacement candidate by the DPR or political party leadership, the KPU verifies the candidate's document requirements, then determines the eligible replacement candidate as stipulated. The final mechanism executed is the DPR leadership requesting the President to issue a Presidential Decree. The inauguration and oath-taking of the new DPR member will be conducted before the DPR leadership in accordance with Article 78 of Law No. 17/2014. The new officeholder will serve until the remaining term of the DPR ends at that time. However, it is important to note that if the remaining term is only 6 months, the recall process cannot be implemented.

The rationale underlying the recall mechanism in Indonesia is multifaceted, reflecting a blend of administrative requirements and the objective of enhancing political accountability. As outlined in Article 239 of Law No. 17 of 2014, the grounds for recall encompass a range of conditions, including the inability to perform duties for three consecutive months without justification, violation of the oath of office or the code of ethics of the DPR, resignation, death, a criminal conviction carrying a sentence of at least five years, and defection to another political party. This diversity of grounds suggests that the recall mechanism in Indonesia is not solely intended to address situations where public officials lose public trust, but also includes administrative and personal circumstances.

Administrative grounds such as death or resignation, while relevant within the context of legislative body management, do not fully capture the essence of recall as a mechanism for ensuring the accountability of public officials to their constituents. For instance, in the case of death, the termination of office occurs automatically due to the official's incapacity to continue their duties. Similarly, resignation is often motivated by personal or political factors, such as health issues, political pressures, or disagreements with party policies. These grounds are primarily administrative rather than political in nature, and are not directly tied to public dissatisfaction with an official's performance or actions.

In contrast, grounds such as violations of the code of ethics, breach of the oath of office, or the inability to fulfill official duties are more closely aligned with the principle of accountability. Violations of the code of ethics or the oath of office, for example, suggest an abuse of authority or behavior that deviates from the moral and legal standards expected of public officials. In this context, recall serves as a mechanism to preserve the integrity of the legislative institution and to prevent the erosion of public trust. Similarly, the failure to perform duties for three consecutive months highlights the importance of consistency and the active presence of officials in performing their representative functions, which are central to the legitimacy of their office.

Despite the emphasis on accountability, the implementation of recall in Indonesia is frequently influenced by the dynamics of political party interests. In practice, the recall process is often initiated by political parties against members perceived as disloyal or in disagreement with the party's policies. This introduces a tension between the representative function of officials as agents of the public and their obligations to their political parties. In some instances, the recall mechanism may be exploited as a political tool to exert control over legislative members, potentially compromising their independence in decision-making. While recall is theoretically designed to uphold accountability, its practical application can be shaped by the political interests of the parties involved.

An examination of the diverse grounds for recall in Indonesia reveals a fundamental distinction between recall as a form of forced removal and the administrative termination of office. Forced removal is typically predicated on serious violations that lead to a loss of public trust, such as corruption or a breach of the oath of office. In contrast, administrative terminations, such as resignation or death, do not involve the moral or political evaluation of an official's performance but are the result of unavoidable circumstances. This distinction underscores the dual functions of recall in Indonesia: as a mechanism to safeguard political integrity and as an administrative process to ensure the continuity of the legislative body.

This analysis suggests that the recall mechanism in Indonesia may benefit from legal reform to better emphasize the principles of accountability and to mitigate the potential for politicization. For example, more precise regulations regarding the grounds and procedures for recall could help to clearly differentiate between instances where recall is necessary to maintain accountability and cases where termination arises for purely administrative reasons. Moreover, a more transparent and participatory process could help ensure that recalls genuinely reflect the will of the public, rather than serving the interests of political parties. Additionally, providing constituents with the right to initiate recall, as is the case in the Philippines, could further enhance the democratic nature of the recall mechanism.

2.2. Recall mechanisms in the Philippines

In the Philippines, the development of the recall mechanism has distinct historical origins, reflecting the country's unique political and social trajectory. The recall process gained prominence following the 1986 EDSA Revolution, which culminated in the ousting of the authoritarian regime of Ferdinand Marcos. The 1987 Philippine Constitution incorporated democratic principles that emphasized the participation of the people and the accountability of public officials (Dachi et al., 2024). Within this constitutional framework, the recall mechanism was introduced as a means to empower local communities in monitoring and holding their elected representatives accountable. The focus on local officials, such as governors, mayors, and barangay council members, highlights the relatively decentralized political structure of the Philippines in comparison to Indonesia. The recall mechanism in the Philippines was specifically designed to address local issues, including corruption, abuse of power, and failures in the provision of public services.

The recall mechanism in the Philippines is detailed in the Local Government Code of the Philippines Book I. The recall mechanism for elected officials in local government units (LGUs) due to loss of trust is a democratic process that allows voters in an LGU to take action against officials deemed to have not fulfilled their expectations or trust. The term elected officials refers to individuals chosen by voters to hold positions in provincial, city, municipal, or barangay (village) levels of government (Capuno, 2011). This recall process enables registered voters in the LGU to take steps to oust or remove officials who are perceived to no longer represent their interests adequately. This can occur in various situations, such as when officials are involved in corruption, abuses of power, or fail to perform their duties effectively.

Recall cannot be initiated during the first year of assuming office or within one year before the next election (see Article 74 of The Local Government Code of The Philippines Book I). This restriction is intended to provide stability to local government during the initial period of officials' terms (David & Legara, 2017). During the first year, newly elected officials typically need time to adapt to their responsibilities, implement their agendas, and build credibility with voters. Allowing for a recall process too early could disrupt stability and consistency in local government leadership. This restriction provides local officials with an opportunity to demonstrate their capabilities and performance to voters before they can be subject to recall. By giving officials the first year to show their commitment and ability in carrying out their duties, voters can make informed assessments of their elected officials'.

The recall process is one of the mechanisms that allow voters to take action against elected officials deemed to no longer adequately represent their interests. This process begins with the collection of supporting signatures for the recall petition, followed by formal steps to submit the recall petition to the Commission on Elections (hereinafter Comelec). According to Article 70(B) of the Local Government Code of The Philippines Book I, the initial step in this process is the preparation of a written recall petition. This petition must contain clear and comprehensive information about the reasons for the recall, supporting evidence for these claims, as well as details about the targeted official and the relevant local government jurisdiction. Once drafted, representatives of the petitioners are appointed to sign the petition. These representatives may be individuals or representatives of groups or organizations supporting the recall petition. This signing is typically done officially in the presence of the election registrar or their representative to ensure the validity of the signatures.

After the recall petition is signed by the representatives of the petitioners, it is then submitted to the Comelec through its office in the relevant LGU. This means the petition is delivered to the authority responsible for processing recall petitions and overseeing elections at the local level. Upon receiving the petition, the Comelec will verify the submitted documents and review the claims made. This process may involve checking the validity of signatures, conducting further investigation into the reasons for the recall, and ensuring that the petition meets the legal requirements. If the recall petition meets the criteria, the Comelec will initiate a legal and democratic process to proceed further. This may include giving the targeted official an opportunity to respond, further investigation into the claims, and organizing a recall election to decide the fate of the official concerned.

As stipulated in Article 70 letter a of The Local Government Code of The Philippines Book I, the recall mechanism for elected officials at the provincial, city, municipal, or barangay levels is governed by percentage requirements that must be met by the petitioners submitting the recall petition. These requirements are designed to ensure that the recall petition is supported by a sufficient number of registered voters in the relevant LGU. For initial support in the form of a petition for recall, the rules are as follows:

a. LGUs with voter populations less than 20,000: At least 25% of registered voters in the LGU. This ensures that the recall petition has significant support from voters in smaller LGUs.
b. LGUs with voter populations between 20,000 and 75,000: At least 20% of registered voters, with the number of petitioners not less than 5,000. This sets a higher threshold for larger LGUs, while still allowing for a significant level of voter support for the recall petition.
c. LGUs with voter populations between 75,000 and 300,000: At least 15% of registered voters, with the number of petitioners not less than 15,000. This sets an even higher threshold for larger LGUs, ensuring that the recall petition has substantial support before further processing.
d. LGUs with voter populations more than 300,000: At least 10% of registered voters, with the number of petitioners not less than 45,000. This ensures that even very large LGUs must see a significant percentage of support for the recall petition.

In the recall process in the Philippines, there are two possible outcomes regarding the tenure of the incumbent official under scrutiny, commonly referred to as the incumbent. If the incumbent successfully garners the majority of votes in the recall election, then the recall process is considered unsuccessful. This means that the majority of voters choose to retain the incumbent in office, and they successfully maintain their position. In this case, the incumbent will continue to serve and will not be replaced by another candidate. However, if another candidate participating in the recall election receives the highest number of votes, then the recall process is considered successful. This means that the majority of voters choose to remove the incumbent from office and replace them with a new candidate. In this scenario, the candidate who receives the highest number of votes will replace the incumbent and assume the position.

2.3. A comparative analysis of recall mechanisms in Indonesia and the Philippines

Both Indonesia and the Philippines have mechanisms for recall to allow voters to take action against elected officials deemed to no longer represent their interests adequately. However, there are significant differences in the details and implementation of the recall mechanisms in both countries. In Indonesia, the recall mechanism is governed by different laws, primarily Law No. 17/2014 and Law No. 7/2017. Reasons for recall include death, resignation, and dismissal for various reasons such as inability to perform duties continuously, violation of oath/pledge of office, or involvement in criminal activities. The recall process begins with a submission of a petition by the leaders of the DPR or political parties to the President, followed by verification and the selection of a replacement candidate by the Komisi Pemilihan Umum (KPU), and finally the swearing-in of the replacement by the leaders of the DPR. This process aims to ensure the stability and credibility of the legislative institution and meet public expectations of accountability. Meanwhile, in the Philippines, the mechanism for recall is detailed in The Local Government Code of The Philippines Book I. The procedure begins with the collection of signatures supporting the recall petition, which is then submitted to the Comelec. The Comelec verifies

the documents and claims submitted in the petition, ensuring that the stipulated requirements, including the percentage of voter support, are met. If the petition passes verification, a recall election is conducted where voters decide whether the elected official should remain in office or be replaced by a new candidate.

The comparison of the recall mechanisms in both countries reveals several significant differences. First, the Philippines imposes strict time requirements before a recall can be initiated, whereas Indonesia lacks clear time restrictions. This reflects a stricter approach in ensuring stability and consistency in local government leadership in the Philippines. Second, the initiation and verification processes for recall also differ. In Indonesia, the process is initiated by the leaders of the DPR (House of Representatives) or political parties, whereas in the Philippines, it begins with the collection of signatures supporting the recall petition from voters. Verification of documents and claims is handled by the Comelec in the Philippines, whereas in Indonesia, it is done by the KPU. Third, the Philippines has a more formal and democratic election recall process, where voters decide the fate of elected officials through majority vote. In contrast, in Indonesia, the recall process is more centralized around decisions made by the leaders of the DPR or political parties, with the appointment of replacements more closely tied to internal political processes. While both countries share the same goal of enabling voters to take action against elected officials deemed not to represent their interests well, the differences in the details and implementation of the recall mechanisms reflect variations in political systems and democratic values between the two countries.

The differing levels of government at which the recall mechanism is applied in Indonesia and the Philippines illustrate divergent approaches to political accountability, shaped by each country's distinct historical and political contexts. In Indonesia, recall is applicable to members of the national legislature, reflecting the need to regulate the conduct of policymakers at the highest echelons of government. This focus can be understood in light of Indonesia's transition from an authoritarian regime to a democratic system, which necessitated mechanisms to ensure that the newly established parliament would function as a legitimate and accountable representative body. The implementation of recall at the national level also signifies efforts to balance power between the executive and legislative branches, while mitigating the potential for abuse of power among legislative members.

Conversely, in the Philippines, the recall mechanism is confined to local officials, underscoring a focus on enhancing accountability at the level of government closest to the electorate. This emphasis aligns with the Philippines' historical trajectory of decentralization, in which local governments possess a considerable degree of autonomy in managing their affairs. The application of recall at the local level is intended to empower citizens to directly influence the leadership of their communities and to ensure that local officials remain responsive to the needs and concerns of their constituents. This approach reflects broader efforts to promote civic engagement and democratic participation within a political system that has historically been dominated by national elites.

These differences can be explained by a combination of historical, political, and institutional factors. In Indonesia, the legacy of centralized power under the New Order regime created a pressing need for robust accountability mechanisms at the national level. In contrast, the Philippines' long-standing tradition of local democracy and decentralized governance has contributed to the prioritization of local officials in the recall process. Additionally, these variations reflect practical challenges inherent in the implementation of recall. In Indonesia, the application of recall at the local level may face significant logistical and administrative challenges, given the country's vast territorial expanse and cultural diversity. In the Philippines, the implementation of recall at the national level may be less feasible due to the high financial costs and procedural complexities involved.

A comparative analysis of the recall systems in Indonesia and the Philippines offers a comprehensive understanding of how this institutional mechanism operates within distinct political and governance frameworks. The primary criteria for evaluating the effectiveness of these systems include the protection of officials subject to recall, the extent of public participation, and procedural efficiency. Although both countries share the overarching goal of ensuring the accountability of public officials, the

implementation of the recall process in each context reflects divergent democratic values and encounters unique challenges.

In Indonesia, the recall system is characterized by a more centralized structure, with significant control exerted by political parties and legislative authorities. This centralized approach affords greater protection to officials subject to recall, as the process involves stringent verification procedures, and the final decision rests with executive authorities. Such an arrangement serves to mitigate the potential for the recall mechanism to be exploited for short-term political advantage or as an unfair instrument for the removal of officials. However, this heightened protection is accompanied by notable limitations, particularly regarding public participation. The public has limited direct involvement in the recall decision-making process, as the procedure is largely controlled by political parties or legislative bodies. This restricted participatory dimension undermines the sense of public ownership of the recall process and diminishes its political legitimacy.

Conversely, the recall system in the Philippines places greater emphasis on citizen participation. The process is initiated by a citizen-led petition for recall, which is subsequently verified by the Comelec. This system enhances public involvement by enabling citizens to directly evaluate the performance of their elected officials. However, the Philippine system is not without its shortcomings, particularly with respect to the protection of officials subject to recall. Due to the flexible nature of the recall process, which allows for recall based on general public dissatisfaction without the need for specific justifications, officials are often vulnerable to political pressure and partisan attacks. This situation can lead to political instability, particularly in regions marked by political polarization.

In terms of procedural efficiency, Indonesia benefits from a more structured and clearly defined recall process, with distinct stages and relatively well-controlled timelines. In contrast, the Philippine recall system may be more cumbersome, with the potential for prolonged and costly procedures, particularly when special elections are required. Furthermore, the flexibility afforded to citizens in initiating recalls in the Philippines introduces the possibility of unnecessary political disruptions, which can impede local governance and stability.

While Indonesia's recall system is more effective in ensuring institutional stability and safeguarding officials from undue political influence, it offers limited opportunities for direct public engagement. The Philippine system, in contrast, is more participatory and democratic but is vulnerable to politicization and instability. The effectiveness of the recall systems in both countries is contingent upon the specific priorities they seek to uphold – whether the protection of institutional stability or the promotion of greater public involvement. Ideally, integrating the most effective elements of both systems could yield a balanced recall mechanism that enhances the protection of public officials, increases public participation, and improves procedural efficiency.

3. Participation and the actors involved in recall mechanisms

Political participation is a crucial aspect of democracy that allows citizens to actively engage in the decision-making process (Karp & Banducci, 2008), both in general elections and in other mechanisms such as recall. In the recall mechanisms of Indonesia and the Philippines, there is a deep understanding of how political participation can be reflected in the process of removing elected officials who are perceived to no longer represent the interests of the public well. These mechanisms illustrate how the reasons for recall are closely related to performance and integrity.

In Indonesia, ethics and integrity are crucial because they form the moral foundation for every member of the DPR in carrying out their duties. In this context, there is a strong expectation from the public that representatives will act according to high moral and ethical principles, and will represent public interests with integrity (Finn, 1993). Therefore, when there is an ethical violation or abuse of power by a member of the DPR, the recall mechanism becomes an important tool to uphold moral and ethical standards in governance. The recall mechanism also reflects the need for accountability and transparency in the political system. By allowing citizens to take action against DPR members deemed to violate ethical

codes or engage in unethical behavior, the recall process strengthens the concept of accountability among elected leaders. This creates moral pressure on representatives to maintain integrity in their duties, knowing that ethical violations can lead to their removal from office. Furthermore, the importance of transparency and accountability in the replacement process of dismissed DPR members highlights a commitment to democratic principles and has significant implications for political participation in Indonesia. Transparency in each stage of the replacement process ensures that decisions can be understood and monitored by the public. This not only enhances the public's trust in political institutions, but also gives them confidence that political processes are not conducted covertly or behind closed doors.

The importance of transparency and accountability in the replacement process for dismissed DPR members not only reflects a commitment to democratic principles, but also strengthens the role of political parties within Indonesia's political structure. This provides a more comprehensive understanding of how political participation is realized through the recall process, linking moral and ethical aspects, transparency, and the role of political parties, which should not be overlooked. Political parties have the authority to propose the dismissal of DPR members and are responsible for overseeing their performance. In this context, political parties are not only vehicles for individual or constituent aspirations, but also guardians of integrity and accountability within legislative bodies. The involvement of political parties also reflects the close connection between individual political participation and the broader political structure. In representative democracies like Indonesia, political parties serve as intermediaries between the public and the government. Therefore, when political parties engage in the recall process, they indirectly facilitate public political participation through established and constitutionally recognized channels.

In the Philippines, the recall mechanism is also regulated by law, which establishes the procedures to be followed and certain limitations, such as time constraints before a recall petition can be filed. This mechanism provides a clear overview of the process of filing a recall petition, starting from the collection of signatures to verification by the Comelec. The imposition of time limits in the recall mechanism in the Philippines underscores the need for strict regulation in political participation. Setting these time limits is not merely an administrative obligation, but also a strategic step to maintain political stability and provide opportunities for newly elected officials to prove themselves. These time limits create a clear and structured framework in the recall process. By setting clear time limits, the recall process becomes more organized and avoids unnecessary delays or manipulations. This allows all parties involved, including voters and elected officials, to have a clear understanding of the stages of the process. Furthermore, time limits provide an opportunity for newly elected officials to establish themselves before facing scrutiny from voters. This creates a healthy dynamic in the political process where elected officials have the chance to work and make a positive impact before being evaluated by the electorate. Thus, time limits not only protect political stability, but also safeguard the rights and opportunities of all parties involved in the political process.

The percentage support requirements in the recall mechanism process in the Philippines reflect an approach towards broad and inclusive political participation. These requirements not only place responsibility on individuals or small groups petitioning for recall, but also emphasize significant support from the broader community. The percentage support requirements ensure that the recall petition has strong legitimacy. In a democratic context, political legitimacy is crucial to prevent the misuse of political processes. By establishing significant support requirements, the recall process is better protected from unreasonable or opportunistic attempts to remove elected officials. Substantial support from the community also indicates a genuine need or strong desire to initiate the recall process, rather than merely impulsive actions from a small faction. The percentage support requirements reinforce the principle of majority decision-making in democracy. In the context of the recall mechanism, significant support requirements affirm that a decision to remove an elected official is indeed supported by the majority of registered voters. This helps ensure that the political process aligns with the will of the majority and is not influenced by small groups or individual interests.

The recall process in the Philippines highlights the essence of democracy as the primary foundation for political decision-making. These democratic principles ensure that the voice of the people holds significant power in determining the political direction and fate of elected representatives. The recall mechanism provides a means for the public to express satisfaction or dissatisfaction with the performance of elected officials. In a healthy democracy, it is crucial for citizens to have mechanisms that allow them to correct or amend political decisions deemed inadequate or detrimental to public interests. The recall process provides a democratic platform for voicing these views and taking appropriate action. By placing the final decision in the hands of voters through elections, the recall process reinforces the principle of popular sovereignty. In representative democracies, representatives are elected by the people to represent their interests and aspirations (Garsten, 2010; Putri, 2020; Zhou, 2024). However, if these representatives fail to meet expectations or violate the trust bestowed upon them by the people, the recall process provides a means for the public to take action and rectify these mistakes through a democratic mechanism. The democratic process in recall elections emphasizes the accountability of elected leaders to the people (Jiménez, 2011; Qvortrup, 2011; Serdült, 2015; Welp & Castellanos, 2020).

The recall procedures in Indonesia and the Philippines exhibit notable differences in terms of stages and public participation. In Indonesia, the recall mechanism is more centralized, involving internal authorities such as the leadership of the DPR and the President. This reflects a more institutional approach to the oversight of legislative officials. In contrast, the recall process in the Philippines places a greater emphasis on direct public participation, from the initiation of petitions to the conduct of special elections. This approach highlights the Philippines' focus on participatory democracy at the local level. Although the recall process in the Philippines grants more power to the public, it also faces challenges, such as the potential for misuse by certain groups for political gain. On the other hand, the recall system in Indonesia, while more structured, tends to limit direct public involvement in the process. This presents its own challenges in fostering a sense of public ownership and engagement with the political accountability mechanism.

Another key difference lies in the flexibility of grounds for recall. In Indonesia, the grounds for recall are detailed in the law and encompass violations of ethics, incapacity, or criminal conduct. In contrast, the recall process in the Philippines is more flexible, as it allows the public to initiate recall petitions based solely on dissatisfaction with an official's performance. This approach reflects a divergence in the political cultures of the two countries. In Indonesia, recall serves to maintain the integrity of legislative institutions, whereas in the Philippines, it is designed as a mechanism to ensure the responsiveness of local officials to the needs of the public. The recall procedures in both countries reflect the unique characteristics of their respective political systems. In Indonesia, recall emphasizes institutional stability and legislative oversight, while in the Philippines, it functions as an instrument of direct democracy that provides greater space for public participation. These differences underscore the fact that recall is not merely a legal mechanism, but also a reflection of the differing democratic values and accountability norms in each country. Further research could focus on evaluating the effectiveness of each approach in enhancing public trust in their political systems

Political participation is not just a right, but also a responsibility that requires active involvement from every citizen in overseeing and ensuring the integrity and accountability of elected representatives. The recall election process not only reaffirms the essence of democracy as the primary foundation for political decision-making, but also strengthens the principle of popular sovereignty and maintains a high level of accountability between leaders and the populace.

Conclusion

The recall mechanisms in Indonesia and the Philippines illustrate that, while both countries pursue the shared objective of enhancing public accountability, the approaches and implementation reflect distinct structural, political, and cultural dynamics. In Indonesia, recall at the national level is characterized by a structured and legally codified framework; however, the process is predominantly governed by political parties and legislative authorities. This arrangement ensures greater institutional stability but limits direct public participation in the recall process. In contrast, the Philippine recall system, primarily implemented at the local level, enables direct public engagement, as the process is initiated by community-driven petitions. This approach reflects a more participatory democratic ethos, albeit with a heightened susceptibility to politicization and political instability.

Indonesia's recall mechanism, with its focus on national legislators, underscores the imperative of maintaining legislative integrity amidst complex political dynamics. Nevertheless, the dominance of political parties in the process risks compromising legislative independence, rendering the mechanism vulnerable to partisan interests. Conversely, the Philippine recall system empowers the public with a more direct means to assess the performance of local officials. However, the procedural flexibility in initiating recalls may exacerbate political instability, particularly in regions characterized by significant polarization. Advancing the efficacy of recall mechanisms necessitates achieving an equilibrium between institutional stability, public participation, and accountability. Ideally, the strengths of both systems could be synthesized to create a more comprehensive and balanced recall framework. Indonesia could benefit from the Philippines' emphasis on public engagement, while the Philippines might consider integrating safeguards to protect officials subject to recall, thereby mitigating potential abuse of the mechanism.

In the Philippine context, exploring the feasibility of extending the recall mechanism to the national level – such as for members of parliament – merits further investigation. A rigorous analysis is essential to evaluate the potential advantages and challenges of such an expansion, including its implications for political stability and civic participation. In Indonesia, reforms aimed at increasing public involvement in the recall process could enhance the mechanism's legitimacy. Integrating mechanisms such as open consultations or referenda into the process could amplify public input while maintaining institutional stability. Future scholarly inquiry could focus on assessing the impacts of recall mechanisms on political accountability and public trust in both jurisdictions. Comparative studies that examine recall systems in other countries could yield valuable insights into best practices and innovative approaches to the design of such mechanisms. By adopting a more inclusive and evidence-driven perspective, recall mechanisms have the potential to serve as more effective instruments for fostering democratic governance and accountability, not only in Indonesia and the Philippines but also in other nations considering the adoption of similar institutional arrangements.

References

Aliksan Rauf, M. A., Bunga, M., & Djanggih, H. (2018). The Political Party's Recall Right Over the Membership Status of the House of Representatives in Indonesia's Constitutional System. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, *7*(4), 443. https://doi.org/10.24843/JMHU.2018.v07.i04.p03

Aspinall, E. (2005). Elections and the normalization of politics in Indonesia. *South East Asia Research*, *13*(2), 117–156.

Bueza, M. (2014, August 6). *Fast Facts: The recall process*. Rappler. https://www.rappler.com/newsbreak/iq/70044-fast-facts-process-recall/

Capuno, J. J. (2011). Incumbents and Innovations under Decentralization: An Empirical Exploration of Selected Local Governments in the Philippines. *Asian Journal of Political Science*, *19*(1), 48–73. https://doi.org/10.1080/02185377.2011.568243

Congress of the Philippines, Republic Act No. 9244 of February 19, 2004. An act eliminating the preparatory Recall assembly as a mode of instituting recall of elective local government officials, amending for the purpose sections 70 and 71, chapter 5, Title One, Book I of Republic Act no. 7160. https://lawphil.net/statutes/repacts/ra2004/ra_9244_2004.html

Dachi, J. V. N., Shahrullah, R. S., & Syarief, E. (2024). Reviewing the Constitutional Rights on Democratic Election Practices in Indonesia and The Philippines. *Justitia et Pax*, *39*(1), 1–53. https://doi.org/10.24002/jep.v39i1.6229
Dameanti, A. S., Mahendra, R., & Oktivan, Y. V. (2024). A Critical Review of Mid-Term Replacements in the Political Dynamics of Indonesia: A Democratic Perspective. *Civil Officium: Journal of Empirical Studies on Social Science*, *3*(1), 16–21. https://doi.org/10.53754/civilofficium.v3i1.389
David, C. C., & Legara, E. F. T. (2017). How Voters Combine Candidates on the Ballot: The Case of the Philippine Senatorial Elections. *International Journal of Public Opinion Research*, *29*(1), 70–94. https://doi.org/10.1093/ijpor/edv041
E. Rappard, W. (1912). The Initiative, Referendum and Recall in Switzerland. *Annals of the American Academy of Political and Social Science*, *43*, 110–145.
Evendia, M. (2015). The Implications of the Political Party's Recall Right on the People's Sovereignty System. *Fiat Justisia: Jurnal Ilmu Hukum*, *6*(3). https://doi.org/10.25041/fiatjustisia.v6no3.357
Fikri, S. (2021). *The Authority of Political Parties in the Mid-Term Substitution of Members of Representative Institutions* [Thesis]. Universitas Airlangga.
Finn, P. (1993). Public Trust and Public Accountability. *The Australian Quarterly*, *65*(2), 50–59. https://doi.org/10.2307/20635720
Garsten, B. (2010). Representative government and popular sovereignty. In I. Shapiro, S. C. Stokes, E. J. Wood, & A. S. Kirshner (eds.), *Political Representation* (pp. 90–110). Cambridge University Press. https://doi.org/10.1017/CBO9780511813146.006
George, C. (2016). Remembering the Philippines' People Power Revolution. *Media Asia*, *43*(1), 1–6. https://doi.org/10.1080/01296612.2016.1179016
Hilmy, M. I., & Marfiansyah, T. (2021). Recall Referendum as an Alternative Mechanism for Mid-Term Replacement in Legislative Institutions in Indonesia. *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, *4*(1). https://doi.org/10.24090/volksgeist.v4i1.4515
Inoguchi, T., & Blondel, J. (2012). *Political Parties and Democracy: Contemporary Western Europe and Asia*. Palgrave Macmillan.
Jiménez, R. (2011). Forensic analysis of the Venezuelan recall referendum. *Statistical Science*, *26*(4), 564–583. https://doi.org/10.1214/11-STS375
Karp, J. A., & Banducci, S. A. (2008). Political Efficacy and Participation in Twenty-Seven Democracies: How Electoral Systems Shape Political Behaviour. *British Journal of Political Science*, *38*(2), 311–334. https://doi.org/10.1017/S0007123408000161
Lee, D. (2018). The Legacies of the Reformasi Movement in Indonesia. *Current History*, *117*(800), 222–228. https://doi.org/10.1525/curh.2018.117.800.222
Liddle, R. W. (2013). Improving the Quality of Democracy in Indonesia: Toward a Theory of Action. Indonesia, *96*, 59–80. https://doi.org/10.5728/indonesia.96.0057
Nadeau, K. (2020). People Power and Elite Democracy (1986–2001). In *The History of the Philippines* (pp. 123–140). ABC-CLIO, LLC. https://doi.org/10.5040/9798400665592.ch-008
Huda, N. (2011). The Recall of Members of the House of Representatives (DPR) and Regional House of Representatives (DPRD) in the Dynamics of Indonesia's Constitutional System. *Mimbar Hukum*, *23*(3). https://doi.org/10.22146/jmh.16169
Pastarmadzhieva, D. (2020). The right to recall: Conceptual framework, examples and the Bulgarian debate. *Balkanistic Forum*, *2*, 317–330. https://doi.org/10.37708/bf.swu.v29i2.23
Putri, A. N. (2020). Accountability of the Representative Function of Members of the House of Representatives. *Jentera: Jurnal Ilmu Hukum*, *3*(2).
Qvortrup, M. (2011). Hasta la Vista: A comparative institutionalist analysis of the recall. *Representation*, *47*(2), 161–170. https://doi.org/10.1080/00344893.2011.581067
Rudianto, R., & Purwanto, P. (2021). A Legal Analysis of the Mid-Term Replacement of Sworn-in Members of the Regional House of Representatives (DPRD). *IUS*, 8(2), 71–83. https://doi.org/10.51747/ius.v8i2.691
Rumokoy, N. K. (2012). A Juridical Study on the Recall Rights of Political Parties in Indonesia's Constitutional System. *Jurnal Hukum Unsrat*, *10*(1), 1–7. http://repo.unsrat.ac.id/49/1/Hal_1_-_7_Nike_K._Rumokoy.pdf
Schaffner, M. A. (1907). The Initiative, The Referendum, and The Recall: Recent Legislation in the United States. *American Political Science Review*, *2*(1), 32–42. https://doi.org/10.2307/1944555
Serdült, U. (2015). The History of a Dormant Institution: Legal Norms and the Practice of Recall in Switzerland. *Representation*, *51*(2), 161–172. https://doi.org/10.1080/00344893.2015.1056219
Spivak, J. (2020). Recall Elections in the US: Its Long Past and Uncertain Future. In Y. Welp & L. Whitehead (eds.), *The Politics of Recall Elections* (pp. 73–93). https://doi.org/10.1007/978-3-030-37610-9_5
Twomey, A. (2011a). *Second Thoughts: Recall Elections for Members of Parliament* (11; 55).
Twomey, A. (2011b). The Recall of Members of Parliament and Citizens. *UNSW Law Journal*, *34*(1).

W. Guthrie, G. (1912). The Initiative, Referendum and Recall. *Annals of the American Academy of Political and Social Science*, *43*, 17–31.
Welp, Y., & Castellanos, A. S. (2020). Understanding the use of recall referendums: Evidence from Ecuador. *International Political Science Review*, *41*(3). https://doi.org/10.1177/0192512119830373
Welp, Y., & Whitehead, L. (2020). The Politics of Recall Elections. In *The Politics of Recall Elections* (pp. 1–7). Springer International Publishing. https://doi.org/10.1007/978-3-030-37610-9_1
Yahya, A. Z., & Hufron, H. (2023). The Urgency of Implementing Constituent Recall. *Jurnal Mengkaji Indonesia*, *2*(1), 63–80. https://doi.org/10.59066/jmi.v2i1.323
Zhou, Y. (2024). Representative System and Popular Sovereignty. In *A Comparative Study of Representative Systems* (pp. 75–111). Springer Nature Singapore. https://doi.org/10.1007/978-981-15-4186-5_3

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A COMPARATIVE ANALYSIS OF PUBLIC ACCOUNTABILITY MECHANISMS

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Abstract. This comparative analysis defines public accountability mechanisms as essential tools in public governance, highlighting their role in ensuring transparency, responsibility, and effective oversight. The study aims to articulate these mechanisms, explain why they exist, and explain why they are essential in ensuring good governance. It also examines various examples of the broad ways in which officials can be held accountable. Fundamental mechanisms include performance evaluation, transparency, audits, and legal basis. This comparative study contrasts public accountability devices in the United States, China, the United Kingdom, India, and Scandinavian countries. The goal is to identify similar and different strategic means by which these devices are realized, and highlight the impact that this has on transparency, efficiency, and public trust in governance. The study analyzes these various approaches to provide insights into what has worked in public accountability and where efforts for improvement might be made. This contributes to the formation of a better understanding of how different governmental systems help to improve accountability and develop public trust through good administrative practices.

Keywords: public accountability, administrative transparency, accountability mechanism, public trust.

Introduction

Public accountability describes government agencies and public officials' responsibility and answerability for their actions, maintaining transparency, ethical behavior, and efficiency. Globally, public accountability is critical in maintaining trust between the government and citizens by avoiding power abuse and promoting fair governance (Kankpang & Nkiri, 2019). Mechanisms such as audits, performance evaluation, and judicial oversight are domains that evaluate and monitor the government's performance. In democratic systems, accountability helps to maintain the effectiveness of decisions made in citizens' interest, maintain the rule of law, and prevent the misuse of resources.

In recent years, the field of administrative law has witnessed significant scholarly attention, particularly in the context of Central and Eastern European countries. The book *Comparative Administrative Law: Perspectives from Central and European Countries* (Deviatnikovaitė, 2024) offers a comprehensive analysis of the evolution and current state of administrative law in this region. It highlights the various reforms and challenges faced by administrative systems in transitioning countries, while also comparing them to Western European models. This work provides a critical perspective on how administrative accountability is understood and applied across different legal systems, offering valuable insights for researchers and practitioners alike.

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Transparency, efficiency, and trust are at the core of democratic societies and, as such, operate as a foundation of public governance accountability. These grounds help to make public officials credible in terms of their responsibilities, decisions, and trust, creating a culture of honesty and accountability (Schmidthuber et al., 2021).

Firstly, accountability makes the actions of the government available and easy for the public to comprehend. When officials need to be held responsible for their decisions and actions, nothing will likely happen in their favor (Schmidthuber et al., 2021). Transparency gives citizens information about how the government spends their taxes and about the outcomes of public policies. It is essential for a working democracy that citizens are allowed to see how their governments behave so they can make informed decisions and keep their leaders accountable (Gorwa & Ash, 2020).

Second, accountability increases efficiency in public governance (Solomon, 2020). Public officials tend to perform their duties better when the authorities watching them are also being watched. Performance audits and evaluations are accountability mechanisms through which we learn where to improve and can ensure that public resources are used optimally (Ferry et al., 2023). This results in better service delivery and more effective public policies.

Additionally, the government and its citizens can develop trust through accountability. Trust is a key component of a stable and prosperous society, and that trust is built on transparent and consistent communication regarding the ethical behavior of public officials (Chen & Wan, 2020). Citizens always appreciate and encourage accountability.

This article focuses on the concept of public accountability within administrative law, examining how political institutions are held responsible for their actions. Public accountability refers to how public officials and institutions are answerable to the public, ensuring transparency and ethical governance. The research aims to explore accountability mechanisms in different countries, with an emphasis on comparative approaches to understanding how various systems function. The article also seeks to answer several key questions, including how public accountability can be improved in different contexts and which methods are most effective. To achieve this, the research uses a comparative methodology, examining case studies from various countries and analyzing the strengths and weaknesses of each. The findings aim to provide insights into how public accountability can be better integrated into administrative law.

The article explores both legal and political aspects, which is to be expected as administrative law inherently concerns the governance of politics. This dual perspective is appropriate and provides a comprehensive overview of the subject. The current study aims to identify different public accountability mechanisms, which involves articulating what these mechanisms are, their purpose, and how important they are for public governance. It also aims to provide a broad definition, purpose, and examples of how officials can be held accountable. The mechanisms used include several domains – for example, performance evaluation, transparency, audits, and legal frameworks (Vian, 2020).

The research aims to examine public accountability mechanisms in governance, specifically focusing on how different countries implement transparency, responsibility, and oversight to ensure effective public governance. The main tasks include identifying key accountability mechanisms, comparing their implementation across various countries, and analyzing the impact on transparency, efficiency, and public trust. The research uses a comparative methodology, examining case studies from the United States, China, the United Kingdom, India, and Scandinavian countries. Data is gathered through document analysis, interviews, and secondary sources such as government reports, academic articles, and policy papers.

1. The comparative nature of the study and public accountability mechanisms

1.1. Comparative study

Transparency, efficiency, and trust in public governance need public accountability mechanisms (Ardigó, 2019). This comparative study investigates public accountability mechanisms in the United States, China, the United Kingdom, India, and Scandinavian countries to identify commonalities and differences.

From the perspective of democracy and the separation of powers, public accountability is deeply entrenched in the United States. The primary mechanism here includes judicial review and a comprehensive system of checks and balances (De Benedictis-Kessner & Warshaw, 2020). The Government Accountability Office (GAO) audits federal agencies to determine compliance with laws and regulations, and the Freedom of Information Act presents transparency based on citizens' access to information in government (Finn, 2021).

The nature of public accountability in China is distinctly different from that in other countries because of its single-party system (Ping et al., 2022). The primary sources of accountability are internal and are dominated by the Communist Party in its functions concerning government operations. Accountability is within the purview of the Central Commission for Discipline Inspection, which investigates corruption and ensures party discipline (Liao & Tsai, 2020). Some work is indeed being done to increase transparency, such as through the Open Government Information regulations, but this is not as intensive as in democratic systems (Ripamonti, 2024).

A modern account of accountability and oversight exists in the United Kingdom, combining traditional parliamentary oversight with contemporary accountability mechanisms (Papadopoulos, 2023). The scrutinization of government expenditures and policies falls to Parliamentary committees, e.g., the Public Accounts Committee, and the National Audit Office is an independent public sector organization auditor (Ferry et al., 2023). The United Kingdom also has a long tradition of judicial review, which permits the courts to review the lawfulness of administrative action.

India's democratic framework and federal structure are reflected in the country's public accountability mechanisms (Khosla & Vaishnav, 2021). The Comptroller and Auditor General carries out audits as regards government accounts and reports to Parliament, while the Right to Information Act allows citizens to ask for information from public authorities (Relly et al., 2020). To strengthen accountability, it is necessary to monitor cases against corruption, which is a task that falls to the Central Vigilance Commission (Sharma & Virk, 2023).
The high levels of transparency and low levels of corruption in Scandinavian countries guarantee that a combination of legal and cultural mechanisms is employed to achieve accountability (Lytvyn et al., 2023). In Sweden, citizens have an institution, the Ombudsman, with which to file complaints about public authorities. Similar institutions in Denmark and Norway oversee public administration, ensuring that the laws are complied with (Kumar & Sharma, 2022). These include open government data and citizens' participation in the decision-making process.

The comparative analysis of public accountability mechanisms in the United States, China, the United Kingdom, India, and Scandinavian countries reveals stark differences influenced by each country's political and cultural contexts (Chaturvedi, 2023). In the UK and the US, parliamentary oversight and judicial review function automatically. In contrast, in China, every check and balance is automatic, but the mechanism lacks transparency (Rose-Ackerman, 2021). India brings legislative pull through strong transparency laws, like the Right to Information Act, to bring public access to information, while Scandinavian countries, which see high transparency and low corruption, have been known to possess legal frameworks mixed with a strong culture of public engagement and open data initiatives (Kankpang & Nkiri, 2019). Such diversity underscores the significance of designing and engineering accountability mechanisms paired with governance arrangements and local cultural contexts to foster transparency, efficiency, and public trust (Gupta et al., 2020).

1.2. Public accountability mechanisms

1.2.1. Legal accountability

Laws, regulations, and judicial review are essential to accountability. Laws are formal rules produced by governmental bodies (Brewer-Carias, 2023), determining what behavior is appropriate and what is not, and laying out penalties for infringement. They are used to maintain order, protect individual rights, and encourage justice. Regulations are critical to ensure that laws are not only established but also properly implemented, giving a clear framework for societal behavior. By establishing clear rules and sanctions, they prohibit wrongdoing, encourage accountability, and develop an atmosphere in which individuals and organizations can operate with confidence and fairness (Abbott & Snidal, 2021). Thus, they tend to deal with specific matters in more general judicial authorities to enforce corresponding law provisions coherently and effectively.

Judicial review is one of the fundamental characteristics of any legal system, and imparts upon the courts the power to examine judicial acts. Administrative branches ensure that those acts conform to the constitution and are agreeable to other legal standards (Cass et al., 2024). This is a case of checks and balances, ensuring that people do not abuse power. An important check on progressive or counter-progressive trends is that courts can declare conservative, illegal, inappropriate, or simply biased laws or regulations null and void via the mechanism of judicial review (Masnov, 2021).

Concurrently, these mechanisms make up a robust system of accountability (Laebens & Lührmann, 2021). Standards are set through law, regulations specify the implementation of details, and judicial reviews see that implementation occurs justly. This interplay reinforces public trust in the legal system and facilitates a just and orderly way of life.

Moreover, political accountability includes elected officials, political parties, and the government (Nyberg, 2021), who represent their constituents, make decisions, and pass laws according to the wishes of those who elect them. Political parties are vehicles by which voters are organized and mobilized (Luna et al., 2021), through which programs and policy choices are advocated for. The parliamentary administration, made up by elected representatives, ensures that the law is carried out correctly (Bar-Siman-Tov, 2020). This covers everything from reviewing government action to holding hearings to investigating misconduct. In combination, these elements bring transparency, accountability, and responsiveness to governance, which means that public officials act for the betterment of the people.

Internal audits and performance evaluations are essential to bureaucratic accountability (Raffler, 2022). An audit is an organization's comprehensive review of all financial records, where all records are verified in terms of the funds being used to detect fraud and mismanagement. This ensures compliance with applicable laws and regulations. Internal audits can be performed by agency staff or independent bodies. Audits often result in recommendations for improvements to financial practices regarding operational efficiency (Eulerich & Eulerich, 2020).

The effectiveness and efficiency of employees and programs are evaluated during performance evaluation. In these evaluations, objectives and KPIs are regularly reviewed, and feedback is provided (Ardigó, 2019; Han, 2020). They help us understand what employees are good at and where they may need extra training or support. Performance evaluations also ensure that programs are accomplishing what they intend to and are producing results that are valuable to the public.

Together, audit and performance evaluation work to create a system of checks and balances inside agencies (Babalola, 2020). Transparency is these agencies' form of promotion, as they keep operations and finances transparent and accountable while staying ahead in their respective industry. These internal mechanisms provide a feeling of trust in government agencies through efforts regarding responsibility and excellence (Hardiningsih et al., 2022).

1.2.2. Public and social accountability

Promoting accountability depends on media, civil society, and public opinion. The media investigates, reports on, and informs the public of government actions (Alawattage & Azure, 2021; Brewer-Carias, 2023). Organizations in the civil society network organize citizens and campaign for policy changes (Pinckney et al., 2022). The media and civil society influence public opinion and pressure officials to act responsibly and transparently. These elements can create an educational axis of informed citizens who demand accountability (Brewer-Carias, 2023).

1.2.3 Ethical and professional accountability

Administrative behavioral standards and ethical responsibility codes include basic administrative ethics and codes of conduct (Brewer-Carias, 2023). The standards that public servants have to follow include valuing integrity, transparency, and impartiality. They act as a framework for decision-making and work to prevent conflicts of interest, corruption, and abuses of power. If these codes are followed, the administrators can maintain public trust, uphold the law, and provide services reasonably and efficiently. Regular training and enforcement of these ethical guidelines guarantee that all employees know and agree to adhere to strict principles of professional conduct (Trevino & Nelson, 2021).

2. Accountability mechanisms in different countries

2.1 The United States

The United States has a sound structure for government accountability, embodied in the Federal Government and symbolized by the Government Accountability Office (GAO) and Inspectors General. The GAO serves as an independent, nonpartisan, nonpolitical agency of Congress and performs auditing, evaluation, and investigative functions. As for its mission, this highly regarded institution is charged with enhancing federal performance and promoting greater responsibility to the American populace. The performance audit is one of the investigative techniques employed by the GAO to solve national and global issues, enhance program performance, cut costs, and make decisions (*Consumers' Research v. Federal Communications Commission*, 2023).

The Inspectors General (IGs), created by the Inspector General Act of 1978, contribute to increased government accountability. They are policy-oriented entities within Federal Agencies that perform audits and investigations to help detect fraud, waste, abuse, and mismanagement. IGs offer fact-based information to decision-makers and the public to clarify issues concerning government operations. They also propose measures to enhance the economy, efficiency, and effectiveness of the agencies of the Central Government (*United States v. Arthrex, Inc.*, 2021).

In this way, the GAO and IGs are essential in ensuring effectiveness and accountability in government operations. They assist in preventing corrupt practices, measuring conformity, and evaluating the performance of agencies and government departments. Some areas of specialization include auditing and evaluation, investigations, and providing solutions to increase the efficiency and effectiveness of the government (*Seila Law LLC v. Consumer Financial Protection Bureau*, 2020). All of these mechanisms are essential for enforcing the standards of public accountability, enhancing propriety in the utilization of public resources, and ensuring the proper accountability of government officials.

2.2. The United Kingdom

The two concepts of parliamentary oversight and Ombudsman systems form part of the accountability apparatus in the United Kingdom, which enables the country to ensure that government activities are conducted with a view towards the citizenry's interest (Bar-Siman-Tov, 2020).

The principal way in which the UK Parliament exercises oversight is through committees. These select committees include the Public Accounts Committee (PAC) and the Public Administration and Constitutional Affairs Committee (PACAC) (Kirkham, 2022). The role of the PAC is to analyze the welfare of the government's investments and the aims and objectives of projects, and to scrutinize the government's expenditure. It examines reports from the National Audit Office (NAO), an independent

auditor of government bodies. The PAC interviews government personnel regarding the NAO's report and provides recommendations to control public expenditure.

On the other hand, the PACAC supervises quality and standards in public administration and constitutional affairs. It examines numerous organizations, such as the Parliamentary and Health Service Ombudsman (PHSO), to identify how well they are doing their jobs (Kirkham & Stuhmcke, 2020). The duties of PACAC also entail "Scrutinizing the expenditure, monitoring the supply of public services, and holding the executive accounts" (Kirkham & Stuhmcke, 2020).

In the UK, complaint systems related to the functioning of public organizations and services are served by several ombudsperson services. The most visible among them is the PHSO, which is responsible for the management of complaints of members of society who feel unfairly treated or let down by the Prime Minister's departments, NHS England, as well as other governmental and related establishments (Kirkham & Stuhmcke, 2020; Ngatikoh et al., 2020). The PHSO is supervised by a Parliamentary Commissioner for Administration but is entirely independent of government departments and directly accountable to Parliament.

The Local Government and Social Care Ombudsman is responsible for complaints regarding the local authorities and social care providers in England and Scotland. The Public Services Ombudsman has the authority to investigate complaints against public service providers in Scotland. These Ombudsmen are essential in monitoring the equity and effectiveness of service provision at the local level, and taking care of complaints about maladministration and acts of poor service (Chen, 2023). The parliamentary oversight and Ombudsman systems in the UK are compelling; invariably, these mechanisms level the playing field regarding government accountability (McBurnie, 2020).

2.3. India

Judicial review and the Central Vigilance Commission (CVC) have remained central to the structure of Governance in India, especially in recent times. The judiciary, through the power of judicial review, monitors whether the executive and legislative organs act within the Constitution. In contrast, the CVC deals with the issue of misconduct in Government (Fischer, 2020).

In India, the judiciary, particularly the Supreme Court and the High Courts, has exercised its veto power to advance accountability through historic decisions. One notable instance in recent years relates to the Supreme Court judgment which directed the setting up of Police Complaints Authorities to deal with police brutality and the violation of rights (Fischer, 2020). This judgment made the point that the judiciary can step in and ensure that the enforcement machinery is used following the law and is not abused.

In the fight against corruption, the CVC, created to oversee vigilance across central government bodies, has been particularly significant. Over the last few years, the CVC has initiated several high-profile investigations and reforms. For example, the CVC played a vital role in the 2021 inquiry regarding alleged irregularities in procuring a leading public sector enterprise (Ardigó, 2019; Baxi, 2022). The CVC's findings triggered sweeping administrative reforms and formalized a stricter set of procurement rules to avoid interdictions in the future.

2.3.1. Case Study: Prakash Singh v. Union of India (2020)

The Public Interest Litigation was filed by Prakash Singh, a former police officer, who petitioned for police reforms, accountability, and transparency in the police force. Based on the Supreme Court's judgment, states and districts were asked to create of Police Complaints Authorities nationwide to look into complaints against police officers. This was intended to curb police excesses and to provide citizens with an avenue in seeking redress for grievances against members of law enforcement agencies (Gorwa & Ash, 2020; Hu & Conrad, 2020; Schmidthuber et al., 2021).

2.4. Scandinavian Countries

Openness and public concern in governance mechanisms is seen in the more developed Scandinavian countries of Denmark, Norway, and Sweden. These nations can be counted on to remain among the least corrupt in the world because they have substantial safeguards against corruption.

2.4.1. Transparency mechanisms

The right to view official papers that are owned by a government body is known as public access in Scandinavia countries. By exposing government acts to scrutiny, a transparent process fosters accountability and confidence between the government and its constituents (Lee, 2007). Giving people the choice to select information regarding policies and accuracy makes public access more effective and encourages more democratic engagement. For example, Sweden's dedication to openness and public access to information is anchored by the Freedom of the Press Act, which was passed in 1766 (Lee, 2007). In addition to granting public access to official papers, this law safeguards journalists' freedom to report on government actions (Lee, 2007). Citizens are now more equipped to participate in democratic processes and hold their government responsible thanks to the Act's promotion of an open culture. The law also makes it possible for anybody to request access to public documents, which makes it one of the most progressive transparency systems in the world. (Magnússon, 2020). Ensuring that public officials are held accountable for their acts and fostering trust between the government and its constituents have both benefited greatly from this dedication to public access (Magnússon, 2020).

The Freedom of the Press Act continues to play a significant role in Swedish politics and influences comparable transparency efforts abroad. Denmark also has similar laws that require the release of government information, which cuts down on corruption and the embezzlement of public funds (Tonhaeuser & Stavenes, 2020).

In addition, public participation is a part of the governance frameworks in Scandinavian countries. The civil societies in these nations promote people's participation in various ways – consultations, referendums, and participatory budgeting (Simonofski et al., 2021). For example, in Denmark, people can participate in making budgetary decisions and thus judge how public money is spent. This participatory approach improves government transparency and addresses a significant issue: that decisions made are congruent with the people's point of view.

2.4.2. Case study: Denmark's open budget process

Denmark encourages citizens to access its budget plans. The government also ensures that it releases a detailed budget on government expenditure to citizens to be reviewed. This process is acknowledged by the Open Budget Index, which has ranked Denmark among the best regarding its budget (Boeree et al., 2021). This process keeps citizens close to implementing the budget so that the utilization of their money is effective, and any action taken by the government is most appropriate.

Citizens' participation in Scandinavian countries is not limited to formal structures, as there is high volunteerism in the area of community participation. For example, a very high percentage of the adult population in Norway volunteers to work in organizations and participate in community activities. Due to this culture of civic engagement, social dilemmas are minimized, and trust, cooperation, and governance are increased.

2.5. China

In China, accountability mechanisms are intrinsically linked to the structures and operations of the Chinese Communist Party (CCP) and its hierarchical administrative controls.

Party-based accountability forms an integral part of governance, whereby party members and officials have to conform to the policy and directives of the CCP. There is a system of enforcement, ultimately

enforced by a combination of internal party rules, disciplinary action, and performance evaluations (Qin & Owen, 2023). Simply put, the role of the Central Commission for Discipline Inspection is to monitor and investigate party members, to oversee the quality of ethical standards, and to unearth corruption.

However, hierarchical administration controls accountability by dividing the government into separate tiers that specify authority and responsibility (Cass et al., 2024; Reddick et al., 2020). Each level of government is accountable to each level below it. This structure guarantees that policies and directives issued by the central government are put in place consistently throughout the country. The key to this is reflected in the cadre management system, where officials are measured in terms of their performance and compliance with party policies (Schillemans et al., 2021). These evaluations serve as a basis on which promotions and career advancement are often contingent, leading to strong incentives for compliance and high performance.

2.5.1. Case study: Earmarked Project System

A notable case study with which these mechanisms are illustrated is the Earmarked Project System, which analyzes how authority and accountability are distributed in Chinese government hierarchies (Shen et al., 2024). This system advocates for interdepartmental competition and expansion with a top-tier ranking over lower-tier government driven by incentives and strict oversight. One example is the use of technology to monitor bureaucratic performance and facial recognition for tracking attendance on digital platforms when conducting performance evaluations. These tools also make things more transparent and offer fewer opportunities for corruption.

3. Comparative analysis, challenges, and emerging trends in public accountability

3.1. Strengths and weaknesses of different mechanisms

Some task markets are good in corporate governance, and some are not. For example, some are efficient in limiting the most threatening areas of managerial incompetence. Several different accountability mechanisms offer varying degrees of strengths and weaknesses and can be successful or not in various contexts.

Internal accountability mechanisms include several advantages, such as close alignment to organizational goals, and can be implemented quickly (Ghonim et al., 2022; Kirkham & Stuhmcke, 2020). However, they can be biased and opaque, undermining their credibility. External accountability mechanisms include regulatory oversight and third-party audits. They create a transparent environment and provide stakeholders with an impersonal point of view for trust. At the same time, they can be costly and time-consuming, which may cause delays or incentives to the decision-making process (Silva et al., 2023).

Social accountability mechanisms include public reporting, community monitoring, and other stakeholder empowerment tools (Guerzovich et al., 2022). This domain enables transparency and responsibility. Importantly, these mechanisms can result in significant improvements in service delivery and governance that often come with the threat of stakeholder avoidance and conflicts of interest.

Legal accountability mechanisms concern judicial reviews and legal penalties to enforce laws and regulations, and act as a sign of deterrence against misconduct. However, they are adversarial, and lengthy legal processes are often necessary (Brewer-Carias, 2023).

3.2. Cultural and institutional influences on accountability

The effectiveness of accountability systems is significantly determined by culture and organizational structures. Perceptions of accountability are a function of cultural norms and values in shaping what happens when a rule is created and what happens when a rule is enforced (Abhayawansa et al., 2021). Using hierarchical structures may discourage open communication and transparency in cultures with large power distances, where the accountability mechanism cannot be as effective (Lægreid & Rykkja,

2022). However, cultures that support and motivate transparency in the accountability system thrive. Legal and political frameworks have institutional structures that also play a significant role. The enhancement of accountability is apparent in robust legal systems with clear regulations and independent judiciary bodies that involve multiple stakeholders in the decision-making process (Lægreid & Rykkja, 2022; Rose-Ackerman, 2021). Accountability can be better promoted, and public participation and decentralization can be promoted through political structures.

3.3. The effectiveness of accountability mechanisms in curbing corruption

Different types of accountability mechanisms effectively reduce corruption and increase transparency in every domain (Svara, 2021). Intervening in the context of receiving information involves finding the internal mechanisms that address corruption, i.e., the internal audits and the compliance program, which promote conformity to internal policies and procedures. However, internal biases and lack of independence may limit them. Regulatory oversight and third-party audits all have an external view of operations. They are likely to reveal corruption compared to internal audits since they are independent and cover a broader scope (Orozco, 2020). While these mechanisms can drive enormous improvements in governance, they may struggle with a lack of stakeholder engagement or conflicts of interest. Legal accountability, such as judicial review and anti-corruption laws, serves as a potent deterrent to corruption due to the threat of legal action (Findley et al., 2020) which it is usually adversarial and expensive. Each approach has its strengths and challenges; in many cases, combining these approaches is the best way to strengthen control over corruption and advance transparency (Orozco, 2020).

3.4. The interaction between accountability mechanisms

The interaction of legal, political, and social mechanisms is complex; their relationships are far from clear-cut, and are often complementary or contradicting (Brochmann, 2020). Formal mechanisms of accountability and governance are drawn from the law or other forms of regulation. While they guarantee consistency and can be easily enforced, they are rigid and slow to adapt. Some political mechanisms, like government policies and administrative actions, can tackle emerging issues and quickly involve several actions to address changes (Papadopoulos, 2023).

The objectivity and stability of legal mechanisms can be lacking. Transparency and responsiveness are based on social mechanisms, i.e., public opinion and community engagement, that pressure institutions on behalf of the public (Samaratunge & Alam, 2021). However, these mechanisms are dynamic, inconsistent, influenced by cultural norms, and capable of adaptation. When aligned, such mechanisms can produce a robust accountability system in which laws are enforced, policies are correctly implemented, and public oversight maintains transparency (Ngatikoh et al., 2020). In this case, conflicts arise when political interests compromise legal norms, or social norms contradict firm legal ideals; challenges are faced in governance and accountability, but knowing how they interplay is critical to governance (Abbott & Snidal, 2021).

3.5. Challenges and emerging trends in public accountability

3.5.1. Technological advances

Platforms, big data, and AI improve accountability mechanisms dramatically by improving transparency, efficiency, and responsiveness (Kulal et al., 2024). Real-time reporting and public engagement are promoted on digital platforms, promoting transparency and stakeholder engagement. Big data can be used to analyze large datasets that cannot be analyzed otherwise, and instead can show patterns of misconduct and inefficiency (Samaratunge & Alam, 2021; Talesh & Cunningham, 2021).

These tools provide AI with the ability to increase predictive possibilities and automate monitoring operations, allowing it to identify and react to issues in time. However, all these technologies cover privacy concerns, personal information, and all the essentials related to an individual that are meant to maintain transparency and effectiveness.

3.5.2. Globalization and transnational accountability

International norms, agreements, and oversight significantly influence domestic accountability as they have established criteria and frameworks that govern political life. International norms like those laid down by the United Nations and other global bodies also compel countries to follow these lines and adopt domestic norms in these areas (Jongen, 2021). Through participation in international agreements like the OECD Anti-Bribery Convention and the UN Convention Against Corruption, domestic reforms are driven to some extent by mechanisms for monitoring and reporting compliance. External evaluation and pressure on countries to conform to agreed standards come through international oversight, such as from the International Monetary Fund and World Bank. However, how effectively these international influences work depends on domestic institutions' political will and ability to take on and enforce the necessary changes (Rose-Ackerman, 2021). International norms and agreements are an essential impetus for reform. Still, standards reform is ultimately conditioned by domestic commitment and the ability to adapt these standards to local contexts.

3.5.3. Accountability in authoritarian vs. democratic systems

There are significant differences between authoritarian and democratic accountability mechanisms (Laebens & Lührmann, 2021). In centralizing accountability in an authoritarian system, the power often lies with a few leaders. Many common mechanisms, such as internal audits, are limited by a lack of transparency and public participation. On the other hand, the democratic system highlights decentralized accountability with multiple connected players like an independent judiciary and public elections (Shrestha et al., 2023). While transparent and responsive, these systems are slower and more difficult due to consensus and broad participation. However, the approach reflects the regime's political structure and values.

Conclusion

In this paper, accountability mechanisms were analyzed comparatively within various contexts, highlighting their advantages and limitations. Audits and performance reviews, as internal mechanisms, are biased and not transparent enough to align with organizational goals. Regulatory administration and third-party audits are complex (Noll, 2021), time-consuming, and often costly, offering no fundamental certainty of independence and adding to the perception of an ever-lengthening list of requirements. Social mechanisms, including public reporting and community monitoring, can benefit stakeholders and be made more transparent, while their effectiveness is limited by low engagement and conflicts of interest (Wang et al., 2020).

In this paper, public accountability within administrative law was discussed; its importance was ascertained in assuring that governance is made within the realm of transparency and that public resources are effectively managed. This was achieved through comparative analysis, showing how different countries have different ways of putting accountability mechanisms in place in the different political, legal, and cultural contexts in which they operate. The research draws attention to the importance of public accountability in fostering trust between citizens and government institutions, at the same time as revealing the difficulty of enforcing it to prevent abusive practices while calling for better laws to delineate permissible activities.

The findings indicate that strengthening public accountability is vital for enhancing administrative efficiency and responding to the public's concerns regarding government practices. Different accountability models have been implemented globally, but they are only successful if their legal provisions are in line with political will and public expectations. Further research into the relationship between public accountability and citizen engagement would benefit from an examination of this in rapidly evolving digital governance scenarios. This paper improves the understanding of how public accountability mechanisms work in various administrative systems and has implications for policy that seeks to improve administrative transparency and accountability.

References

Abbott, K. W., & Snidal, D. (2021). The governance triangle: Regulatory standards institutions and the shadow of the state. In *The spectrum of international institutions* (pp. 52–91). Routledge. https://www.taylorfrancis.com/chapters/edit/10.4324/9781003111719-5/governance-triangle-kenneth-abbott-duncan-snidal

Abhayawansa, S., Adams, C. A., & Neesham, C. (2021). Accountability and governance in pursuit of Sustainable Development Goals: Conceptualising how governments create value. *Accounting, Auditing & Accountability*, *34*(4), 923–945. https://doi.org/10.1108/aaaj-07-2020-4667

Alawattage, C., & Azure, J. D.-C. (2021). Behind the World Bank's ringing declarations of "social accountability": Ghana's public financial management reform. *Critical Perspectives on Accounting*, *78*, 102075. https://doi.org/10.1016/j.cpa.2019.02.002

Ardigó, I. A. (2019). *Local government accountability mechanisms*. Transparency International; U4 Helpdesk Answer 2019:09. https://www.u4.no/publications/local-government-accountability-mechanisms

Babalola, J. B. (2020, February 27). *Governance and internal control in public institutions* [presentation]. Presented at a 2-day national workshop on anti-corruption organized by American Anti-Corruption Institute (AACI) and Department of Adult Education, University of Ibadan, Nigeria.

Bar-Siman-Tov, I. (2020). *Parliamentary activity and legislative oversight during the coronavirus pandemic-a comparative overview*. Bar Ilan University Faculty of Law Research Paper, 20–06.

Baxi, U. (2022). Systemic governance corruption: The dialectics of law and non-violent social movements in contemporary India. In K. Kannabiran, B. Hollstein & F. Hoffmann (Eds.), *Discourses on corruption: Interdisciplinary and intercultural perspectives* (pp. 40–65). Sage.

Boeree, N. C., Zoller, C., & Huijsman, R. (2021). The implementation of national dementia plans: A multiple-case study on Denmark, Germany, and Italy. *International Journal of Environmental Research and Public Health*, *18*(19), 10220.

Brewer-Carias, A. R. (2023). *Judicial review in comparative law: 1985–1986*. Ediciones Olejnik. https://www.torrossa.com/it/resources/an/5594748#

Brochmann, G. (2020). The Mechanisms of Control. In G. Brochmann & T. Hammar (eds.), *Mechanisms of immigration control: A comparative analysis of European regulation policies* (pp. 1–27). Routledge. https://doi.org/10.4324/9781003086062-1

Cass, R. A., Diver, C. S., Beermann, J. M., & Mascott, J. L. (2024). *Administrative law: Cases and materials* (9th ed.). Aspen Publishing.

Chaturvedi, S. (2023). *Comparative public administration* (1st ed.). Academic Guru Publishing House.

Chen, X. (2023). Study on the reform of the ombudsman system in the United Kingdom. *Science of Law Journal*, *2*(12), 93–96. https://doi.org/10.23977/law.2023.021213

Chen, X., & Wan, P. (2020). Social trust and corporate social responsibility: Evidence from China. *Corporate Social Responsibility and Environmental Management*, *27*(2), 485–500. https://doi.org/10.1002/csr.1814

Consumers' Research v. Federal Communications Commission No. 21-3886 (6th Cir. 2023).

De Benedictis-Kessner, J., & Warshaw, C. (2020). Accountability for the local economy at all levels of government in United States elections. *American Political Science Review*, *114*(3), 660–676. https://doi.org/10.1017/S0003055420000027

Deviatnikovaitė, I. (Ed.). (2024). *Comparative administrative law: Perspectives from Central and Eastern Europe* (1st ed.). Routledge.

Eulerich, A., & Eulerich, M. (2020). What is the value of internal auditing? – A literature review on qualitative and quantitative perspectives. *Maandblad Voor Accountancy En Bedrijfseconomie*, *94*(3/4), 83–92. https://doi.org/10.5117/mab.94.50375

Ferry, L., Midgley, H., Murphie, A., & Sandford, M. (2023). Auditing governable space—A study of place-based accountability in England. *Financial Accountability & Management*, *39*(4), 772–789. https://doi.org/10.1111/faam.12321

Findley, M., Nielson, D., & Sharman, J. (2020, July 20). *Anti-corruption measures*. FACTI Panel Background Paper 5. https://factipanel.org/docpdfs/FACTI%20BP5%20-%20Anti%20corruption%20measures.pdf

Finn, P. (2021). Freedom of information legislation and the democratic oversight narrative. *Critical Military Studies*, *7*(3), 335–354. https://doi.org/10.1080/23337486.2019.1687997

Fischer, A. (2020). *The judicialisation of politics in India: Origins and consequences of the power of the Indian Supreme Court* [doctoral thesis, Heidelberg University]. https://doi.org/10.11588/heidok.00025364

Ghonim, M. A., Khashaba, N. M., Al-Najaar, H. M., & Khashan, M. A. (2022). Strategic alignment and its impact on decision effectiveness: A comprehensive model. *International Journal of Emerging Markets*, *17*(1), 198–218. https://doi.org/10.1108/IJOEM-04-2020-0364

Gorwa, R., & Ash, T. (2020). Democratic transparency in the platform society. In N. Persily & J. A. Tucker (Eds.), *Social media and democracy: The state of the field and prospects for reform* (pp. 286–312). https://doi.org/10.1017/9781108890960.013

Guerzovich, F., Aston, T., Levy, B., Chies Schommer, P., Haines, R., Cant, S., & Faria Zimmer Santos, G. (2022). *How do we shape and navigate pathways to social accountability scale? Introducing a middle-level Theory of Change*. CEDIL Research Project Paper 1. https://doi.org/10.51744/CRPP1
Gupta, A., Boas, I., & Oosterveer, P. (2020). Transparency in global sustainability governance: To what effect? *Journal of Environmental Policy & Planning*, *22*(1), 84–97. https://doi.org/10.1080/1523908X.2020.1709281
Han, Y. (2020). The impact of accountability deficit on agency performance: Performance-accountability regime. *Public Management Review*, *22*(6), 927–948. https://doi.org/10.1080/14719037.2019.1679237
Hardiningsih, P., Udin, U., Masdjojo, G. N., & Srimindarti, C. (2022). Does competency, commitment, and internal control influence accountability? *Journal of Asian Finance, Economics and Business*, *7*(4), 223–233. https://doi.org/10.13106/jafeb.2020.vol7.no4.223
Hu, S., & Conrad, C. (2020). Monitoring via the courts: Judicial oversight and police violence in India. *International Studies Quarterly*, *64*(3), 699–709. https://doi.org/10.1093/isq/sqaa039
Jongen, H. (2021). Peer review and compliance with international anti-corruption norms: Insights from the OECD Working Group on Bribery. *Review of International Studies*, *47*(3), 331–352. https://doi.org/10.1017/S0260210521000097
Kankpang, A. K., & Nkiri, J. E. (2019). Administration, accountability and transparency in public sector organisations: A conceptual overview. *Accounting and Taxation Review*, *3*(4), 1–14.
Khosla, M., & Vaishnav, M. (2021). The three faces of the Indian state. *Journal of Democracy*, *32*(1), 111–125.
Kirkham, R. (2022). Parliamentary scrutiny of the Parliamentary and Health Services Ombudsman. *Journal of Social Welfare and Family Law*. Advance online publication. https://doi.org/10.1080/09649069.2022.2031108
Kirkham, R., & Stuhmcke, A. (2020). The common law theory and practice of the ombudsman/judiciary relationship. *Common Law World Review*, *49*(1), 56–74. https://doi.org/10.1177/1473779520904963
Kulal, A., Rahiman, H. U., Suvarna, H., Abhishek, N., & Dinesh, S. (2024). Enhancing public service delivery efficiency: Exploring the impact of AI. *Journal of Open Innovation: Technology, Market, and Complexity*, *10*(3), 100329. https://doi.org/10.1016/j.joitmc.2024.100329
Kumar, P., & Sharma, V. (2022). Ombudsman in Sweden and Denmark; A comparative study. *Journal of Algebraic Statistics*, *13*(2), Article 2.
Laebens, M. G., & Lührmann, A. (2021). What halts democratic erosion? The changing role of accountability. *Democratization*, 28(5), 908–928. https://doi.org/10.1080/13510347.2021.1897109
Lægreid, P., & Rykkja, L. H. (2022). Accountability and inter-organizational collaboration within the state. *Public Management Review*, *24*(5), 683–703. https://doi.org/10.1080/14719037.2021.1963822
Lee, E. (2007). Freedom of the Press 2.0. *Ga. L. Rev.*, *42*, 309
Liao, X., & Tsai, W.-H. (2020). Strengthening China's powerful Commission for Discipline Inspection under Xi Jinping, with a case study at the county level. *The China Journal*, *84*(1), 29–50. https://doi.org/10.1086/708610
Luna, J. P., Rodríguez, R. P., Rosenblatt, F., & Vommaro, G. (2021). Political parties, diminished subtypes, and democracy. *Party Politics*, *27*(2), 294–307.
Lytvyn, N. A., Artemenko, O. V., Kovalova, S. S., Kobets, M. P., & Kashtan, E. V. (2023). Administrative and legal mechanisms for combating corruption. *Journal of Financial Crime*, *30*(1), 154–166. https://doi.org/10.1108/JFC-11-2021-0241
Masnov, J. (2021). *Judicial review as an instrument of natural rights theory: An intellectual history* [master's thesis, Portland State University].
https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=6785&context=open_access_etds
Magnússon, G. (2020). Inclusive education and school choice lessons from Sweden. *European Journal of Special Needs Education*, *35*(1), 25–39.
McBurnie, G. (2020). *Methods used by health ombudsman in their system improvement role: A comparison of two international health ombudsman in their system improvement role and the response of Scottish health boards to the system improvement activities of the SPSO* [doctoral thesis, Queen Margaret University]. https://eresearch.qmu.ac.uk/bitstream/handle/20.500.12289/11162/11162.pdf?sequence=1&isAllowed=y
Ngatikoh, S., Kumorotomo, W., & Retnandari, N. D. (2020). Transparency in government: A review on the failures of corruption prevention in Indonesia. In *Proceedings of the Annual Conference of Indonesian Association for Public Administration (IAPA 2019)* (pp. 181–200). https://doi.org/10.2991/aebmr.k.200301.010
Noll, R. G. (Ed.). (2021). *Regulatory policy and the social sciences* (1st ed.). University of California Press.
Nyberg, D. (2021). Corporations, politics, and democracy: Corporate political activities as political corruption. *Organization Theory*, *2*(1). https://doi.org/10.1177/2631787720982618
Orozco, D. (2020). Compliance by fire alarm: Regulatory oversight through information feedback loops. *Journal of Corporation Law*, *46*(1), 97–142.
Papadopoulos, Y. (2023). *Understanding accountability in democratic governance*. Cambridge University Press. https://doi.org/10.1017/9781108973823

Pinckney, J., Butcher, C., & Braithwaite, J. M. (2022). Organizations, resistance, and democracy: How civil society organizations impact democratization. *International Studies Quarterly*, *66*(1), sqab 094. https://doi.org/10.1093/isq/sqab094
Ping, S.-N., Wang, Y.-T., & Chang, W.-Y. (2022). The effects of China's development projects on political accountability. *British Journal of Political Science*, *52*(1), 65–84. https://doi.org/10.1017/S0007123420000381
Qin, X., & Owen, C. (2023). The CCP, campaign governance and COVID-19: Evidence from Shanghai. *Journal of Chinese Political Science*, *28*(4), 619–644. https://doi.org/10.1007/s11366-022-09838-8
Raffler, P. J. (2022). Does political oversight of the bureaucracy increase accountability? Field experimental evidence from a dominant party regime. *American Political Science Review*, *116*(4), 1443–1459. https://doi.org/10.1017/S0003055422000181
Reddick, C. G., Demir, T., & Perlman, B. (2020). Horizontal, vertical, and hybrid: An empirical look at the forms of accountability. *Administration & Society*, *52*(9), 1410–1438. https://doi.org/10.1177/0095399720912553
Relly, J. E., Rabbi, Md. F., Sabharwal, M., Pakanati, R., & Schwalbe, E. H. (2020). More than a decade in the making: A study of the implementation of India's Right to Information Act. *World Development*, *136*, 105088. https://doi.org/10.1016/j.worlddev.2020.105088
Ripamonti, J. P. (2024). Essays on transparency and trust in government [doctoral Thesis, Universita' Commerciale "Luigi Bocconi"]. https://iris.unibocconi.it/handle/11565/4062466
Rose-Ackerman, S. (2021). *Democracy and executive power*. Yale University Press. https://doi.org/10.2307/j.ctv1z9n1kq
Samaratunge, R., & Alam, Q. (2021). Accountability and transparency in emerging countries: Governance, democratic currents and change. *Public Administration and Development*, *41*(4), 147–156. http://dx.doi.org/10.1002/pad.1963
Schillemans, T., Overman, S., Fawcett, P., Flinders, M., Fredriksson, M., Laegreid, P., Maggetti, M., Papadopoulos, Y., Rubecksen, K., Rykkja, L. H., Salomonsen, H. H., Smullen, A., & Wood, M. (2021). Understanding felt accountability: The institutional antecedents of the felt accountability of agency-CEO's to central government. *Governance*, *34*(3), 893–916. https://doi.org/10.1111/gove.12547
Schmidthuber, L., Ingrams, A., & Hilgers, D. (2021). Government openness and public trust: The mediating role of democratic capacity. *Public Administration Review*, *81*(1), 91–109. https://doi.org/10.1111/puar.13298
Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197 (2020).
Sharma, A., & Virk, H. K. (2023). An analytical study of India's efforts to ensure good governance. *Asian Journal of Multidimensional Research*, *12*(8), 31–40. https://doi.org/10.5958/2278-4853.2023.00106.4
Shen, X., Huang, G., & Zhang, X. (2024). Financing urban land development in underdeveloped small cities in Western China: The role of earmarked funds. *Journal of Urban Management*. Advance online publication. https://doi.org/10.1016/j.jum.2024.10.001
Shrestha, K., Martinez-Vazquez, J., & Hankla, C. (2023). Political decentralization and corruption: Exploring the conditional role of parties. *Economics & Politics*, *35*(1), 411–439. https://doi.org/10.1111/ecpo.12222
Silva, S. C., Corbo, L., Vlačić, B., & Fernandes, M. (2023). Marketing accountability and marketing automation: Evidence from Portugal. *Euromed Journal of Business*, *18*(1), 145–164. http://dx.doi.org/10.1108/EMJB-11-2020-0117
Simonofski, A., Vallé, T., Serral, E., & Wautelet, Y. (2021). Investigating context factors in citizen participation strategies: A comparative analysis of Swedish and Belgian smart cities. *International Journal of Information Management*, *56*, 102011. https://doi.org/10.1016/j.ijinfomgt.2019.09.007
Solomon, J. (2020). *Corporate governance and accountability* (5th ed.). John Wiley & Sons.
Svara, J. H. (2021b). *The ethics primer for public administrators in government and nonprofit organizations* (3rd ed.). Jones & Bartlett Learning.
Talesh, S. A., & Cunningham, B. (2021). The technologization of insurance: An empirical analysis of Big Data and artificial intelligence's impact on cybersecurity and privacy. *Utah Law Review*, *2021*(5), 967–1027.
Tonhaeuser, V., & Stavenes, T. (2020). Why change party finance transparency? Political competition and evidence from the 'deviant' case of Norway. *European Journal of Political Research*, *59*(3), 578–598. https://doi.org/10.1111/1475-6765.12369
Trevino, L. K., & Nelson, K. A. (2021). *Managing business ethics: Straight talk about how to do it right* (5th ed.). John Wiley & Sons, Inc.
http://dspace.vnbrims.org:13000/jspui/bitstream/123456789/5010/1/Managing%20Business%20Ethics%20Straight%20Talk%20about%20How%20to%20Do%20It%20Right%2C%20Fifth%20Edition.pdf
United States v. Arthrex, Inc. 594 U.S. 1 (2021).
Vian, T. (2020). Anti-corruption, transparency and accountability in health: Concepts, frameworks, and approaches. *Global Health Action*, *13*(sup1), 1694744. https://doi.org/10.1080/16549716.2019.1694744
Wang, R., Zhou, S., & Wang, T. (2020). Corporate governance, integrated reporting and the use of credibility-enhancing mechanisms on integrated reports. *European Accounting Review*, *29*(4), 631–663. https://doi.org/10.1080/09638180.2019.1668281

Wierzynska, A., Steingrüber, S., Oroxom, R., & Bauhoff, S. (2020). Recalibrating the anti-corruption, transparency, and accountability formula to advance public health. *Global Health Action*, *13*(sup1), 1701327. https://doi.org/10.1080/16549716.2019.1701327

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COMPARATIVE ASPECTS OF THE PROTECTION OF COMPETITION IN KOSOVO AND ALBANIA

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Abstract. The protection of free competition in the market is essential because it has positive effects on enterprises, traders, consumers, and others. Hence, the issue is how to ensure the adequate protection of free competition through the legal and institutional framework. In this regard, I have provided answers from a comparative perspective on the regulation of competition protection in the Republic of Kosovo and the Republic of Albania. This topic is then further developed by assessing the harmonization of the legislation of these countries with the EU *acquis*. In order for all the analyses conducted in this paper to be well-founded, the relevant legislation, the role of the authorities, strategic documents, legal doctrines, and other sources have been examined. Finally, the protection of free competition and the concrete actions that must be undertaken by the competent bodies are also assessed. After this topic has been addressed from a comparative point of view, conclusions are drawn.

Keywords: protection of competition, legal framework, institutional framework, competition authority, enterprises.

Introduction

The protection of free competition is granted a special place within applicable legislation because clear legal and institutional definitions must be made in order to guarantee it. Dealing with competition protection is always necessary because it involves a wide range of enterprises and relevant institutional mechanisms. In addition to these issues, another matter for treatment relates to the concrete measures that must be undertaken by the competent bodies to ensure free competition in the market.

It is essential to correctly understand the role and the positive impact that fair competition has – not only between enterprises, but also among consumers. Bearing this in mind, it is in the general interest to have effective competition in the market and to provide safe and high-quality products. Hence, competition which is developed in compliance with the law has positive effects when it comes to market participants and consumers who seek to purchase products or provide services. However, to achieve all of this, effective legal and institutional frameworks are essential.

In this study, the legal normative, descriptive, comparative, statistical, and deductive methods are used to assess the legislation, legal doctrine, practical cases, and annual reports of the competition authorities in Kosovo and Albania. Hence, through these methods and resources, the protection of free competition in these two countries is analyzed.

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The *normative legal method* is used to analyze and evaluate the legal framework of the two countries concerning the protection of competition. This enables the legal perspectives, the legal acts that foresee protection, and the manner of regulation by legal provisions to be highlighted. By underlining these aspects of the legal framework, it becomes clear that it is essential in the field of the protection of free competition in the market.

Through the use of the *descriptive method*, the aim is to present these issues correctly in terms of the legal regulations of the respective countries. Therefore, in various parts of the paper, several articles of legal acts, mission statements, and definitions related to objectives as determined by the respective competition authorities are highlighted. This method is used because it makes possible the fair presentation of the legal regulation of the competition field, as stipulated by legal provisions.

Because this paper considers comparative aspects of the protection of competition, the *comparative method* is essential in order to observe the manner of regulating the protection of competition in these countries. Therefore, using this method enables the observation of similarities and differences as far as the protection of competition is concerned, from both the legal and institutional points of view. This enables an understanding of the legal frameworks and the manner of institutional organizations employed to ensure the protection of competition.

The *statistical method* serves to present data related to the number of cases handled by the competition authorities in Kosovo and Albania in tabular form for the 2017–2021 period. In addition to the number of cases handled by the authorities, qualitative aspects of the legislation of these countries are also presented. The data presented in this paper were obtained from the official websites of the competition authorities of the countries in question.

The *analysis method* enables the assessment of the manner of regulating competition protection in these two countries, alongside various practical cases handled by the competition authorities, which are published on their official websites. In addition to the legal aspect, this analysis highlights how cases are handled when it comes to practice. In several cases, it can be observed that the competition authorities handle cases in compliance with the applicable legislation.

The *deductive method* is used to first present more general aspects of competition protection and then to draw special conclusions, ensuring the coherence of the content of the paper. The manner of protecting competition in both countries is presented by handling the legal and institutional frameworks separately. Hence, both a general and specific overview of competition protection is provided.

When the protection of competition in the Republic of Kosovo and the Republic of Albania is mentioned, several questions automatically emerge concerning the legal standpoints of these countries: Do they have a legal framework for the protection of competition? What is the special legal framework for this field? Is the existing legal framework harmonized with EU legislation? To answer these questions, the legal framework for the protection of competition in these two countries is analyzed and addressed, before the legal definition of the protection of competition according to the hierarchy of legal acts is then presented.

Another important aspect is the institutional framework for the protection of free competition in the Republic of Kosovo and the Republic of Albania. The legal framework foresees rights and responsibilities, but when it comes to the matter of the supervision and implementation of legislation, the institutional framework is key. Regarding the institutional framework, the manner of regulation in both countries is assessed, emphasizing the role of the competition authorities, the organizational structure, decisions rendered, memorandums of cooperation, and memberships in various important international mechanisms.

Based on this research, specific works carried out by the competent bodies in the field of competition in these countries are mentioned (see Tosheva & Dimeski, 2019). Some of the necessary actions that must be undertaken by the competition authorities to ensure free and effective competition protection in the market are thus made

clear, alongside the goals and objectives of the respective competition authorities. To advance best practices in the field of competition, both countries have signed a memorandum of cooperation. Keeping in mind the ongoing European integration processes in the two countries, the progress made in the field of competition is also analyzed.

The protection of free competition is important for both the state and society because it directly affects many areas, including enterprises, businesses, and consumers. If there is no supervision of the market according to applicable legislation, this could lead to inequality between enterprises and the violation of consumer rights. Referring to several international instruments, such as in the Treaty on the Functioning of the European Union (2012), it can be observed that competition protection is guaranteed (Borchardt, 2010; Hetemi, 2005).

When it comes to the protection of competition, the COVID-19 pandemic presented a difficult situation for businesses (Mulaj & Prenaj, 2023), but the matter of market functioning and supervision was also challenging. This must be emphasized because the pandemic has caused difficulties concerning the supervision of competition and the protection of consumer rights (Braholli, 2022). Even in cases of requests for supervision or consumer complaints regarding product prices, it has not been easy to address or resolve them.

1. The legal and institutional framework regarding the protection of competition in Kosovo

1.1. Legal framework

The Republic of Kosovo has a legal framework concerning the field of competition (Mulaj, 2020). The protection of free competition is foreseen by the Constitution, highlighting constitutional guarantees (Constitution of Kosovo of 2008, Art. 10 and 119(3); Hasani & Čukalović, 2013). In addition to the relevant provisions of the Constitution, Kosovo also possesses Law No. 08/L-056 on the Protection of Competition (hereinafter Law No. 08/L-056; Skara, 2023). In Art. 1 of this law, matters related to the protection of competition are specifically foreseen, and the following are defined: free and effective competition in the market, the competition authority, the enforcement of the law, and the partial compatibility of the law with the legal acts of the EU.

"This law applies to all forms of prevention, limitation or distortion of competition by enterprises in the territory of the Republic of Kosovo or outside the territory if their actions affect the market of the Republic of Kosovo" (Law No. 08/L-056, Art. 2(1)). Additionally, chapters two and three of this law provide for *agreements* (Art. 5, Prohibited agreements-cartels; Art. 6, Group exclusion; Art. 7, Agreements of minor importance) and the definition of *a dominant position* (Art. 8, Determination of dominant position; Art. 9, Misuse of dominant position; Art. 10 Ascertainment of misuse of dominant position).

In addition to the law, by-laws have been issued for the protection of competition, such as: Administrative Instruction No. 04/2012 on the Form and Content of the Legitimation; Administrative Instruction No. 05/2012 on the Criteria and Conditions for Assigning Agreements of Small Value; Administrative Instruction No. 06/2012 on the Manner of Submitting the Request and the Criteria for Determining the Concentration of Enterprises, etc. Where they assess that it is necessary to complete the amendment of legal acts, repeal them, or issue new legal acts, competent bodies must undertake concrete procedural actions to protect competition.

In terms of its legal framework, Kosovo has made significant progress over the years, which affects not only the provision of free competition but also the fulfillment of obligations derived from the agreements signed as part of European integration processes. Here the alignment of the legislation in the field of competition with the *acquis* of EU (Law No. 05/L-069) should be mentioned, especially regarding legislative matters of particular importance. As emphasized, the law on the protection of competition is partially in line with several EU legal acts. This implies the need to work in terms of harmonizing domestic legislation with that of the EU.

Regarding the fulfillment of obligations as part of European integration processes, which also include the field of competition, it is worth analyzing the report produced by the European Commission for Kosovo in 2023, where it may be observed that progress has been made in certain matters. In the report, it appears that current legislation regarding the field of competition is partially in line with the EU *acquis*. Therefore, further efforts are needed. Nonetheless, the use of the word "partial" implies that Kosovo is heading in the right direction in terms of drafting, approximating, and harmonizing its domestic legislation with that of the EU.

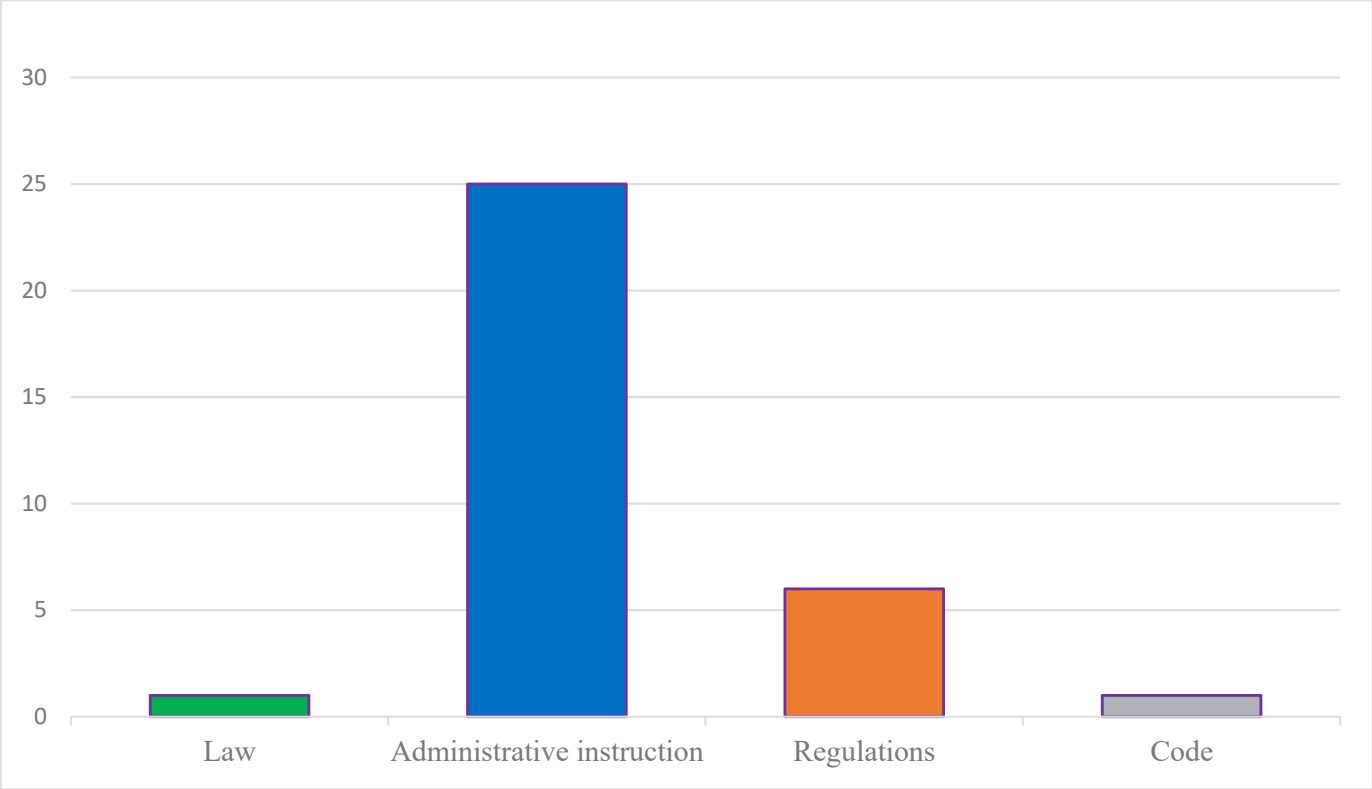

Figure 1. The legal framework for the protection of competition in Kosovo
Source: Kosovo Competition Authority (n.d.-a)

From Figure 1 it can be seen that Kosovo possesses legislation for the protection of competition in the areas of law, administrative instructions, regulations, and a code of ethics.

1.2. Institutional framework

In addition to the legal framework, the institutional framework is very important when it comes to the protection of free competition in the market. In November 2008, Kosovo established the Competition Authority (https://ak.rks-gov.net/), which plays a key role in terms of protecting free competition in the market (Kosovo Competition Authority, 2019b, p. 4; Art. 20 of Law No. 2004/36 on Competition). The establishment of this Authority was foreseen by law, where the obligations it has as an independent agency are clearly defined.

According to Art. 21 of Law No. 08/L-056, the Competition Authority is answerable to the Assembly of the Republic of Kosovo, and is headquartered in Pristina. The role and importance of the Competition Authority can be seen when analyzing its legal responsibilities, the matter of appointing committee members, and the manner in which it reports. The Commission is appointed by the Assembly, via a governmental proposal after the termination of the public vacancy (Law No. 08/L-056, Art. 22(3)). This fulfills the legal duties of the Competition Authority, and at the same time contributes to the functioning of free competition in the market.

The Competition Authority is independent and impartial in its work (Asllani et al., 2021). This is significant for any authority because it cannot work efficiently if independence is not guaranteed. Independence and impartiality are necessary when it comes to conducting work based on legal competencies. To achieve their intended objectives, it is required that such institutions have an organizational structure related to the performance of concrete tasks. In this regard, it should be emphasized that the Competition Authority is structured as an organogram that includes the Commission and the Secretariat (Kosovo Competition Authority, n.d.-b).

Law No. 08/L-056 stipulates that the Competition Commission is a collegial body, and the conditions that must be fulfilled to be a member of the Commission are also outlined. In Art. 23(1), it is stated that: "Conditions to be a member of the Commission, the appointed person must: 1.1. be a citizen of the Republic of Kosovo; 1.2. have a high qualification in jurisprudence, economics or equivalent field; and, 1.3. have five (5) years of professional work experience." These conditions for the selection of Commission members aim to ensure the appointment of qualified experts who will perform their duties professionally.

Regarding the responsibilities of the Secretariat, in Art. 29 of Law No. 08/L-056, the following is stated: "Responsibilities of the Secretariat: 1. For application of this law, the Secretariat has the following responsibilities: 1.1. monitors and analyzes market conditions for the development of free and effective competition; 1.2. conducts investigations by the Law on General Administrative Procedure, this law and other applicable legislation; 1.3. drafts investigation reports and submits them to the Commission for decision-making; 1.4. ensures the publication of decisions and other publishable acts, of by-laws approved according to this law, as well as of the Authority's annual work report; 1.5. takes care concerning the application of the Commission's decisions; 1.6. conducts other work foreseen by the Competition Authority statute."

Special attention should also be paid to the organizational structure: within the Competition Authority, the number of professional administrative personnel is small, and this should be increased in order to increase efficiency. This could be achieved through legal amendments.

The Competition Authority conducts procedures based on the Law on Protection of Competition. If there is no adequate provision foreseen by this law, then the provisions of the Law on Administrative Procedure apply (Law No. 08/L-056, Art. 33; Law No. 05/L-031). This concerns cases where the procedural aspect is ambiguous. Regarding the issue of handling competition cases, the special law applies.

The Kosovo Competition Authority (2019b) has issued Strategy 2020–2023 (hereinafter, the Strategy). In this strategy, the objectives that are expected to be achieved for advancement in the protection of competition are outlined: "1. strengthening of professional and administrative capacities in the function of the Competition Law application; 2. promotion of competition policies; and 3. realization of the obligations arising from the European Integration process" (p. 8). The Strategy also foresees the values and principles of the Competition Authority, such as: "Transparency and cooperation, integrity and impartiality, quality, efficiency and effectiveness" (p. 5).

According to the report of the European Commission (2023b, pp. 90–91) for Kosovo, the institutions of Kosovo have undertaken several actions to ensure free competition. It is important to have continuous functioning of the relevant institutional mechanisms. This is emphasized because in the framework of this report it is stated that the non-functioning of the Commission for a certain period has affected stagnation in the realization of legal obligations. In short, the Commission must be functional to achieve its goal of protecting competition.

Hence, it is of particular importance that the Commission be in full composition. Even in the cases where a seat is vacant as a result of the resignation of a member of the Commission, a new member should be appointed according to the law as rapidly as possible. The Competition Authority publishes its decisions, conclusions, and recommendations on its website, which can be summarized as follows (Table 1).

Year	2017	2018	2019	2020	2021
Prohibited Agreements	10	6	4	5	4
Dominant Position	1	2	-	2	1
Concentrations of Enterprises in the Market	2	3	4	5	10
Professional Opinions/Recommendations	5	-	10	4	2
Monitored Markets	-	-	-	5	8
Total:	18	11	18	21	25

Table 1. Cases examined and other actions performed by the Kosovo Competition Authority during the 2017–2021 period

Source: Kosovo Competition Authority (2018, 2019a, 2020, 2021, 2022)

Table 1 covers the 2017–2021 period, in which it can be seen that the number of cases reviewed each year by the Competition Authority of the Republic of Kosovo differs. In addressing and investigating certain matters, the Competition Authority of Kosovo renders decisions and conclusions. These decisions are made regarding prohibited agreements, dominant positions, and concentrations. In addition to decisions and conclusions, the Competition Authority also provides professional opinions, thus playing an active role.

Considering the number of decisions that have been rendered over the years, it is clear that there is the practical protection of competition in Kosovo. Here, some cases reviewed by the Competition Authority can be mentioned, such as Decision No. 138/18-02/D, dated March 30, 2018, by which it was decided, after monitoring the price of standard bread, that the price of bread from bakers would be determined based on market supply and demand. Likewise, with Conclusion No. 356/23-02/D, dated August 3, 2023, the Competition Authority Commission initiated investigative procedures against several commercial enterprises on suspicion of prohibited agreements and abuse of dominant position regarding the determination of a single price for sunflower oil. They were then asked to submit the documents as requested by the Authority.

The start of the *ex officio* procedures of the Competition Authority is foreseen by law, regarding the finding of prohibited agreements and a dominant position (Law No. 08/L-056, Art. 36). However, in cases where it finds that there is no sufficient basis for undertaking such an action, then such a procedure is not initiated. This can also be argued based on the conclusion drawn by the Competition Authority in case No. 42/2023, dated April 24, 2023, regarding not initiating a procedure against the Ministry of Health.

The Kosovo Competition Authority also provides professional opinions, including the following: Professional Opinion of the Competition Authority No. 355/19-02/D, dated November 19, 2019, addressed to the Ministry of Infrastructure and Transport [in this case, the Ministry submitted a request regarding the assessment of the Incentive Project Proposal for the development of the air transport market. The Authority issued a professional opinion, and in point three of this opinion, it is stated that the prerequisites for eligibility should not be discriminatory and must not exclude competitors with the potential to provide the necessary services]; Professional Opinion of the Competition Authority of Kosovo No. 147/21-02/D dated April 22, 2021 on Protected Commercial Products in Parallel Import [in this professional opinion, it is stated that Parallel Import has both legal and economic aspects. From an economic perspective, it promotes the availability of trademarked goods at different prices, contributing to the prevention of commercial monopolies. From a legal perspective, it is essential to prevent fraud and consumer confusion regarding product quality and to protect the economic interests of trademark owners]; and others.

2. The legal and institutional framework for the protection of competition in Albania

2.1. Legal framework

The Republic of Albania also has a legal framework for the protection of competition (Constitution of the Republic of Albania, 1998, Art. 11): Law No. 9121, dated July 28, 2003, for the Protection of Competition (hereinafter, Law No. 9121), and its amendments. This law provides general provisions, competition

restrictions, and measures on the abuse of a dominant position, concentrations of enterprises, the Competition Authority and administrative procedures, and others (Law No. 9121; Law No. 9499; Law No. 10 317; Nazifi & Broka, 2015).

To protect free competition in the market, in addition to legal acts, the competent bodies have also regulations and administrative instructions, including: the Regulation on the Organization and Functioning of the Competition Authority; the Regulation on Agreements of Minor Importance; and the Internal Regulation for the Prevention of Conflict of Interests in the Exercise of Public Functions in the Competition Authority.

"The purpose of this law is the protection of free and effective competition in the market, by defining the rules of conduct of enterprises, as well as the institutions responsible for the protection of competition and their liabilities" (Law No. 9121, Art. 1). As outlined in this article of the law, several significant provisions regarding the protection of competition can be identified. First, it concerns the protection of free and effective competition, which is an essential condition for the proper functioning of the market. Secondly, the matter concerns the behavior of enterprises, obliging them to act in compliance with the legal provisions which affect respect and competitiveness in the market. Third, this law defines the institutions responsible for the protection of free competition in the market and their responsibilities under the law.

The aforementioned law provides a list of prohibited agreements as follows: "1. All agreements prohibited, which have as their object or as a consequence the obstruction, limitation or distortion of competition in the market, especially agreements that: a) determine, directly or indirectly, the purchase or sale prices, or any other terms of trading; b) limit or control production, markets, technical development or investments; c) share markets or sources of supply; d) apply different conditions for the same transactions with other commercial parties, by placing them in an unfavorable competitive situation; e) condition the conclusion of contracts with the acceptance by the other contracting parties of additional obligations that, by their nature or commercial use, are not related to the object of these contracts" (Law No. 9121, Art. 4(1)).

Thus, the law specifically provides that those agreements which negatively affect free competition in the market are prohibited. The Competition Authority, which has the legal task of supervising and ensuring free competition in the market, investigates and prevents such actions.

The competent institutions of Albania have issued legal acts in the field of competition protection, establishing a consolidated legal framework. This may also be observed in the Albania Progress Report of 2023 produced by the European Commission (2023a). Among other things, it is presented that there is progress in the field of competition, including the harmonization of legislation with: the EU *acquis*, the Stabilization and Association Agreement, and Art. 101 and 102 of the Treaty on the Functioning of the European Union (p. 86).

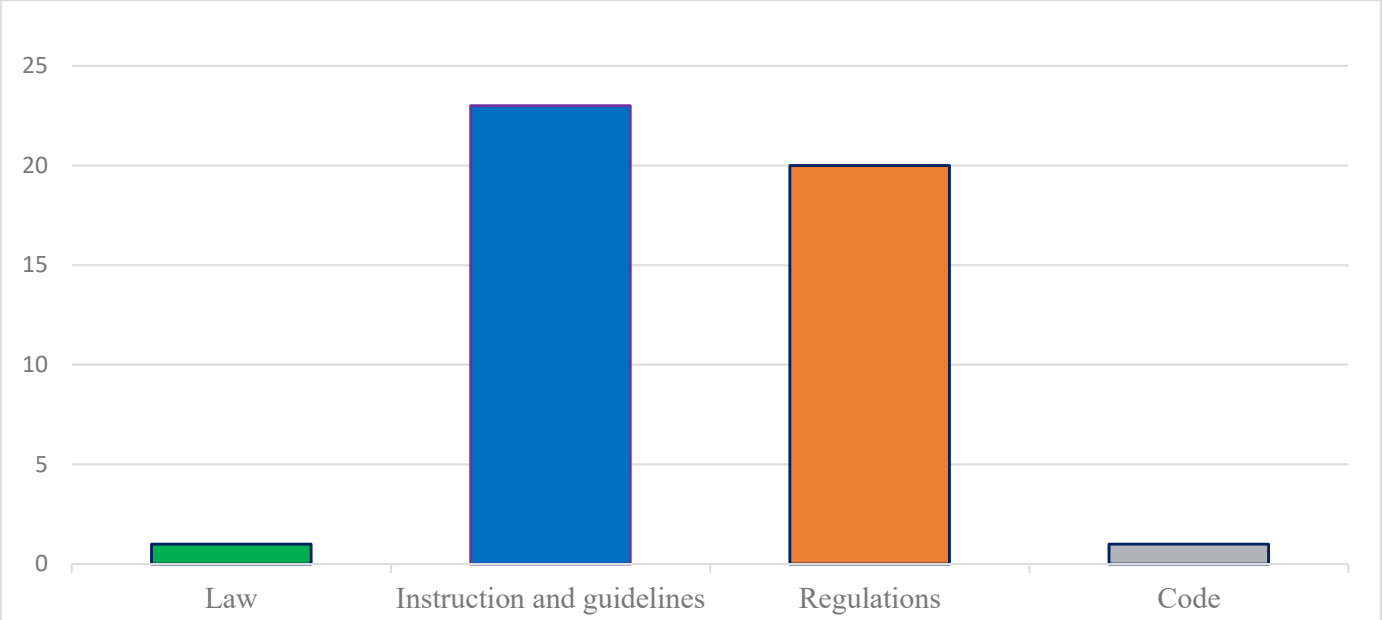

Figure 2. The legal framework for the protection of competition in Albania
Source: Competition Authority of Albania, n.d.-c

Based on Figure 2, it can be seen that Albania provides legislation for the protection of competition, including the law, instructions and guidelines, regulations, and a code of ethics.

2.2. Institutional framework

Albania also possesses an institutional framework for protecting free market competition, having established the Competition Authority (https://caa.gov.al/) in March 2004 based on the Law on the Protection of Competition of 2003.

The mission of the Competition Authority of Albania (n.d.-d) is stated as follows: "The Competition Authority acts to ensure a free and effective competition in the market in compliance with the law […] by relying on three main pillars that determine the protection of competition: abuse with the dominant position; prohibited agreements in the form of cartels and mergers or concentrations of enterprises, as well as the entire legal framework that regulates the activity of an independent institution in the Republic of Albania." Thus, the Competition Authority clearly defines the goals that need to be achieved where the matter of free competition and the pillars for its protection are concerned.

Likewise, Albania has addressed important aspects related to prohibited agreements, highlighting the relevant legal framework. The supervision of competition and the application of what is determined by law are the responsibilities of the Competition Authority, in its aim of ensuring the protection of free competition in the market. The Competition Authority, as a public body (Law No. 9121, Art. 18(1)), was established to supervise the implementation of the Law on the Protection of Competition.

The Competition Authority of Albania (n.d.-e) is structured as an organogram, as follows: "Chairman, Cabinet, Commissioners, Secretary General, Directorate of Supervision of Productive Markets, Directorate of Supervision of Service/Non-Productive Markets, Directorate of Analysis and Methodology of Markets, Legal Directorate, Integration and Judicial Affairs, Directorate of Human Resources, Budget and Communication (Human Resources and Budget Sector and Communication Sector)". The Competition Authority is a legal entity headquartered in Tirana, consisting of the Commission and the Secretariat (Law No. 9121, Art. 18(1); Nazifi & Broka, 2016).

Law No. 9121 specifies that the Commission has five members (Art. 19) – the same number as the Kosovo Commission. Art. 20 determines the conditions for electing members of the Commission, where the following is stated: "A candidate who meets the following conditions may be elected a member of the Commission: a) be an Albanian citizen; b) have at least 15 years of experience in the profession; c) be known for the contribution given in the field of economic and legal sciences or for the management skills and professionalism shown in different sectors of the economy; d) not to have been dismissed from work or civil service by disciplinary measure."

Art. 27 of Law No. 9121 stipulates that the Secretariat is led by the General Secretary who is elected by the Commission, and that the employees of the Secretariat are civil servants. Art. 28 states that "when it comes to the application of legal provisions of this law, the Secretariat has the following responsibilities: a) monitors and analyzes market conditions for the development of free and effective competition; b) conducts investigations, in compliance with the Administrative Procedure Code, this law and the applicable legislation; c) drafts and submits investigation reports to the Commission for decision-making; d) ensures the publication of the rendered decisions of the by-laws issued in implementation of this law, as well as of the annual report of the Authority; e) follows and controls the application of the decisions rendered by the Commission."

Year	**2017**	**2018**	**2019**	**2020**	**2021**
Prohibited Agreements	-	8	4	7	28
Abuse of Dominant Position	9	14	11	7	16
Concentrations of Enterprises in the Market	16	-	24	19	31
Professional Opinions/Recommendations	9	9	26	10	8
Closure of Investigations	3	-	-	-	-
Temporary Measures	2	2	2	3	-
Bylaws	1	-	4	4	2
Legal Assessments	-	11	-	-	-
Others	5	6	19	22	8
Fine	-	6	-	11	-
Agreements	2	-	-	-	-
Terms and Obligations	-	-	3	3	-
Exceptions to Agreements	-	1	-	-	1
Investigative Procedures	-	30	-	-	-
Commitments	-	-	-	1	-
Total:	47	87	93	87	94

Table 2. Cases examined and other actions performed by the Competition Authority of Albania during the 2017–2021 period

Source: Competition Authority of Albania (2017, 2018, 2019, 2020, 2021)

Table 2 covers the 2017–2021 period, during which it can be seen that there were varying numbers of cases resolved each year. The Competition Authority of Albania also conducts investigations regarding the abuse of a dominant position. Concerning practical cases, case Decision No. 279/10 Prot., dated September 21, 2023, closing the investigation procedure stands out. In those cases where it is ascertained that there is no misuse of a dominant position, the authority renders a decision to end the investigation. However, there are cases in which the Competition Authority undertakes temporary measures. For example, in Decision No. 272/12 Prot., dated May 24, 2023, the Competition Authority "imposed a temporary measure for restoring competition in the taxi service market [...]." This is just one example in which the active role of the Competition Authority in protecting free competition in the market may be observed.

The Competition Authority of Albania also conducts legal assessments: in Decision No. 308/2 Prot., dated June 8, 2023, on the approval of the instruction "On unofficial instructions regarding new or unresolved issues

concerning Articles 4 and 9 of the Law No. 9121/2003 on the protection of competition for individual cases" [the first point of this decision states that the purpose of this guidance is to provide certainty to enterprises regarding the legality of their actions in relation to an agreement or practice they wish to implement in cases of uncertainty due to new or unresolved questions regarding the implementation of these two articles of the law]; and in Decision No. 699, dated July 20, 2020, on "some recommendations for the Financial Supervision Authority regarding the licensing of the General Directorate of Road Transport Services for exercising the activity of an insurance agent" [in this decision, the Commission recommended to the Financial Supervisory Authority that, prior to licensing, it request the Directorate to undertake several actions, including: concluding separate contracts, not setting unfair purchase prices, not applying unequal conditions for the same commercial transactions, and not concluding contracts with additional obligations].

The Competition Authority also provides bulletins on its website related to decisions rendered on a monthly basis. Based on these bulletins, it is possible to observe cases that have been handled and the manner of decision-making, thus assessing the success of the Competition Authority in its main task of supervising the implementation of the law for the protection of competition.

3. A comparative analysis of the protection of competition in Kosovo and Albania

From a comparative point of view, it should be emphasized that both countries have competition authorities, and both possess legal frameworks regarding the protection of competition. Using laws and by-laws, the role and the organizational structure of the Competition Authority is clearly defined in both countries. However, it should be noted that in terms of organization, the Competition Authority of Albania employs a larger number of administrative officials. Special attention should then be paid to the organizational and institutional protection of competition.

The Competition Authority of Albania was established earlier than the Kosovo Competition Authority. The Competition Authority of Albania (n.d.-b) has signed several bilateral and multilateral agreements, along with memorandums of understanding within the country. The Competition Authority of Albania (n.d.-a) is also a member and participant in several international organizations, such as the International Competition Network (ICN), the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD).

Kosovo Competition Authority is a member of the ICN. Likewise, it has signed memorandums of understanding and cooperation with several countries and institutions, such as the 2009 Memorandum of Understanding between the Kosovo Competition Commission and the Competition Authority of Albania.

Unlike the Law on the Protection of Competition of Kosovo, which requires 5 years of professional work experience as one of the conditions to be elected a member of the Commission, the Law on the Protection of Competition of Albania requires no less than 15 years of professional work experience for the same position.

If we analyze the progress reports of the European Commission, we can observe progress in the protection of competition in both countries. However, progress is more pronounced in Albania than in Kosovo. The latter still has work to do in advancing the institutional structure for the protection of competition, as in certain years the competition commission has been non-functional due to the non-appointment of commission members.

The comparative analysis of the protection of competition highlights the real state of competition protection in the two aforementioned countries. Albania initiated competition protection earlier than Kosovo, and there are certain key factors that influenced this development. It should be kept in mind, that, unlike Albania, Kosovo has been in a transitional phase as a state and has had to work continuously both in the legislative and institutional spheres. Kosovo should deepen its cooperation with Albania to advance best practices in the area of the

protection of competition. This could be achieved by reviewing existing legal acts and conducting detailed analyses regarding the institutional framework so that the intended level of protection is achieved.

In terms of the practical implementation of competition protection in Kosovo and Albania, it is useful to examine and analyze the practical work of the competition authorities. The authorities in each country have addressed various cases regarding the protection of competition, the outcomes of which are published on their websites. The analysis of these decisions makes it clear that the authorities are active in protecting free competition in the market. To make progress in this direction, the commissions must be continuously functional. The Commission of the Competition Authority of Kosovo has not operated continuously as a result of resignations and delays in the appointment of new members.

The competition authorities of Kosovo and Albania publish agreements related to their institutions on their official websites: memberships in the respective organizations, memorandums of understanding, decisions taken, and other items. The publication of the decision bulletin increases transparency towards the general public, but at the same time raises awareness that must then be acted on via the legislation in force. This practice is important because it provides the possibility to observe the measures taken by the Competition Authority regarding certain cases.

As for the findings highlighted in this paper, it is worth mentioning that they concern the real existing situation in both countries, assessing applicable legislation, decisions, and data published on the official websites of the authorities.

Conclusion

Kosovo and Albania have a consolidated legal framework concerning the field of competition. Regulation is based on legal acts that specifically foresee intended goals based on what is defined within their respective laws. In addition to laws, both countries have issued by-laws to further specify several important procedural issues regarding the protection of free competition in the market.

From an institutional point of view, Kosovo and Albania have respective competition authorities established according to the laws on the protection of competition. Bearing in mind the missions envisioned for these competition authorities, they aim to ensure free competition in the market by implementing legal obligations. To enhance transparency, the competition authorities also publish the decisions rendered by their commissions on their websites.

To protect free competition in the market, it is important to invest as much as possible in an adequate legal framework and effective regulation concerning it. In the first case, relevant institutions should analyze the legislation to observe how adequate results are being achieved in practice. In the second case, it is crucial to analyze whether there are sufficient administrative capacities to protect free competition in the market, taking into account the necessity of ensuring protection that is in compliance with the law.

Based on the analyses conducted, advancements in the protection of competition in certain years can be observed. This is supported by both case practice data from annual reports and statistical data which is accessible on the official websites of the competition authorities. Legal amendments made in the direction of competition protection also support this view.

With respect to the field of competition, the further alignment of the national legislations of Kosovo and Albania with that of the EU is also crucial. This is emphasized because the further approximation and harmonization of legislation regarding the protection of competition in these two countries is quite significant. In this regard, Albania has made more advances than Kosovo; however, the latter continues to make progress in the field of competition.

References

Asllani, G., Grima, S., & Citaku, Sh. (2021). Competition regulation in Kosovo: An emphasis on enterprises concentration. In E. Özen, S. Grima, & R. D. Gonzi (Eds.), *Emerald Studies in Finance Insurance and Risk Management: New Challenges for Future Sustainability and Wellbeing* (pp. 429–440). Emerald Publishing Limited. https://doi.org/10.1108/978-1-80043-968-920211023

Administrative Instruction No. 04/2012 on the form and content of the legitimation of Kosovo. (2012). https://gzk.rks-gov.net/ActDetail.aspx?ActID=8167 [in Albanian]

Administrative Instruction No. 05/2012 on the criteria and conditions for assigning agreements of small value of Kosovo. (2012). https://gzk.rks-gov.net/ActDetail.aspx?ActID=8168 [in Albanian]

Administrative Instruction No. 06/2012 on the manner of submitting the request and the criteria for determining the concentration of enterprises of Kosovo. (2012). https://gzk.rks-gov.net/ActDetail.aspx?ActID=8169 [in Albanian]

Borchardt, K. D. (2010). *The ABC of European Union law*. Ministria e Integrimit. https://integrimi-ne-be.punetejashtme.gov.al/wp-content/uploads/2020/04/3-ABC-e-s%C3%AB-Drejt%C3%ABs-s%C3%AB-Bashkimit-Europian.pdf [in Albanian]

Braholli, A. (2022). An investigation of consumer behavior in online trade during the Covid-19 pandemic: A case study. *Quality - Access to Success*, *23*(186), 45–58. https://doi.org/10.47750/QAS/23.186.07

Competition Authority of Albania. (n.d.-a). *International organization participation*. Retrieved October 10, 2024. https://caa.gov.al/en/international-relations/international-organization-participation/

Competition Authority of Albania. (n.d.-b). *International relations*. Retrieved October 10, 2024. https://caa.gov.al/en/international-relations/

Competition Authority of Albania. (n.d.-c). *Laws*. Retrieved October 10, 2024. https://caa.gov.al/en/laws/

Competition Authority of Albania. (n.d.-d). *The Mission of the Competition Authority*. Retrieved October 10, 2024. https://caa.gov.al/en/mission/

Competition Authority of Albania. (n.d.-e). *The Structure of the Competition Authority*. Retrieved October 10, 2024. https://caa.gov.al/en/about-the-authority/the-structure/

Competition Authority of Albania. (2017). *Annual Report 2017*. https://caa.gov.al/wp-content/uploads/2023/05/Raporti_Vjetor_2017_i_AK.pdf [in Albanian]

Competition Authority of Albania. (2018). *Annual Report 2018*. https://caa.gov.al/wp-content/uploads/2023/05/Raporti_Vjetor_2018.pdf [in Albanian]

Competition Authority of Albania. (2019). *Annual Report 2019: Executive overview*. https://caa.gov.al/wp-content/uploads/2023/05/AK-Raporti-Vjetor-2019-Permbledhje-Ekzekutive.pdf [in Albanian]

Competition Authority of Albania. (2020). *Annual Report 2020: Executive overview*. https://caa.gov.al/wp-content/uploads/2023/05/Raporti-2020-PE.pdf [in Albanian]

Competition Authority of Albania. (2021). *Annual Report 2021: Executive overview*. https://caa.gov.al/wp-content/uploads/2023/05/RVPE-2021.pdf [in Albanian]

Conclusion of the Kosovo Competition Authority No. 356/23-02/D dated August 3, 2023. https://ak.rks-gov.net/assets/cms/uploads/files/Konkluzioni.pdf [in Albanian]

Conclusion of the Kosovo Competition Authority No. 42/2023, dated April 24, 2023. https://ak.rks-gov.net/assets/cms/uploads/files/KONKLUZIONI%20Final%20-%20Rasti%20Pharma%20Leader%20LLC%20(1).pdf [in Albanian]

Consolidated version of the Treaty on the Functioning of the European Union. (2012). *Official Journal of the European Union*, C 326/49, 26.10.2012.

Constitution of the Republic of Albania. (1998). https://qbz.gov.al/preview/635d44bd-96ee-4bc5-8d93-d928cf6f2abd [in Albanian]

Constitution of the Republic of Kosovo. (2008). https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702 [in Albanian]

Decision of the Competition Authority of Albania No. 272/12 Prot., dated May 24, 2023. https://caa.gov.al/wp-content/uploads/2023/05/99.pdf [in Albanian]

Decision of the Competition Authority of Albania No. 279/10 Prot., dated September 21, 2023. https://caa.gov.al/wp-content/uploads/2023/09/VENDIM-NR-1014.pdf [in Albanian]

Decision of the Competition Authority of Albania No. 308/2 Prot., date June 08, 2023. https://caa.gov.al/wp-content/uploads/2023/08/VENDIM-NR-990-BASHKELIDHUR-UDHEZIMI.pdf [in Albanian]

Decision of the Competition Authority of Albania No. 699, dated July 20, 2020. https://caa.gov.al/wp-content/uploads/2023/06/Vendim_nr._699_dat_20.07.2020.pdf [in Albanian]

Decision of the Competition Authority of Kosovo No. 138/18-02/D, dated March 30, 2018. https://ak.rks-gov.net/assets/cms/uploads/files/Kartelet/Vendimi%20Final.pdf [in Albanian]

European Commission. (2023a). Commission Staff Working Document: Albania 2023 Report. Brussels, 8.11.2023

SWD(2023) 690 final. https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_690%20Albania%20report.pdf
European Commission. (2023b). Commission Staff Working Document: Kosovo 2023 Report. Brussels, 8.11.2023 SWD(2023) 692 final. https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_692%20Kosovo%20report_0.pdf
Hasani, E., & Čukalović, I. (2013). *Commentary: Constitution of the Republic of Kosovo*. Pristina.
Hetemi, M. J. (2005). *Disa tema aktuale të ekonomisë së tregut* [Some current topics of the market economy]. Prishtinë. [in Albanian]
Internal regulation on the prevention of conflict of interests in the exercise of public functions in the Competition Authority, dated July 3, 2008. https://caa.gov.al/laws/per-parandalimin-e-konfliktit-te-interesave-ne-ushtrimin-e-funksioneve-publike-ne-autoritetin-e-konkurrences/ [in Albanian]
Kosovo Competition Authority. (n.d.-a). *Legal framework*. Retrieved October 12, 2024. https://ak.rks-gov.net/en/kuadri_ligjor
Kosovo Competition Authority. (n.d.-b). *Organizational structure*. Retrieved October 12, 2024. https://ak.rks-gov.net/struktura
Kosovo Competition Authority. (2018). *Annual Report 2017*. https://ak.rks-gov.net/assets/cms/uploads/files/Raporti%20i%20Punes%202017_FINAL_AKK.pdf [in Albanian]
Kosovo Competition Authority. (2019a). *Annual Report 2018*. https://ak.rks-gov.net/assets/cms/uploads/files/Raporti%20i%20punes/Raporti%20i%20Punes%20i%20AKK-s%C3%AB%202018%20(FINAL).pdf [in Albanian]
Kosovo Competition Authority. (2019b). *Kosovo Competition Authority Strategy 2020–2023*. https://ak.rks-gov.net/assets/cms/uploads/files/Strategjia%20e%20AKK%202020-2023%20FINALE.pdf
Kosovo Competition Authority. (2020). *Annual Report 2019*. https://ak.rks-gov.net/assets/cms/uploads/files/Raporti%20i%20punes/Raporti%20i%20Punes%20i%20AKK-s%C3%AB%202019%20-%20FINAL.pdf [in Albanian]
Kosovo Competition Authority. (2021). *Annual Report 2020*. https://ak.rks-gov.net/assets/cms/uploads/files/Raporti%20i%20Punes%20i%20AKK-s%C3%AB%202020_FINAL.PDF [in Albanian]
Kosovo Competition Authority. (2022). Annual Report 2021. https://ak.rks-gov.net/assets/cms/uploads/files/RAPORTI%20I%20PUN%C3%8BS%202021.pdf [in Albanian]
Law No. 05/L-069 on the ratification of the Stabilization and Association Agreement between the Republic of Kosovo and the European Union and the European Atomic Energy Community. (2015). https://gzk.rks-gov.net/ActDetail.aspx?ActID=11239 [in Albanian]
Law No. 05/L-031 on the general administrative procedure of Kosovo. (2016). https://gzk.rks-gov.net/ActDetail.aspx?ActID=12559 [in Albanian]
Law No. 08/L-056 on the protection of competition of Kosovo. (2022). https://gzk.rks-gov.net/ActDetail.aspx?ActID=59498 [in Albanian]
Law No. 10 317, dated 09.16.2010, amending Law No. 9121, dated 28.7.2003, on the protection of competition of Albania. (2010). https://qbz.gov.al/eli/ligj/2010/09/16/10317/16cb3f30-6142-4bf2-b306-171d767be58f;q=mbrojtjen%20e%20konkurrences [in Albanian]
Law No. 2004/36 on competition of Kosovo. (2007). https://gzk.rks-gov.net/ActDetail.aspx?ActID=2459 [in Albanian]
Law No. 9121, dated 28.7.2003, on the protection of competition of Albania. (2003). https://qbz.gov.al/eli/ligj/2003/07/28/9121/16a3ab8a-bc95-4b00-8a52-1fec5f8d6781;q=mbrojtjen%20e%20konkurrences [in Albanian]
Law No. 9499, dated 3.4.2006, amending Law No. 9121, dated 28.7.2003, on the protection of competition of Albania. (2006). https://qbz.gov.al/eli/ligj/2006/04/03/9499/7e8c8280-dab7-4afc-93f0-968af9f228d0;q=mbrojtjen%20e%20konkurrences [in Albanian]
Memorandum of understanding between the Kosovo Competition Commission and the Competition Authority of Albania. (2009). https://ak.rks-gov.net/assets/cms/uploads/files/MOU/Memorandum%20ne%20mes%20AKK-%20dhe%20Autoritetit%20te%20Shqiperise.PDF [in Albanian]
Mulaj, V., (2020). Improvement of the Kosovo market through implementation of competition legal framework. *The Lawyer Quarterly*, *10*(3). https://tlq.ilaw.cas.cz/index.php/tlq/article/view/420
Mulaj, V., & Prenaj, V. (2023). Legal regulation of individual businesses in Kosovo and the impact of the Covid-19 pandemic. *The Lawyer Quarterly*, *13*(2). https://tlq.ilaw.cas.cz/index.php/tlq/article/view/553
Nazifi, E., & Broka, P. (2015). Review of Ten Years of Albanian Competition Law Developments. *Yearbook of Antitrust and Regulatory Studies*, *8*(11): 129–148. https://press.wz.uw.edu.pl/yars/vol8/iss11/6/
Nazifi, E., & Broka, P. (2016). Grounds for Private Enforcement of Albanian Competition Law. *Yearbook of Antitrust and Regulatory Studies*, *9*(13), 61–76. https://doi.org/10.7172/1689-9024.YARS.2016.9.13.3

Professional opinion of the Kosovo Competition Authority No. 355/19-02/D, dated November 19, 2019, addressed to the Ministry of Infrastructure and Transport. https://ak.rks-gov.net/assets/cms/uploads/files/Mendim%20Profesional%20drejtuar%20Ministrise%20se%20Infrastruktures%20dhe%20Transportit.PDF [in Albanian]
Professional opinion of the Kosovo Competition Authority No. 147/21-02/D dated April 22, 2021. https://ak.rks-gov.net/assets/cms/uploads/files/Opinioni%20Profesional.pdf
Regulation on agreements of minor importance of Albania, dated November 8, 2011. https://caa.gov.al/laws/per-marreveshjet-me-rendesi-te-vogel/ [in Albanian]
Regulation on fines and relief from them of Albania, dated September 11, 2009. https://caa.gov.al/laws/per-gjobat-dhe-lehtesimin-prej-tyre/ [in Albanian]
Regulation on the Organization and Functioning of the Competition Authority of Albania, dated October 26, 2018. https://caa.gov.al/laws/per-organizimin-dhe-funksionimin-e-autoritetit-te-konkurrences/ [in Albanian]
Skara, G. (2023). Reform of Kosovo Competition Law: Closer to EU Competition Law. *Journal of European Competition Law & Practice*, *14*(3), 171–176. https://doi.org/10.1093/jeclap/lpad013
Tosheva, E., & Dimeski, B. (2019). The competition policy in Western Balkan countries: How far they have come on the EU accession "Road"? *Balkan Social Science Review*, *14*, 31–55. https://js.ugd.edu.mk/index.php/BSSR/article/view/3338

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THE RIGHT OF FOREIGNERS TO HEALTH CARE: FEATURES OF THE REGULATION BY THE CONSTITUTION OF UKRAINE AND INTERNATIONAL STANDARDS IN THIS SPHERE

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Abstract. This article considers the legal regulation of the right to health protection by the norms of the Constitution of Ukraine of 1996. Particular emphasis is placed on the provisions of Art. 49 of the Constitution of Ukraine and the positive obligation of the state to create conditions for effective and accessible medical service only for citizens of Ukraine. First of all, the article examines the correlations between this provision and the relevant provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. The paper concludes that accessibility of all medical services in the field of health is provided by the ICESCR's right to health care and international obligations of states in this area, and Art. 49 of the Constitution of Ukraine does not correspond to this. At the same time, the article provides examples of gaps in the legislative regulation regarding certain aspects of the right to health of certain categories of foreigners.

Keywords: International Covenant on Economic, Social and Cultural Rights 1996, international law of human rights, right to health care, rights of foreigners, the Constitution of Ukraine 1996.

Introduction

In Ukraine, human health is proclaimed the highest social value, and a number of rights related to health are constitutional, i.e., guaranteed by the Basic Law of the state – the Constitution of Ukraine (1996) (hereinafter – the Constitution). The norms of the Constitution are the basis on which the further legal regulation of human and civil rights, as well as the activities of the state in the field of health care, should be based. At the same time, the Basic Law of Ukraine is characterized by a somewhat inconsistent approach when granting different categories of individual rights and freedoms (Protsenko, 2020).

A different approach to determining the conditions for the exercise of their rights by citizens and foreigners is also prescribed in the basic article of the Constitution on the issue of the right to health – Art. 49. According to this article, *everyone* has the right to health care, medical assistance, and medical

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insurance (Part 1 of Art. 49). At the same time, the state creates conditions for effective and accessible medical care for all citizens (Part 3 of Art. 49). On the one hand, the Constitution guarantees everyone the right to health care, medical assistance, and health insurance. On the other hand, it imposes a positive obligation on the state to take care of the efficiency and accessibility of medical care not for everyone, but only for citizens of Ukraine. Separately it should be noted that the rights and freedoms provided for in Art. 49 of the Constitution may be temporarily restricted under conditions of martial law or a state of emergency, in accordance with Art. 64 of the Constitution.

In the authors' opinion, it is difficult to understand the logic of the construction of this legal regulation, because health care and medical assistance is provided through health protection. Therefore, as part of the right to health care, it must be effective and affordable to all. It is thus appropriate to establish the truth or falsity of the approach prescribed in Part 3 of Art. 49 of the Constitution – namely, whether the state can guarantee only its citizens effective and accessible medical care – by comparing it with the international legal regulation of human and civil rights and freedoms in the field of health.

Here it is appropriate to mention Part 1 of Art. 26 of the Constitution, which is closely related to the topic of this research. According to it, foreigners and stateless individuals who are in Ukraine on legal grounds enjoy the same rights and freedoms, as well as bear the same duties, as citizens of Ukraine, with exceptions established by the Constitution, laws, or international treaties of Ukraine. This article, even if it equates the right of foreigners with those of Ukrainian citizens, does not eliminate the problems mentioned above. In particular, the answer to the question of whether it is possible, on the basis of Part 1 of Art. 26 of the Constitution, to consider that the rights of citizens provided by Part 3 of Art. 49 of the Constitution also apply to foreigners remains unclear.

It should also be noted that in the modern science of international law, the human right to healthcare is widely studied. In this regard, the works of Chapman (2002), Kinney (2001), Leary (1994), Da Silva (2018), Toebes (1999), Tobin (2011), and Yamin (2005) are particularly relevant. However, as a rule, these studies focus more on the content of this right and, for obvious reasons, do not compare it with Art. 49 of the Constitution of Ukraine. In addition, these studies do not focus on the subjects to whom this right is granted and the problems they face. The only exception is refugees, whose rights, in particular in the field of healthcare, are widely and comprehensively studied. Other categories of foreigners are often overlooked by international law scholarship, as it is believed that national regime or health insurance guarantee them the possibility of exercising their rights. However, gaps in the international and national legal regulation of the right to health for certain categories of foreigners may lead to the deprivation of medical care, which, in turn, will harm not only them, but also society as a whole. While conducting this research, the following specific methods of legal science were principally applied: comparative method, formal legal (dogmatic) method, legal interpretation method, and hermeneutic method of law interpretation.

1. The issue of the conformity of Part 3 of Art. 49 of the Constitution of Ukraine with the norms of the International Covenant on Economic, Social and Cultural Rights of 1966

To assess the provisions of Part 3 of Art. 49 of the Constitution, it is necessary to refer to the International Covenant on Economic, Social and Cultural Rights of 1966 (hereafter – ICESCR). It is a fundamental universal international treaty in the field of economic, social, and cultural human rights, involving 172 member states. Art. 12 of the ICESCR specifically focuses on the right to the highest attainable standards of physical and mental health (hereinafter – the right to health). This instrument is constructed as a list of international legal obligations for states regarding economic, social and cultural rights – a framework which allows for the better assessment of the content of Part 3 of Art. 49 of the Constitution. The latter also stipulates the obligation of the state to take care of the efficiency and accessibility of medical care. Ukraine is a party to the Covenant and is, therefore, obliged to comply with its provisions. ICESCR "provides the most comprehensive article on the right to health in international human rights law" (CESCR General Comment No. 14, 2000, § 2). For contrast, it should be added, however, that the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) does not explicitly provide for the right to health; however, the European Court of Human Rights practices the

protection of this right under other articles of the Convention, such as Art. 2 (concerning the right to life); Art. 3 (provides for the prohibition of torture), etc.

It should also be separately stated that the subject of this article is not the question of the nature of economic, social and cultural human rights and their relationship with civil and political rights; the peculiarities of the structure of ICESCR are indicated only because the article examines the responsibilities of the state, and the Covenant states the obligations of states for each right separately. At the same time, it must be noted that in Ukraine, even at the court level, there are cases of misunderstanding the legal nature and legal force of international treaties, in particular ICESCR (Decision in case No. 215/1717/17, 2017)

The study of the content of Art. 12 of ICESCR allowed us to identify a number of markers for compliance, with which Part 3 of Art. 49 of the Constitution should be tested. This is a question of the maintenance of the right provided by Art. 12 of ICESCR and the content of the international legal obligations of the states enshrined in it.

2. The content of the right to health according to Art. 12 of ICESCR and the issue of the compliance of Art. 49 of the Constitution of Ukraine

Regarding the content of the rights provided by Art. 12 of ICESCR, it particularly guarantees the right to health, namely the right to the highest attainable standard of physical and mental health. However, the right to health is considered here in a broad sense, and is not only limited to health care. This fact is emphasized in General Comment No. 14 (2000) (hereafter – Comment No. 14) prepared by the United Nations Committee on Economic, Social and Cultural Rights (hereafter – CESCR).

General Comments are non-binding international legal instruments prepared by the CESCR, based on an analysis of ICESCR Member States' reports, to facilitate the implementation of its provisions. Despite the non-binding nature of these General Comments, it is appropriate to compare their provisions with the provisions of the Constitution, as the Comments are drafted in the spirit of fundamental international human rights instruments and are a dynamic response to the problems, gaps and shortcomings that arise in the application of these treaties.

Inter alia, the CESCR stipulates that "according to the Committee's interpretation, the right to health, as defined in Art. 12, § 1, is not limited to the right to timely and appropriate health care". Further, in Comment No. 14, the other components of this right are enumerated, including safe food, healthy occupational and environmental conditions, access to health-related education and information, as well as the participation of the population in all health-related decision-making (§ 11). In turn, Hendel (2014), having analysed the present-day international legal regulation of the right to health, proved that this right is interpreted broadly. In particular, she stressed that:

> the right to health is a complex and systemic concept including the following: biomedical human rights, the right to medical care, the right to a healthy workplace, the right to a healthy natural environment, the right to prevention, treatment and control of diseases, the right to access medicines, the right to access safe drinking water, the right to information about factors that affect health, etc. (p. 10)

The authors perceive that the approach to understanding the right to health enshrined in Comment No. 14 reflects the idea prescribed in Art. 25 of the Universal Declaration of Human Rights in 1948. In the latter, the right to health care and social services necessary for the maintenance of health and the right to sickness benefits are part of a more general right, i.e., the right to an adequate standard of living. However, in ICESCR itself the right to health and the right to a standard of living adequate are textually divided between individual articles and are more detailed. Nonetheless, their meaningful connection and interdependence are indisputable:

> The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health. (Comment No. 14, 2000)

Thus, Art. 49 of the Constitution, in terms of the scope of the rights provided, does not correspond to the broad understanding of the right to health laid down in Art. 12 of ICESCR. The Basic Law of Ukraine grants everyone solely the right to a disparate triad of objects based on unknown criteria (health care, medical care, medical insurance) instead of granting everyone the right to health – or, at least, part of it, namely the right to health care, as a number of components of the right to health can be deduced from other articles of the Constitution (Art. 27 provides for the right to protect life and health from unlawful encroachments; Art. 43 – the right to proper, safe and healthy work conditions; Art. 46 – the right to social protection; Art. 48 – the right to an adequate standard of living; Art. 50 – the right to an environment that is safe for life and health, etc.). At the same time, the Constitution obliges the state to create conditions for effective and accessible medical care only for its citizens, which is related to health care, medical assistance and health insurance.

It should be noted that, although enshrined in Part 1 of Art. 49 of the Constitution, the approach to determining the scope of rights guaranteed by the Constitution was not, however, reflected in the legislation of Ukraine related to the health issue. For example, in the Law of Ukraine "On Fundamentals of the Legislation of Ukraine on Health Care" of 1992, the right to health care includes a number of components, including, inter alia, qualified medical care. Thus, according to this Law, medical care is a component of health care. In addition, this Law generally reflects the approach of Art. 12 of the ICESCR, as in Art. 6 and Art. 11 it provides for the granting of a wide range of powers in the field of health to individuals, although these powers are not considered as components of the right to health, but as a narrower right – the right to health care.

It is worth mentioning that the authors of a number of comments on the Constitution (e.g., Oprishko, Averianov, Kornienko etc.) have not paid attention to the discrepancy stated above, and have conversely believed that Part 1 of Art. 49 of the Constitution corresponds to Art. 12 of ICESCR. For example, Oprishko et al. (1996) in the *Commentary to the Constitution*, stated that in accordance with Art. 12 of the Covenant "everyone has the right to medical assistance and medical care in case of sickness. This inalienable human right is reflected in the first part of Art. 49 of the Constitution…" (p. 126). Thus, the authors of the abovementioned Commentary did not trace the fundamental international legal obligation of states to recognize the right of everyone to the highest attainable standard of physical and mental health provided in Part 1 of Art. 12 of the Covenant. Moreover, they paid attention only to the measures listed in its § d of Part 2 of Art. 12 – namely, medical assistance and medical care in case of sickness, whose use is necessary for the exercise of this right. Instead, they should have compared the obligations of states defined in § d of Part 2 of Art. 12 of the Covenant and the obligations of Ukraine under Part 3 of Art. 49 of the Constitution, and indicated that they focus on a different range of subjects.

In the same vein, Tatsii et al. (2003), authors of another *Commentary to the Constitution*, noted the following:

> The inalienable human right to life and health, reflected in a number of articles of the Constitution (Art. 5, 27 [the quote probably contains an error, because Art. 5 of the Constitution establishes the form of government of Ukraine and a number of principles for the exercise of power]), was developed in Art. 49 … The content of this article is fully in line with the provisions of the Universal Declaration of Human Rights (Art. 25) and the International Covenant on Economic, Social and Cultural Rights (Art. 12), according to which everyone has the right to medical assistance and medical care in case of sickness. (p. 252)

However, not all researchers are unanimous regarding the full compliance of Part 1 of Art. 49 of the Constitution with the provisions of ICESCR and other acts of international human rights law relating to the right to health. For example, Shekera (2013) also came to the conclusion that the content of Part 1 of Art. 49 of the Constitution is narrower than the content of the right to health enshrined in present-day international legal acts. In particular, he stated that:

> The constitutional right to health care and medical assistance in Ukraine (Article 49 of the Constitution) does not fully comply with basic international legal standards as in international treaties to which the Ukrainian state is a party, this right is considered much more broadly, and includes human social well-being. This imposes additional obligations on the state to create conditions for the realization of this right. (p. 530)

2.1 The content of international obligations in the field of the right to health provided by ICESCR, and equality and non-discrimination as their constituent elements

There are two positive international legal obligations concerning the provisions of Art. 12 of ICESCR: the obligation to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Part 1 of Art. 12); and the obligation to take measures for the full exercise of this right – in particular, measures which would assure all medical services and medical attention in the event of sickness (§ d, Part 2 of Art. 12). As can be seen, both obligations of states are directly related to equality and non-discrimination, a fundamental principle of international human rights law. The latter is a key issue for this study and is further consistent with Part 2 of Art. 2 of ICESCR, which provides for a general – i.e., applicable to all rights under the Covenant – obligation of states to guarantee the exercise of the rights proclaimed in ICESCR without any discrimination in relation to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. A connection between the provisions of Art. 12 and Part 2 of Art. 2 ICESCR is also indicated separately in Comment No. 14 (2000), where it is stated that "States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2)" (§ 30).

In addition, Comment No. 14 of ICESCR's international obligations regarding the right to health clarifies that, as with all human rights, the right to health provides for three categories or levels of obligations for States parties to the Covenant: the obligations to respect, protect and fulfil. The content of each of these obligations is revealed through the principle of equality and non-discrimination. In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all individuals – including prisoners or detainees, minorities, asylum seekers and illegal immigrants – to preventive, curative and palliative health services, abstaining from enforcing discriminatory practices as a state policy) (Comment No. 14, 2000, § 34). This provision turns out to be effective for the current study, as it emphasizes the need to protect certain categories of foreigners, namely: asylum seekers and illegal immigrants.

The interpretation of the content of the obligation on states to protect the right to health in Comment No. 14 (2000) is of particular significance for this study, as it means, in particular, that "obligations to protect include, inter alia, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties" (§ 35). Thus, in this provision, legislative measures and access to health services composed of medical care are linearly linked in a logical manner: the former must provide the latter. That is, Part 3 of Art. 49 of the Constitution does not correspond to the idea laid down in the understanding of Art. 12 of ICESCR.

The obligation to fulfil is closely related to the obligation to protect the right to health, as it requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realization of the right to health (Comment No. 14, 2000, § 33). The latter stipulates the following: "to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation" (§ 36). That is, the authors of Comment No. 14 repeatedly pointed out the importance of developing the necessary legislative regulation of the

right to health, which, in the opinion of the authors of the current study, does not correspond to Part 3 of Art. 49 of the Constitution.

Returning to the principle of equality and non-discrimination, it should be mentioned that in Comment No. 14, equality and non-discrimination are also perceived as part of the content of the right to health itself. In particular, in § 12(b), it is stated that "health facilities, goods and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party" (Comment No. 14, 2000), and this rule is considered in the Notes as one of the main elements of the right to health – namely, the accessibility of health care facilities, goods and services. In Comment No. 14, it is specifically explained that the triad "health facilities, goods and services" embodies a broad understanding of the right to health outlined in §§ 11 and 12(a) of this Comment.

Thus, according to ICESCR and Comment No. 14, an international legal act designed to clarify the provisions of the Covenant, the principle of equality and non-discrimination is used in two areas:
- the first is realised via the content of the right to health, in particular, such component as accessibility to everyone;
- the second is the international legal obligations of states in the field of health – namely, those provided for in Part 2 of Art. 2 and Art. 12 of ICESCR's commitment to guaranteeing the right to health without discrimination, recognizing the right of everyone to health, as well as committing to take measures to provide all medical assistance and medical care in case of sickness.

2.2. On the issue of including citizenship among the grounds recognized by international human rights law, discrimination on the basis of which is prohibited

CESCR, in explaining the specifics of the principle of equality and non-discrimination in the sphere of health, often refers to the classic list of grounds on which discrimination is prohibited that is recognized by the international law: race, color, sex, language, religion, political or other opinion, national or social origin, property status, birth or other circumstances. For example, in Comment No. 14 (2000), the content of non-discrimination, which is one of the aspects of access to the right to health, is explained as follows: "health care facilities, goods and services must be de jure and de facto accessible to all … without discrimination on any of the prohibited grounds" (§12(b)). In addition, § 18 reiterates the grounds on which discrimination in access to health services and the means and methods of obtaining them is prohibited. Interestingly, this list is expanded here, compared with the provisions of Part 2 of Art. 2 of the Covenant. Thus, along with the classic components, it includes: physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status.

Similarly, § 19 of Comment No. 14 is related to non-discrimination issues. It assumes that "states have a special obligation … to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health".

Therefore, the above examples from Comment No. 14, and Part 2 of Art. 2 of ICESCR do not directly indicate citizenship as ground of discrimination. It is evident that the list of grounds on which discrimination is prohibited enshrined in Part 2 of Art. 2 of the ICESCR and other acts of the Bill of Human Rights is not exhaustive. At the same time, citizenship cannot unconditionally be included in this list, because a number of rights are granted exclusively to citizens of states in present-day international human rights law. In this regard, an important question arises as to whether the absence of citizenship in the list of grounds on which discrimination is prohibited gives states the right to ensure the right to health, or to certain components of it, exclusively to their own citizens.

A negative answer to this question can be given based on the provisions of CESCR General Comment No. 20 (2009) on "Non-discrimination in economic, social and cultural rights (Art. 2, § 2, of the International Covenant on Economic, Social and Cultural Rights". This Comment clearly states that "the Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless

persons, migrant workers and victims of international trafficking, regardless of legal status and documentation" (§ 30).

In its turn, the position of Comment No. 20 is enhanced by the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966 (hereinafter – ICERD), which, incidentally, chronologically preceded ICESCR, and was developed by the United Nations Committee on the Elimination of Racial Discrimination (CERD) in its General Recommendation XXX on discrimination against non-citizens (hereinafter – the Recommendation, 2005). Thus, according to ICERD, States parties undertake to prohibit and eliminate racial discrimination in all its forms and ensure the equality of every person before the law without distinction as to race, colour, or national or ethnic origin, especially in the exercise of certain human rights. Inter alia, this rule applies to rights in the economic, social and cultural spheres – in particular, the right to health care and the right to medical assistance.

The Recommendation bridges the gap that may arise due to the fact that ICERD discloses the concepts of discrimination and equality through a list, albeit inexhaustive, of factors. However, there is no direct mention of citizenship among the latter. Thus, the Recommendation contains a fundamental principle, according to which:

> Art. 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social, and cultural rights. … States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognised under international law" (Recommendation, 2005, § 3).

Based on the above and other principles of international law, the Recommendation derives the following proposition that to "ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative, and palliative health services" (§ 36). It is especially relevant to the current study that the Recommendation enshrines a clear indication of the obligation of states not to restrict non-citizens' access to health care, because Part 3 of Art. 49 of the Constitution does not correspond to this provision. In addition, the presence in the cited General Comments and the Recommendation of certain provisions on non-discrimination on the grounds of citizenship indicates that, despite the spread of Art. 12 of ICESCR and Art. 5 of ICERD, in the practice of states there have been cases of the restriction of foreigners' rights to health, and the states should pay attention to this aspect.

In this regard, it is important to note that the Durban Declaration on the Elimination of All Forms of Racial Discrimination, adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, South Africa, August 31–September 7, 2001), highlights that "xenophobia against non-nationals, particularly migrants, refugees, and asylum-seekers, constitutes one of the main sources of contemporary racism" (Declaration of World Conference, 2001, § 16).

Taking into account that the present-day international human rights system includes a number of rights granted exclusively to citizens of states, citizenship cannot be included in the list of "anti-discrimination grounds" established in international human rights law – namely, race, color, sex, language, religion, political or other opinion, national or social origin, property status, or birth. However, in view of the above, it can be proposed that citizenship be included among the other features for which discrimination is prohibited in the regulation of certain areas of public relations, such as measures to eliminate racial discrimination, economic, social, and cultural human rights. Incidentally, Ukrainian legislators have already followed this path in defining discrimination in the Law of Ukraine "On the Principles of Prevention and Counteracting Discrimination in Ukraine" of September 6, 2012. In particular, this is considered to represent a situation in which a person and/or group is restricted in recognizing, realizing or exercising rights and freedoms in any form established by this law on various grounds, among which the law clearly states citizenship, except in cases where such a restriction has a legitimate, objectively justified purpose and the ways to achieve it are appropriate and necessary (Art. 1). Moreover, healthcare

(Article 4) is within the scope of this law, and the Verkhovna Rada of Ukraine is recognized as an entity endowed with the authority to prevent and resist discrimination (Art. 9).

3. The state of regulation of the right to health by the Constitutions of other states

General Comment No. 15 of the UN Human Rights Council on "The position of aliens under the Covenant" (1986), although it concerns the International Covenant on Civil and Political Rights, emphasizes that many states are characterized by the unsatisfactory constitutional regulation of the rights of foreigners. In particular, this document notes that:

> A few constitutions provide for equality of aliens with citizens. Some constitutions adopted more recently carefully distinguish fundamental rights that apply to all and those granted to citizens only, and deal with each in detail. In many States, however, the constitutions are drafted in terms of citizens only when granting relevant rights (§ 3).

In view of this, the authors consider it necessary to study the regulation of the right to health by the constitutions of other states. This begins with the Constitution of France, as the constitutional law of this state has largely set the standards of the legal regulation of human rights. Currently, France has a package of constitutional acts consisting of: the Constitution of France of 1958 (as amended in 2008), the Declaration of the Rights of Man and of the Citizen of 1789, the Preamble to the Constitution of France of 1946, and the 2004 Charter of the Environment. Human rights are regulated by the Declaration of the Rights of Man and of the Citizen of 1789 and the Preamble to the Constitution of France of 1946, and according to the latter "it (The Nation) shall guarantee to all, notably to children, mothers and elderly workers, protection of their health". In addition, the Charter for the Environment of 2004 proclaims that "each person has the right to live in a balanced environment which shows due respect for health" (Art. 1). Thus, compared to the norms of present-day international human rights law, these acts proclaim the right to health in a narrower sense, but extend it to everyone, without reservations regarding citizenship.

It is also appropriate to study the approaches to guaranteeing the right to health applied in the Constitutions of newly created states, as they have had the opportunity to build national human rights legislation taking into account the latest international legal standards in this area. Thus, the Transitional Constitution of the Republic of South Sudan 2011 introduced a separate section II – the Bill of Rights – which provides that "all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill". In addition, the article of the Constitution of South Sudan on "Public Health Care" stipulates the obligation of the state to provide citizens with free primary health care and emergency medical care.

The 2007 Constitution of Montenegro also provides for the right of everyone to health protection, and, in particular, the right of children, pregnant women, elderly people, and people with disabilities to health protection from public revenues, if they do not exercise this right on some other grounds (Art. 69).

The provisions of the Fundamental Law of Hungary 2011 are also exemplary from the point of view of this research, although a number of other provisions, including those relating to human rights, have been widely criticized. The aforementioned law proclaims that:

> Everyone shall have the right to physical and mental health. Hungary shall promote the effective application of the right referred to in § (1) by an agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organising safety at work and healthcare provision, by supporting sports and regular physical exercise, ensuring the protection of the environment. (Art. XX).

Proceeding from the above, the wording of the right to health enshrined in the Basic Law of Hungary is as close as possible to the wording of Art. 12 of ICESCR. Moreover, unlike the Constitution, the state undertakes to organize health care, and this is one way to promote the right to health.

The 1991 Constitution of Romania guarantees the right to health care without special instructions to the subjects to whom it applies (Part 1 of Art. 34), and provides for the obligation of the state to take measures in the field of hygiene and public health (Part 2 of Art. 34). Other issues related to health care should be regulated by law (Part 3 of Art. 34). A similar approach to the regulation of the right to health is applied in Moldova, whose Constitution of 1994 provides a guarantee of the right to health protection (Part 1 of Art. 36), regulation by a special law of the structure of the health care system (Part 3 of Art. 36), and the gratuitous nature of the minimum state health insurance (Part 2 of Art. 36).

The constitutions of other states bordering Ukraine use an approach somewhat similar to that implemented in the Constitution. Namely, they extend the right to health care to all, but, at the same time, they establish the positive obligation of the state to provide effective and accessible medical care only to citizens. However, this obligation is associated with the gratuitous nature of public medicine, and this circumstance makes legal regulation that is differentiated by subject composition in such a way more justified. Thus, the Constitution of Poland of 1997 guarantees everyone the right to health care, but the state undertakes to ensure only citizens equal access to state-funded medical services (Part 1, 2, Art. 68). Similarly, the 1992 Constitution of Slovakia traditionally grants the right of everyone to health care, and the right of citizens to free medical care provided on the basis of health insurance (Art. 40).

The approach of Belarus to the constitutional regulation of the right to health care is significantly different to the above examples. The Constitution of 1994 guarantees the right to health care exclusively to citizens of Belarus, including free treatment in state health care institutions (Part 1 of Art. 45). In addition, the state creates conditions for sufficient medical care for all citizens (Part 2 of Art. 45) and ensures the right of citizens to health care by developing physical training and sport, taking measures to improve the environment, developing opportunities for the use of fitness institutions, and improving health and occupational safety (Part 3 of Art. 45).

In the aforementioned constitutions there is a tendency to allocate a separate article with a special focus on the right to health care, which, in the vast majority of cases, is given to everyone. In the same articles, a number of constitutions define the obligations of states to promote the exercise of this right by individuals. However, the responsibilities of the state related to free public health care/assistance should be performed exclusively in relation to its citizens.

The Constitution of Ukraine also provides free medical care in state and municipal health care facilities, as stipulated in the second sentence of Art. 49, Part 3. However, in this case the legislator does not specify the range of subjects to whom this free assistance may be granted. This was also not done in the interpretation of the second sentence of Part 3 of Art. 49 of the Constitution of Ukraine by the Constitutional Court of Ukraine (CCU) in Decision No 10-rp/2002 of 29 May 2002 in the so-called "Case on Free Medical Care", which explained the extent to which state and municipal medical institutions should provide free medical care. It is worth remembering that, in accordance with Art. 150(2) of the Constitution of Ukraine and Art. 7(1)(2) of the Law of Ukraine "On the Constitutional Court of Ukraine" of July 13, 2017, the CCU is authorised to officially interpret the Constitution of Ukraine, and, in accordance with Art. 151^2 of the Constitution of Ukraine, its decisions are binding and final and cannot be appealed. In particular, considering this case, the CCU had to clarify the possibilities and methods of direct payment by patients for medical care provided to them in the state and municipal health care institutions of Ukraine. The question of determining the range of subjects to which the second sentence of Part 3 of Art. 49 of the Constitution of Ukraine applies was not included in the constitutional petition. As a result, in its final conclusions on the case the CCU indicated exclusively citizens. Thus, the Decision stated that:

> the provisions of Part Three of Art. 49 of the Constitution of Ukraine "in state and municipal health care facilities medical care is provided free of charge" should be understood as meaning that in state and municipal health care facilities medical care is provided to all citizens regardless of its volume and without their previous, current or subsequent payment for such care. (Decision No. 10-rp / 2002, 2002)

However, it should be emphasized that the Ukrainian deputies who appealed to the CCU in this case, first, inaccurately conveyed the content the Constitution of Ukraine in the relevant submission, noting that "the right to health care, medical assistance and health insurance is an inalienable right of *the citizen of Ukraine* [emphasis added], which is recorded in Art. 49 of the Constitution of Ukraine" (Constitutional submission of People's Deputies of Ukraine, 2002, § 1). Secondly, along with the terms "citizen" and "citizens of Ukraine", terms such as "population", "population funds", and "patients" were also used which, according to their content, are broader than "citizens of a particular state". Moreover, the CCU itself in Decision No 10-rp/2002 used the above list of terms, and also noted that in the phrase

> "medical care is provided free of charge" the last word in the context of the whole Art. 49 of the Constitution of Ukraine means that *the individual* [emphasis added] receiving such care in state and municipal health care institutions, should not reimburse its cost in the form of any payments or in any form, regardless of the time of medical care. (Decision No. 10-rp / 2002, 2002, Item 4, § 1).

In the authors' opinion, such a juggling of concepts indicates that people's deputies and judges, by focusing on the issue of the possibility of direct payment for medical care provided to patients, did not pay attention to the definition of categories of individuals entitled to free medical care. Such negligence in the official interpretation of the Constitution of Ukraine enshrined in a legally binding document (decision of the CCU) can lead to serious consequences. After all, the position of the CCU regarding the fact that "in state and municipal health care facilities medical care is provided to all citizens regardless of its volume and without their previous, current or subsequent payment for such care" (Decision No. 10-rp/2002, 2002) actually means that, for example, foreign citizens and stateless persons permanently residing in Ukraine cannot count on free medical care, although, in fact, according to the current legislation of Ukraine, certain categories of foreigners are entitled to it.

4. Features of the regulation of the right to health care of foreigners provided by the legislation of Ukraine

Similarly to the provisions of the Ukrainian Constitution, national Ukrainian legislation in the field of health care also does not always guarantee certain categories of foreigners access to and efficiency of medical care. Particularly, this is the case with payment for medical care regulated in the Law of Ukraine "On State Financial Guarantees of Medical Care" 2017 (hereinafter the Law "On State Financial Guarantees"). This particular law is the cornerstone of the medical reform which has been taking place in Ukraine since 2018. First of all, it should be noted that according to Part 1 of Art. 4 of this Law, the state guarantees full payment from the State Budget of Ukraine for necessary medical services and medicines provided during emergency, primary, secondary (specialized), tertiary (highly specialized), and palliative medical care, as well as medical rehabilitation, medical care for children under 16, and medical care in connection with pregnancy and childbirth to the following categories of individuals:

- citizens of Ukraine;
- foreigners permanently residing in Ukraine (the authors would like to emphasize that according to § 6, Part 1 of Art. 1 of the Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons", 2011, in Ukraine a foreigner is a person who is not a citizen of Ukraine and is a citizen (subject) of another state or states);
- stateless persons permanently residing on the territory of Ukraine;
- persons recognized as refugees or persons in need of additional protection.

Thus, in Ukraine, not only citizens but also other categories of individuals receive the right to free medical services. The state also provides payment for medical services and medicines granted during emergency medical care to foreigners permanently residing in Ukraine, as well as stateless individuals permanently residing on the territory of Ukraine under the condition of further compensation of their full value by said persons. At the same time, medical services and medicines related to the provision of other types of medical care are paid for by these categories of individuals at their own expense, via voluntary health insurance, or through other sources not prohibited by law (Part 2 of Art. 4 of the Law "On State Financial Guarantees").

The authors deliberately separated the list of individuals who receive free medical services in order to show that the legislator did not regulate the issue of payment for medical services and medicines by foreigners and stateless individuals temporarily residing in Ukraine. However, this issue is extremely important as this category of individuals includes a large number of foreigners who come to Ukraine, such as foreign students and migrant workers.

It is clear that the issue of payment for medical services rendered is resolved at the expense of medical insurance, which, according to the Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons" of December 25, 2011, must be available to almost all persons who come to Ukraine for temporary residence. Thus, in accordance with Art. 5 of the Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons", a valid health insurance policy is included in the list of documents on the basis of which a temporary residence permit is issued. However, due to the variety of types of health insurance, a foreigner may be denied a temporary residence permit. In particular, the Administrative Court of Ukraine considered case No. 320/6677/23 on the refusal to issue a temporary residence permit to a Russian citizen who had been living in Ukraine since 2019. The grounds for the refusal were that, in the opinion of an employee of the State Customs Service of Ukraine, the insurance policy submitted by the citizen – "Agreement on Voluntary Medical Insurance and Accident Insurance during Travel or Stay in Ukraine", which provided coverage of medical and other expenses and accident insurance – was not a valid health insurance policy. However, the Sixth Administrative Court of Appeal of Ukraine, having considered the case materials, ruled that the insurance policy provided by the plaintiff met the requirements established by the immigration legislation of Ukraine, as it provided for coverage of medical expenses, including emergency medical care, emergency inpatient or outpatient medical care, and medical evacuation, treatment and observation provided by state and departmental medical institutions in Ukraine (for more information on this case, see Resolution in case No. 320/6677/23, 2023).

It should be taken into account that only foreigners and stateless persons who perform military service in the Armed Forces of Ukraine, the State Special Transport Service, and the National Guard of Ukraine under a contract are not required to have a valid health insurance policy. The legality of their temporary residence in Ukraine is confirmed by the military ticket of a private, sergeant, or sergeant major (part 19 of Art. 4 of the Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons", 2011). At the same time, returning to the topic of the article, neither the Law of Ukraine "On Military Duty and Military Service" nor the Regulation on Military Service in the Armed Forces of Ukraine by Foreigners and Stateless Persons, approved by the Decree of the President of Ukraine on the 10 June 2016, clearly regulate the conditions and procedure for providing such individuals with medical care in Ukraine. It is likely that these issues will be regulated by the contract on military service concluded between the foreigner and the state, represented by the Ministry of Defense of Ukraine. After all, according to the standard form of this contract, which is set out in the Annex to the above Regulation, the Ministry undertakes to ensure that a foreign serviceperson is granted the right to healthcare and the right to receive medical care in healthcare facilities of the Ministry of Defense of Ukraine (clause 2).

However, it is extremely important to clearly understand the terms of payment for foreigners who have a valid health insurance policy – for example, for emergency medical care provided to them in a state or municipal healthcare facility. After all, a person in need of such assistance may be unconscious or may lack identification documents, and citizens who request such assistance may not know about the insurance policy and may call an ambulance from a state or municipal healthcare facility. According to part 3 of Art. 3 of the Law of Ukraine "On Emergency Medical Care" of 22 September 2012, calling for such assistance is the duty of Ukrainian citizens.

In turn, special legislation on the issue of emergency care is also inconsistent in terms of payment by different categories of individuals. Thus, the Law of Ukraine "On Emergency Medical Care" of 2012 provides that, on the territory of Ukraine, every citizen of Ukraine and any other person has the right to free, affordable, timely, and quality emergency medical care (Part 1 of Art. 3). However, foreigners and stateless individuals temporarily staying on the territory of Ukraine are provided with emergency

medical care in accordance with the procedure established by the Cabinet of Ministers of Ukraine (Part 2). Thus, the Law does not provide for the special legal regulation of emergency medical care for foreigners and stateless individuals temporarily residing in Ukraine. Therefore, we can conclude that they, along with citizens of Ukraine, are entitled to free medical care.

At the same time, Ukraine has not developed a separate procedure for providing emergency medical care to foreigners and stateless individuals temporarily staying in Ukraine, which was discussed in Part 2 of Art. 3 of the Law of Ukraine "On Emergency Medical Care" of 2012; no such separate procedure has been developed for foreigners and stateless persons temporarily residing here. Instead, there is a more comprehensive document approved by the decision of the Cabinet of Ministers of Ukraine No. 121 (2014), which outlines a

> Procedure for providing medical care to foreigners and stateless individuals who permanently reside or temporarily stay on the territory of Ukraine … and compensation for the cost of medical services and medicines provided to foreigners and stateless individuals temporarily residing or staying on the territory of Ukraine.

According to § 2^1 of this Procedure, foreigners and stateless individuals temporarily residing in Ukraine, as well as persons temporarily staying in Ukraine, are obliged to reimburse the full cost of medical services and medicines related to the provision of emergency medical care to the state. At the same time, in accordance with § 2 of the Procedure, foreigners and stateless individuals temporarily residing or staying in Ukraine are granted medical care on a paid basis, unless otherwise stipulated by international treaties or laws of Ukraine.

Thus, on the issue of payment for medical services including emergency medical care, without any legal grounds an executive body, i.e., the Cabinet of Ministers of Ukraine, equated the legal status of individuals temporarily residing in Ukraine with the legal status of individuals temporarily staying here. In this case, the Procedure defines a subject that establishes the cost of medical care (proper health care institution) and a form of payment (cash and non-cash in the national currency). However, this regulation applies only to medical care provided to a foreigner or a person without citizenship temporarily staying on the territory of Ukraine; it does not apply to individuals temporarily residing in Ukraine.

The aforementioned problems cannot be solved by the application of the general norm of the Law of Ukraine "On Fundamentals of the Legislation of Ukraine on Health Care" regulating the rights and duties of foreigners in the field of health care, as it establishes the national mode for foreigners and stateless individuals permanently residing on the territory of Ukraine and for persons recognized as refugees or persons in need of additional protection. According to this Law, the rights and obligations in the field of health care of foreigners and stateless individuals temporarily staying on the territory of Ukraine must be determined by the laws of Ukraine and relevant international agreements. At the same time, the legal status of foreigners and stateless individuals temporarily residing in Ukraine is again not regulated by law.

Practice shows that healthcare issues for foreigners and stateless persons temporarily residing in Ukraine may arise not only in connection with payment for emergency medical care provided to them outside the health insurance policy. For example, in 2021, the Solomianskyi District Court of Kyiv considered case No. 760/8326/21 on fraud and abuse of office. Law enforcement agencies uncovered a criminal scheme to fraudulently obtain foreigners' money for their admission to medical universities in Ukraine. This case is interesting for this study because the prosecutor , during the investigation of this case, found and seized 271 voluntary health insurance contracts for foreign citizens in Ukraine, a significant part of which covered the costs associated with the treatment of COVID-19 and subsequent observation. It can be assumed that as a result of these investigative actions, hundreds of foreign students in Ukraine were left without health insurance, and therefore, in the event of illness, if they did not have the means, they might not have received the medical care that they needed. In the context of the COVID-19 pandemic, this could have posed a great danger to their health.

Gaps in Ukrainian legislation in the sphere of the provision of free medical care to certain categories of individuals have already become a matter at issue by CESCR, which, in its 2020 "Concluding Observations on Ukraine's Seventh Periodic Report", expressed the concern that "as a result of recent health care reform of the health-care system asylum seekers were deprived of the right to free medical care that existed before, including emergency medical care and initial medical examinations" (§ 38).

Indeed, the Law "On State Financial Guarantees", together with foreigners and stateless individuals temporarily residing in Ukraine, has overlooked foreigners and stateless persons who have applied to the competent state authorities for recognition as a refugee or a person in need of additional protection, as well as foreigners and stateless persons in respect of whom a decision has been made to draw up documents to resolve the issue of recognition as a refugee or a person in need of additional protection. While they were mentioned in the Procedure of 2014, this provides only for free medical examination for these persons and emergency medical care (§ 4), and does not say anything about medical care in general. Moreover, a mechanism to cover the costs of medical examinations and emergency medical care for such patients at the expense of budget funds has not been developed.

Another vulnerable category of individuals in terms of health care is foreign nationals who are held in temporary accommodation centres for foreigners and stateless persons illegally staying in Ukraine (TACs). Despite the fact that the issue of providing them with medical care is regulated by the relevant bylaw (specifically, Instructions, 2016), there are still many unresolved issues in practice. This is due, in particular, to the aforementioned medical reform, which does not provide for the state to cover the costs of medical care for foreigners who are illegally staying in Ukraine and are accommodated in TACs. For example, in 2023, a citizen of Morocco who was held in a temporary detention facility in Ukraine was provided with the necessary dental care only with the assistance of the Ukrainian Parliament Commissioner for Human Rights. In particular, the Ukrainian Parliament Commissioner for Human Rights initiated an inspection at the request of this person, during which he found that:

> foreigners and stateless persons temporarily staying on the territory of Ukraine, within the framework of the medical guarantees programme, are provided with payment for the necessary medical services and medicines related to the provision of emergency medical care by the state. Such persons are obliged to reimburse the state for the full cost of the medical services and medicines provided. Medical services and medicines related to the provision of other types of medical care are paid for by foreigners and stateless persons temporarily staying in Ukraine at their own expense, voluntary health insurance or other sources not prohibited by law. (Ombudsman of Ukraine, 2023).

It is clear that the subject of the Kingdom of Morocco did not have the necessary funds for dental treatment. Therefore, the management of the TACs turned to NGOs and the International Organization for Migration in Ukraine for help, and the latter provided the necessary funding.

It is also worth noting that before the medical reform, there were fewer significant problems with the financing of medical care provided to foreigners in TACs. For example, when considering case No. 743/354/18 (Decision in case No. 760/8326/21, 2018) on the extension of the detention of an Angolan citizen in 2018, the latter complained that he did not receive proper medical care in the Chernihiv TACs. In this regard, the court issued a separate ruling to inform the administration of the TACs of the Angolan citizen's complaints. However, the Chernihiv TACs subsequently provided evidence of the provision of adequate medical care to the Angolan citizen, which was carried out not only at the TACs' health centre, but also at the Chernihiv Regional Hospital (Resolution in case No. 743/354/18, 2018). That is, before the medical reform, the state provided medical care to persons held in temporary detention facilities.

Conclusion

Against the background of the proclaimed right of everyone to health care, Art. 49 of the Constitution of Ukraine provides for the obligation of the state to provide basic elements of this right – i.e., the efficiency and accessibility of medical care – not to all individuals, but only to citizens. Adopted in

1996, the Constitution does not fully reflect sufficiently high international standards in the field of the right to health. These standards are enshrined in the ICESCR, to which the Ukrainian SSR has been a party since 1973. In particular, if we follow the information of ICESCR, then Part 3 of Art. 49 of the Constitution does not reflect the provisions of Art. 12 of the Covenant, i.e., the international legal obligation of the state to create conditions that would provide all with medical assistance and medical care in case of sickness. Provided in Part 3 of Art. 49 of the Constitution, the obligation of the state to create conditions for effective and accessible to all citizens medical care is limited in object and subject composition of this obligation.

At the same time, the analysis of current soft international law acts in the field of human rights, primarily prepared in the Comment No. 14 (2000), further highlights the shortcomings of the regulation of the right to health enshrined in Part 3 of Art. 49 of the Constitution. After all, these instruments place special emphasis on the connection between the right to health and the international legal obligations of ICESCR member states in this field of law, with the key principle of international human rights law – that is, the principle of equality and non-discrimination. In turn, the latter is implemented through the obligation of states to extend the right to health to various categories of non-citizens (CESCR General Comment No. 20, 2009) and through the obligation of states to ensure respect for the right of non-citizens to an adequate level of physical and mental health by, inter alia, not applying the policy of denial or restriction of access to preventive, curative, and palliative care (Recommendation, 2005) to them. Moreover, the global community now recognizes that xenophobia against non-citizens is one of the main sources of present-day racism.

The comparison of Part 3 of Art. 49 of the Constitution with the relevant provisions of the constitutions of other states also indicates problems with the Ukrainian Constitution on this issue. In particular, a number of states which Ukraine shares borders with and which belong to the group of post-socialist countries use an approach somewhat similar to that implemented in the Constitution. Namely, the constitutions of states such as Romania, Moldova, Hungary, Slovakia, and Poland extend the right to health care to all, but at the same time establish the positive obligation of the state to assist only citizens in exercising this right. In the authors' opinion, this obligation is associated with the gratuitous nature of state medicine, and this circumstance makes such differentiated by subject composition legal regulation more reasonable than the approach enshrined in Part 3 of Art. 49 of the Constitution.

It should be emphasized that further Ukrainian legislation in the field of health does not always guarantee access and efficiency of medical care to certain categories of foreigners. In particular, the current health care reform in Ukraine does not properly address the health rights of foreigners and stateless individuals temporarily residing in Ukraine, first of all, who are illegally staying in the country. Nor does it address foreigners and stateless persons who have applied to the competent authorities with a statement of recognition as a refugee or a person in need of additional protection. Incidentally, this issue has already been considered by the UN Committee on Economic, Social and Cultural Rights.

Thus, given the facts that the Constitution is relatively rigid and the procedure for amending it is quite complex and lengthy, the Ukrainian parliament, taking into account the provisions of the International Bill of Human Rights, should eliminate all shortcomings that limit the rights of foreigners in the field of healthcare from the laws and regulations of Ukraine, primarily those concerning persons who are illegally staying in the territory of Ukraine.

References

CERD General recommendation XXX on discrimination against non-citizens (2005). https://www.refworld.org/pdfid/45139e084.pdf

CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2000). https://www.refworld.org/pdfid/4538838d0.pdf

CESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (2009). https://www.refworld.org/docid/4a60961f2.html

CESCR Concluding observations on the seventh periodic report of Ukraine No. E/C.12/UKR/CO/7 (2020). https://www.ohchr.org/en/documents/concluding-observations/ec12ukrco7-committee-economic-social-and-cultural-rights
CCPR General comment No. 15: The position of aliens under the Covenant (1986). https://www.refworld.org/docid/45139acfc.html
Chapman, A. (2002). Core obligations related to the right to health. In A. Chapman, S. Russell (Eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (pp. 85–216). New York, NY: Intersentia.
Constitutional submission of People's Deputies of Ukraine on the need for an official interpretation of the third part of Article 49 of the Constitution of Ukraine (2002). Materials of the case No. 1-13/2002 to the decision of the CCU No. 10-рп/2002 part 1. http://www.ccu.gov.ua/docs/459
Da Silva, M. (2018). The International right to health care: a legal and moral defense. *Michigan Journal of International Law*, *39*, 343–384.
Declaration of World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001). https://www.un.org/en/durbanreview2009/pdf/DDPA_full_text.pdf
Decision in case No. 215/1717/17 of the Terniv District Court of Kryvyi Rih of 26 April 2017. http://reyestr.court.gov.ua/Review/66198335
Decision No. 10-рп/2002 of the Constitutional Court of Ukraine of 29.05.2002 in the case No. 1-13/2002 on the constitutional submission of the 53 People's Deputies of Ukraine regarding the official interpretation of the provision of Part 3 Article 49 of the Constitution of Ukraine «state and municipal healthcare institutions provide free medical care» (case on free medical care. https://zakon.rada.gov.ua/laws/show/v010p710-02#Text
Decision in case No. 743/354/18 of the Ripky District Court of Chernihiv Region of 29 March 2018. https://reyestr.court.gov.ua/Review/73059875 .
Decision in case No. 760/8326/21 of the Solomyansky District Court of the city of Kyiv of 07 April 2021. https://reyestr.court.gov.ua/Review/96193148
Hendel, N. V. (2014). *International legal regulation of states cooperation in the sphere of healthcare* [abstract, doctoral thesis, National University "Odesa Law Academy"]. https://dspace.onua.edu.ua/items/50cbf480-b696-4db2-a387-2d30f1e22849
Instructions on the procedure for the detention of foreigners and stateless persons in temporary accommodation centres for foreigners and stateless persons illegally staying in Ukraine, approved of Order No. 141 of the Ministry of Internal Affairs of Ukraine of 29 February 2016. https://zakon.rada.gov.ua/laws/show/z0748-16#Text
International Covenant on Economic, Social and Cultural Rights (1966). https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf
Kinney, E. (2001). The international right to health: what does this mean for our nation and our world? *Indiana Law Review*, *34*, 1457–1475.
Law of Ukraine "On Emergency Medical Aid" No. 5081-VI (2012). *Vidomosti Verkhovnoi Rady Ukraine [The Official Bulletin of the Verkhovna Rada of Ukraine]*, 2013, 30. https://zakon.rada.gov.ua/laws/show/5081-17 . English annotation available at https://zakon.rada.gov.ua/laws/anot/en/5081-17
Law of Ukraine "On Military Duty and Military Service" No. 2232-XII (1992). *Vidomosti Verkhovnoi Rady Ukraine [The Official Bulletin of the Verkhovna Rada of Ukraine]*, 1992, 27. https://zakon.rada.gov.ua/laws/show/2232-12#Text .
Law of Ukraine "On State Financial Guarantees of Medical Service to the Population" No. 2168 (2017). *Vidomosti Verkhovnoi Rady Ukraine [The Official Bulletin of the Verkhovna Rada of Ukraine],* 2018, 5. https://zakon.rada.gov.ua/laws/show/2168-19. English annotation available at https://zakon.rada.gov.ua/laws/show/en/2168-19#Text.
Law of Ukraine "On the Constitutional Court of Ukraine" No. 2136-VIII (2017). *Vidomosti Verkhovnoi Rady Ukraine [The Official Bulletin of the Verkhovna Rada of Ukraine]*, 2017, 35. https://zakon.rada.gov.ua/laws/show/2136-19#Text.
The Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons" No. 3773-VI (2011). *Vidomosti Verkhovnoi Rady Ukraine [The Official Bulletin of the Verkhovna Rada of Ukraine]*, 2012, 19-20. https://zakon.rada.gov.ua/laws/show/3773-17#Text. English annotation available at https://zakon.rada.gov.ua/laws/anot/en/3773-17
Law of Ukraine "On the Principles of Preventing and Combating Discrimination in Ukraine" No. 5207-VI (2012). *Vidomosti Verkhovnoi Rady Ukraine [The Official Bulletin of the Verkhovna Rada of Ukraine]*, 2013, 32. https://zakon.rada.gov.ua/laws/show/5207-17#Text
Leary, V. A. (1994). The Right to Health in International Human Rights Law. *Health and Human Rights*, *1*(1), 24–56.
Ombudsman of Ukraine. (2023, December 20). *Following the Ombudsman's response, the right of a foreigner to receive medical care and treatment in a temporary stay centre for foreigners and stateless persons was restored.* https://ombudsman.gov.ua/news_details/za-reaguvannya-upovnovazhenogo-ponovili-pravo-inozemcya-na-

nadannya-medichnoyi-dopomogi-j-likuvannya-u-punkti-timchasovogo-perebuvannya-inozemciv-ta-osib-bez-gromadyanstva
Oprishko, V. F., Averyanov, V. B., & Kornienko, M. I. (Eds.). (1996). *Commentary to the Constitution of Ukraine.* Kyiv: Legislation Institute of The Verkhovna Rada of Ukraine
Protsenko, I. (2020). Rights of Aliens to Organize in Trade Unions. *Czech Yearbook of International Law*, *11*, 199–222.
Regulation on Military Service in the Armed Forces of Ukraine by Foreigners and Stateless Persons, approved by the Decree No. 248/2016 of the President of Ukraine of 10 June 2022. https://zakon.rada.gov.ua/laws/show/248/2016#n487
Resolution in case No. 320/6677/23 of the Sixth Appeal Administrative Court of Ukraine of 21 December 2023. https://reyestr.court.gov.ua/Review/115906939
Resolution in case No. 743/354/18 of the Kyiv Administrative Court of Appeal of 13 June 2018. https://reyestr.court.gov.ua/Review/74717307
Resolution No. 121 of the Cabinet of Ministers of Ukraine "On approval of the Procedure for providing medical assistance to foreigners and stateless persons permanently residing or temporarily staying in the territory of Ukraine, who applied for recognition as a refugee or a person in need of additional protection, in respect of whom a decision was made to issue documents for resolution of the issue of recognition as a refugee or a person in need of additional protection, and who are recognized as refugees or a person in need of additional protection, and compensation for the cost of medical services and medicines provided to foreigners and stateless persons temporarily residing or staying in the territory of Ukraine» of 19 March 2014. https://zakon.rada.gov.ua/laws/show/121-2014-%D0%BF#Text
Shekera, O. H. (2013). Constitutional basis of public health protection in Ukraine. *Zbirnyk naukovyi prats spivrobitnykiv NMARO imeni R. L. Shupyka [Collection of scientific works of staff members of NMAPE]*, *22*(4), 526–533. http://nbuv.gov.ua/UJRN/Znpsnmapo_2013_22%284%29__78
Tatsii, V. Y., Bytiak, Y. P., & Hroshevoi, Y. M. (Eds.). (2003). *The Constitution of Ukraine: A scientific and practical commentary.* Kharkiv, Kyiv.
The Constitution of France (1958). http://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly
The Constitution of Montenegro (2007). https://www.constituteproject.org/constitution/Montenegro_2013
The Constitution of the Republic of Belarus (1994). https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2022)034-e
The Constitution of the Republic of Moldova (1994). https://www.constcourt.md/public/files/file/Actele%20Curtii/acte_en/MDA_Constitution_EN.pdf
The Constitution of the Republic of Poland (1997). https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm
The Constitution of the Slovak Republic (1992). https://www.prezident.sk/upload-files/46422.pdf
The Constitution of Romania (1991). https://faolex.fao.org/docs/pdf/rom129678.pdf
The Constitution of Ukraine (1996). *Vidomosti Verkhovnoi Rady Ukraine [The Official Bulletin of the Verkhovna Rada of Ukraine]*, 1996, No. 30. https://zakon.rada.gov.ua/laws/anot/en/254%D0%BA/96-%D0%B2%D1%80
The Fundamental Law of Hungary (2011). https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178
The Transitional Constitution of the Republic of South Sudan (2011). https://www.refworld.org/pdfid/5d3034b97.pdf or https://freidok.uni-freiburg.de/fedora/objects/freidok:12863/datastreams/FILE1/content
Toebes, B. (1999). *The Right to Health as a Right in International Law*. Oxford, England: Intersentia/Hart.
Tobin, J. W. (2011). *The Right to Health in International Law*. Oxford University Press.
Yamin, A. E. (2005). The Right to Health Under International Law and Its Relevance to the United States. *American Journal of Public Health*, *95*(7), 1156–1161. https://doi.org/10.2105/AJPH.2004.055111

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THE LEGAL REGIME OF CORPORATE LIABILITY IN BOSNIA AND HERZEGOVINA AND LATVIA – A BRIEF COMPARATIVE OVERVIEW

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Abstract. The purpose of this research is to provide an overview of the basic characteristics of the legal regime and types of liability of legal entities in Latvia, as a member of the European Union, and Bosnia and Herzegovina, as a candidate for membership in this community of European states. This comparative study highlights similarities and differences between approaches to the criminal and civil liability of legal entities in the two countries. The principal results and major conclusions are that legal entities can be liable for other natural or legal persons, and this liability can be based on law or contract, either for an indefinite number of cases or a specific case. Here, there are minor differences between Bosnia and Herzegovina and Latvia, primarily based on the different treatment of certain companies and the fact that partnerships in Latvian law do not have legal subjectivity, so partners are independently liable. Regarding the liability of legal entities for criminal offenses, both criminal legislations have adopted a model where liability is regulated within criminal law provisions, not through lex specialis. The main difference between the legislations lies in the area of criminal sanctions. Criminal law in Bosnia and Herzegovina foresees penalties and security measures, while Latvian law includes coercive measures that somewhat more broadly restrict the rights of legal entities.
Keywords: legal entity, business entity, civil liability, criminal liability

Introduction

Engaging in socially unacceptable actions is not solely the domain of natural persons. Different forms of liability can also be observed in cases involving legal entities, although ultimately these cases still revolve around the actions or omissions of individuals. Nevertheless, it is appropriate in such cases, regardless of the

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culpability of the responsible individuals within the legal entity, to establish the liability of the legal entity itself, respecting the principle of "where there is profit, there should also be burden" (*Ubi emolumentum, ibi et onus esse debit*). The issue of the liability of legal entities in the form of business entities is particularly addressed by company law theory, which, in the course of its development, has transitioned from negationist to affirmativist theories regarding the recognition of the legal personality of companies (Vasiljević, 2019, pp. 77–79). Finally, with the acceptance of affirmativist theories, a further step was taken, recognizing the general legal and business capacity of companies and implying that this type of legal entity can enter into all legal relationships except those inherently reserved for natural persons, such as marriage.

When discussing the liability of business entities and legal entities in general, a division into criminal liability and civil liability is evident, although in certain cases one tortious behavior can trigger both criminal and civil tort liability. Criminal liability rests on culpability, and in that sense represents subjective and primarily individual responsibility. In contrast, in addition to subjective liability, (civil) tort and contractual liability also involve objective liability based on causation or action.

Therefore, the consequences of tortious behaviors depend on whether civil or criminal tort liability is established. The penal nature of sanctions in cases of established criminal liability is determined based on the severity of the offense and the degree of culpability (intent, conscious or unconscious carelessness). For example, white-collar crimes are often less socially dangerous compared to violent criminal offenses (St-Georges et al., 2023, p. 1753). In contrast, in civil tort liability, the principle of compensation predominates. The primary objective of civil compensation is the reparation of damages, irrespective of the degree of culpability (intent, gross or ordinary negligence). Thus, unlike criminal law, where guilt must be proven, in civil law, there is a presumption of guilt if causation between the wrongful act of the tortfeasor and the resulting damage is proven (Salma, 2008, pp. 88–97). Accordingly, the nature of incrimination in criminal law is of a public law character, while in civil law, it involves private law incrimination. Therefore, in contractual relations, for example, the amount of damages is measured according to its actual amount; in criminal law the amount of the fine imposed on the offender depends on the severity of the criminal offense or misdemeanor committed.

Consequently, there is a visible difference in the treatment of the nature of liability, or the need to analyze its types in a multidisciplinary manner from the perspective of either criminal or civil law. In this paper, the authors will attempt to provide an overview of the basic characteristics of the legal regime and types of liability of legal entities in Latvia, as a member of the European Union, and Bosnia and Herzegovina, as a candidate for membership in this community of European states. This comparative study uses descriptive-analytical methodology to analyze the legal frameworks of liability of legal entities and the differences between laws in Bosnia and Herzegovina and Latvia.

1. Legal norms as the basis of the liability of legal entities

1.1. Legal regulation on criminal liability

The legal norm serves as the basis of legal entity liability – it is designated differently depending on whether it concerns civil or criminal liability. Criminal liability is based on the principle of legality, which implies a written, precise definition of the criminal act (usually in the provisions of the criminal code) for which a legal entity may be held responsible.

In the criminal legislation of Bosnia and Herzegovina, the liability of legal entities for criminal offenses was introduced with the reform of the criminal legislation in 2003, and is the result of the acceptance of obligations arising from international legal acts that regulate this matter, namely the Convention on the Bribery of Foreign Public Officials in International Business Transactions (1997), the United Nations Convention against Transnational Organized Crime (2000), the Convention on the Protection of the Environment through

Criminal Law (1998), the Criminal Law Convention on Corruption of the Council of Europe (1999), and the Convention on Cybercrime (2001).
When it comes to criminal acts for which legal entities may be accountable, the criminal legislation in Bosnia and Herzegovina has opted for a model of a clause whereby acts that can be committed by legal entities are not exhaustively defined (Art. 123 of the Criminal Code of Bosnia and Herzegovina; hereinafter – CC of BiH, Art. 122 of the Criminal Code of the Republic of Srpska; hereinafter – CC of RS). The phrase "criminal legislation in Bosnia and Herzegovina" encompasses criminal legislation at the level of Bosnia and Herzegovina as a whole, the entities of the Republic of Srpska and the Federation of Bosnia and Herzegovina, and the criminal legislation of the Brčko District of Bosnia and Herzegovina. In this article, the relevant provisions of criminal legislation at the level of Bosnia and Herzegovina and the criminal legislation of Republic of Srpska are examined.

Three models for determining the scope of criminal offenses for which legal entities may be held responsible stand out: the first, according to which legal entities are liable for all committed criminal offenses (Australia, Canada, Netherlands); the second, in which the liability of legal entities for criminal offenses exists only in cases explicitly provided for (France); and the third, in which criminal offenses are exhaustively prescribed (e.g., USA) (de Maglie, 2011, pp. 260–261). It is observed that legal entities in the practice of the Court of Bosnia and Herzegovina most commonly appear as perpetrators of criminal offenses such as tax evasion (Art. 210 of the CC of BiH), organized crime (Art. 250 of the CC of BiH), as well as the criminal offense of money laundering (Art. 209 of the CC of BiH) (see, e.g., judgments of the Court of Bosnia and Herzegovina: S1 2 K 018505 15 K dated April 2, 2015; S1 2 K 018850 15 K dated September 15, 2015; S1 2 K 019779 16 K dated December 20, 2016; S1 2 K 023781 16 Ko dated December 27, 2016; and S1 2 K 024023 16 Ko dated January 26, 2017). In other words, there is a separation between individual and legal entities as the perpetrators of criminal acts. Although the fundamental principle of legality is cited in determining the scope of criminal acts for which legal entities may be accountable, the legislator has justifiably remained consistent with previous legal regulations on this matter. This is because a taxative listing would necessarily require revision, as was the case in Italian criminal legislation (see Italian Legislative Decree n. 231 dated June 8, 2001; Italian Decree Law n. 124 dated October 26, 2019). Hence, it is more acceptable for legal entities to generally appear as perpetrators of all criminal acts rather than listing them categorically. Such a stance is justified because white-collar criminality, within which the responsibility of legal entities arises, encompasses a wide range of criminal acts. Of course, even this kind of determination of criminal acts for which legal entities may be accountable is subject to limitations, primarily because some of these acts are conditioned by the existence of certain characteristics of their perpetrators (e.g., official persons).

At the beginning of the 21st century, this discussion (about legal entities as such) had become conceptual, both when solving issues related to Latvia's accession to the European Union and responding to current events in public and legal life, transforming and developing both criminal and civil law. The issue of corporate liability indirectly related to the EU's financial interests in accordance with the PIF Directive (Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law). It should be noted that at the beginning of the 21st century, due to Latvia's international obligations which directly or indirectly stipulated the obligation to determine the criminal liability of legal entities, a discussion was also activated in Latvia about the need to address legal entities within the framework of criminal law. The aforementioned obligations included, but were not limited to: the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990); Council Resolution of 28 May 1999 on increasing protection by penal sanctions against counterfeiting in connection with the introduction of the euro; the Criminal Law Convention On Corruption (1999); Council framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro; the Convention on the Protection of the European Communities' Financial Interests (1995); and the United Nations Convention against Transnational Organized Crime (2003).

In the course of this scientific discussion (Latvijas Vestnesis, 2002), it was not doubted that the legal person is the bearer of legal obligations and is therefore also the subject of legal responsibility, but attention was also paid to the fact that it is impossible, for example, to arrest a legal person or impose a prison sentence. Furthermore, when recognizing a legal person as a criminal subject and convicting them criminally, the principle of guilt is deformed in criminal law, because guilt is a person's mental attitude towards all the objective signs of the criminal offense committed by them in the form of intent or negligence.

On the other hand, Latvia carefully followed rapid international developments. In Germany, for example, although there were already opportunities to take action against companies involved in crimes (Remeikiene et al., 2022; Kipane et al., 2023) and to combat the criminal activities of legal entities by means of administrative sanctions (a legal entity was not recognized as a subject of criminal law in Germany during this period), these administrative sanctions alone were not sufficient to fulfill the international requirements regarding the fight against terrorism, money laundering and similar criminal offences. Moreover, as of October 1, 2003, in compliance with UN anti-terrorism requirements, the Institute of Criminal Liability of Legal Persons was introduced in the Swiss Penal Code, providing companies with a maximum fine of 5 million Swiss francs. Another approach was taken by the Finnish Criminal Code, which provided that, according to the wording "Competence to apply Finnish criminal law", the criminal liability of legal entities is applicable (for example, for the negligence of a corporation by not controlling the actions of its subordinates in a timely manner).

Although there were different opinions among Latvian jurists, this discussion was largely concluded on May 5, 2005, when the National Assembly (*Saeima* in Latvian) adopted amendments to the Criminal Code in the third reading. These amendments aimed to introduce a new institute in criminal law in the context of the liability of a legal entity. At the same time, the law did not envisage triggering the criminal liability of a legal person in the same way as a natural person – i.e., means of coercive influence were provided for the realization of the criminal liability of a legal person. With the entry into force of these amendments in the Criminal Law, a regulatory basis was still needed on which to regulate the procedure for the enforcement of coercive measures applicable to a legal entity. It is significant that one of the conditions that hindered the practical application of the new law institute for Latvia was the presence of ambiguities and inaccuracies in the regulatory framework. A few years later (in 2015 and 2016), clarifying amendments were made to the Criminal Law regarding coercive means applicable to legal entities.

1.2. Focusing on the legal regulation of civil liability

The regulation of civil liability depends primarily on the type of liability involved, namely whether it is tortious or contractual liability. Civil tort (non-contractual) liability most commonly involves culpability for causing damage or behavior contrary to good customs, and it may be based on legal provisions (Salma, 2008, p. 82). On the other hand, contractual liability implies a breach of contractual obligations (p. 85). In this case, the contracting parties themselves create rights and obligations in an individual legal act. With this type of liability, there can be a departure from the principle of compensation in both directions. Namely, the contracting parties can incorporate so-called exoneration clauses into their contractual relationship, which limit or even exclude liability, usually for the economically stronger party (unless it concerns intent or gross negligence, for which degrees of fault cannot exclude liability) (Salma, 2011, p. 72). On the other hand, it is possible to agree on the application of certain sanctions (e.g., contractual penalty for late delivery of goods, etc.) even if no damage has been caused.

In Bosnia and Herzegovina, civil tort liability is regulated by the Law on Obligations (hereinafter LO), which was enacted in 1978 in the Socialist Federal Republic of Yugoslavia and has been adopted by both the Republic of Srpska and the Federation of Bosnia and Herzegovina (Art. 154–209 of the LO). On the other hand, contractual liability involves *inter partes* relations and is regulated by individual norms, namely contracts concluded between subjects of a specific contractual relationship.

Regardless of whether it is contractual or tort liability, the legislator in Bosnia and Herzegovina only recognizes compensation for material damage when it comes to legal entities. This type of damage can consist of ordinary damage or loss of profit, where the court considers the gain that could have been reasonably expected according to the normal course of affairs or special circumstances, but whose realization was prevented by the tortfeasor's action or omission (Art. 189 of the LO). The issue of compensation for non-material damage suffered by legal entities, such as damage to business reputation (goodwill), remains contentious. The Law regulating obligations provides for compensation for non-material damage only to natural persons (Art. 199–205 of the LO). However, in European Union law, there is increasing recognition of the possibility of determining such compensation, in line with Art. 41 of the European Convention on Human Rights. This is even the case when it comes to legal entities, which cannot inherently be recipients of all forms of non-material damage as in the case of natural persons (e.g., due to endangerment of health, physical disability, mental anguish, etc.) as these entities do not have feelings like humans do (Pavelek & Zajičkova, 2023, pp. 331–335). The number of such cases has particularly increased in the period after 2010, both in the practice of the Court of Justice of the European Union and in the practice of the European Court of Human Rights (pp. 339–342). There is increasing acceptance that legal entities can suffer non-material damage, which is intangible in nature and cannot be precisely monetarily assessed like material damage.

In Latvian law, civil liability is attributed to two types of liability – contractual liability and tort liability. The basis of contractual liability is a breach of contract (if the duty to compensate for losses arises from a breach of contractual obligations, then the amount of compensation shall be determined in accordance with the contract – see: Civil Law Section 1785; hereinafter CL), whereas the basis of tort liability (non-contractual liability) is a delict – illegal activity in general (Judgment of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia, 2008). If a person suffers losses from the illegal actions of another person outside the scope of contractual relations, the person causing the losses shall be liable for all such losses (CL Section 1784). Moreover, a loss which has already arisen may be a diminution of the victim's present property or a decrease in their anticipated profits (CL Section 1772). A loss shall be considered direct where it is the natural and inevitable result of an illegal act or failure to act; indirect where it is caused by an occurrence of particular circumstances or relationships; and accidental where caused by a chance event or force majeure (CL Section 1773).

Latvian court practice shows that claims can be brought even in cases where establishing causation can be very difficult; therefore, as an auxiliary source when considering various disputes related to the issue of causation in Latvian courts, a doctrinal document was developed in the European legal space – The Principles of European Tort Law (PETL). PETL were meant to stimulate discussion both among academics and practitioners and could serve as guidelines for national legislatures, thereby fostering gradual harmonization. This document significantly expands the range of types of causation and thus includes such types as alternative causes, potential causes and uncertain partial causation in the space of Latvian law. At the same time, it should be noted that a legal entity is to blame and therefore responsible for any violation of rights committed by its employee at the order or command of the manager or owner of this legal entity. If a delict is committed as a result of such a task, then the legal entity will be liable even if the actions of this natural person exceed the limits of the task, authorization or employment contract (Bitāns, 1997, pp. 55–81).

2. Criminal liability of legal entities

2.1. Establishing the basis of liability

The bases of criminal liability for legal entities in the legislation of Bosnia and Herzegovina are prescribed cumulatively. Firstly, in accordance with the concept of corporate crime, there is a requirement for the commission of a criminal act by an individual (perpetrator) acting on behalf of, for the account of, or in the interest of the legal entity. Corporate crime is defined in theory as prohibited and punishable conduct by corporations or their representatives acting on their behalf to achieve organizational goals (Farmer, 2022, p.

511). It should be emphasized that in practice, there are cases where a natural person is also the only employee of a legal entity, and therefore appears as the actual manager of the legal entity. In such cases, the legal entity is liable for the criminal offense within the limits of the perpetrator's responsibility. There are two types of legal entities in this regard: legal entities whose membership does not include anyone other than the perpetrator, and legal entities that, in addition to the perpetrator, have no organs that could direct or supervise the perpetrator. This solution deviates from the model of limited (derivative) liability and represents a model of extreme derivative liability of the legal entity for a criminal offense. Thus, in a verdict of the Court of Bosnia and Herzegovina (S1 2 K 02839920 K dated August 26, 2020), I.L. and A.L. were convicted as accomplices in the criminal offense of tax evasion or fraud (Art. 210, para. 3 of the CC of BiH), where I.L. was the owner and deputy director of the legal entity R.T. while A.L. held the position of director.

In addition to the above, it is necessary to meet one of the four alternative conditions: that the characteristics of the criminal offense stem from decisions, orders, or approvals of the management or supervisory bodies of the legal entity; when the management or supervisory bodies of the legal entity influenced the perpetrator or enabled them to commit the criminal offense; when the legal entity disposes of unlawfully acquired property benefits or benefits from objects resulting from the criminal offense; or when the supervisory bodies of the legal entity failed in their duty of supervision over the legality of the employees' work (Art. 124 CC of BiH, Art. 105 CC of RS). If no causal link is established between the activities of the individual and the legal entity, there can be no question of the liability of the legal entity for criminal offenses, but only of the individual responsibility of the perpetrator (Babić & Marković, 2021, p. 487). Individual criminal liability of members of these bodies arises from collective decision-making according to the principle of majority decision-making. Thus, for example, a decision of the management board of a joint-stock company is adopted when a majority of the present members vote for it (unless otherwise determined by the statute or founding act) (Vuković, 2011, pp. 303–304).

The act by which a natural person fulfills the characteristics of a criminal offense, in accordance with the basic provisions, is the activity of doing or not doing, and in that regard, is not further specified. It is the activity by which the characteristics of a specific criminal offense are realized. In contrast, the activities of legal entities are specified. The actions by legal entities, such as influencing or enabling the commission of a criminal offense, can be realized through both action (making decisions, issuing orders or approvals, disposing of unlawfully acquired property benefits, etc.) and inaction (in cases of failure to exercise due supervision).

By making decisions or issuing orders or approvals, a legal entity directs the person on how to behave (Deisinger & Vrhovšek, 2009, p. 55). A decision imposes an obligation on individuals regarding how they should behave. Unlike a decision, an order imposes an obligation on a named individual, while approval represents agreement with an already commenced act executed in accordance with the decision of the legal entity (p. 55). These activities can be realized before or during the undertaking of actions that fulfill the characteristics of incrimination and may not have a formal form. Influencing or enabling a natural person to commit a criminal offense, according to the employed formulation, constitutes complicit activities, although it is significant to emphasize that this is not complicity. These acts are, by nature, raised here to the level of executive activities. The relationships, as well as the very act of execution through which the liability of a legal entity for a criminal offense is established, are often complex. This is demonstrated in the *Srebrena Malina* case (S1 2 K 039029 21 K dated April 5, 2023), in which the Prime Minister of the Federation of Bosnia and Herzegovina was found guilty of the criminal offense of abuse of office and authority under Art. 383, para. 3 of the CC of BiH. In this case, the act of execution was the "approval" of the responsible person in the legal entity Silver Raspberry. The criminal offense was committed during the COVID-19 pandemic, when the Government of the Federation of Bosnia and Herzegovina expressed the need to purchase 100 ventilators. In this context, Silver Raspberry submitted an offer for the purchase of this quantity of ventilators amounting to 10,530,000 BAM. F.H., at the time of signing the contract with the Government, did not have the subject of the contract or the contractual legal arrangements in place to ensure the delivery of the

contracted goods. In this instance, F.H., in his capacity as the responsible person and the sole member of the management of Silver Raspberry, acted on behalf of, for the account of, and in the interest of this legal entity by granting approval and taking other actions aimed at purchasing 100 ventilators of a different model at nearly half the price. He was aware that the price of the ventilators was significantly lower and that he would gain additional profit from the difference in the agreed price.

Lastly, the only omission mode of committing a criminal offense by a legal entity is defined as the failure to exercise due supervision over the legality of the work of employees. In this case, control over the legality of work that should be exercised by the legal entity, i.e., management and supervisory bodies, is based on the relevant legal provisions relating to the activities of the legal entity. It is significant to highlight that when the legal entity is obliged to exercise appropriate supervision and fails to do so, it ultimately results in the commission of a specific criminal offense.

In modern Latvia, legal persons are not subject to criminal liability in the classical sense (as is the case with natural persons), because either a single natural person (general manager, chairperson or other responsible employee) or a group of natural persons (board, council, etc.) acts on behalf of a legal person, but not the entire collective of working people (Krastiņš, 2009, pp. 122–128). However, in order to respect the requirements of the European Union, Latvia has also planned to apply means of coercive influence to legal entities in the Criminal Law. Accordingly, coercive measures are applied to legal entities, and not criminal liability *per se*. Until 2005, legal entities in Latvia were not considered a subject of criminal liability; however, with the 2005 amendments to the Criminal Law, the situation has changed and the criminal responsibility of legal entities was introduced.

It should be taken into account that in terms of criminal law, liability is intended only for legal entities of private law – that is, those persons to whom the legislator has granted the status of a legal entity, including political parties or religious organizations, state or municipal capital companies, as well as partnerships. However, regarding partnerships, it should be noted that their legal status is obtained through registration. In the event that one of the associations of persons to be registered does not comply with the registration procedure, it will not be considered a subject of responsibility within the framework of the regulation of the application of means of coercive influence, as it will not have acquired the status of a legal entity.

On the other hand, a situation is possible where a natural person commits a criminal offense for the benefit of the estate (an estate is a legal person and may acquire rights and assume obligations), which gives grounds for the application of means of coercive influence in relation to this estate. Accordingly, the means of coercive influence could also be appropriate for the estate. A natural person who has committed a criminal offence acting in the interests of a legal person governed by private law, for the benefit of the person or as a result of insufficient supervision or control thereof, shall be held criminally liable, but the coercive measures provided for in this law may be applied to the legal person (Criminal Law Section 12).

The aforementioned connection between a private person and a legal entity can manifest itself in many ways. For example, in one case (Department of Criminal Cases, case No. SKK-23/2021), person B, being a member of a limited liability company that owned 50% of the company's shares, and an official of the company – a member of the board, whose job duties included ensuring copyright compliance – knowingly allowed the limited liability company's economic activities to be conducted using computer programs that were reproduced without the permission of the copyright holder – that is, copies of computer programs made illegally (by installation), as well as computer programs permanently stored in electronic form after their production. As a result of this criminal offense, the exclusive right of the owner of the computer program's rights to their use was violated, with which this company suffered a large loss. The Department of Criminal Affairs of the Senate of the Republic of Latvia emphasized that the task of a board member as a responsible employee of a company is to manage and represent society. This means that a member of the board has a

certain set of rights and obligations which they must undertake in order to ensure the operation of the company. A natural person is guilty in the sense that they realize the illegal or legal interest of their legal entity through their action or inaction in a legally unauthorized manner, for which criminal liability is provided for in one of the articles of the Special Part of the Criminal Law (Krastiņš & Liholaja, 2018, p. 284).

2.2. Criminal sanctions in the legislation of Bosnia and Herzegovina

The system of criminal sanctions for legal entities in Bosnia and Herzegovina is dualistic and consists of penalties and security measures. In addition to the above, legal entities responsible for committing a criminal offense may also have unlawfully acquired property confiscated as a result of the offense (Art. 140 of the CC of BiH, Article 119 of the CC of RS). It is noted that the legislator in the Republic of Srpska, does not provide the possibility of imposing conditional sentences on legal entities, unlike the criminal legislation of Bosnia and Herzegovina, which does so (Art. 136 of the CC of BiH). There, a conditional sentence is imposed on a legal entity instead of a fine, and the court may impose a conditional sentence of a fine up to 1,500,000 BAM and determine that it will not be executed if the legal entity, during the probation period determined by the court, which cannot be shorter than 1 year or longer than 5 years, does not commit another criminal offense.

Both legislators in BiH have prescribed three penalties for a legal entity responsible for a criminal offense: a fine, confiscation of property, and the penalty of terminating the legal entity. The punishment is determined according to general rules, taking into account the economic capacity of the legal entity.

The fine is imposed in full amounts, ranging from 5,000 BAM to 5,000,000 BAM (Art. 132, para. 1 of the CC of BiH, Art. 112, para. 1 of the CC of RS). It is observed that the legislators did not provide for specific penalty frameworks for this fine (a solution present in Serbian and Croatian criminal legislation) that would depend on the severity of the criminal offense. Only in a separate provision is deviation from the prescribed (singular) penalty framework allowed in cases where property damage is caused to another or unlawful property gain is acquired, and in such cases, the fine cannot exceed twice the amount of the damage caused or the benefit obtained. There are views that, considering that the most common sanction for legal entities is a fine (while it is imprisonment in the case of individuals), there is no reason for liability to be criminal, but rather civil (Lee, 2011, pp. 5–6).

The second punishment is the confiscation of the property of the legal entity (at least half, a larger part, or the entire property), which is conditioned, on the one hand, by the severity of the criminal offense (the prescribed prison sentence is at least 5 years), and, on the other hand, by the fact that the activities of the legal entity were entirely or predominantly used to commit the criminal offense (Art. 132 of the CC of BiH, Art. 113 of the CC of RS). The Court of Bosnia and Herzegovina imposed this punishment on 6 legal entities in judgment S 1 2 K 013758 14 K dated July 27, 2016.

The most severe punishment, the termination of the legal entity (the so-called corporate death penalty), can be imposed if the activities of the legal entity were entirely or predominantly used to commit a criminal offense, whereby the court initiates the liquidation process of the legal entity. It is clear that in this case, the goal of the punishment as a means of special prevention is fully achieved (Weissmann, 2007, p. 319). Unlike the confiscation of property, the imposition of this punishment is not conditioned by the severity of the criminal offense. Along with this punishment, confiscation of property can also be imposed (Art. 134 of the CC of BiH, Art. 114 of the CC of RS).

It should be noted that the Court of Bosnia and Herzegovina, in imposing a fine, takes into account mitigating and aggravating circumstances, so in some cases, it approaches the minimum fine value. As an illustrative example, the case of a legal entity in form of a limited liability company (LLC) can be mentioned, which was given the minimum fine of 5,000 BAM for the criminal offense of tax evasion or fraud (Art. 210, para. 2 of

the CC of BiH). In this case, it is interesting to note that a natural person was the only person in the legal entity, and he was sentenced to a conditional sentence (with a parallel fine of 1,000 BAM) (Judgment of the Court of Bosnia and Herzegovina, S1 2 K 019779 16 K, dated December 20, 2016). Similarly, in a case where an LLC was accused of tax evasion or fraud (Art. 210, para. 2 of the CC of BiH), the Court of Bosnia and Herzegovina sentenced the natural person G.V., as the director and responsible person in the legal entity, to a conditional sentence, while imposing a fine on the legal entity in the statutory minimum (5,000 BAM) (Judgment of the Court of Bosnia and Herzegovina, S1 2 K 023781 16 Ko, dated December 28, 2016).

However, there are also judgments in which significantly higher amounts were imposed as fines on legal entities – where, for example, an LLC was fined 2,500,000 BAM for the criminal offense of tax evasion or fraud (Art. 210, para. 4 of the CC of BiH). It is interesting to note that in this case, the legal entity disposed of property obtained by committing a criminal offense in the amount of 468,357 BAM, which is around 20 times more than the value of unlawfully obtained property in the previously analyzed judgments (Judgment of the Court of Bosnia and Herzegovina, S1 2 K 010164 19 Ko, dated March 16, 2023). In this case, the accused individuals V.B. and M.V. were sentenced to prison terms of 2 and 2.5 years, respectively, as well as parallel fines.

In the case of Silver Raspberry, the legal entity was held responsible for the extended criminal offense of abuse of position or authority (Art. 383 of the CC of FBiH), and the Court of Bosnia and Herzegovina imposed a fine of 200,000 BAM. In this case, three individuals were sentenced to prison terms ranging from 4 to 6 years, and the property acquired by committing the criminal offense amounted to 694,747 BAM (Judgment of the Court of Bosnia and Herzegovina, S1 2 K 039029 21 K, dated June 30, 2023), which is more than in the S1 2 K 010164 19 Ko case, dated March 16, 2023. Finally, in the case of KD LLC, the court sentenced the owner and responsible person of the legal entity to 6 months in prison and a parallel fine of 450,000 BAM, while imposing a single fine of 400,000 BAM on the legal entity (Judgment of the Court of Bosnia and Herzegovina, H-K-05/09, dated October 16, 2006). Interestingly, the imposed fines were not in the maximum amount of this penalty. The sentences imposed in most of the illustrated examples, considering the nature of the criminal offenses committed (the protected object being the economy and payment transactions of Bosnia and Herzegovina), could not be considered satisfactory. However, it should be reiterated that the fines, which were oriented towards the minimum (and typically accompanied by a conditional sentence for the individual), resulted from plea agreements between the prosecution and the defendants. It seems that due to the complexity of the cases, the "safe verdict" method was used, which resulted in mutual benefit for the parties in the criminal proceedings. In these cases, the defendants' confessions represented a mitigating circumstance that certainly influenced sentencing.

When it comes to disposing of property benefits representing the result of a criminal offense committed by a natural person, the liability of the legal entity is based on the fact that there is awareness on the part of the legal entity that it involves unlawfully acquired property benefits, thus manifesting agreement with an already committed criminal offense or a criminal offense in progress. Thus, in verdict of the Court of Bosnia and Herzegovina S1 2 K 026470 20 K dated May 5, 2021, by failing to record the income obtained through business books in terms of taxable business turnover, the authorized person representing the legal entity committed the criminal offense of tax evasion or fraud (Art. 210, Par. 3 of the CC of BiH) and unlawfully obtained financial gain in the name and for the account of the legal entity in the total amount of 89,358 BAM. Similarly to the aforementioned case, the failure to record taxes by not reporting the realization by the person authorized to represent the legal entity resulted in the unlawful financial gain in the amount of 250,474 BAM in the name and for the account of the legal entity (S1 2 K 028750 20 K dated May 4, 2022). In addition, in the judgment of the Court of Bosnia and Herzegovina (S1 2 K 032246 21) of March 18, 2022, a legal entity was held responsible for disposing of property benefits obtained through a criminal offense in the amount of 259,181 BAM. Similarly, in the judgment of the Court of Bosnia and Herzegovina (S1 2 K 010164 19 Ko) of

March 16, 2023, a legal entity was held responsible for disposing of property benefits obtained through a criminal offense in the amount of 468,357 BAM.

Security measures are aimed at legal entities to remove circumstances that have contributed to the commission of a criminal offense (Vilks et al., 2024). In this regard, the legislator in the Republic of Srpska has envisaged three security measures: confiscation of specific items of property, publication of the verdict in the mass media, and prohibition of certain business activities (Art. 116 of the CC of RS), unlike the legislation at the level of Bosnia and Herzegovina, where the security measure of confiscation of specific items of property is not observed. When it comes to these measures, the court will order the publication of the verdict (completely or partially in print, on radio or television, in one or more means of public information) in cases where it deems it useful for the public to know about the conviction and when it is beneficial to eliminate danger to the life and health of people, or when it is necessary to ensure the safety of the public. Prohibition of certain activities (production of certain products or performance of certain tasks, prohibition of engaging in certain business activities of commodity turnover, etc.) can be imposed for a period of 1–5 years if engaging in these activities may result in danger to the life and health of people or may harm economic and financial operations or the economy, or in cases of recidivism, i.e., previous punishment of the legal entity for the same or similar criminal offense (within the previous 2 years) (Art. 139 of the CC of BiH, Art. 118 of the CC of RS).

Related to the system of criminal sanctions in BiH, two more questions stand out in terms of their importance. Firstly, both legislations provide for the legal consequences of conviction. They consist of a ban on work based on permits, authorizations or concessions. The difference is that permits, authorizations and concessions can be issued either by competent state authorities or by competent institutions of the Republic of Srpska (Art. 120 of the CC of RS), while the CC of BiH, in its provisions, provides for the possibility of banning work based on permits, authorizations, or concessions issued by Bosnia and Herzegovina or a foreign state (Art. 141 of the CC of BiH). Finally, considering that general provisions apply to the statute of limitations for criminal prosecution, the statute of limitations for the execution of penalties and security measures under the CC of RS (Art. 121) occurs when 5 years have passed since the legal validity of the verdict/decision for the execution of a fine (3 years according to the CC of BiS), and 10 years for the execution of a confiscation of property penalty and a penalty for the cessation of a legal entity (5 years according to the CC of BiH), while the statute of limitations for the execution of security measures occurs three years after the legal validity of the decision by which the security measure was imposed. When it comes to the statute of limitations for security measures, a (qualitative) distinction is also observed, which is reflected in the fact that in the CC of BiH, the statute of limitations for the execution of security measures occurs 6 months after the legal validity of the decision by which the security measure of publication of the verdict was applied and for a time equal to that determined for the duration of the security measure on the prohibition of certain activities (Art. 142, para. 3). Regarding the mentioned provisions, it is questionable whether it is justified to determine the statute of limitations regarding the penalty for cessation of a legal entity. The essence of this penalty lies in the cessation of the existence of the legal entity and the negation of its existence, so it is debatable whether the execution of this penalty should be subject to limitation.

The legal system of Latvia has chosen a solution when the legal person as the subject of criminal liability is not subject to classical punishments, but rather to coercive means of influence. Namely, for the criminal offences provided for in the Special Part of Criminal Law, a court – or, in the cases provided for by the Law, a prosecutor – may apply a coercive measure to a legal person governed by private law, including a State or local government capital company, as well as a partnership, if a natural person has committed the offence in the interests of the legal person, for the benefit of the person or as a result of insufficient supervision or control, acting individually or as a member of the collegial authority of the relevant legal person: 1) on the basis of the right to represent the legal person or act on the behalf thereof; 2) on the basis of the right to take a

decision on behalf of the legal person; 3) in implementing control within the scope of the legal person (Criminal Law Section 70.[1]).

The following types of coercive measures applicable to a legal person exist in the Latvian legal system: 1) liquidation (the compulsory termination of activities of a legal person); 2) restriction of rights (the deprivation of specific rights or permits or the determination of such prohibition which prevents a legal person from exercising certain rights, receiving State support or assistance, participating in a State or local government procurement procedure, or performing a specific type of activity for a period of 1 year and up to 10 years); 3) confiscation of property (the compulsory alienation of the property owned by a legal person to the State ownership without compensation); and 4) recovery of money (Criminal Law Section 70.[1]–70.[6]). In determining the type of coercive measure, the nature of the criminal offence and the harm caused shall be taken into account and whether a coercive measure has been previously applied to a legal person (Criminal Law Section 70.[8] (1)). However, in determining the extent of a coercive measure, the following conditions shall be taken into account: 1) the actual action of a legal person; 2) the nature and consequences of the acts of a legal person; 3) measures which a legal person has performed in order to prevent the committing of a criminal offence; 4) the size, type of activities, and financial circumstances of a legal person; 5) measures which a legal person has performed in order to compensate for the losses caused or prevent the harm caused; and 6) whether a legal person has reached a settlement with the victim (Criminal Law Section 70.[8] (2)).

3. Civil liability of legal entities

3.1. Independent liability

Considering the accepted concept of a legal entity as a social reality, in the law of Bosnia and Herzegovina, independent civil liability for actions and obligations undertaken in legal transactions has been accepted. This applies to both tortious (according to the Art. 172, para. 1 of the LO, a legal entity is liable for damage caused by its body to a third party in the performance or in connection with the performance of its functions) and contractual liability. In earlier regulations (laws on enterprises in the former Yugoslavia), this was even emphasized by including the abbreviation “p.o.” (full liability) as a mandatory element of the legal entity’s firm, in the form of a business entity. Later, this was omitted as it is implied. Accordingly, every legal entity is liable for civil obligations with its entire assets, and only after settling the obligation to the other contractual party or the injured party, depending on the type of liability, is there a possibility of recourse from the responsible natural person. For example, an employee or representative of the legal entity who caused the damage intentionally or with gross negligence (legal entities in Bosnia and Herzegovina can exercise this right within a period of 6 months from the date of the compensation paid to the injured party (Art. 172, para. 3 of the LO)), or a person who has duties towards the business entity such as a director, a member of the management board, or a controlling shareholder with over 50% capital participation in the company, in case of breach of loyalty duties. This right can be exercised directly only by the business entity through its representatives or authorized members of the business entity through derivative action.

Within the framework of civil liability in Latvia, the subject of liability is stipulated in Section 1407 of the Civil Law: “The State, local governments, associations of persons, institutions, establishments, and such aggregations of property as have been granted the rights of a legal person shall be considered to be legal persons.” In Latvia, the legislator has also included the state as the prime legal entity under public law and municipalities in this circle of subjects. However, it should be taken into account that ministries or institutions that are not considered autonomous state institutions cannot be subjects of responsibility within the framework of civil liability, but the claim for the actions of the employees of these institutions can be brought against the state as a subject of civil law.

Among private law legal entities, Section 1407 of the Civil Law covers two types of civil law subjects: associations of persons to which the law has granted legal personality (capital companies, cooperative

societies, associations, etc., as well as associations of persons that have not been granted the status of a legal entity, but have a certain legal capacity as for associations of persons founded on the basis of a partnership agreement or partnerships as one of the types of commercial companies); and joint ownership – the only such type of joint ownership is estate.

It is significant that, despite the fact that they are a type of commercial company, personal partnerships are not granted a legal personality in Latvian law. This position of the legislator is related to the fact that in the German Commercial Law, the regulation of which was taken as the basis for the Latvian Commercial Law, partnerships are not considered legal entities. Attention should also be paid to the fact that in special sub-sectors of civil law, within which special legal capacity exists, only legal entities subject to special regulation within the framework of the regulation of these sub-sectors can be subject to civil liability. In the case of liability of special subjects (credit institutions, insurance companies, etc.), the subject of liability can only be legal entities, in respect of which the regulation of liability will apply as subjects subject to supervision.

3.2. Liability for another

The liability of business entities can be triggered for the acts of another person/entity (vicarious liability), in which case a member of the business entity is liable for the entity's obligations. Such a form of liability occurs in Bosnia and Herzegovina in the case of partners and general partners of partnerships (business entities with unlimited joint liability) and limited partnerships (Art. 48 para. 3 and Art. 86 para. 2 of the Law on Business Entities [LBE] of RS; Art. 76 and Art. 94 of the LBE of BiH). Namely, partners of these forms of business entities are jointly and severally liable for all the obligations of the partnership according to the law itself, so creditors or injured parties have the freedom to recover both from the assets of the partnership and from the assets of its partners.

In addition to the aforementioned case, liability for another may also be imposed on any member of any legal form of business entity by a court judgment if piercing the legal personality of the business entity occurs (Art. 15 of the LBE of RS). This concerns situations where members of the company use the company to achieve prohibited goals, to the detriment of creditors, when they manage the assets of the company contrary to the law as if they were their own, thereby creating a misconception among third parties, and when they diminish the assets of the company knowing that it will not be able to meet obligations to third parties thereafter. In the case of such illegal actions by members of business entities, the veil of legal personality is lifted, and their unlimited joint liability arises for all the damage they have caused to third parties. However, the burden of proof of abuse lies on the other side, which is often not a simple task, and courts in Bosnia and Herzegovina rarely decide to apply the mentioned institute in practice. Finally, liability for another can be established based on the law and in some other cases, such as in the case of status changes of business entities (mergers, divisions, and separations) (Vasiljević & Radović, 2023, p. 119).

Contractual liability for another, on the other hand, can be viewed from both an obligational law (including commercial law) perspective and from the perspective of company law. Namely, this form of liability can be established in each individual contractual relationship when the debt of the main debtor is assumed by some third legal entity. For example, one company can guarantee the fulfillment of the debt of another company, or a bank can issue a bank guarantee for the fulfillment of the obligation of the debtor from a specific obligational relationship (Jovanović et al., 2020, p. 135). Such cases of liability for another most commonly occur among related companies that mutually support each other (e.g., parent and subsidiary companies or sister companies) or as a form of the service provided by a company (as in the case of a bank guarantee). Additionally, this approach can be used to cover the entire debt amount or to limit liability only to a portion of it.

However, contractual liability for another can also be assumed on an abstract basis, where it is implied to apply to all future obligations of a business entity. Unlike concrete liability, this form should be registered in the court register (at municipality courts, with territorial jurisdiction according to the seat of the company) within the information about a specific business entity, so that third parties could be informed of such a fact by inspecting the mentioned register. In legal theory, it is considered that this form of liability encompasses both contractual and tortious liability, but it should not extend to obligations outside the activities of the business entity, as the goals of mutual liability of commercial subjects would be "betrayed" in that way (Vasiljević, 2019, pp. 113–114). Additionally, if limited, the limitation of such liability must also be specified in the court register and must be regulated in a way that is understandable to third parties and does not lead them to uncertainty. For example, liability could not be limited by a single total amount of money which, if exhausted, would result in termination, as third parties cannot know when that will happen, but it could be limited to a specific amount of money for each specific case or to a certain percentage of the debtor's obligation.

Finally, contractual liability for another, regardless of whether it is specific or abstract liability, can be divided by type into joint and several liability and subsidiary liability, and by scope into limited and unlimited liability with one's entire own assets. In case of doubt, or when it is not specifically determined in a particular case, it is presumed in business relations that it concerns unlimited joint and several liability, which is the most favorable option for the creditor or the injured party (Vasiljević & Radović, 2023, pp. 119–121). Namely, in the case of joint and several liability, there is the possibility of choice between the main debtor and the joint debtor, while in the case of subsidiary liability, the creditor (injured party) must first address the main debtor, leaving a subsequent deadline for fulfillment. Only if the obligation is not fulfilled can the creditor turn to the subsidiary debtor. However, this is a more favorable regime for creditors than the standpoint that prevailed in the earlier period, according to which the creditor had to attempt to recover from the main debtor in the enforcement proceedings first, and only in case of failure could they turn to the subsidiary debtor. Such an understanding was overcome by the principled stance taken in 1979 at the XI session of the highest commercial courts of the former Yugoslavia (Vasiljević, 2019, p. 116).

It should be noted that there are frequent cases when the same individual is a board member of many legal entities at the same time. Sometimes this situation can be used to the detriment of legal entities or to the detriment of other owners of capital shares. Of course, this is connected with complex cases where the question of causation has been a point of contention. A practical example is the Judgment of the Department of Civil Cases (Supreme Court of the Republic of Latvia) in case No SKC-86/2022 of June 30, 2022, where Limited Liability Company X (hereinafter LLC X) filed a lawsuit against Person A on July 13, 2018, for the recovery of damages in the amount of €259,000. The lawsuit states that the shareholders of LLC X are Person A (99 shares of the share capital) and Swedish company B (101 shares of the share capital). The defendants are LLC X and LLC C, the sole shareholder of which is LLC X, with Person A having the right to represent the companies separately. By the loan agreement of December 20, 2013, LLC C, on whose behalf Person A acted, issued a loan of €125,000 to Person A, setting an interest rate of 0.5% per annum on the outstanding amount and a repayment term of December 20, 2022. Person A and LCC X, on whose behalf Person A acted, on January 6, 2017, concluded an agreement granting a loan of €60,000 to Person A with an interest rate of 0.5% per annum of the outstanding amount and a repayment term of January 5, 2022. By the loan agreement of March 2, 2017, LCC C, on whose behalf Person A acted, issued LCC X, on whose behalf Person A acted, a loan of €74,000 with an interest rate of 0.5% per annum of the outstanding amount. Person A executed these agreements ostensibly in order to document the funds paid to them in accounting. Person A confirmed this fact at the meeting of shareholders of LCC X on April 6, 2018. The agreements were concluded by concealing information from the other shareholder. Person A, being a member of the board of directors of the company, failed to fulfill their duties as a good and diligent manager, thus causing losses to the company in the amount of €259,000.

When considering this case, the court concluded that a board member is a person of trust for the company's shareholders, who is entrusted with the management of other people's property. Accordingly, a board member has a duty to be loyal both to the company as an independent legal entity and to the economic interests of all its shareholders, avoiding a conflict of interest in the performance of their duties. The risk of abuse of rights and the risk of a conflict of interest are increased in self-contracting transactions; therefore, a board member does not have the freedom to self-contract, use the company's transaction opportunities, or gain personal benefit from the performance of their duties, causing harm to the interests of the company. In a situation where a board member is also a shareholder in the company, the scope of business literacy knowledge does not change depending on the status in which they assume their duties.

In Latvian law, the basis of contractual liability according to Civil Law is a breach of a contractual obligation (everyone has a duty to compensate for losses they have caused through their acts or failure to act (CL Section 1779); every delict, that is, every wrongful act per se, as a result of which harm has been caused (also moral injury) shall give the person who suffered the harm therefrom the right to claim satisfaction from the infringer, insofar as they may be held at fault for such act (CL Section 1635)). It is easy to see that the mentioned norms can be applied both in contract law and in tort law. On the other hand, contractual liability as such is regulated by another legal norm: "If the duty to compensate for losses arises from a breach of contractual obligations, then the amount of compensation shall be determined in accordance with the contract" (CL Section 1785). Of course, it should be taken into account that not only natural persons, but also legal persons shall have legal capacity in lawful transactions, unless otherwise provided by law.

Latvian legal doctrine recognizes that the concept of breach of contractual obligation also includes the dimension of fault, and only in exceptional cases is the debtor responsible for an accidental event. In addition, a separate provision provides that a court may also release the debtor from consequential losses due to default in other cases where the debtor cannot be considered at fault due to lack of care, recklessness or negligence, or if performance did not occur due to force majeure. In Latvian contract law, civil liability arises for the debtor's breach of a contractual obligation, which in certain cases requires an assessment of culpability – that is, an analysis of whether the debtor acted in accordance with the standard of necessary action or due care (Brants, 2020). However, the parties can contractually strengthen or soften the liability model established by law, including adjusting the strict liability regime. In general, this is a complex system of responsibility that manifests itself in several dimensions and is difficult to classify. An interesting and debatable issue is the presumption of culpable conduct in contract law – that is, the question of whether such a presumption should reasonably be applied to tort cases as well.

Conclusion

In both Latvia and Bosnia and Herzegovina, both legal and natural persons can be liable under civil law and criminal law. In modern legal theory, they are recognized as having general legal and business capacity, which allows them to enter into all types of legal relationships with other natural and legal persons, except those reserved for natural persons (particularly in family law).

Therefore, legal entities can be held liable for unlawful conduct, whether it arises from a civil or criminal offense or a breach of the rights and obligations established by a specific contractual relationship. However, the nature of offenses in criminal and civil law differs. In criminal law, offenses have a public law character, while in civil law, the primary goal is compensation for harm caused to another person.

In both Bosnia and Herzegovina and Latvia, legal entities are subjects of civil liability, including public (the state, entities, cantons, districts, and local government units) and private law entities. However, there are differences regarding which entities have legal subjectivity. In Latvian law, partnerships do not have subjectivity, and lawsuits cannot be filed against them but against individual partners. Similarly, ministries

and state institutions, although they have subjectivity, do not have autonomy in this sense; the relevant level of public authority (state, entity, canton, or Brčko District in Bosnia and Herzegovina) is liable for damage caused by their employees.

Finally, legal entities can be liable for others, i.e., for another natural or legal person, and this liability can be based on law or contract, either for an indefinite number of cases (common with affiliated companies) or a specific case (e.g., providing a surety or bank guarantee). Here, there are minor differences between Bosnia and Herzegovina and Latvian laws, primarily based on different treatments of certain companies and the fact that partnerships in Latvian law do not have legal subjectivity, so partners are independently liable.

Regarding the liability of legal entities for criminal offenses, both criminal legislations have adopted a model where their liability is regulated within the criminal law provisions, not through lex specialis. Both Latvian and Bosnia and Herzegovina /Republic of Srpska criminal laws prescribe conditions necessary for establishing the liability of legal entities for criminal offenses. The main difference between the legislations lies in the area of (criminal) sanctions. Bosnia and Herzegovina and Republic of Srpska criminal laws foresee penalties and security measures, while Latvian law includes coercive measures that somewhat more broadly restrict the rights of legal entities. Interestingly, in the Republic of Srpska, legal entities account for a small percentage of those involved in criminal offenses compared to the number of registered legal entities; around one in a hundred registered legal entities is held accountable for a criminal offense. Specific suggestions for the improvement of the legal regulation will be developed and described in future articles.

References

Babić, M., & Marković, I. (2021). *Criminal law – general part*. Faculty of Law, University of Banja Luka.
Bitāns, A. (1997). *Civil liability and its types*. Riga: AGB.
Brants, E. (2020). Elements of fault in the application of contractual liability. In *Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās* (pp. 270–286). Riga: LU Academic Press. https://doi.org/10.22364/juzk.78.29
Civil Law, *Government Gazette*, 41, 20.02.1937.
Commercial Law. (2000). *Latvian Gazette*, 158/160, 04.05.2000; Reporter of the Saeima and Cabinet of Ministers of the Republic of Latvia, 11, 01.06.2000.
Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. (1990). *CETS*, No. 141. https://rm.coe.int/168007bd23
Convention on the Protection of the European Communities' Financial Interests. OJ C 316, 27.11.1995, p. 49–57. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41995A1127%2803%29
Council framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro. OJ L 140, 14.6.2000, p. 1–3. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000F0383
Council Resolution of 28 May 1999 on increasing protection by penal sanctions against counterfeiting in connection with the introduction of the euro. OJ C 171, 18.6.1999, p. 1–2. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31999Y0618%2801%29
Criminal Code of Bosnia and Herzegovina. *Official Gazette of BiH*, No. 3/2003, 32/2003 - corr., 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 55/2006, 8/2010, 47/2014, 22/2015, 40/2015, 35/2018, 46/2021, 31/2023, and 47/2023. https://www.paragraf.ba/propisi/bih/krivicni-zakon-bosne-i-hercegovine.html
Criminal Code of the Republic of Srpska, *Official Gazette of the RS*, No. 64/2017, 104/2018, 15/2021, 89/2021, and 73/2023. https://www.paragraf.ba/propisi/republika-srpska/krivicni-zakon-republike-srpske.html
Criminal Law Convention on Corruption. (1999). *CETS*, No. 173. https://rm.coe.int/168007f3f5
Criminal Law. *Latvian Gazette*, 199/200, 08.07.1998; Reporter of the Saeima and Cabinet of Ministers of the Republic of Latvia, 15, 04.08.1998.
De Maglie, C. (2011). *Societas Delinquere Potest?* The Italian Solution. In M. Pieth & R. Ivory (Eds.), *Corporate Criminal Liability* (pp. 255–270). Springer.
Decision of the Criminal Cases Department of the Senate of the Republic of Latvia of September 21, 2021 Case No. 11816006415, SKK-23/2021. ECLI:LV:AT:2021:0921.11816006415.6.L
Deisinger, M., & Vrhovšek, M. (2009). *Criminal liability of legal entities*. Faculty of Law, University of Belgrade.

Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. OJ L 198, 28.7.2017, p. 29–41. http://data.europa.eu/eli/dir/2017/1371/oj
Farmer, L. (2022). Taking market crime seriously. *Legal Studies*, *42*(3), 508–524. https://doi.org/10.1017/lst.2022.2
Jovanović, N., Radović, V., & Radović, M. (2020). Company law – law of business entities. Faculty of Law, University of Belgrade.
Judgment of the Court of Bosnia and Herzegovina, case No. H-K-05/09 of 16.10.2006.
Judgment of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia of 11 June 2008 in Case No. SKC – 259
Judgment of the Court of Bosnia and Herzegovina, case No. S 1 2 K 013758 14 K of 27.07.2016.
Judgment of the Court of Bosnia and Herzegovina, case No. S1 2 K 018505 15 K of 02.04.2015.
Judgment of the Court of Bosnia and Herzegovina, case No. S1 2 K 018850 15 K of 15.09.2015.
Judgment of the Court of Bosnia and Herzegovina, case No. S1 2 K 019779 16 K of 20.12.2016.
Judgment of the Court of Bosnia and Herzegovina, case No. S1 2 K 023781 16 K of 27.12.2016.
Judgment of the Court of Bosnia and Herzegovina, case No. S1 2 K 024023 16 K of 26.01.2017.
Judgment of the Court of Bosnia and Herzegovina, case No. S1 2 K 02839920 K of 26.08. 2020.
Judgment of the Court of Bosnia and Herzegovina, case No. S1 2 K 026470 20 K of 05.05. 2021.
Judgment of the Court of Bosnia and Herzegovina, case No. S1 2 K 028750 20 K of 05.04. 2022.
Judgment of the Court of Bosnia and Herzegovina, case No. S1 2 K 032246 21 K of 18.03.2022.
Judgment of the Court of Bosnia and Herzegovina, case No. S1 2 K 010164 19 K of 16.03.2023.
Judgment of the Court of Bosnia and Herzegovina, case No. S1 2 K 039029 21 K of 30.06.2023.
Judgment of the Department of Civil Cases (Supreme Court of the Republic of Latvia), case No. SKC-86/2022 of 30.06.2022.
Judgment of the Department of Criminal Cases (Supreme Court of the Republic of Latvia), case No. SKK-23/2021 of 21.09.2021.
Kipane, A., Vilks, A., & Krivinch, A. (2023). Forecasts of Long-term Progress in the Socio-cultural Sphere in the Context of Combating Economic Crime. *Pakistan Journal of Criminology*, *15*(4), 49–67.
Krastiņš U., & Liholaja, V. (2018). *Commentaries on the Criminal Law. Part One (Chapters I-VIII2)* (2nd suppl. ed.). Riga: Court House Agency.
Krastiņš, U. (2009). *Criminal Law Theory and Practice: Opinions, Problems and Solutions. 1998–2008*. Riga: Latvian Gazette.
Latvijas Vestnesis. (2002, July 12). *What should be the liability of a legal entity?* Issue: 12.07.2002, No. 105. https://www.vestnesis.lv/ta/id/64444
Law on Business Entities of the Federation of Bosnia and Herzegovina. (2015). *Official Gazette of the FBiH*, No. 81/15 and 75/21. https://www.paragraf.ba/propisi/fbih/zakon-o-privrednim-drustvima.html
Law on Business Entities of the Republic of Srpska. (2008). *Official Gazette of the RS*, No. 127/08, 58/09, 100/11, 67/13, 100/17, 82/19, and 17/23. https://www.paragraf.ba/propisi/republika-srpska/zakon-o-privrednim-drustvima.html
Law on Obligations, *Official Gazette of the SFRY*, No. 29/1978, 39/1985, 45/1989, 57/1989, and *Official Gazette of the RS*, No. 17/93, 3/96, 37/01, 39/03, and 74/04. https://www.paragraf.ba/propisi/republika-srpska/zakon-o-obligacionim-odnosima.html
Law on Obligations, *Official Gazette of the SFRY*, No. 29/1978, 39/1985, 45/1989, 57/1989, *Official Gazette of the RBiH,* No. 2/92, 13/93 and 13/94, and *Official Gazette of the FBiH,* No. 23/03 and 42/11. https://www.paragraf.ba/propisi/fbih/zakon-o-obligacionim-odnosima.html
Law on Registration of Business Entities in the Federation of Bosnia and Herzegovina, *Official Gazette of the FBiH*, No. 27/05, 68/05, 43/09, 63/14, 32/19 - decision of the Constitutional Court, and 85/21. https://www.pufbih.ba/v1/public/upload/zakoni/14623-zakon-o-registraciji-poslovnih-subjekata-ispravan-tekst.pdf
Law on Registration of Business Entities in the Republic of Srpska, *Official Gazette of the RS*, No. 67/13, 15/16, and 84/19. https://www.paragraf.ba/propisi/republika-srpska/zakon-o-registraciji-poslovnih-subjekata-u-republici-srpskoj.html
Lee, I. B. (2011). Corporate Criminal Responsibility as Team Member Responsibility. *Oxford Journal of Legal Studies*, *31*(4), 755–781.
Pavelek, O., & Zajičkova, D. (2023). Compensation for non-material damage caused to legal entities in the decision-making practice of the CJEU and the ECH. *Juridical Tribune*, *13*(3), 331–345. https://doi.org/10.24818/TBJ/2023/13/3.01

Remeikiene, R., Gaspareniene, L., Fedajev, A., Raistenskis, E., Krivins, A. (2022). Links between crime and economic development: EU classification. *Equilibrium. Quarterly Journal of Economics and Economic Policy*, *17*(4), 909–938. https://doi.org/10.24136/eq.2022.031
Salma, J. (2008). Legal characteristics of civil liability – distinction between civil and criminal liability. *Proceedings of the Faculty of Law in Novi Sad*, *42*(1– 2), 79–98.
Salma, J. (2011). Contractual liability (in European, domestic and comparative law). *Proceedings of the Faculty of Law in Novi Sad*, *45*(1), 69–107.
St-Georges, S., Arel-Bundock, V., Blais, A., & Mendoza Aviña, M. (2023). Jobs and Punishment: Public Opinion on Leiency for White Collar Crime. *Political Research Quarterly*, *76*(4), 1751–1763. https://doi.org/10.1177/10659129231176211
United Nations Convention against Transnational Organized Crime. (2000). UN General Assembly A/RES/55/25 https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html
Vasiljević, M. (2019). *Company Law – Law of Business Organizations* (11th edition). Faculty of Law, University of Belgrade.
Vasiljević, Z. & Radović, V. (2023). Company law – law of business entities. Faculty of Law, University of Banja Luka.
Vilks, A., Kipane, A., & Krivins, A. (2024). Preventing international threats in the context of improving the legal framework for national and regional security. *Social and Legal Studios*, *7*(1), 97–105. https://doi.org/10.32518/sals1.2024.97
Vuković, I. (2011). Collegial decision-making and criminal liability. *Law and Economy*, *48*(7–9), 302–317.
Weissmann, A., (2007). A new approach to corporate criminal liability. *American Criminal Law Review*, *44*(4), 1319–1342.

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HOW THE LAW PROTECTS INDIVIDUALS FROM DOMESTIC VIOLENCE IN POLAND AND UKRAINE: A COMPARATIVE STUDY

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Abstract. One of the most important human rights is the right to life. This right is subject to protection in all spheres of public life. One area of protection of the right to life is the protection of individuals from domestic violence. In this article, based on the analysis of statistical data, it is established that – despite the ratification of the Istanbul Convention and systematic measures to implement its provisions – the level of domestic violence remains extremely high in Ukraine and Poland. The differences between the initiation of pretrial domestic violence investigations in Ukraine and Poland are analyzed, and the peculiarities of the initiation of ex parte and ex officio proceedings are determined. On the basis of this research, recommendations are put forward to improve the Ukrainian criminal procedure legislation. In particular, proceedings on the fact of having committed domestic violence should be initiated regardless of the existence of a victim statement – that is, ex parte proceedings should be changed to ex officio proceedings.

Keywords: Istanbul Convention, gender, violence, women, domestic violence, ex parte proceedings, ex officio proceedings.

Introduction

One of the most important functions of criminal law is the reduction or complete elimination of cases of violence, including those in the context of family life. It should be emphasized that both social and legal measures of family protection arise mainly from the fact that the family is the main social unit; the possibility of coexistence between groups of people and the State as a whole depends on its proper functioning. Currently, the goal of both Polish and Ukrainian legislators is to ensure a situation in which families would be free from violence, or this violence would occur only sporadically. After all, both Poland and Ukraine have ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter – the Istanbul Convention). However, Ukraine only ratified the Istanbul Convention in 2022, and has not yet received any reports on the results of its implementation.

In contrast, Poland ratified the Istanbul Convention on April 27, 2015. The ratification process was accompanied by persistent debates, with most of the controversy surrounding the fundamental concepts of the Convention (in the spirit of anti-gender discourse), the structural nature of violence against women and gender discrimination, and the obligation of the State to counter stereotyped gender roles (Balogh, 2020). The Convention has been a tool for real change in Polish law and practice, particularly with regard to sexual and domestic violence (Sękowska-Kozłowska, 2020). Poland submitted its first report to the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) on 26 March 2020. Given that Poland has ratified the Convention and has been implementing it for more than 8 years, this experience presents an interesting subject for research, as Poland is ahead in terms of the application of the Convention's provisions. It is also interesting to compare Polish and Ukrainian experience with regard to the

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results of combatting domestic and gender-based violence – in particular, the number of recorded crimes, the consequences of their consideration by the pretrial investigation authorities and courts, etc.

The research methodology used in this study is based on a combination of general scientific methods (analysis, synthesis, abstraction, etc.) and the system-structural and comparative law methods. The methods of analysis and comparison are used to process the statistical data of the pretrial investigation authorities and courts of Ukraine on criminal offenses for January–June 2021, 2022, 2023 (Prosecutor General's Office, n.d.) and reports of the police authorities of Poland for 2020, 2021, 2022, and 2023 (Police Statistics, n.d.-a), along with data from surveys of women in Poland (Grabowska & Grzybek, 2016). Based on the analysis, certain correlations are established that lead to the formulation of numerous conclusions (section 1). The goal of the article is to analyze the differences between the initiation of a pretrial investigation on domestic violence in Ukraine and Poland, and to determine the peculiarities of the initiation of ex parte and ex officio proceedings. The latter is essentially an analysis of the legislation of Poland and Ukraine with regard to the implementation of the provisions of Art. 55 of the Istanbul Convention. Thus, section 2 is dedicated to researching the compliance of the national legislation of Ukraine and Poland with the provisions of the Istanbul Convention regarding the initiation of the procedure for bringing perpetrators to criminal responsibility.

The methodology first entailed a desk review of previous research by the author of this article (Demura, 2024), as well as other researchers from Poland (Gawinowska, 2021; Niemi & Sanmartin, 2020; Sękowska-Kozłowska, 2020; Burek, 2020, etc.) and Ukraine (Uliutina et al., 2021; Humin et al., 2021; Zohal, 2022; Teremetskyi et al., 2024, Popika, 2024; Bysaha, 2024; Ablamskyi et al., 2023, etc.). To the extent necessary for this study, research published by international organizations was reviewed and analyzed further, including GREVIO's (2021) work on legislative and other measures giving effect to the provisions of the Istanbul Convention. Additional data was used from the submission of the Commissioner for Human Rights (2020) of the Republic of Poland to GREVIO on the implementation of the Istanbul Convention in Poland. Unfortunately, a similar GREVIO report for Ukraine has not yet been compiled, which makes it impossible to compare the achievements of Poland and Ukraine in implementing the Istanbul Convention. At the same time, this article uses data from the Shadow Report for GREVIO on the implementation of the Istanbul Convention by Ukraine produced in 2024 (EHRAC et al., 2024).

Before proceeding with the main material of the study, it is necessary to explain the choice of Poland as a country for comparative analysis. The first factor is the proximity of the territorial locations of Ukraine and Poland. It is through the analysis of legislation and practice in such close territories that significant differences in the implementation of the international norms in national law can be most obviously demonstrated. The second factor is the common historical past – in particular, having been under the influence of the Union of Soviet Socialist Republics (USSR) for such a long time. This study will illustrate the differences between the approaches to domestic violence in these countries that have long shared a common history, but have been developing on their own for more than 30 years. The third factor, as mentioned above, is that Poland submitted its first report to GREVIO on March 26, 2020, and received its first evaluation report in 2021 (GREVIO, 2021). Unlike Poland, Ukraine has not received a similar report, and has only recently submitted a State report addressed to GREVIO (Report submitted by Ukraine, 2023). These factors together explain the choice of Poland as a jurisdiction for comparison.

Gender and violence against women are central concepts in the Istanbul Convention. The Convention's conceptualization of violence is important, as it guides the interpretation of the measures and provisions of the Convention. The Convention defines violence in several ways (Niemi & Sanmartin, 2020). Within the meaning of the Istanbul Convention:

> "violence against women" is understood as a violation of human rights and a form of discrimination against women, and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life; "domestic violence" as all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim (Art. 3).

According to the Polish legislation, domestic violence (Pol. *przemoc w rodzinie*) is prosecuted under Art. 207 of the Criminal Code of Poland (CC of Poland, 1997) as "Cruel Treatment," and consists of physical or mental violence against a person close to a perpetrator or against another person who is permanently or temporarily dependent on a perpetrator, or against a person who is in a vulnerable state due to their age or physical or mental condition. According to the definition of the Supreme Court,

> violence means an action or inaction consisting in the intentional infliction of physical pain or acute moral suffering, repeatedly or once, but intense and characterized by the exceptionally cruel attitude of a perpetrator towards a victim. Physical violence is the infliction of physical pain that negatively affects the human body.

The Law of Ukraine No. 2227-VIII of December 6, 2017, criminalized domestic violence, which entailed changes to the procedural law. Art. 126-1 was added to the Criminal Code of Ukraine (CC of Ukraine, 2001), and criminal responsibility for domestic violence was provided. Such a legislative initiative is related to the need to implement the provisions of the Istanbul Convention into the criminal legislation of Ukraine. After the introduction of the specified changes, the Law of Ukraine "On Ratification of the Convention of the Council of Europe on the Prevention of Violence Against Women and Domestic Violence and Combating These Phenomena" No. 2319-IX was only adopted on June 20, 2022. This law entered into force on July 2, 2022, and the Istanbul Convention entered into force for Ukraine on November 1, 2022. The Supreme Court defines a crime related to domestic violence as any criminal offense, the circumstances of which include at least one of the elements listed in Art. 1 of the Law of Ukraine "On Prevention and Combating Domestic Violence," regardless of whether they are specified in the relevant Article (or part of the Article) of the CC of Ukraine as signs of a substantive crime or an aggravation (Resolution of the Unified Chamber of the Cassation Criminal Court of the Supreme Court dated February 12, 2020; case No. 453/225/19).

Having outlined the context of domestic violence legislation in these two countries, a comparative analysis of the following data can be conducted:

1. Statistical data of the pretrial investigation authorities on the number of registered proceedings on cases related to domestic violence and their subsequent progress within the framework of criminal proceedings in Ukraine and Poland

In order to confirm the relevance of the chosen topic and the importance of its further research, reference should be made to the statistical data of the pretrial investigation authorities regarding the number of registered proceedings and their subsequent progress within the framework of a criminal proceeding.

1.1. Ukraine

In order to conduct a comparative analysis, statistical data from Ukraine for the first half of 2021, 2022, and 2023 shall be used applying the following criteria: the number of recorded criminal offenses; the number of criminal proceedings in which persons were served with a notice of suspicion; the number of criminal proceedings sent to court; the number of criminal proceedings sent to court with an indictment; the number of criminal proceedings in which a proceeding was closed; and the number of criminal proceedings in which no decision had been made (on termination or suspension) at the end of the reporting period (Prosecutor General's Office, n.d.). This time interval was selected due to the importance of emphasizing the growth of indicators for 2023 compared to previous years. For example, in the first half of 2023, the number of registered criminal proceedings almost doubled, as well as the number of notices of suspicion, etc.

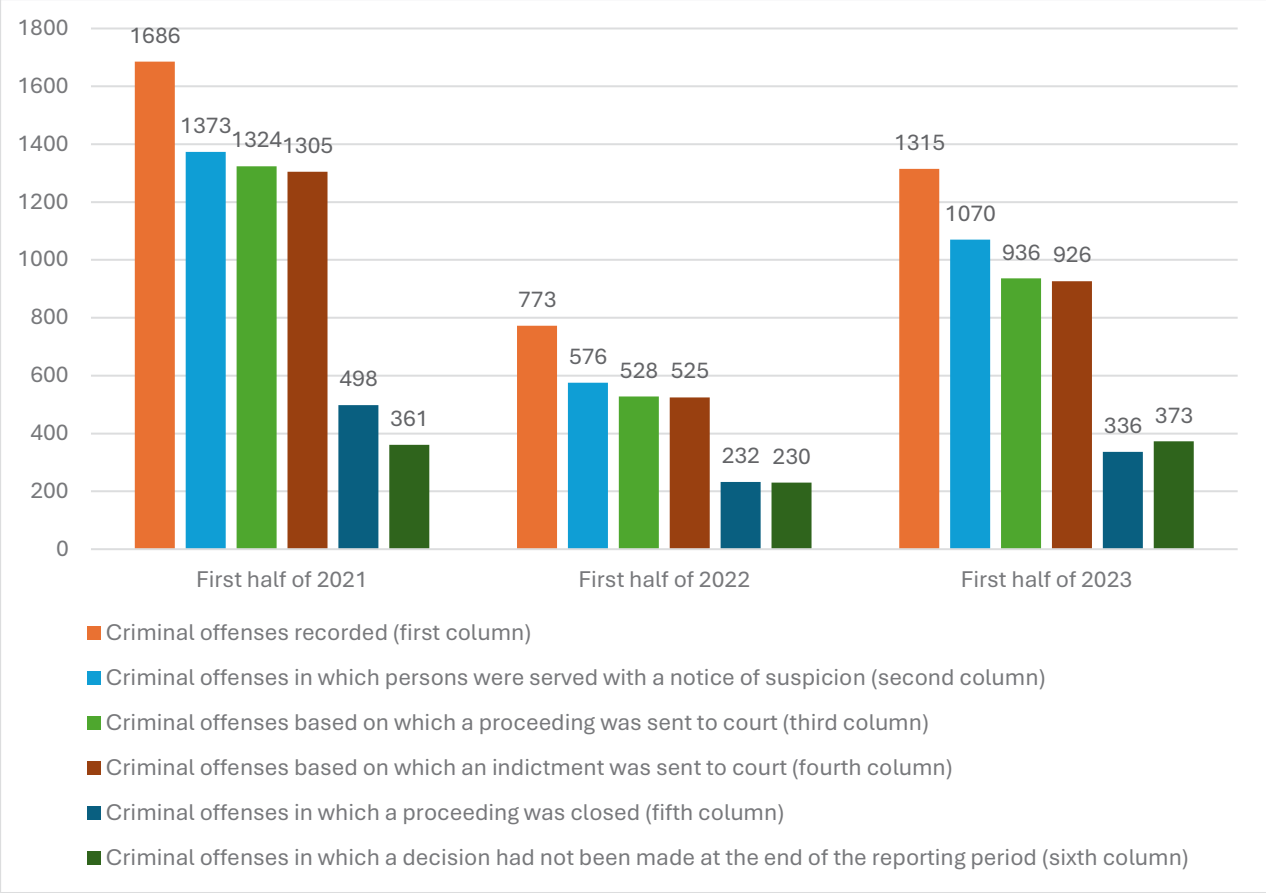

Figure 1. Data from the Ukrainian pretrial investigation authorities regarding the recording and progress of criminal proceedings for the first half of 2021, 2022, and 2023.

The data from the Prosecutor General's Office (n.d.) indicate that in the first half of 2022, the number of criminal offenses and other data recorded significantly decreased. This is particularly well illustrated by the data from the first half of the year, when active hostilities took place in a significant part of the territory of Ukraine, and there was also the active displacement of the population both within the territory of Ukraine and abroad.

Ablamskyi et al. (2023) also provide interesting statistical data on the registration of criminal offenses related to domestic violence and their interpretation. According to the analysis of data on domestic violence, in the first months of the full-scale invasion of the Russian Federation the recorded number of cases of domestic violence decreased compared to previous years. Thus, in the first half of 2022, compared to the first half of 2021, there were 27.5% fewer appeals to the National Police of Ukraine regarding domestic violence. In the period from January 1, 2022, to June 30, 2022, the Prosecutor General's Office recorded 56% fewer criminal proceedings in the context of domestic violence compared to the same period in 2021.

This difference in quantitative indicators for different years can be explained as follows: 1) a sufficiently large number of situations related to domestic violence are considered by the community to be an exclusively private matter, and the affected persons do not want to report this fact or are subjected to pressure from one side of the family or the general public; 2) in the conditions of war, many people are constantly searching for safety, and in some areas there was a lack of communication for a long time, which did not make it possible to report possible cases of domestic violence (Teremetskyi et al., 2024).

1.2. Poland

According to the statistical data of the Polish police authorities, in 2020, 59,701 applications for the initiation of a domestic violence procedure were received; the number of persons who experienced domestic violence was 85,575, of which 62,866 were women, 10,922 were men, and 11,787 were minors; and the number of

persons suspected of committing domestic violence was 73,228, of which 6,677 were women, 66,198 were men, and 353 were minors (Police Statistics, n.d.-a).

In 2021, 53,985 similar applications were received; the number of persons who experienced domestic violence was 75,761, of which 55,112 were women, 9,520 were men, and 11,129 were minors; and the number of persons suspected of committing domestic violence was 64,846, of which 6,173 were women, 58,349 were men, and 324 were minors (Police Statistics, n.d.-a).

In 2022, 52,569 applications for the initiation of the procedure were received; the number of persons who experienced domestic violence was 71,631, of which 51,935 were women, 8,714 were men, and 10,982 were minors; and the number of persons suspected of committing domestic violence was 62,244, of which 6,497 were women, 55,426 were men, and 321 were minors (Police Statistics, n.d.-a).

In 2023, the number of applications was 54,029; the number of persons who experienced domestic violence was 77,832, of which 51,631 were women, 9,162 were men, and 17,039 were minors; and the number of persons suspected of committing domestic violence was 63,016, of which 7,595 were women, 55,225 were men, and 196 were minors (Police Statistics, n.d.-a).

This data is illustrated in Figure 2.

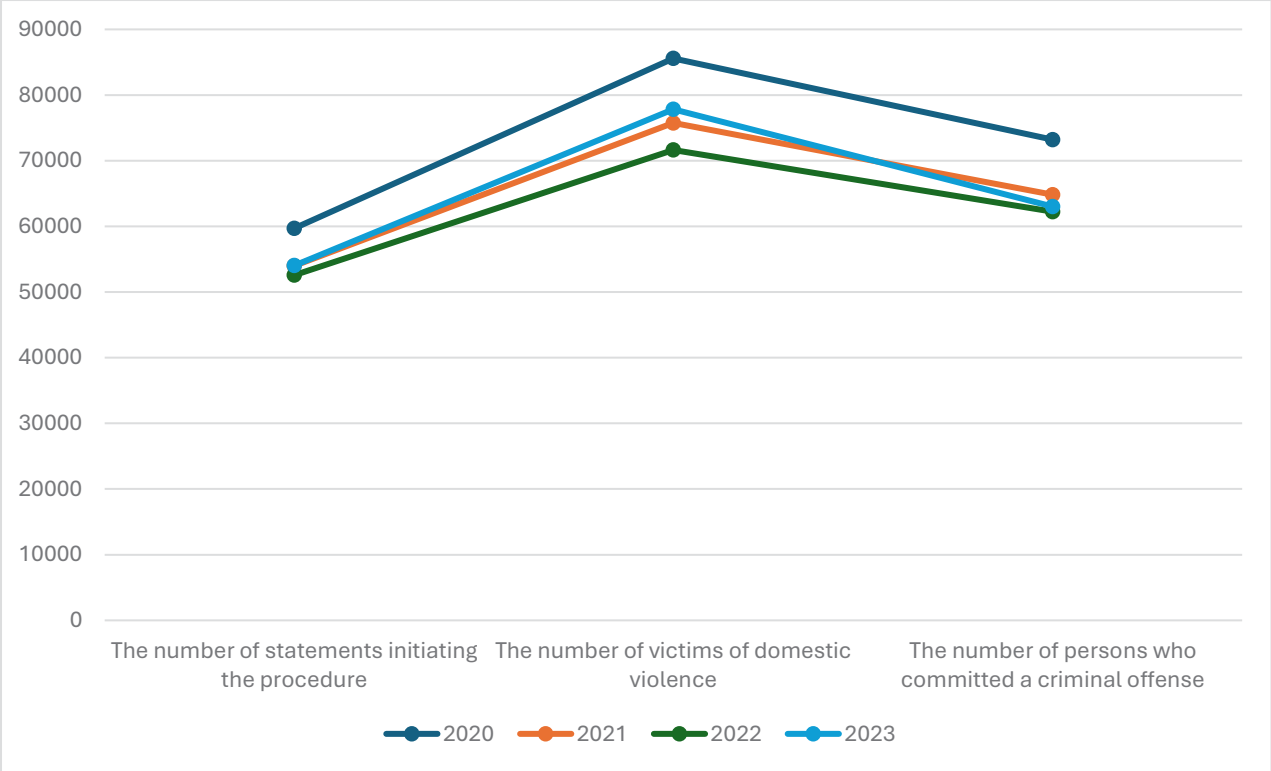

Figure 2. Statistics on the initiation of domestic violence proceedings in Poland in 2021–2023.

It is worth specifying that Figure 2 represents statistical data from the police, and does not take into account data on the activities of other non-police entities authorized to combat domestic violence in Poland. Since 2012, the system of statistical registration of domestic violence has changed, and the form of data presentation has also changed. The above figures refer to the actions taken by the police authorities under the Blue Card procedure.

As for qualitative indicators, it can be seen that women form the largest group of victims of domestic violence. The Center for Women's Rights estimates that the principal reason for men's violent attitudes relates to a particular male approach to women. This approach is rooted in the assumption that social gender roles give men an advantage, and the power to subjugate women. This finding is supported by the fact that men

who abuse women and children rarely use violence against people they consider as equals (Chrzczonowicz, 2020). Gender-based violence significantly affects the social positions of women. In particular, domestic violence in Poland results in more instances of women being killed than any other type of criminal activity (Gawinowska, 2021).

Proceedings can be traced from their registration to putting the crime for which the perpetrator has been prosecuted on record (Table 1). The relevant authorities for summarizing statistical data in Poland provide the following data according to Art. 207 of the CC of Poland on "Cruel Treatment."

Year	Number of initiated proceedings	Number of recorded crimes
2020	28,912	16,259
2019	30,456	16,416
2018	28,786	15,269
2017	28,608	15,824
2016	26,633	14,513
2015	27,642	14,191
2014	30,901	17,523
2013	29,879	17,513
2012	29,193	17,785
2011	29,958	18,832
2010	30,534	18,759

Table 1. Data from the pretrial investigation authorities regarding initiated and recorded crimes under Art. 207 of the CC of Poland for 2010–2020 (Police Statistics, n.d.-b).

Fluctuations can be seen in the number of proceedings initiated per year and the consequences of the consideration of such proceedings. As Table 1 depicts, the number of prosecutions is almost half the number of all initiated proceedings. Comparing the data in Table 1 with the above data on the number of statements submitted to the police authorities for the initiation of the procedure within the framework of the Blue Card program makes it possible to assert that not every statement for the initiation of the procedure regarding domestic violence results in the initiation of a criminal proceeding under Art. 207 of the CC of Poland. In 2020, for example, 59,701 statements for the initiation of the procedure were received, 28,912 criminal proceedings were initiated, and perpetrators were brought to responsibility for 16,259 crimes.

The statistical data is slightly different from the data that come from surveys of women in Poland. According to a 2016 study by the STER Foundation, 87% of female respondents had experienced some form of sexual harassment. Furthermore, 22% of surveyed women had been raped. In these cases, the culprits were mostly current (22%) or ex-partners (63%). As much as 55% of rapes occurred in private apartments (Grabowska & Grzybek, 2016, p. 8). This survey reveals that there is a much greater rate of occurrence of this crime than actual applications for the initiation of the procedure to law enforcement agencies would suggest, indicating the high latency of domestic violence.

1.3. A Comparative Analysis of the Statistical Data of Poland and Ukraine

Comparing the quantitative indicators of Poland and Ukraine, we can say that in Poland, the police authorities receive on average 18 times more statements on domestic violence than in Ukraine. In order to assess these data, our attention must turn to the population figures in Poland and Ukraine. In connection with the full-scale invasion of the Russian Federation into the territory of Ukraine, the Institute of Demography cannot determine the exact population of Ukraine in 2024, giving only an approximate figure: from 28 million to 34 million citizens. As of January 1, 2022, the population was 41,167,300. As for Polish data, at the end of June 2023, the population of Poland was 37,698,000.

If we compare the data for 2020, the conclusion is as follows: despite a population of almost 3.5 million more people, the number of registered applications in Ukraine was 18 times less than in Poland.

It can be concluded, therefore, that Ukraine currently does not have a sufficient number of legal mechanisms for detecting and recording the facts of domestic violence. Also, in the opinion of the author, the population is not sufficiently informed about the possibility of bringing perpetrators to criminal responsibility. Equally important is the fact that proceedings related to domestic violence are in the form of a private prosecution – that is, they are initiated solely based on the statement of a victim. Therefore, if a victim does not file such a complaint, it is not possible to prosecute a perpetrator. This provision will be discussed in more detail in section 2 of this article. In addition, the introduction of martial law and the potential for its extension is an additional risk factor. One of the priority areas in terms of martial law is the prevention of domestic violence by servicepeople and veterans. Since military factors (combat exposure and mental health problems) are risk factors for general violence, research on their effects on domestic violence is limited. Some researchers have compared the prevalence of domestic violence among a large sample of British military personnel and examined the risk factors related to domestic violence. The prevalence of domestic violence immediately after returning from military service was 3.6%, where domestic violence was significantly associated with discharge from military service (Kwan et al., 2018). After Ukraine's victory, this area may acquire a fundamentally new meaning in view of the return of a significant number of active servicepeople to their families, which necessitates the development of comprehensive strategies and programs aimed at preventing domestic violence among servicepeople and veterans at the current stage (Teremetskyi et al., 2024).

2. A Comparative Research of ex parte and ex officio Proceedings Under the Legislation of Ukraine and Poland

2.1. Ukraine

After analyzing the Ukrainian practice of applying the law, comparative research between the legislative provisions of Poland and Ukraine on the peculiarities of initiating a pretrial investigation in proceedings related to domestic violence and other types of violence can be conducted.

In this aspect, it is important to acknowledge Art. 55 of the Istanbul Convention on "Ex parte and ex officio proceedings." Art. 55(1) of the Istanbul Convention places on parties the obligation to ensure that investigations into a number of categories of offences shall not be wholly dependent upon the report or complaint filed by a victim, and that any proceedings underway may continue even after a victim has withdrawn their statement of complaint.

For the sake of the completeness of this research, a list of the *corpus delicti* of criminal offenses which should not depend on a statement or complaint of a victim for investigation is included: Art. 35 – physical violence; Art. 36 – sexual violence, including rape; Art. 37 – forced marriage; Art. 38 – female genital mutilation; and Art. 39 – forced abortion and forced sterilization.

Art. 55(2) of the Istanbul Convention obliges the parties to this Convention to

> take the necessary legislative or other measures to ensure, in accordance with the conditions provided for by their internal law, the possibility for governmental and nongovernmental organizations and domestic violence counsellors to assist and/or support victims, at their request, during investigations and judicial proceedings concerning the offences established in accordance with this Convention.

The first part of the provision of the Istanbul Convention noting that "investigations ... shall not be wholly dependent upon the report or complaint filed by a victim ..." has not yet been reflected in the Ukrainian legislation, and its implementation should be considered. As of today, such criminal offenses as domestic violence (which includes sexual, physical, and other types), rape, and others involve proceedings in the form of private prosecution – that is, proceedings that are initiated exclusively based on a victim's statement (Art. 477(1) of the Criminal Procedure Code of Ukraine (CPC of Ukraine, 2013)). Within the meaning of the Istanbul Convention, these proceedings are investigated ex parte. In fact, this indicates the need to change

the approach to such categories of criminal offenses in order to carry out proceedings on them even in the absence of complaints or statements from victims. In other words, they must be excluded from the list of private prosecution offenses.

The second part of the cited provision of Art. 55(1) of the Istanbul Convention, that any proceedings underway may continue even after a victim has withdrawn their statement of complaint, has been implemented in Ukrainian national legislation. Specifically, the withdrawal of a victim's accusation is not grounds for terminating the proceedings (Art. 284(1)(7) of the CPC of Ukraine). Thus, this regulatory provision stipulates that criminal proceedings shall be terminated if the victim – or, in cases provided for by the CPC of Ukraine, their representative – withdraws the accusation in a private prosecution criminal procedure, except for in criminal proceedings related to domestic violence. Therefore, a kind of "safeguard" is currently established in the Ukrainian criminal procedure legislation regarding the closure of proceedings in cases of domestic violence.

An interesting aspect of this research is the provision regarding the possibility of concluding agreements in cases related to domestic violence. Thus, according to Art. 469(1) of the CPC of Ukraine, "a conciliation agreement in criminal proceedings regarding criminal offenses related to domestic violence may be concluded only at the initiative of a victim, their representative or legal representative." Therefore, in general, it is possible to conclude a conciliation agreement in such categories of cases, but only at the initiative of the victim. Still, the issue arises as to whether a victim of domestic violence, who is often in a state of emotional, physical, or psychological dependence on their abuser, can freely exercise their rights. The answer to this issue lies in the specifics of each case, but at the same time there is an extremely high probability that an abuser will continue to exert illegal influence on a victim to coerce them into concluding a conciliation agreement, thereby reducing the severity of punishment and obtaining other advantages.

The authors of shadow report on the implementation of Istanbul Convention in Ukraine (EHRAC et al., 2024) insist on the necessity of introducing changes in the criminal procedure legislation – in particular, introducing amendments to Art. 469(1) of the CPC of Ukraine determining that conciliation agreements in criminal proceedings in criminal offences related to domestic violence are not allowed.

In order to illustrate the importance of raising this issue, reference to the data from judicial statistics on the number of agreements concluded in proceedings regarding domestic violence under Art. 126-1 of the CC of Ukraine should be made. In 2021, among 1,498 criminal proceedings held under Art. 126-1, 435 sentences were passed with the approval of a conciliation agreement, and 24 sentences with the approval of a plea agreement (The Judiciary of Ukraine, 2021). In 2022, of the 962 criminal proceedings initiated, 261 sentences were passed with the approval of a conciliation agreement, and 31 sentences with the approval of a plea agreement (The Judiciary of Ukraine, 2022). In 2023, from 1,537 criminal proceedings considered, 328 sentences were passed with the approval of a conciliation agreement, and 71 sentences with the approval of a plea agreement (The Judiciary of Ukraine, 2023).

These data are visualized in Figure 3.

Figure 3. The results of the judicial consideration of criminal proceedings under Art. 126-1 of the CC of Ukraine for 2021–2023.

The data in Figure 3 indicate a significant proportion of conciliation agreements among the total number of criminal proceedings related to domestic violence. This further underscores the importance of protecting the rights of domestic violence victims and the need to establish additional safeguards to prevent the possibility of a victim being pressured by their perpetrator.

The European Court of Human Rights emphasizes the importance of protecting individuals from domestic violence when interpreting Art. 3 of the European Convention on Human Rights (ECHR). In *Valiulienė v. Lithuania* (2013), the Court assessed the facts of the case and found the act of inflicting physical injuries on the applicant five times, combined with her feeling of fear and helplessness, to represent ill treatment of the applicant. The Court noted that the obligation on the State to bring to justice perpetrators of acts contrary to Article 3 of the ECHR serves mainly to ensure that acts of ill treatment do not remain ignored by the relevant authorities and to provide effective protection against acts of ill treatment (*Valiulienė v. Lithuania*, 2013).

The material above discusses ex parte and ex officio proceedings under Ukrainian legislation, noting that Article 55(1) of the Istanbul Convention is not incorporated into the country's criminal procedure laws. This research emphasizes the necessity of revising the approach to criminal offenses such as physical violence, domestic violence, and sexual violence – including rape – by initiating proceedings even without complaints or statements from victims; that is, they should be excluded from the list of crimes specified in Art. 477(1)(1) of the CPC of Ukraine. The authors of the Shadow Report (EHRAC, 2024) share a similar view. It should be noted that the Shadow Report is posted on the official website of the Council of Europe on the Istanbul Convention as an alternative to the official report of the authorities. Based on the results of this study, a number of amendments to criminal legislation are proposed in order to implement the provisions of the Istanbul Convention. In particular, the authors insist on the necessity of amending the criminal procedure legislation as follows:

- introduce amendments to Art. 477 of the CPC of Ukraine in terms of the removal of crimes provided for in Art. 126-1 (domestic violence), Art. 151-2 (forced marriage), Art. 152(1) (rape without aggravating circumstances), Art. 153(1) (sexual violence), Art. 154 (compulsion to sexual intercourse), and Art. 161(1) (violation of citizens' equality based on their race, ethnicity, or religion without aggravating circumstances) from the list of proceedings for which private criminal proceedings can be carried out;

- append Art. 477 of the CPC of Ukraine with a section stating that private criminal proceedings shall not be carried out in criminal offences provided for in Art. 121, 122, 125, 126, and 126-1 of the CC of Ukraine, as well as other offences stipulated in the CC of Ukraine, in the case of their commission in a family or at the place of residence, or against relatives, or against a former or current spouse, or against another person who resides (or has resided) with the perpetrator as one family but is not (or was not) in a family relationship or married to them (EHRAC, 2024).

Art. 55(2) of the Istanbul Convention stipulates that "any proceedings underway may continue even after a victim has withdrawn her statement of complaint" – a provision that has currently been implemented into the Ukrainian national legislation. Specifically, the withdrawal of a victim's accusation is not grounds for terminating the proceedings. At the same time, in accordance with the legislation of Ukraine, it is possible to conclude a conciliation agreement in such proceedings. In cases related to domestic violence, such an agreement can be concluded only at the initiative of a victim, or their representative or legal representative. However, the existence of these legislative provisions is the cause of numerous disputes in the legal community.

2.2. Poland

This article further analyzes the procedure for conducting ex parte and ex officio proceedings in accordance with the Polish legislation. The crime stipulated in Art. 207 of the CC of Poland is a crime prosecuted ex officio. The provisions of Art. 304(1)1 of the Criminal Procedure Code of Poland (CPC of Poland) impose a public duty on anyone who becomes aware of the commission of a crime prosecuted ex officio – in this case, domestic violence – to report it to a prosecutor or the police. In turn, in accordance with the provisions of Art. 304(2) of the CPC of Poland, public institutions and local self-government authorities which, in connection with their activities (for example, a school, a medical institution, etc.), become aware of the commission of a crime prosecuted ex officio are obliged to immediately notify a prosecutor or the police about it and take the necessary measures before the arrival of the authority authorized to carry out criminal prosecution, or before it passes the corresponding order, in order to prevent the destruction of traces and evidence of the crime. This obligation applies to all individuals "who, in connection with the performance of their official or professional duties (for example, a school teacher, teacher, general practitioner), become aware of the suspicion of committing a crime of domestic violence prosecuted ex officio."

Poland has reserved the right not to apply Art. 55(1), in respect of Art. 35 regarding minor offences, exempting it from the obligation to subject minor acts of physical violence against women to ex officio investigation and prosecution. The initial reservation for a period of 5 years was renewed for the same period by a declaration of the Polish authorities in January 2021. The explanations provided indicate that the Polish legal framework continues to require a complaint by a victim noting attempts on their bodily integrity for prosecution to begin (Art. 217(3) of the Criminal Code), requiring the upholding of the reservation. It should be added that reservations and declarations play an important role in the Istanbul Convention. So far, almost half of the 45 states (and the European Union) that have signed the Convention have decided to formulate a reservation and/or an interpretative declaration (Burek, 2020).

It should also be noted that, as a consequence of the reservation expressed by Poland as to the Convention, certain petty offences which could fall under Art. 35 of the Convention are not prosecuted by the state, but are handled under private prosecution procedures initiated by victims. This relates in particular to offences involving causing the impairment of a body function or an incapacitating condition which lasts not longer than 7 days (Art. 157 § 2 of the CC of Poland), or hitting or otherwise violating bodily integrity (Art. 217 § 1 of the CC of Poland). Proceedings in such cases may be initiated ex officio if, in a prosecutor's opinion, this is required due to the public interest (Art. 60(1) of the CPC of Poland).

However, as the Commissioner for Human Rights (2020) of the Republic of Poland noted in his Submission to GREVIO, in practice, a prosecutor taking over a private prosecution case is quite rare. In the above matter, it is worth emphasizing that Polish law enshrines the power of the prosecutor to initiate criminal proceedings prosecuted in the form of a private prosecution when, in their opinion, it is required due to the public interest.

In the remainder of the offences listed in Art. 55(1), GREVIO's (2021) Evaluation Report notes, with satisfaction, that ex officio prosecution has been introduced for rape and sexual violence, domestic violence, and forced abortion, and that cases of forced marriage, female genital mutilation, and forced sterilization may also be prosecuted ex officio under general offences.

Consequently, Polish legislation has undergone changes, and proceedings regarding rape and sexual violence, domestic violence, and forced abortion have become ex officio proceedings and do not depend on the filing of a complaint by a victim. Moreover, the relevant authorities are obliged to report to law enforcement officers on the discovery of such a crime. In the author's opinion, such legislative changes indicate the adaptation of legislation in accordance with the requirements of the Istanbul Convention. The imposition of the obligation on the relevant authorities to report a crime indicates active combat against the phenomenon of domestic violence and other forms of violence at the state level.

Conclusion

This article has provided a comprehensive analysis of the law enforcement practice of Poland and Ukraine regarding bringing perpetrators to criminal responsibility for domestic violence. Statistical data from the pretrial investigation authorities and courts in Ukraine and Poland formed the empirical component of this research. On the basis of this analysis, recommendations regarding the interpretation of the relevant numerical indicators obtained from the statistical data of the pretrial investigation authorities were provided. This article represents an interim stage of a more extensive study which not only aims to investigate the current situation, but also focuses on the further state of law enforcement practice regarding the systematic fight against domestic violence throughout the European Union.

Statistical data from pretrial investigation authorities regarding the registration and reporting of criminal proceedings on domestic violence were analyzed (Art. 126-1 of the CC of Ukraine and Art. 207 of the CC of Poland). Based on the comparison of statistical data, it was determined that in Ukraine in the first half of 2022, the number of recorded criminal offenses decreased, which was related to the onset of the full-scale war in Ukraine. According to the statistical data from the police authorities of Poland, gradual growth from 2010 to 2020 with minor fluctuations was established. Based on the comparison of the 2020 data in the two countries, the following conclusion was formed: despite a population of almost 3.5 million more people, the number of registered statements in Ukraine is 18 times less than in Poland. The article also provided explanations for the reasons behind such significant differences, offering suggestions to improve the Ukrainian legislation in terms of bringing to light acts of domestic violence committed in Ukraine.

On the grounds of the analysis of Ukrainian and Polish legislation on the implementation of Art. 55 of the Istanbul Convention regarding "ex parte and ex officio proceedings," significant differences between the legislation of these countries were established. In Poland, these proceedings are investigated ex officio – that is, they do not depend on a victim filing a statement about a criminal offense. Moreover, the criminal procedure legislation of Poland imposes an obligation on the employees of schools and social services to report to law enforcement authorities on the discovery of a crime. Unfortunately, in Ukraine, such proceedings are investigated ex parte – that is, law enforcement authorities can start a pretrial investigation on domestic violence only upon receiving a victim's statement. Even when the pretrial investigation authorities receive a statement from neighbors, teachers, or social workers, this information cannot be included in the Unified Register of Pretrial Investigations before a victim reports on a crime. Thus, the author insists that the Ukrainian legislation should be changed in this regard, and that domestic violence proceedings should be changed from ex parte to ex officio proceedings.

References

Ablamskyi, S., Drozd, V., Muzychenko, O., & Stativka, O. (2023). Reassessing views on preventing and combating domestic violence: Theoretical and legal research. *Lex Humana*, *15*(2), 228–243. https://seer.ucp.br/seer/index.php/LexHumana/article/view/2480

Balogh, L. (2020). *The Ratification Status of the Council of Europe's Istanbul Convention Among EU Member States*. MTA Law Working Papers No. 2020/7. https://real.mtak.hu/122887/1/2020_7_Balogh.pdf

Bysaha, Y. (2024). The problem of domestic violence: Issues of theory and practice. *Uzhhorod National University Herald Series Law*, *82*(1), 265–269. https://doi.org/10.24144/2307-3322.2024.82.1.40
Chrzczonowicz, M. (2020, July 30). *Why do we need an anti-violence convention? "If the procedures had worked, our client could have lived."* OKO Press. https://oko.press/po-co-nam-ta-konwencja-antyprzemocowa/
Commissioner for Human Rights. (2020). *Submission of the Commissioner for Human Rights of the Republic of Poland to the Group of Experts on Action Against Violence Against Women and Domestic violence on the Implementation of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence in the Republic of Poland*. https://rm.coe.int/chr-poland-submission-30-06-2020/16809eed4b
Council of Europe Convention on preventing and combating violence against women and domestic violence. (2011). *CETS*, No. 210. https://rm.coe.int/168008482e
Criminal Code of Poland. (1997). https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970880553/U/D19970553Lj.pdf
Criminal Code of Ukraine. (2001). https://zakon.rada.gov.ua/laws/show/2341-14
Criminal Procedure Code of Ukraine. (2013). https://zakon.rada.gov.ua/laws/show/4651-17#Text
Demura, M. (2024, April 8). *Criminal liability for domestic violence: analysis of the practice of bringing perpetrators to justice*. Just Talk. https://justtalk.com.ua/post/kriminalna-vidpovidalnist-za-domashne-nasilstvo-analiz-praktiki-prityagnennya-vinnih-osib-do-vidpovidalnosti
EHRAC, Women's initiatives for Gender Justice, La Strada Ukraine, ULAG & Equality Now. (2024, July). *Sexual Violence and Stigmatisation of Victims: NGO Shadow Report on the Implementation of The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence in Ukraine*. https://rm.coe.int/sexual-violence-and-stigmatisation-of-victims-grevio-shadow-report-ukr/1680b195ff
GREVIO. (2021). *Baseline Evaluation Report: Poland*. https://rm.coe.int/grevio-baseline-report-on-poland/1680a3d20b
Gawinowska, K. (2021). Between Rights and Values on the Polish (non) Compliance with the Istanbul Convention. *Journal for Legal, Political and Social Theory and Philosophy*, *5*(1), 87–116. http://dx.doi.org/10.51204/IVRS_21104A
Grabowska, M., Grzybek, A. (2016). *Break the taboo: a report on sexual violence* (1st ed.). Warszawa.
Humin, O., Merkulova, V., Hrytenko, O., Yuldasheva, S., & Bratkov, S. (2021). Legal regulation of prevention of domestic violence in Ukraine. *Cuestiones Políticas*, *39*(70), 282–302 https://doi.org/10.46398/cuestpol.3970.18
The Judiciary of Ukraine. (2021). *Report of the courts of first instance on consideration of the files of criminal proceeding No. 1-k*. Retrieved November 10, 2024. https://court.gov.ua/inshe/sudova_statystyka/zvitnist_21
The Judiciary of Ukraine. (2022). Report of the courts of first instance on consideration of the files of criminal proceeding No. 1-k. Retrieved from https://court.gov.ua/inshe/sudova_statystyka/zvit_dsau_2022
The Judiciary of Ukraine. (2023). Report of the courts of first instance on consideration of the files of criminal proceeding No. 1-k. Retrieved from https://court.gov.ua/inshe/sudova_statystyka/zvit_dsau_2023
Niemi, J., & Sanmartin, A. (2020). The concepts of gender and violence in the Istanbul Convention. In J. Niemi, L. Peroni & V. Stoyanova (eds.), *International Law and Violence Against Women* (pp. 77–94). http://dx.doi.org/10.4324/9780429289736-4
On making changes to the criminal and criminal procedure codes of Ukraine in order to implement the provisions of the Council of Europe Convention on the Prevention of Violence Against Women and Domestic Violence and the Combat Against These Phenomena: Law of Ukraine No. 2227-VIII dated December 06, 2017. https://zakon.rada.gov.ua/laws/show/2227-19#n41
On ratification of the Council of Europe Convention on the Prevention of Violence Against Women and Domestic Violence and the Combat Against These Phenomena: Law of Ukraine No. 2319-IX dated June 20, 2022. https://zakon.rada.gov.ua/laws/show/2319-20#Text
Police Statistics. (n.d.-a). *Przemoc w rodzinie - dane od 2012 roku*. Retrieved October 20, 2024. https://statystyka.policja.pl/st/wybrane-statystyki/przemoc-w-rodzinie/201373,Przemoc-w-rodzinie-dane-od-2012-roku.html
Police Statistics. (n.d.-b). Proceedings initiated and crimes found under Art. 207 of the CC of Poland for the years 1999–2023. Retrieved October 10, 2024. https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-7/63507,Znecanie-sie-art-207.html.
Popika, I. (2024, April 22). *Domestic violence in 2023: Data and trends*. Ukrainian Women Lawyers Association "JurFem." https://jurfem.com.ua/domashne-nasylstvo-2023/
Prosecutor General's Office. (n.d.). *Unified report on criminal offenses for January–June 2021, 2022, 2023*. About registered criminal offenses and the results of their pre-trial investigation. Retrieved November 10, 2024. https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2
Report submitted by Ukraine pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report). (2023). https://rm.coe.int/report-submitted-by-ukraine-baseline-evaluation-/1680abd88d

Resolution of the Unified Chamber of the Cassation Criminal Court of the Supreme Court dated February 12, 2020; case No. 453/225/19. https://reyestr.court.gov.ua/Review/87602679
Sękowska-Kozłowska, K. (2020). The Istanbul Convention in Poland: Between the 'War on Gender' and Legal Reform. In J. Niemi, L. Peroni & V. Stoyanova (eds.), *International Law and Violence Against Women* (pp. 259–276). https://doi.org/10.4324/9780429289736-13
Teremetskyi, V., Sloma, V., Fedorenko, T., Polyukhovich, O. (2024) Modern Challenges and Areas of Counteraction in Ukraine. *Journal of Lifestyle and SDGs Review*, *5*(2), e03384. https://doi.org/10.47172/2965-730X.SDGsReview.v5.n02.pe03384
Uliutina, O., Artemenko, O., Vyshnevska, Y. (2021). Domestic violence against women in marriage and family relations: ways of regulation and legal settlement in Ukraine. *Journal of International Legal Communication*, *1*(1), 40–46. https://doi.org/10.32612/uw.27201643.2021.1.pp.40-46
Valiulienė v. Lithuania, ECtHR, 26 March 2013, Application no. 33234/07. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-117636%22]}
Burek, W. (2020). Reservations and declarations under the Istanbul Convention. In J. Niemi, L. Peroni & V. Stoyanova (eds.), *International Law and Violence Against Women* (pp. 277–295). http://dx.doi.org/10.4324/9780429289736-14
Zohal, D. (2022) Genesis of Legal Regulation of Domestic Violence in Ukraine. *Journal of Legal Studies*, *30*(44), 78–91. https://doi.org/10.2478/jles-2022-0017

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A COMPARATIVE STUDY OF EXECUTIVE CLEMENCY FOR BATTERED WOMEN IN MURDER CASES: PERSPECTIVES FROM THE UNITED STATES AND UNITED KINGDOM

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Abstract. This paper examines how executive clemency can play an important function in confronting the framework-level inefficiencies and injustices encountered by battered women standing trial for or convicted of murder. Women in these situations frequently encounter culturally and legally ingrained biases that fail to fully recognise the prolonged impact of abuse and trauma, rendering clemency an essential path for seeking justice. This paper considers clemency practices in the United States and the United Kingdom, highlighting the impact of notable cases and legal structures. It particularly considers the role of Battered Woman Syndrome in the United States and the trauma-informed measures established by the United Kingdom's Domestic Abuse Act of 2021. This paper utilises a doctrinal methodology to examine statutes, case law, and academic literature, aiming to appraise how effectively clemency serves to promote justice for battered women who have endured cumulative abuse. The findings suggest that although clemency is instrumental in addressing systemic shortcomings, its uneven implementation, along with prevailing political and societal biases, limits its effectiveness. This paper recommends the implementation of reforms that include the establishment of independent clemency review boards, providing trauma-informed training for those involved in decision-making, and creating standardised criteria for the application of clemency. These measures aim to improve transparency, equity, and accessibility, thereby ensuring that clemency can serve as an effective means of justice and mercy.

Keywords: executive clemency, battered woman syndrome, murder, domestic violence, self-defence.

Introduction

Pardons, commutations and reprieves are mechanisms of executive clemency, and are useful tools in correcting and addressing anomalies and harshness in the criminal justice system (Huang, 2010). This affords governments the chance to extend mercy to persons who may have been convicted or sentenced unfairly due to factors that could be deemed as extenuating or due to procedural flaws. In the context of defendants who are battered women, clemency wields unique importance (Schornstein, 2016). These women are often unable to access justice and seek help within conventional legal systems for the

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prolonged abuse and trauma that they have endured. The granting of clemency in such cases acknowledges the specific overlap between domestic violence and criminal behaviour, offering a way of finding justice and balance that takes into consideration such factors.

Lenore Walker has testified for over 350 battered women facing murder charges, contributing to the development of legal precedents in the process (Boxall, 1995). She deserves accolades for bringing about and advocating for the assessment and integration of the experiences of battered women defendants during trial (Walker, 1979). Her studies and campaigns, as well as the public display of cases with expert opinions and testimonies, have generated extensive legal commentary and drawn public attention to the conditions under which battered women murder in self-defence. Introducing Battered Woman Syndrome (BWS) into testimony and discussing how to adapt it has influenced legislative reforms, public debates, and clemency initiatives in various states, enabling battered women to be freed from jail. This could possibly be best used to secure amendments to self-defence law that do not emphasise learned helplessness (Madden, 1993; Walker, 1979).

Around the world battered women continue to struggle with clemency processes which are marred with structural barriers and inconsistencies. Most legal systems do not take into account the cumulative effect of prolonged abuse, trauma and social pressure on the actions of the battered woman, leading to unduly severe sentences (Zepinic, 2021). In some jurisdictions where clemency is available, its application is usually sporadic, and is often influenced by political considerations, judicial prejudices, and societal reluctance to embrace a culture of forgiveness in cases of violence (O'Donnell, 2017; Sarat & Hussain, 2004). In addition, the lack of clear guidelines and the poor recognition of BWS make clemency applications even more difficult for many women, and they remain without recourse to justice. These framework-driven barriers call for a comparative approach to pinpoint effective strategies and recommend changes that can help the standardisation and integration of BWS for the application of clemency within varying legal systems.

To this end, this research centres on two main jurisdictions which have been selected due to the differences in their legal systems and their progress in treating BWS as a factor and consideration for clemency: the United States (US) and the United Kingdom (UK). Clemency has a long-standing and rich tradition in the US, just as advocacy movements and key cases such as those of Beverly Ibn-Tamas and Thomia Hunter have been instrumental in influencing and stirring legal and social debates across the board (Huss et al., 2006). These efforts have brought into the spotlight the importance of clemency in combating biases in the judiciary and structural inequities. On the other hand, in the UK there have been recent positive legal developments in relation to the effect of domestic violence on women's behaviour, especially in influencing defences and clemency petitions. The Domestic Abuse Act of 2021 is an example of how the UK has been enhancing the application of a trauma-informed approach in its criminal justice system.

This analysis also encompasses three secondary jurisdictions that offer valuable comparative insights to enrich practicable recommendations as regards the standardisation and adoption of BWS as a mitigating factor for battered women: New Zealand, South Africa, and Australia. New Zealand can be considered progressive in terms of domestic violence legislation, with its clemency policies taking into consideration the unique circumstances of battered women who kill in situations of domestic abuse. South Africa offers a rich socio-legal context in which social and organisational factors affect the practice and application of clemency, revealing the relationship between legal reforms and cultural norms. Australia, with its state-specific mechanisms and legal reforms addressing domestic violence, sets the pace for how clemency can be integrated within broader institutional reforms. Altogether, these jurisdictions present an opportunity to examine shifts in the perspective of clemency in cases involving battered women defendants.

This paper leans on the doctrinal method of research to analyse legal instruments, case law, statutes, and literature on the practice of clemency in the chosen jurisdictions. The doctrinal method is most suitable for this study in that it allows for the detailed explication of legal concepts as well as their meanings and implications in certain situations. To systematically compare the jurisdictions assessed in this paper, a

comparative approach is taken to analyse clemency practices and how they manage the issue of domestic violence as a factor in criminal conduct. In light of these methodological tools, this paper seeks to establish best practices, assess existing deficiencies, and offer practical recommendations for possible legal and policy reforms. This approach is important as it ensures that the analysis is systematic and relevant to the discourse on clemency and justice for battered women defendants.

This study has a number of specific objectives. First, it aims to compare and evaluate clemency practices in the US and the UK in terms of legal procedures, judicial precedents, and deeply entrenched issues. Second, it seeks to examine the relevance of the secondary jurisdictions of New Zealand, South Africa, and Australia in contributing to recognising and understanding clemency for battered women, as well as discussing recent developments and socio-legal factors. Lastly, it offers policy recommendations and advocacy initiatives seeking to improve clemency practices and outcomes across the world. By so doing, this paper will contribute to the existing body of literature and inform policy discussions on how to expand the application of clemency to consider and accommodate gender- and trauma-sensitive justice systems.

1. Conceptual Framework

Executive clemency is the ability of the head of state or government executive to reduce or nullify criminal sentences for a crime that has been committed. It appears in different forms, such as: pardons, which completely absolve convicted persons of their offences and expunge their legal consequences; commutations, which lessen the extent or duration of punishment without erasing the guilty verdict or conviction; and reprieves, which are temporary measures that are adopted to suspend the enforcement of a sentence, usually to await further consideration and/or review. In the context of justice systems, clemency has two major primary functions: on the one hand, serving as a corrective instrument to address judicial errors and rooted yet flawed inequities; on the other hand, as a means of achieving justice and compassion, especially in cases where it is most deserved.

When it comes to cases involving battered women, executive clemency can be seen as an important tool to remedy the deficiencies of judicial decisions that rarely take into account the psychological and social factors that lead these women to act in a certain way. Women who are subjected to severe abuse for an extended period are usually ostracised by conventional justice systems, which utilise predetermined sentencing parameters that do not factor in the effects of coercion, trauma, and manipulation on the woman's ability to make rational decisions. Clemency presents a means to address such oversight, thus affording justice systems an opportunity to consider factors that may have been overlooked in the course of conventional justice proceedings. By establishing clemency as a framework for mercy, this paper contends that context is fundamental in the assessment of criminal behaviour, especially when it comes to cases of abuse where legal concepts like the principle of self-defence may not fully capture all elements of abuse and survival.

BWS, a form of Post-Traumatic Stress Disorder (PTSD), provides a way of explaining the actions of people who have been subjected to prolonged and severe abuse from their partner. BWS was first conceptualised by Lenore Walker in the latter part of the 1970s, and it posits that abuse results in learned helplessness whereby victims see themselves as unable to escape their circumstances (Walker, 1979). This condition is characterised by behaviours like fear, hyper-vigilance, and the perception of risks or danger where they do not exist, leading to actions that may seem extreme or irrational under normal circumstances.

In recognition of this phenomenon, in late 2022, the US President Joe Biden fully pardoned five drug and alcohol offenders and a woman convicted of murder in the 1970s. This could mean that their criminal records are now purged of these crimes. Among these notable cases was that of Beverly Ann Ibn-Tamas, whose narrative significantly raised awareness of BWS by highlighting why survivors might resort to violence in situations that are not traditionally seen as self-defence. At the age of 33 and pregnant, Ibn-Tamas shot and killed her husband, neurosurgeon Abdur Ramad Yussef, in their Washington, DC home on February 23, 1976. The shooting was allegedly in response to her husband's threat of eviction

(Aljazeera, 2022). Ibn-Tamas claimed she feared for her life due to his physical and verbal abuse before and during her pregnancy.

According to the *Washington Post* (Schneider, 1991), Ibn-Tamas testified that after a fight, her husband had forced her upstairs and assaulted her with a hairbrush and a pistol from their bedroom dresser. He then ordered her to leave and kicked her abdomen when she refused. She saw the weapon on the dresser and, believing her husband was about to grab it, shot him. Ibn-Tamas then attempted to escape with her 2-year-old daughter, but fired again when her husband appeared on a landing near the stairs. She noted that he seemed ready, as if anticipating her flight, and she feared he had taken another gun from their home. The White House revealed that during her trial, the court excluded expert testimony on BWS, and Ibn-Tamas was sentenced to 5 years in prison. Domestic violence expert Lenore Walker testified for Ibn-Tamas in her appeal, which was of great importance for the legal representation and judicial acknowledgement of BWS and led to a great deal of academic investigation. The White House also stated that Ibn-Tamas, now 80, went on to become a nursing director at an Ohio healthcare company, while her children achieved higher education degrees (Aljazeera, 2022).

When considering clemency applications, BWS offers a useful perspective and a basis on which to assess the behaviour of women who have committed offences against their abusers. However, the common practice in traditional legal systems requires the defendant to prove that they were in imminent danger and that reasonable and proportionate force was used to defend themselves to justify the claim of self-defence. This standard does not capture the pervasive and cumulative nature of domestic violence. This allows for clemency as informed by BWS, which enables a defendant's actions to be evaluated through a wider lens by considering the surrounding circumstances rather than just the immediate context itself, thereby considering the long-standing abuse that led them to believe their lives were in danger or that shaped their perception of danger and survival.

BWS has significantly contributed to the construction of public opinion and legal approaches to battered women. In the US and the UK, for example, the opinions of experts on BWS have contributed to and influenced clemency decisions, thereby revealing the relationship between psychology and law. The case of Beverly Ibn-Tamas in the US draws attention to the need for judicial systems to factor in and consider psychological aspects of abuse, while the UK's emerging legal mechanisms, including the Domestic Abuse Act of 2021, mirror the increasing awareness and recognition of trauma as a factor capable of influencing criminal behaviour.

2. Theoretical Frameworks

Feminist legal theory serves as a useful theoretical approach for analysing the ways in which law is gendered, especially in relation to cases of domestic violence and clemency. This theory challenges the patriarchal structures and cultural biases that are evident in many legal systems, especially those that perpetuate the exclusion of women and reinforce gender inequalities. In the context of battered women, the esoteric nature of the legal system is pointed out, where inequalities such as the underreporting of domestic violence and the prioritisation of conventional defence principles place battered women on trial at a disadvantage. Through the promotion of and advocacy for a more inclusive and extensive approach to justice, feminist legal theory endorses the consideration of trauma-related perspectives in granting clemency decisions. It commands attention to the need for an understanding of the social, economic, psychological and cultural contexts that influence women's experiences with the legal system. This theory is most useful and relevant in jurisdictions like the UK, given the recent legal reforms that sought to address to the gendered nature of domestic violence, and in the advocacy campaigns that have led to clemency for battered women in the US.

The theory of restorative justice is an efficient alternative to the traditional punitive approaches embodied in healing, accountability and the restoration of relationships. This theory focuses on the needs of victims and communities, as well as the prevention of further criminal activity by targeting the underlying causes of such behaviour rather than merely punishing offenders. When it comes to battered women, restorative justice offers a theoretical lens that makes it possible to view the actions of these

women within the broader context of their responses to victimisation and the need for survival. As a form of restorative justice, clemency acknowledges the role that flaws in the legal system play in the criminalisation of battered women. It offers a chance for governments to acknowledge these miscarriages of justice and attempt to rectify them so as to encourage rehabilitation. For example, in New Zealand, clemency practices are grounded in the principles of restorative justice and have justified the need to address the causes of domestic violence, providing women who have been battered with a means for reintegration and healing.

The principles of comparative law are useful in developing a framework for comparing clemency processes throughout various countries. By comparing and contrasting how different legal systems approach the pardoning of battered women, comparative analysis reveals effective strategies and areas for improvement. This is especially pertinent for this paper given that it aims to synthesise knowledge from the US, the UK, and the secondary jurisdictions of New Zealand, South Africa and Australia. For instance, the US has a well-documented record of clemency initiatives for battered women who kill their partners, owing to advocacy movements and judicial precedents. On the other hand, the UK offers a recent example of legal reforms that factor in a trauma-informed approach to criminal defence, clemency considerations, and decisions alike. Other jurisdictions, such as South Africa and Australia, provide rich insights into how culture, society and law coexist and influence clemency decision-making processes and general practices. In essence, comparative law principles offer a perspective through which the aforementioned dynamics can be adopted by identifying varying strategies that can be applied across different legal contexts.

In an effort to enhance the conceptual analysis in this paper, information and ideas gleaned from clemency practices in New Zealand, South Africa, and Australia are included. The experience of New Zealand also proves that clemency can exist in harmony with other legal measures in the fight against domestic violence. For instance, the country's Family Violence Act of 2018 offers a finely tuned legal approach to addressing domestic violence, which has been factored into clemency decisions for battered women.

The South African experience, framed within its distinct socio-legal landscape, provides important lessons regarding the difficulties of advancing clemency in societies fraught with persistent gender injustices (Mdlenleni et al., 2021; Segalo, 2015; Yende et al., 2024). For instance, in the case of *S v. Ferreira and Others* (2004), the appellant, following serious physical and extreme mental abuse, hired others to kill her abuser. She was convicted by a trial court who stated that she could have just walked away. She then appealed for a reduced sentence. The court acknowledged the impact of the abuse on her psychological condition, which influenced her behaviour. The moral culpability of the accused was evaluated in relation to her circumstances, emphasising the profound abuse she endured and its effect on her mental state. This demonstrates that reduced sentencing is an effective mechanism for rectifying structural injustices even in the context of challenging legal and cultural contexts. Although the court reduced her sentence, it declined to grant an acquittal due to the premeditated nature of the act.

Australian States have implemented state-specific reforms that can be used to model how clemency can be made part of a larger process of reform (NSW Government, 2024). This has occurred alongside other efforts such as the Victorian Royal Commission into Family Violence, which sought to address the issue of domestic violence generally, thus making it difficult for battered women to be punished without mercy (Caruso & Crawford, 2014).

3. Cross-Jurisdictional Clemency Practices

Assessing the historical context of providing executive clemency for battered women defendants is fundamental to understanding its effectiveness. Historically, the legal system has struggled to handle cases of battered women. Over time, legal frameworks, public views, and judicial interpretations have shaped how certain situations involving battered women are understood and handled. For example: victims of domestic violence who killed their abusers in self-defence began a campaign for legal reform in the US in the 1990s; women's rights advocacy groups across the US have sponsored clemency

initiatives to reduce the sentences of battered women, enabling women imprisoned for killing their abusers to submit a petition to the state governor for clemency under these schemes; and the early 1990s saw the manifestation of clemency schemes in Maryland, Ohio, California, Kentucky, Illinois, Massachusetts, and Louisiana (Feldman, 2024). For each clemency initiative, clemency advocates focus on three main themes: bringing the issue of these women to the state governor's attention; canvassing for the implementation of domestic violence and abuse legislation; and raising public awareness, empathy, and support for these women, who did not receive a fair trial as it did not consider the effect of prolonged abuse on their actions (Schornstein, 2016).

3.1 Clemency in the US

Executive clemency has always been an integral part of the American criminal justice system, and is authorised by the US Constitution. Specifically, Article II, Section 2 vests the president of the US with the power to grant reprieves and pardons for federal offences except in cases of impeachment. State governors have similar powers and functions, with decisions and procedures which are usually guided by advisory boards or commissions. Clemency in the US serves multiple purposes, including correcting judicial errors, mitigating severe penalties, and offering a pathway to justice when the legal system fails to consider exceptional circumstances or equitable reasons for leniency (Larkin, 2020). In some US states, the advisory board, usually the parole board, considers clemency requests, collects evidence, holds proceedings, and makes recommendations to the governor on whether to grant a pardon or commutation. Governors often heed their advisory groups' recommendations, notwithstanding their autonomy. Another administrative entity may need to affirm a governor's clemency decision in some US states. Massachusetts, for example, created the Governor's Council to check and balance gubernatorial power (Goldfarb, 2004), while Louisiana has parole boards and pardon committees, alongside governor-appointed members. In the latter state, the pardon committee can reduce an inmate's sentence, while the parole board can grant parole, although the parole board evaluates the eligibility of a prisoner for parole based on the jail term they have served. Because most women convicted for murdering their abuser serve lengthy terms, parole is unattainable; thus, their only option is to petition the pardon committee for sentence reduction or clemency after serving enough time (Schornstein, 2016). In Missouri, the governor can grant reprieves, commutations, and pardons for all crimes except treason and impeachment under Article IV, Section 7. The governor receives a non-binding recommendation from the board of probation and parole after reviewing all clemency petitions. Nonetheless, clemency remains at the governor's discretion (Stallion, 2016).

Clemency has been effective in dealing with cases of battered women to address the problems of a legal system that fails to account for the psychological effects of prolonged abuse. Most battered women who kill their husbands or partners are charged with serious offences including murder, often because traditional laws on self-defence are rigid and limited to cases where the woman was in actual and imminent threat of harm from her husband or partner. This standard does not address the implications of the cumulative effect of abuse, and as such, leaves clemency as one of the few avenues for redress.

The clemency procedure has also developed over time in the US through legal decisions as well as the activities of interested groups. A major shift occurred in the 1990s when clemency campaigns became popular, especially in Ohio and Massachusetts. Ohio was one of the first jurisdictions to consider executive clemency for battered women, establishing the legal system's awareness of the specific issues faced by battered women defendants and defining the executive branch's potential intervention to correct miscarriages of justice. In 1990, just weeks before leaving office, Governor Celeste granted clemency to twenty-five women serving long sentences for actions taken against their abusers after the Ohio Supreme Court acknowledged the battered woman defence. The governor observed that the criminal justice system had mistreated these women because their full histories of domestic violence were not presented (Wilkerson, 1990).

Clemency efforts in Ohio and Massachusetts have also seen success in other areas of this issue. Again in 1990, Ohio legalised the use of expert testimony on BWS, which spurred a clemency movement supported by Governor Richard Celeste and his wife, Dagmar, who had offered their residence as Ohio's

first women's refuge since 1976 (Wilkerson, 1990). Dagmar Celeste, a Netherlands native who majored in Women's Studies at Capital University in Ohio, initiated an abused women's support group in Marysville's women's jail when Richard Celeste became governor (Orleck, 2014). While facilitating the support group, she realised that many women had been convicted of crimes against their batterers, revealing a loophole in the justice system regarding domestic violence. In response to her discovery, Celeste discussed the issue with her husband, leading to the initiation of clemency programmes in Ohio. Twenty-one of these women were set to be released in early January 1991, while the remaining four were to serve up to 2 additional years in prison. As a condition of their release, all the women were required to volunteer 200 hours in the community, specifically in roles related to addressing domestic abuse (Wilkerson, 1990).

Prior to Richard Celeste assuming the role of governor in 1981, the Ohio Supreme Court offered a ruling in the case of *State v. Thomas* (1981). This ruling upheld the murder conviction of an abused woman, even though the trial judge had disregarded testimony from specialists regarding BWS. In March 1990, the Court reversed its previous ruling and re-evaluated its conclusion. In the well-known case of *State v. Koss* (1990), the Court overturned the conviction of a woman who had killed her abuser, ruling that her act of voluntary manslaughter was justified. This decision was based on the fact that crucial testimony from an expert on BWS had been excluded from the trial. Later in 1990, the state legislature enacted a statute that allowed the use of expert testimony on BWS during the trial of a defendant who asserted self-defence in response to allegations of murdering or assaulting her abuser (Dutton & Aoláin, 2019). Again in 1990, the governor's staff provided education to both their own organisation and the Ohio Parole Board on topics such as domestic abuse, self-defence, and the legal challenges faced by women who have been convicted of violence against their abusers (Schornstein, 2016).

Another key case study from this period is that of the Framingham Eight – eight inmates from Massachusetts' women's jail who murdered their batterers in the late 1980s and early 1990s. After meeting at a jail support group for battered women and discovering their shared experiences, they decided to embrace the term and unite to voice their concerns. To garner media attention, advocates for the support group launched a media campaign aimed at raising awareness about domestic violence and the self-defence claims of these women. By 1991, Boston media had begun extensively covering the issue of domestic violence and the cases of the Framingham Eight (Goldfarb, 2004).

At the time, Massachusetts Governor William Weld appeared to have taken a tough stance on crime. However, in 1991, the Massachusetts legislature addressed the legal needs of domestic abuse victims. The governor modified sentence clemency rules to include testimony regarding abuse that had immensely contributed to the offence. This was the first formal clemency expansion for battered women in the US, and these legislative modifications energised Massachusetts' clemency campaign. The Framingham Eight petitioned the governor for pardons in February 1992 through lawyers paid for by women's advocacy groups. They disclosed histories of abuse in their applications, arguing that they were denied a fair trial due to the now altered legislation. Seven of the eight women were tried by the Advisory Board of Pardons and Parole Board, but only two were pardoned by the governor (Schornstein, 2016).

In 1994, Illinois Governor Jim Edgar pardoned four Cook County women who had killed their abusive partners, justifying their release with BWS. He rejected clemency petitions from eight other women because they did not meet the BWS requirement (Chicago Tribune, 1994). According to governor counsel Diane Ford, the governor thoroughly evaluated all 12 petitions and found strong evidence of BWS in the cases of Christine Popp, Velma Taylor, Betty Jordan, and Mary Young – the four women granted clemency (Chicago Tribune, 1994).

In 1992, Missouri Governor John Ashcroft reduced the sentences of two battered women who killed their husbands in self-defence (Romero et al., 2004). Similarly, Juanita Thomas, an African-American woman who was convicted of murdering her abusive partner, was the first woman freed by the Michigan Battered Women's Clemency Project in 1998 through a motion for relief from judgment (Geraghty, 1998). While there is no consensus on whether battered women who kill should be forgiven, they are

treated differently by the legal system than other murder offenders. The criminal justice system should tailor its response in order to account for the severity and duration of abuse suffered by these women, acknowledging the impact of such trauma. This includes admitting the testimonies of battered women as valid evidence in their defence (Becker, 1995).

Some mistreated women who murder their abusers go through the criminal justice system without receiving adequate consideration of their abuse. Women who do not fit the established paradigm of a battered woman may not receive fair treatment. Additionally, deeply entrenched racism and prejudice often result in battered women from marginalised communities being denied equal treatment in trials. Even if the clemency authority has been used arbitrarily and without regard for justice or the public interest, each jurisdiction's administrators have exclusive discretion. Thus, clemency remains essential for ensuring the fair treatment of battered women within the legal system (Becker, 1995).

Recognising the disproportionate impact of sentencing on battered women speaks to the existence of inequalities and shortcomings within the criminal justice system. It reinforces the need for reforms that address the root causes of criminal behaviour. Clemency, by embodying fairness and compassion, stresses that each case is unique and requires individual analysis, including the survival techniques of these women. It can balance power and handle the complex issues faced by battered women across all legal systems (Afkhami et al., 2019). Another concerning observation is that law enforcement authorities are often more prompt in intervening to safeguard a perpetrator of domestic violence from being killed than they are in responding to a plea for aid from a victim of abuse (Dowling et al., 2018).

3.2 Clemency in the UK

Clemency in the UK is based on the Royal Prerogative of Mercy, which is a discretionary legal power that was originally held by the monarch and is currently exercised by the Secretary of State for Justice. This power enables the granting of pardons, the reduction of sentences, and other forms of assistance to address wrongful convictions or humanitarian concerns in specific situations. Although used less frequently than in the US, clemency in the UK has been instrumental in reducing the worst effects of the criminal justice system, especially for women who kill their abusers. The recognition of domestic abuse as a form of criminal offence and its acceptance in the legal system as a factor that may reduce the severity of a crime has also impacted clemency petitions. Recent advancements, such as the Domestic Abuse Act of 2021, have reiterated the need for a trauma-informed justice system that echoes much-needed calls for ending cycles of prolonged abuse. Nevertheless, the use of clemency is still limited, and factors like a lack of clear procedures, relatively low publicity and awareness, and mistrust among the public have a tendency to hamper its implementation.

The institution of clemency in the UK has developed from an absolute royal prerogative into a more systematic approach within the contemporary constitution. Clemency is seldom sought, and is usually granted in situations where there has been a miscarriage of justice or where the convict is terminally ill or old. Nevertheless, the growing awareness of domestic abuse as a common social problem has slowly broadened its definition and made it more applicable, extending its grace towards battered women. The Royal Prerogative of Mercy is an extra-judicial process that is intertwined with judicial processes like appeals and reviews in handling possible miscarriages of justice (Gay, 2014). Whereas decisions on clemency are made with the help of advisory panels in the US, in the UK clemency is mainly a matter of ministerial prerogative based on the informed recommendations of legal consultants and advocacy groups.

The UK has done much to ensure that considerations of domestic violence are incorporated into its legal system and therefore its clemency practices. According to the Homicide Act 1957, there are some partial defences, including diminished responsibility and loss of control of the defendant, which are very helpful in the cases of battered women. Such provisions provide for the possibility of lowering the charge from murder to manslaughter as a way of recognising the psychological and emotional factors that come with abuse. This has most recently been enhanced by the Domestic Abuse Act of 2021, which not only recognises coercive control as a form of domestic abuse but also requires the Court to have regard to the

impact of abuse during criminal trials. This Act has also affected clemency applications by offering a legal foundation for acknowledging the circumstances that lead to battered women killing their partners.

In *R v. Challen* (2019), the defendant was charged with the murder of her husband in 2011; she had been a victim of coercive control for many years (Hill & Weaver, 2019). This was a landmark case within the UK legal framework because it was one of the first to fully recognise coercive control as an element of an offence that can be considered as a mitigating factor. Challen was originally sentenced to life in prison; however, in 2019, her conviction was overturned due to fresh evidence that proved the extent of the psychological torture and abuse she had suffered. Although her case was dealt with through the appeal process rather than clemency, this shows the increasing awareness of coercive control in the UK's legal framework (BBC, 2021).

The case of Emma Humphreys became a turning point in the consideration of abuse as a mitigating factor in battered women cases (Centre for Women's Justice, 2019). Humphreys, who was sentenced to life in prison after having been convicted of killing the man who exercised control over her, had her sentence commuted due to the work of Justice for Women, a legal advocacy group that exposed the shortcomings of her trial, including the lack of consideration for the prolonged abuse that Humphreys had suffered. Her release paved way for the consideration of trauma informed approaches to clemency and influenced future reforms (McGillivray, 2021).

As a woman convicted of murdering her husband, Kiranjit Ahluwalia became a flag bearer for the idea of the need to change the approach towards dealing with cases of domestic violence. In *R v. Ahluwalia* (1992), her conviction was quashed, and as such she was released on appeal when it was established that she had been a victim of domestic violence and psychological coercion, and that culturally and legally ingrained prejudices influenced the trial (BBC, 2019). Although her case does not relate to clemency, it made a huge contribution to the reforms that define and have shaped contemporary practices.

Clemency has not exactly been an extremely important factor in ensuring the freedom of battered women in the UK. Instead, social justice organisations like Justice for Women and Southall Black Sisters have played an immense role in making society aware of the plight of women in the criminal justice system. These groups engage in lobbying for the change of laws, offering legal assistance and raising awareness of the existing structural issues that contribute to inequality.

In cases like *R v. Humphreys* (1995), it is clear that the role of advocacy is as important as that of public and media pressure, having resulted in the consideration of factors that were earlier neglected during trial. Likewise, the increased understanding of coercive control as an essential element of domestic abuse can be attributed to continued advocacy by feminist legal scholars and activists. Measures like the Domestic Abuse Act of 2021 and cases like Sally Challen's provide a basis for further development, underlining the need for considering trauma and prolonged abuse in the trials of battered women.

Under English law, battered women have historically had a tough time accessing justice. The repealed provocation defence that was scrapped in 2010 was viewed by many scholars as being gender-biased and ineffective in defending women who killed their partners in the heat of passion (Clough, 2016). The new partial defence of loss of control, which was implemented by the Coroners and Justice Act of 2009, is an attempt to come up with a better approach whereby one has to have a reasonable belief of being in imminent danger of being subjected to serious violence, and the defence of provocation includes cumulative loss of control (Clough, 2016). Although this defence is an improvement, it is not without its flaws, including the need to identify a specific provocation and the possibility of not being applicable in all cases of battered women who kill their partners.

4. The Intersection of Gender-Based Violence and Clemency

The overlap between gender-based violence and clemency reveals an important consideration within justice systems, which have often found it difficult to tackle the distinct challenges encountered by

women who have experienced abuse. The experiences of these women, frequently subjected to extended periods of domestic violence, lead them to engage in criminal activities as a final strategy for safeguarding their well-being. Nonetheless, conventional legal frameworks often overlook the multidimensional interplay of cumulative trauma and coercion that shapes individuals' actions. Clemency serves as an important extrajudicial mechanism that addresses endemic shortcomings, offering individuals an opportunity for justice when traditional defences, like self-defence, fall short.

Across the globe, legal systems are increasingly acknowledging the importance of gender-based violence in clemency applications, though the degree of success varies greatly. In regions such as the US, clemency has served as a mechanism to confront the injustices experienced by battered women. As a recognised subset of PTSD, BWS elucidates the impact of prolonged abuse on a victim's perception of danger and their decision-making processes. The acknowledgement of these issues has resulted in notable clemency cases such as that of Thomia Hunter in Ohio, where the presence of domestic abuse and the improper handling of BWS testimony played a major part in the decision to grant clemency. In the UK, the Domestic Abuse Act of 2021 brought attention to the relevance of coercive control and emotional abuse, which has the potential to reshape the legal system's perspective on clemency. The situation involving Sally Challen, whose life sentence was revoked following the introduction of evidence regarding coercive control, speaks to the growing understanding of how domestic violence influences behaviour and accountability.

BWS plays an important role in connecting the issues of domestic violence and clemency, providing a psychological framework that aids in comprehending the behaviours of women who have experienced abuse. BWS points to the profound impact of sustained abuse, manifesting in symptoms such as learned helplessness, hypervigilance, and an intensified perception of threat. The consequences of these effects may result in actions that seem excessive when evaluated through conventional legal frameworks. For instance, numerous women experiencing abuse may engage in violent actions during times when they feel a sense of safety, rather than in response to immediate danger (National Collaborating Centre for Women's and Children's Health (UK), 2010; Rakovec-Felser, 2014). This behaviour complicates the ability to satisfy the strict requirements set forth by self-defence legislation. Clemency shaped by an understanding of BWS facilitates a deeper assessment of these cases, acknowledging the psychological and emotional impact of abuse. Nonetheless, dependence on BWS has also faced criticism. There are perspectives that suggest that viewing battered women exclusively through the lens of psychological conditions may diminish their sense of agency and perpetuate stereotypes associated with passivity (Delgado-Alvarez & Sanchez-Prada, 2022; Rakovec-Felser, 2014). Moreover, the varying implementation of BWS in different jurisdictions speaks volumes towards the necessity for uniform practices in making clemency decisions.

While there are major possibilities for progress, the incorporation of gender-sensitive perspectives into clemency decisions continues to encounter numerous obstacles. The presence of gender biases in the criminal justice system frequently diminishes the validity of the accounts provided by battered women. Stereotypes surrounding victimhood, along with societal expectations regarding remorse and passivity, have a disproportionate impact on women who diverge from these established norms (Delgado-Alvarez & Sanchez-Prada, 2022). Moreover, dependence on conventional self-defence laws, which necessitate proof of an immediate threat, does not adequately address the cumulative and persistent characteristics of domestic violence. Unable to fulfil these criteria, numerous women who have experienced abuse often perceive clemency as their sole option for relief (Bakircioglu, 2009; Bettinson & Wake, 2024). However, the clemency process frequently lacks transparency and consistency, with decisions shaped by political factors and societal pushback (Larkin, 2022; Rappaport, 2020). Executives often approach the issue of clemency in cases of violence with caution, concerned about possible repercussions and the impact on their political reputation.

The availability of advocacy and legal support also represents a notable obstacle. A large number of women who have experienced abuse often find themselves without the necessary resources or understanding to effectively engage with the clemency process. Organisations dedicated to advocacy, such as Justice for Women in the UK and the National Clearinghouse for the Defence of Battered Women

in the US, are essential in addressing this disparity. These organisations offer legal support, compile records of abuse histories, and promote advocacy for policy changes. Nevertheless, their influence remains constrained, resulting in numerous women lacking sufficient representation. This points to the necessity of exhaustive reforms to guarantee that clemency is both accessible and fair for all individuals.

Confronting these obstacles necessitates an elaborate strategy, and it is crucial to broaden the scope of legal frameworks that are informed by an understanding of trauma. The Domestic Abuse Act of 2021 in the UK and California's Penal Code § 4801, which requires the consideration of intimate partner battery in parole decisions, represent relevant legislative advancements. It is essential that these frameworks are supported by the creation of independent clemency review boards, which would serve to improve both transparency and consistency in this process. It is also essential that these boards comprise specialists in domestic violence and trauma, thereby guaranteeing that decisions are made with a thorough awareness of the applicant's situation. Public awareness campaigns also play a vital role, and it is essential for advocacy groups and policymakers to collaborate in transforming societal views on clemency for battered women. This involves pointing out the fundamental failures that lead to their criminalisation and highlighting the wider societal advantages of embracing compassion and justice.

An examination of clemency practices across different jurisdictions uncovers a range of challenges and innovative approaches. In the US, the incorporation of BWS into clemency applications, alongside the proactive involvement of advocacy organisations, has facilitated significant advancements. Nonetheless, this process is heavily influenced by political factors, where choices are frequently affected by societal views and the discretion of those in leadership positions. In the UK, recent legal reforms and classical cases such as that of Sally Challen point to the promise of trauma-informed approaches; however, the use of clemency continues to be constrained. Countries like New Zealand, South Africa, and Australia offer further perspectives. Progressive domestic violence legislation in New Zealand, along with its integration of trauma-informed perspectives in clemency decisions, serves as a valuable model for other nations to consider. The distinctive socio-legal landscape of South Africa speaks to the importance of cultural influences, whereas state-specific reforms in Australia point out the necessity of harmonising clemency with more extensive legal transformations.

The overlap between gender-based violence and clemency decisions draws attention to the essential requirement for justice systems to adapt to the specific difficulties encountered by women who have experienced abuse. Clemency acts as an essential mechanism for tackling institutionalised biases and inequalities, presenting a route to justice that conventional legal systems frequently do not achieve. Through the implementation of trauma-informed strategies, the establishment of standardised clemency procedures, and the assimilation of global best practices, justice systems can more effectively navigate the intricate challenges associated with gender-based violence. By adopting this approach, clemency can serve as an important tool for promoting compassion, fairness, and equity in situations concerning battered women.

5. Challenges in Clemency Practices

Clemency serves as an imperative tool in justice systems, and is aimed at confronting framework-level injustices and providing compassion in situations where conventional legal processes may be inadequate. Nonetheless, the use of such a strategy in situations concerning battered women continues to encounter major hurdles. These challenges stem from a combination of infrastructural, legal, political, and social obstacles that together hinder its fair and efficient application. Clemency presents an opportunity for fostering fairness and compassion; however, it must be willing to confront its inherent limitations to fully unlock its potential.

A notable challenge in clemency practices is the dependence on executive discretion, which frequently results in inconsistency and unpredictability in the decision-making process. In places such as the US, the authority to grant clemency lies with governors or presidents, who may be swayed by political factors or the sentiments of the public (Krieger, 2024). The concentration of power can lead to the influence of personal biases on outcomes, thereby compromising the transparency of the process. In the UK, the

Royal Prerogative of Mercy, which is implemented based on ministerial advice, functions without established criteria (Torrance, 2024). This lack of standardisation results in a system that can be quite opaque, potentially leading to deserving applicants being overlooked. The absence of established structures across different jurisdictions speaks to the pervasive inequities present within clemency frameworks.

The presence of gender biases in legal systems adds complexity to clemency decisions concerning battered women. Societal stereotypes frequently suggest that women must portray themselves as passive and regretful victims in order to be considered deserving of compassion (Copenhaver, 2002). Women who challenge these stereotypes, whether by standing up to their abusers or demonstrating assertiveness, are frequently met with scepticism, which diminishes their chances of obtaining clemency (Copenhaver, 2002). The impact of these biases is intensified by ingrained racism and intersectional prejudices, leading to serious disadvantages for women from marginalised communities. For instance, women from minority communities may encounter heightened scepticism regarding their accounts of abuse, or may endure more severe judgements as a result of deeply rooted stereotypes (Smith, 2024).

Another major concern is the existence of inflexible legal standards that do not reflect the actual experiences of women who have suffered abuse. Conventional self-defence laws which necessitate evidence of an immediate threat frequently overlook the cumulative impact of sustained abuse, resulting in numerous battered women being unable to satisfy these requirements (McPherson, 2022). As a result, clemency emerges as their sole feasible option. The clemency process also frequently faces limitations due to insufficient legal frameworks that fail to adequately acknowledge BWS or other trauma-informed viewpoints. The irregular acceptance of BWS testimony in legal settings restricts battered women from effectively presenting thorough evidence for their clemency applications, thereby reinforcing integrated disparities.

The involvement of political factors in clemency decisions poses a serious obstacle. The perceptions of the public, influenced by representations in the media and prevailing societal views, frequently compel those in positions of authority to adopt a stance that is perceived as tough on crime, especially violent offences (Larkin, 2016). Executives might be concerned that offering clemency to battered women who commit homicide could be seen as endorsing violence, potentially resulting in political repercussions. This hesitance generates a discouraging atmosphere, inhibiting the application of clemency even in situations where justice evidently calls for it. The impact of public opinion shows the necessity of enhanced advocacy and education to foster societal backing for clemency as a valid reaction to institutional shortcomings.

The availability of legal resources and advocacy continues to pose a considerable obstacle for women who have experienced abuse and are pursuing clemency (Uygur & Skinnider, 2022). The majority of women face challenges in effectively navigating the intricate and frequently unclear clemency process. While many advocacy organisations offer legal representation and document histories of abuse, they mostly advocate for policy reforms. These organisations also frequently face challenges related to insufficient funding and excessive demands on their resources, which restricts their capacity to assist all deserving applicants. Women who are marginalised encounter a range of interconnected obstacles, such as cultural stigmas, language barriers, and fundamental discrimination, all of which hinder their ability to obtain clemency.

In light of these challenges, the following practicable opportunities and recommendations to reform and improve clemency practices, especially concerning cases involving battered women, are offered:

1. All stakeholders involved in the dispensation of justice should receive training on the psychological and behavioural impacts of prolonged abuse to ensure clemency decisions and trials alike are informed by a trauma-sensitive perspective.
2. Independent boards featuring legal experts, domestic violence advocates, and other stakeholders deemed relevant by the respective justice system should assess clemency applications

transparently and fairly, consequentially reducing the impact of undue influence throughout the entire process.

3. Clear and consistent guidelines must be put in place to adopt and acknowledge BWS and trauma-related factors as valid mitigating factors in clemency applications.
4. Advocacy groups and policymakers should educate and sensitise the public regarding systemic shortcomings and point to successful clemency cases to foster societal support for fairness and compassion.
5. International collaboration should promote the propagation of best practices and adopt flexible means to refining context-sensitive strategies to clemency across jurisdictions.
6. Digital platforms should be used to streamline clemency applications and improve, track, and enhance accessibility and transparency for marginalised individuals.

Conclusion

Clemency serves as an essential tool for confronting the institutionalised biases and injustices encountered by battered women in criminal justice systems across the globe. Clemency provides a pathway to mercy and rehabilitation, recognising the effects of enduring abuse and the constraints of conventional legal systems in tackling gender-based violence. Nonetheless, the implementation of this concept frequently encounters systemic obstacles, such as gender biases, inflexible legal standards, political opposition, and an absence of uniform procedures. The challenges highlighted here emphasise the necessity for reforms that incorporate trauma-informed principles, improve transparency, and ensure equitable access to clemency processes.

The examination of clemency practices in regions like the US and the UK reveals a landscape marked by both advancements and ongoing disparities. The US showcases the possibilities of clemency initiatives driven by advocacy and bolstered by the judicial acknowledgement of BWS and the implementation of reforms at the state legislative level. The evolving legal framework in the UK, especially the Domestic Abuse Act of 2021, emphasises the significance of incorporating trauma-informed perspectives within justice systems. Countries like New Zealand, South Africa, and Australia present valuable perspectives, showcasing approaches that utilise cultural and legal advancements to improve clemency for women who have experienced abuse. In order to fully harness the potential of clemency as an instrument of justice, it is essential for jurisdictions to embrace a more systematic and fair methodology.

The establishment of independent clemency review boards, the standardisation of application criteria, and the promotion of public awareness represent crucial measures for fostering a more equitable process. Furthermore, collaboration across different jurisdictions and the implementation of best practices can contribute to the harmonisation of clemency frameworks. This approach ensures that battered women receive treatment characterised by dignity and compassion, irrespective of their geographic or cultural backgrounds.

Clemency serves as both a means to rectify specific instances of injustice and a reflection of a deeper dedication to the ideals of fairness, equity, and compassion within our legal frameworks. By acknowledging the distinct situations faced by battered women and tackling the deeply entrenched challenges that lead to their criminalisation, clemency can act as a source of hope and a driving force for reform. In this process, clemency reinforces the function of justice systems as mechanisms for both accountability and compassion, guaranteeing that women who have suffered abuse receive the acknowledgement and remedy they rightfully deserve.

References

Afkhami, M., Ertürk, Y., & Mayer, A. E. (2019). *Feminist advocacy, family law and violence against women: International perspectives*. Routledge International Development Research Centre.

Aljazeera. (2022, December 30). *US President Biden issues pardons for drug crimes, murder*. https://www.aljazeera.com/news/2022/12/30/us-president-biden-issues-pardons-for-drug-crimes-murder

Bakircioglu, O. (2009). The right to self-defence in national and international law: The role of the imminence requirement. *Indiana International and Comparative Law Review*, *19*, 1–49.
BBC. (2019, April 3). *Kiranjit Ahluwalia: The woman who set her husband on fire*. https://www.bbc.com/news/uk-47724697
BBC. (2021, September 9). *Sally Challen defence QC leads domestic homicide review*. https://www.bbc.com/news/uk-england-surrey-58502249
Becker, C. (1995). Clemency for killers? Pardoning battered women who strike back. *Loyola of Los Angeles Law Review*, *29*(1), 297.
Bettinson, V., & Wake, N. (2024). A new self-defence framework for domestic abuse survivors who use violent resistance in response. *The Modern Law Review*, *87*(1), 141–171. https://doi.org/10.1111/1468-2230.12837
Boxall, B. (1995, January 29). Abuse expert stirs uproar with Simpson defense role: Trial: Psychologist Lenore Walker says she is testifying to bar either side from distorting data on battered women. *Los Angeles Times*. https://www.latimes.com/archives/la-xpm-1995-01-29-mn-25821-story.html
Caruso, D., & Crawford, N. (2014). The executive institution of mercy in Australia: The case and model for reform. *University of New South Wales Law Journal*, *37*(1), 312.
Centre for Women's Justice. (2019, October 10). *Who was Emma Humphreys?* Centre for Women's Justice. https://www.centreforwomensjustice.org.uk/new-blog-1/2019/10/10/xx7q615gzr5xysyqiyooi3hivqduym
Chicago Tribune. (1994, May 13). *4 who killed mates freed*. https://www.chicagotribune.com/1994/05/13/4-who-killed-mates-freed/
Clough, A. (2016). Battered women: Loss of control and lost opportunities. *Journal of International and Comparative Law*, *3*(2), Article 2.
Copenhaver, B. (2002). *A portrayal of gender and a description of gender roles in selected American modern and postmodern plays* [doctoral dissertation, East Tennessee State University]. https://dc.etsu.edu/etd/632
Delgado-Alvarez, C., & Sanchez-Prada, A. (2022). Stereotypes about battered women and victim's self-defense: Legal implications. *Journal of Interpersonal Violence*, *37*(21–22), NP21019–NP21044. https://doi.org/10.1177/08862605211055154
Dowling, C., Morgan, A., Boyd, C., & Voce, I. (2018). *Policing domestic violence: A review of the evidence*. Australian Institute of Criminology Research Report 13. https://www.aic.gov.au/sites/default/files/2020-05/rr_policing_domestic_violence_211118.pdf
Dutton, A., & Aoláin, F. N. (2019). Between reparations and repair: Assessing the work of the ICC trust fund for victims under its assistance mandate. *Chicago Journal of International Law*, *19*(2), 490–547. https://chicagounbound.uchicago.edu/cjil/vol19/iss2/4
Feldman, B. (2024). *The second look movement: A review of the nation's sentence review laws*. The Sentencing Project. https://www.sentencingproject.org/reports/the-second-look-movement-a-review-of-the-nations-sentence-review-laws/
Gay, O. (2014). *Royal prerogative of mercy- a question of transparency*. House of Commons Library. https://commonslibrary.parliament.uk/royal-prerogative-of-mercy-a-question-of-transparency/
Geraghty, S. (1998). *Clemency for battered women in Michigan: A manual for attorneys, law students and social workers*. ACLU Michigan Battered Women's Clemency Project.
Goldfarb, P. (2005). Intimacy and injury: How law has changed for battered women. In A. Barnes, *The handbook of women, psychology, and the law*. Jossey-Bass. https://lira.bc.edu/work/sc/a006c5af-2e24-4f49-86f3-e25ae47c104d
Hill, A., & Weaver, M. (2019, June 7). Sally Challen walks free as court rules out retrial for killing abusive husband. *The Guardian*. https://www.theguardian.com/uk-news/2019/jun/07/sally-challen-will-not-face-retrial-for-killing-husband
Huang, J. (2010). Correcting mandatory injustice: Judicial recommendation of executive clemency. *Duke Law Journal*, *60*(1), 131–165.
Huss, M. T., Tomkins, A. J., Garbin, C. P., Schopp, R. F., & Kilian, A. (2006). Battered women who kill their abusers: An examination of commonsense notions, cognitions, and judgments. *Journal of Interpersonal Violence*, *21*(8), 1063–1080. https://doi.org/10.1177/0886260506290206
Krieger, A. (2024, November 25). *Understanding clemency: History, impact, and Biden's potential legacy*. The Leadership Conference on Civil and Human Rights. https://civilrights.org/blog/understanding-clemency-history-impact-and-bidens-potential-legacy/
Larkin, P. J. (2016). Revitalizing the clemency process. *Harvard Journal of Law & Public Policy*, *39*, 834–916. https://doi.org/10.2139/ssrn.2862705
Larkin, P. J. (2020). Guiding presidential clemency decision making. *The Georgetown Journal of Law & Public Policy*, *18*(2), 451–502.
Larkin, P. J. (2022). Focusing presidential clemency decision-making. *Buffalo Law Review*, *70*(1), 1.
Madden, A. (1993). Clemency for battered women who kill their abusers: Finding a just forum. *UC Law SF Journal on Gender and Justice*, *4*(1), 1.

McGillivray, C. J. (2021). *Empirical extension of the theory of moral injury: Investigating the role of intrapersonal moral injury cognitions through paradigmatic models in non-offending parents of children who have experienced sexual abuse* [doctoral dissertation, Bond University]. https://pure.bond.edu.au/ws/portalfiles/portal/197623117/Cher_McGillivray_Thesis.pdf
McPherson, R. (2022). Women and self-defence: An empirical and doctrinal analysis. *International Journal of Law in Context*, *18*(4), 461–475. https://doi.org/10.1017/S1744552322000131
Mdlenleni, L., Mandyoli, L., & Frantz, J. (2021). Tenacity of Gender Inequality in South Africa: A Higher Education Perspective. *Policy and Practice: A Development Education Review*, *33*, 119–134.
National Collaborating Centre for Women's and Children's Health (UK). (2010). Women who experience domestic abuse. In *Pregnancy and Complex Social Factors: A Model for Service Provision for Pregnant Women with Complex Social Factors*. RCOG Press. https://www.ncbi.nlm.nih.gov/books/NBK62622/
NSW Government. (2024, September 17). *Royal prerogative of mercy*. Communities and Justice; NSW Department of Communities and Justice. https://dcj.nsw.gov.au/dcj/legal-and-justice/laws-and-legislation/royal-prerogative-of-mercy-and-reviews-of-convictions-sentences/royal-prerogative-of-mercy.html
O'Donnell, I. (2017). For and against clemency. In I. O'Donnell (Ed.), *Justice, mercy, and caprice: Clemency and the death penalty in Ireland* (pp. 54–84). Oxford University Press. https://doi.org/10.1093/oso/9780198798477.003.0003
Orleck, A. (2014). *Rethinking American Women's Activism* (1st ed.). Routledge. https://www.researchgate.net/profile/Annelise-Orleck/publication/308516586_Rethinking_American_Women's_Activism/links/57e55cf808aed7fe46631c16/Rethinking-American-Womens-Activism.pdf
R v. Ahluwalia, 4 All ER 889 (England and Wales Court of Appeal 1992).
R v. Humphreys, 4 All ER 1008 (England and Wales Court of Appeal 1995).
R v. Challen, EWCA Crim 916 (England and Wales Court of Appeal 2019)
Rakovec-Felser, Z. (2014). Domestic violence and abuse in intimate relationship from public health perspective. *Health Psychology Research*, *2*(3), 1821. https://doi.org/10.4081/hpr.2014.1821
Rappaport, A. (2020). An unappreciated constraint on the president's pardon power. *Connecticut Law Review*, *52*(1), 271–318.
Romero, B., Collins, J., Johnson, C., Merrigan, J., Perkins, L., Sznyter, J., & May, L. (2004). The Missouri battered women's clemency coalition: A collaborative effort in justice for eleven Missouri women. *Saint Louis University Public Law Review*, *23*(1). https://scholarship.law.slu.edu/plr/vol23/iss1/10
S v. Ferreira and Others, 4 All SA 373 (Supreme Court of Appeal of South Africa 2004).
Sarat, A., & Hussain, N. (2004). On lawful lawlessness: George Ryan, executive clemency, and the rhetoric of sparing life. *Stanford Law Review*, *56*(5), 1307–1344.
Schneider, H. (1991, February 20). MD. TO FREE ABUSED WOMEN. *Washington Post*. https://www.washingtonpost.com/archive/politics/1991/02/20/md-to-free-abused-women/faea49c2-446e-4dea-9871-73cbf21d81f9/
Schornstein, J. (2016). Lessons from the past: Revitalizing the clemency movement for battered women incarcerated for killing their abuser. *Women Leading Change: Case Studies on Women, Gender, and Feminism*, *1*(1), Article 1. https://journals.tulane.edu/ncs/article/view/1094
Segalo, P. (2015). Gender, social cohesion and everyday struggles in South Africa. *Psychology in Society*, *49*, 70–82. https://doi.org/10.17159/2309-8708/2015/n49a6
Smith, M. (2024). *Under-protected: Failures of state actors to protect black women from intimate partner violence*. Seton Hall University Student Works 37. https://scholarship.shu.edu/student_scholarship/1449/
Stallion, K. (2016). No less a victim: A call to Governor Nixon to grant clemency to two Missouri women. *Missouri Law Review*, *81*(1), 287–307.
State v. Koss, 49 Ohio St. 3d 213 (1990). https://scholar.google.com/scholar_case?case=8772153789756204912&q=State+v.+Thomas+423+N.E.2d+137+(Ohio+1981&hl=en&as_sdt=206
State v. Thomas, 66 Ohio St. 2d 518 (1981). https://scholar.google.com/scholar_case?case=15287766688766531977&q=State+v.+Thomas+423+N.E.2d+137+(Ohio+1981&hl=en&as_sdt=206
The New York Times. (1991, February 20). *Maryland's governor to free women who killed abusers*. https://www.nytimes.com/1991/02/20/us/maryland-s-governor-to-free-women-who-killed-abusers.html
Torrance, D. (2024). *The royal prerogative and ministerial advice*. https://commonslibrary.parliament.uk/research-briefings/cbp-9877/
Uygur, G., & Skinnider, E. (2022). *Understanding barriers to women's access to justice and legal aid in Türkiye*. Council of Europe. https://rm.coe.int/understanding-barriers-to-women-s-access-to-justice-and-legal-aid-in-t/1680a967d7
Walker, L. E. (1979). *The battered woman*. Harper & Row.

Wilkerson, I. (1990, December 22). Clemency granted to 25 Women convicted for assault or murder. *The New York Times*. https://www.nytimes.com/1990/12/22/us/clemency-granted-to-25-women-convicted-for-assault-or-murder.html

Yende, S. J., Hlatshwayo, L. P., Davis, M. N., & Motubatse, K. T. (2024). Persistent inequality: Understanding the challenges faced by women in South Africa despite the annual celebration of Women's Day. *Pakistan Journal of Life and Social Sciences (PJLSS)*, *22*(2), 2456–2467. https://doi.org/10.57239/PJLSS-2024-22.2.00179

Zepinic, V. (2021). Battered women syndrome: A headache for medicine and law. *Psychology*, *12*(6), Article 6. https://doi.org/10.4236/psych.2021.126052

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CZECHIA, ESTONIA AND THE EU – DIFFERENT APPROACHES TO RUSSIAN SANCTIONS POLICY WITH REGARD TO THE RIGHT TO PROPERTY

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Abstract. This article examines the legal frameworks for restricting the right to property due to international sanctions, focusing on the sanctions policies of the European Union, Czechia, and Estonia. The research aims to explore how these jurisdictions balance the public interest with the individual right to property in response to Russia's aggression against Ukraine. The principal results highlight the coordinated approach of the European Union, which emphasizes a balance between the public interest and the individual right to property as established in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. This article analyses the asset freezing and partial release mechanisms in the Czech legal framework, while the Estonian legal framework, especially after recent amendments to its International Sanctions Act, is noted for its use of sanctioned assets in prepayment for damages caused by the aggressor state. In conclusion, the author compares these different approaches within the boundaries of European and national constitutions and evaluates their strengths and weaknesses. This comparative analysis provides insight into current and proposed restrictions on the right to property within European sanctions and national legal frameworks, with the aim of contributing to the discussion on the constitutionality of certain sanction measures.

Keywords: sanctions, EU, right to property, freezing, confiscation

Introduction

In varietate concordia [2]

The objective of this article is to examine the legal frameworks for restricting the right to property due to international sanctions, with a focus on the sanctions policies of the European Union (EU), Czechia, and Estonia. The article aims to explore how these jurisdictions balance the public interest with the individual right to property in response to Russia's aggression against Ukraine.

The methods used in this article include a comparative legal analysis of the relevant legal frameworks and policies in Czechia, Estonia and the EU. The analysis involves the examination of legislative texts, legal principles, and recent amendments to assess and evaluate the practical implementation and constitutional implications of these sanctions.

Sanctions policy has evolved significantly over time, becoming a crucial tool in international relations. Historically, sanctions have been used to achieve economic, political, and military objectives, with notable examples dating back to ancient Greece (Zamarovský, 2016) and the Napoleonic era (Druláková & Zemanová, 2012). The modern use of sanctions, particularly by international organizations like the United Nations and the EU, has become more targeted over time, focusing on specific sectors and individuals (rather than states) who violate international law (Druláková & Zemanová, 2012).

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[2] *Unity in diversity*.

The EU has emerged as one of the key Western players in sanctions policy, particularly following Russia's annexation of Crimea in 2014 and subsequent invasion of Ukraine in 2022. The EU's coordinated approach to a united sanctions policy emphasizes a balance between the public interest and the individual right to property, as established in the European Convention on Human Rights (ECHR, 1950) and the Charter of Fundamental Rights of the EU (2000).

This article first provides a detailed analysis of the Czech legal framework on asset freezing and partial release before comparing it with the Estonian legal framework, which, following amendments, plans to use sanctioned assets in prepayment for damages caused by the aggressor state. Through this comparison, the article evaluates the strengths and weaknesses of these approaches and considers their alignment with broader European as well as national legal standards. This comparative analysis aims to contribute to the discussion on the constitutionality of these proposed solutions and provide insight into current and proposed restrictions on the right to property within sanctions imposed by the EU or its Member States.

1. EU sanctions policy

1.1. The emergence of the Common Foreign and Security Policy

The Maastricht Treaty, signed in 1992, marked a significant milestone in European integration, leading to the creation of the EU and the establishment of the Common Foreign and Security Policy (CFSP). The CFSP allows EU Member States to coordinate their foreign policies and make joint decisions, including sanctions, against third countries or entities. The EU uses the term *restrictive measures*, while the Czech legal framework generally uses the term *sanctions* (European Union External Action, 2023). For simplicity, the author will use the general term *sanctions* or *sanctions policy*.

1.2. The legal framework of EU sanctions policy

The legal framework of EU sanctions policy is enshrined in several founding documents, particularly the Treaty on EU (TEU) and the Treaty on the Functioning of the EU (TFEU). Article 29 of the TEU states that the EU Council adopts decisions defining the Union's approach to a specific geographical or thematic issue, and Member States must ensure that their national policies align with the Union's positions. This allows the EU Council to adopt decisions on imposing sanctions against the governments of non-EU countries, non-state entities, and other individuals.

The TFEU, particularly Article 215, provides the legal basis for implementing these decisions to ensure their uniform application across all Member States. This article states that if a decision adopted under Chapter 2 of Title V of the TEU provides for the interruption or reduction of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures.

Other EU institutions also play crucial roles in this process. The European Council sets the strategic directions and priorities of the Union in foreign policy and security. As mentioned, the EU Council adopts decisions on sanctions. The European Commission ensures the implementation of these decisions and monitors their compliance within national states. The European Parliament has a consultative role, meaning that it is informed of the measures taken and can provide feedback and recommendations (European Council, n.d.).

In addition to these bodies, the proposed measures are assessed and discussed by the relevant preparatory bodies of the Council, which may include: (i) the Council working group responsible for the geographical area in which the affected country is located (e.g., the Working Group on Eastern Europe and Central Asia for Ukraine or Belarus, the Mashreq/Maghreb Working Group for Syria); (ii) the Working Group of Foreign Relations Counsellors; (iii) if necessary, the Political and Security Committee, and (iv) the Committee of Permanent Representatives (COREPER II) (European Commission, 2024c).

1.3. The mechanism for adopting sanctions in the EU

Sanctions within the EU are adopted through a structured decision-making process requiring consensus among Member States. The EU Council acts unanimously on proposals from the High Representative of the Union for Foreign Affairs and Security Policy or Member States, as outlined in relevant legislation (e.g., Act on Restrictive Measures against Certain Serious Acts in International Relations, 2023, § 4 et seq.; discussed in section 2.3.1 of this paper).

The stages of adopting sanctions in the EU can be summarized as follows (European Council, n.d.):

(i) **Submission of proposal** – Stakeholders submit proposals to specialized council working groups (e.g., COEST for Eastern Europe).
(ii) **Adoption of decision** – The EU Council adopts sanctions unanimously. This is followed by the EU Council regulation establishing the legal framework for implementation.
(iii) **Implementation and enforcement** – The implementation and enforcement of sanctions is primarily the responsibility of Member States.
(iv) **Notification and review** – Subjects of sanctions are informed of these measures individually by letter, or through a notice published in the Official Journal of the EU. All restrictive measures are regularly reviewed.
(v) **Legal protection** – Subjects affected by sanctions can request that the EU Council review the decision. They can also challenge the EU Council's decision under Articles 275 and 263 TFEU.

1.4. Types of sanctions imposed by the EU

EU sanctions fall into three main categories (European Commission, 2024c):

(i) **Economic sanctions:** Measures such as trade embargoes and financial restrictions targeting the economic activities of a country.
(ii) **Targeted sanctions:** Actions such as asset freezes and travel bans aimed at individuals and entities violating international law.
(iii) **Sectoral sanctions:** Restrictions on specific economic sectors (e.g., energy, technology) to hinder industrial and economic capabilities.

1.5. EU sanctions regimes against the Russian Federation

The EU has imposed extensive sanctions on Russia in response to the annexation of Crimea in 2014, the non-implementation of the Minsk agreements, and aggression against Ukraine since 2022 (Global Sanctions, n.d.). Fourteen packages of sanctions have been adopted, targeting approximately 1,800 individuals and entities through asset freezes, travel bans, and bans on the export and import of goods such as technology, energy, aviation, dual-use items, and industrial goods (Council Regulation (EU) No. 833/2014, 2014).

It can be argued that a unified legal framework has been adopted at the EU level, setting goals that Member States must achieve in enforcing these sanctions (e.g., banning the issuance of permits for movement and residence to certain persons or freezing assets). Individual states are then given the space to either: (i) be more proactive, like Estonia; (ii) enforce the adopted sanctions within national constitutional limits, like Czechia; or (iii) conduct a more independent sanctions policy that may not be as strict by blocking or postponing certain important decisions made at the EU level, like Hungary (Euronews, 2024).

Current sanctions measures adopted at the EU level can be categorized as follows (EU Sanctions Map, n.d.):

(i) **Sectoral sanctions**: The regulation on sectoral sanctions includes a wide range of measures aimed at restricting Russia's economic activities. Key measures include:
   a. **Export bans**: Arms, energy, dual-use goods, luxury goods, and industrial items.
   b. **Import bans**: Oil, coal, steel, seafood, wood, and other goods.
   c. **Service bans**: Technical, brokerage, and financing services.

d. **Broadcasting restrictions**: Bans on certain Russian media outlets.

(ii) **Targeted sanctions**: This regulation introduces targeted sanctions, including asset freezes and travel bans for subjects deemed responsible for undermining Ukraine's territorial integrity, sovereignty, and independence (Council Regulation (EU) No 269/2014, 2014). Key measures include:
   a. **Asset freezes/travel bans**: Subjects undermining Ukraine's sovereignty.
   b. **Sanctions on key subjects**.

(iii) **Sanctions related to Crimea and Sevastopol**: The regulation on Crimea and Sevastopol includes, among other things (Council Regulation (EU) No 692/2014):
   a. A ban on importing goods originating from Crimea or Sevastopol into the EU.
   b. A ban on providing financing, financial assistance, insurance, and reinsurance related to the import of goods originating from Crimea or Sevastopol.

(iv) **Sanctions related to some Ukrainian territories**: This regulation includes, among other things (Council Regulation (EU) 2022/263):
   a. A ban on importing goods originating from Russian-controlled areas in Ukraine, e.g., Donetsk, Kherson, Luhansk, and Zaporizhzhia.
   b. A ban on providing financing, financial assistance, insurance, and reinsurance related to the import of goods originating from these areas.

(v) **Human rights-related sanctions**: This regulation includes, among other things (Council Regulation (EU) 2024/1485, 2024):
   a. **Asset freezes/Export controls**: Targeting individuals involved in human rights violations and repression in the Russian Federation.

It is important to note that Council Regulations (EU) No. 833/2014 and No. 269/2014 represent the legal foundation for these measures, which are designed to weaken the Russian economy and deter further aggression while supporting efforts for peaceful conflict resolution.

2. Restricting the right to property through sanctions policy

2.1. The nature of the right to property

The right to property represents one of the (if not the most) fundamental legal institutions (Fruthová & Marek, 2018). This right can be described as the legal dominion of a person (natural or legal, as well as the state) over a specific thing, which is direct and exclusive (Bohuslav, 2011). It is the strongest and most extensive real right, which operates against all other persons (*erga omnes*) (Bělovský, 2021). The right to property consists of several partial rights that together form its content: (i) *ius possidendi* – the right to hold the thing; (ii) *ius utendi et fruendi* – the right to use the thing and enjoy its fruits and benefits; (iii) *ius abutendi* – the right to change or destroy the thing; and (iv) *ius disponendi* – the right to dispose of the thing, which includes the right to sell, donate, exchange, bequeath, etc. (Skřejpek & Urfus, 1995).

To summarize, this right expresses the entitlement of subjects to own, use, and dispose of property at their discretion. It includes the right to possession, sale, lease, or transfer of property to another person (Bohuslav, 2011). Ownership can include both tangible things, such as real estate, vehicles, or land, and intangible things, such as patents, copyrights, or trademarks. The right to property is the basis for other legal fields, such as contract law, inheritance law, or intellectual property law (Kratochvíl, 2008).

The history of the right to property dates back to ancient civilizations, where land and property ownership was a key element of social and economic life (Kincl, 2007). Roman law distinguished between different types of ownership and provided legal tools for protecting the right to property (Fruthová & Marek, 2018). Over the centuries, the concept of the right to property evolved and became the foundation of modern legal systems worldwide. In the European (continental) legal environment, the regulation of the right to property closely follows the Roman regulation of the right to property.

In modern times, the right to property is still understood as a fundamental right, but it is limited by various public law regulations and obligations (Bohuslav, 2011). Its restriction from the perspective of sanctions law will be the subject of the following chapters.

2.2. Interference with the right to property by sanctions policy

One of the key aspects of the EU's sanctions policy towards the Russian Federation is the restriction of the right to property of subjects associated with or linked to the Russian Federation, whether through the freezing of assets located within the territory of EU Member States or their intended confiscation (European Commission, 2024c).

2.2.1. The protection of the right to property at the EU level

To address the freezing or deprivation of the right to property, it is first necessary to present the scope of its protection, which is contained in the founding or related treaties of the EU.

The protection of the right to property is enshrined through a dual framework: the Charter of Fundamental Rights of the European Union and the ECHR. The Charter is a legally binding document for both the institutions and Member States of the EU, while the ECHR operates within the broader framework of the Council of Europe, encompassing a set of 46 Member States. It is important to note that all EU Member States are also parties to the ECHR, creating a dual responsibility to uphold the principles of both documents. This relationship is reflected in Article 6(3) of the TEU, which states that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". This duality strengthens the protection of property rights across the EU, as Member States are bound by both instruments.

Article 17(1) of the ECHR explicitly states that:

> Everyone has the right to own, use, dispose of, and bequeath lawfully acquired possessions. No one can be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time. The use of property may be regulated by law insofar as is necessary for the general interest.

This legal provision is based on Article 1 of the Additional Protocol to the ECHR, which states that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties (Council of Europe, 1952).

These provisions create a legal boundary protecting the right to property at the EU level, and ensure that any interference with these rights is carried out only under these specified conditions. This strengthens legal certainty and the protection of individuals and legal entities throughout the EU.

From the paragraphs above, several imperatives essential for assessing whether the restriction of the right to property is carried out in accordance with the provisions for its protection can be derived. Thus, deprivation of the right to property is permissible, but it can only occur based on the public interest, in cases and under conditions provided by law, and with fair compensation in a reasonable time. In the context of sanctions policy, related considerations regarding the confiscation of the right to property arise. If we applied these considerations to the frozen assets of the Russian Federation within the territory of EU Member States and simultaneously used the imperatives of Article 17 of the ECHR, could we conclude that it is possible to deprive the Russian Federation of its right to property? Could such a process be considered confiscation?

In the author's opinion, the answer is no. Fair compensation is a key element following expropriation (almost its culmination) according to Article 17 of the ECHR, which ensures that individuals' right to property is protected even in cases where property is taken in the public interest. This principle requires that anyone

deprived of their property receives financial compensation corresponding to the value of the expropriated property, thus preventing financial harm to the owner (although the compensation may not equal the value of the property). Providing fair compensation ensures legal certainty, strengthens individuals' trust in the rule of law and state institutions, and protects individual rights by balancing the public interest with the protection of private property. Compensation must be adequate and provided in a reasonable time, ensuring that the expropriation process is not only legal but also fair and humane. It should also be noted that the notion of a reasonable time cannot be taken for granted, as will be discussed in the following chapters.

If we compare the legal regulation of expropriation with that of confiscation, the latter does not include the element of compensation. Confiscation is carried out without compensation, and often serves as a criminal sanction. A historical example of confiscation is the seizure of nobles' property during the French Revolution (Doyle, 2003). In 1792, a series of decrees were adopted that allowed the confiscation of the property of emigrants and enemies of the revolution without any compensation. This act was motivated by political and ideological reasons and led to the extensive redistribution of property in favour of the state and revolutionary forces. Therefore, the question arises as to whether the current political establishment will resort to adopting ad hoc norms serving to distort the legal order to allow confiscation despite the imperative of fair compensation in a reasonable time expressed in Article 17 of the ECHR.

Hypothetically, Article 17 of the ECHR could also be amended, but it is questionable whether such an amendment (i) would be accepted by the creator (the Council of Europe) of the ECHR, and (ii) would be accepted by the courts applying the ECHR. In this context, it is worth mentioning the judgment of the Czech Constitutional Court of 25 June 2002, file no. Pl. ÚS 36/01, one of the key ideas of which can be expressed as follows: the achieved level of protection of human rights and freedoms must not be reduced (Ústavní soud, 2002). The Constitutional Court emphasized in this judgment that the constitutional maxim according to Article 9(2)[3] of the Constitution has consequences not only for the constitutional legislator, but also for the Constitutional Court. The impermissibility of changing the essential requirement of maintaining a democratic state governed by the rule of law also contains an instruction to the Constitutional Court that no amendment to the Constitution can be interpreted in such a way that its consequence would involve a reduction in the already achieved procedural level of protection of fundamental rights and freedoms. This principle is crucial to ensuring that any legislative changes do not result in weakening the protection of fundamental rights and freedoms, which is in line with the principle of the rule of law and the protection of human rights.

At the common European level, a similar conclusion can be found in the judgment of the European Court of Human Rights in the case of *Soering v. the United Kingdom* (1989), which, among other things, established that states must not reduce the achieved level of human rights protection by allowing extradition to countries where the person would face a real risk of inhuman or degrading treatment. This principle ensures that states adhere to their obligations and do not endanger the achieved level of human rights protection (i.e., by extraditing a citizen to a country applying the death penalty).

The potential introduction of the confiscation of individuals' property without compensation would thus not be possible under the current legal framework, or it would face challenges in a potential review.

2.2.2. The use of proceeds from frozen assets owned by the Russian Federation – a forerunner to confiscation?

After Russia's invasion of Ukraine in 2022, the EU, in cooperation with international partners, decided to freeze the assets and reserves of the Russian Central Bank (CBR) held in the jurisdictions of EU Member States. These measures include a ban on any transactions related to the management of these reserves and assets, leading to their freezing (Reuters, 2024).

In February 2024, the EU Council adopted decisions and regulations clarifying the obligations of central securities depositories (CSDs) holding CBR assets and reserves. CSDs must separately record extraordinary cash balances resulting from EU restrictive measures and must also separately record corresponding income.

[3] For non-Czech readers, the author also cites the relevant provision of the Czech Constitution, namely Article 9(2), which states: "Changing the essential elements of a democratic state governed by the rule of law is inadmissible".

CSDs are prohibited from disposing of net profits from these assets. This decision lays the groundwork for a possible financial contribution to the EU budget, which would be obtained from these net profits and used to support Ukraine and its reconstruction.

In February 2024, negotiators of the European Parliament and the EU Council reached an agreement on the establishment of the so-called Ukraine Facility, meaning a package of €50 billion to support the recovery and modernization of Ukraine from 2024 to 2027 (European Commission, 2024a). This package includes €33 billion in loans and €17 billion in grants. The agreement emphasizes that Russia must bear full responsibility and pay for the damages caused by its aggression against Ukraine. The text of the agreement also highlights the importance of cooperation with international allies in achieving this goal, including the use of immobilized Russian assets to support Ukraine's recovery.

In July 2024, the EU announced the first transfer of €1.5 billion from the proceeds of immobilized Russian assets to support Ukraine (European Commission, 2024b). These extraordinary revenues were generated by EU CSDs and held by CSDs from immobilized Russian state assets. This step represents a significant milestone in the EU's efforts and a step towards using the assets of one state to rebuild another state.

The above example of using frozen CBR assets can serve as an exemplary case of restricting the right to property of a foreign state (the Russian Federation) adopted at the EU level. This measure was carried out exclusively based on a Council regulation that sets rules for managing immobilized assets. Currently, these rules apply only to Euroclear Belgium, as only this CSD holds CBR reserves and assets exceeding €1 million (European Commission, 2024b). The regulation stipulates that only CSDs meeting this condition are required to separate extraordinary income and report it to the Commission. This ensures that only relevant entities are subject to these specific obligations, allowing for the effective management and use of these funds to support Ukraine.

The above regulations, however, impact other assets located within the territory of EU Member States. The following sections aim to compare the constitutional limits on freezing or directly confiscating assets in selected EU Member States and assess how states handle these limits when implementing sanctions policy.

2.3. Constitutional protection of the right to property in Czechia

The constitutional protection of the right to property in Czechia is enshrined in both the Constitution of Czechia and the Charter of Fundamental Rights and Freedoms (Charter).

The right to property is considered one of the fundamental human rights. In the preamble and Article 1 of the Constitution, Czechia is described as a "democratic state, based on respect for human rights". In the Charter, the right to property is regulated within the second chapter (human rights and fundamental freedoms). Article 11(1) of the Charter states that "everyone has the right to own property". This provision ensures the equality of all owners before the law. Article 11(4) of the Charter then states that "expropriation or compulsory restriction of the right to property is possible in the public interest, based on law, and for compensation". Expropriation is therefore possible only under strictly defined conditions, including the public interest, a legal basis, and compensation. The wording of the Czech Charter is similar to the wording of the ECHR, except for the reasonable time requirement. The principle expressed in Article 11(4) of the Charter is crucial for the protection of the right to property and ensures that interference with these rights is carried out fairly. This means that the state can interfere with an individual's right to property only if it is necessary for the public interest and if appropriate compensation is provided (alongside legal authorization).

In concluding, the author would also mention the decision of the Constitutional Court dated 28 July 2004, in which the Constitutional Court confirmed that the protection of the right to property includes protection against unauthorized interference, and emphasized that right to property must also be protected against interference by public authorities (Ústavní soud, 2004).

2.3.1. Restriction of the right to property by the sanctions policy of Czechia

The sanctions policy of Czechia is implemented through two legal regulations, specifically (i) the Act on the Implementation of International Sanctions (2006), and (ii) the Act on Restrictive Measures against Certain Serious Acts in International Relations (the Sanctions Act, 2023). The Sanctions Act can be described as a predominantly procedural norm adopted after the Russian aggression against Ukraine, as the existing Czech legal framework allowed for the implementation of sanctions measures adopted outside the republic (by the UN Security Council or the EU) in a rigid and insufficient manner. Therefore, the Czech Parliament adopted a separate Sanctions Act effective from 1 January 2023, which introduced a national sanctions list, institutionalized the proposal of entities for inclusion on the EU sanctions list, and established rules for adopting national restrictive measures against certain entities for conduct punishable under the relevant EU regulation.

The Act on the Implementation of International Sanctions sets out the procedures and powers of the Czech state in implementing international sanctions necessary for maintaining or restoring international peace and security, combating terrorism, complying with international law, protecting human rights and freedoms, and supporting democracy and the rule of law.

Regarding property, the third part of the Act on the Implementation of International Sanctions (§§ 10–11) regulates obligations concerning property subject to international sanctions, and the fourth part (§§ 12–13c) addresses the powers and duties of state authorities and the Czech National Bank. The Financial Analytical Office (the Authority) based in Prague is the competent authority responsible for implementing sanctions policy. The Authority issues general measures imposing restrictions, prohibitions, or orders involving asset freezes or other targeted financial sanctions.

The Authority may decide on the following concerning property subject to sanctions:

(i) restriction or prohibition of dealing with such property;
(ii) seizure of property for management by the Authority if it was not surrendered upon a previous request;
(iii) taking over property for state management purposes;
(iv) sale of property or part thereof, with the proceeds, after deducting management costs, belonging to the owner of the property;
(v) exceptional use of property for reasons of special consideration (maintenance, care, and other reasons specifically listed in the Act on the Implementation of International Sanctions);
(vi) decision to create a so-called protective barrier, which means limited exercise of the right to property. This barrier is created if the application of international sanctions prevents or significantly hinders the operation of a business enterprise. The Authority may decide to create a protective barrier upon request if it is permissible and does not undermine the purpose of international sanctions.

The Sanctions Act, together with the Act on the Implementation of International Sanctions, provides a framework for implementing sanctions measures, including mechanisms for asset freezes and granting exceptions, ensuring that these measures comply with Czechia's international obligations. As illustrated above, Czech legal regulations do not allow the deprivation of the right to property without further ado (i.e., the confiscation of property), as expropriation can only be carried out for compensation, and even sanctions regulations explicitly provide that the sale of property will not be an exception in this case.

Beyond the scope discussed in this section, the author adds that Article 39 of the Charter allows for the deprivation of the right to property under criminal law. This provision states that only the law can determine what constitutes a criminal act and the penalties, including other deprivations of rights or property, that can be imposed for committing such acts. The Constitutional Court, in its ruling Pl. ÚS 16/93, further emphasized that the legal system recognizes another form of forced deprivation of the right to property in the public interest and based on law, but without compensation (Ústavní soud, 1994). This is the institution of confiscation under criminal law, the admissibility of which is established precisely in Article 39 of the Charter.

Therefore, financial penalties and property forfeiture are not covered by Article 11(1) of the Charter, as they have a constitutional basis in Article 39. However, this does not mean that the affected person cannot seek

protection of the right to property under Article 11(1) of the Charter (Kühn et al., 2022). It is important to note that this represents a theoretical departure from the strict protection of the right to property, as this penalty (property forfeiture) is imposed by courts rather exceptionally (Kovačiková, 2019). Similar forms of this penalty can be found in other European countries, such as Germany or Russia (Adamov, 2023).

2.3.2. Reflections on how Czech sanctions policy restricts the right to property

Czechia's independent sanctions policy has undergone long and complex development, culminating in the adoption of a new Sanctions Act and a comprehensive amendment to the Act on the Implementation of International Sanctions after 2020. The Authority received new powers to manage frozen assets, including their sale. The proceeds from these assets, as well as the assets themselves during the freeze period, still belong to the sanctioned entity. Both international sanctions (by the UN Security Council or the EU) and new national sanctions can be imposed on them. However, confiscation of property is not possible due to the wording of Article 11(4) of the Charter, as compensation for confiscation goes against its purpose. The current government is also not in favour of adopting ad hoc legislation that would undermine one of the fundamental rights as guaranteed by the Charter to all residents without distinction – the right to property (Vláda České republiky, 2020).

A separate area for reflection is the issue of establishing so-called protective barriers under the Act on the Implementation of International Sanctions. There is no legal entitlement to the creation of these barriers. The author believes that this opens up a significant space for subjective differentiation by the Authority when granting these exceptions. Such an environment could be conducive to the emergence of corruption. The author attempted to establish the reasons for granting or not granting a protective barrier by submitting a request under the Czech Information Act on Free Access to Information. The request concerned two hotels with very similar names located approximately 50 km apart, both owned by different owners, and both subject to restrictive measures imposed by the EU. The Authority froze them as part of the assets of sanctioned persons. In one case, the Savoy Westend Hotel in Karlovy Vary was granted a protective barrier, while in the case of the Savoy Hotel in the spa town of Mariánské Lázně, no protective barrier was established, and the company operating the hotel went bankrupt.

The author leaves aside the question of why his nearly year-long legal dispute with the Authority, in which he successfully appealed three times against the Authority's negative decisions to the Ministry of Finance as the superior authority, has so far been unsuccessful. The Authority has long unlawfully refused to disclose its decisions and allow access to its decision-making process. This may indicate a lack of publicity and an element of public control over the Authority's activities. Such differentiation, however, has no place in a democratic legal state such as Czechia.

In the context of expert assessments of the current legal regulation on restricting the right to property, it is also necessary to mention the issue of flow-through accounts and ownership structure control. Flow-through accounts, often used to circumvent sanctions, allow the transfer of funds between different entities without leaving a clear trace of the actual owner or the origin of the money (Hayes, 2024). To make sanctions policy more effective, it is necessary to introduce stricter control of these accounts and ensure the transparency of financial flows. Discussions are ongoing on the issue of reversing the burden of proof, where the account owner must prove the legal acquisition of suspicious funds (Rekonstrukce státu, 2023). The Ministry of Justice is preparing a law that would allow for the prosecution of highly suspicious transactions even without knowledge of the source crime, and that would permit the potential seizure of money. Ownership structure control is another key measure. Many sanctioned entities use complex ownership structures to hide the actual owners and circumvent sanctions. In Czechia, there is a register of beneficial owners. However, this register is often not updated and is thus uninformative. Sanctions should ideally be tightened to motivate entities to update the register. Otherwise, this is just another bureaucratic tool of the state, which is an administrative burden for law-abiding Czech companies.

2.4. The protection of the right to property in Estonia

The right to property in Estonia is protected at both the constitutional and statutory levels. At the statutory level, the right to property is defined within the Property Act (1993), which sets out owners, forms of ownership, reasons for the creation of the right to property, the content and objects of the right to property, and the principles of exercising and protecting the right to property. The Estonian Constitution extensively addresses the protection of the right to property as follows:

> The property of every person is inviolable and equally protected. Property may be taken from the owner without his or her consent only in the public interest, in the cases and pursuant to a procedure provided by law, and for fair and immediate compensation. Everyone whose property has been taken from him or her without his or her consent has the right to bring an action in the courts to contest the taking of the property, the compensation, or the amount of the compensation. Everyone has the right to freedom from interference in possessing or using his or her property or making dispositions regarding the same. Limitations of this right are provided by law. Property may not be used in a manner that contravenes the public interest. On public interest grounds, the law may provide classes of property which may be acquired in Estonia only by citizens of Estonia, by certain categories of legal persons, by local authorities, or by the Estonian government. (§ 32)

The protection of property rights in Estonia is very similar to protection under the Czech Charter or the ECHR, which it closely resembles (thanks to the inclusion of the time aspect for compensation for the expropriation proceedings). The Estonian Constitution guarantees the inviolability and equal protection of property. The right to property can be restricted in accordance with the law, and under § 32 of the Estonian Constitution, property can be taken in the public interest if provided for by law and if fair compensation is paid immediately. One of these laws for the deprivation of the right to property is the Estonian International Sanctions Act.

2.4.1. Restriction of the right to property by the sanctions policy of Estonia

The right to property in Estonia can be restricted if such a restriction is carried out in accordance with the Estonian Constitution (for reference, see the previous paragraph). This wording may give the impression that confiscation of property is not possible.

The right to property can be restricted in Estonia based on the International Sanctions Act (2019), which was extensively amended on 17 June 2024. According to § 3(3) of the International Sanctions Act, international sanctions can "ban the entry of a subject of an international sanction into the state, restrict international trade and international transactions, and impose other prohibitions or obligations". These other prohibitions or restrictions include limitations on the right to property.

In this context, § 6 of the International Sanctions Act on liability is also interesting:

> A natural or legal person, entity, or body is not held liable for applying international sanctions if they acted in good faith. The application of international sanctions is in good faith if the person, entity, or body did not know and did not have to know that their action is not in compliance with the measures provided in the legislation imposing the international sanctions.

This amended wording of the law seems to prioritize good faith in implementing sanctions policy over the wording of the sanctions policy itself. It will be interesting to see what practical consequences this provision will have.

Key restrictions on the right to property include § 14 et seq. regarding financial sanctions. Measures aimed at restricting the financial and economic activities of entities listed on the sanctions list can include:

(i) the freezing of financial assets and economic resources – a measure ensuring that sanctioned entities cannot dispose of their financial assets and economic resources;

(ii) a ban on opening and using accounts (point 5 of the law) and a ban on transactions with securities (point 6 of the law), ensuring that sanctioned entities cannot use financial institutions to circumvent sanctions. The purpose here is to prevent money laundering and terrorist financing.

The author would like to focus primarily on § 29 et seq. of the International Sanctions Act on "using assets of subject of international sanctions as prepayment of compensation for damage". In this case, the state for the first time receives the possibility to deprive sanctioned entities of their right to property without further ado (i.e., without providing corresponding compensation as required by the constitution).

According to §§ 291–292 of the International Sanctions Act, the Estonian Ministry of Foreign Affairs can decide to use the financial or other assets of a subject of international sanctions as prepayment for compensation for damage caused to a foreign state. Financial assets are used without further ado; other assets are sold, and the proceeds go towards the reconstruction of the affected state. This mechanism is activated if the damage was caused by a violation of the prohibition on the use of armed force (under Article 2(4) of the UN Charter) or a violation of the rules of the law of war. The process begins with an administrative procedure during which the Ministry of Foreign Affairs verifies whether an unlawful act causing damage occurred and whether the affected state (or an international organization or compensation fund or other mechanism on behalf of the affected state) submitted a claim for compensation that was not satisfied within a reasonable time by the aggressor state. An agreement between Estonia and the affected state should be concluded regarding the use of such seized financial assets. If all conditions are met, including a request to use the assets as a prepayment for compensation, the Ministry of Foreign Affairs can decide to seize the assets. This decision must include detailed information about the owner of the assets, a description and the value of the assets, and justification for using the assets as a prepayment for compensation. The owner of the assets is informed of this decision electronically, by mail, or by other means, and if this is not possible, the decision is published in national newspapers and the official publication. If the owner of the assets challenges the decision in administrative court, the validity of the decision is suspended during the court proceedings. This mechanism ensures that the assets of subjects of international sanctions can be effectively used to compensate for damages caused by unlawful acts.

A subject whose assets can be seized can be either (i) an entity or a legal person established in this state that is under the control of the respective state or of which more than 50% is owned by that state and which has financially or materially supported the commission of the unlawful act, or (ii) a natural or legal person whose connection or contribution to the commission of an unlawful act has been identified and proven sufficiently. The decision to use the assets for the reconstruction of the affected state is preceded by a non-public administrative procedure by the Estonian state.

This amendment to the law is an important step in sanctions policy and an ingenious solution for seizing the assets of the aggressor state and its affiliated persons for their war crimes and refusal to pay reparations.

2.4.2. Reflections on how Estonian sanctions policy restricts the right to property and its comparison with the Czech legal framework

In comparing these two jurisdictions, it is necessary to reflect on the amendment to the International Sanctions Act, which, among other things, states that in exceptional circumstances the interests of the asset owner may outweigh the need to implement the sanction measure of asset seizure for reconstruction reparations. These exceptional circumstances, however, are not specified, which can lead to ambiguities and the inconsistent application of the International Sanctions Act, similarly to the situation with the Czech Act on the Implementation of International Sanctions and the approval of protective barriers. It is also necessary to point out that during the legislative process in the Estonian parliament, a significant change occurred, where the original proposal of the amendment suggested that the sanction measure of asset seizure would be decided by an administrative court, while an amendment in parliament adopted a change that specified that the seizure and subsequent sale of assets would be decided by the Ministry of Foreign Affairs (Riigikogu, 2024). Administrative proceedings conducted by the Ministry of Foreign Affairs can be abused for political purposes, whereas proceedings conducted by administrative courts would inspire more trust in the impartiality of decision-making. A lack of independence and transparency in this process can lead to unfair asset seizures. The amendment also

does not address the protection of the rights of third parties who may be affected by the asset seizure, such as creditors or co-owners who may be negatively impacted by the forced sale or seizure of assets.

When comparing the Czech and Estonian legal regulations for implementing sanctions measures, it can be stated that § 14 of the International Sanctions Act provides a legal framework for restricting the financial activities of sanctioned entities by allowing the closure of bank accounts. The International Sanctions Act goes far beyond the Czech legal framework. In the Czech legal environment, the bet was made that banks, as regulated financial institutions, would regulate the opening and closing of bank accounts through their own autonomous regulatory rules. In his legal practice, the author has encountered situations where, although these autonomous rules may have good intentions, their implementation can deprive bank accounts of entities that are not subject to sanctions measures. Affected persons have practically no chance to legally fight or protest against the perceived unjustified closure of accounts. A bank, as a private law entity, does not have to comply with everyone in opening a bank account or maintaining it for an indefinite period. If a bank account is not opened or if the bank decides to close it, the weaker party (the client) has practically no means through which to disagree with and defend against this decision. However, in the 21st century, the existence of a bank account is essential not only for legal persons, but also for individuals. In Czechia, for example, logging into a specialized government portal (*datové schránky*) can be done through a bank account, which is the most widespread method. By not opening a bank account or closing it, legal and natural persons can lose one of the easiest ways to communicate with the state and other private law entities with established data boxes. If the regulation of bank accounts was introduced within the legislation of the Czech sanctions, it would ensure the possibility of review, as it would be a form of administrative decision (in the case of the International Sanctions Act, see § 14).

In a potential review of the constitutionality of this amendment, it is necessary to assess whether it will be found unconstitutional for violating:

- **(i)** **the right to own property** (i.e., the right to property) under Protocol No. 1 to the ECHR, which states that everyone has the right to the peaceful enjoyment of their possessions. Any restriction of this right must be lawful, legitimate, and proportionate. The absence of compensation for seized assets may violate this right, and it will also be necessary to assess the attribution of alleged violations to persons under point (ii) below, i.e., natural and legal persons;
- **(ii)** **the right to a fair trial**, which is guaranteed under Article 6 of the ECHR (i.e., the insufficient protection of the rights of asset owners affected by the sale after the proceedings at the Estonian Ministry of Foreign Affairs may thus violate this right);
- **(iii)** **the proportionality of the sanction** of deprivation of the right to property, where, according to the case law of the European Court of Human Rights, any restriction of rights must be proportionate. While the proportionality of asset seizure for legal entities controlled by the Russian state may seem relatively acceptable and worthy of approval, the mere alleged attribution of acts to natural and legal persons may not be considered proportionate.

Concerns regarding the constitutionality of the adopted International Sanctions Act have already been raised (News ERR, 2024a, 2024b).

Conclusion

The Czech Charter, the Estonian Constitution, and the ECHR do not allow for the deprivation of the right to property of sanctioned entities without further ado. In all affected cases, these constitutional documents require compensation for the deprivation of the right to property. However, providing compensation would sharply contradict the purpose of confiscation. Nevertheless, there are growing discussions and ongoing attempts to constitutionally implement the confiscation of certain assets, which are often already frozen. The first attempts in this regard can be seen at both the European level (see the seizure of proceeds from frozen assets) and in legislative activities in the field of sanctions policy in the case of the amendment to the International Sanctions Act.

Czechia, Estonia and the EU have different approaches to asset confiscation within the framework of sanctions policy, although all three jurisdictions are based on similar fundamental principles of the right to property

protection. The EU establishes a union-wide framework for sanctions measures through regulations that are directly binding on Member States. These regulations are then implemented by the states and brought to life. Measures from these regulations include asset freezes and financial sanctions aimed at restricting the economic activities of sanctioned entities.

Czechia implements sanctions measures through asset freezes, always emphasizing that this freezing is temporary. Estonia, on the other hand, adopted an amendment to the International Sanctions Act, which allows the use of the assets of sanctioned entities as prepayment for compensation for damage caused by unlawful acts, representing a stricter approach to asset confiscation. However, this mechanism may raise questions about the constitutionality and proportionality of the right to property protection, especially in the context of the case law of the ECHR. For instance, in *Hentrich v. France* (1995), the ECHR highlighted that interferences with property rights must strike a fair balance between the general interest and the individual's rights. Although this case did not involve sanctions, it underscores the necessity of proportionality when state actions limit property rights. Applying this reasoning to sanctions, one could argue that measures must be precisely tailored to achieve their aims without placing an excessive burden on individuals. This tension aligns with the judicial principle articulated by the ECHR in *J. A. Pye (Oxford) Ltd v. United Kingdom* (2007), which underscores that property rights, while not absolute, require careful balancing against collective objectives to avoid disproportionate outcomes. In conclusion, the author can state that while the Czech and European approaches emphasize the protection of the right to property and the provision of compensation, the Estonian approach represents an innovative but potentially controversial solution in the field of sanctions policy. Time will tell how well this bold solution pays off.

To address the research problem, the following recommendations can be made:

- Firstly, the EU Member States should harmonize their legal standards for sanctions across the EU in order to ensure consistency and fairness in sanction policy (i.e., the application of sanctions).
- Secondly, it is essential to enhance transparency and accountability in the implementation of sanctions policy by providing clear guidelines for the use of protective barriers and mechanisms to prevent their misuse, amongst other measures.
- Lastly, judicial review mechanisms should be strengthened to ensure that sanctions policy complies with constitutional and human rights standards. This should include providing affected parties with effective legal remedies.

These recommendations aim to improve the implementation and effectiveness of sanctions policies while ensuring the protection of the right to property and adherence to legal standards.

References

Act on Implementation of International Sanctions (2006), as amended. Act No. 69/2006 Coll.
Act on Restrictive Measures against Certain Serious Acts in International Relations (2023), as amended, Act No. 1/2023 Coll.
Adamov, J. (2023). Bezpečnostní a ústavněprávní aspekty provádění sankčních opatření [Security and constitutional aspects of the implementation of sanctions measures]. In J. Kudrna (ed.), *Právní aspekty zajišťování bezpečnosti státu: (rizika, výzvy a možnosti řešení)* [Legal Aspects of Ensuring State Security: (Risks, Challenges, and Possible Solutions)] (pp. 165–175). Praha: Wolters Kluwer.
Bělovský, P. (2021). Part one. General provisions. In J. Spáčil, M. Králík et al., *Občanský zákoník III. Věcná práva (§ 976–1474)* [The Civil Code III. Rights in rem (§ 976 – 1474)] (pp. 1–9). Praha: C. H. Beck.
Bohuslav, P. (2011). *Nabývání vlastnictví originárním způsobem* [Acquisition of Ownership by Original Means]. Praha: C. H. Beck.
Charter of Fundamental Rights and Freedoms (1993), as amended. Act No. 2/1993 Coll. https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf
Charter of Fundamental Rights of the European Union. OJ C 364, 18.12.2000. https://www.europarl.europa.eu/charter/pdf/text_en.pdf
Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012, p. 391–407. http://data.europa.eu/eli/treaty/char_2012/oj

Consolidated Version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012, p. 47–390. http://data.europa.eu/eli/treaty/tfeu_2012/oj
Constitution of the Czech Republic (1993), as amended. Act No. 1/1993 Coll. https://www.zakonyprolidi.cz/obor/ustava-a-ustavni-zakony
Constitution of the Republic of Estonia (1992), as amended. Act No. RT 1992, 26, 349 https://www.riigiteataja.ee/en/eli/530102013003/consolide
Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in view of activities undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. OJ L 78, 17.3.2014, p. 6–15. http://data.europa.eu/eli/reg/2014/269/oj
Council Regulation (EU) No 692/2014 of 23 June 2014 on restrictions on imports into the Union of goods originating in Crimea or Sevastopol in response to their illegal annexation. OJ L 183, 24.6.2014, p. 9–14. http://data.europa.eu/eli/reg/2014/692/oj
Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's activities destabilising the situation in Ukraine. OJ L 229, 31.7.2014, p. 1–11. http://data.europa.eu/eli/reg/2014/833/oj
Council Regulation (EU) 2022/263 of 23 February 2022 concerning restrictive measures in response to the recognition of the independence of the non-government-controlled territories of Donetsk and Luhansk regions of Ukraine and the deployment of Russian armed forces in those territories. OJ L 42I, 23.2.2022, p. 77–94. http://data.europa.eu/eli/reg/2022/263/oj
Council Regulation (EU) 2024/1485 of 27 May 2024 concerning restrictive measures in view of the situation in Russia. OJ L, 2024/1485, 27.5.2024. http://data.europa.eu/eli/reg/2024/1485/oj
Doyle, W. (2003). *The Oxford history of the French Revolution*. Oxford.
Druláková, R., & Zemanová, Š. (Eds.). (2012). *Mezinárodní kontext české sankční politiky* [The International Context of Czech Sanctions Policy]. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk.
EU Sanctions Map (n.d.). *Russia*. Retrieved October 17, 2024. https://www.sanctionsmap.eu/#/main/details/26/?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D
Euronews. (2024, October 8). *Hungary won't agree to change sanctions on Russian frozen assets until US elections*. https://www.euronews.com/my-europe/2024/10/08/hungary-wont-agree-to-change-sanctions-on-russian-frozen-assets-until-us-elections
European Commission. (2024a). *Ukraine Facility*. https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy/countries-region/ukraine/ukraine-facility_en
European Commission. (2024b, July 26). *First transfer of €1.5 billion of proceeds from immobilised Russian assets made available in support of Ukraine today*. https://neighbourhood-enlargement.ec.europa.eu/news/first-transfer-eu15-billion-proceeds-immobilised-russian-assets-made-available-support-ukraine-today-2024-07-26_en
European Commission, (2024c, October 25). *Sanctions adopted following Russia's military aggression against Ukraine*. https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en
European Convention on Human Rights (1950). https://www.echr.coe.int/documents/d/echr/convention_ENG
European Council. (n.d.). *EU sanctions against Russia explained*. Retrieved October 7, 2024. https://www.consilium.europa.eu/en/policies/sanctions-against-russia-explained/
European Union External Action. (2023, October 7). *European Union sanctions*. https://www.eeas.europa.eu/eeas/european-union-sanctions_en
Fruthová, V., & Marek, N., (2018). *Originární způsoby nabývání vlastnictví v římském právu a dnes* [Original Methods of Acquiring Ownership in Roman Law and Today]. Praha: Auditorium.
Global Sanctions. (n.d.). *EU regulations*. Retrieved September 20, 2024. https://globalsanctions.com/sanctioning-states/eu/regulations/
Hayes, A. (2024, 31 August). *What Is a Flow-Through (Pass-Through) Entity, Types, Pros & Cons*. Investopedia. https://www.investopedia.com/terms/f/flow-through.asp
Hentrich v. France, ECtHR, 3 July 1995, App. No. 13616/88. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57928%22]}.
International Sanctions Act (2019), as amended. Act No. RT I, 19.03.2019, 11. https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/508072024005/consolide

J. A. Pye (Oxford) Ltd v. The United Kingdom, ECtHR, 30 August 2007, App. No. 44302/02. https://hudoc.echr.coe.int/eng?i=001-82172
Kincl, J. (2007). *Gaius: Učebnice práva ve čtyřech knihách* [Gaius: Textbook of Law in Four Books]. Plzeň: Aleš Čeněk s.r.o.
Kovačiková, V. (2019, December 12). *Několik poznámek k trestu propadnutí majetku* [Several Notes on the Punishment of Forfeiture of Property]. Právní prostor. https://www.pravniprostor.cz/clanky/trestni-pravo/nekolik-poznamek-k-trestu-propadnuti-majetku
Kratochvíl, Z. (2008). *Obecné pojetí vlastnického práva* [The General Concept of Property Rights]. https://is.muni.cz/th/yr0pw/Obecne_pojeti_vlastnickeho_prava.pdf
Kühn, Z., Kratochvíl, J., Kmec, J., Kosař, D., et al. (2022). *Listina základních práv a svobod Velký komentář* [Charter of Fundamental Rights and Freedoms: Comprehensive Commentary]. Praha: Leges.
Law of Property Act (1993), as amended. Act No. RT I 1993, 39, 590 https://www.riigiteataja.ee/en/eli/510072014007/consolide
News ERR. (2024a, May 18). *Legality of Russian assets confiscation law controversial*. https://news.err.ee/1609345965/legality-of-russian-assets-confiscation-law-controversial
News ERR. (2024b, May 31). *Justice chancellor: Russian asset seizures not immune to lawsuits*. https://news.err.ee/1609358493/justice-chancellor-russian-asset-seizures-not-immune-to-lawsuits
Rekonstrukce státu, (2023, October 11). *Česká pračka na špinavé peníze pojede ještě bezmála 500 dní* [The Czech Money Laundering Machine Will Keep Running for Almost 500 More Days]. https://www.rekonstrukcestatu.cz/archiv-novinek/ceska-pracka-na-spinave-penize-pojede-jeste-bezmala-500-dni
Reuters. (2024, 1 August). *Legal challenges of confiscating Russian central bank assets to support Ukraine*. https://www.reuters.com/legal/transactional/legal-challenges-confiscating-russian-central-bank-assets-support-ukraine-2024-08-01/
Riigikogu. (2024). *Rahvusvahelise sanktsiooni seaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seadus 332 SE [Act 332 SE: Amending the International Sanctions Act and Related Laws]*. https://www.riigikogu.ee/ru/deyatelnost/zakonoproekty/eelnou/d2665559-f09b-43ec-9c69-5fdb5fd1cdae/rahvusvahelise-sanktsiooni-seaduse-muutmise-ja-sellega-seonduvalt-teiste-seaduste-muutmise-seaduse-eelnou-332-se/
Skřejpek, M., & Urfus, V. (1995). *Římské právo [The Roman law]*. Praha: C. H. Beck.
Soering v. the United Kingdom, ECtHR, 7 July 1989, App. No. 14038/88. https://hudoc.echr.coe.int/eng?i=001-57619
Treaty on European Union (consolidated version). OJ C 326, 26.10.2012. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3AC2012%2F326%2F01
United Nations Charter (1945). https://www.un.org/en/about-us/un-charter/full-text.
Ústavní soud (1994, May 24) [Constitutional Court]. *Decision Pl. ÚS 16/93*. https://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-16-93
Ústavní soud (2002, June 26) [Constitutional Court]. *Decision Pl. ÚS 36/01*. https://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-36-01
Ústavní soud (2004, July 28) [Constitutional Court]. *Decision Pl. ÚS 599/03*. https://www.zakonyprolidi.cz/judikat/uscr/i-us-599-03
Vláda České republiky (2020, May 10). *Deník N: Vláda zvažuje konfiskaci zmrazeného ruského majetku. Obnášelo by to nový ústavní zákon* [Deník N: The Government Considers Confiscation of Frozen Russian Assets. It Would Require a New Constitutional Law]. https://vlada.gov.cz/cz/clenove-vlady/pri-uradu-vlady/michal_salomoun/z-medii/denik-n-vlada-zvazuje-konfiskaci-zmrazeneho-ruskeho-majetku--obnaselo-by-to-novy-ustavni-zakon-197646/
Zamarovský, V. (2016*). Řecký zázrak* [The Greek Miracle]. Praha: Garamond.

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