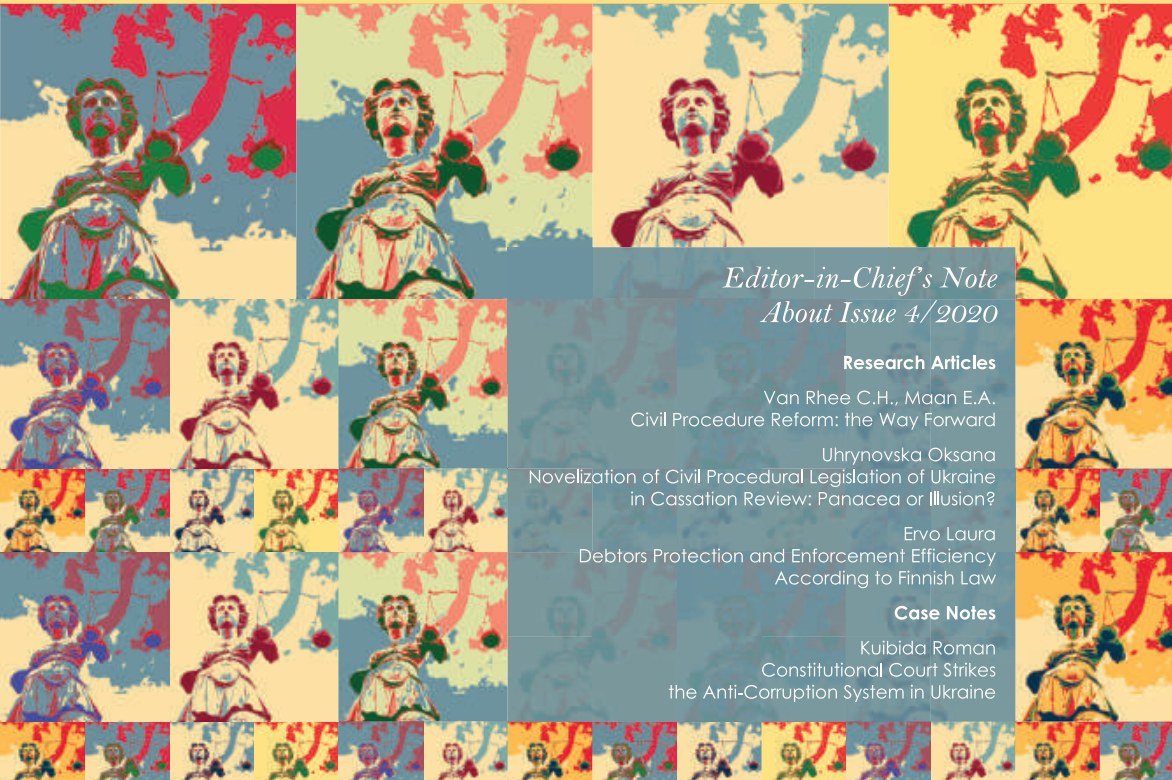
ISSN 2663-0575

ACCESS TO JUSTICE IN EASTERN EUROPE



ACCESS TO JUSTICE IN EASTERN EUROPE

Founded by East European Law Research Center

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ISSN 2663-0575
EELRC
Publishing House VD 'Dakor'

Access to Justice in Eastern Europe

Issue 4 (8) December 2020

doi.org/10.33327/AJEE-18-3.4

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ABOUT ISSUE 4/2020

This AJEE issue begins with the article of *C.H. Van Rhee and E.A. Maan*, which is based on a report evaluating the new Ukrainian Civil and Commercial Procedural Codes implementation. The article is supplemented with the questionnaires used to collect data due to the great interest to their content and its correlation to conclusions. The recent reform of procedural law in Ukraine seems to be one of the most spectacular parts of the general reform of judiciary and related institutions within the course of European integration of Ukraine. The goals and the interim results of this process are among the most favorite topics for researchers and now we have a unique opportunity to acknowledge the assessment of leading European experts in this field.

The procedural issues of cassation review in Ukraine is in the spotlight of this issue. The ongoing changes of civil procedural legislation have introduced so-called filters of cassation, which should help to avoid overloading of the Supreme Court - each year they receive more than 20, 000 applications, which is 500 applications per each Cassation Court judge annually. The article by *Oksana Uhrynovska* gives detailed research of the mentioned filters and assesses them as a positive step in forming the cassation appeal institution, in particular, letting the Supreme Court in Ukraine be a court of law, not facts.

The question of a judge position as a main representative of judiciary system, a face of judiciary, is always topical. Recent process of Ukrainian judges lustration has illustrated the phenomenon of mixed political and social impacts with the doubted results. In the article of *Olena Ovcharenko and Tetiana Podorozhna* deep analysis of the judges lustration in Ukraine is presented.

The issues of interference with the peaceful enjoyment of property require proportionnality of interference, which are profoundly studied in the article of *Oksana Kaplina and Serhiy Fomin*. Ukrainian examples illustrating this issue contribute to to the general approach developing.

Concluding the part with the research articles, we are happy to present *Laura Ervo's* contribution related to the debtor's protection and ensuring the enforcement efficiency. The Finnish law gives us some answers to the important questions of human rights protection, when enforcement of decision is going to happen.

A few notes have been included in this issue due to their value and relevance. In particular, the note related to the the constitutional crisis in Ukraine, which happened in recent months due to the imbalance of executive and judiciary branches. *Roman Kuibida's* contribution gives us an opportunity to look more deeply inside the ongoing anti-corruption problems of Ukrainian reality.

The next note includes some interesting remarks devoted to the criminal liability for the infringement of IP rights.

The topic of protection and risks of illegal divulgation of banking secrecy in Ukrainian law was analysed in the note. Some of the author's recommendations concerning the bank secrecy's apparent risk are worth attention of our audience.

Last, we are happy to announce that our Editor-in-Chief has become a member of European Association of Science Editors (EASE). Conveying our sincere willingness to cooperate and to contribute to the activities of the EASE, we express our great support of values disseminated by this association!

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Access to Justice in Eastern Europe,
Issue 4 (8) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com
10.33327/AJEE-18-3.4

C.H. van Rhee, E.A. Maan 'Civil Procedure Reform: The Way Forward' 2020 4(8) Access to Justice in Eastern Europe 180-208
10.33327/AJEE-18-3.4-a000035

CIVIL PROCEDURE REFORM: THE WAY FORWARD[1*]

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1 This article is based on C.H. van Rhee, E. Maan (co-author R. Kostur), 'Monitoring of Implementation of Civil and Commercial Procedural Codes. Final Report', prepared with the financial support of the European Union within the EU-funded Project PRAVO-Justice.

* *Received: 21.10.2020. Revised: 06.11.2020. Approved: 24.11.2020.*

This article is based on a report evaluating the implementation of the new Ukrainian Civil and Commercial Procedural Codes. A multiple-choice questionnaire and an additional questionnaire for conducting in-depth interviews with selected stakeholders were used in order to collect data (see Appendix). This approach allowed for the identification of problematic areas in procedure and court organisation, for the collection and statistical elaboration of data on the implementation of the Codes, and for the identification of measures to improve court practice and organisation and, consequently, for enhancing trust in the judicial system.

For the purposes of the report, monitoring tools were complemented by court visits, bilateral interviews, and roundtables in different regions of Ukraine. These additional sources of information enabled the experts to develop informed observations on the specifics of the Codes and on the framework of their implementation. The research has resulted in a set of recommendations which are listed in the conclusion of this paper.

Keywords: *Ukraine, Code of Civil Procedure, Code of Commercial Procedure, Civil Justice, Litigation, Courts, Evaluation.*

1. INTRODUCTION

Authorities in Ukraine attach high importance to the new Civil and Commercial Procedural Codes and their proper implementation, aiming at the improvement of the functioning of the judiciary in civil and commercial cases and increasing trust in the judicial system. The objectives of procedural law reform in Ukraine are similar to the objectives of procedural law reform in other jurisdictions: improving the quality of the legislation (including access to justice and effectiveness of proceedings) and increasing the efficiency of proceedings (including cost-effectiveness, reasonable costs, and reducing the length of court proceedings). Instilling trust in the judicial system is another aim.

Within the context of the EU Project Pravo-Justice, a Procedural Codes Monitoring (PCM) mission was launched to analyse the implementation of the new Civil and Commercial Procedural Codes (new versions of these Codes were adopted in October 2017 and entered into force in December 2017). A selection of outcomes of the mission are presented in this article (see also the Appendix), and they can be used as a starting point for the introduction of the necessary practical measures to improve the implementation of the Codes and the identification of the actors involved in the implementation of such measures.

The experts have taken note of the outcomes of two other projects:

- The EU Twinning Project 'Strengthening the Institutional Capacity of the Supreme Court in the Field of Human Rights Protection at the National Level' executed by consultants from Germany, Austria, Latvia, and the Netherlands.
- A bilateral project between Ukraine and the Netherlands aimed at developing guidelines for court practice (see below).

Findings and ideas from these projects have also been incorporated in the present report.[2]

2 Materials regarding these projects are in the possession of the authors and can be consulted on request.

2. IMPLEMENTATION OF THE CIVIL AND COMMERCIAL PROCEDURAL CODES IN UKRAINE: FINDINGS AND OBSERVATIONS

Analysis of the implementation of the new Civil and Commercial Procedural Codes in Ukraine has led to a number of findings and recommendations, which concern such spheres as Human Resources, Legislation, Soft Law and Judicial Culture, Organisation, Working Conditions and Facilities, and the Bar. The analysis of each of these spheres is given in detail in this paper.

2.1. Human Resources

Training for New Judges

In Ukraine, those who want to become a judge are trained for a period of one year. It is questionable whether such a short training period is sufficient, especially for recently graduated candidates. In the Netherlands, it takes ca. 7 years between graduation and appointment as a judge. In France, the training of future magistrates takes almost four years after a severe selection process, whereas in England and Wales judges are mainly recruited from among experienced (usually 20 years or more) barristers. A longer training period than currently present in Ukraine would allow judges to acquire the necessary skills to administer justice, for example, where it concerns conducting hearings, attempts to settle cases, and presenting a proper analysis of the case to the parties. Improvement of skills will also foster more trust in the judiciary with the public at large.

Continuous Training of Judges

In Ukraine, continuous training is provided to judges on a tri-annual basis by the National School of Judges (10-day courses). Such training is without doubt useful, but the experts are of the opinion that the way training is organised should be amended.

In light of the introduction of the new Codes, it would be useful to organise focused and targeted training for all judges in order to ensure that they understand the new approach advocated by these Codes (more adversarial, less inquisitorial). Also, the new rules on disclosure require proper preparation. Unfortunately, no targeted courses were offered before the introduction of the Codes and, subsequently, the introduction suffered considerably.

Short (e.g. two days) and frequent (every four months) training sessions would be advisable. This would allow judges to focus on issues that prove to be problematic under the new legislation. Short training sessions at relatively short intervals allow judges to become familiar with the new rules and allow them to directly implement what they have learned. Training sessions should preferably be organised at the local and/or regional level, and they should also be open for attorneys, therefore, allowing interaction between attorneys and judges. Initially this may not be appreciated by Ukrainian judges, but experience in other advanced jurisdictions that have embraced the idea that litigation is the joint responsibility of all actors involved, has proven that interaction between judges and attorneys is beneficial. It creates common expectations

and mutual understanding, which is very beneficial for the efficient administration of justice. It also creates trust in the justice system.

Position and Remuneration of Judges

The system of remuneration of judges should reflect the role the judiciary has to play within society. The new Codes aim at a thorough preparation of cases at first instance. On appeal, only facts established at first instance should be taken into consideration; new facts cannot be introduced. This means that litigation at first instance is central in the life of a lawsuit. Obviously, such an approach requires experienced and motivated first-instance judges. This can only be achieved if the career prospects and remuneration of judges are in line with their responsibilities. In this respect, the observation in the Twinning Report (see the introduction above) that a better quality of the first instance courts will lead to a lower number of appeals should be highlighted.

It is a serious concern that the present position of a judge is not very attractive at many courts and in various regions of Ukraine: unpleasant working conditions, the constant threat of disciplinary proceedings (see below), modest remuneration, understaffed courts, a high workload, and a negative image with the public at large are just a few circumstances that may not be attractive to many professionals.

Staffing and Size of Courts

The experts noted that the number of judges in the courts was frequently below the required number to execute all the necessary tasks. The Twinning report contains some statistics: the number of judges in the first instance courts is about 60% of the number that is needed; on appeal only 50% of the judges required to handle civil cases is present; and in the commercial appellate courts the number of judges is 71%.

Introducing new Procedure Codes when courts are severely understaffed is not a good idea, to put it mildly. Understaffing is especially problematic when courts are relatively small, which is the case with many of the first instance courts in Ukraine. This makes these courts vulnerable in case of vacancies or illness, facilitates improper influencing of judges, does not allow for specialisation, and makes organising court work in a systematic way exceedingly difficult. Therefore, the merging of courts according to clear criteria would be helpful. The creation of general courts of first instance would be advisable, as is happening in many European jurisdictions, especially the most efficient ones. In the Netherlands, for example, such courts serve a population of ca. 1.5 million. The territorial jurisdiction of appellate courts in the Netherlands covers a population of ca. 5 million.

During interviews with stakeholders in Ukraine, it appeared that one of the (many) objections against larger courts concerns access to court and the visibility of the court system. This objection may be countered by creating central courthouses in the larger cities with trial centres in the region at a driving distance of, for example, about one hour from the central courthouse. On set days a selection of judges from the central courthouse would travel to the trial centres for hearings, and the local front office of the registry would facilitate their work. The suggested changes are of course major, but

if Ukraine aims at a modern and well-organised court system, such changes cannot be omitted (examples of jurisdictions where this approach has been chosen are the Netherlands, Sweden, and England and Wales).

Disciplinary Proceedings Against Judges

Judges fear disciplinary proceedings being brought against them. In Ukraine, litigants bring disciplinary complaints frequently. This often occurs as part of procedural tactics or if they only disagree with the conclusions of the judge in their case. The fear for disciplinary proceedings makes judges feel restrained in the way they handle cases. As a result, they are not willing to use their discretionary powers to improve the way cases are litigated. The experts find it unusual that in cases like this disciplinary proceedings can be brought at all. They know that disciplinary proceedings are often abused in this way in Socialist systems where the Executive tries to control the Judiciary, but this should not happen in democratic, liberal societies.

It seems that the use of disciplinary complaints is rather widespread in Ukraine. In liberal, democratic societies, disciplinary proceedings should only aim at unacceptable behaviour of judges, e.g. where judges accept bribes or treat the litigants in a disrespectful manner. Such disciplinary proceedings are not meant to target the professional decisions of the judge in litigating cases. These decisions should only be subject to appeal and cassation. In situations where disciplinary proceedings are justified, one could consider measures to prevent abuse as much as possible. In the first place one could prescribe that attorneys, before they submit a disciplinary complaint against any judge, must have consulted the local Dean of the Bar and must state in their complaint that they have done so, mentioning the point of view of the Dean. In this way, the body in charge of overviewing the ethical behaviour of attorneys is informed about developments. Secondly, it would be advisable to have the president of the court handle small complaints and complaints that are clearly inadmissible (a complaint against the reasoning of the judge or against the decision itself) in order to deal with them within a short time-frame. Finally, requiring payment of a court fee for such complaints might be useful to prevent unmeritorious complaints. This fee should only be paid back when the complaint is wholly or partly successful. In this way, the fee would serve as a kind of fine for unmeritorious complaints.

2.2. Legislation

International Developments

One of the issues discussed at round tables and during interviews was that the new Ukrainian legislation is sometimes not in line with international developments in the area of civil and commercial procedure.[3] During the last few decades, many European jurisdictions have introduced far-reaching reforms in civil procedure. These reforms

3 Here one should also refer to the ELI/UNIDROIT Model European Rules of Civil Procedure, which were recently approved by both institutions and which will be published soon.

have several features in common. They put an emphasis on the obligations of the parties and their attorneys in preparing their case well before it is brought to court, and they reduce the number of motions that may be submitted in individual cases. Additionally, they provide the judge with the necessary case-management powers in conducting the lawsuit, and they aim at avoiding procedural complications. In Ukrainian legislation traces of these aims can also be found, but the experts feel that this is not always the case in actual court practice.

Preparation of the Implementation of New Legislation

Regarding the introduction and implementation of the new rules, the experts firstly find it remarkable that many respondents are not aware of an official document explaining the aims and purposes as well as the underlying principles of the new legislation. Secondly, the number of amendments to the draft legislation proposed by Parliament (apparently some 5,000 in total) is surprising. Such amendments, especially if introduced in great numbers, harm the consistency of the law as well as its clarity and structure. Parliament should concentrate on the great outlines of technical legislation and not on details. Details should be left to specialists in drafting legislation, as is the case in the majority of European jurisdictions. Thirdly, the time between the adoption of the Codes by Parliament and their entry into force was too short. This meant that those who have to work with the new legislation could not prepare themselves for the far-reaching changes that were introduced. It appeared to the experts that no or almost no training was offered to prepare for the implementation of the new Codes. It is, therefore, not a surprise that first experiences were difficult and sometimes confusing. The experts doubt that the new rules can be applied faithfully in practice. According to some respondents, the new rules are even ignored and judges continue hearing cases in the familiar manner from before the introduction of the new legislation (at several law schools it was stated that teaching had not been adapted to the new legal reality).

Notification of Court Documents and Other Procedural Acts

There are frequent problems with notification, which is surprising in an age of instant, electronic communication. The most fundamental solution to these problems would be transferring the responsibility for proper notification in civil and commercial litigation from the court to the parties. The parties should make use of the services of specialised private bailiffs for locating the opponent party and subsequent notification (private bailiffs have been introduced recently in Ukraine in addition to bailiffs employed by the state). The costs of notification should be borne by the parties and not by the court. This may be an incentive for parties involved in litigation to ensure notification in a cost-efficient manner by accepting documents and/or motions from the other party without formalities. Costs of notification are part of litigation costs and should in the end be borne by the losing party. Such costs should not be borne by the courts (as is currently the case) and this would result in a reduction of expenses incurred by the State.

Another, more practical approach to solve notification problems could be the following: notification is done as much as possible through electronic means, if possible, through

the lawyer of the party that needs to be notified (lawyers should have a valid e-mail address for notification). If parties or their lawyer are not notified in the correct manner but nevertheless make an appearance in court, the right to claim that notification was defective is precluded. It is surprising that nothing of the kind has been considered when drafting the new Procedural Codes.

Citizens should, in the opinion of the experts, not be able to avoid notification. They should have an official address for notification, and notification should be valid if the citizen has been served at the correct address. This could be either a physical address or an electronic address.

The experts have the impression that often Ukrainian citizens are over-protected against rightful claims of creditors and that they have many possibilities to avoid being notified. This debtor-friendly approach is harmful for the economy. Debtors in need of protection should be protected by the State or society at large (social security measures), and not to the detriment of individual creditors who rightfully claim payment for services provided.

Related to this is the need to oblige courts to include the default interest rate (either starting from the submission of the claim or the date of the judgment) in judgements ordering the debtor to pay a certain amount of money.

2.3. Soft Law and Judicial Culture

Practice Directions

Not everything can be regulated by law. Additional rules and regulations will be necessary outside the Codes. Experience in other European jurisdictions shows that flexible, practical guidelines drafted by those who have to apply the rules (judges and attorneys) are often very successful. Regarding this topic, a project is currently being executed in Odessa, led by Judge Esther de Rooij, member of the board of the First Instance Court of Amsterdam. Three courts are participating in this project (the Court of Appeal of Odessa and the first instance courts of Malinovky and Izmaiel regions). Participants have agreed to draft two sets of guidelines/practice directions. One of these concern civil cases, while the other covers criminal litigation. The Ukrainian High Council of Judges has approved of the project and the Supreme Court has agreed to cooperate. It is expected that the project will continue for the next two years on the basis of a Matra-funded bilateral project (Ukraine and the Netherlands). The project deserves attention and support.

Guidelines may be the result of meetings of the leadership of the courts with the heads of the local or regional Bar Associations. At these meetings, the implementation of the rules from the Codes can be evaluated and solutions to the manifested problems can be agreed upon. These solutions should then become part of the guidelines. Of course, there should be transparency in organising meetings and drafting guidelines in the sense that interested persons have to be informed about the meetings, the agenda, and the participants beforehand. In such a way, the idea of a judicial network (consisting of, amongst others, representatives of clients, attorneys, court registries, courts, and enforcement agents) can be realised.

Meetings and guidelines as mentioned above are absent in Ukraine. This is problematic, for example, as it results in an inflexible system and practices that may differ from one court to another.

Disregarding the New Rules

It seems that in Ukraine, the idea that new rules are capable of changing practice and behaviour is firmly believed in. Experience shows, however, that just changing the rules does not lead to a change in practice and behaviour. In order to introduce changes, the new rules need to be accompanied by measures facilitating their implementation.

An example of a change in the rules which has not resulted in a change in practice is the new procedural track for so-called 'minor cases' (i.e., small claims; Art. 278 and following Ukrainian Code of Civil Procedure). It is not often used since litigants prefer hearings, which are absent in this track. The many detailed rules on the minor cases track do not help to change this situation. A more straightforward approach would have been to lay down that cases under a certain value must be heard in summary proceedings unless the court decides otherwise (obviously, no appeal should be allowed against such a procedural decision). In addition to this rule, the legislature should create working circumstances for judges facilitating them to apply this rule strictly.

Another rule that is often ignored lays down that new facts cannot be introduced on appeal. There does not seem to be a consistent approach regarding this matter by the appellate courts. Some judges and lawyers stated that even the Supreme Court is too lenient regarding this matter. This results in a situation where first instance litigation is not taken seriously since the case can be litigated again on appeal. Parties not only have rights, but also (procedural) obligations and commitments; if they fail to comply with these, the court should draw the proper procedural consequences. The credibility of the system requires that the appellate courts maintain the rules strictly. They should make clear in the reasoning of their judgements that according to the applicable legislation, new facts cannot be introduced on appeal. It goes without saying that the Supreme Court has an important supervisory role in this respect.

Here, attention may also be paid to the order for payment procedure, which in its current form is not successful. This may be due to the fact that there are incentives for debtors in the current system to file opposition against orders for payment (which opposition then transforms the procedure in an ordinary lawsuit). Such incentives may be delays in the ordinary procedure and enforcement that allow them to postpone paying their debts.

Judicial Discretion

The experts have the impression that the new rules are sometimes very detailed, preventing judges from using discretion and dealing with cases according to their specific features. In a well-working justice system, one should give the professional judge sufficient trust to handle cases in the appropriate manner, using their expertise. Experts find support in the Twinning Report and argue that it is the role of the judge to understand the purpose of law in society and to help the law to achieve its purpose, bridging the gap between law and society.

In general, the experts note that in Ukraine, much court time is being used for observing formalistic rules. An example is the rule that documents need to be summarised orally in a court hearing. The experts noted that the lawyers attending these hearings were not in a position to add much to the court proceedings apart from listening to the summary of the judge. Such wasteful use of court time should be prevented, if necessary, by the fiction that documents have been read aloud in court when they are listed in an inventory signed by the parties and the judge.

Early Oral Hearing

An early oral hearing where the case is discussed between the judge and the parties/attorneys is beneficial for efficiency. Such a hearing could be scheduled after the statement of defence has been submitted. During this hearing, the judge and the parties/attorneys could discuss whether the case can be settled and, if not, determine the further procedural steps that need to be taken. The judge could even decide that after this hearing, enough information has been obtained to decide the matter. The minutes of the hearing should detail what has been agreed upon. Hearings of this kind will also enhance trust in the judiciary. They are absent in Ukraine even though they would be possible under the current rules.

2.4. Organisation

Specialisation

The relatively small size of the courts in Ukraine does not allow for specialisation. This is not in line with current developments in other European jurisdictions, where specialisation is on the rise since it promotes efficiency and quality. This is not only true for family law, but also for other areas such as insolvency law. During interviews (see Appendix) it appeared that the absence of specialisation is problematic since civil judges often have to act as investigating judges in criminal cases. It appears that this hinders the daily work of civil judges, forcing them to postpone hearings in order to perform urgent tasks in the area of criminal law. In larger courts, it would not be necessary to hinder civil judges with the tasks of investigating judges and, as a result, their work in the civil section would move forward more smoothly without sudden interventions from other branches of the law. The experts do not feel that creating separate criminal courts would be beneficial since this would increase the costs of maintaining the courts and it would hinder relevant interactions between the judges of the civil and criminal divisions.

Allocation of Cases

Allocation of cases through a computer-programme aims at ensuring and enhancing the impartiality of Ukrainian judges. This is, however, only true in theory, since the system can be manipulated for various legitimate reasons by the person in charge of the system. It seems that parties are able to use the system in such a way as to ensure that their case is being heard by their preferred judge (e.g. by submitting the same case several times and withdrawing those cases that do not end up before the preferred judge, or by way

of recusing the judge that is not preferred by a party). To improve this situation, it may be wise to allocate cases in a late stage of the proceedings, just before the first hearing, and to have the allocation of cases performed under the supervision of a senior judge on the basis of objective criteria, like the experience of the judge, their case load, and specialisation. Recusal should only be allowed on a limited number of grounds; here the introduction of a court fee for each motion to recuse should be considered, only to be returned when the recusal is successful.

2.5. Working Conditions and Facilities

Working Conditions at the Courts

Working conditions are often problematic at Ukrainian courts, at the civil courts more often than at the commercial courts. Facilities are insufficient (e.g. the experts were informed of judges having to pay for their own air-conditioning and electricity, buildings being decrepit without enough lightening, and offices being occupied by too many civil servants). Investments in the infrastructure of the courts is very much needed.

Courthouses

Courthouses need to show the ambition of courts to be institutions of authority that function independently and impartially. Courthouses should be well-located and divided in three sections: (1) proper waiting areas for the public, front offices, information desks, and courtrooms; (2) secure areas for detainees and investigating judges; (3) restricted areas with offices for the registry, supporting staff, and judges. After a security check, the public and lawyers should only have access to public areas. In this way judges and supporting staff will not be disturbed by members of the public entering their work spaces. At the same time the public is shown that judges are not accessible outside the courtroom and do only communicate with parties and lawyers in the courtroom in the presence of the opponent party. Courthouses in Ukraine often do not exhibit these features.

Case Law

The availability and accessibility of case law, mostly from the Supreme Court, belongs to the working conditions in court. Currently, the Ukrainian Supreme Court plans to improve the availability of its case law. The Twinning Report states: 'To get more legal unity and to make judgments more predictable it should help to provide the Supreme Court and the legal practice with a second public database. In this second database the Supreme Court can publish a subset of its judgments; only its guiding judgments or judgments in which the Supreme Court briefly provides the legal practice with an overview of its jurisprudence'. Access to case law not only implies the technical possibility to consult court rulings, but also the possibility to identify relevant case law, something which may require editorial activity (as suggested in the Twinning Report) or sophisticated software. Moreover, case law and other relevant materials must be available free of charge, directly at the desk of the judge and the judicial assistants.

2.6. The Bar

Organisation

The professional capacities and skills of attorneys as well as their mutual relationships are a matter of great concern. A well-functioning judiciary should, for example, be able to interact well with its most important partner, the Bar. Regular meetings should take place between the courts and the Bar in which practical issues can be discussed and resolved. This can lead to a more efficient procedure, but also to a better understanding by the various actors in lawsuits and prevent abuse of procedural tools. Moreover, practice directions and guidelines should be drafted with the input of the Bar. However, in the eyes of an important, well-educated group of Ukrainian attorneys, the position of the Ukrainian Bar is problematic. Considering the present situation in Ukraine, where the National Bar Association seems not to have the support and trust of a considerable number of lawyers, measures should be taken to ensure a representative Bar which can be a credible discussion partner for the judiciary.

The Twinning Report contains important information on the relationship of the various professional groups involved in the administration of justice:

> 'Judges, prosecutors and lawyers essentially contribute to justice in different roles. The interests of these professional groups are, naturally, different. Their work should be characterised by mutual professional respect. … discussions with the various professional groups showed that their mutual relationships are very tense and complicated. While representatives of different legal professions deal with each other more objectively in most European countries, the interaction in Ukraine is marked by great mutual mistrust. This is detrimental to a case-oriented factual completion of the individual proceedings and should be countered by trust-building joint events and other measures.'

Training

Experts got the impression that training for attorneys is not well-organised by the Bar. Some law firms (usually the better ones) organise training themselves due to the questionable training offered by the Bar. Mandatory and focused training for attorneys, particularly where it concerns representing the interests of their clients in court, is very much needed. This would ensure that attorneys are also aware of the latest developments in legislation and case law.

Fee System

When discussing improvements of civil and commercial procedure, often fees are being mentioned by attorneys. It appears that attorneys have a financial interest in the number of motions and hearings. This can easily lead to proceedings which are not efficient. Measures are needed to take away incentives for inefficient litigation, which are not in the interest of the clients and which create a burden on the courts. Only necessary activities of the attorney should be remunerated. The court should evaluate whether activities have been in the interest of the client and clients should be informed about the strategy of the attorney and the related costs.

Respondents often discuss the relationship between court rulings on costs and the remuneration as agreed upon between attorney and client. It should be mentioned here that for example in the Netherlands, cost rulings are only meant to calculate what the loser should pay the winner in compensation for costs incurred, but this calculation does not have to coincide with what the winner and their attorney have agreed upon as regards remuneration. In the Netherlands, the costs awarded by the court to the winner are usually less than the costs actually incurred by the winner. This is done on purpose because full compensation of costs may induce litigants to start litigation too easily. After all, at the start of a case, litigants often think that their case is much stronger than it appears to be in court when the opponent has also provided his/her arguments. The fact that the winner may have to pay part of the costs even if successful may make him/her more careful when considering the start of litigation.

In the Netherlands, the National Bar Association publishes guidelines for costs to be agreed upon between client and attorney based on the type of case, the instance at which the case is being litigated (first instance, appeal, or cassation), and the number of relevant motions and hearings. The court does take these guidelines into consideration when determining the amount of costs to be paid by the loser.

3. CONCLUSIONS AND KEY RECOMMENDATIONS

The implementation of the new Civil and Commercial Procedural Codes in Ukraine meets various challenges and various measures are needed to improve the existing situation. The measures suggested in the present text are often *not* aimed at new legislation. It should be remembered that rules as such do not change practice. Changing practice is the result of interpreting and applying existing rules in the right manner, i.e. according to the aims the legislature had in mind when introducing the rules. In Ukraine, just like anywhere else, these aims include efficiency, effectiveness, and quality in the administration of justice. It is the task of the Supreme Court to show the lower courts the way ahead by providing interpretations in its case law that are uniform, clear, and well-reasoned. This presupposes a Supreme Court that has the time and facilities to execute this task and that is not overburdened with cases that are irrelevant for its main task. Filters to reduce the number of cases that reach the Supreme Cassation Court are in the opinion of the experts urgently needed.

The main recommendations that can be found in the report that served as the basis of this article (see footnote 1), can be divided in structural and practical recommendations. The main structural recommendations are as follows:

- Experts on organisational matters (not necessarily lawyers) should analyse the work processes in the Ukrainian courts. They should advise on how to optimise and standardise the work processes in court, from the moment a case is filed with the court until judgment and enforcement. This advice should be implemented in all courts, making work processes more uniform and efficient throughout Ukraine.
- Too many bodies are responsible for the judiciary. There should be a coordinator (a single person or a body of persons) for judicial affairs who oversees and coordinates measures and policies aimed at the courts. This

coordinator could be the Ministry of Justice, the High Council for the Judiciary, or the Supreme Court.

- There are too many small courts in Ukraine. This hampers efficiency, uniformity and specialisation. A merger of courts is advisable, creating general courts for civil, commercial, administrative, and criminal matters, with sections devoted to each of these areas of the law. Courts serving a population of at least one million citizens would be advisable. Where needed, trial centres can be created where judges can sit for a limited number of days per month in order to guarantee that the administration of justice is sufficiently near the citizens in sparsely populated areas.
- When legislating on procedure and court organisation, judges and lawyers as well as court users should be involved, e.g. by way of internet consultations. In addition, legislation should not be introduced without sufficient preparation and training. This presupposes a sufficient period of time between adoption of the legislation and its actual entry into force.
- The allocation of cases to particular judges or panels of judges should be such that it can be influenced by neither litigants nor court staff. At the same time, the allocation system should be such that specialisation of judges in certain areas is being utilised. The allocation system should allow the burden of cases to be shared equally between the judges.
- Measures should be taken to make sure that the case law of the Supreme Court is easily available to all citizens. The case law should be presented in such a manner that it is searchable and that relevant case law can be identified easily. This also guarantees that the Supreme Court itself can guarantee the uniformity of its case law.
- Clear filters on the basis of objective (monetary) criteria for the admissibility of appeal and cassation should be introduced.
- Courts of appeal should not allow new facts on appeal.
- Measures should be taken to reduce the number of third-party interventions in civil and commercial proceedings.
- Parties should be allowed to agree on the territorially competent court; no referral to other courts in such cases.
- Further measures should be introduced to guarantee independence and impartiality of judges.
- One should make sure that the number of experienced judges in the first instance courts is sufficient.
- Remuneration and other working conditions should be reconsidered.
- A system of court-annexed mediation should be developed. Courts should refer to external, qualified mediators. Mediation should not take place in court. Judges should limit themselves to settlement attempts.
- Soft law (practice directions) should be used to guide the participants in the procedure. Judges should be involved in developing this soft law in order to make clear what the court expects from the litigants in areas not specifically regulated by law. Ideally, these practice directions should be uniform throughout the country.
- Where possible, the best European practices should be studied, made available, and used as an example in law reform.

The main practical recommendations are as follows:

- An early oral hearing is beneficial for efficiency if used for settlement or setting a procedural calendar (discussing what is needed in the case). This requires an exchange of information between judge and parties (cards-on-the-table) and shared responsibilities. A cooperative attitude should be reflected by the lay-out of the courtroom: parties should not face each other but the judge.
- Precious court time should not be wasted by reading judgments in court. Judgments should be made available at the earliest possible moment in writing.
- Hearings should be used for exchanging information. The time available for the hearings should be communicated in advance (e.g. 20 mins per party). Hearings during which no exchange of information takes place are superfluous and a waste of time and money.
- Judges should ask questions during a hearing and should not use these hearings for long monologues.
- Court fees should be levied in all cases (including challenges of independence and impartiality and for filing disciplinary complaints) and should only be returned in exceptional situations. The amount of court fees should be such that they make parties consider the seriousness of their claim. When a service is free of charge, it is overused and abused.
- A quick and efficient procedure for dismissing unmeritorious claims should be developed.
- Clear-cut criteria should be developed in order to determine whether a case should be classified as minor (small claims). Subjective criteria like the importance of the case for the litigants should be abolished. Appeal and cassation in minor cases should not be possible. Ways to avoid the minor cases track after a case has been classified as minor should not be available.
- Judges should only be involved in real cases (judges should decide cases). Administrative work and clearly unfounded and vexatious claims should, as much as possible, be handled by legal support staff.
- Lawyers' fees are part of the contract between lawyers and clients. The court establishes these costs independently and not in relation to the agreement between lawyers and clients. The court follows set criteria. Obviously, when concluding their contract, lawyers and clients may take into consideration earlier court practice in similar cases.

APPENDIX: QUESTIONNAIRES

QUESTIONNAIRE A

Questionnaire A was filled out by 278 respondents. The group of 278 respondents can be divided in the following sub-groups: Attorneys (163), Judges (47), Corporate lawyers (20), Legal scholars (14), Judicial assistants (1), Mediators (1), Court Secretaries (1), and Others (31).

Chapter 1: Quality

Question 1: Aims

1. The aims of the new Procedural Codes are enabling better access to court, proportionality, efficiency, low costs, and fairness. Do judges have these aims in mind when interpreting the procedural rules?

The number of respondents that answered this question positively without reservation is low (18.98%). The largest number of respondents think it to be 'most likely' that judges have the aims of the Procedural Codes in mind when interpreting the new rules. Ca. 26% of respondents think that judges do (probably) not have the relevant aims in mind.

Questions 2, 3, and 13: Training

2. Is additional training of judges needed in order to foster a better understanding of the procedural rules?

3. Is additional training of lawyers needed in order to foster a better understanding of the procedural rules?

13. Are the judges sufficiently trained in order to achieve the aims of the rules of procedure that are foreseen by the legislature?

The overwhelming majority of respondents (more than 85%) is of the opinion that additional training is needed or most likely needed (even though ca. 67% of respondents are also of the opinion that judges are (most likely) sufficiently trained to achieve the aims of the procedural rules as foreseen by the legislature). This is not surprising given the fact that many respondents feel that sufficient training was not offered to them. Moreover, it seems that initial drafts were shared with the courts ca. 6 months before the introduction of the new legislation, but practising lawyers only obtained knowledge of the new legislation at the moment it was being introduced. Obviously, this is not effective and does not allow for preparation to ensure proper application. Those with an overly legalistic attitude to matters often forget that rules themselves do not change reality. It is the behaviour of those who apply the rules that has to be addressed. In many jurisdictions, important reforms in procedural legislation are often accompanied by training and other mechanisms to bring the reforms to the attention of those who need to implement these reforms in practice (judges and lawyers in our case), a very good example being England and Wales at the time of the important Woolf Reforms of 1998.

However, nothing of the kind seems to have been considered in Ukraine and this is unfortunate given the extent of the procedural reforms and their complexity. According to those interviewed by the experts, the Ukrainian process of legislation poses problems, also because in the Parliament large numbers of amendments are proposed that often do not support the coherence and clarity of the legislation. One should reconsider the role of individual members of the Parliament in drafting very technical legislation. In the majority of European jurisdictions, Parliament plays a far less dominant role regarding such matters than in Ukraine; often such work is done by specialised parliamentary commissions. For example, in England and Wales the 1998 Rules of Procedure were drafted by judges and other lawyers, a task that had been delegated to them by Parliament.

Question 4: Amending the rules

4. Will it be helpful to ensure that procedural rules are not frequently amended in order to allow judges and lawyers to find ways to improve legal proceedings in practice?

Ca. 88% of respondents provided a positive answer to this question. Obviously, a stable procedural regulatory framework does not mean that improvements and changes cannot be introduced. Changes and improvements are also possible without changing the rules, for example based on the case law of the Supreme Court, or through agreements on the application of the rules within the judiciary, preferably after consultation with the Bar (judicial guidelines, practice directions, etc.). In most Western European jurisdictions, it has become clear that the procedural rules can only provide a framework for procedure and cannot regulate all aspects and practical details of it (this was already noted as regards codifications in general more than 200 years ago by Jean-Étienne Marie Portalis, the father of the French 1804 Code civil).[4] In addition, rules, especially rules which come into being through the legislature, should not try to regulate every aspect of procedure since this prevents flexibility and the capability of judges to cope with the everyday problems in the administration of justice. The rules should set the framework in the context of which the judiciary has to operate, allowing the judiciary itself to do the necessary fine-tuning. An overly legislative approach to matters should be avoided at all means, since it labours under the erroneous belief that the rules themselves can change society, whereas in actual practice, change is an intricate interplay between the rules and those who apply them.

It has been observed by the experts that in Ukraine judges often perceive that they are not trusted by the authorities and the public at large. This results in a situation in which they are often not willing to direct court hearings in an efficient and effective way (using case management powers and skills) since they fear to be criticised. In order to change this, one may consider giving the judges instruments to direct court hearings efficiently and effectively, and allow courts to provide explanations to the public of the way the procedure is conducted. This calls for additional training of judges in order to further their forensic skills.

Question 5: Orality

5. Orality may increase the efficiency of the handling of cases in court. Is the level of orality sufficient in the procedural rules?

Ca.70% of respondents feel that the level of orality is sufficient in the new procedural model. Ca. 27 % of respondents feel that the level of orality is not sufficient. The latter number of ca. 27% may seem surprising given the high level of oral elements in the new Procedural Codes, but on second thoughts this may be explained by the fact that oral elements are not always used in an effective and efficient manner. An appearance of the parties and their lawyers before the judge should enable the judge to get a proper understanding of the dispute by asking relevant questions and by inviting parties to give their view on the matter that keeps them divided. Orality should not be used when it is neither effective nor efficient, and where writing – e.g. where it concerns statements of case, requests for interim decisions and documentary evidence – from the point of view of quality and consistency is a superior alternative. While attending court hearings in Ukraine, the experts noted that much court time is being used to go through court files, having judges dictate summaries of the materials for an audio registration in the presence of the parties and their lawyers without any oral interaction between a judge and parties/lawyers taking place. Obviously, such exercises can better be done in writing, for example in the final judgment where the judges have to give reasons for their judgment. Another option to avoid these time-consuming activities without added value could be disseminating a list of documents in the file to attorneys and agreeing that these are supposed to have been read out in court (legal fiction) although obviously in that case no audio-recording can be made (but, one should ask whether such a recording is really needed; who would consult the recording anyway?).

Also, the oral reading of full judgments should, in the opinion of the experts, be abolished as having no added value. Reading judgments in court is most likely a Soviet inheritance and it is utterly superfluous in times when everyone uses modern means of communication. An electronic message allowing those interested to read the judgment suffices. Such an approach to matters also

4 See Preliminary Address on the First Draft of the Civil Code, available at:<https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/code/index.html> accessed 30 October 2020.

guarantees publicity, and doing away with the reading of judgments in court allows the court to devote time to matters that really deserve attention.

It should be mentioned that some respondents argue that they prefer hearing the judgment being read straight after the hearing so that they know the outcome of the dispute right away. According to the experts, this apparently means that the written judgment that is read in court is not made available to the parties timely. It is suggested that this situation should be changed in the sense that a written text is made available as soon as possible, making the reading of the judgment superfluous in order to get timely notice of it (i.e. replace the reading of the judgment by providing the written text that is available at the moment originally set aside for reading).

Questions 6, 7 and 8: Role of Case Law

6. Does the system of case reporting (i.e. publishing case law) influence the behaviour of the parties when making decisions about taking cases to court?

7. Does the system of case reporting influence the parties when making decisions about the manner how to litigate cases?

8. Does the system of case reporting influence the judges?

Ca. 90% of respondents answer the above questions positively. This means that Ukraine has evolved tremendously since the times when case law did not play any role whatsoever, just like many Central and Eastern European states. It may indicate that lawyers inform their clients effectively about the relevant case law and that based on this information clients decide whether to go to court (although during the interviews it appeared that sometimes doubts exist as to the information the lawyers provide to their clients). It may also indicate that lawyers carefully consult case law in deciding how to litigate cases when brought to court. It furthermore indicates that judges take case law seriously. It should be mentioned here that the system of case reporting is still under development: the experts were shown a new database developed by the Supreme Court allowing interested actors to access it. Such initiatives are, obviously, very important. In present-day society, case law must be available to the public at large and free of charge.

Question 9: Case Law and Uniformity

Does the system of case reporting result in a more uniform application of the law throughout the country?

Ca. 75% of respondents feel that the system of case reporting has a positive effect on the uniform application of the law throughout Ukraine. Again, this demonstrates that judges consult case law which influences their decisions, and that, in general, case law is taken seriously. This is a tremendous change when compared to previous practices and it shows that the new procedural rules are having a very positive effect according to those who apply and work with the rules. However, still more than 20% of the respondents finds that there is no unifying effect of case law.

Questions 10 and 11: Case Law and Guidance to Judges

10. Are the judges sufficiently aware of the case law of the cassation court?

11. Do the judgments of the cassation court provide sufficient guidance on how the highest court applies and interprets the law?

Ca. 78% of respondents are positive about the guiding effect of the judgments of the Supreme Court, whereas ca. 20% do not have a positive opinion. Ca. 73% of respondents believe that the judges are sufficiently aware of the case law of the Supreme Court. Ca. 18% of respondents believe this is not the case. This is probably due to the fact that one is still experimenting with the case law of the cassation court to make it available through online platforms. Some judges interviewed by the experts indicated that they need to consult commercial publications in order to become aware of the relevant case law since the information provided by the cassation court itself was hard to navigate. Commercial publications would group relevant judgments together and would provide the necessary tools for a better understanding of the case law, whereas the online platform of

the Supreme Court itself apparently only provides the case law without such tools. Some judges informed the experts that they did not have access or were not aware of the online platform of the cassation court, and that they had to pay prescriptions to commercial publications privately. The cassation court might consider developing better and systematic access to its case law.

This situation calls for developing a system to make case law available, not only for the judiciary but for the entirety of the legal community. Such a system should be searchable based on the relevancy of case law given the large number of cases that can be made available through electronic means.

Question 12: Binding Precedents

12. What is the status of judgments of the cassation court?

Surprisingly, there is no agreement as regards the status of the judgments of the cassation court between respondents. Ca. 35% feel that the judgments are binding and need to be followed by lower judges, whereas ca. 48% regard these judgments as persuasive only. This means that the latter respondents are of the opinion that the situation in Ukraine is similar to that in many other civil law jurisdictions where a system of binding precedent does not exist. The ca. 35% of respondents who feel that the judgments of the cassation court are binding, seem to labour under the influence of common law jurisdictions, where indeed case law is binding and where elaborate systems of distinguishing exist when it is felt that in a particular case the relevant ruling of the Supreme Court should not be followed.

Since Ukraine is a civil law jurisdiction and systems of distinguishing are very labour-intensive, the experts would suggest that, like elsewhere in the civil law world, case law should be persuasive only, thus allowing judges to disagree with the rulings of the cassation court without distinguishing. This approach lays the burden of providing reasons why in a particular dispute case law should be or should not be followed on the cassation court and not on the lower judges (who should nevertheless, for reasons of transparency, explain why they chose not to follow case law that is apparently applicable to the case at hand). The cassation court will have to provide clear reasons when it feels that its case law is relevant for the case submitted to its court when quashing the decision of the lower court.

Question 14: Procedural Tracks

14. Does the differentiation between specific procedures for specific types of cases (civil, administrative, etc.) function well?

Ca. 48% of respondents believe procedural differentiation works well, whereas ca. 36% is of the opinion that this is not the case. The experts agree with the minority opinion that the new Codes are still somewhat static as regards the procedural tracks that are available. Especially the track for 'minor cases' (small claims; art. 274 CPC) is not being used frequently even though a large number of cases do in principle qualify for this track. It appears to be relatively easy to have 'minor cases' heard according to the track for regular cases. The problem seems to be that the track for 'minor cases' provides a completely written procedure, whereas judges feel that in many instances hearings are needed.

For the experts this does not come as a surprise, since a single hearing in a small and uncomplicated case may allow the judge to get a good grasp of the matter within a relatively short period of time, whereas purely written proceedings, as foreseen by the Ukrainian track for minor cases, have proven to be less effective. In actual practice, within many jurisdictions the purely written procedure is often prescribed for more complicated, technical matters in which hearings may not be particularly useful, whereas oral proceedings are often prescribed for uncomplicated matters. Whatever may be true, the experts believe that more flexibility in the rules, allowing judge and parties to decide what is the best procedural framework for the case at hand, may be the best approach to matters. This would mean that the judge and the parties discuss in an early stage of the procedure what is needed from a procedural perspective, that they agree on a procedural calendar, and that the calendar is used as guidance throughout the lawsuit. This approach is advocated in some Western European jurisdictions, notably in Sweden.

It should also be mentioned here that many of those interviewed by the experts stated that the distinction between civil and administrative cases poses difficulties and results in interim judgments deciding on how to classify these cases.

Chapter 2: The Roles of the Parties and their Lawyers

Questions 15 and 16: Abuse of the Rules

15. Are the sanctions provided by the procedural rules against procedural misbehaviour effective?

16. Are changes needed in the rules against procedural misbehaviour?

Ca. 45% of respondents feel that the sanctions against procedural misbehaviour are most likely effective, and ca. 45% believe that this is (probably) not the case. Ca. 10% of respondents do not know whether this is the case. Therefore, it seems that a close look into this matter is needed because procedural misbehaviour is an old and persistent problem in litigation. Legal systems should provide sufficient means to stop such practice. Attention is especially required since ca. 63% of respondents feel that changes in the rules against procedural misbehaviour are needed.

Question 17: Mandatory Representation and Quality

17. Mandatory representation by a lawyer increases the quality of the court decision.

Ca. 64% of respondents feel this statement is true. Still, ca. 28% believe this statement is not true. This means that there is a need for research into this matter. Lawyers may obviously improve the quality of court decisions as one may expect them to filter out futile cases or cases that do not offer any prospects of success. Moreover, lawyers will know which documents are relevant for the file and will be able to produce them on time. An extremely adversarial attitude may not be helpful in this respect.

Since the new Ukrainian Codes advocate as a starting point an adversarial approach, one should pay close attention to the role of lawyers within this model. If the presence of lawyers does not increase the quality of court decisions, additional measures are needed (e.g. introducing a more cooperative model of litigation). Additional rules on training and education as well as rules on the admission to the Bar may prove to be necessary. Citizens must be able to rely on lawyers (and on their ability to give proper counsel) that have passed professional tests and that are able to instil confidence in clients that hire them to safeguard their vital interests. It should be noted that currently legislative measures pending before Parliament are aiming at abolishing mandatory legal representation in Ukraine.

Questions 18, 19 and 20: Effects of Mandatory Representation

18. Mandatory representation influences access to court.

19. Mandatory representation influences the efficiency of court proceedings.

20. Mandatory representation influences fairness.

Ca. 70% of respondents believe that mandatory representation increases access to court. This is surprising, since mandatory representation obviously increases the costs of access to court for the parties, unless the legal aid system functions effectively or there are other means for people without the necessary financial means to engage a lawyer. It is suggested that research is conducted into the effects of mandatory representation on access to justice, especially from the perspective of costs and the legal aid system. Ca. 70% of respondents are also of the opinion that mandatory representation influences the efficiency of court proceedings, most likely in a positive manner since the judge can rely on trained lawyers when dealing with the case instead of on the parties themselves who obviously need a lot of judicial guidance when litigating on their own behalf. It would be relevant to understand how the general public, the clients of the attorneys, assess the work of their lawyers. A close look at the results learns that there is a conspicuous different

opinion between judges and attorneys. For instance, 37% of judges answer question 20 with yes, while 55% of attorneys answer this question positively.

Given the beneficial aspects of mandatory representation, it is surprising that only ca. 43% of respondents believe that it influences fairness: ca. 47% of respondents believe that this is not the case. When it comes to efficiency (question 19), 80% of judges and attorneys think that mandatory representation is positive.

Questions 21 and 22: Legal Aid

21. Is there a relation between the legal aid system and mandatory representation?

22. Does the legal aid system guarantee sufficient access to court to underprivileged parties?

Ca. 51% of respondents believe that there is a relation between the legal aid system and mandatory representation, whereas ca. 20% do not believe that this is the case and ca. 28% do not know. This shows that many respondents do not have a clear view on the relationship between mandatory representation and access to justice. If access to justice is indeed an element of the right to a fair trial as appears from the Golder judgment of the European Court of Human Rights (*Golder v. United Kingdom*),[5] all the respondents who are lawyers should have responded in the affirmative. In a situation where representation is mandatory, the legal system should provide means for indigent litigants to avail themselves of the help of a lawyer, either by way of a pro bono system, by way of paid legal aid, or by way of instruments like contingency fees (*see also ECtHR Airey v. Ireland*).[6] Obviously, ca. 51% of respondents have noted the strong relationship between mandatory legal representation and legal aid, but it is alarming that ca. 20% have the opposite opinion, whereas a staggering ca. 28% do not know. Raising awareness about this matter among lawyers is obviously needed. This is also the case because ca. 27% of respondents feel that the legal aid system in Ukraine is not sufficient as it does not guarantee access to justice for underprivileged parties, and nearly 17% do not know whether this is the case. Once again, what was said above about the need for training, education, and admission to the profession shows the relevancy of this matter.

Question 23: Access to Justice

23. Can access to court for underprivileged parties be guaranteed by other means than legal aid (e.g. self-representation and assistance by the court of the party that does not have a lawyer)?

Ca. 50% of respondents feel that legal aid is the only means to guarantee access to justice to underprivileged parties. Ca. 43% feel that other means can (probably) also be used to guarantee access to justice to underprivileged parties. Again, this shows that a considerable number of respondents are not aware of the possibilities to provide access to justice without financial help of the State.

Questions 24, 25 and 26: Preparation of Cases

24. Are cases sufficiently prepared by the parties when they submit the case to the court?

25. Are cases sufficiently prepared by lawyers when they submit the case to the court?

26. Are rules guiding the behaviour of the litigants and their lawyers before they go to court needed?

Only ca. 3% of respondents answer 'yes' without any reservations as regards the sufficient preparation by the parties before going to court. Ca. 50% answer that cases are 'probably' sufficiently prepared by the parties. Ca. 40% of respondents feel that this is (probably) not the case. At the same time, the overwhelming majority of respondents feel that lawyers (probably) prepare cases well before going to court (ca. 85%). This is unusual, since it is hard to see how a lawyer can be well-prepared while the client is not prepared, unless the questions were interpreted

5 *Golder v. United Kingdom* (App No 4451/70) ECHR 21 February 1975.

6 *Airey v. Ireland* (App No 6289/73) ECHR 9 October 1979.

by the respondents in such a manner that preparation by litigants is only deemed relevant in cases where they are not represented by a lawyer.

The experts feel that further research into the issue of preparation is needed since an effective and efficient justice system is only feasible when parties and lawyers prepare their cases well before addressing the court. This is a joint responsibility. If problems exist (ca. 71% of respondents apparently feel that problems exist, because they advocate rules guiding the behaviour of judges and lawyers before they go to court), the English pre-action protocols may serve as an example; instruments such as these may be worthwhile for consideration in Ukraine.

A positive feature of these protocols is that before cases are brought to court, the parties and their lawyers investigate whether settlement is possible, and if this is not possible the case will be well-prepared when it is submitted to court. Obviously, also less stringent measures may be contemplated, such as a cards-on-the-table approach in the early stages of procedure including the presentation of evidence (Ukraine knows a cards-on-the-table approach, but it seems that this system is suffering from existing court practises, allowing evidence to be presented late without justification).

Questions 27 and 28: Third Parties

27. How does the system of admitting interested third parties to a pending procedure function?

28. How frequently are interested third parties admitted to a pending procedure?

Ca. 73% of respondents feel that the system of admitting interested third parties to a pending procedure works well. Ca. 63% of respondents are of the opinion that such parties are often admitted to pending procedures, whereas ca. 31% think that this happens sometimes.

The experts feel that in Ukraine third party interventions (interventions of others than the original parties to the suit) occur frequently. In other countries, this is rarely the case. Any intervention by a third party results in complications and more lengthy lawsuits, and, therefore, this matter should be evaluated critically. If necessary, the reasons and complications that may cause third party interventions must be removed.

Chapter 3: The Role of the Court

Question 29: Case Allocation

29. Is the current system of allocation of cases to particular judges sufficient?

Ca. 75% of respondents feel that the current system of case allocation is (probably) sufficient. Ca. 18% have doubts. According to the experts, the system of case allocation may be improved by allocating in a late stage, just before the first hearing is scheduled in order to prevent parties from contacting the judge. Obviously, judges should never convene privately with one of the parties outside the courtroom, but in order to make such encounters harder, a system of allocation which does not allow the parties to know who their judge is well in advance, may be beneficial. The experts also wonder how a system with a random allocation can be combined with the wish to have specialised judges hear cases dealing with the subject-matter in which they specialise.

During court visits and meetings with lawyers, it became clear that the manner of allocation in daily practice allows interventions that go against the professed ideal of random allocation (which aims at preventing all kinds of improper influence). This makes a system of random allocation problematic. In addition to late allocation (see above), it would be preferable to develop clear criteria for the allocation of cases (workload, illness, absence, other judicial/administrative duties, specialisation, work experience) and make these public. This would allow development of an informed and sophisticated system of case allocation instead of a system of random allocation with the help of a computer, a system which obviously causes all kinds of problems in practice and which is unknown in many European jurisdictions (Germany being an exception).

Questions 30 and 32: Independence

30. Do the new rules foster independence of judges (undue external influence in decision-making is prevented)?

32. Are additional measures needed to foster independence of judges?

Ca. 57% of respondents are of the opinion that the new Ukrainian rules foster the independence of judges. Ca. 34% do (probably) not think that independence is being fostered by the new rules. This high number of ca. 34% is alarming according to the experts, also because more than ca. 80% of respondents are of the opinion that new measures fostering independence are (probably) needed. In addition, it seems that the trust of the public in the judiciary in Ukraine is rather low in comparison with European standards, so there is still work to do, also in terms of providing the general public with reliable information.

Questions 31 and 33: Impartiality

31. Do the new rules foster impartiality of judges (undue external influence in decision-making is prevented)?

33. Are additional measures needed to foster impartiality of judges?

Ca. 57% of respondents answer the first question positively. Ca. 34% is of the opinion that the new rules do not foster impartiality. The high number of ca. 34% is alarming according to the experts and the topic therefore urgently needs close attention, also because ca. 75% of respondents state that new measures fostering independence are (probably) needed.

Questions 34 and 35: Trust and Discretion

34. Should the judge be given more trust to implement the rules loyally?

35. Should the judge have discretion in organising court hearings?

Respondents seem equally divided as regards the trust to be given to judges when implementing the rules of procedure loyally: ca. 45% answer positively to this question, and ca. 51% negatively. Also, with regards the second question the picture is divided. Ca. 62% of respondents are in favour of discretion for the judge in organising court hearings and apparently consider judges capable of discretional decisions in this respect. Nevertheless, ca. 35% of respondents express doubts or are not in favour of such liberty. This may imply that a considerable part of the respondents do not have enough trust in the professional capacities of the judges. It would be advisable to investigate whether this is true and to what extent, and to uncover the reasons for this possible lack of trust.

Question 36: Hints

36. Should the court be allowed to give an analysis of the possible manners in which the case may progress in court?

Allowing the judge to give an analysis of how the case may progress in court, especially in the early stages of the proceedings (such as during an initial hearing when the parties become aware of all aspects of their case), provides litigants with a tool to measure their chances of success. This tool may induce them to reassess their procedural position and to make the choice to settle their case early in order to avoid the risks, costs, and efforts related to court proceedings.

Ca. 70% of respondents are in favour of allowing the court to give an analysis and, since the rules of procedure do not prohibit the judge to do so, this might be an interesting case management instrument for the judge. In a conversation with parties and their lawyers, aspects dealing with obligations to produce evidence and the evidential risk (which party bears the risk if no sufficient evidence is brought forward) may lead parties to have a fresh look at threats and opportunities. Obviously, judges need training in this respect, e.g. in order to avoid giving the impression of partiality, and such training can be offered in cooperation with judges from jurisdictions where

similar tools are being used. Moreover, this might require a change of procedural culture from the side of the attorneys as well; it even impacts on the relation between attorney and client.

Question 37: Unrepresented Parties

37. Are the answers to question 36 the same if a party is not represented by a lawyer?

Ca. 67% of respondents answer this question positively. In the opinion of the experts it is, however, not self-evident that the parties themselves, without the assistance of a lawyer, will be able to understand the analysis provided by the judge. If one wants to increase the likelihood of such understanding, it means that the judge should communicate with the parties in a non-technical manner, allowing parties to understand the implications of the information provided by the judge. The judges will have to be aware of the fact that they are not communicating with trained lawyers and must be able to express themselves in the appropriate manner. The experts feel that appropriate and focused training of judges is needed in this respect, although currently the relevance of this training may be limited due to mandatory representation by lawyers in civil and commercial disputes.

Question 38: Passive Judge and Fairness

38. The new rules assign the judge a relatively passive role. Does this result in a fair determination of the case?

The procedural system in Ukraine can be described as follows: a system in which the scope of the procedure is determined by the parties, where the parties have the primary responsibility to put forward what is relevant and to produce the relevant documents (evidence as well as other documents), and in which the judge is expected to ensure efficient and expedient litigation. The answers to the above question have to be evaluated from this perspective.

Ca. 50% of respondents answer this question positively, whereas ca. 44% answer the question negatively. This implies that a large minority of respondents are not convinced that the approach of the Ukrainian legislature which favours the adversarial system is correct especially where many other European jurisdictions – particularly where it concerns the role of the court as regards efficiency and speediness of proceedings – have turned away from adversarialism, introducing more cooperative models of litigation.

As is shown throughout history, adversarialism in its extreme form does not favour efficiency, effectiveness, and decisions that are based on facts that come near to the truth ('fair decisions'). Adversarial systems often allow the party with the most extensive financial means to win the case since the judge is passive and the lawyers do most of the work. Obviously, in such a situation the party with the best (usually most expensive) lawyers is likely to win the case. It is not without reason that in the US, with its extremely adversarial approach to litigation, the advice is to hire the best possible lawyer (i.e. the most expensive lawyer that one can afford) because one's chances to win the case will often increase significantly. This approach may not always result in fair decisions, i.e. decisions based on the true facts in which the party that is right indeed wins his case.

Questions 39 and 40: Passive Judge, Efficiency and Reasonable Time

39. The new rules assign to the judge a relatively passive role. Does this result in an efficient determination of the case?

40. The new rules assign to the judge a relatively passive role. Does this impact on the requirement of a hearing within a reasonable time?

Ca. 43% of respondents answer positively to the first question and ca. 50% answer negatively. So, there is no majority in favour of the idea that a passive judge increases efficiency. In the international debate on litigation, it is common wisdom that passive judges do not increase efficiency. Most modern legal systems have therefore introduced so-called case-management tools which allow the judge to guard over the time taken for litigation and, in some jurisdictions, even provide the judge with instruments to assist parties in the evidentiary stage of proceedings.

Judicial case management guarantees that scarce resources are used in a careful manner and that litigation is not dependent on the whims of the parties. This approach guarantees that other cases that are waiting to be heard also get their day in court within a reasonable time. This belongs to the requirements of a fair trial under Article 6 ECHR (Capuano v. Italy).7 Passivity of the judge is considered to create backlogs and sluggish litigation. It would be interesting to investigate whether the emphasis on passivity is also problematic in Ukraine. Maybe this is not the case since ca. 56% of respondents are of the opinion that the passive role of the judge does not impact on the requirement of a hearing within a reasonable time. If this is indeed true, this is so surprising that the matter definitely deserves further attention.

Question 41: Direct Oral Judgments

41. Would a system allowing judges to pronounce judgment orally directly at the closure of the hearing, if properly recorded, be advisable in relatively uncomplicated cases?

A minority of respondents are against such an innovation (ca. 45%), whereas a majority of respondents (ca. 50%) are in favour (73% of judges are in favour and only 41% of attorneys). Research in the Netherlands has shown that the approach suggested in the question increases efficiency and does not influence the quality of judgments since judges will only use this approach in relatively uncomplicated, small cases which do not need lengthy investigation (and after an oral hearing) and where the reasoning can be dictated immediately by the judge and recorded by the clerk. Such an approach also requires determined and skilled judges who aim at handling cases according to their complexity and merits. Moreover, this is only the case as long as indeed this practice is limited to simple and straightforward cases; one should avoid pressure to act likewise in more complicated cases as experience shows that in such situations mistakes are made. It might be advisable to show Ukrainian judges the implications of the Dutch approach in training sessions, allowing them to discuss it in an informed manner to allow them to determine whether this approach would suit Ukrainian legal culture.

Chapter 4: Procedure

Questions 42 and 43: Taking Evidence

42. What effect do the new obligations of the parties in the taking of evidence have as regards the determination of the case?

43. Is it necessary to further specify the obligations of the court in the taking of evidence?

Ca. 71% of respondents noted a positive effect of the new obligations of the parties in the taking of evidence, the majority of them being judges. This may not be surprising because the new rules shift much of the work in the evidentiary stage from the judge to the parties. This will indeed save time for judges, allowing them to pay attention to other matters and to reduce the backlog of cases. Ca. 63% of respondents also feel that the obligations of the courts in the taking of evidence need to be further specified. This most likely means that courts have different opinions of their role during the evidentiary stage of litigation and that rules are needed for uniformity. Drafting and introducing procedural guidelines, describing what the participants in civil procedure may expect from each other, can provide useful guidance. In this respect the Dutch project, initiated in the courts in Odessa and implemented by Judge Esther de Rooij (Amsterdam) (see above), deserves support and close attention.

Question 44: Disclosure of Evidence

44. Disclosure of evidence obliges the parties to produce documents that meet a certain standard of relevance spontaneously, even if not asked for by the opponent party and even if these documents are detrimental for their own case. Does the new obligation of disclosure of evidence have a positive effect?

7 *Capuano v. Italy* (App No 9381/81) ECHR 25 June 1987.

Disclosure is a tool from Anglo-American jurisdictions and is meant to compensate for the traditionally passive role of the judge in these jurisdictions. It is up till now to a large extent unknown in the civil law world. Where it concerns documentary discovery, it forces the parties to submit all relevant documents (including e-documents) to the court even if these documents are not beneficial for, or even detrimental to, their case. Ca. 54% of respondents believe that the new obligation has a positive effect, whereas ca. 32% do not believe there is a positive effect. Since discovery is a new tool that does not belong to the Ukrainian civil law tradition, it may be worthwhile to investigate how it works in practice. Often, lawyers who are unfamiliar with discovery, wrongfully think that it only forces the parties to provide relevant documents in an early stage of litigation, stimulating a cards-on-the-table approach. It is often forgotten that discovery also means producing documents that may be detrimental for one's own case and being sanctioned if this does not happen spontaneously. It furthermore means that the opponent party does not have to identify documents it wants to see that are in the possession of the other party and to ask the judge for their production (after all, these documents should have been produced spontaneously by the other party).

Question 45: Is Disclosure Rightly Understood?

45. Disclosure obliges the parties to produce documents that meet a certain standard of relevance spontaneously, even if not asked for by the opponent party and even if these documents are detrimental for their own case. Is disclosure understood rightly by the courts?

Ca. 48% of respondents answer this question positively, and ca. 39% negatively. Opinions are divided and this may be a reason to have a further look into the way this new procedural instrument works in practice in Ukraine.

Question 46: Procedural Abuse

46. Are judges in a position to prevent parties and their attorneys to apply the rules in the wrong manner?

Ca. 78% of respondents answer this question positively. It seems, therefore, that a large majority of respondents are of the opinion that the new Codes have given the judge the necessary tools to guard against procedural abuse. This is obviously very positive.

Question 47: Delay

47. Which instruments are used to prevent delay?

According to 56% of respondents, case calendars and hearings for directions are most often used in order to prevent delay. The respondents show that tools like consultations with the parties are not very often used. In light of the adversarial approach to litigation under the new rules, which do not put an emphasis on cooperation, this outcome is not a surprise since consultations belong to a more cooperative model and not to an adversarial model like the Ukrainian model. In international literature on civil procedure, consultations are, however, considered to be positive since they foster a cooperative model of litigation. The fact that Ukraine has introduced a model of litigation with many adversarial elements may hinder the use of consultations. This is not in line with the best international practices.

Question 48: Omitted as it was Interpreted in Different Ways by the Respondents.

Question 49: Facts on Appeal

49. How does the appellate court deal with the facts of the case?

The situation does not seem straightforward since ca. 43% of respondents are of the opinion that only the facts provided at first instance are taken into consideration, whereas ca. 50% feel that new facts are also taken into consideration. It is interesting to break down the results: 29% of judges answer that only facts presented at first instance may be taken into consideration, and 70 % of judges believe that courts of appeal accept facts beyond those presented in the first instance. The situation of attorneys is that 45% thinks the first option is correct, while 55% answers that the court of appeal considers new facts. Since the new rules are straightforward on this matter, the answers to this question may indicate that not all courts of appeal apply the new rules correctly. This is a matter of concern since the powers of the court of appeal as regards the facts directly impact on the functioning of the justice system and the first instance courts in particular, and even on the procedural attitude of the parties.

One must bear in mind that if the courts of appeal accept new facts this potentially interferes with the clear intentions of the legislator: the approach should be to focus on the assessment of the case at first instance and not to allow litigation on new matters. If courts of appeal easily accept new facts, this will encourage attorneys to litigate strategically, not putting all their cards-on-the-table at first instance. It goes without saying that such an approach leads to frequent appeals and an extended length of proceedings.

Questions 50 and 51: Access to the Cassation Court

50. Does limited access to the cassation court influence the capacity of this court to guarantee the uniform application of the law?

51. Would the introduction of access filters at the cassation court reduce the workload of this court, allowing it to concentrate on the uniform application of the law and the development of the law?

Ca. 56% of respondents answer the first question positively and ca. 40% negatively. This division of opinions is surprising, since it is generally recognised that unlimited access to the cassation court will result in an overburdened court that cannot execute its main task in the area of uniformity of practice and development of the law. A good example of such a dysfunctional, overburdened cassation court can be found in Italy (where access to the cassation court is a constitutional right, and this is wrong in the opinion of the experts). Consequently, most jurisdictions have introduced access filters to their superior court in order to keep the case load within limits, allowing the judges to investigate relevant cases seriously. It would therefore be important to study why a significant part of the respondents do not believe that limited access to the Supreme Court influences the capacity of the court to guarantee a uniform application of the law. This is especially true in light of the answers to the second question above. This question is answered positively by ca. 75% of respondents and negatively by ca. 20%.

Question 52: Court Fees and Access to Court

52. Do court fees influence access to court?

Ca. 77% of respondents answer this question positively, as could be expected. In order to guarantee access to court, help needs to be provided to parties of limited means. This help, however, should only be provided in real cases, which means that a test as regards the merits of the case needs to be performed before legal aid is being granted or court fees are reduced or suspended. It should be remembered that court fees are also a means to make litigants think about the merits of their case before going to court and incurring expenses. Given the huge case load of the Ukrainian courts, one needs to ask whether the system of helping indigent parties to litigate contains sufficient safeguards against unmeritorious cases arriving at the court.

Question 53: Flexibility in Procedure

53. Do the present rules allow sufficient flexibility in allowing the judge to handle cases according to their specific features (i.e. allowing the judge to select the case-management techniques and mechanisms that do justice to the case at hand)?

Ca. 48% of respondents answer this question positively and ca. 40% negatively. This means that a serious number of respondents feel that flexibility is lacking. A lack of flexibility was also the impression of the experts when consulting the Codes and when discussing matters with judges and lawyers. It seems that the rules prescribe a relatively rigid framework for handling cases, leaving the judges little discretion in this respect. The Codes provide a rather legalistic approach to matters without taking into consideration that cases may differ considerably, also from a procedural perspective. A one-size-fits-all (or three-sizes-fit-all) is often not the right solution to matters. The fact that ca. 40% of respondents feel that sufficient flexibility is absent justifies further attention. In the end, flexibility in handling cases in court is an important tool for effective, efficient, and high-quality litigation (and in the end, for access to justice).

For such an approach basic trust in the skills and abilities of judges is required. As stated above, such trust is low or even absent in Ukraine. It is essential that measures are taken to enhance trust in the judiciary. By creating an environment where judges are willing to use their skills and knowledge in an effective manner and by limiting the possibility to submit complaints against judges who do their work in a faithful manner, one might create a common understanding of how civil lawsuits are conducted in court which will be beneficial for all concerned.

Question 54: Early Oral Hearing

54. Can an oral hearing be scheduled in an early stage under the present rules?

Ca. 53% of respondents answer this question positively and ca. 35% negatively. This is surprising since the Codes should be clear in this respect. A closer look into this matter is needed, also since an early oral hearing appears to be a good instrument for increasing efficiency and quality.

Question 55: Referral in Case of Lack of Jurisdiction

55. To what extent will courts that not have jurisdiction automatically refer cases to the competent court?

Ca. 50% of respondents answer that such referrals occur always or mostly and ca. 27% that they occur rarely or never. Automatic referrals are important in light of access to justice, but also in light of efficiency and quality. Courts (and the procedural rules) should avoid or remedy jurisdictional problems as much as possible themselves. Jurisdictional complications should not or very rarely occur in a well-working justice system: they are systemic irritants. In addition, the experts feel that the rules on jurisdiction should not be so strict as to disallow the litigants a choice of court.

Chapter 5: Settlement and ADR

Questions 56, 57 and 58: Settlement

56. Should measures be taken to enhance early settlement?

57. To what extent does early settlement occur in practice?

58. In which stage of the proceedings does early settlement occur in practice?

Ca. 88% of respondents answer the first question positively. Settlements are instruments to avoid costs for the parties and alleviate the burden on the State judicial system. Many jurisdictions, therefore, stimulate settlement, especially in the early stages of the lawsuit. The experts learned that there are tools available in the Ukrainian legal system that are aimed at promoting settlement, but that these tools are often not used. An example of a tool that is rarely used is in-court settlement. The limited use of settlement techniques also appears from the answers to the second question above, where respondents indicate that early settlement does not often occur in practice. If settlement occurs, often it occurs only after the hearing or even in the final stages of the case. It is, therefore, not a surprise that the respondents feel that measures should be taken to enhance early settlement.

One of the areas in which early settlements prove to be of great value are divorce and family law cases. From a legal perspective these are often relatively simple cases, but at the same time they

are factually and emotionally complicated cases. Early settlement (wholly or in part) in these cases is clearly in the interest of the parties and their family. The way settlement is regulated in divorce and family cases in Ukraine may not be the most effective way. Ukrainian judges are allowed to mediate between the parties to reach a settlement. However, this means that if mediation is unsuccessful, the case needs to be transferred to another judge for reasons of impartiality (Art. 205(4) CPC). This may not be efficient and one could ask whether judges should not use other techniques to reach a settlement, techniques that do not require the transfer of the case to another judge in case of failure.

Experience in other jurisdictions shows that the judge can try to have parties reach a friendly settlement without using mediation techniques that disqualify them from hearing the case in case of no-settlement due to a possible violation of impartiality principles. Judges may, for example, order a hearing in which they discuss the case with the parties and their lawyers. This would illustrate the various possible scenarios and give the parties some time to discuss matters amongst themselves to see whether on the basis of the information provided by the judge a settlement is possible. Judges may also ask the parties whether they would be willing to use out-of-court mediation before a private mediator since a mediated settlement is often better for the future relationship of the parties than a court decision. The introduction of court-annexed mediation could also be considered. In that case, parties could be referred to a court-approved external mediator while the court adjourns the hearing. In case mediation is successful, the court will close the case, if necessary, by incorporating the agreement reached in a judgment. If mediation is unsuccessful, the case will be continued before the same judge.

Questions 59 and 60: ADR

59. Are ADR mechanisms often used?

60. Does the use of ADR mechanisms influence access to court?

The final questions in the questionnaire concern the use of ADR (alternative dispute resolution), which can be defined as mechanisms to solve disputes without the help of the State judiciary. According to ca. 77% of respondents, they are not often used in Ukraine, even though ca. 41% of respondents feel that these mechanisms influence access to court (ca. 52% of respondents believe that these mechanisms do not influence access to court). The experts feel that access to court is at stake in relation to ADR if one considers access to court from the perspective of the judicial system as a whole. Large numbers of litigants making use of the State judicial system influences access to court negatively since the means to finance the system are by definition limited. It is therefore important that litigants are empowered to solve their disputes as much as possible without the help of the state, and ADR provides a very useful instrument for this.

It should be noted that some respondents did not have a clear idea about the definition of ADR. Alternative dispute resolution by its very definition is a means of resolving disputes without the use of the State court system. Examples are:

- Arbitration (litigation before a private judge appointed by the parties);
- Mediation (settlement attempts before a neutral third party who does not decide but who facilitates settlement negotiations);
- Resolution of claims by consumer complaints boards; or
- Submission of a case to a neutral third party who issues a binding decision to which the parties have agreed to abide beforehand in a contract (this is called 'binding advice' in the Netherlands).

SUMMARY

Questionnaire A has allowed the experts to identify and define many issues in the application of the Ukrainian Civil and Commercial Procedural Codes. Part of these issues were problems in the application of the Codes. Furthermore, training seems to be problematic: the overwhelming majority of respondents are of the opinion that additional training is needed. Such training

should, according to the respondents, take place within a stable procedural framework in the sense that the Codes should not be changed too often.

Respondents are generally satisfied with the level of orality of the procedure according to the new Procedural Codes. They are also satisfied with the role of case law, and they feel that the system of case reporting has a positive effect on the uniform application of the law throughout Ukraine. The majority of respondents are positive about the quality of the judgments of the Supreme Court as well, although there is no agreement as regards the status of these judgments in the Ukrainian legal system.

Procedural differentiation in the sense of tailoring the procedure to the type of case at hand works well according to the majority of respondents. Respondents are divided as regard the question whether sanctions against procedural misbehaviour are effective. The statement that mandatory representation by a lawyer increases the quality of the court decision is supported by a large number of respondents, whereas there is strong support for the statement that mandatory representation increases access to court. Mandatory representation also means, according to respondents, that cases are prepared well before they go to court. Respondents are divided about whether the new rules foster independence and impartiality of judges. Respondents seem equally divided as regards the trust to be given to judges when implementing the new rules of procedure loyally. They, nevertheless, seem to favour more active judges, since the majority of respondents think it to be a good idea to allow the court to give a neutral analysis of the case to the parties and in this manner, influence the way the case is litigated.

The respondents are divided about the question whether a passive role of the judge results in fair decisions, while there is also no clear majority in favour of the idea that a passive judge increases efficiency. A majority of respondents, and especially the judges, noted a positive effect of the new obligations of the parties in the taking of evidence. The respondents are divided about the question whether documentary discovery has positive effects. They are also divided about the way the appellate courts deal with the facts of the case. This difference of opinion is surprising since the new rules are straightforward on this matter. Respondents are even divided about the effects of unlimited access to the Supreme Court. This division of opinions is surprising as well, since it is generally recognised that unlimited access to the Supreme Court will result in an overburdened court that cannot execute its main tasks in the area of uniformity of practice and development of the law.

Finally, according to the majority of respondents, in-court settlement and ADR are not often used in Ukraine, even though a large proportion of respondents feel that settlements may lead to fast and positive results of procedures while ADR influences access to court.

QUESTIONNAIRE B

The in-depth-interviews with stakeholders on the basis of Questionnaire B were conducted to provide the necessary background information, and helped to identify additional areas in need of attention. The areas identified concern, amongst other things, the work conditions at the courts, the remuneration of judges, the staffing and size of the courts, judicial specialisation, the fact that judges perform many tasks unrelated to deciding disputes on the merits, judicial discretion, the introduction and implementation of new procedural rules, practice directions, allocation of cases, and the service of the summons (notification).

Access to Justice in Eastern Europe,
Issue 4 (8) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com
10.33327/AJEE-18-3.4

O Uhrynovska 'Novelization of Civil Procedural Legislation of Ukraine in Cassation Review: Panacea or Illusion? (2020) 4(8) *Access to Justice in Eastern Europe* 209-225
10.33327/AJEE-18-3.4-a000036

NOVELIZATION OF CIVIL PROCEDURAL LEGISLATION OF UKRAINE IN CASSATION REVIEW: PANACEA OR ILLUSION?*

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Summary: 1. Introduction – 2. Cassation Essence and Approaches to Appealing Ukrainian Cassation Court Decisions– *2.1. Persons Who Have the Right to Cassation Appeal – 2.2. Procedural Status of 'Non-parties to the Case if the Court Decided on their Rights, Freedoms, Interests and (or) Responsibilities' at Cassation Proceedings Stage* – 3. Cassation Appeal Objects – 3.*1. Grounds for Appealing Court Decisions on Application Merit Conditions – 3.2. Failure to Indicate Grounds for Appealing Court Decisions in Cassation: Procedural Law Quality Shortcomings* – 4. Cassation Proceedings Closure: Remarks – 5. Conclusions

The article analyzes the novelties introduced to the civil procedural legislation in the

* *Received: 12.10.2020. Revised: 06.11.2020. Approved: 24.11.2020.*

1 The author expresses her gratitude to her Master Degree student, Mr. Pinyashko Mykhailo, for his help in finding and collecting case law during this study.

cassation review. Cassation proceedings in Ukraine's current civil proceedings engender a post-appellate court decision review, the content and purpose of which are to ensure civil proceeding implementation based on the latter principle application. The author evaluates cassation filters as a positive step in forming the cassation appeal institution. They constitute self-limitation of the Supreme Court's jurisdiction and are designed to relieve it from reviewing an excessive number of cases. Simultaneously, the current legal regulation of cassation filters (grounds for appealing court decisions) is far from ideal and needs to be improved, given the shortcomings highlighted in the study. The non-parties to the case, possessing the right to cassation appeal, are not always burdened with participation in the case. Using the example of prosecutor participation in the cassation proceedings, the author illustrates how national law confers such rights on persons who did not take part in the case.

Keywords: *cassation review, persons who have the right to cassation appeal, non-parties to the case, objects of cassation appeal, grounds for appealing against court decisions in cassation.*

1. INTRODUCTION

Constitutionally, human and civil rights and freedom protection epitomise a crucial judiciary function, portraying system and unity of state justice policy. Building a cassation review model has proved to pose a challenging issue in developing the judicial system. Since the beginning the Civil Court of Cassation work (hereinafter – CCC SC), 27,500 cases have been transferred to it from the Supreme Specialized Court of Ukraine for Civil and Criminal Cases (hereinafter - SSCU) and the Supreme Court of Ukraine (hereinafter – SCU).[2] Including new cases, 53,500 cases were pending in the CCC SC in 2018.

According to the civil proceedings state review in 2019, the Civil Court of Cassation of the Supreme Court received more than 26,000 procedural appeals: cassation appeals, appeals, court decision review applications due to newly discovered or exceptional circumstances, jurisdiction requests. The number slightly increased by 4.6% (1,100) compared to 2018. The predominant number of new applications to the CCC (25, 600) still entailed cassation appeals. According to the trial results by panels of three or five judges, 6.4 thousand local and appellate court decisions were revoked, which is 32.2% of the reviewed court decisions (19, 900); 367 court decisions were changed. Of the total number of revoked court decisions: 2,800 (44.1%) were revoked with a case referral for retrial; 1,700(26%) adopted a new decision; 1,100 (17.3%) upheld the court decision, 265 (4.1%) closed the proceedings not considering the application, 167 (2.6%) were revoked recommending further consideration.[3] Thus, the SCU faced a problem— the uncontrolled flow of cassation appeals hindered the effective justice administration.

2 Editor's Note. For more details on the Ukrainian judicial system formation, see S Prylutskyi, O Strieltsova 'Ukrainian Judiciary Under The XXI Century Challenges' (2020) 2/3(7) *Access to Justice in Eastern Europe* 78-99.

3 'Analytical review of the state of civil proceedings in 2019' (*Supreme Court*) <https://supreme.court.gov.ua/userfiles/media/Analiz_Civil_sudu_2019.pdf> accessed 10 October 2020.

Given the excessive cassation court workload, the need to introduce cassation filters to ensure efficient justice administration and a reasonable time for case consideration remains relevant. Notably, filter implementation is not exclusively Ukrainian know-how. Thus, Republic of Kazakhstan CPC's (Civil Procedural Code) Part 2 of Article 434 refers to cases decisions in simplified proceedings regarding cases involving individual property interests with a claim less than 2,000 calculation indices per month and legal entities with a claim amount less than 30,000 calculation indices per month are not subject to cassation review.[4]

In turn, other foreign country legislation, such as Austria and Croatia, clearly defines the grounds for cassation appeals against court decisions of previous instances. [5] Thus, foreign states unload the cassation courts differently, introducing formalized appeal procedures. Accordingly, on 15 January 2020, the Law on cassation filters[6] was adopted, taking effect on 8 February 2020. This law established an exhaustive list of grounds for appellate court decisions (procedural and on dispute merits) to introduced cassation filters. It changed the cassation court's case consideration limits, especially regarding cassation appeal details and the deadline for resolving opening cassation proceedings issues. Given the dynamic legislative processes and the legislator's constant desire to change, and the cassation court's legal regulation, this article analyzes Ukraine's civil procedure legislation reform concerning cassation review, identifies weaknesses, and suggests ways to eliminate them.

2. CASSATION ESSENCE AND APPROACHES TO APPEALING UKRAINIAN CASSATION COURT DECISIONS

Literally, cassation (Latin *quassare* – shake; damage; break) means a higher state body's court decision review or revocation due to non-compliance or rule violation of procedure by the entity making the decision.[7]

Presumably, cassation (as a cassation proceeding) originated in medieval France during the absolute monarchy formation.[8] Thus, the cassation institution's name was first enshrined in the French justice system, derived from the French verb *kasser* – to break. According to the French Code of Civil Procedure of 1806, the Court of Cassation was

4 Code of the Republic of Kazakhstan of 31 October 2015 № 377-V "Civil Procedure Code of the Republic of Kazakhstan" (as amended and supplemented on 07.07.2020) <https://online.zakon.kz/document/?doc_id=34329053#pos=2;-108> accessed 9 October 2020.

5 D Luspenyk, 'Kasatsiini Filtry U Tsyvilnykh Spravakh Problemni Pytannia Sudovoho Pravotlumachennia Ta Pravozastosuvannia' [Cassation filters in civil cases: problematic issues of judicial interpretation and law enforcement] (15 June 2020) Judicial-legal newspaper <https://sud.ua/ru/news/blog/171319-kasatsiyni-filtri-u-tsivilnikh-spravakh-problemni-pitannya-sudovogo-pravotlumachennya-ta-pravozastosuvannya> accessed 10 October 2020.

6 Law of Ukraine "On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine on Improving the Procedure for Judicial Cases" (hereinafter also Law №460-IX) [2020] Vidomosti of the Verkhovna Rada 29/194.

7 IO Kotovych, 'Kasatsiine Provadzhennia Yak Dodatkova Harantiia Sudovoho Zakhystu Prav Osoby' ['Cassation proceedings as an additional guarantee of judicial protection of individual rights'] (2013) 4 European Perspectives 84.

8 AT Komziuk, VM Bevzenko, RS Melnyk, *Administratyvnyi Protses Ukrainy [Administrative process of Ukraine]* (textbook, Precedent 2007).

the highest court reviewing a judgment's compliance with the rule of law, while the appellate courts entailed the second court instance reviewing cases merits, considering factual and legal issues, allowing new evidence submission, verifying and evaluating.[9] The cassation institution introduced in France was further developed in almost all European countries, developing peculiarities within these countries' national legal systems. Hence, this article will focus on the nuances of the Ukrainian cassation's subject procedural status right in light of the latest reform requirements, introduced procedural filters, cassation right objects, and the introduced filter application. This examination will unveil the complexity of the Ukrainian cassation appeal and the proposed procedural filters' quality.

2.1 Persons who have the right to cassation appeal

Traditionally, persons who have the right to cassation appeal comprise individuals who, following a civil law procedure, have the right to initiate an appellate court review in cassation.[10] According to Part 1 of Article 389 of the Ukrainian CPC, parties and non-parties in the case have the right to file an appeal against the cassation court's decision if the court decided one's rights, freedoms, interests or responsibilities. The participant list is defined in parts 1-4 of Article 42 of procedural law, including parties and third parties (in the claim proceedings), the applicant and debtor (in the enforcement proceedings), the applicant and persons concerned (in special proceedings). Participant status in the case is also vested in bodies and persons who, by law, possess the right to go to court in others' interests. An example of the latter can involve the proceedings when the Parliamentary Commissioner for Human Rights applies to the court or the prosecutor's representation of state interests.

However, the latter's ability to go to court, including when initiating court cassation reviews, hinges on proving appeal validity. Hence, this research will explore the current case law prosecutor appeals against a court decision in the state's interests. According to R.M. Minchenko, to become a cassation appeal subject, a person must possess the right to a cassation appeal. This right engenders a state-guaranteed right of persons participating in the case and their successors and persons not taking part if the court decided on their rights, freedoms, and responsibilities. The cassation appeal aims to verify the court decision legality of the first instance after their appeal consideration, and appellate court rulings entered into force.[11] Since this definition does not fully cover all subjects, following the provisions of national law, can initiate a contested decision review in cassation, this interpretation is challenging to support.

9 KM Bida, 'Kasatsiine Provadzhennia V Hospodarskomu Sudochynstvi Ukrainy' ['Cassation proceedings in commercial litigation of Ukraine'] (Candidate of law thesis, Taras Shevchenko National University of Ukraine, 2005).

10 MY Stefan, *Tsyvilne Protsesualne Pravo Ukrainy Akademichnyi Kurs [Civil procedural law of Ukraine: Academic course]* (Textbook for students of legal special higher education establishments, Concern Publishing House 'In Jure' 2005).

11 RM Minchenko, 'Kasatsiine Provadzhennia Obiekty Ta Subiekty Kasatsiinoho Provadzhennia' ['Cassation proceedings: objects and subjects of cassation proceedings'] [2012] Scientific works of NU OLA.

Thus, this definition follows the right-holders to a cassation appeal are divided into those participating in the case (or their successors) and those not participating in the case. At the same time, the scholar refers to the latter only as:

> persons who did not participate in the case if the court has decided on their rights, freedoms, and responsibilities.' Instead, the exercise of the right of the other rights-holders to a cassation appeal, to the author's conviction, is burdened with participation in the case.

However, Part 3 of Article 24 of the Law of Ukraine of the Prosecutor's Office, amended on 3 July 2020, outlined the right to an appeal or a cassation appeal against a court decision in a civil, administrative, or commercial case, regardless if participation is granted to a higher prosecutor, namely: the General Prosecutor, one's first deputy and deputies, heads of regional and district prosecutor's offices, first deputies and deputy heads of regional prosecutor's offices, heads, deputy heads, heads of divisions of the Specialized Anti-Corruption Prosecutor's Office. Therefore, the definition by R.M. Minchenko asserted persons who have the right to cassation appeal against a court decision in civil proceedings does not cover the listed persons, who may apply to the cassation court with the relevant complaints.

The prosecutor's participation issue in civil proceedings remains relevant and debatable. Moreover, SCU's legal position assessment indicates the prosecutor's participation in cases to protect the state's interests. Thus, the Joint Chamber of the Commercial Court of Cassation decided on 7 December 2018 in case № 924/1256/17, interpreting Part 3 of Art. 23 of the Law of Ukraine 'On the Prosecutor's Office' in a systematic connection with the provisions of procedural law, noted that the prosecutor represents in court the legitimate interests of the state in case of violation or threat of violation of state interests, namely:

- if the protection of these interests thus exercised by a body of state power, a body of local self-government or another subject of power, the competence of which includes the authority to exercise such protection in disputed legal relations
- if there is no body of state power, the body of local self-government or another subject of power, the competence of which includes the authority to protect the state's legitimate interests in disputed legal relations[12]

The Grand Chamber of the Supreme Court (Grand Chamber) in the decision of 26 June 2019 in case № 587/430/16-c specified the Joint Chamber of the Commercial Court of Cassation, indicating the need to check in each case:

- arguments of the parties regarding the presence or absence of public authority power to protect legitimate interests in the manner the prosecutor chooses
- prosecutor arguments about the absence of a body competent to protect the state's legitimate interests[13]

Another Grand Chamber resolution detailed the grounds for representing the state interests by the court prosecutor. If the prosecutor uncovered the absence of a competent body to protect the legitimate state interests in disputes representing state interests,

12 Resolution in case №924/1256/17 (Joint Chamber of the Kyiv Commercial Court, 07.12.2018).

13 Resolution in case №587/430/16-ц (Grand Chamber of the Supreme Court, 26.06. 2019).

prosecutor argument, the court must verify it regardless of whether the prosecutor provided evidence of establishing the relevant body. The court independently checks whether anybody filed a lawsuit to protect the state's interests with such a prosecutor claim. The procedure provided for in Part 4 of Art. 23 of the Law of Ukraine 'On the Prosecutor's Office' applies only to establish the existence of grounds for representing the state's interests in court if the subject of authority not or improperly exercises the state's protection legitimate interests. In other words, the prosecutor is obliged to notify the relevant subject in advance before applying with the court, only when the prosecutor has the authority to protect the legitimate state interests in the disputed legal relationship but does not or improperly performs them. The Grand Chamber also cited when initiating proceedings on a prosecutor-filed claim statement in the state's interests, the person of a body authorized to perform state functions in contentious relations acquires plaintiff status. In the absence of such a body or authority to apply to the court, the prosecutor shall mention this in the claim statement, where the prosecutor shall acquire a plaintiff status.[14] In cases of failure to prove the grounds of appeal, the prosecutor's cassation appeal is not accepted and returned based on Part 2 of Article 393, clause 5 of Part 2 of Article 392, and clause 4 of Part 4 of Article 185 of the CPC of Ukraine.

Thus, the prosecutor's state representation encompasses two cases. Generally, the prosecutor's participation in the trial of cases to protect state interests is appropriate. Furthermore, the prosecutor's entry cannot be justified by an excessively wide range of state interests. Hence, imposing the prosecutor's obligation to prove the validity of entering the process embodies a legislator's rational decision.

2.2 Procedural status of 'non-parties to the case if the court decided on their rights, freedoms, interests and (or) responsibilities' at the stage of cassation proceedings

Another right-holder to a cassation appeal constitutes persons not participating in the case if the court decided their rights, freedoms, interests or responsibilities as specified by case law. The SCU in its ruling of 11 July 2018 in case № 911/2635/17 stated, unlike an appeal against a court decision by a party to the case, a person not involved in the case must prove a legal connection with the parties to the dispute or directly with a court decision by substantiating three criteria: the court has decided on their right, interest, duty and such a connection is evident and unconditional, as opposed to probable. Thus, the decision is made on a person's rights and obligations not involved in the case. If the decisional motivation contains court conclusions on the individuals' rights and obligations, or in the operative decision, the court directly indicates such a person's rights and obligations.[15] When distinguishing persons whose rights, freedoms, interests or obligations have been decided by the court from third parties, not making independent claims on the dispute's subject matter, one must pay attention to the following. According to Article 53 of the Ukrainian CPC, the court has grounds to involve a third party without independent claims when 'the decision in the case may affect its rights and (or) obligations to one of the parties.' The legislator's legal

14 Resolution in case №922/614/19 (Grand Chamber of the Supreme Court, 11.02.2020).

15 Resolution in case №911/2635/17 (Kyiv Commercial Court as a part of the Supreme Court, 11.07.2018).

technique insinuates the phrase 'may affect' covers broader cases than the verbiage 'the court has decided on.'

Secondly, although such persons' interest is procedural, not substantive, adopting a decision on the dispute's merits encompasses third parties' involvement without independent claims. However, as for the individuals whose rights, freedoms, interests or responsibilities the court has resolved, their appearance in the process does not depend on the decision on the merits of the claims. Thus, such persons' rights may be resolved, for example, in decisions to secure a claim or approve a settlement agreement.

Also, per the requirements of Part 4 of Article 389 of the Ukrainian CPC, filing cassation appeals against court decisions by persons whose rights, interests, or obligations the court decided is possible only after the appeal review of such persons in appellate proceedings, except when the appellate court directly made the court decision. Hence, various legal positions in legal circles, directly admitting cassation appeals against court decisions, without obliging persons whose rights, obligations or interests the court decided to overcome the barrier of an appeal for their appeal notice. The primary supporting arguments provide direct access to file a cassation appeal to such persons are:

1. Part 4 of Art. 389 of the Ukrainian CPC, only covering the appeal against a court decision, thus excluding specified norm effect on appeal cases against appellate court decisions;
2. following Part 4 of Art. The court decided 389 Ukrainian CPC, persons whose rights, interests or responsibilities, are affected by the procedural party rights only after the cassation proceeding opens (apparently, in mandatory prior appeal, such persons would possess the party rights from the moment of opening the appellate proceedings based on Part 3 of Article 352 of the Ukrainian CPC);
3. the need to ensure the individual right to appeal the appellate court's decision and prevent the person from falling into a vicious circle, in which the cassation appeal filing is subject to a condition that obviously cannot be fulfilled.[16]

Therefore, an appeal barrier for such persons following CPC Part 4 of Article 389 embodies a necessity, and these points do not refute this position, given the following. The first argument does not correspond to Part 1 of Article 258 of the Ukrainian CPC, personifying rulings from court decisions. Supporters have contended the second argument regarding the absence of an appeal barrier essentially appeals to the provision outlined in Part 4 of Article 389 of the Ukrainian CPC. In other words, supporters of this approach, the absence of Part 4 of Article 389, would testify the appeal is obligatory since instructions are already outlined in Part 3 of Article 352 of the Ukrainian CPC.

Nevertheless, given the provision of Part 4 of Article 389 of the Ukrainian CPC, the need to overcome the barrier of appeal does not exist. However, the last two procedural law provisions address different legal regulation subjects and do not contradict each other. Thus, Part 4 of Article 389 of the Ukrainian CPC is designed for cases where the appellate court decided the rights, interests or responsibilities of persons without their participation. In turn, Part 3 of Article 352 regulates cases where the court made such

16 V Barsuk, O Malinevsky, '"Phantom" interest' (11 January 2019) Judicial Gazette <*https://yur-gazeta.com/publications/practice/sudova-praktika/fantomniy-interes.html*> accessed 10 October 2020.

a mistake in the first instance. Also, the absence of the provisions of Part 4 of Article 389 of the Ukrainian CPC would violate the access of these persons to justice, as it would make appealing the court decision impossible. Support for the third argument would mean transforming the cassation court into a court of law and fact, contrary to cassation appeal since the SCU is not such.[17] Case law reflects this provision.[18] Finally, the content of parts 2 and 3 of Article 370 of the Ukrainian CPC also testify to a court decided need for a preliminary appeal by persons whose rights, freedoms, and or interests without their participation. The cited norms authorize the appellate court when these persons apply to suspend the adopted decisions' validity and authorize the court to cancel them in procedural law cases. Hence, legal experts must pay attention to the case law on this issue.

Ruling the judgments of 14 February 2020 in case №463/2390/15-c, of 8 April 2019 in case №291/1008/18, and of 23 January 2019 in case №219/4727/18, the SCU stated the analysis of the provisions of parts 1 and 4 of Article 389 of the Ukrainian CPC gives grounds to conclude a person not participating in the case may file a cassation appeal, provided the appellate court reviews its appeal against the court decision of the first instance, as of the first instance determines the parties' composition.[19;20;21] Thus, if the court decided on their rights, freedoms, interests or responsibilities remain independent right-holders to appeal, persons not participating in the case remain independent right-holders to appeal, but the appeal barrier burdens exercising their rights.

3. CASSATION APPEAL OBJECTS

The cassation appeal objects are defined in clauses 1-3 of part 1 of Article 389 of the Ukrainian CPC, including:

1. the court decision of the first instance after the appellate case review (appellate court decision of instance);
2. court decisions of the first instance determined by the procedural law after appellate proceedings review;
3. personalized in Part 3 of Article 389 of the Ukrainian CPC appellate court decisions.

Law №460-IX excluded from the cassation appeal objects such first-instance court decisions on the proceedings' opening, violating jurisdiction rules. It also amended clause 3 of part 1 of Article 389 of the Ukrainian CPC with a new provision based on clause 3. The appellate court decision to refuse to satisfy the review application on newly discovered or exceptional circumstances remains subject to appeal.

17 B Gulko, 'Verkhovnyi Sud – Ne Sud Faktu A Sud Prava' ['The Supreme Court is not a court of fact, but a court of law'] (*Verkhovhyi Sud*, 29 March 2018) <https://supreme.court.gov.ua/supreme/pres-centr/news/457146/> accessed 10 October 2020.

18 Resolution in case №П/811/1170/16 (Kyiv Administrative Court as a part of the Supreme Court, 19.07.2018).

19 The decision in the case №463/2390/15-ц (Kyiv Civil Court as a part of the Supreme Court, 14.02.2020).

20 The decision in the case №291/1008/18 (Kyiv Civil Court as a part of the Supreme Court, 8.04.2019).

21 The decision in the case №219/4727/18 (Kyiv Civil Court as a part of the Supreme Court, 23.01.2019).

Appealing individual court decisions in cassation proceedings as the cassation appeal object depends significantly on how the court operates. Clause 1 of Part 2 of Article 36 of the Ukrainian Law 'On the Judiciary and the Status of Judges' as amended on 20 June 2020 (Law 401402-VIII) stipulates the SCU administer justice as a cassation court and in procedural law as a first or appellate court, in the manner procedural law prescribes. According to clause 8 of part 2 of Article 129 of the Ukrainian Constitution, the judicial proceeding's basic principles include 'ensuring the right to an appellate review of the case and a cassation appeal against a court decision' as specified by law. A similar provision is duplicated in Article 14 of Law 21402-VIII.

The Academic Explanatory Dictionary defined the 'ensuring' of the right involves guaranteeing such a right, creating reliable conditions for its implementation.[22] Therefore, from these national legislation provisions, citizens guarantee filing an appeal. Meanwhile, as for court decisions' cassation appeal, procedural law limits the latter's cases. This legislator's position corresponds to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention or the ECHR). The European Court of Human Rights (hereinafter referred to as the ECtHR or the Court) has long followed a consistent approach in its case-law, according to which clause 1 of Article 6 of the Convention provides a wide range of guarantees in proceedings at first instance but does not oblige the Member States to establish appellate and cassation courts. If the latter is created, the person must be guaranteed compliance with Clause 1 of Article 6 of the ECHR at these courts' level. However, in such cases, less stringent standards may be applied.[23;24] From this point of view, the ECtHR distinguishes between the functions and tasks of the appellate and cassation courts: if the appellate review is considered a minimum standard of appeal, the cassation review is traditionally considered extraordinary given the unique cassation court as the highest instance court, the power specifics in terms of limitations regarding issues of law, and a greater degree of procedural formality.[25]

Consequently, the idea of introducing cassation filters at the cassation appellate stage by Law №460-IX seems acceptable and aligns with the purpose of the court decision review. The additions made by Law №460-IX in cassation filters indicated the legislator had defined an exhaustive list of grounds on which court decisions can be appealed in cassation. Thus, part 2 of Article 389 of the Ukrainian CPC reworded the specified law, fixing the 'exclusive' grounds for appealing court decisions. Markedly, clauses 1-3 and paragraph 1 of clause 4 of the cited rule determine the grounds for appealing decisions on the dispute's merits. Instead, paragraph 2 of clause 4 of Article 389 of the Ukrainian CPC applies to appeals concerning procedural decisions provided for in clauses 2, 3 of part 1 of Article 389 of the Ukrainian CPC.

22 'Academic Explanatory Dictionary of the Ukrainian Language' <http://sum.in.ua/> accessed 10 October 2020.

23 Resolution of the European Court of Human Rights in Delcourt v. Belgium, no. 2689/65, 17 January 1970, § 25, Series A no. 11.

24 Levages Prestations Services v. France (App no 21920/93) ECHR 23 October 1996, § 48.

25 D Luspenyk, 'Systema Perehliadu Sudovykh Rishen U Tsyvilnomu Sudochynstvi Vidpovidnist Mizhnarodnym Standartam Ta Efektyvnist' ['System of review of judicial decisions in civil proceedings: compliance with international standards and efficiency'] (*Verkhovnyi Sud*, 1 July 2019) <https://supreme.court.gov.ua/supreme/pres-centr/zmi/737883/> accessed 10 October 2020.

3.1 Grounds for Appealing Court Decisions on Merit Application Conditions

According to clause 1 of part 2 of Article 389 of the Ukrainian CPC, the grounds to appeal a court decision do not take into account the SCU's conclusion on the application of the rule of law in similar appellate court legal relations, unless the SCU decision departs from such a ruling. National law does not define 'similar legal relations.' As a result, determining if legal relations' similarity is carried out considers the criteria formed due to law enforcement.

Thus, similar legal relationship can mean both those with only certain standard features and those legal relationships identical, the same as others. Their elements determined the similarity of legal relations: subjects (participants), objects, and content (rights and responsibilities of legal relation subjects). The theory of law embodies the subjective and objective criteria of similarity of legal relations, essential for the hypothesis of the rule of law. This premise must regulate these relations, indicating specific law subjects or objects to which this norm's disposition rule applies. If the rule of law does not ensure its effect applies only to a limited number of persons, the subjective criteria do not affect the individual legal relationship qualifications. Notably, the primary criterion entails legal content, participants' rights and obligations without which establishing the similarity of legal relations remains impossible.[26] In cases №№761/31121/14-ц, 522/2202/15-ц, the Grand Chamber of the SCU recognized the dispute objects' difference does not indicate legal relations dissimilarity.[27] The claim's subject, grounds, content, and facts, coupled with substantively regulating the disputed legal relationship, should help determine the similarity of legal relations.

The legislator seeks to justify introducing a filter of not considering the SCU similar legal relations conclusions, which should screen out individual cases during the opening stage. However, such legal relations' similarity is determined after the judges' panel opens it. Lack of legal relations similarity serves as the basis for closing the proceedings following clause 5 of part 1 of Article 396. In other words, when appealing a court decision on the grounds provided in clause 1 of Part 2 of Article 389 of the CPC must be met. In the absence of other technical defects of the applicant's appeal, the cassation proceedings shall be opened in any case. Clause 1 of part 2 of Article 389 of the Ukrainian CPC does not clearly answer the question concerning failure to consider SCU conclusions.

CPC Part 4 of Article 263 stipulates when choosing and applying the rule of law to the disputed legal relationship, the court considers the decisions applying the relevant rules of law set out in the SCU's rulings. Hence, the appellate court's failure to consider SCU's rulings validate revoking such decisions based on CPC clause 1 of part 2 of Article 389. Subclause 7 of paragraph 1 of the Transitional Provisions to the CPC specifies a court hearing a cassation case as a judicial panel or a chamber (joint chamber) shall refer the case to the Grand Chamber of the SCU if such a panel or chamber (joint Chamber) considers it necessary to depart from the conclusion, set out in a previous SCU decision.

26 'Judges of the general courts of the western regions of Ukraine discussed with a judge of the Supreme Court the significance of the conclusions of the Supreme Court on the application of the law in civil cases' (*Supreme Court,* 12 April 2019) < https://supreme.court.gov.ua/supreme/pres-centr/news/689380/> accessed 10 October 2020.

27 Resolution in case №761/31121/14-ц (Grand Chamber of the Supreme Court,12.12.2018).

In other words, the courts of first and appellate instances cannot deviate from the legal positions outlined in the SCU decisions when considering a particular case. Instead, if during the court consideration, the SCU reconsiders the court decision in similar legal cassation relations (in another case), the proceedings in the first case may be suspended until the end of the second cassation case (clause 10 of Part 1 of Article 252, clause 14 of Part 1 of Article 253 of the CPC of Ukraine).

The following circumstances also testify to the need to consider the Supreme Court's legal positions. Thus, the SCU in the decisions of 24 January 2018 in case №911/462/17, of 01 March 2018 in case №910/7109/17 in resolving the dispute, referred to SCU conclusions about similar legal relations.[28;29] Also, in the decisions of 16 January 2018 in the case №377/237/15, of 16 January 2018 in the case №207/2008/15-ц, the SCU, guided by CPC Part 4 of Article 263, considered the SCU position.30;31 Finally, in cases where the SCU did not apply the SCU's legal positions, the SCU's findings could not be taken into account when considering the dispute, but the SCU's conclusions referred to by the party were not relevant to dispute legal relations.[32;33]

Markedly, CPC clause 1 of part 2 of Article 389 designates the grounds for cassation appeal, providing disregard for an SCU decision and not merely an approved appellate court decision textual reference absence. Basically, clause 1 of Part 2 of Article 389 of the CPC concerns precisely the content and not the judgment form. The wording has posed difficulties in applying CPC clause 1 of part 2 of Article 389, excluding when the SCU deviates from such a ruling.

First, such legal techniques impose an additional obligation for the appellant to follow the latest case law without any official information systems considering the SCU's prevailing legal positions. Conceivably, when the SCU's legal position has already changed, but the general public has not received the positional shift in a resolution.

Secondly, CPC Part 2 of Article 416 obliges only the Chamber, the United, and the Grand Chamber to rule on applying the rule of law only, but most SCU resolutions, adopted at the board level, may also contradict one another. Should the SCU panels' legal positions be ignored? Hence, although a cassation court decision does not automatically mean an appropriate conclusion, taking into account, the SCU judicial panel positions seem rational.[34;35]

According to CPC clause 2 of part 2 of Article 389, the judgment's revocation grounds justify the need to deviate from the rule of law conclusion in such legal relations set out in the SCU ruling and the appellate court applied. The application idiosyncrasies partly coincide with clause 1 of part 2 of Article 389 of the CPC, namely regarding

28 Resolution in case №911/462/17 (Kyiv Civil Court as a part of the Supreme Court, 24.01.2018).
29 Resolution in case №910/7109/17 (Kyiv Civil Court as a part of the Supreme Court, 01.032018).
30 Resolution in case №377/237/15 (Kyiv Civil Court as a part of the Supreme Court, 16.01.2018).
31 Resolution in case №207/2008/15-ц (Kyiv Civil Court as a part of the Supreme Court, 16.01.2018).
32 Resolution in case №906/538/16 (Kyiv Commercial Court as a part of the Supreme Court, 09.02.2018).
33 Resolution in case №910/5001/17 (Kyiv Commercial Court as a part of the Supreme Court, 12.03.2018).
34 Decision in case №809/109/18 (District Administrative Court of Ivano-Frankivsk region, 05.03.2018).
35 Decision in case №809/24/18 (District Administrative Court of Ivano-Frankivsk region, 09.02.2018).

similar legal relations and the lack of a legally established court conclusion definition. However, clause 2 of part 2 of the article separately outlines conditions for applying this provision. Thus, when filing a cassation appeal based on paragraph 2 of part 2 of the said article, the applicant must indicate the SCU decision, the appellate court applied, briefly formulate the legal conclusion from which the appellant intends to deviate and justify the need for such a nonconformity.

Therefore, the analyzed basis excessive;y lists evaluation categories: motivation, validity, similarity. Also, conceptually, when deciding on the cassation proceedings opening, the court should follow a formal conduct model, rather than investigative and superficially examine the cassation appeal content, for the court does not yet require the cassation proceedings materials. CPC clause 4 of part 1 of Article 396 allows the court to close the cassation proceedings in premature conclusions cases, confirming the need to open it. Therefore, validity and motivation should assess the case merits to a level such as a cassation filter's value and efficiency.

According to Ukrainian CPC clause 3, part 2 of Article 389, a court decision may also be appealed in cases without an SCU conclusion on applying the rule of law. Therefore, the application individualities also depend on the legal relation similarity. Moreover, clause 3 provides for the absence of an SCU conclusion in principle, and not only in the contested decision. The simultaneous applicant reference to CPC paragraphs 1 and 3 of Part 2 of Article 389 pose a problem because they are mutually exclusive. The case law experts have asserted to initiate cassation proceedings on this ground, the appellant can refer to the relevant CPC paragraph of Article 389.[36;37]

The most challenging law enforcement problem emerges from the CPC clause 4 of Part 2 of Article 389. The paragraph refers to the provisions of Article 411 of the CPC. Thus, the judgment remains subject to revocation on the grounds in CPC part 2 of Article 411. Simply, this epitomises a gross procedural law violation, an unconditional ground for revoking the judgment. This court decision remains subject to cancellation and retrial on the following grounds: procedural law violation, violations making establishing case facts impossible, facts relevant to the proper case resolution. Inadequate resolution applies if the court:

- did not examine the evidence gathered in the case, subject to the conclusion the cassation appeal grounds stated in the cassation appeal (clauses 1-3 of the second part of Article 389 of the CPC);
- considered the case according to general claim proceeding rules of simplified claim proceedings;
- unreasonably rejected the request for demand, examination, or evidentiary review, another party request (statement) to establish the circumstances vital for the proper case resolution;
- established substantial circumstances based on inadmissible evidence.

36 Resolution in case №662/211/19 (Kyiv Civil Court as part of the Supreme Court, 22.05.2020).

37 Resolution in case №607/3119/19 (Kyiv Civil Court as part of the Supreme Court,13.04.2020).

3.2 Failure to indicate the grounds for appealing against cassation court decisions: shortcomings in the quality of procedural law

By ratifying the Convention and its protocols, Ukraine has guaranteed everyone under its jurisdiction the rights and freedoms outlined in the Convention and these protocols. Article 17 of the Ukrainian Law outlines ECtHR case law judgement, enforcement and application as amended on 2 December 2012, providing for the Convention's application. The ECtHR case law engenders the court law source. Article 18 of this Law defines the procedure for referring to the Convention and the Court case-law. Notably, it goes about Court case law precisely as disclosed in Article 1 of this Law, following ECHR case law and the ECHR and not only Ukraine's decisions. The rule of law in ECtHR decisions concerning Ukraine connects to law quality and legal certainty requirements. Thus, in the judgment of 10 December 2009 in *Mikhaylyuk and Petrov v. Ukraine*, application № 11932/02, the Court stated the expression 'per the law' refers to the relevant legislation quality and requires availability to the person concerned, who must foresee its consequences and this legislation must comply with the rule of law.[38]

Also, revealing the legal phenomenon of quality of law, the ECtHR has formulated numerous conclusions:

- current national legislation provisions must be formulated sufficiently and clearly for practical application;[39]
- no rule can be considered a 'law' if it is not formulated with a precision sufficiently enabling the citizen to regulate one's conduct: the individual must be able, if necessary, after appropriate consultation, to foresee the consequences that may follow from one's actions. These consequences should not be predicted with absolute certainty. While certainty in law is highly desirable, it can be unduly rigid, and the law must keep pace with changing circumstances;[40]
- a legal provision can withstand a quality check if that provision is sufficiently clear in the vast majority of cases national bodies decided.[41]

In view of the above, we propose to pay attention to the 'quality of the law', which regulates cases of non-indication of grounds for appealing against court decisions in cassation procedure. Thus, CPC clause 5 of part 2 of Article 392 stipulates the appellant, filing a corresponding cassation appeal, is obliged to indicate a specific ground (or several grounds) to appeal the court case decision. In this case, the claimant independently chooses such a ground, based on the list of grounds set out in CPC Article 389. Therefore, the failure of the person filing the cassation appeal to state the relevant grounds for appealing the court decision represents a shortcoming in executing a cassation appeal.

From the provisions of CPC part 2, Article 393, and Article 185, the consequence of violating Article 392's requirements regarding the form and content of a cassation

38 Mykhailyuk and Petrov v. Ukraine (App No 11932/02) ECHR 10 December 2009,.

39 'Resolution of the European Court of Human Rights in the case of 22 June 2004' (2004/00) № 4 Case law of the European Court of Human Rights. Decision. Comments.

40 'Judgment of the European Court of Human Rights in the case of Volokha v. Ukraine of 2 November 2006' (2007/04 (23) Official Gazette of Ukraine, 958.

41 'Resolution of the European Court of Human Rights in Gavenda v. Poland of 14 March 2002' (2002/00) 2 Case law of the European Court of Human Rights. Decision. Comments.

appeal involves leaving such an appeal without motion. Basically, if the person filing the cassation appeal fail to indicate the grounds for appealing the court decision, the appeal can be left without motion. Additionally, CPC paragraph 4 of part 4 of Article 393 specifies the complaint will not be accepted for consideration, and the court will return it if it does designate the grounds for appealing a court cassation decision. Thus, the current legal regulation provides for different legal consequences of identical situations. In cases where the appellant has not personally given the grounds for appealing the court decision, the appeal can be either left without motion or returned at the judiciary panel's discretion. Moreover, procedural law does not indicate which rule has priority.

Unfortunately, various jurisdictional cassation courts and internal cassation court panels of the respective jurisdiction have disputed this issue. Thus, case law has illustrated Administrative Court of Cassation judiciary panels in some cases have left the cassation appeals without motion, and in others have not accepted and returned them.[42;43;44] At the same time, the Civil Court of Cassation judiciary panels in cases where the appellant does not specify the grounds for appealing the court cassation decision apply CPC Part 2 of Article 393 and leave the complaint without motion.

Consequently, the second approach in appealing the decisions provided for in CPC clause 1 of part 1 of Article 389 cites court decisions of the first instance after their review on appeal and appellate court decisions, correctly adjusts CPC clause 4 of part 4 of Article 393 when accompanying Law On Cassation Filter's amendments entail a legislator legal shortcoming. Since CPC clause 5 of part 2 of Article 392 was amended on 01 January 2020, before the amendments to the Law On Cassation Filters, it established the duty of a person filing a cassation appeal to indicate the incorrect substantive law court application or procedural law violation. Failure to comply with this obligation will enact CPC clause 4 of Part 4 of Article 393, followed by the appellant complaint's return. Since CPC clause 5 of part 2 of Article 392 has been changed in terms of appealing the decisions provided for in CPC clause 1 of Part 1 of Article 389, no need exists to apply paragraph 4. Part 4 of Article 392 when appealing such court decisions.

However, the grounds for appealing court decisions on procedural issues, procedural law court decisions of the first instance after their appeal review, and the appellate court decisions have not changed. Such grounds include the substantive law court or procedural law violation incorrectly applying the CPC's wording of 01 January 2020. When appealing court rulings delineated CPC clauses 2-3 of part 1 of Article 389, applying CPC clause 4 of part 4 of Article 392 and returning cassation appeals demonstrates a logical outcome of not specifying the grounds for appealing the relevant court rulings.

Thus, the current procedural legislation governing cassation proceedings opening and possible non-compliance consequences with cassation appeal guidelines requires immediate changes and additions, as procedural law quality in the cassation review remains questionable. Hence, the legislator should change the grounds for appealing court decisions

42 Resolution in case №810/2632/16 (Kyiv Administative Court as a part of the Supreme Court, 19.02.20020).

43 Resolution in case №640/972/19 (Kyiv Administative Court as a part of the Supreme Court, 16.04.2020).

44 Resolution in case №560/2953/19 (Kyiv Administative Court as a part of the Supreme Court,12.05.2020).

on procedural issues or introduce an updated procedure for appealing decisions on the merits. Specifically, it should address procedural decisions regarding the consequences of not stating the grounds for appealing court decisions, or, ultimately, determine which rules have priority: CPC Part 2 of Art 393 or clause 4 of Part 4 of Article 393.

4. CLOSURE OF CASSATION PROCEEDINGS: SOME REMARKS

In summarizing civil procedural novelties in the cassation review, the grounds for closing the cassation proceedings have supplemented the Ukrainian CPC (Civil Procedural Code) by Law №460-IX of 15 January 2020. Such grounds constitute the provisions in CPC clauses 4 and 5 of Part 1 of Article 396, for its content reduced to the following cases:

- if the person filing the cassation appeal refers to the SCU conclusion absence regarding applying the rule of law in such legal relations, but such an SCU ruling has already taken place
- if a person refers to the appellate court instance on not considering the SCU decision as a ground for cassation appeal. However, the SCU has already deviated from this conclusion in the appellant's opinion, where the appellate court did not consider it. The appellate court resolved the dispute, considering the SCU's new conclusion, except when the SCU decides to deviate from the new conclusion.

The complexity of applying CPC clause 4 of Part 1 of Article 396 involves no official information systems stores the SCU's current legal opinions in the context of Law on Cassation Filters.

The appeal 'unless the Supreme Court decides it is necessary to deviate from such a conclusion,' needs examination. The appellate or cassation proceedings closure engenders an interdisciplinary and collaborative institution typical of court proceedings in the relevant court, regardless of jurisdiction. Since such an institution is procedural, its application is due to process peculiarities. The CPC defined, CAS (Code of Administrative Procedure) or ComPC (Commercial Procedural Code) is not related to the substantive disputed legal relationship. However, a separate appeal in the provision of CPC clause 4 of Part 1 of Article 396 illustrates the institution's closing of the cassation proceedings depends on how the dispute merits were resolved, not corresponding to the legality of such an entity. Moreover, no other grounds for closing the cassation proceedings are provided in CPC clauses 1-3, 5 of part 1 of Article 396 relating to substantively regulating disputed legal relations.

Logically, the decision to close or not close the cassation proceedings per CPC clause 4 of Part 1 of Article 396 is possible only after processing the evidence, so the deadline for deciding on dispute merits may coincide with issuing a decision to close the cassation proceedings. As a result, the question arises: why close the cassation proceedings when the possibility to decide to leave the cassation appeal unsatisfied exists, not changing the contested decision. Meanwhile, the court's conviction to diverge from the previous legal position may express the judiciary bias of those previously supporting a party's position.

CPC Clause 5 of Part 1 of Article 396 designates the cassation court closes the cassation proceedings if after the cassation opening proceedings under clause 1 of the second part of Article 389 of this Code the court finds the law application ruling set out in

the SCU and referred to by the appellant in the cassation appeal concerns non-similar legal relationships. This procedure applies only to cases where the cassation proceedings were initiated under paragraph 1 of the second part of Article 389 of the CPC if the appellate court in such legal relations applied the rule of law without considering the SCU conclusion. The SCU decision of 08 April 2020 strikingly exemplifies enacting the grounds provided in CPC clause 5 of Part 1 of Article 396, in which the court analyzed legal relations similarity based on such criteria as the claim subject (of initial claims assessment), claim grounds (factual case circumstances and substantive legal regulation of the disputed legal relationship) and the parties.[45] Incidentally, neither CPC clause 4 nor clause 5 of Part 1 of Article 396 delineates the proceeding closure initiator. Consequently, the question arises whether the court can independently, given the civil dispositive process, close the cassation proceedings if it meets the grounds provided in these clauses. Hence, in this case, the cassation court has the right to close the proceedings, as the court discretion covers resolving this issue.

Another civil procedure legislation novelty comprises transferring the case to the established jurisdiction court. Thus, following CPC Part 4 of Article 414, if the cassation court closes the proceedings based on paragraph 1 of the first part of Article 255 of this code, the court, at the plaintiff's request, decides in writing to transfer the case to continue the trial, the jurisdiction of which includes such a case consideration, except in proceedings closed on several claims to consider in different proceedings or the case transfer in part for a new trial or further consideration. This progressive change aims to ensure persons applying to the court have access to justice and rendering inert-jurisdictional court disputes impossible.

Court case transfer due to legal instrument jurisdiction is actively employed.[46;47] Markedly, the appellate or cassation courts execute case transfer to the respective jurisdiction and only in cases where they close the proceedings on non-jurisdictional grounds. Therefore, higher court decision changes, if the first instance court closed the proceedings because the case should be considered under other proceeding rules, does not constitute grounds for transferring the case to an established jurisdiction court. Case №813/1056/18 typifies these guidelines. The Lviv District Administrative Court received a claim statement from an individual to the State Register of Legal Entities, Individual Entrepreneurs and Public Associations of the State Registration Office of the Legal Department of the Lviv City Council, the State Register of Legal Entities, Individual Entrepreneurs and Public Associations of the Regional Municipal enterprises of the Lviv Regional Council 'Bureau of Technical Inventory and Expert Assessment', demanding to cancel several registration actions regarding changes to legal entity statutory documents. The Lviv District Administrative Court closed the proceedings because the disputed legal relationship should consider the case according to civil procedure rules.[48]

According to the Eighth Administrative Court of Appeal's decision, the Lviv District Administrative Court's decision of 13 February 2019 to close the proceedings in the

45 Resolution in case №910/16868/19 (Kyiv Commercial Court as a part of the Supreme Court, 08.04.2020).

46 Resolution in case №695/1446/17 (Kyiv Commercial Court, 16.06.2020).

47 Resolution in case №175/660/17 (Kyiv Commercial Court, 29.04.2020).

48 Resolution in case №813/1056/18 (Lviv District Administrative Court, 13.06.2018).

administrative case №813/1056/18 did not change changes.[49] According to a decision of 1 April 2020, the Grand Chamber of the SCU upheld the cassation appeal partially. The Lviv District Administrative Court decision of 13 February 2019 and the Eighth Administrative Court of Appeal's decision of 23 April 2019 changed the case's referral to the general court's jurisdiction, determining the plaintiff's right to sue in commercial proceedings. On the other hand, the Lviv District Administrative Court decision of 13 February 2019 and the Eighth Administrative Court of Appeal's on 23 April 2019 did not change unchanged.[50]

Refusing to transfer the case to the established jurisdiction, the Grand Chamber of the SCU, in the decision of 6 May 2020 in case №813/1056/18, noted the case transferred to the appropriate jurisdiction where the cassation court closes the proceedings are executed. Therefore, since the first instance's court decided to close the proceedings and not the Grand Chamber of the SCU, the case referral to the Commercial Court of Lviv region should have been refused.[51] Thus, Law №460-IX of 15 January 2020 also specifies additional grounds for closing cassation proceedings. Hence, the legislator, in this case, was inconsistent. The grounds for closing the cassation proceedings provided for in Ukrainian CPC paragraph 4 of part 1 of Article 396 are essentially not procedural. As for Ukrainian CPC paragraph 5 of part 1 of Article 396, in this case, the decision to close the cassation proceedings depended on the judiciary panel's conclusion of the similarity of legal relations, which may be streamlined. In other words, the issue decision relevant to the applicant, in this case, significantly depended on court discretion.

5. CONCLUSIONS

These results lead to the following conclusions. First, cassation proceedings in Ukraine's current civil proceedings encompass a post-appellate court decision review, the content and purpose of which is to implement civil proceedings based on the latter's principles. The idea of implementing cassation filters depicts a positive step in cassation appeal, as they display SCU's self-limitation of jurisdiction, relieving it from excessive case reviews. After all, the court cassation exemplifies a court of law, not fact. Furthermore, cassation filters' legal regulation (grounds for appealing court decisions) is far from ideal and needs improving, given the shortcomings highlighted in the study. Consequently, effective cassation filters application requires:

- providing participants with a single information system revealing the current legal SCU positions
- developing a unified method of reflecting legal opinions in a court decision
- preventing law enforcement practices in similar legal relations within various appellate districts

Individuals with the right to cassation appeal should not be burdened with case participation. Prosecutor participation in cassation proceedings typified how national law confers such rights on persons not participating in the case. The basis for the process entry of such persons, including the cassation appeal, should directly reference the law.

49 Resolution in case №813/1056/18 (The Eighth Administrative Court of Appeal, 23.04.2019).

50 Resolution in case №813/1056/18 (Grand Chamber of the Supreme Court, 01.04.2020).

51 Resolution in case №813/1056/18 (Grand Chamberof the Supreme Court, 06.05.2020).

Access to Justice in Eastern Europe,
Issue 4 (8) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com
10.33327/AJEE-18-3.4

O Ovcharenko, T Podorozhna 'Lustration of Judges in Ukraine: National Insights and European Implications' (2020) 4(8) *Access to Justice in Eastern Europe 226-245*
10.33327/AJEE-18-3.4-a000037

JUDGE LUSTRATION IN UKRAINE: NATIONAL INSIGHTS AND EUROPEAN IMPLICATIONS*

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This article primarily focuses on the Ukrainian judge lustration, analysed from diverse aspects. Ukraine's legal lustration framework engenders two legal acts— the Law On Restoring Trust into Judicial Power in Ukraine (2014) and the law On Purification of

* *Received: 01.09.2020. First Revised: 10.10.2020. Second Revised: 19.11.2020. Approved: 24.11.2020.*

Government (2014). Social feedback on adopting these Laws, their key objectives, provided instruments and efficiency issues are discussed. This research particularly scrutinises the fundamental European lustration standards, referencing a few European countries' experiences: Albania, Bosnia and Herzegovina, Poland. Deep insight into national lustration procedures is given, considering the European Court of Human Rights' relevant rulings and the Ukrainian Constitution's provisions. Remarks on whether all lustration laws comply with the Ukrainian Constitution are offered. Addressing the High Council of Justice's precedents, a judicial body entitled to verify the judges' lustration results, an in-depth empirical analysis of those procedural results are provided. Overall, Ukrainian lustration embodies a unique phenomenon due to strong social demand formalized in specially designed regulation.

Keywords: *Ukraine, lustration, judges, judicial independence, judicial reform.*

1. INTRODUCTION

Recent events in Ukraine have unveiled the public administration system's ineffectiveness, where institutions have become vulnerable to relapses into the old Soviet order. The revival of socio-political phenomena and tendencies, such as the rule of law, respecting human rights and freedom of expression, power decentralization and party pluralism, needs support. Undoubtedly, enhanced mechanisms overcoming these challenges engenders the lustration. As a legal institution, lustration encompasses legal norms determining the procedure for implementing lustration. Restrictions, essentially, entail a person's accountability for specific actions. In lustration, various responsibility mechanisms apply. Since lustration restrictions epitomise legality, legal systems represent a primary element.[1] Lustration aims to strengthen a new democratic society and facilitate human rights and rule of law.

The Law On Restoring Trust into Judicial Power in Ukraine № 1188-VII, adopted on 8 April 2014,[2] monitors general jurisdiction court judges and punishes those legal officials found guilty of unfairly and judicially persecuting Euromaidan protest (taking place from November 2013 until February 2014) participants. This law launched two powerful judiciary audit instruments. All heads and deputy heads of general jurisdiction courts, except the President of the Supreme Court of Ukraine (SCU), had to resign from their administrative positions from the moment the Law entered into force, 11 April 2014. This occurred in all Ukrainian courts expeditiously, with the court's senior judges temporarily executing the court presidents' administrative functions. As outlined in this Law, the judicial communities initiated new court heads' elections with the judges' meetings on a rolling basis. Consequently, all courts elected their Presidents and deputy Presidents on a new democratically. In such a revolutionary manner, the Ukrainian judiciary eradicated the traditional, non-transparent, and undemocratic court Presidential appointment by the High Council of Judges.

1 O Busol, '"Pro vidnovlennia doviry do sudovoi systemy" ne ye zakonom pro liustratsiiu ta potrebuie doopratsiuvannia' ['"On Restoring Trust into Judicial Power in Ukraine" is not a Law on lustration and needs to be improved'], (2014) 8 *Hromadska dumka pro pravotvorenn*ia 11–20.

2 Zakon Ukrayiny 'Pro Vidnovlennya Doviry do sudovoyiy gilky vlady' 1188-VII [Law of Ukraine 'On Restoring Trust into Judicial Power in Ukraine'] [2014] Vidomosti of the Verkhovna Rada 23/870 <http://zakon3.rada.gov.ua/laws/show/1188-18> accessed 25 October 2020.

Secondly, the Law On Restoring Trust into Judicial Power in Ukraine outlined disciplining judges who had been proved to ban Euromaidan activities or had been involved in other severe human rights or European Convention on Human Rights violations. The Temporary Specialized Commission of Vetting of Judges of General Jurisdiction Courts (Commission) was charged with investigating and verifying judicial offenses. The SCU formed this 15-member Commission from civil society representatives, the Verkhovna Rada (Parliament) of Ukraine, and government representatives responsible for the Issues of Anticorruption Measures Police. However, this Commission, part of the High Council of the Judiciary, lacked members for various reasons. The quorum was not continuously maintained. The Law entitled citizens to file petitions against judges, allegedly violating their conventional rights and human dignity during the Euromaidan protests. The Commission held public hearings, clarifying severe judicial offenses within a procedure similar to a regular disciplinary investigation. However, this temporary agency drastically lacked human resources and time, initially intended to function for one year. Besides, the rulings of the Commission did not have absolute power, as long as a verification of the High Council of Justice remained obligatory.

Despite implementing the Law's vetted instruments restoring judicial trust and some provisional imperfection, judiciary lustration had commenced symbolically, following most Euromaidan activists' expectations. The law 'On Purification of Government' № 1682-VII was adopted on 16 October 2014.[3] Even though the aforementioned law referred mostly to the executive and law-enforcement agency representatives, some provisions directly affected judges and other judicial officials.

First, all judges had to confirm they legally acquired property ownership, including movable and immovable property, bank deposits, and numerous civil obligations. Court presidents directed implementing this instrument, controlling the asset officially published results on a unique website the Ministry of Justice administered. The latter empowered state fiscal agency officials to monitor judges' assets. Additionally, the State Judicial Administration had to reveal all Euromaidan protest participants' judicial convictions. Moreover, certain judicial officials were automatically dismissed from office when the Law 'On Purification of Government' came into force. An official ban on holding a public institutional office for five to ten years was imposed. The Ministry of Justice publically lists (https://lustration.minjust.gov.ua/register) the officials, known as a Unified State Register of Persons, Entitled for Application of Bans Provided by the Law 'On Purification of Government'. The Law restricts such judiciary as members of the High Council of Judiciary (except the SCU President), members of the Higher Qualification Commission of Judges of Ukraine, Head of the State Judicial Administration of Ukraine, first deputy head and deputy head of the State Judicial Administration of Ukraine. Furthermore, the State Security Service of Ukraine checks judges and other state officials on contact with the KGB[4] or membership in the Communist Party of the former USSR's governing bodies.

3 Zakon Ukrayiny 'Pro ochyshchennya vlady' 1682-VII [The Law of Ukraine 'On Purification of Government'] [2014] Vidomosti of the Verkhovna Rada 44/2041 <http://zakon3.rada.gov.ua/laws/show/1682-18/print1533984852614110> accessed 15 June 2019.

4 Editor's note. The State Security Committee of the Soviet Union.

Judges who failed to apply for the newly launched monitoring were discharged from office. Only 42 of 8500 Ukrainian court judges employed at the beginning of 2014 failed to meet this requirement or did not grant the vetting screenings' permission.[5] All judges in office applied for the initial asset checks; however, the process was not efficient. An attempt to unveil the judges' hidden bonds with the KGB-shadows failed, mostly due to the long period since the USSR's decay. The only significant consequence of the Law 'On Purification of Government' for the judicial system's functioning was a complete shutdown, provided by the Law for the High Council of Judiciary and the Higher Qualification Commission of Judges of Ukraine, members of which had been all automatically dismissed from their offices in November 2014. For almost a year after this demonstrative public suspension, Ukraine's judiciary lacked the instruments and official mechanisms to select new judges, assess existing judges and impose sanctions upon those suspected of breaching judicial duties. However, this fact did not affect the long-term vetting of Ukrainian judiciary procedures.

International institutions and national nonprofit government organisations (NGOs) welcomed the initial legal acts to dismiss civil servants and law-enforcement agency employees, collaborating with the former undemocratic regime. However, individuals who had to comply with new verification and assessment severely criticized this process. Emphasizing the new legal provisions' anti-constitutionality, lustration opponents predicted judicial revision of the initiated public authority dismissals and adverse reactions from some European partners of Ukraine, particularly the European Court of Human Rights (ECHR). However, most of those expectations did not come to fruition. Neither did the Euromaidan activists' sincere hope the lustration would transform into a universal recipe eradicating all the problems and complications accumulating in the Ukrainian establishment since the state sovereignty and independence proclamation.

2. INTERNATIONAL STANDARDS OF LUSTRATION OF JUDGES: BASIC MODEL

Restoring public judiciary confidence should align with international standards. Upon entering the European Council (EC) as a full-fledged member in 1995, Ukraine has committed to creating proper judiciary functioning conditions, safeguarding court and judge independence and impartiality.[6]

5 Data about the quantity of judges in 2014 is taken from: 'Dopovyd' Golovy Verhovnogo Sudu Ukrainy Yaroslava Romaniuka na XIII z'izdi suddiv Ukrainy 12 lystopada 2015 roku' ['Report of the President of the Supreme Court of Ukraine at 13th national meeting of the judges of Ukraine, 12 November 2015'] (2015) Official web-site of the Supreme Court of Ukraine <http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(print)/AD5F6A13882B688BC2257EFB00385AD7> accessed 25 October 2020; Data about the quantity of judges, entitled to the lustration restrictions, is taken from: 'Shchorichna dopovyd za 2017 rik "Pro stan zabezpechennya nezaleznosty suddiv v Ukraini, zatverdzhena rishennyan Vyshchoiy rady pravosuddia vid" 13 liutogo 2018 roku No 463/0/15-18' ['2017 Report "On the Situation with Judicial Independence in Ukraine", adopted by the decision of the High Council of Justice on 13 February 2018, No 463/0/15-18'], (2018) Official web-site of the High Council of Justice <http://www.vru.gov.ua/add_text/26> accessed 25 October 2020.

6 Parliamentary Assembly of the Council of Europe, Opinion No 190 (1995) 'Application by Ukraine for Membership of the Council of Europe' (*The official web-site of the Parliamentary Assembly of the Council of Europe*) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13929&lang=en> accessed 20 October 2020.

European institutions elaborating exceptional standards should be considered when drafting national lustration legislation. Parliamentary Assembly Resolution No 1096 (1996) 'Measures to Dismantle the Heritage of Former Communist Totalitarian Systems' lists the members aiming to prevent misusing restrictive measures and precedents of fair trial breaches in the course of government agency purification. The Guidelines to Ensure that Lustration Laws and Similar Administrative Measures comply with the Requirements of a State-Based on the Rule of Law, incorporated into this Resolution, declare:

> lustration should be administered by a specifically created independent commission of distinguished citizens nominated by the head of state and approved by parliament';
> lustration should be limited to positions in which a good reason believes the subject would pose a significant danger to human rights or democracy;
> in no case may a person be lustrated without being furnished with full due process protections, including, the right to counsel (assigned if the subject cannot afford one), confront and challenge the evidence used against the person, access to all available inculpatory and exculpatory evidence, present evidence, an open hearing if requested and appeal to an independent judicial tribunal;
> lustration cannot be used for punishment, retribution or revenge.[7]

The ECtHR, in its lustration precedents, generally assesses national vetting procedures focusing on safeguarding EC standards. However, the relevant rulings of the Court are not aimed to revoke national lustration laws, undermining or proclaiming as controversial to the rule of law some specific lustration restrictions. The Court analyses lustration restriction provided by the national laws following the principle of proportionality.[8] Moreover, as ex-SCU Head Yaroslav Romaniuk stressed, "…the Court carefully examines lustration procedures, enshrined in the national law, and checks for their compliance with international standards, in particular, with all the guarantees of fair trial, provided by article 6 of the European Convention of Human Rights."[9] The ECtHR reviews each lustration considering the proportionality principle and searches for possible violations of other ECHR rights, such as the right to respect private and family life, freedom of expression, right to free elections, prohibiting discrimination while imposing lustration restrictions.[10]

Hence, lustration procedures cannot be excluded from regular sanctions imposed upon judges. Ukrainian academicians' have corroborated such an assertion regarding the European standards of judges' legal liability. According to Larysa Vynohradova:

> any procedure of legal liability of judges should be set in line with the principles of independence, impartiality, transparency, fairness, reasonable time limits and other guarantees of due process, and be determined directly by law. When evaluating any procedure applied to a judge, it is necessary to address the requirements of the due trial procedure. Absence of one or more of the above-mentioned requirements in the legal

7 Parliamentary Assembly (n 3, n 4).

8 Adamsons v Latvia (App no 3669/03) ECHR 24 June 2008 <https://hudoc.echr.coe.int/eng#{%22dmdocnumber%22:[%22837061%22],%22itemid%22:[%22001-87179%22]}> accessed 27 October 2020.

9 'Interv'u Golovy Verhovnogo Sudu Ukrainy Yaroslava Romaniuka – golovnomu redactorovi zurnalu "PravoUkrainy" Oleksandru Svyatozkomy' ['The Interview of the President of the Supreme Court of Ukraine Yaroslav Romaniuk to Oleksander Svyatozkiy, Chief Editor of the Journal "Pravo Ukrainy"'] (2014) 11 *Pravo Ukrainy* 14-73.

10 'Praktyka organiv konstytuziynoiy urysdykziiy ta Europeys'kogo Sudu z prav lyudyny z pytan' lustrazii ['Precedents of the Constitutional Courts and European Court of Human Rights on Issues of Lustration'] (2015) 3 *Visnyk Konstytuziynogo Sudu Ukrainy* 120-130.

> procedure applicable to a judge raises questions to the legitimacy of the latter and may serve as a basis for appealing its results to the court. The grounds of liability and sanctions applied for judicial violation must be clearly and unambiguously established by law and cannot have a retroactive effect.[11]

European institutions share the same values regarding judges' legal liability, which should safeguard judicial independence. In the Statement of Principles of the Independence of the Judiciary, the Conference of Chief Justices of Central and Eastern Europe issued on 14 October 2015, two basic ideas regarding judge accountability were formulated:

- judge individual liability for failings: under para. 20 of the Statement 'judges who are presidents of chambers should not be removed as president based on adjudication by the judge or by other judges within the chamber that is deemed to be mistaken, unpopular, or disfavored;
- judiciary control over judge dismissal: under para. 21 of the Statement: 'where procedures for removing a judge by a vote of the people do not apply, procedures for removing judges must be under the judiciary's control.[12]

The Consultative Council of European Judges emphasized such judges liability cornerstones 'In each country, the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give rise to disciplinary sanctions as well as the procedures to be followed (para. 71).'[13] The Uinted Nationa (UN) Basic Principles on the Independence of the Judiciary of 1985 embraced:

> a charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.[14]

Therefore, fundamentally universal judicial liability standards should be considered when introducing national special assessments. Otherwise, courts would reverse decisions dismissing judges. Lustration expert Roman David purported, that 'The process [of lustration] must be open and transparent. The secretiveness of the process and in camera hearings has proved itself to be destructive and harmful to the atmosphere of national reconciliation.'[15] Failure to meet those elementary values resulted in the ECtHR rulings judge lustration illustrates this position.

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11 L Vynogradova, 'Urydychna vidpovidalnist suddiv zahalnyh sudiv Ukrainy' ['Judicial Liability of Judges of Courts of General Jurisdiction of Ukraine'](Candidate of Law thesis, Odessa Law Academy2004).

12 CEELI Institute, 'Statement of Principles of the Independence of the Judiciary' (Conference of Chief Justices of Central and Eastern Europe, 14 October 2015) , <http://ceeliinstitute.org/brijuni-statement/> accessed 20 October 2020.

13 Consultative Council of European Judges, Opinion no 3 to the attention of the Committee of Ministers of the Council of Europe 'On the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality' (*The official web-site of the Consultative Council of European Judges*, 19 November 2002) <https://rm.coe.int/16807475bb/> accessed 16 June 2020.

14 Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx> accessed 25 October 2020.

15 R David, 'In Exchange for Truth: The Polish Lustrations and the South African Amnesty Process' (2006) 33 (1) Politikon 81–99.

The case of Ivanovski v. *'The former Yugoslav Republic of Macedonia'*[16] concerned lustration proceedings against the President of the Constitutional Court of the former Yugoslav Republic of Macedonia. He had been dismissed from office, which the ECtHR found incompatible with articles 6 and 8 of the ECHR. In its decision of 21 January 2016, the Court stated the lustration proceedings in Mr. Ivanovski's case had 'raised concerns about pressure on the independence of the judiciary.' Although the national authorities proclaimed the former judge had collaborated with the secret police for about 30 years before the restrictive measures were initiated against him, the Court had reasonable doubts, that upon such a period, Mr. Ivanovski portrayed a menace to democracy. Therefore, the sanctions, restricting his professional involvement for five years, were disproportionally severe. As a result, Mr.Ivanovski was awarded 4,500 euros (EUR) in just compensation.[17]

3. LUSTRATION, JUDGES VETTING AND ASSESSMENT: EUROPEAN EXPERIENCE AND UKRAINIAN PERSPECTIVES

Lustration engenders a Latin origin, as reflected in the Roman Republic I century B.C. During this period, the 'lustratio' denoted the process within which public officials, who occupied critical army and senate posts under one dictator, were not allowed to occupy them in the future. Simply, it repressed the previous elite, without persecution and murders. Generally, lustration entailed removing elite political representatives from power and prohibiting them from occupying certain positions because they represented a political regime confessed crimes against humans.18 The core sense of the latter classifies lustration as:

- *a measure to safeguard democracy when a democratic regime is established after enduring massive human rights abuses.*

Brian Grodsky explained:

> Lustration's popularity in Eastern Europe hinges on the theory that past abuses' qualitative and temporal nature has a determinative effect on the type of justice pursued. … Since in communist states, large groups of people were responsible for relatively low-level abuses, criminal trials were considered to be either inappropriate or ineffective.[19]

- *An essential part of transitional justice.*[20]

16 *Ivanovski v 'The former Yugoslav Republic of Macedonia'* (App no 29908/11) ECHR 9 May 2011 < https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-115519%22]}> accessed 25 October 2020.

17 The Registrar of the European Court of Human Rights, 'Lustration proceedings against Constitutional Court president were unfair' (*The Official web-site of the European Court of Human Rights*, 21 January 2016) , <http://www.euro-centre.eu/lustration-proceedings-constitutional-court-president-unfair/> accessed 25 October 2020.

18 S Kostezh, 'Liustratsiia: politychni chystky za shyrmoiu reform' ['Lustration: Political Purges behind the Screen of Reform'] <http://ua.112.ua/analityka/lyustraciya-politichnichistki-za-shirmoyu-reform-52168.html> accessed 15 June 2019.

19 B Grodsky, 'Beyond Lustration: Truth-Seeking Efforts in the Post-Communist Space' (2009) 5(2), *Taiwan Journal of Democracy* 21-43.

20 R Ursachi, 'In Search of a Theoretical Framework of Transitional Justice Toward a Dynamic Model' in Erna Matanović Anđelko Milardović and others (eds.), *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe* (Political Science Research Centre 2007, Book 5) 67-83.

According to researcher Neira Nuna Chengich:

> Lustration is considered as an alternative measure to address the issue of punishing those responsible for committing acts of aggression and repression. Such out-of-court disciplinary sanctions are generally applied by administrative agencies. Political and professional disqualifications had been one of the most popular instruments of transitional justice in Central European states since 1989 and had been frequently used as a suitable alternative for criminal prosecution.[21]

As UN Secretary-General Kofi A. Annan declared, 'one of the major objectives of such kind of measure is to strengthen integrity and accountability in the public sector and restore confidence in national institutions and government.'[22] The EC Parliamentary Assembly added, 'the key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge.'[23] Cynthia M. Horne, having explored lustration in Central and Eastern Europe, specifically Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia, Bulgaria and Romania, commented on effectiveness:

> Multiple measures of lustration are always highly significant and positive predictors of trust in public institutions. … lustration has an impact, but a lesser impact on the trust in national government than on the trust indirectly targeted public institutions. The severity of lustration measures was not significant, and the timing of lustration did not appear to impact trust in government. However, economic performance measures do impact citizens' perceptions of trust in the national government, as do the levels of perceived corruption.[24]

- *reconciling various lustration perceptions based on national peculiarities*

As ex-President of the Constitutional Court of Ukraine Stanyslav Shevchuk emphasized,

> lustration is simultaneously a system of measures aimed at protecting democracy and an instrument of pursuing the so-called "retroactive justice," that strives for the prosecution of persons, guilty of committing of politically motivated crimes.'[25]

According to Bardha Maxhuni and Umberto Cucchi,

> 'vetting must be viewed as a complex process which needs to take into consideration political will, socio-economic context, timing, resources needed and sustainability of the process, granting that there is no "one size fits all" model.[26]

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21 N Chengich, 'Mekhanizmy pravosuddya perekhidnoho periodu ta pravalyudyny v konfliktnykh i postkonfliktnykh sytuatsiyakh' ['Mechanisms of Transitional Justice and Human Rights in Conflict and Post-conflict Situations'] (Sarajevo, 5-13 December 2015) <https://helsinki.org.ua/wp-content/uploads/2016/08/Kryminalne-peresliduvannya-vojennyh-zlochyntsiv.pdf> accessed 25 October 2020.

22 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies' (Report of the UN Secretary General) [2004] UN S 616< https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/.

23 Parliamentary Assembly (n 3).

24 C Horne, 'Lustration and Trust in Central and East Europe: Assessing the Impact of Lustration on Trust in Public Institutions and National Government' (2012) 45(4) *Comparative Political Studies* 1-37 <https:// doi.org/ 10.1177/ 0010414011421766 > accessed 25 October 2020.

25 S Shevchuk, 'Liustratsiia yak retroaktyvna spravedlyvist: yevropeiski standarty zakhystu prav liudyny pry perekhodi do demokratychnoho pravlinnia' ['Lustration as Retroactive Justice: European Standards For The Protection Of Human Rights During The Transition To Democratic Regime'], (2006) 2 *Yurydychnyi zhurnal* 20-27 <http://www.justinian.com.ua/article.php?id=2140 > accessed 25 October 2020.

26 B Maxhuni, U Cucchi, 'An Analysis of the Vetting Process in Albania'(2017) 01 Policy Analysis <http://www.legalpoliticalstudies.org/wp-content/uploads/2017/06/An-Analysis-of-the-Vetting-Process-in-Albania.pdf> accessed 25 October 2020.

4. UKRAINIAN JUDGE LUSTRATION: FUNDAMENTAL CHALLENGES AND BASIC RESULTS

Once the Ukraine adopted lustration legislation, it sparked broad social discussion questioning its necessity, legality and compliance with rule of law standards. Lustration proponents referred to 'democracy, capable of defending itself,' which the ECtHR corroborated in several lustration cases.[27] Interpreting this concept,[28] in some exceptional cases, democratic countries can launch unpopular restrictive civil servant measures, reportedly collaborating with previous undemocratic regimes. Instruments aim to safeguard the rule of law values and prevent massive human rights abuses or criminal actions. One of the principal controversies to resolve the Ukrainian judge's situation entailed its advisability and constitutionality.

The related questions have been raised and detailed in the Opinion No 788/2014 of the Venice Commission, issued on 16 December 2014, 'On the Law on Government Cleansing (Lustration Law)[29].' In the official request, the SCU forwarded to the Constitutional Court of Ukraine on 16 March 2015, questioning judge lustration legitimacy.[30] However, this neither affected the procedures already been launched nationally nor adopted amendments to vet the legislation. Therefore, the researcher will interpret the controversial Ukrainian judiciary's purification issues based on document analysis.

Most modern scholars identify two primary lustration concepts: political phenomenon and legal construction. The first issue in need of discussion encompasses a judge's potential to become an object of lustration restriction, a significant national concern. Some experts and top judiciary officials have claimed judges hold a special status in the checks and balances, and therefore, they should be excluded from extraordinary restrictive measures. Some Ukrainian and European mavens have expressed lustration constitutes political liability, to which judges shall not be subjected because the basis for dismissal is established in Ukraine's Constitution. Law cannot expand the listing of

27 *Vogt v Germany* (App no 17851/91) ECHR 26 September 1995 <https://www.legal-tools.org/doc/6df4f3/pdf/> accessed 10 June 2020; *Naidin v Romania* (App No 38162/07) ECHR 21 October 2014 <http://base.garant.ru/70979206/> accessed 10 October 2020.

28 The core aspects of this concept can be traced in such sources: K Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) *The American Political Science Review* 417–432; K Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31(4) *The American Political Science Review* 638–658; R David, 'Lyustratsiya v Ukrayini ta yevropeys'ki standarty: formuvannya demokratiyi, spromozhnoyi sebe zakhystyty' ['Lustration in Ukraine and European Standards: Formation Of Democracy, Capable of Defending Itself'] (*Official Web-site of the Fair Justice Project*, 2015) <http://www.fair.org.ua/content/library_doc/FAIR_Report_Roman_David_Lust_and_Democ_2015_UKR.pdf> accessed 27 October 2020.

29 Venice Commission, Opinion no 788/2014 'On the Law on Government Cleansing (Lustration Law)' (*Official web-site of the Venice Commission*) <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)044-e> accessed 27 June 2019.

30 Resolution No 3 of the Plenum of the Supreme Court of Ukraine 'Pro zvernennya do Konstytutsiynoho Sudu Ukrayiny z konstytutsiynym podannyam schodo vidpovidnosti (konstytutsiynosti) deyakykh polozhen' Zakonu Ukrayiny № 1682-VII "Pro ochyshchennya vlady" polozhennyam chastyny tret'oyistatti 22, statey 38, 58, chastyny druhoyi statti 61, chastyny pershoyi statti 62, chastyny pershoyi statti 64 Konstytutsiyi Ukrayiny' ['Adress to the Constitutional Court of Ukraine with a constitutional petition on the conformity (constitutionality) of certain provisions of the Law of Ukraine No 1682-VII "On Purification of Government" to the provisions of part three of article 22, articles 38, 58, part two of article 61, part one of article 62, part 1 of article 64 of the Constitution of Ukraine"] <http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/4944FCD7E14A72AEC2257E0B002FAE8E> accessed 27 October 2020.

those grounds. Besides, article 127 of the Constitution of Ukraine outlaws any judge's political involvement. Mark S. Ellis, addressing lustration in Eastern European countries, professed, 'the implementation of lustration legislation is politically motivated.'31 According to Ukrainian academics, considering the statutory guarantees of judicial independence, political responsibility measures cannot apply to judges.[32]

However, the ECtHR has developed an entirely different approach to lustration's legality, making it possible to apply it to judges. In the case of VOGT v. GERMANY, the Court declared:

> The civil service was the cornerstone of a "democracy capable of defending itself. Its members could not, therefore, play an active role in parties, such as the DKP, that pursued anti-constitutional aims (para. 54)"; … a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded (para. 59).[33]

The Venice Commission follows the same approach, pointing out:

> lustration procedures, despite their political nature, must be devised and carried out only by legal means, in compliance with the Constitution and taking into account European standards concerning the rule of law and respect for human rights.[34]

When addressing lustration measures on Ukrainian judges, its legality has readily emerged, as Ukrainian pundits have elucidated.[35] Agreeing with the researchers, restrictive measures applicable to judges maintain an exclusive statutory nature. In contrast, under the Law 'On Purification of Government' № 1682-VII, a judge could be dismissed from office for breaching the oath (a basis of dismissal of judges, provided in article 126 of the Constitution of Ukraine before the amendments of 2016). They could also become a subject of criminal, disciplinary procedure; as for the Law 'On Restoring Trust into Judicial Power in Ukraine' № 1188-VII, the same legal measures could be undertaken. Another restrictive instrument, Law 'On Purification of Government' No. № 1682-VII, involves dismissal from a governmental post, combined with the ban to hold a similar governmental post for five to ten years. It has proven quite problematic to define those measures' legality. Hence, any dismissal from a governmental post (including judicial position) shall be regarded as a disciplinary sanction. However, legal consequences, provided by such a dismissal, are more severe than regular punitive actions, as future career restraints accompany them. Due to this obstacle,

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31 ES Mark, 'Purging the Past: the Current State of Lustration Laws in the Former Communist Bloc' (1996) 59(4) *Law and Contemporary Problems* 181-196.

32 O Martzelyak, M Pogoretsky, S Prilutskiy, 'Naukovo-pravovyy vysnovok shchodo pytan′ vidpovidal′nosti suddiv u konteksti vidpovidnosti konstytutsiyi ukrayiny polozhen′ punktu 6 chastyny pershoyi, punktiv 2, 13 chastyny druhoyi, chastyny tret′oyi statti 3 Zakonu Ukrayiny "Pro ochyshchennya vlady" No 1682-vii' ['Scientific Opinion on Issues of Liability Of Judges in the Context of the Constitutionality of paragraph 6 of part one, paragraphs 2, 13 of part two, part three of Article 3 of the Law of Ukraine "On Purification of Government" No 1682-VII"] (2015) 2 *Visnyk Kryminalnogo Sudochynstva* 249-263<http://vkslaw.knu.ua/images/verstka/2_2015_Na_dopomogu_yrustam_1.pdf> accessed 27 October 2020.

33 *Vogt v Germany* (n 47).

34 Venice Commission, Amicus Curiae Opinion no 524/2009 'Opinion on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania' (*Official web-site of the Venice Commission*, 9-10 October 2009) para 149 <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)044-e> accessed 17 October 2020.

35 Martzelyak et al (n 52) 259.

lustration dismissals can be classified as administrative sanctions. Besides, some lustration limitations can be qualified as criminal as they apply exclusively in criminal proceedings. The Law of Ukraine 'On Purification of Government', Article 55 of the Ukrainian Criminal Code was amended with a new punishment, banning occupying particular governmental posts for a term not exceeding five years.[36] Considering these arguments, legislative lustration restrictions on judges' lustration combine disciplinary, administrative and criminal sanctions, demonstrating legal complexity.

Another controversial issue is the possibility of the Commission to go into the content of judicial decisions. Even though the Ukrainian Commission does not comprise a judicial body, it is entitled by law to review the legality and reasonableness of a decision the courts rendered in the Euromaidan activists' cases. Moreover, although only higher courts have exclusive powers to review judicial decisions on a procedural basis, Article 124 of the Ukraine Constitution prohibits the delegation of the court's functions and appropriates these functions by other body officials.[37] In the Opinion of the Venice Commission No CDL-AD (2013) 013 'On the Temporary State Commission on miscarriages of justice of Georgia' it has been concluded:

> The very idea of a process of massive examination of possible cases of miscarriage of justice by a non-judicial body raises issues regarding the separation of powers and the independence of the judiciary as enshrined in the Georgian Constitution. It may only be conceived in very exceptional circumstances (para. 11).[38]

The Ukrainian and Georgian government purification encompasses many standard features. However, in Ukraine, the judiciary vetting offers a starting point for judges' total reassessment, Ukrainian Constitution amendments adopted in 2016, following the Law On Judiciary and Status of Judges' changes.'[39] Moreover, none of the national lustration included the extrajudicial revision of decisions undertaken in Euromaidan protests.

Thus, the conducted analysis has unmasked a legal phenomenon. Lustration engenders specific immanent characteristics, namely, legislatively. Ukraine and other European countries adopted regulatory acts on government purification in due time. The principal selection criteria designated persons falling under the lustration. Lustration entails purifying all government branches from corruption threats according to a specific legal basis. This personalized phenomenon names officials at various levels not allowed to

36 This sanction could only be applicable in lustration cases; however, it has never been imposed by courts in 2014-2018.

37 *Konstytutsiya Ukrayiny*, adopted on 28 June 1996, with further amendments [*The Constitution of Ukraine*] (*Official web-site of the Parliament of Ukraine*) <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> accessed 10 October 2020.

38 Venice commission and directorate for justice and human dignity, joint opinion No728/2013 ‹On The Draft Law On The Temporary State Commission On Miscarriages Of Justice Of Georgia', (*Official Web-Site Of The Venice Commission, 23 May 2013*) Para. 11 <Http://Www.Venice.Coe.Int/Webforms/Documents/?Pdf=Cdl-Ad(2013)013-E> Accessed 16 October 2020.

39 Zakon Ukrayiny 'Pro vnesennya zmin do Konstytutsiyi Ukrayiny (shchodo pravosuddya)' No 1401-VIII, adopted on 2 June 2016 [The Law of Ukraine 'On Amending Constitution of Ukraine (concerning justice)'] (2016) 18 *Golos Ukrainy* ; Zakon Ukrayiny 'Pro sudoustriy i status suddiv' No 1402-VIII, adopted on 2 June 2016, with further amendments [The Law of Ukraine 'On Judiciary and Status of Judges'] (*Official web-site of the Parliament of Ukraine*) <http://zakon0.rada.gov.ua/laws/show/1402-19> accessed 17 October 2020.

work as public authorities while also establishing a rating scale to determine the degree of criminal activity over the regime's entire existence. Lustration laws (government purification) target the authoritarian, anti-national regime-connected politician. However, everyone falling under lustration should have the right to defense. Everyone should possess the capacity to sue and be sued under national laws. In this case, the presumption of innocence must be observed. This means no person may be charged with a criminal offense, except on the basis and under the procedure prescribed by law. This stipulates a person cannot be accused of illegal actions and cannot be lustrated until issuing a court decision.

As a legal phenomenon, lustration ensures transitional justice for transit societies, preferring democratic values in the State's organization. Lustration measures must comply with the rule of law, and fundamental freedoms, and democratic principles. It must also be accompanied by certain guarantees enabling lustration to settle political and personal accounts with opponents. In Ukraine, lustration was introduced as transitional justice. Identifying shortcomings in its functioning and further developments deserve study. Hence, the Ukrainian legislator's lustration approach remained inconsistent with the Ukrainian social and political environment's circumstances and conditions. As a result, such a perspective does not reflect an effective instrument for government purification. The Ukrainian lustration model should be modified given the specificities and interests of developing its national legal system and the political and legal situation and socio-economic challenges.

5. LUSTRATION EFFICIENCY: EMPIRICALLY

Georgian lustration started in 2004 with President Saakashvili coming into power. In 2004 most governmental officials were simultaneously dismissed, and new civil servants and police officers were appointed. The severe, all-inclusive lustration affected all spheres of social life. New administration rules and standards were introduced, strengthening the responsibility for corruption crimes, substantially increasing government officials' salaries, and launching adequate social security packets for newly appointed officials. As a result, the state managed to overcome total corruption and organized crime, creating a new Georgian image attractive for investing and conducting business.[40] Markedly, the Georgian judge's lustration was initiated within a specific procedural framework not limited by single lustration law but marked by legislative acts adopted in various phases. During the two judicial reform stages, judges were selected with exceptional attention and responsibility, based on strictly defined criteria, like the candidate's characteristics, reputation, qualification, and analytical thinking. Considering these criteria, 186 new judges were appointed from 2005 to May 2014.[41] In Ukraine, the lustration results can be

40 Khlabystova (n 38) 140-152; V Goshovskiy, 'The Genesis of Lustration in the World and its Significance for the Development of the Law-Based Society' (2017) 1 Legea Si Viata 33-37 <http://www.legeasiviata.in.ua/archive/2017/1-2/9.pdf> accessed 20 October 2020.

41 'Judicial Reform in Georgia' (*Official web-site of the High Council of Justice of Georgia*) <http://hcoj.gov.ge/en/reforms/judicial-reform> accessed 29 October 2020; N Kalandadze, 'Judicial Reform in Georgia' *(2007) 9 (20) CACI Analyst* <https://www.cacianalyst.org/publications/field-reports/item/11485-field-reports-caci-analyst-2007-9-20-art-11485.html> accessed 30 October 2020; 'Reform in Georgia' (*Policy Paper by the Administration of the Government of Georgia*, October 2015) <http://gov.ge/files/288_52140_166496_20151026ReformsinGeorgia.pdf> accessed 30 October 2020.

regarded as quite successful. Still, they did not end up in the total shift of all Ukrainian judges. The purification processes could be characterized as relatively gradual and consistent.

According to the Law of Ukraine 'On Purification of Government', the lustration revision procedure was completed in December 2015. The Ministry of Justice filed to the High Council of Justice 70 cases recommending dismissing judges due to lustration. According to the High Council of Justice, in 2015-2016, 31 out of those 70 judges were released on the consent of the Council regardless of the verification, the Law 'On Purification of Government' envisaged (on such grounds as at their discretion, for the oath violation, on term of office expiration, on retirement, as a result of a criminal conviction).[42] As the Council of Judges reported, 42 judges refused to undergo thorough lustration verifications and should have been dismissed from their posts by the High Council of Justice according to clause 5 of Article 12 of the Law 'On Purification of Government.'[43] In 2016, the High Council of Justice discharged only seven judges following the Law 'On Purification of Government.' The High Council of Judges rejected all other motions of the Ministry of Justice of Ukraine to lustrate judges due to formal defects in the Ministry's complaints.[44] In such a situation, the Ministry came up with a statement most of the judges had managed to avoid lustration.[45] On the contrary, the Council of Judges of Ukraine was more optimistic in evaluating the result of judicial lustration, reporting that '91,2 % of all judges successfully fulfilled the Law "On Purification of Government" provisions and were positively assessed in the vetting procedures.' According to the Ruling of the Supreme Court Grand Chamber in the proceedings, No 800/186/17 of 31 January 2019, application of the Law of Ukraine 'On Purification of Government' in a concrete case has been recognized as legitimate, as it is 'aimed at reaching a perfect balance between needs of the democratic state and defense of democracy and human rights."[46]

The court presidents and vice presidents' automatic dismissals resulted in re-elections in April-September 2014, for judges restored over 80 % of the lustrated leaders to administrative posts. This gave rise to public activists' criticism, challenging this lustration instrument. In most courts, the Presidents' re-elections were held democratically, avoiding scandals. Civil activists unveiled conflicts, atypically buying

42 'Zvit Vyshoyi Rady ustytsyi za resultatamy diyal'nosti u 2016 rozi' ['Report of the High Council of Justice on Results of its Work in 2016'] (*Official web-site of the High Council of Justice*) <https://hcj.gov.ua/sites/default/files/field/file/zvit_2016.pdf > accessed 20 October 2020.

43 Decision of the Council of Judges of Ukraine No 23 'Pro stan vykonannya suddyamy ta sudamy Ukrayiny Zakonu "Pro ochyshchennya vlady"' ['On results of fulfillment of the Law of Ukraine "On Purification of Government" by the Judges of Ukraine'] (*Official web-site of the Council of Judges of Ukraine*, 3 March 2016) , <https://court.gov.ua/userfiles/file/DSA/2018_DSA_docs/ZVIT_RSU.pdf> accessed 20 October 2020.

44 Ministry of Justice of Ukraine, Report 'On results of the Collection and Processing of the information on implementation of the Law of Ukraine "On Purification of Power" for 2 years, elaborated by Department of Lustration of the Ministry of Justice of Ukraine' (*Official web-site of the Ministry of Justice of Ukraine*, October 2016) , <http://lustration.minjust.gov.ua/main/work_material> accessed 10 October 2020.

45 Report (n 95).

46 Decision (n 96); Ruling of the Supreme Court Grand Chamber in the proceedings No 800/186/17 of 31 January 2019 (*Official web-site of the Supreme Court*) <http://www.reyestr.court.gov.ua/Review/76822787> accessed 20 October 2020.

judges' votes, public and repeated illegal voting when the first attempt to elect the court leader failed.[47]

The punishment of judges involved in severe human rights abuses during the EuroMaidan protests was quite notable. As the Temporary Specialized Commission of Vetting of Judges of General Jurisdiction Courts finished their activities on 1 June 2015, 2192, complaints from citizens had been registered. The Commission found Only 309 admissible, and relevant proceedings against judges suspected of unlawful actions were started, confirming 41 judges' guilt. The Commission, handing those cases to the High Council of Justice for final verdicts, found 12 more judges guilty of minor offenses, and five judges were acquitted. Criminal proceedings were not initiated due to a lack of relevant grounds. As the Commission powers were limited to a one-year, the remaining lustration cases (305) were handed to the High Council of Judges for finalization, as Article 2 of the Law of Ukraine 'On Restoring Trust into the Judicial Power in Ukraine' prescribed. As of 1 January 2018, the High Council of Justice completed the consideration of these materials; accordingly, almost 10% of the judges accused of human rights infringements were dismissed. The High Council of Justice approved the discharge of 61 judges, of which ten of the decisions were appealed, and the court cancelled them. The High Council of Judges closed another 90% of the disciplinary proceedings, initiated by the Temporary Specialized Commission of Vetting of Judges of General Jurisdiction Courts, for various reasons. The judges were, therefore, acquitted.[48] The SCU canceled some of the lustration decisions the High Council of Judges delivered upon judge appeals. For instance, in 2016, the SCU ruled to restore 23 out of 29 judges, discharged under the Law of Ukraine 'On Restoring Trust into Judicial Power in Ukraine'[49]to their posts. Those judicial decisions were delivered if the requirements of the procedure, envisaged by law, had been neglected, or the fair trial guarantees, provided by Article 6 of the ECHR, had been ignored either by the Temporary Specialized Commission of Vetting of Judges of General Jurisdiction Courts or by the High Council of Justice.[50] Such a precedent was exceptional; in all other cases, the SCU denied appeals to the dismissed judges initiated and stressed the legitimate application of the Law of Ukraine On Restoring Trust into Judicial Power in Ukraine.

We have conducted an empirical study of over 115 decisions of the High Council of Judges delivered in 2015-2017 based on the application of the Law of Ukraine 'On

47 R Kuibida, 'Suchasnyy etap sudovoyi reformy: peredumovy, klyuchovi podiyi I vyklyky' ['Current Stage of Judicial Reform: Background, Key Events and Challenges'] (*Official web-site of the Center of Political and Legal Reforms*, 27 November 2014) <http://pravo.org.ua/files/Curent_situation.pdf> accessed 20 October 2020; I Novozhylova, 'Chy pobachyt' ukrayins'ka Femida lyustratsiyu?' ['Will Ukrainian Femida See Real Lustration?'] (*Zhytomyr.Today*, 21 September 2015) <http://zhitomir.today/blog/chi_pobachit_ukrayinska_femida_lyustratsiyu-id71.html> accessed 20 October 2020.

48 R Maseko, 'Vyshcha rada pravosuddya real'no zvil'nyla lyshe 10 % "suddiv Maydanu"' ['The High Council of Justice Actually Dismissed only 10% of "Maidan's Judges"'] (*Ukrains'ka Pravda*, 24 September 2017), <https://blogs.pravda.com.ua/authors/maselko/59c810d71cd38/> accessed 20 October 2020; High Council of Justice Report (n 9); Report (n 95).

49 Report (n 95).

50 O Nechytaylo,"Skasuvannya sudom deyakykh rishen' VRYU shchodo zvil'nennya suddiv gruntuyet'sya na nedotrymanni strokiv prytyahnennya do dystsyplinarnoyi vidpovidal'nosti' ['The Annulment by the Court of Some Decisions of the HCJ on the Dismissal of Judges is Based on Failure to Comply with the Terms of Disciplinary Proceedings'] (*Official web-site of the Higher Administrative Court of Ukraine*, 1 March 2016) <http://www.vasu.gov.ua/123567/> accessed 20 October 2020.

Restoring Trust into Judicial Power in Ukraine', and have revealed several trends, manifested in the process of judging of lustrated judges:[51]

According to a former member of the High Council of Justice, Andriy Boyko:

> one of the common reasons for lustration of judges following the Law of Ukraine "On Restoring Trust into Judicial Power in Ukraine", have been documented facts of ignoring of basic legislation provisions. For example, numerous gross violations by judges of the provisions of procedural codes, the Law of Ukraine On judiciary and status of judges' and of the European Convention of Human Rights were reported in the period of the 'EuroMaidan.' Those infringements resulted in bringing activists of the protests to criminal and administrative liability for actions that would not have been prosecuted under other circumstances.[52]

According to our findings, 27 judges were dismissed for civil activists' detention with gross CPC violations. Such judges had not considered all the criminal indictments' circumstances when delivering decisions on activists' pre-trial detentions. In contrast, they should have investigated the case materials more thoroughly and should have assessed more evidence the prosecutors provided. Moreover, judges ignored relevant ECtHR rulings concerning pre-trial detention in criminal proceedings, delivered decisions relying exclusively on prosecutors' opinions, rejected suspects' motions, and failed to apply another restrictive pre-trial measure, bail or home-arrest envisaged by CPC.

The reasons exist, for which judges could have been summarily dismissed:

- absence of a judge in the court for a long time without compelling reasons
- travel outside the Ukraine controlled territory, without being dismissed from Ukrainian judgeship in the manner prescribed by law
- taking judicial offices under the authority of the Russian Federation [on the territory of Crimea][53]
- Ukrainian judges deliver justice on the territory of the self-proclaimed republics–LNR and DNR, in the name of those unrecognized states.
- Judges could be dismissed per the Law of Ukraine 'On Purification of Government' that envisaged the imposing restrictions for certain officials to take specific governmental posts for a period up to five years [failure to reveal asset acquisition origins]

51 All of the researched cases have been taken from the official web-sites of the High Council of Judges and the Higher Qualification Commission of Judges of Ukraine, where open registers of their decisions on imposing disciplinary sanctions on judges are placed (see <http://www.vru.gov.ua/act_list>; <https://vkksu.gov.ua/ua/rishiennia-komisii/rishiennia-komisii-za-2016/> accessed 30 October 2020).

52 A Boyko, 'Vidpovidal′nist′ slidchykh suddiv za porushennya norm protsesual′noho prava ta obov′yazkiv suddi shchodo zakhystu prav lyudyny u protsesi ukhvalennya sudovoho rishennya pro zastosuvannya trymannya pid vartoyu shchodo uchasnykiv Revolyutsiyi hidnosti' ['The Responsibility of Investigating Judges for Violating the Procedural Law and the Judge's Obligations Regarding the Protection of Human Rights in the Process of Adopting Court Decisions on Detention of Participants of the Revolution of Dignity'] (2016) 1 *Vysnyk Assoziatzii Slidchyh suddiv Ukrainy* 15-20.

53 In the decision of 24 December 2015, the High Council of Justice proved that 276 judges of the Autonomous Republic of Crimea after the annexation of the peninsula by the Russian Federation, having received citizenship of the Russian Federation, occupied judicial posts under the authority of the Russian Federation. As a result, following the decree of the Russian Federation President on their appointment, the judges started to administer justice in the Crimea. Those judges were dismissed for the breach of oath and accused of state treason. In the decision of 26 December 2016, the Higher Qualification Commission of Ukraine ordered to dismiss 100 Crimean judges who had not filed petitions to be transferred to the territory, controlled by the Government of Ukraine.

One of the primary features of national judge lustration entailed disciplining a judge for violating human rights.[54] For example, on 5 November 2015, the High Council of Justice submitted a decision to the Ukrainian President concerning the dismissal of the Pechersk District Court of Kyiv Rodion Kireyev for oath violation. The judge became well-known for pre-trial jail detention, delivered by him in August 2011, in the criminal proceedings against the ex-Prime-Minister of Ukraine Yulia Tymoshenko. As it has been stated in the ECHR decision, delivered on 30 April 2013, Ukraine violated its obligations under Article 5 of the ECHR, claiming the pre-trial detention of Yulia Tymoshenko was 'arbitrary and unlawful.' while

> 'no risk of absconding was discernible from the accusations which had been advanced among the reasons for her detention: these were all of a minor nature and had not resulted in her failing to attend the hearings. In fact, the main justification for her detention indicated by the judge had been her alleged hindering of the proceedings and contemptuous behavior, which was not among the list of reasons that could justify the deprivation of liberty under Article 5 § 1. Nor was it clear how the replacement of the applicant's obligation not to leave town by her detention was a more appropriate preventive measure in the circumstances.'[55]

In January 2016, the President of Ukraine dismissed judge Kireyev from his post, although, since February 2014, he had not been in Ukrainian territory, hiding from justice in the Crimea. This case became the first national precedent of punishing a judge for a decision, the ECtHR impugned.

It would be appropriate to refer to the Venice Commission Opinion, delivered in June 2016, where judges' liability standards, preconditioned by the adverse ECtHR decision, were described. The Commission noted:

> Judges' liability is indeed admissible, but only where there is a culpable mental state (intent or gross negligence) on the part of the judge. b) Liability of judges brought about by an adverse judgment by the European Court of Human Rights should therefore only be based on a national court's finding of either intentional or gross negligence on the part of the judge. The judgment of the European Court of Human Rights should not be used as the sole basis for a judges' liability. The finding of a violation of the European Court of Human Rights by the European Court of Human Rights does not necessarily mean that judges at the national level can be criticized for their interpretation and application of the law (i.e. violations may stem from systemic shortcomings in the member States, e.g. length of proceedings cases, in which personal liability cannot be raised).[56]

As a former member of the High Council of Justice, Supreme Court Judge Les'ko Alla fairly underlined:

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54 Article 3 of the Law of Ukraine 'On Restoring Trust into Judicial Power in Ukraine' called for disciplining of judges who, individually or collectively, took decisions contradicting the European Convention of Human Rights if those facts had been verified by the European Court of Human Rights. One of the grounds for lustration under the Law of Ukraine 'On Purification of Government' was deliverance of unlawful decisions, acts or omissions that had led to violations of human rights and fundamental freedoms, mentioned in European Court of Human Rights decisions.

55 *Tymoshenko v Ukraine* (App No 49872/11) ECHR 30 April 2013 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109460%22]} > accessed 20 October 2020.

56 Venice Commission, Republic of Moldova Amicus Curiae Brief for the Constitutional Court Opinion no 847/2016 'On the Right of Recourse by the State Against Judges' (Article 27 of the Law on Government Agent no.151 of 30 July 2015)' (*The official web-site of the Venice Commission*, 13 June 2016) <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)015-e> accessed 20 October 2020.

> 'proceedings on disciplinary complaints against judges, backgrounded by delivered decisions of the European Court of Human Rights, where violations of Ukraine had been proved, demonstrated that most of the breaches of the European Convention of Human Rights had been caused by serious loopholes of Ukrainian legislation, which were marked by the Court as breaches of the European guidelines.'[57]

Hence, the national court's judicial decisions, ruled in compliance with such legal provisions, should be excused from the disciplinary proceedings. On the other hand, existing procedural instruments envisage subsequent judicial decisions after the relevant European Court of Human Rights rulings.[58]

Finalizing the lustration proceedings analysis against judges, these measures have demonstrated relatively high effectiveness. Even though some public activists have expressed anxiety and even anger with national vetting procedures (interviews of human rights activists' leader Eugen Zaharov,[59] civil activist and lawyer Roman Maselko[60] and ex-vice Minister of Justice Tetyana Kozachenko,[61]) the overview of the statistical data on the application of lustration restrictions upon judges has revealed the following trends. Following the Law of Ukraine 'On Purification of Government,' up to 0.1% of judges were dismissed, comparing the ratio of the total number of judges (7500) in the system general jurisdiction courts at the moment of Law adoption[62] to the number of judges, released by decisions of the High Council of Judges.[63] According to the Law of Ukraine 'On Restoring Trust into Judicial Power in Ukraine, ' sanctions were imposed on 10% of judges whose activities were reviewed. However, the number of judges who voluntarily resigned from their judicial posts in 2015-2017 should be considered since the lustration processes may have indirectly preconditioned the departure. Most of those judges manifested their unwillingness to undergo lustration and further assessment procedures. Therefore, according to the High Council of Justice, the number of voluntary resignations did not exceed 300-400 yearly in previous years. In 2016, the Council accepted 1449 judge resignation applications.[64] In 2017, an additional 360

57 A Lesko, 'Problema vykonannya rishen′ Yevropeys′koho sudu z prav lyudyny: neobkhidnist′ systemnoho analizu ta vprovadzhennya' ['The Problem of Implementing of the European Court of Human Rights decisions: the Call for Complex Analysis and Implementation'] (*Official web-site of the High Council of Justice*, 23 November 2016) <http://www.vru.gov.ua/news/1880> accessed 10 October 2020.

58 Such a revision is done by the Supreme Court in accordance with Articles 361-369 of the Code of Administrative Procedure of Ukraine. See Kodekc Admimistratyvnogo Sudochynstva Ukrayiny No 2747-IV, adopted on 6 July 2005 (with further amendments) [Code of Administrative Procedure of Ukraine] <http://zakon3.rada.gov.ua/laws/show/2747-15> accessed 20 October 2020.

59 E Zaharov, 'Zakon pro lyustratsiyu peredbachaye zvil′nennya ponad pivmil′yona derzh sluzhbovtsiv' ['The law on Lustration Demands Dismissal of More than Half a Million of Civil Servants'] (*iPressUA*, 30 September 2014) <http://ipress.ua/news/zakon_pro_lyustratsiyu_peredbachaie_zvilnennya_ponad_pivmilyona_derzhsluzhbovtsiv__pravozahysnyk_87582.html> accessed 15 October 2020; Zaharov (n 67).

60 Maseko (n 101).

61 T Kozachenko, 'Kryteriyiv, za yakymy mozhna lyustruvaty suddiv, duzhe malo: Interv′yu vydannyu ZIK' ['There are Very Few Criteria that can be Used to Lustrate Judges: Interview to the Journal ZiK'] (*ZIKTV Channel*, 29 November 2017) <https://zik.ua/news/2017/11/29/tetyana_kozachenko_kryteriiv_za_yakymy_mozhna_lyustruvaty_suddiv_duzhe_malo_1216133> accessed 20 October 2020.

62 Report (n 9).

63 Report (n 95); Decision (n 96); Report of the Ministry of Justice (n 97).

64 Report (n 95).

judges resigned.[65] Moreover, ordinary disciplinary procedures demonstrated similar effectiveness. According to the High Council of Justice, 96 decisions in disciplinary cases of judges were passed in 2017; in 8953 proceedings initiating judge disciplinary liability, complaints were dismissed in compliance with the Law 'On the High Council of Justice';[66] thus, slightly more than 1% of all judicial offense complaints resulted in the actual sanctions upon the judges. Comparably, addressing lustration results in Ukraine's police authorities (former militia bodies) could be a significant disappointment. As the National Police of Ukraine reports, 'a total number of 86 219 police officers were reappointed, accounting for 93% of those who had been going through lustration; overall 5,436 of police officers were fired in the process of the vetting assessment; more than two thousand of dismissed police officers in 2016-2017 won their court suits, in which they had appealed their discharges. They were reimbursed more than 55 million [in Ukrainian Hrivnas] of budget funds for wrongful dismissal.'[67]

Such a failure in militia purification was due to crucial loopholes of relevant legislation, adopted in a rush of 2014 post-revolutionary implications, without considering the necessary guarantees of due process of law Article 6 of the ECHR.[68]

The key aspects of Ukrainian lustration have been summarized in the ECtHR's decision in *Polyakh and others v. Ukraine*, delivered on 17 October 2019. The Court stressed the uniqueness of Ukrainian lustration and found loopholes in the envisaged by Government purification measure power. Notably, it was declared that 'the first three applicants' right to a fair trial had been violated because proceedings on their dismissal had lasted more than four and a half years and were still ongoing. The Court also noted the violation of Article 8 (right to respect for private and family life) of the Convention regarding all five applicants. It was no doubt that in the period when former President Viktor Yanukovych was in power, the Ukrainian civil service and democratic governance had indeed faced considerable challenges, which justified a need for reform. However, the Court found that the Law of Ukraine "On Purification of Government" was of comprehensive application and had led to the dismissal of the applicants for merely having worked in the civil service for more than a year while Mr. Yanukovych was in power or for having been a Communist Party official before 1991. The law, therefore, had no regard to the applicants' roles or whether they had been associated with any of the undemocratic acts that had taken place under the former president.[69]

Consequently, the ECtHR decision was based on a traditional and universally respected theory of legal liability. Any restriction measure put upon an offender should be

65 Report of the High Council of Justice (n 9).

66 Report of the High Council of Justice (n 9).

67 L Hryshko, 'Provalena reforma, abo dorohyy revansh militsioneriv' ['Failure to Reform, or Expensive Revenge of Ex-policemen'] (*Deutsche Welle*, 9 November 2017) <https://www.dw.com/ukB2/a-41312321> accessed 30 October 2020; Report of the Ministry of Justice (n 97).

68 Y Lysianskyi, 'Zamestitel' glavy VASU Mikhail Smokovich: "Odnimi vysokimi zarplatami doveriya k sudam ne vernesh"' ['Vice President of the Highest Administrative Court of Ukraine, Mikhail Smokovich: "You Cannot Return Trust to the Courts only with the Means of High Remuneration"'] (*Official web-site of the Highest Administrative Court of Ukraine*, 4 May 2016) <http://www.vasu.gov.ua/123606/> accessed 30 October 2020.

69 *Polyakh and Others v Ukraine* (App No 58812/15 and 4 others) ECHR 17 October 2019 < https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-196607%22]}> accessed 30 October 2020.

envisaged by law, individually assessed, predictable in advance and applied within due process procedures. In other cases, national and international courts could challenge any lustration measure not fitting in those standards.

5. CONCLUSIONS

Based on the research, several Ukrainian judge lustration conclusions have emerged: its background, legal regulation, intercourse, and results. Based on the reflections regarding its nature and understanding, lustration can be conceptualized as the measures regulated by law, aimed at verifying the past of the persons collaborating with non-democratic regimes and imposing special sanctions on these individuals to prevent their participation in state power. Specifically, judicial civil activist detentions, Ukrainian judges delivered during the Euromaidan events (November 2013-February 2014), contributed significantly to human rights activists' dissatisfaction, who were ready to introduce people's vetting of judges. Instead, in 2014 the Parliament of Ukraine adopted two lustration laws: 'On Restoring Trust into Judicial Power in Ukraine' and 'On Purification of Government'. These laws aimed to start an unprecedented judiciary purification campaign to eradicate the heritage of past undemocratic processes. Within this framework, the positive effect of implementing Ukrainian lustration substantially impacted government bodies and their officials' activities. Nevertheless, today the provisions of the Laws of Ukraine 'On Purification of Government' and 'On Restoring Trust into Judicial Power in Ukraine' are far from being appropriate. Furthermore, new legislation provisions in this domain are necessary since lustration should be legal, fair and objective to be applied within the appropriate mechanisms.

Lustration is being disputed internationally and domestically. Regarding the ECtHR concept of 'a democracy capable of defending itself'[70], a unique, national approach has been worked out in Ukraine. The Venice Commission identified domestic distinctiveness of the Ukrainian lustration: 'The Law "On Purification of Government" differs from lustration laws adopted in other countries of Central and Eastern Europe in that it is broader in scope. It pursues two different aims. The first is protecting society from individuals who, due to their past behavior, could pose a threat to the newly established democratic regime. The second is to cleanse the public administration from individuals who have engaged in large-scale corruption. The term lustration in its traditional meaning, only covers the first process.'[71]

Although government purification embodies a political phenomenon, it requires a competent legal framework and an appropriate executive mechanism. Otherwise, lustration might well become 'witch-hunting,' directly contradicting the rule of law desirable for young democracies. That is the reason why lustration measures should be analyzed from several perspectives— value protection essential for democratic society

70 Ždanoka v Latvia (App No 58278/00) ECHR 16 March 2006 <http://associationline.org/guidebook/action/read/chapter/4/section/jurisprudence/decision/102> accessed 28 October 2020.

71 Venice Commission, Final Opinion № 788/2014 'On the Law on Government Cleansing (Lustration Law) of Ukraine as Would Result from the Amendments, Submitted to the Verkhovna Rada on 21 April 2015' (19-20 June 2015, para. 107) <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)012-e> accessed 22 October 2020.

during the transition period and human rights respect and the rule of law principle since these two aspects are closely interrelated. Primarily, this can be attributed to respect for human rights could not be achieved in the absence of effective democracy because a democratic society is based on respect for fundamental human rights and freedoms. Hence, the lustration does not restrict or infringing fundamental natural rights (right to life, prohibiting torture, right to liberty and personal integrity). On the contrary, limitations imposed on the right of access to the state (public) service (government decision-making) represent the direct consequence of the period of extensive transitional changes since it concerns the persons who have compromised themselves by working with the former repressive regime. Lustration remains integral to democratization and an inevitable transitional justice component. Within this overall aim, restrictions on specific individuals who collaborated with the repressive regime remain acceptable.

Applying lustration restrictions upon judges did raise some concerns about the constitutionality of the relevant legislation. In particular, such legal principles, provided by the Constitution of Ukraine, have been questioned concerning judges: double jeopardy ban for one offense, vagueness of innocence presumption safeguards, collective guilt possibility and retroactive lustration force. Those questions are expected to be unveiled by the Constitutional Court of Ukraine. Guarantees of judicial independence outweighed most of the uncertain lustration issues provided by regular disciplinary proceedings applied following lustration legislation. Those procedures' vagueness is compliant with the limitation exclusiveness (sanctions), its temporal basis, and the democratic society's legitimate expectations after the revolutionary power shift. We should also refer to the Constitutional Court of Slovenia's opinion that in 1994 reviewed the possibility of bringing under retroactive liability (lustrating) judges who had previously delivered decisions with severe human rights and freedoms violations. The Court did admit such liability and noted, relying on the rule of law constitutional concept, that ' … the so-called lustration rule means that the right to participate in state administration may be limited (this case concerns the right to be elected on judicial post) regarding facts of cooperation with the previous non-democratic regime'; the Court mentioned that documented facts of misuses of power by a concrete judge could be a reason for councils assessing judges in selection procedures to reject such a candidate.[72]

Empirical insight into Ukrainian judge lustration demonstrates it has been quite successful, resulting in voluntary and compelled dismissal of up to 25 % of Ukraine's general jurisdiction courts. Supplemented by Constitutional amendments of 2016 launched a completely new selection model, assessment, and judge discipline. Precedents of disciplining judges based on human rights breaches, contained in judicial decisions and attested by the ECtHR, demonstrate European aspirations of the Ukrainian judiciary.

72 Decision of the Constitutional Court of the Republic of Slovenia of 14 July 1994 cited by 'Praktyka orhaniv konstytutsiynoyiy urysdyktsiyi ta Yevropeys′koho sudu z prav lyudyny z pytan′ lyustratsiyi (prodovzhennya)' ['Precedents of Courts of Constitutional Jurisdiction and the European Court of Human Rights on Lustration (Continued)'] (2015) 3 *Vysnyk Konstytuyziynogo Sudu Ukrainy* (2015) 120-130.

Access to Justice in Eastern Europe,
Issue 4 (8) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com
10.33327/AJEE-18-3.4

O Kaplina, S Fomin 'Proportionality of Interference with the Right to Peaceful Enjoyment of Property During the Seizure of Property in Criminal Proceedings in Ukraine' (2020) 4 (8) *Access to Justice in Eastern Europe* 246-264
10.33327/AJEE-18-3.4-a000038

PROPORTIONALITY OF INTERFERENCE WITH THE RIGHT TO PEACEFUL ENJOYMENT OF PROPERTY DURING THE SEIZURE OF PROPERTY IN CRIMINAL PROCEEDINGS IN UKRAINE*

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* *Received: 13.10.2020. Revised: 03.11.2020. Approved: 24.11.2020*

This article considers relevant science and law enforcement practice issues of state intervention's legitimacy in the right to peaceful property enjoyment in criminal proceedings during property seizure. These issues are considered everywhere through international instruments' prism, particularly the Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms, Article 1 of Protocol No. 1 to the Convention and the ECtHR case-law. Based on the ECtHR case law, the authors analyze the conditions under which the state may interfere in exercising a protected right, often called criteria for intervention. Based on the fact restrictions are permissible if they are prescribed by law, necessary in a democratic society and pursue a legitimate goal, the authors consider these conditions through the lens of national law enforcement practices of Ukrainian criminal proceedings. The authors emphasize the relevance of these criteria of the legality of individual rights restriction in criminal proceedings since when applying for property seizure, the Ukrainian legislator requires investigating judges to consider reasonableness and restriction proportionality of property rights, and apply the least onerous seizure method, not suspend or excessively restrict a person's lawful business activities, or other consequences significantly affecting others' interests. Due to the amendment of the Ukrainian criminal procedure legislation, the practice is slowly approaching the European Court of Human Rights practice's European standards. However, proper systematic, logical and consistent court decisions limiting the human right to peaceful property possession remain critical. Based on the study, the authors offer a model of logical reasoning, following which the investigating judges can correctly formulate the motivational part of the decision to satisfy or deny the request for property seizure. Particular attention is paid to the reasonableness, suitability, necessity, and proportionality of the means of restricting the right to peaceful enjoyment of the property and describes each of them.

***Keywords**: the seizure of property in criminal proceedings; proportionality of interference in constitutional law; the right to peaceful enjoyment of property; measures to ensure criminal proceedings; inviolability of property rights; criteria for the admissibility of restrictions of human rights.*

1. INTRODUCTION

Art. 41 of the Constitution of Ukraine states: 'Everyone has the right to own, use and dispose of their property, the results of their intellectual, creative activity… No one may be unlawfully deprived of property rights. The right of private property is inviolable… Confiscation of property may be applied only by court decision in cases, to the extent and in the manner prescribed by law.' This provision of the Constitution of Ukraine correlates with several international legal documents enshrining the inviolability of property rights principle, such as the Universal Declaration of Human Rights (art. 17, para 2 art. 29);[1] the International Covenant on Civil and Political Rights (art. 2, 17)[2];

1 UN General Assembly, *Universal Declaration of Human Rights* [1948] 217 (III) A <https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf> accessed 5 November 2020.

2 The United Nations General Assembly, *International Covenant on Civil and Political Rights* [1966] Treaty Series 999 <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 5 November 2020.

the International Covenant on Economic, Social and Cultural Rights (art. 3, 4),[3] the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[4] and the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.[5] This protocol was signed on 20 March 1952, supplementing rights guaranteed by the Convention, including the right to property protection. Art. 1 of the right to property of the First Protocol to the Civil Procedural Code contains three rules pertinent to national criminal proceedings, to which scholars and practitioners regularly pay attention:

> Every natural or legal person is entitled to the peaceful enjoyment of his or her possessions. No one shall be deprived of their 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.[6]

Thus, the Basic Law of Ukraine, international legal acts establishing the inviolability of property rights, is not absolute. Procedural guarantees must accompany any state intervention in the property's peaceful possession to protect this vital right. This fully applies to the criminal process because it involves activities affecting human rights and freedoms. Criminal procedure inextricably links with criminal procedural coercion, measures to ensure criminal proceedings, including property concerns. That is why statutory guarantees exist to protect against abuse by the bodies conducting criminal proceedings. Such a bureaucratic order of ensuring criminal proceedings will fairly balance general societal interest and protect fundamental individual rights. Established law strictly prohibits human rights interference necessary in a democracy.

Hence, Ukrainian judges, investigative judges, prosecutors, investigators, detectives, and lawyers need to remain aware of Art. 1 of the First Protocol to the Civil Procedural Code and the ECtHR interpretation. This article attempts to address these issues through international instruments' prism, the ECtHR case law, and the Ukrainian law doctrine.

2. PEACEFUL ENJOYMENT OF PROPERTY PRINCIPLE IN EUROPEAN CONVENTION ON HUMAN RIGHTS CASE-LAW

The ECtHR noted:

> 'The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general

3 The United Nations General Assembly, *International Covenant on Economic*, Social and Cultural Rights [1966] Treaty Series 993 <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> accessed 5 November 2020.

4 Council of Europe, European *Convention for the Protection of Human Rights and Fundamental* Freedoms [1950] ETS 5 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 5 November 2020.

5 Council of Europe, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol* No 11 [1952] ETS 9 <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/rms/090000168006377c> accessed 5 November 2020.

6 Protocol to the Convention (n 5).

> interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.'[7]

In *James and Others v. the United Kingdom,* the ECtHR explained this relationship claiming:

> the three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.[8]

The ECtHR cited the same in the case of *Papastavrou and Others v. Greece*, emphasizing 'the second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule.'[9]

The general first rule declares the right to property respect (right to peaceful enjoyment of property). The other two, engendering exceptionality, regulate depriving property. These conditions constitute a denial of such a right is only justified for societal interests, and they must follow the law. Interference with property rights can take two forms: deprivation of possessions and control of property use. Moreover, these provisions are interrelated and must be interpreted in conjunction.

Based on international criminal proceedings, the right of ownership does not remain absolute, revealing the need for its regulation and state restriction. When exercising such powers, the state must adhere to permissible lawful interference principles. International standards of national law should provide the guidelines for lawful interference. In addition to the Ukrainian Constitution, sectoral legislation reflects property rights inviolability. In particular, Art. 16 of the Criminal Procedure Code of Ukraine (CPC) designates criminal proceedings must follow the CPC when depriving or restricting property rights based on a reasoned court decision adopted. Without a court decision, the property's temporary seizure is allowed. While the property's seizure, the person *de jure* is not deprived of property rights but is only temporarily (until CPC abolishes it) being limited by the right to alienation, disposal, and property use. Thus, the ECtHR recognizes the property seizure as a control measure[10] and requires authorities not to contradict the third rule of Art. 1 of the First Protocol to the ECHR. Specifically, the Contracting Parties have the right to control the property use following public interest's needs; thus, such laws are enacted to achieve these objectives.

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7 *Sporrong and Lonnroth v Sweden* (Apps Nos 7151/75 and 7152/75) ECHR 23 September 1982, § 61 <http://hudoc.echr.coe.int/eng?i=001-57580> accessed 5 November 2020; *Depalle v France* (App No 34044/02) ECHR 29 March 2010, § 77; *Zelenchuk and Tsytsyura v Ukraine* (Apps Nos 846/16 and 1075/16) ECHR 22 May 2018, § 56; *Andriy Rudenko v Ukraine* (App No 35041/05) ECHR 21 December 2010, §§ 35-37.

8 *James and Others v the United Kingdom* (n 8).

9 *Papastavrou and Others v Greece* (App No 46372/99) ECHR 10 April 2003, final from 10 July 2003, § 33 <http://hudoc.echr.coe.int/eng?i=001-61019> accessed 5 November 2020.

10 *Raimondo v Italy* (App No 46372/99) ECHR 22 February 1994, § 27; *Andrews v the United Kingdom* (App No 49584/99) ECHR 26 September 2002; *Adamczyk v Poland* (App № 28551/04) ECHR 7 November 2006; *Borzhonov v Russia* (App No 18274/04) ECHR 22 January 2009, § 57.

The First Protocol to the ECHR establishes broad powers to exercise control over property, 'as it deems necessary.' The state's rights to interfere with the right to peaceful enjoyment of property must be regulated by law. These three provisions of Art. 1 of the First Protocol to the ECHR are interrelated. The state's powers should systematically connect it with the second rule. Therefore, the property control the state implements should portray public interest.

While restricting property rights, the state intervenes in individual law. During this process, the interference must adhere to the requirements specified in Art. 8 of the ECHR, according to which:

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.[11]

Thus, ECHR Article 8 formulates the conditions under which the state may inhibit this protected right, criteria for intervention. Therefore, according to the ECHR, permissible limitations include situations provided by law, necessary in a democratic society and pursuing intending legitimate goals. These criteria correlate with the provisions contained in Art. 1 of the First Protocol to the ECHR. Despite Part 2 of Art. 8 of the ECHR design, the court separately assesses state compliance with these conditions in the following order: legality, legitimate purpose, necessity.[12] Decisions of the ECtHR continuously emphasise this premise. Notably, in the case of *Shvydka v. Ukraine*, the Court mentioned:

> for the interference to be justified […], it must be 'prescribed by law,' pursue one or more of the legitimate aims listed in the second paragraph of that provision and be 'necessary in a democratic society' – that is to say, proportionate to the aim pursued.[13]

The criteria introduced into the ECtHR practice to evaluate state interference legitimacy in the rights guaranteed by the ECHR have been called the 'three-component test.'[14] The principle of proportionality has German roots. Since ancient times, many legal systems have embraced it,[15] gradually developing its tenets over several centuries, but recently, it has received a new breath through the constitutional judiciary and international judicial institutions. Although the Convention does not directly incorporate this ideal,

11 Convention (n 4).

12 H O'Boyle, Warbrick, *Law of the European Convention on Human Rights* (3rd edn, Oxford university press 2014).

13 *Shvydka v Ukraine* (App No 17888/12) ECHR 30 October 2014, § 33 <http://hudoc.echr.coe.int/eng?i=001-147445> accessed 2 November 2020. See also *Gladysheva v Russia* (App No 7097/10) ECHR 6 December 2011, § 77; *Brumarescu v Romania* (App No 28342/95) ECHR 23 January 2001, § 78; *Sporrong and Lonnroth v Sweden* (Apps Nos 7151/75) ECHR 23 September 1982, and 7152/75, § 69-74.

14 TI Fulei, *Application of the Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights in the administration of justice* (BAITE 2017) 38.

15 AA Bazhanov, 'Substantiation of the principle of proportionality in the practice of the Federal Constitutional Court of Germany (1950—1960)' ['Obosnovanye Pryntsypa Sorazmernosty V Praktyke Federalnoho Konstytutsyonnoho Suda Hermanyy'] (2018) 5 Journal of the University of OE Kutafina (MSLUK) 159-168.

it embodies an essential rule of law element. Therefore the ECtHR uses the principle of proportionality to interpret legislation.[16]

3. EUROPEAN CONVENTION ON HUMAN RIGHTS CRITERIA OF ASSESSING STATE INTERFERENCE LEGITIMACY IN THE RIGHT OF PEACEFUL PROPERTY ENJOYMENT

3.1. Legitimacy of State Interference in Property Rights

The first and most crucial requirement of Article 1 of Protocol No. 1 to the ECHR encompasses State interference with the unimpeded property use must comply with the *law.*

Understanding several law concepts the ECtHR uses remains paramount: law, provided by law, in accordance with the law. Referring to the ECtHR legal position has formed an autonomous concept of law. One of the first and most common ECtHR cases, formulating these concepts entailed *The Sunday Times v. the United Kingdom*.[17] The complaint concerned the possible violation of Art. 10 of the ECHR in connection with the ban by the national courts of the United Kingdom to publish articles in the newspaper 'Sunday Times' to discuss the 'scandalous' trial, which at that time had not yet been completed. Such a ban was due to contempt to court because press comments could influence and predict incompatibility with the principle of independence and court and judiciary impartiality. One aspect the Court needed to consider comprises interpreting prescribed by law in the light of the interference with the ECHR's rights.[18]

The ECtHR noted: 'The word 'law' in the expression "prescribed by law" covers not only statute but also unwritten law. … It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10 (2) (art. 10-2) and strike at the very roots of that State's legal system.'In paragraphs 2 of Articles 9, 10 and 11 of the Convention, both the French and English texts use the equivalent expression *'prevue spar la lois' and 'prescribed by law.'* However, if the French text retains the same expression in Art. 8 § 2 of the Convention, in Art. 1 of the First Protocol to the European Convention on Human Rights and Art. 2 of the Fourth Protocol, the English text, respectively, says otherwise: in accordance

16 VG Gulumyan, 'Principles of interpretation of the European Convention on Human Rights (criticism and defense)' ['Pryntsypy Tolkovanyia Evropeiskoi Konventsyy Prav Cheloveka (krytyka Y Zashchyta)'] (2015) 3 (45) Journal of Constitutional Justice 17; TI Dudash, 'The case law of the European Court of Human Rights: a hermeneutic analysis' ['Praktyka Yevropeiskoho Sudu Z Prav Liudyny Hermenevtychnyi Analiz'] (2009) 21 The case law of the European Court of Human Rights: general theoretical research, Series I. Research and abstracts 26-40; PM Rabinovich, SE Fedik, 'Peculiarities of interpretation of legal norms on human rights (based on the case law of the European Court of Human Rights)' ['Osoblyvosti Tlumachennia Yurydychnykh Norm Shchodo Prav Liudyny (za Materialamy Praktyky Yevropeiskoho Sudu Z Prav Liudyny'] (2004) 5 Proceedings of the Lviv Laboratory of Human and Citizen Rights of the Research Institute of State Building and Local Self-Government of the Academy of Legal Sciences of Ukraine 27.

17 *The Sunday Times v the United Kingdom* (App No 6538/74) ECHR 26 April 1979 <http://hudoc.echr.coe.int/eng?i=001-57584> accessed 5 November 2020.

18 *The Sunday Times v the United Kingdom* (App No 6538/74) ECHR 26 April 1979 <http://hudoc.echr.coe.int/eng?i=001-57584> accessed 5 November 2020.

with the law, provided by law and in accordance with law. Thus, when confronted with several versions of a legally binding international treaty, each of which is authentic but not the same, the Court must provide them with an interpretation that brings them as close as possible and is consistent with the treaty's goals and objectives.

According to the ECtHR, the expression prescribed by law implies the following two requirements. First, the law must be adequately accessible: citizens must have the appropriate circumstances to navigate which legal rules apply to the case. Secondly, a norm cannot be considered a law if it is not formulated with sufficient precision to enable a citizen to agree with it: he or she must be able, using advice if necessary, to predict, to a reasonable degree according to the circumstances, the consequences that this action may cause. These consequences do not have to be predicted with absolute certainty: experience shows that this is unattainable... Accordingly, many laws inevitably use terms that are more or less vague: their interpretation and application are the tasks of practice.'[19]

Thus, the ECtHR has formulated several requirements national law must meet to comply with the rule of law, enshrined in the ECHR's Preamble and embodies the meaning of the ECHR. First, it is a relatively broad understanding of national law, which includes the current law and the interpretation given to it by national courts, established practice, including judicial. Secondly, it is a requirement concerning the quality of the law: its accessibility and predictability, respectively.

The ECtHR still always reminds formulated in the decision *The Sunday Times v. the United Kingdom* requirements for the concept of law, supplementing it with a new meaning. In particular, in the decision *Silver and Others v. the United Kingdom*, it was stated that:

> the law must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case'[20]; 'the principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application.[21]

Also, in the Decision in the case *Serkov v. Ukraine*, the ECtHR indicated

> the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. The mere fact that a legal provision is capable of more than one construction does not mean that it fails to meet the requirement of "foreseeability" for the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice. The task of the supreme courts in securing a uniform and coherent application of the law cannot be underestimated in this regard. A failure by a supreme court to cope with that

19 *The Sunday Times v the United Kingdom* (App No 6538/74) ECHR 26 April 1979 <http://hudoc.echr.coe.int/eng?i=001-57584> accessed 5 November 2020.

20 *Silver and Others v the United Kingdom* (Apps Nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75) ECHR from 25 March 1983, §§ 87-88 <http://hudoc.echr.coe.int/eng?i=001-57577> accessed 5 November 2020.

21 *Zelenchuk and Tsytsyura v Ukraine* (Apps Nos 846/16 and № 1075/16) ECHR 22 May 2018, § 98 <http://hudoc.echr.coe.int/eng?i=001-183128> accessed 5 November 2020; Budchenko v Ukraine (App No 38677/06) ECHR 24 April 2014, § 40 <http://hudoc.echr.coe.int/eng?i=001-142517> accessed 2 November 2020.

> task may produce consequences incompatible, inter alia, with the requirements of Article 1 of Protocol No. 1. The Court admits that it is primarily for the national authorities to interpret and apply domestic law. However, the Court is required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention, as interpreted in the light of the Court's case-law.[22]

As interference with the right of property borders on the possibility of arbitrary restriction, the state must ensure the quality of the law and provide remedies against arbitrary interference by the authorities in the exercise of the rights guaranteed by the Convention. Thus

> the law should be accessible to the persons concerned and formulated with sufficient precision to enable them to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'[23] and 'there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights.[24]

The ECtHR reiterated this provision in the Decision Feldman and Slovyanskyy bank v. Ukraine, also having predicted that

> the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights be, in certain cases, subject to some form of adversarial proceedings before an independent body competent to review the reasons for the measures and the relevant evidence. It is true that Article 1 of Protocol No. 1 contains no explicit procedural requirements and the absence of a judicial review does not amount, in itself, to a violation of that provision. Nevertheless, it implies that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision.[25]

An example is the case of *Denisova and Moiseyeva v. Russi*a, in which the ECtHR found a violation of Art. 1 of the First Protocol to the ECHR. The reason for this was the wife's property seizure (subsequent confiscation) based on a court judgment against her husband. At that time, the Supreme Court of the Russian Federation had already interpreted such cases, stating the confiscation of jointly acquired property is possible only within the share of the spouses found guilty of the crime. Since the seizure of his wife's property was not carried out in accordance with the law, the Court found a violation of Art. 1 of the ECHR.[26]

Another example can be given. *Latvian citizen V.M. Baklanov* decided to move from Latvia to Russia, agreed with a realtor to buy an apartment, withdrew from his bank account the amount of 250 thousand US dollars and gave them to his friend B. to

22 *Serkov v Ukraine* (App No 39766/05) ECHR 7 July 2011, § 35-36 <http://hudoc.echr.coe.int/eng?i=001-105536> accessed 6 November 2020.

23 *Maestri v Italy* (App No 39748/98) ECHR 17 February 2004, § 30 <http://hudoc.echr.coe.int/eng?i=001-61638> accessed 6 November 2020.

24 *Kruslin v France* (App No 11801/85) ECHR 24 April 1990, § 30 <http://hudoc.echr.coe.int/eng?i=001-57626> accessed 6 November 2020.

25 *Feldman and Slovyanskyy bank v Ukraine* (App No 42758/05) ECHR 21 December 2017, § 55 < http://hudoc.echr.coe.int/eng?i=001-179557> accessed 6 November 2020.

26 *Denisova and Moiseyeva v Russia* (App No 16903/03) ECHR 1 April 2010, §§ 55-65 <http://hudoc.echr.coe.int/eng?i=001-98018> accessed 6 November 2020.

send to Moscow. B. was detained on arrival at the airport as he had not specified the currency amount in the customs declaration during customs control, he was charged with smuggling, and he was later sentenced to two years' probation. According to the court's decision, the money stored in the customs terminal had to be turned over to the state as smuggling evidence. Having heard the case, the ECtHR noted the first and most imperative requirement of Art. 1 of the First Protocol to the ECtHR emphasises any public authorities interference in the property's peaceful possession must remain lawful; deprivation of property can only occur under lawful conditions. In this case, the Court stated, under the law, 'instruments of crime belonging to the accused, money and other objects acquired by criminal means' remain subject to confiscation. In the meantime, no one claimed, nor had there been any evidence the applicant's money had been criminally obtained. Considering the domestic court's failure to cite legal provisions as grounds for confiscating this substantial sum of money and the apparent contradiction between case law on domestic law, the Court asserted the domestic law in question had not been worded precisely enough for the applicant to reasonably foresee the case circumstances. Consequently, the interference with the applicant's property rights could not be regarded as lawful within the meaning of Art. 1 of the First Protocol to the ECHR, indicating a violation.[27] Since the ECHR's protection remain subsidiary to national protection and the ECtHR does not replace national courts, the law's regulatory potential remains crucial. Nationally, the state should protect individual rights from arbitrary interference during property seizure in criminal proceedings, adopting relevant legislation. Essentially law imposes additional obligations on the state to prevent defects in criminal procedure, creating a transparent and predictable procedure for court appeals questioning interference legality.

3.2. Determining the legitimacy of the purpose of interfering in property rights

For interference with property rights to remain lawful within the meaning of Art. 1 of the First Protocol to the ECHR, it should follow the second rule of Art. 1, carried out in societal interests. The ECtHR considers whether a legitimate purpose exists for interfering with property rights after establishing lawful interference. As in the case *Tregubenko v. Ukraine*, 'the Court reiterates that a deprivation of property can only be justified if it is shown, inter alia, to be "in the public interest" and "subject to the conditions provided for by law.' Moreover, any property interference must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a

> fair balance must be struck between the demands of the community's general interest and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent throughout the Convention. The Court further observes that the requisite balance will not be struck where the person concerned bears an 'individual and excessive burden.[28]

In the case of *Sukhanov and Ilchenko v. Ukraine*, it was also stated that

27 *Baklanov v Russia* (App No 68443/01) ECHR 9 July 2005, § 39-46 <http://hudoc.echr.coe.int/eng?i=001-69317> accessed 6 November 2020.

28 *Tregubenko v Ukraine* (App No 61333/00) ECHR 2 November 2004, § 53-54 <http://hudoc.echr.coe.int/eng?i=001-67248> accessed 6 November 2020.

the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful and that it should pursue a legitimate aim 'in the public interest.[29]

ECtHR case-law analysis determining legitimate intervention purpose gives states discretion because the authorities remain most aware of their societal needs. Therefore, they hold a more advantageous position than an ECtHR judge. The ECtHR's supervision in this part remains limited to power abuse cases and apparent arbitrariness.

The respondent state must determine interference purpose or objectives when exercising an individual right, the Convention protects. Such purposes may include public order protection, national security interests, public peace, riot and crime prevention, ensuring any lawful obligation fulfillment, right and others' freedom protection, morality protection, state economic welfare and judiciary healthcare[30] interests.[31] The legitimate aim of interfering with individual rights must also be provided for in national law. The criminal procedure legislation contains legitimate property seizure purposes (Articles 2, 170 of the CPC).

Concerning restricting the right to the extent necessary in a democratic society, the ECtHR explained given the ECtHR case law,

> the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.'[32] The ECtHR professed 'whilst the adjective "necessary" […] is not synonymous with "indispensable" […] neither has it the flexibility of such expressions as "admissible," "ordinary," "useful," "reasonable" or "desirable."[33]

The ECtHR characterized a democratic society as having two distinctive features: tolerant and open. While interference with a protected right may hold 'necessary in a democratic society,' a democracy may bind state-justified interference. However,

> given the diversity of historical, cultural and political differences in Europe […], the formation of its own idea of democracy is the prerogative of each state, which, accordingly, has some discretion in determining the means necessary to protect this particular democratic order.[34]

In assessing whether the interference remained proportionate to the legitimate aim, the ECtHR referred to the discretion doctrine the state implements when its authorities initially assess the interference. This doctrine was first formulated in the ECtHR's decision in the case *Handyside v. the UK*.

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29 *Sukhanov and Ilchenko v Ukraine* (Apps Nos 68385/10 and 71378/10) ECHR 26 June 2014, § 53 <http://hudoc.echr.coe.int/eng?i=001-145014> accessed 6 November 2020.

30 See *Olsson v Sweden (n 31) (№ 1))* from 24 March 1988, complaint № 10465/83, § 58; VA Tumanov (ed), European Court of Human Rights Selected decisions in 2 vols [Evropeiskyi Sud Po Pravam Cheloveka Izbrannye Reshenyia] (Vol 1, Norm, 2000); D Harris, M O'Boyle, K Warbrick, *Law of the European Convention on Human Rights* (OUP 2014).

31 *East/West Alliance Limited v Ukraine* (App No 19336/04) ECHR 23 January 2014, § 185. < http://hudoc.echr.coe.int/eng?i=001-140029> accessed 4 November 2020.

32 *Olsson v Sweden* (n 31).

33 *Handyside v the United Kingdom* (App No 5493/72) ECHR 7 December 1976, § 48 <http://hudoc.echr.coe.int/eng?i=001-57499> accessed 4 November 2020.

34 D Harris, M O'Boyle, K Warbrick, *Law of the European Convention on Human Rights* (Third Edition, OUP 2014) Art 513.

However, it was later applied to any court case appraisal of state discretion in determining whether the interference demonstrated a democratic societal necessity. According to this doctrine, the Court considers states possess discretion.

> Because of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the […] "necessity" of a "restriction" or "penalty" […] It is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context. Nevertheless, Convention does not give the Contracting States an unlimited power of appreciation. The Court […] is responsible for ensuring the observance of those States' engagements […], the domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also *the decision applying it*, even one given by an independent court. The Court must decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of "interference" they take are *relevant and sufficient*.[35]

The ECtHR has also developed evaluation components when determining whether an intervention proved necessary in a democratic society: protected right importance; democratic society nature; European and international consensus; importance and objective interest being protected; intervened interest judicial assessment availability.

Within the criterion admissibility framework of interference with a person's right, the proportionality between interference with human rights necessity in a democratic society and ensuring a legitimate interference goal is assessed. As the ECtHR contended in *Sukhanov and Ilchenko v. Ukraine*:

> Any public authority interference with the peaceful possession enjoyment should remain lawful and pursue a legitimate public interest aim. Any interference must also remain reasonably proportionate to the desired objective. In other words, a fair balance must be realised between community interest and individual fundamental right protection. The requisite balance will not be found if the concerned person or persons have borne an individual and excessive burden.[36]

Thus, interfering with individual rights holds disproportionate if it does not achieve legitimate goals. Resolving proportionality involves balancing various factors, often challenging for the ECtHR and law enforcement officials trying to justify interfering with individual rights. The ECtHR highlights a fair balance between societal and individual interests, but reaching such an equilibrium has proven quite onerous. In other words, the state-applied human rights restrictions must remain proportionate to the law's content and scope and cannot be so severe or violate the law's essence.

For example, in *Bokova v. Russia*, Bokova filed a complaint after her husband, and his accomplices were convicted of committing large-scale fraud. The perpetrators had to pay the victim more than 9 million USD. Bokova's house was seized to secure a civil lawsuit. Claiming she did not receive domestic legal protection, the applicant

35 *Handyside v the United Kingdom* (n 35).

36 *Sukhanov and Ilchenko v Ukraine* (n 30).

applied to the ECHR. She professed she had received the house before her husband's criminal activities, so she had legitimate grounds to demand she should retain at least part, explicitly, the share not obtained criminally. Additionally, sufficient procedural safeguards to avoid arbitrariness did not accompany the house seizure. No domestic court examined the amount of money criminally invested in the house and did not allow the applicant to present arguments to protect her property share. This approach gave the ECtHR grounds to recognize a violation of Art. 1 of the First Protocol to the ECHR unanimously.[37] Thus, the interference with the applicant's property rights was held disproportionate to the state authorities' aim. The applicant incurred an excessive burden, excessively affecting her property rights, and she was not given any procedural guarantees to protect her property.

Hence, the right to peaceful property possession embodies a fundamental right, but it does not remain absolute and may be limited under certain conditions. However, the violation of Art. 1 of the First Protocol to the ECHR, when significantly imbalanced, represents disproportion 'between the measures taken and the aim pursued.'[38]

4. UKRAINIAN PROPORTIONALITY PRINCIPLE AND DETERMINING PROPERTY RIGHTS INTERFERENCE LIMITS

Understanding proportionality's essence requires exploring modern doctrinal approaches. In national court practice, often constitutional, this principle tests proportionality as a formalized procedure for verifying the legality and validity of state coercive measures restricting human rights. Scientists have developed the principle's analytical epitome. However, they disagree regarding its nomenclature because sometimes they call it the principle of proportionality,[39] dimensionality,[40] adequacy,[41] prohibition of redundancy,[42] and proportionality of human rights restrictions.[43] Concerning their elements, most of these concepts aim to assess this principle's significance for law enforcement practice. P.M. Rabinovych pointed out the principle of proportionality restricting human rights illustrates a restriction legitimacy guarantee. The triad of criteria for this principle constitutes real human rights protection, fairly

37 *Bokova v Russia* (App No 27879/13) ECHR 16 April 2019, § 54, 59. <http://hudoc.echr.coe.int/eng?i=001-192463> accessed 5 November 2020.

38 *James and Others* (n 8); *East/West Alliance Limited v Ukraine* (n 33).

39 YO Yevtoshuk, 'The principle of proportionality as a necessary component of the rule of law' ['Pryntsyp Proportsiinosti Yak Neobkhidna Skladova Verkhovenstva Prava'] (Candidate of Law Thesis, University of Economics and Law 'KROK' 2015).

40 PM Rabinovych (ed), OM Lutsiv, SP Dobryansky, OZ Pankevich, SP Rabinovych, *The principle of the rule of law: problems of theory and practice [Pryntsyp Verkhovenstva Prava Problemy Teorii Ta Praktyky]* (Spolom 2016) Art 65.

41 SP Pogrebnyak, 'The principle of proportionality in judicial activity' ['Pryntsyp Proportsiinosti U Sudovii Diialnosti'] (2012) 2 Philosophy of law and general theory of law 49-55.

42 A Fosculle, 'The principle of proportionality' (2015) 1 (104) Comparative constitutional review 159-163.

43 OI Andreeva, *The ratio of rights and responsibilities of the state and the individual in the rule of law and the specifics of its manifestation in the field of criminal proceedings (theoretical aspect)* [*Sootnoshenye Prav I Obiazannostei Hosudarstva I Lychnosty V Pravovm Hosudarstve I Spetsyfika Eho Proiavlenyia V Sfere Uholovnoho Sudoproyzvodstva (teoretycheskyi aspekt)*] (MK Sviridova ed, Tomsk University Publishing House 2004) 138.

balancing personal protection requirements and public interest protection, democratic society standards compliance.[44]

S.P. Pogrebnyak voiced

> In a state governed by the rule of law, the prohibition of excessive state interference with individual liberty is seen as an axiomatic requirement: the state has the right to restrict human rights only when it is really necessary, and only to the extent that is proportionate to the pursued goal. In other words, the principle of proportionality (adequacy) is proclaimed and operates in this sphere. It is based on the idea that the general interest of the state cannot be such as to suppress the freedom of the individual… It is designed to protect the individual when he or she remains face to face with the state, and is a prerequisite for regulatory intervention to be appropriate to the goals it achieves.[45]

Y.O. Yevtoshuk defined the principle of proportionality as pivotal to the rule of law, and believed in a 'broad sense it means that all subjects of power that directly or indirectly interfere in the private autonomy of the individual should take only reasonable measures (appropriate, necessary, proportionate in the narrow sense) to achieve a legitimate public goal.'[46] D.G. Shustov stressed the principle of proportionality 'allows determining whether the degree of restriction of the right is reasonably proportionate to the goal pursued by law and necessary to achieve the goal and whether the means are reasonably proportional to the goals.'[47] R.A. Maidanyk also purported according to the principle of proportionality, the authorities,

> cannot impose obligations that exceed the limits of necessity arising from the public interest on citizens in order to achieve the goals required to be achieved by the applied measure (or actions of the authorities). Accordingly, the measure applied must be proportionate (must meet) the objectives.[48]

Ex-chairman of the SCU, Y.M. Romanyuk, emphasized:

> Interference with property rights, even if it meets the first two criteria (i.e. has a legitimate purpose, and is carried out in accordance with national law and in the public interest), will still be considered a violation of Art. 1 of the First Protocol, if a reasonable proportionality between the interference with the right of a person and the interests of society has not been ensured.[49]

The ECtHR uses the following stages to evaluate legitimate law restriction: legality, legitimate purpose, democratic society necessity. However, experts have offered their vision an activity's legality assessment algorithmization. A. Barak distinguished four

44 SP Rabinovych, 'Peculiarities of interpretation of legal norms on human rights (based on the case law of the European Court of Human Rights)' ['Osoblyvosti Tlumachennia Yurydychnykh Norm Shchodo Prav Liudyny (za Materialamy Praktyky Yevropeiskoho Sudu Z Prav Liudyny)'] in *Proceedings of the Lviv Laboratory of Human and Civil Rights* (Series I, Research and abstracts, Issue 5, Astron 2004) p 31-32.

45 Pogrebnyak (n 43) 49-55.

46 Yevtoshuk (n 41).

47 DG Shustov, *The principle of proportionality in the constitutional law of Israel [Pryntsyp Proportsyonalnosty V Konstytutsyonnom Prave Yzraylia]* (Legenda 2015) 99.

48 R Maidanyk, 'Proportionality and property rights: doctrine and case law' 'Proportsiinist (spivrozmirnist) I Pravo Vlasnosti Doktryna I Sudova Praktyka' (2016) 1 Law of Ukraine 41-54.

49 Y Romanyuk, 'Interference with property rights in terms of its compliance with Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms: criteria of the European Court of Human Rights and the experience of Ukraine on some examples of case law' (2016) 1 Law of Ukraine14-24.

proportionality test stages: 1) identifying legitimate restrictive right purpose, 2) a rational relationship between the legitimate aim and the chosen means (relevance of the means used), 3) applicable measures need assessment and 4) comparing advantages of achieving a legitimate goal and the subjected restrictions human rights (proportionality in the narrow sense or weighing).[50]

Some scholars have reduced the number of stages to two, indicating criteria to establish the intervention's proportionality.[51] For example, M. Cohen-Elia and I. Porat, S.P. Pogrebnyak proposed establishing the authorities' actions engender a limited, certain right. At the second stage, the authorities must demonstrate they pursued a legitimate objective, and the restriction remained proportionate to that goal. Three criteria establish proportionality: first, the means intended to achieve the power goal must suit achieving this goal (*appropriateness*); secondly, of all the appropriate options, the least restrictive to a person's right (*necessity*) should be chosen; thirdly, the right restriction harm must remain proportionate to the government's benefit in achieving the pursued objective (*proportionality in the narrow sense*).[52]

Thus, when determining the restriction legitimacy on human rights developed in national legal doctrine, generally, the proportionality principle coincides with ECtHR practice. ECtHR case-law exemplifies the court gradually appraising the state's property right interference legality, guaranteed nationally and internationally. In *Borzhonov v. Russia*, the court assessed property seizure compliance under Art. 1 of the First Protocol to the ECHR. The case involved a criminal tax evasion case instituted against the applicant. The bus belonging to the applicant was seized to secure a possible civil action and confiscate property. The investigation lasted for six years, and when the case was closed, the applicant was not notified, and the property seizure was not cancelled until the complaint was lodged with the ECtHR. Considering, inter alia violations of Art. 1 of the First Protocol to the ECHR, the Court, after examining the domestic law (lawfulness of the interference), articulated:

> not only must an interference with the right of property pursue, on the facts as well as in principle, a 'legitimate aim' in the 'general interest,' but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[53]

The court also considered the accused's property seizure could not be criticized given the second paragraph of Art. 1 of the First Protocol to the Convention. However, it excessively burdens a person to dispose of property and should provide procedural

50 A Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press 2012) 638; AA Bazhanov, 'Problems of realization of the principle of proportionality in judicial practice' (2018) 6 (13) Proceedings of the Institute of State and Law RN 129.

51 M Cohen-Elia, I Porat, The American Method of Weighing Interests and the German Proportionality Test: Historical Roots (2011) 3 Comparative Constitutional Review 61; Pogrebnyak (n 43) 51.

52 Cohen-Elia (n 54); Pogrebnyak (n 43) 49-55.

53 This approach can be seen in the Judgment of the ECHR in the case *Edwards v Malta* (App No 17647/04) ECHR 24 October 2006, § 69 <http://hudoc.echr.coe.int/eng?i=001-77655> accessed 10 November 2020.

safeguards to ensure the system's functioning, and its impact on applicant property rights must not be arbitrary or unpredictable.

Although inevitably, any seizure or confiscation poses a detriment, the Court also reminded the impairment must not exceed the actual damage for that measure to remain compatible with Art. 1 of the First Protocol. The parties did not deny that the bus was of some commercial value to the applicant. However, following a change in the criminal law excluding confiscation from criminal offenses and the absence of a civil action against the applicant, the domestic authorities must reassess the legality and necessity of the property seizure order. The investigator must lift the arrest if the measure no longer remains necessary. However, no progress existed in this case. The authorities did not leave the bus with the applicant, prohibiting him from disposing of it. Although the alternative solution did not interfere with the applicant's rights, it essentially helped decide whether the means chosen was reasonable and appropriate to achieve the legitimate goal pursued. Hence, the Court concluded the authorities failed to strike a fair balance between the general interest requirements and the need to protect the applicant's right to respect property, maintaining the arrest warrant for more than six years.[54] In this decision, the ECtHR judges' reasoning gave a comprehensive argument.[55] Hence, property seizure must be executed following the law, pursue the public interest, remain necessary for a democratic society, and restriction right must remain proportionate to the measure's purpose.

The Court took a different approach when examining the proportionality of the interference with property rights, considering the case concerned Italian mafia members. In the case of *Raimondo v. Italy*,[56] Mr. Raimondo challenged the seizure of sixteen properties and six vehicles. The court found national law provided for such a measure. Its purpose was not to deprive the applicant of the property but only to prohibit its use. It portrayed an intermediate measure, further ensuring property confiscation, considered obtained illegally. The common interest justifies such a measure, and given the adverse economic power of the Mafia, the arrest at this proceedings stage stood disproportionate to the pursued goal. Consequently, no violation of Article 1 of the First Protocol on this position of the ECHR's complaint was ruled. Thus, in this case, the ECtHR demonstrated the balance between the rights of a person suspected of committing crimes and the public interest in combating organized crime; the latter was highly valued and given priority.[57]

In *Gabric v. Croatia*, a Serbian citizen was detained at the Croatian-Serbian border for failing to declare 30,500 West German marks. The applicant's 20,000 marks (allowable allowance excess) were seized and later confiscated. She was also sentenced to six months in prison with probation and a fine of 600 Croatian crowns. Having considered the case, the ECtHR unanimously ruled 'the confiscation of the entire amount to be

54 *Borzhonov v Russia* (n 10).

55 The same detailed argumentation can be observed in judgement in the case *East/West Alliance Limited v Ukraine* (n 33).

56 *Raimondo v Italy* (n 10).

57 J McBride, *European Convention on Human Rights and Criminal Procedure. The practice of the European Court of Human Rights*, 2nd ed (KIS, Council of Europe 2019) 101- 102.

declared as an additional sanction to the fine is a disproportionate measure which placed a disproportionate burden on the applicant.'[58]

Moreover, since Art. 173 of the CPC stipulates when deciding to seize property, the court must consider the property restriction's reasonableness and proportionality rights. If the investigator's request for property seizure is granted, the court must apply the least onerous arrest method, not suspending or excessively restricting lawful business activities of the person or other consequences significantly affecting the others' interests (clause 2, part 4 of Article 173 of the CPC). Thus, the domestic legislator tried to unify the international legal standards in Art. 1 of the First Protocol to the ECHR and national practice to ensure observing personal rights of those whose property was seized. This positive legislator step has indicated the state should set goals for interfering with individual rights and fairly balancing intervention needs with the general societal interests.

Criminal proceedings pertain to state activities where coercion could permeate its stages and proceedings, facilitating evidentiary activity implementation to ensure participants in criminal proceedings perform their duties. Therefore, the question inevitably arises about the awareness of the legality criteria regarding restricting a persons' rights in criminal proceedings, including during property seizure and in law enforcement practice execution.

Reference to national court practice has revealed judges have gradually adopted the law's novelties and requirements. Many cases reference Art. 1 of the First Protocol to the ECHR in decisions about satisfaction or refusal to satisfy the investigator's request to seize property. Hence, in some rulings investigating judges have argued and assessed the proportionality of the means restricting the rights of the person pursued. However, such arguments have remained concise, do not detail the proportionality test; judges did not explain how to ensure the public interests, the goal the law enforcer wants to achieve and individual rights.

Considering the investigator's petition to seize 'movable and immovable property' in the case, initiated on the grounds of a crime under Part 3 of Art. 212 of the Criminal Code Evasion of taxes, fees (mandatory payments),[59] the investigating judge resolved the investigator request must be denied claiming,

> investigators have not proved to the court proper and admissible evidence that in this criminal case any person was informed of the suspicion, the possibility of using property as evidence in criminal proceedings, as the petition is based only on allegations of tax evasion of this natural person-entrepreneur, the court also did not prove the reasonableness and proportionality of restricting property rights in criminal proceedings. Because… seizure of… accounts will completely stop the activity of natural person and due to the impossibility of purchasing feed for poultry will lead to its death, i.e. will have irreversible consequence.[60]

58 *Gabric v Croatia* (App No 9702/04) ECHR 5 February 2009, § 39 <http://hudoc.echr.coe.int/eng?i=001-91134> accessed 10 November 2020.

59 *Criminal Code of Ukraine* (Law of Ukraine of 5 April 2001 № 2341-III) <https://zakon.rada.gov.ua/laws/show/2341-14> accessed 10 November 2020.

60 Case No 308/1740/17 (Uzhhorod City District Court, 23 February 2017) <http://reyestr.court.gov.ua/Review/64906747> accessed 10 November 2020.

Another decision of the investigating judge stated:

> the petition does not specify the grounds and purpose of the vehicle's seizure per Art. 170 of the CPC of Ukraine and the necessity of such arrest is not duly substantiated. Moreover, the need for an examination is not a basis for applying such a measure to ensure criminal proceedings as property seizure. Also, following Part 4 of Art. 173 of the CPC of Ukraine, the investigating judge, the court is obliged to apply such a method of seizure of property, which will not lead to the suspension or excessive restriction of lawful business activities of the person, or other consequences that significantly affect the interests of others. Thus, the seizure involves deprivation of the right to alienate, dispose of, and use the property. For example, in the case of seizure of a car owned and used in business JV 'Iceberg' in the form of LLC, it may limit its legitimate business activities of the company… The court was not proved by proper and admissible evidence that there are risks that private entrepreneur PERSON_3 can hide, lose, transfer, alienate the property because, during this period, he had had enough time and opportunities to alienate funds from the accounts specified in the petition.' Given the above, the judge denied the petition.[61]

However, in the motivating decisions of investigating judges, the standard argument of general character has been most often applied. The corresponding CPC Art. 170-174 outlines formal criteria are given without introducing a judgment scheme. Such a standard argument undoubtedly engenders grounds for application satisfaction or denial; however, the proper systematic, logical, consistent argument remains vital but is usually lacking. Such a sequence is not easy to build, but based on the ECtHR's case law and scholarly approaches, an argumentation algorithm model investigating judges and investigators can apply when considering a property seizure.

Since coercion permeates all criminal proceedings, determining the criteria restricting the rights of persons involved in criminal proceedings filing a motion to seize property and investigating judges' decisions about satisfaction or refusal of satisfaction has rendered such an algorithm invaluable.

5. CONCLUSIONS

Assessing the legitimacy of restricting a person's rights to peaceful property possession following an algorithm, where the investigating judge examining the petition or the investigator filing must resolve the following questions:

1. purpose of interfering with a person's right
2. whether the purpose is legitimate, whether the law provided for it;
3. whether seizing property achieves the purpose, whether it is a reasonable, suitable, and necessary means to accomplish this goal, and whether necessary evidence exists for it;
4. whether another less burdensome means other than the property seizure can achieve this aim;
5. whether the means used are proportional to the objective the state wishes to achieve;
6. whether the restriction degree of the person's right is proportional to the goal they wish to achieve.

61 Case № 297/1390/17 (Berehiv District Court of the Zakarpatsky Region, 26 June 2017) <http://reyestr.court.gov.ua/Review/67410143> accessed 10 November 2020.

The proposed questions validate the three-stage solution. At the first stage, the first two questions address goal setting. In the second stage, the third and fourth items concerning the choice of redress resolve means. Finally, the third stage addresses proportionality between the individual's right and the desired goal.

The law requirements legitimise the aim. Such a measure proves reasonable when applied objectively and necessarily if particular grounds and conditions exist. A suitable means entails one by which the desired goal can be achieved. The means is necessary if no other, equally suitable, but less burdensome means exists for the person, and it remains necessary to solve an urgent social problem. When all the possible means by which a legitimate goal can be achieved are met, the most acceptable means emerge, ensuring effective realisation. Proportionality can be considered a means by which the burdens imposed on the person, considering all the circumstances and risks, will adequately accomplish applying this restriction and stand useful to society. Meaning, the degree of influence that a person should experience must be weighed against the state-protected public interest. Applying this measure's societal benefits must remain apparent and more critical than a person's burdens. Personal influence intensity when seizing property may vary in severity. This method considers the goal achievement, crime gravity, existing risks, and the person to whom the measure is applied. Hence, whether the desired result, analyzing all conditions, adequately restricts a person's right to peaceful property enjoyment.

Since implementing the three-stage test poses a challenge for law enforcement, and the subjective assessment may dominate determining restriction proportionality on individual rights, scholars have purported the need to apply an absolute value scale protecting against subjectivity.[62] In this regard, R. Pound proclaimed

> legal experts had paid great attention to developing a way to establish the value of various interrelated interests, based on which it would be possible to say with confidence which interest is more important than others. Were it possible, it would greatly simplify legislators, judges, and lawyers' tasks, contribute to the more excellent stability of regulation achievehieving justice in the state… However, no matter how widespread the search for such a method among philosophers and lawyers is, it must be recognized that today these efforts are futile. A lawyer probably can no more than recognize the problem and try to consider it in the light of all social interests and maintain balance and harmony to recognize them as much as possible.[63]

When considering the essence of the public interest and defining the problem of weighing interests, Cardozo advised judges to rely on justice in society, 'knowledge of life, personal experience and inferences, as does the legislator.'[64]

It is also possible to cite the President of the Supreme Court of Israel's point of view, Aaron Barak, who pointed out finding a common denominator in the balance between individual rights and public interest can embody 'social significance.' The author, in particular, noted

62 TA Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 (5) The Yale Law Journal 943–1005; Bazhanov (n 53).

63 R Pound, *Jurisprudence*, vol. 2. (West Publishing Co 1959) 330–331.

64 BN Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921). <https://archive.org/details/NatureOfTheJudicialProcess/page/n183> accessed 2 November 2020.

> when the public interest is on one side of the balance (such as national security or public safety) and the other side we find a constitutional right (such as freedom of expression or human dignity), the comparison is between the marginal social importance of the benefits gained by advancing the public interest and the marginal social importance of the benefits gained by preventing the harm to the constitutional right. Thus a shared base – or a common denominator – exists; it is in the form of the marginal social importance in fulfilling the public purpose and the marginal social importance in preventing the harm to the constitutional right.[65]

However, such a proposal does not entirely solve the problem, as social significance also remains evaluative and does not engender clear understanding guidelines. So, value commensurability has proven quite complicated, and subjectivity always epitomizes a risk. The law enforcer's professionalism remains vital in balancing interference proportionality with a person's right to the desired state goal.

A universal, substantial limit must regulate law enforcer discretion when deciding property seizure, protecting a person from public authorities' arbitrariness, and offering a methodological basis for criminal proceedings. Such algorithmization can resolve the value of conflict during property seizure. The Constitution of Ukraine (Article 41) guarantees this criminal proceedings measure, associated with criminal authority interference. ECHR, its first protocol, and the CPC (Article 16) have defined such a relationship between the legitimate intervention purpose and degree, balancing conflicting protected values resulting from such intervention.

The State must thoroughly protect fundamental rights, especially the right to peaceful enjoyment of possessions, regardless of restriction, acting in the public interest. The proposed approaches will ensure, on the one hand, property rights inviolability and, on the other hand, necessarily restricting them while prioritising human rights and restriction proportionality.

65 Barak (n 53) 484.

Access to Justice in Eastern Europe,
Issue 4 (8) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com
10.33327/AJEE-18-3.4

L Ervo ' Debtors Protection and Enforcement Efficiency According to Finnish Law'(2020) 4(8) *Access to Justice in Eastern Europe 265-282*
10.33327/AJEE-18-3.4-a000039

DEBTOR PROTECTION AND ENFORCEMENT EFFICIENCY ACCORDING TO FINNISH LAW*

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Human rights/ human considerations have started to carry more weight nowadays, especially in enforcement matters. Both rehabilitative and social aims in legal matters have been strengthened during recent decades. At the same time, increasingly intensive instruments to handle artificial arrangements and fraudulent debtors have emerged. Thus, the question arises whether the enforcement system embodies a creditor-biased or a debtor-biased framework. The present article debates this question in the context of Finnish legislation, focusing on two perspectives of the Finnish enforcement system: How are debtors protected? How can we ensure that the enforcement is efficient?

* *Received: 12.11.2020. Revised: 23.11.2020. Approved: 24.10.2020.*

Keywords: *Enforcement, Protection of debtors, Over-indebtedness, Artificial arrangements, Fraudulent debtors, Efficient enforcement, Rehabilitation of debtors, Covid-19.*

1. STARTING POINTS

Since the 1990s, the global economy has experienced instability. At the beginning of the 90s, many countries suffered economic downturns. This recession caused unemployment and led to human tragedies. European countries, like Spain, Italy, and Greece, experienced economic crises less than ten years ago. Since the whole world is fighting Covid-19, this pandemic represents not only a health problem but also deeply affects global and national economies, causing human tragedies, such as unemployment, deaths, and illness. When such difficulties accumulate, this can also result in economic fatalities. People who have invested a lot, for instance in their homes cannot pay their mortgages on time or at all. Therefore, a need has arisen to help debtors tackle indebtedness to realise financial rehabilitation. This compassion does exemplify not only human decency but also an economic interest. In other words, the aim is to help debtors regain financial independence and economic viability.

At the same time, recent decades have also seen many scandals of an economic nature. We have thus witnessed white-collar crimes, money laundering, tax offenses, and twilight investments in tax havens where even once-respectable banks have been involved.[1]

Hence, two primary enforcement law trends have emerged to protect and rehabilitate debtors and secure efficient, effective enforcement of artificial arrangements and fraudulent debtors. From that perspective, traditional enforcement law has undergone some turmoil, unmasking two countervailing aims: human considerations on the one side and effectiveness on the other side. How enforcement legislation can realize these conflicting objectives simultaneously has posed a pertinent question. This research, situated within the Finnish legislative context, postulates parallel solutions to human considerations and effective governance.

2. HUMAN APPROACH

Nowadays, human rights along with human considerations carry more weight in enforcement matters. This trend has persisted in Finland since 1995. Nevertheless, the idea does not depict a modern concept: the Code of 1734 already mandates fair enforcement.[2] However, some steps have been taken quite recently; for example the last resort of using custody as a coercive measure during the enforcement was abandoned in 1996.[3] During the enforcement, the most demanding coercive measure entails the debtor

1 'Nordealle sakot finanssivalvojalta – taustalla Panama-paperit' (*Kauppalehti*, 21 December 2017) <https://www.kauppalehti.fi/uutiset/nordealle-sakot-finanssivalvojalta-taustalla-panama-paperit/3c85b6ad-e071-3ef3-8da4-37f491726459> accessed 22 November 2020.

2 T Linna, 'Ulosotto ja perusoikeudet' (2000) 5 Lakimies 690–709.

3 Previously, custody could be used to ensure a defendant fulfiled an order on relevant enforcement grounds. (Payment orders were excepted from this practice, but other kinds of duties to fulfil could be thus enforced).

being summoned to a police enforcement inquiry.[4] It is, however, not legal to take him/her into custody beforehand in order to ensure the debtor attends the enforcement inquiry.[5]

Enforcement authorities must protect the interests of creditors and debtors.[6] The debtor does not usually need legal counsel because the enforcement authorities will take one's rights into consideration *ex officio*.[7] They must observe what is fair and guarantee the debtor does not suffer unduly from the judgment execution.[8] The principle of fairness includes a norm concerning conflicting interests. If a conflict exists, the debtor's interests supersede (*prima facie)* those of the creditor.[9]

The Enforcement Code emphasizes the primary principles defining fairness during enforcement.[10]According to the general fairness principle, the executive officer must act impartially and adequately when carrying out official duties. Additionally, the executive duties have to be performed rapidly, effectively and expediently. The procedures cannot harm the debtor or the third party more than required to achieve enforcement. The executive officer also has to promote the debtor's independent initiative and party readiness to conciliate.[11] This principle of due form balances executive powers and optional rules.[12] The fairness principle also encompasses the principle of proportionality.[13]

The fairness principle covers both procedural and material fairness.[14] Procedural fairness in the enforcement process is not identical to the fairness required at the trial stage. During the enforcement procedure, legal protection differs and is not subject to the same protection as civil litigation. Legal protection augments when investigating enforcement material basis during a trial. As enforcement entails one facet of justice administration, the required fairness is more relevant than administrative procedures.[15]

The primary fairness elements constitute 1) the right to be heard, 2) state office impartiality, 3) publicity restrictions, 4) the duty to give decision grounds, 5) the right to appeal, and 6) the right to use counsel or an attorney.[16]

For reasons of fairness, the enforcement must not draw unnecessary public attention and harm.[17] Any damage caused must relate to enforcement. Overly radical acts must be avoided, and enforcement measures must be executed discreetly. Also, business and neighbourhood relations and housing aspects must not be jeopardised unless essential. The party's wishes concerning the place and time of enforcement execution have to

4 Linna (n 2) 692.
5 The Enforcement Code of Finland (705/2007) Chapter 3, Section 59; Linna (n 2) 698.
6 T Linna, T Leppänen, *Ulosottomenettely* (Talentum 2003) 29.
7 Linna, Leppänen (n 6) 290.
8 The Enforcement Code (n 5) Chapter 1, Section 19.
9 R Koulu, H Lindfors, *Ulosotto-oikeus* (Edita 2009) 39 – 40.
10 Linna,Leppänen (n 6) 10 - 11.
11 The Enforcement Code (n 5) Chapter 1, Section 19.
12 Linna, Leppänen (n 6) 11.
13 Linna, Leppänen (n 6) 22.
14 Linna, Leppänen (n 6) 25.
15 Linna, Leppänen (n 6) p. 26.`
16 Linna, Leppänen (n 6) 27 – 31.
17 Linna, Leppänen (n 6) 312.

be considered, if possible, without endangering the principle of judicial investigation. Moreover, the bailiff also must promote a conciliatory spirit amongst the parties.[18]

One of the essential principles of enforcement entails transparency. The executive officer must inform the debtor and protect the individual *ex officio*. The duty to inform the party gains complexity if the person does not retain legal counsel or an attorney. When informing the parties, the executive officer must maintain impartiality: the parties must be treated equally. Transparency constitutes one component in *executive service*.[19] Just like the administration of justice reflects a court service in Scandinavia, the executive authority in civil litigation serves the same purpose and functions as a *service* for clients, who, in this instance, comprise the creditor and the debtor.

Even if the enforcement involves liquidation, rehabilitative ideas have dominated recent reforms. One pertinent example encompasses enforcement time-limits now restrict enforcement, making it no longer valid indefinitely. The usual time limit is 15 – 20 years if the debtor is a natural person.[20] The idea aims to prevent unfair long-lasting enforcement.[21] Thus, modern enforcement shares some characteristics with loan arrangements, even if it represents liquidation.[22]

Debtors, who are legal persons, have realised the notion of the capacity to survive with the help of the right to *beneficium* and the protected portion, which – after the reform ensures legal persons' interests are served.[23]

The appeal is also examined as a whole in the first instance[24], where the District Court may examine if an executive officer's decision stands entirely correct, and the Court is not bound to the complainant/plaintiff claims.[25] This premise exemplifies how the parties are protected *ex officio* during the enforcement procedure.

The right to be heard does not embody an absolute enforcement right like in a civil proceeding. The parties have already been heard during the proceedings when the grounds for the enforcement were obtained. Moreover, enforcement is based on judicial investigation, minimising the need to be heard. However, the debtor usually has a right to be heard. Various notices also serve as tools for delivering information to the debtor.[26]

With the reform of 2003, a general rule was introduced, covering party hearings in the Code of Enforcement. According to Chapter 3, Section 32, the person in question shall reserve an advanced opportunity to be heard suitably by a bailiff. An inability to obtain the individual's contact details or the inability to hear the person for another corresponding reason shall not prevent enforcement continuation. In other situations explicitly stated in law, the bailiff shall hear the parties and third parties if the matter

18 Koulu, Lindfors (n 9) 136.
19 Linna, Leppänen (n 6) 35 – 36.
20 The Enforcement Code (n 5) Chapter 2, Section 24.
21 Linna, Leppänen (n 6) 18.
22 Linna, Leppänen (n 6) 18.
23 The Enforcement Code (n 5) Chapter 4, Sections 21, 64, 65 and Linna, Leppänen (n 6) 22.
24 Only at the district court and no longer at the court of appeal.
25 The Enforcement Code (n 5) Chapter 11, Section 16.
26 Linna, Leppänen (n 6) 27 – 28.

is deemed considerably significant and does not impede the hearing. The person in question shall reserve an opportunity to be heard again if pertinent new evidence emerges regarding the matter. Furthermore, numerous striking paragraphs outline the right to be heard in various situations during enforcement.[27] In practice, the bailiff calls the debtor, and the individual gains the right to be heard immediately.[28]

The bailiff can even organize voluntary meetings for all parties in the enforcement case. Yet, no rules exist concerning this procedure. However, this process exemplifies the only way to encourage communication and discussion between parties; otherwise, they cannot meet. The creditor is not invited to the enforcement inquiry because the debtor must concentrate on relaying information. If the enforcement transpires at an individual's home, the creditor cannot attend[29], as this infringes on the debtor's protection and privacy.[30]

The information also must be given via notices. Three legal *notices* exist when an enforcement ground is based on a liability to pay. First, the bailiff should contact the debtor and *notify* the person *of the filing,* declaring the enforcement matter. Secondly, *prior notice* is given to inform the debtor property that will be seized, called a declaration of an object. The third notice, *a notice after the fact,* refers to facts relevant to the situation, what has happened, and when. This notice can also be termed 'a second declaration of the matter'.[31]

The enforcement authorities aim for a voluntary payment after sending a collection letter. The assistant enforcement officer and the debtor may set up a payment schedule to establish a voluntary debt repayment. The schedule preconditions will be assessed on a case-by-case basis.[32]

Instead of salary or business income, the enforcement authority may create a payment schedule if the debtor can credibly guarantee repayment following the payment schedule. The payment schedule equals wage or business income garnishment. If a payment schedule is set up instead of assessing wages or business income, the same rules for awarding leniency applied to these distraint types are applied to the payment schedule. In addition to setting up the payment schedule, distraint will also be carried out to ensure schedule adherence. If the debtor fails to keep to the schedule, then the seized assets will be sold by compulsatory auction. The officer in charge may decide the payment schedule has also lapsed if the debtor's new debts enter enforcement proceedings or if the debtor mismanages the seized assets. The alternatives involve establishing a new payment schedule to reflect the new circumstances or selling the seized assets.[33]

Every debtor has one personal District Bailiff and one personal assistant executive officer who deals with all the person's debts and other possible executive matters. The

27 The Enforcement Code (n 5)Chapter 3, Section 32 and Linna, Leppänen (n 6) 407 – 410.

28 Linna, Leppänen (n 6) 408 – 409.

29 It is nowadays very rare that enforcement takes place in the debtor's home. Linna (n 2) 696.

30 Linna, Leppänen (n 6) 408 – 409.

31 The Enforcement Code (n 5) Chapter 3, Sections 33, 34 and 36 as well as Linna, Leppänen (n 6) 394.

32 The Enforcement Code (n 5) Chapter 4, Section 59 and 'Velan maksu' (Oikeus.fi, 16 July 2020) <https://oikeus.fi/ulosotto/fi/index/velallisenaulosotossa/maksusuunnitelma.html> accessed 22 November 2020.

33 The Enforcement Code (n 5) Chapter 4, Section 59 and 'Velan maksu' (n 32).

aim is to consider the debtor's entire situation all the time. Even though the creditor can file with any executive officer in the country, one person takes responsibility for one debtor's whole situation. After the opening tasks have been completed, the files will be transferred to the executive officer in charge, who will then remain responsible for the case henceforth.[34]

The attending executive officer usually works in the same residence area as the debtor. If this is not the case, the debtor's real possibilities to attend one's interest have to be otherwise taken into consideration. The other primary principle entails choosing the executive officer in charge to execute enforcement expediently.[35]

3. DEBTOR-BIASED OR CREDITOR-BIASED SYSTEM?

Due to recent extensive reforms in enforcement, debtors' protection is both modern and up to date. Enforcement authorities must protect the interests of debtors *ex officio*. The debtor, therefore, does not usually need an attorney. A bailiff must observe the debtor does not suffer more than necessary to execute the judgment and observe what is fair.

Even if the enforcement involves liquidation, rehabilitative ideas[36] have remained paramount during recent reforms. The voluntary payment objectives, time-limited execution, personal executive officer's systems and the protected portion protect debtors. Moreover, some property types may not be seized, for instance, social benefits and compensation of costs.[37] The newest reform in that sense is that the re-employment of a debtor is supported. If an unemployed debtor obtains a job, the enforcement can be suspended (maximum of six months).[38] In such situations, a robust social aim in enforcement exists. The State will pay any compensations based on pain and suffering or injury or compensation based on a temporary or permanent handicap because of the liberty deprivation of innocent persons kept outside of the enforcement. Physical force is not acceptable in the enforcement of a monetary claim.[39] The debtor is thus well-protected regarding integrity.

However, legal scholars have criticized the enforcement's data protection, especially from the debtor's viewpoint. The effective furnishing of information has traditionally signified a risk to a debtor, and it has been argued enforcement begins to resemble bankruptcy procedures. If the bailiff pools the information furnished from various sources, the bailiff gains a comprehensive overview of the debtor's financial situation.

34 Linna, Leppänen (n 6) 42.

35 The Enforcement Code (n 5) Chapter 3 Section 14.

36 Linna and Hupli have found three kinds of elements in the modern enforcement. First, it still is a liquidation procedure. Second, the enforcement authorities have to protect the debtor in a defensive way. Third, there is a rehabilitative function strongly involved in the current enforcement and other insolvency procedures. Bankruptcy is mainly a liquidation procedure when the reorganization proceedings or legal loan arrangements are based more on the rehabilitation. Still, there is a need for rehabilitation in the enforcement; the legal possibilities to get involved in reorganization procedures or the loan arrangement are not sufficient. On the other hand, those procedures can also be seen as liquidation. T Linna, T Hupli, *Ulosotto ja konkurssi lainkäyttömenettelyinä* (Lakimies 2001) 596 – 625.

37 Koulu, Lindfors (n 9) 157 and pp. 212 – 213.

38 The Enforcement Code (n 5) Chapter 4, Section 51a, and the Government bill nr 150/2017.

39 Koulu, Lindfors (n 9) 157 and pp. 212 – 213.

Koulu and Lindfors are of opinion that the bailiff has better tools for that during the enforcement procedure compared with the bankruptcy procedure.[40] From the debtor's perspective, more effective tools existing in a single enforcement matter than general bankruptcy enforcement have been criticised.

The current dualism typifying this trend is expected to continue in the future. On the one hand, routine matters, such as cooperative salary earners or impecunious debtors, are handled automatically, minimising the enforcement work. In such situations, the enforcement somewhat resembles administration (in the bureaucracy sense) rather than justice administration.[41] However, the enforcement authorities must cooperate with the other authorities and the private sector. The aim is to consider the debtor's situation comprehensively. The bailiff has a new rehabilitative role as well. The second question constitutes, what is to be done with contumacious debtors. They engender current objects in effective and individual enforcement, *special enforcement*. In such cases, the enforcement procedure resembles more justice administration than administrative matters. Thus, the enforcement becomes long-lasting and inclusive mimicking bankruptcy proceedings.[42]

Havansi has also highlighted the same problem. He has asserted enforcement has become softer concerning the honest debtors facing genuine financial challenges. The opposite trend of intensive enforcement concerns the potentially but contumacious solvent debtor.[43]

4. COOPERATION BETWEEN ACTORS

The debtor must cooperate. The debtor's obligation to provide information became more evident and concrete with the 2003 reform. The reform solidified this mandate.[44] The debtor must respond to the bailiff's questions, but otherwise, the debtor does not need to provide information.[45] The Enforcement Code lists the questions.[46] Otherwise, the debtor does not need to remain active, for the debtor has no duty to contact a bailiff if the person's income or wealth changes, and the information encompassing answering the bailiff's questions.[47] Therefore, a debtor's role embodies a passive information source rather than an active subject.

Upon the bailiff's request in an enforcement matter, the debtor shall truthfully provide the following information the bailiff needs for enforcement: (1) debtor's personal and contact details and, insofar as is necessary for the enforcement matter, information

40 Koulu, Lindfors (n 9) 416 – 417.

41 There has also been some discussion in Finnish legal literature whether the enforcement is included in administration or in the administration of justice. Havansi, Linna and Hupli see the enforcement as an administration of justice, whereas Tuori thinks it is only administration. Hidén finds characteristics of both elements. Linna, Hupli (n 36) 596 – 625 and T Linna, *Ulosott-oikeuden yleiset opit – missä ja mitä?* (Lakimies 2009) 3 – 33.

42 Koulu, Lindfors (n 9) 419.

43 E Havansi, *Ulosotto-oikeuden pääpiirteet,* 2nd ed (Helsingin yliopisto 2000) 13 – 14.

44 Linna, Leppänen (n 6) 449.

45 Koulu, Lindfors (n 9) 150.

46 The Enforcement Code (n 5) Chapter 3, Section 32.

47 Linna, Leppänen (n 6) 448.

regarding family and persons maintained by the individual, (2) information on one's property and other assets, income, debts, shareholdings and memberships in other corporations with a bearing on financial status, (3) information on any likely anticipated changes to the information in the following year, (4) information on how wages, salary, or other recurring income is determined, as well as information on the person's place of employment and employer contact details or other payer of wages or salary, (5) information on the whereabouts of an object or document subject to a relinquising liability or a statutory duty of relinquishment to the bailiff, (6) information on contracts and commitments affecting the individual's financial status as well as assets administered or used by the person based on an assignment or a comparable basis, arrangement or contract, (7) information on assets conveyed, payments made and transactions concluded against consideration or without consideration, if the information is necessary to determine whether an action for recovery can be used to recuperate assets for enforcement, and on procedures, arrangements and other measures affecting comparable transactions (8) other comparable information on the person's financial status and operations.[48]

The list is not conclusive. Based on paragraph 8 of Chapter 3, Section 52 of the Enforcement Code, the bailiff can always pose additional similar questions to the debtor. However, the question has to concern the debtor's economic situation, and information must be necessary to execute the enforcement order.[49]

The obligation to provide information also covers contested property and property challenging to realise. Notably, whether the property can or cannot be seized remains irrelevant. The same also applies to property abroad, even if the Finnish bailiff lacks the competence to execute the enforcement where such property is concerned.[50]

A debtor who is a natural person shall provide the information oneself. If the debtor has a guardian, the guardian shall provide the information to administer the assets. Also, an individual managing the debtor's business or assets is required to provide the mandated information. Concerning a decedent's estate, an estate executor or administrator must provide information. If the estate shareholders are jointly in charge, every shareholder is subject to the same compulsion.[51]

If the debtor entails a corporation or a foundation, the information shall be provided by (1) a board of directors member or a comparable body, or chief executive officer or comparable position, (2) an individual personally liable for corporate commitments, (3) an individual entitled to sign for the corporation or foundation alone or jointly with another individual, (4) an individual who, given the circumstances[52], is

48 The Enforcement Code (n 5) Chapter 3, Section 52.

49 However, other kinds of questions may be asked if the debtor has been informed responding to them remains voluntary. But even in that case, the questions must be deemed necessary to fulfil the pending enforcement execution. Linna, Leppänen (n 6) 456.

50 Linna, Leppänen (n 6) 457 – 458.

51 The Enforcement Code (n 5) Chapter 3, Section 53.

52 This refers to the various intermediary arrangements in the corporation or a foundation operation. This intermediary uses the operative power usually belonging to the corporation's organizational entities. These arrangements can be typical, for instance, in family businesses or in one-man companies. The internal hallmark of this arrangement can be, for example, the person has a corporate credit card in one's possession or in one's factual control. Linna, Leppänen (n 6) 454.

managing corporate or foundation operations or seeing to its administration or asset administration.[53] Moreover, a person holding one of these positions during the year preceding the request for information is subject to the obligation to provide information. If no one is available to provide information, the individual last occupying a comparable position is subject to the same mandate.[54]

Furthermore, upon request, a debtor employee and auditor shall provide the required information relating to their tasks. However, this mandate only applies if the bailiff considers the information essential for the enforcement and cannot be obtained in any other manner.[55] The first alternative involves asking the debtor directly. Thus, the role of employees and auditors represents a secondary option. The requirements for interviewing employees and auditors only apply if the information cannot be found otherwise, and this information must also be necessary for the enforcement's execution. The employee plays a significant role during the interviewing process. The employee can only be asked questions related to one's responsibilities. Providing information must not jeopardise an employee's position, for interviewing employees is only permitted as an ultimate means of obtaining information.[56] Furthermore, only higher-ranking employees should be questioned. Lower-ranking clerical employees or workers should not be interviewed.[57] Likewise, the auditor should only be questioned if necessary, and the auditor's privileged position as a debtor's trusted employee should be considered.[58]

The list of questions in the Enforcement Code[59] exclusively concerns the third parties who must give information to the bailiff based on the Enforcement Code. Third parties have no duty to respond to any additional questions.[60]

No particular order in the Enforcement Code list mandates how the bailiff should interview the persons with the duty to provide information. However, in practice, the first source of information remains the debtor or the creditor. This action is also based on the principle of fairness and the protection of privacy.[61]

The bailiff may procure information from a person subject to the compulsion either informally or by carrying out an enforcement inquiry. No rules exist regarding informal information procurement; thus, the fairness principle only suggests a guideline to follow.[62] The Government Bill stated the bailiff should avoid interviewing the debtor in all situations. Hence, casual information obtaining should not occur without the debtor's consent if colleagues, family members, neighbours, or other persons are

53 The person is obliged to give information like a debtor, and has a duty to attend in the enforcement inquiry. Thus, one's position can therefore be seen as a parallel to the debtor's position. (Linna, Leppänen (n 6) 452.)

54 The Enforcement Code (n 5) Chapter 3, Section 54.

55 The Enforcement Code (n 5) Section 55.

56 Linna, Leppänen (n 6) 452.

57 Linna, Leppänen (n 6) 455.

58 Linna, Leppänen (n 6) 456.

59 The Enforcement Code (n 5) Chapter 3, Section 52.

60 Linna, Leppänen (n 6) 482 and 456.

61 Linna, Leppänen (n 6) 446.

62 Linna, Leppänen (n 6) 447.

present. However, an exception exists if the debtor has attempted to avoid the bailiff. In such instances, third parties may be present when posing questions to the debtor.[63]

An enforcement inquiry may be aimed at an employee and the auditor only if a particular reason exists. If a said individual refuses to provide information, then the bailiff may, under threat of a fine, compel the individual to do so at once or within a time limit. In an enforcement inquiry and, when necessary, including information procured informally, the individual subject to the obligation shall be reminded of the duty to give truthful answers, and giving false or concealing information may result in punishment.[64] The offences based on debtor dishonesty should be found in the Criminal Code. The offenses comprise dishonesty by a debtor, aggravated dishonesty by a debtor, fraud by a debtor, aggravated fraud by a debtor, deceitfulness by a debtor, a debtor's violation, and favouring a creditor.[65] The debtor has the duty always to be truthful. This responsibility does not depend on whether the debtor is interviewed informally or if the bailiff carries out an enforcement inquiry. The mandate to remain honest covers many situations, even when the debtor is approached during a chance encounter.[66]

Before the reform in 2003, the enforcement inquiry was mostly only the *ex post facto* possibility to establish the reasons why the debt had not been collected and why and enforcement had been terminated because of a lack of means. Usually, the enforcement inquiry was carried out because there were doubts about whether the debtor had hidden some property. With the reform, the enforcement inquires became a standard way to search property and maintain contact with the debtor. There is thus a substantial change in the ratio of the law.[67]

According to the current Enforcement Code, the bailiff shall carry out an enforcement inquiry if the creditor's receivable cannot be collected in full, and the debtor's financial circumstance has not been credibly ascertained.[68] This rule represents the traditional starting point concerning when the enforcement inquiry becomes obligatory, namely when it is ruled.[69] In practice, the enforcement inquiry embodies the usual way to search for assets and maintain contact with the debtor.[70] The legislator's desire to change the situation thus seems to have been successful.

If an enforcement inquiry has already been carried out while the matter is pending and (1) no more than six months have passed since the inquiry, no need for a new enforcement inquiry exists unless circumstances have changed, (2) more than six months but no more than one year has passed since the inquiry, a new enforcement inquiry shall be executed if deemed justified given the circumstances, (3) more than one year has passed since the inquiry, a new enforcement inquiry shall be carried out unless

63 Government Bill 216/2001, p. 152.

64 The Enforcement Code (n 5) Chapter 3, Section 56.

65 Criminal Code, Chapter 39, Sections 1 – 6.

66 Linna, Leppänen (n 6) 447.

67 Linna, Leppänen (n 6) 464.

68 The Enforcement Code (n 5) Chapter 3, Section 57.

69 This is because the enforcement inquiry is a time-consuming task and it would serve no purpose to carry it out for no reason.

70 The Enforcement Code (n 5) Chapter 3, Section 57, Paragraph1 and Koulu, Lindfors (n 9) 151.

manifestly unnecessary. If the wages, salary, or other recurring income of the debtor have been attached, an enforcement inquiry shall be carried out if necessary, owing to new applications or some other reason. At least once a year, the bailiff shall verify the amount of the recurring income paid to the debtor, unless this is obviously unnecessary.[71] The creditor may also request a bailiff to perform an enforcement inquiry, but the bailiff ultimately decides. The creditor then has no right to evoke the enforcement inquiry.[72] An enforcement inquiry may also be carried out very frequently, as often as every week or even every day, if a valid reason for doing exists, like the conditions concerning the debtor's financial status change very abruptly. However, an enforcement inquiry cannot be utilized as a sanction, even when the debtor is contumacious. Such activities would contradict the fairness principle.[73]

The enforcement inquiry epitomises the most formal act of enforcement execution. The debtor must be summoned at least two days before the inquiry. The individual has to appear in person and is not allowed to use a representative. Being fetched by the police or a threat of a fine can be used as coercive measures.[74] The presence of legal counsel may also be prohibited, or attendance may be subject to rules if counsel's attendance would considerably hamper the enforcement. However, legal scholars have viewed this dynamic as unjust because the debtor must be truthful and correct the given information.[75]

The enforcement inquiry shall be carried out following response protocol to the bailiff's questions. Moreover, the person giving the information may be required to compile a list of the debtor's property and assets, income, and debts or to provide the information needed for such a list. The protocol and list shall be given for review to the person subject to the obligation to provide information, and the corrections and additions shall be noted. The person subject to the mandate to provide information shall sign a statement stating they provided correct information; this statement shall then be added to the protocol and list. The enforcement inquiry may be conducted via telephone or some other suitable contact manner in a simple matter. In this situation, the necessary entries concerning the enforcement inquiry shall be recorded.[76]

An enforcement inquiry shall neither last longer than is needed to procure the necessary information nor for longer than six hours without interruption unless the person subject to the information obligation consents to this. If the inquiry is *essential for the enforcement, a person who has been brought* to the enforcement inquiry by the police *or who attends under threat of being fetched by the police* may be prevented from leaving the inquiry. Also, *another person* subject to the information mandate may be prevented from leaving the inquiry if *a fundamental reason* related to the enforcement exists *and if the prevention cannot be deemed unreasonable* given the circumstances.

71 The Enforcement Code (n 5) Chapter 3, Section 57.

72 Linna, Leppänen (n 6) 465.

73 Linna, Leppänen (n 6) 467.

74 Coercive measures cannot be used where they is not necessary to carry out an enforcement inquiry even though the debtor is being evasive. Linna, Leppänen (n 6) 471.

75 The Enforcement Code (n 5) Chapter 3, Sections 58 and 59; see also Koulu, Lindfors (n 9) 152.

76 The Enforcement Code (n 5) Chapter 3, Section 60.

The inquiry shall be postponed in full or in part if the bailiff deems the person subject to the information obligation cannot reasonably do so, especially illness or some other comparable reason.[77]

Preventing a person from leaving the inquiry poses a complicated question regarding fundamental rights. The legal literature stipulates a bailiff should be careful if a debtor is deprived of liberty, even for only a short period. A person prohibiting another from leaving by depriving liberty tests a state's constitutional limits. Careful attention to procedural correctness and fairness remains imperative.[78]

A person in possession or in charge of accounting data belonging to a debtor liable to keep accounts shall submit the following at the bailiff's request and for enforcement inquiry purposes: (1) accounting journals, receipts, and other accounting material, (2) documents and other records relating to the management and agreements of a corporation or foundation, (3) other documents and records concerning the debtor's business or professional activity.[79] If a person subject to the information obligation refuses to do so in an enforcement inquiry or refuses to submit mandated data, the bailiff may, under threat of a fine, require the individual to fulfil the obligation at once or within a time limit.[80]

5. THE ROLE OF THIRD PARTIES AND OUTSIDERS

The bailiff's right to obtain information from other authorities or third parties was considerably expanded in 1997. While obtaining information remains necessary in various enforcement types, impressive collection garners the most significance.[81]

According to the Enforcement Code's fundamental norm, the bailiff has the right to acquire specifically-outlined information, documents, and materials if they are necessary for enforcement in a given matter.[82] This rule completes attaining information based on other legislative acts. Rules included in other acts. Other possibilities exist to obtain confidential information. The cited rule is, therefore, only a minimum guarantee to obtain information. Also, the bailiff can, of course, collect publicly available information.[83]

The third party is obliged to provide information when asked and therefore has no obligation to provide information actively on one's initiative. The individual must answer the questions and remain truthful. If the third party gives false information or conceals information, the person could commit a criminal offence or remain liable to pay compensation.[84] The enforcement inquiry does not represent a measure against the third party, but a person as a debtor representative remains subject to such an inquiry. However, the third party can be viewed as a debtor if the bailiff suspects

77 The Enforcement Code (n 5) Chapter 3, Section 61.
78 Koulu, Lindfors (n 9) 153 and Linna (n 2) 699.
79 The Enforcement Code (n 5) Chapter 3, Section 62.
80 The Enforcement Code (n 5) Chapter 3, Section 63.
81 Linna, Leppänen (n 6) 482.
82 The Enforcement Code (n 5) Chapter 3, Section 64.
83 Linna, Leppänen (n 6) 483 and 485.
84 Linna, Leppänen (n 6) 492 – 493.

artificial arrangements. In such a case, the third party is subject to the same duties to give information like the debtor.[85]

As the third party holds no general obligation to help the bailiff and give information, a third party's role differs from a witness's role in court proceedings. The third-party can voluntarily offer additional information.[86] Otherwise, for instance, a spouse, a neighbour, or another third party who knows the debtor's information has no general obligation to provide information based on their position.[87] Unlike a witness exception, if a relative or other close person must give information based on the Enforcement Code, the individual has no right to refuse.[88] The third-party also has no right to refuse to give information even if the information may be self-incriminating. Accordingly, it is argued in the legal literature that the third party is obliged to incriminate him/herself if necessary in order to fulfil the obligation to provide information.[89] However, the latter duty can be contested on the grounds of human rights and the European Court of Human Rights' case law.

If a third party refuses to provide information, the bailiff may compel the individual to provide it at once or within a time limit, and the failure to do so may result in the imposition of a fine. If information cannot be obtained from the third party in any other manner, the bailiff may compel the person, under threat of a fine, to arrive at the bailiff's office or at another suitable location to provide the information.[90] No need exists to use coercive measures against the third party who holds a minor interest or the information is not paramount. The situation as a whole is taken into consideration. The same is also true for circumstances where it is not clear if the third party must give information or not.[91]

An authority and a party performing a public task shall, upon request, provide the bailiff with all information in its possession relating to (1) the debtor's property and assets, income, debts, and another financial status and banking information, (2) the debtor's employment and service relationships, pensions and economic activity, (3) the debtor's address, telephone numbers, and other contact details.[92]

The bailiff cannot use the threat of a fine against an authority. However, an authority would be committing a criminal offence if it does not fulfil its duties to give information.[93]

In other words, every person, including outsiders without any specific interest in the case, has the right to receive, from the local enforcement authority, a certificate from the enforcement register concerning a person specified by the individual as a respondent in an enforcement matter. All the data entered into the Enforcement Register may be included on a certificate are public; the other data stored in the register remain confidential. The certificate will include the following information: 1) applicant and respondent names

85 Linna, Leppänen (n 6) 489.
86 Linna, Leppänen (n 6) 483 - 484.
87 Linna, Leppänen (n 6) 489.
88 Code of Judicial Procedure, Chapter 17, Section 20.
89 Linna, Leppänen (n 6) 491 – 492.
90 The Enforcement Code, Chapter 3, Section 68.
91 Linna, Leppänen (n 6) 499.
92 It it not significant if the contact details are confidential or not. Linna, Leppänen (n 6) 496.
93 Linna, Leppänen (n 6) 501.

and respondent's date of birth and the place of residence, 2) the enforcement matter, when it became pending, and passive receivable registration, 3) amount of the applicant's receivable and the amount remitted to the applicant, 4) nature and date of a certificate of impediment. The certificate shall be given as a print-out from the Enforcement Information System. If no register notations exist, a certificate to this effect shall also be issued. A certificate may usually be given covering the two years preceding the request. However, it can be issued covering up to four years if the requester demonstrates the information is necessary for their livelihood or otherwise to safeguard their vital personal or public interest. Before a certificate is issued, the name, profession, and residence of the person requesting the certificate and the essential justification shall be entered into the Enforcement Information System. At the registered person's request, the individual shall be informed of any certificates concerning the registered person having been issued from the enforcement register during the preceding six months.[94] This process aims to control unnecessary requests and to act reasonably concerning the debtor. However, information can be attained based only on the requesting party's inquisitiveness.[95]

6. LIMITATION PERIODS AND DAILY-LIFE PROTECTION

Many protective rules exist in Finnish legislation. For instance, the debtor's necessary living costs are considered with the protected portion system's help, meaning an individual minimum income is protected from enforcement. The debtor's protected portion is 22.63 Euro per day for oneself and 8.12 Euro per day[96] for a spouse, a debtor's child, and a spouse's child depending on o^{n}e's maintenance payment date of the next wages or salary. In the calculation of the protected share, a month corresponds to 30 days. A spouse engenders a married spouse or a person living in marriage-like circumstances. A person is deemed to depend on the debtor for maintenance if one's income is less than the protected portion calculated for the debtor, or a child/children, regardless of whether or not the spouse contributes to sustenance. Debtor-paid maintenance can also be considered. The amount of the protected portion shall be reviewed annually by a Decree of the Ministry of Justice.[97]

The following shall not be garnished from the base income: 1) the debtor's protected portion and one-third of the amount of the wages or salary exceeding the protected portion (*income limit garnishment*), 2) two-thirds of the wages or salary if the wages or salary exceed twice the amount of the debtor's protected portion, 3) less than the amount referred to in subparagraph 2, but at least one-half of the wages or salary, if the wages or salary are more than four times the amount of the debtor's protected portion. The Ministry of Justice's Decree will give more detailed provisions covering the third situation.[98]

Furthermore, the debtor's assets can be repossessed. Nevertheless, the assets the debtor and the debtor's family need for everyday life (tools and educational materials)

94 The Enforcement Code (n 5) Chapter 1, Sections 30 and 31.

95 Linna, Leppänen (n 6) 516.

96 The Decree of the Ministry of Justice 1123/2019 (came into force on 1 January 2020).

97 The Enforcement Code (n 5) Chapter 4, Section 48.

98 The Enforcement Code (n 5) Chapter 4 Section 49.

are protected from repossession. This is called the right to *beneficium* and has to be taken into consideration *ex officio*.[99] This right may also not be renounced; even if the debtor wants to give these items to the executive officer voluntarily, the official cannot accept them. The debtor could sell these items and then give the money to the executive officer.[100]

The enforcement limitation period was adopted in the Finnish enforcement legislation in 2003. This substantial reform towards debtors' rehabilitation reflected altered attitudes concerning payment obligations. Negative attitudes emerged towards the change and the new debut release mindset. The Enforcement Act only contained an enforcement limitation period. It did not outline a final debt limitation statute. Hence, only the enforcement was limited, while materially, the debt was still valid even after this time-limit. The enforcement was not possible after the limitation period had expired. However, private debt collection was permitted, although few legal tools existed to do so. A set-off was possible, as well as taking the debt from the security. Payment could legally be retrieved from a decedent's estate [101]. In practice, the debtor held only a moral obligation to pay. As a whole, the debtor situation remained unclear about how this debt affected taxes and social benefits. The legislator saw this situation as unsatisfactory and took action. With 2008 amendments, the final debt limitation was included in the new Enforcement Code. The economic crisis at the beginning of the 1990s reason precipitated these reforms. As the legal possibility to get a loan or the voluntary release programme did not help, these rules limiting the duration and final limitation statute were adopted into law. [102]

The maximum limitation period now equals 32 years. After that time, no tools exist to continue debt collection. Essentially, the debt no longer exists.[103] A ground for enforcement imposing the payment liability to *a natural person*[104] remains enforceable for 15 years. The first debts based on this amended rule will expire soon. The limitation extends to 20 years if the creditor embodies a natural person or if the debt is based on a crime for which the debtor has been sentenced to imprisonment or community service. If the debtor illustrates before issuing the ground for enforcements, the debt had been transferred to a natural person by someone other than a natural person, the time limit equals 15 years.[105] The duration is calculated from the judgment date by default or the final judgment or other final ground for enforcement.[106] In the case of taxes and other public payment obligations, the debt's final limitation statute provides duration equals

99 On the interpretation of the *beneficium*, see the case law of the Supreme Court 1997:168, 1999:5, 2001:100 and 2004:136.

100 The Enforcement Code (n 5) Chapter 4, Section 21 and Linna, Leppänen (n 6) 67.

101 This complicated possibility was very laborious for creditors to collect the estate payment. At the same time, they had the most unsure and the smallest possibility of obtaining the payment compared with the other creditors. This situation was also seen as a disadvantage to debtor rehabilitation. The individual did not want to become active economicaly because it benefitted only creditors and not one's heirs. Therefore the debtor usually funneled the credit directly to the heir. See P Tuunainen, *Täytäntöönpanon määräaikaistuminen ja velallisen kuolema* (Lakimies 2004) 862 – 882.

102 Koulu, Lindfors (n 9) 112. For the reasons, see also the Government Bill 83/2006.

103 Koulu, Lindfors (n 9) 114.

104 Debt can be based on the business activities. Koulu, Lindfors (n 9) 113.

105 The Enforcement Code (n 5) Chapter 2, Section 24.

106 The Enforcement Code (n 5) Chapter 2, Section 25.

five years, based on the particular Act on the Enforcement on Taxes.[107] This Act has been professed to be older but more modern than the Enforcement Code even though it has undergone several reforms.[108]

The limitation expiry will also delineate a final debt limitation.[109] This amendment came into force on 1 March 2008. When the limitation for enforcement expires, the debt can no longer be collected through any means, and the debt is permanently statute-barred even materially. Thus, the debt can no longer be recovered, for instance, by a collection agency or from a decedent's estate. This limitation period cannot be interrupted.[110] Yet, set-off is usually possible, permitted to take debt from security.[111] Nowadays, the heir is released from the debt as well.[112]

However, the creditor has the right to take legal action against the debtor and require an extension to the enforcement limitation period. The court may extend the duration by ten years from the original limitation period's expiry if the debtor has a complicated payment receipt, for example, concealing or donating assets or circumstances. The creditor must take such actions at the latest within two years of the original limitation period's expiry.[113]

In case the debtor has paid the debt after the final debt limitation, the individual has a right to reimbursement. The bailiff controls *ex officio* preventing such mistakes.[114]

Whether the limitation periods cover foreign judgments and other foreign grounds for enforcement remains unclear in the legal literature. The legislator believes the limitations can be executed based on enforcement's foreign grounds. However, Linna and Leppänen dissented: the foreign enforcement grounds cannot be put at a more advantageous position than the Finnish ones. Creditors should always apply the foreign enforcement ground in such situations. Linna and Leppänen however, contended the circumstances differed if international rules bound Finland. They demonstrated if enforcement grounds were valid for execution in the original country, enforcement could be denied in Finland. This would encompass all the situations where no *exequatur* is needed. If the *exequatur* is needed, the Finnish statutes on the limitation for enforcement and the final statute of debt limitations will be applied.[115]

However, the debtor will not be released if the creditor has not attained grounds for enforcement. For instance, the debt will not fall under the limitation statute if the debtor and creditor have agreed upon and adhere to the payment schedule.[116]

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107 The Act on Enforcement Taxes and Other Public Payments Section 20.

108 Koulu, Lindfors (n 9) 116.

109 The Enforcement Code (n 5) Chapter 2, Section 27.

110 'Täytäntöönpanokelpoisuuden määräaika ja saatavan lopullinen vanhentuminen' (*Oikeus.fi*, 14 July 2020) <https://oikeus.fi/ulosotto/fi/index/ulosotto/taytantoonpanokelpoisuudenmaaraaikajasaatavanlopullinen vanhentuminen.html> accessed 22 November 2020.

111 Government bill 83/2006.

112 Koulu, Lindfors (n 9) 113.

113 The Enforcement Code (n 5) Chapter 2, Section 26.

114 Koulu, Lindfors (n 9) 113.

115 Linna, Leppänen (n 6) 177 – 179.

116 Koulu, Lindfors (n 9) 112.

7. COVID-19 PROTECTION

Due to the Covid-19 pandemic, there are temporary changes in the Enforcement Code. These are put in place to protect those debtors who are economically suffering from the pandemic's consequences. The objective is to make their recovery easier during the period of transition. This temporary legislation came into force in April 2020, and the Finnish government aims to extend the period of the validity of the legislation and the related relief arrangements until the end of April 2021.

The mitigations made possible by the temporary law have already been actively used in the execution of enforcement. Significantly, the applications for grace-free months and relief applications have increased. It is expected that those applications will keep increasing because the economic effects of the pandemic happen with an in-built delay; first, there is a pandemic, and even when it is over, its economic consequences are still there.[117]

The tools that are used to protect debtors during the pandemic and to help them recover economically are, for instance, grace-free months or relief arrangements. Also, the postponement of the execution of enforcement is possible based on the temporary law. This covers both debts and evictions, in which the postponement of the removal date is made possible concerning Covid-19-related problems. Naturally, the urgency requirement stipulates that the foreclosure procedure be carried out without undue delay.[118] One other tool is that the foreclosure procedure does not default in credit records as quickly as usual.[119]

The bailiff must inform a debtor of these mitigation possibilities *ex officio*. It is included in the principle of transparency.[120] However, the bailiff retains case-by-case discretion to change or limit the granting of additional time and relief.[121]

8. CONCLUSIONS

The relatively well-protected debtors' situation can be seen as a problem from the creditors' side and a comparative perspective when the significant monetary collection is seen as the most crucial aim.[122] The Finnish enforcement system and legislation are mainly based on the idea of rehabilitation of a debtor, and, following this kind of thinking, the interests of debtors have to yield to the interests of creditors. However,

117 'Ulosottolain väliaikaisiin muutoksiin esitetään jatkoa' (*Ministry of Justice*, 8 October 2020) <https://oikeusministerio.fi/en/-/ulosottolain-valiaikaisiin-muutoksiin-esitetaan-jatkoa> accessed 22 November 2020.

118 Act on Temporary Modification of the Enforcement Code 289/2020, Chapter 4, Sections 6, 51, 52, 64 and Chapter 7, Section 4.

119 Act on Temporary Modification of the Enforcement Code 289/2020, Chapter 3, Section 21.

120 Act on Temporary Modification of the Enforcement Code 289/2020, Chapter 1, Section 20.

121 Act on Temporary Modification of the Enforcement Code 289/2020.

122 On the other hand, Linna has seen the Finnish enforcement system as quite neutral concerning both parties. She thinks that, especially from the normative perspective, the applicant and the debtor are in the same that is neutral, position. The debtor is not seen as a weaker party, like the employee in employment legislation or consumer in consumer legislation. *Linna*, 2009, p. 18. However, I see the situation as a little bit different, especially from the normative perspective. The debtor is protected by very many rules and the strong objective of rehabilitation is included. In my opinion, it is mostly the applicant who will lose in such situations where creditor's interest and debtor's interest are in collision.

in the long run, society as a whole will arguably benefit more when debtors can later continue their lives or businesses as usual again. On the other hand, the promotion of creditors' interests contributes to the credit and financial markets.[123] Linna thinks that the most critical function of the enforcement is, still, the liquidation, which is also, at the same time, the most vital tool to promote trustworthiness in the whole system.[124] For this reason, it is the State's vital duty to organize enforcement effectively. Simultaneously, Linna reminds us that ineffective enforcement is a different matter than the regulation of the enforcement's intensity. There must be a balance between intensive enforcement and judicial relief. The ineffective enforcement, however, does not fulfil those aims.[125]

Still, honest debtors who have experienced hardship in their lives are worthy of rehabilitative measures, especially when societal needs are considered. Society and debtors benefit more in the long run if the enforcement is more rehabilitative than focused upon liquidation. Of course, in such a system, creditors need to pay for the common good and participate in establishing social benefits stemming from their private funds, which can sound unfair depending on the existing values. Furthermore, what is fair to one actor is not always fair to the opposite party. However, rehabilitative enforcement can benefit creditors when s/he would not otherwise obtain any recompense, or only very little recompense, from an over-indebted debtor. Therefore, rehabilitative enforcement with non-fraudulent debtors can be a win-win situation for all actors, for debtors and creditors alike, and especially for society when viewed as a whole. Whenever there is humanity in liquidation procedures, no one can lose. The economic value should, as it were, be placed on a par with moral values, as *Michael Bayles* has shown by his calculations already in 1990.[126]

123 Linna, Hupli (n 36) 600.

124 The liquidation is of course the main function of the enforcement procedure and therefore it is also important that the general audience has a feeling that they can rely on the enforcement system and, when they have a ground for enforcement, that garnishment is done in an effective way. This is crucial to fulfilling the access to the justice. L Ervo, *Perustuslaki ja oikeuden saatavuus* (Lakimies 2000) 1085 – 1105.

125 Linna, 2009, pp. 20 – 21.

126 MD Bayles, Procedural justice: allocating to individuals (1990).

Access to Justice in Eastern Europe,
Issue 4 (8) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)

R Kuibida, 'Constitutional Court Strikes the Anti- Corruption System in Ukraine' (2020) 4 (8) *Access to Justice in Eastern Europe 283-290*
10.33327/AJEE-18-3.4-n000040

CONSTITUTIONAL COURT STRIKES ANTI-CORRUPTION SYSTEM IN UKRAINE*

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Summary: – 1. Introduction. – 2. Reasoning of the decision of the Constitutional Court. – 1. Circumstances of decision-making. – 4. Reaction of state bodies. – 5. Further necessary steps.

The publication is dedicated to the Constitutional Court of Ukraine's decision, which paralyzed the National Agency's critical activities for preventing corruption and declared unconstitutional criminal liability for knowingly false declarations. The decision caused a considerable resonance, as the declared reasons for its adoption were insufficient to admit that the crucial provisions of the Law 'On Prevention of Corruption' regarding electronic asset declaration, financial control, and lifestyle monitoring are entirely unconstitutional.

The decision's circumstances indicate that the judges ignored the apparent conflict of interest and made an unjustified departure from the previous case-law. Simultaneously, the reaction of crucial state bodies to this decision may cause a constitutional crisis rather than rectify the situation. As a way out, it is proposed to amend the legislation in a constitutional manner that would unblock the agency's activities and, at the same time, lead to greater accountability of the judiciary and the Constitutional Court.

Keywords*: prevention of corruption; unconstitutionality of the law; The Constitutional Court; asset declaration; arbitrary decision*

* Received: 08.11.2020. Revised: 23.11.2020. Approved: 24.11.2020

1. INTRODUCTION: THE 'EXPLOSIVE' DECISION

On 27 October 2020, the Constitutional Court of Ukraine declared unconstitutional a significant part of the Law 'On Prevention of Corruption' and the Article 366-1 of Ukraine's Criminal Code.[1] As a result of the decision of the Constitutional Court, the following provisions have lost their force:

- implementation by the National Agency for the Prevention of Corruption (hereinafter NAPC) of monitoring and control over the implementation of anti-corruption legislation, verification of asset declarations of declarants, storage, and publication of such declarations, monitoring of the way of life of declarants;
- the right of the NAPC to obtain the necessary information, to have access to the registers, to apply to the court with claims for the illegality of acts violating anti- corruption requirements, and protocols on administrative offenses related to corruption; to make instructions on the elimination of violations, carrying out of the official investigation, bringing the guilty person to justice;
- state registration of NAPC regulations in the Ministry of Justice and the procedure for promulgation and entry of NAPC acts into force;
- rights of NAPC authorized persons and tasks of authorized subdivisions (authorized persons) to detect and prevent corruption;
- settlement of conflicts of interest in the activities of officials of the collegial body;
- the openness of the Unified State Register of declarations of persons authorized to perform the functions of the state or local self-government;
- control and verification of such declarations by the NAPC, including full verification;
- the procedure for establishing the timeliness of submission of declarations;
- monitoring the lifestyle of the subjects of the declaration;
- the obligation to notify of a significant change in the property status of the subject of the declaration;
- liability for corruption or corruption-related offenses;
- criminal liability for submitting knowingly false information in the asset declaration of a person authorized to perform state or local self-government functions or his/her intentional failure to submit the declaration.

This decision virtually paralyzed the key activities of the NAPC, retaining its authority to develop anti-corruption policies, state control over compliance with statutory restrictions on the financing of political parties, and work with whistleblowers. It is worth noting that before the 'reset' of this body in 2019, the NAPC had been a 'toothless' body and itself had been involved in numerous corruption scandals, but from the beginning of 2020 after the appointment of a new head began to show impressive activity in the exercise of its powers.

With the Constitutional Court decision, hundreds of criminal proceedings for knowingly false declaration or non-declaration lost their perspective to be brought to

1 The decision of the Constitutional Court of Ukraine No 13-p/2020 of 27 October 2020, by the constitutional submissions of 47 people's deputies of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the provisions of the Law of Ukraine 'On the Prevention of Corruption', Criminal Code of Ukraine <http://www.ccu.gov.ua/dokument/13-r2020> accessed 10 November 2020.

the court, 110 of them were investigated by the National Anti-Corruption Bureau of Ukraine (NABU) against high- ranking officials.

This is not the first decision in recent years that has damaged the state's anti-corruption measures. In particular, the Constitutional Court previously declared unconstitutional the Criminal Code provisions on liability for illicit enrichment[2] (later the legislator corrected these provisions,[3]but all previous criminal proceedings were terminated), the adoption of knowingly unjust court decisions'[4] and provisions on the right of NABU to sue.[5]

However, the justification and circumstances of adopting the Constitutional Court's above- mentioned decision left no doubt that the Constitutional Court judges were guided by their interests and not by the interests of the Constitution's observance.

2. REASONING OF THE DECISION OF THE CONSTITUTIONAL COURT

In the motivating part of the decision, the Constitutional Court concluded that the provisions of the Law 'On Prevention of Corruption' '*concerning the powers of the National Agency for Prevention of Corruption in terms of control functions (control) of the executive over the judiciary*' are unconstitutional. However, in the resolution of the decision, it recognized a number of the Law's provisions as unconstitutional in general, thus depriving the NAPC of the relevant powers and rights concerning all subjects, not only judges.

To declare the provisions of the Law 'On Prevention of Corruption' unconstitutional, the Constitutional Court referred to the constitutional principles of separation of state power and independence of the judiciary, the body of constitutional control, and the inadmissibility of interference in their activities. The Constitutional Court stated that:

- 'the main direction of ensuring the independence of the judiciary is the creation of special institutions, the purpose of which is to remove the judiciary from the field of administrative control and effective management of the executive and legislative branches';
- 'any forms and methods of control in the form of inspections, and monitoring of the functioning and activities of courts and judges should be implemented only

2 The decision of the Constitutional Court of Ukraine No 1-p/2019 of 26 February 2019 in case by the constitutional submissions of 59 people's deputies of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of Article 368-2 of the Criminal Code of Ukraine <http://www.ccu.gov.ua/docs/2627> accessed 10 November 2020.

3 The Law of Ukraine 'On the introduction of amendments to certain legislative acts of Ukraine concerning the confiscation of illegal assets of individuals authorised to perform the functions of the state or local self- government, and punishing for the acquisition of such assets' of 31 October 2019 <https://zakon.rada.gov.ua/laws/show/263-20#Text> accessed 10 November 2020.

4 The Decision of the Constitutional Court of Ukraine No 7-p/2020 of 11 June 2020 in the case by the constitutional submission of 55 people's deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of Article 375 of the Criminal Code of Ukraine <http://www.ccu.gov.ua/docs/3127> accessed 10 November 2020.

5 The Decision of the Constitutional Court of Ukraine No 4-p(II)/2019 of 6 June 2019 in the case by the constitutional complaint of the joint-stock company 'Zaporizhzhya Ferroalloy Plant' regarding the compliance with the Constitution of Ukraine (constitutionality) of the provision of paragraph 13 of the first part of Article 17 of the Law of Ukraine 'On the National Anti-Corruption Bureau of Ukraine' <http://www.ccu.gov.ua/docs/2748> accessed 10 November 2020.

by the judiciary and exclude the establishment of such bodies in the system of both executive and legislative powers';
- 'different declaration rules need to be provided, particularly higher judicial bodies have the right to require special acts to regulate this issue, and judges' declarations can be handled by a special judicial body,' while the NAPC is an executive body.

Virtually, the Constitutional Court used arguments to destroy the judiciary's accountability and create conditions for judges' impunity. In the case of the NAPC, the Constitutional Court ignored the fact that this body only prepares the necessary materials and has no authority to punish judges (in disciplinary, administrative, criminal proceedings) due to exercising adjudicating powers is the prerogative of the judiciary.

The judiciary and judges enjoy the most significant guarantees of independence and protection, including constitutional ones. No one may remove a judge from office or bring him or her to any kind of legal responsibility, except for judicial bodies that are not subordinated to the legislature or the executive (except for minor administrative offenses). Judges enjoy immunity from detention. They have the highest salaries compared to other branches of government. It does not make sense to list these guarantees further because there are many. All this applies even more to the judges of the Constitutional Court.

Thus, the judiciary may have autonomy in matters of disciplinary liability. However, it is impossible to create separate tax services, patrol police, customs, NAPC, and Accounting Chamber for courts and judges within the judiciary. These are the functions of the executive and parliamentary control. The judiciary cannot perform these functions through 'outstanding institutions'; otherwise, it will become a parallel judicial state within the state, with its executive power.

The interpretation of the judiciary's independence formulated by the Constitutional Court, which consists of its exclusivity and the need to create separate control bodies for judges, also contradicts one of the constitutional principles: equality of all before the law.

Recognition of the unconstitutionality of the article of the Criminal Code was reasoned by the Constitutional Court in particular that '*the establishment of criminal liability for declaring knowingly false information in the declaration, as well as intentional*

intentional non-submission of declaration by a declarant is excessive punishment for these offenses,' this has to be 'grounds for other types of legal liability.' Such motivation is also unconvincing.

According to Article 92 of the Ukraine Constitution, only laws define acts that are crimes and responsibility for them. That is, the criminalization or decriminalization of individual acts is the discretion of the legislature. Of course, this does not mean that such laws cannot be assessed for constitutionality. However, the Constitutional Court should refrain from substituting itself for the legislator and interfering in its discretion unless the legislator allows apparent arbitrariness.

Simultaneously, criminalizing the deliberate misrepresentation of one's property by the subjects of declaring or knowingly ignoring the obligation to file such a declaration

is not arbitrary. Such actions contribute to impunity for corruption, which is one of the biggest problems of Ukrainian society. By determining soft punishments for such a crime, the legislator allowed the courts to apply appropriate sanctions on the principle of proportionality.

Four judges of this Court also drew attention to the shortcomings of the reasoning of the Constitutional Court's decision and expressed their dissenting opinions.

3. CIRCUMSTANCES OF DECISION-MAKING

Ultimately, the Constitutional Court's decision is perceived as abnormal not only because of the 'quality' of the arguments but also because of the circumstances of its adoption, which differ significantly from its usual practice.

Thus, the Constitutional Court has gone far beyond the requests of a constitutional submission. In this case, among the provisions of the Law 'On Prevention of Corruption', which were declared unconstitutional, approximately 3/4 of the provisions had not been challenged at all. Moreover, the Constitutional Court's argumentation was in no way related to the applicant's arguments, which had not been assessed at all. The current Law 'On the Constitutional Court of Ukraine' of 2017 does not provide for the Constitutional Court's right to declare unconstitutional other provisions of legal acts that the applicant does not question. Since the adoption of this law, the Constitutional Court has not gone beyond requests of constitutional petitions.

The Constitutional Court's ruling goes beyond its reasoning: the unconstitutionality of specific provisions of the Law 'On Prevention of Corruption' is justified only by the inadmissibility of the NAPC's oversight of judges and the Constitutional Court judges. However, vital anti-corruption provisions were recognized unconstitutional in general, even though the court could have recognized them unconstitutional only so far as it concerns judges. Moreover, the Constitutional Court declared many provisions of the Law unconstitutional without any reasons, particularly about NAPC acts, declarant's obligation to report significant property status changes, and openness of the register of asset declarations.

In this case, the Constitutional Court did not postpone losing the force of the relevant provisions, which were declared unconstitutional, neither it gave the Verkhovna Rada of Ukraine time to bring these provisions into line with the Constitution of Ukraine, deliberately creating severe problems for all NAPC functions concerning all subjects susceptible to Law

'On Prevention of Corruption.' This is also not typical of such cases and is probably the result of the bias of the Constitutional Court judges.

The most apparent violation was the consideration of the case by the Constitutional Court judges in a conflict of interest when the beneficiaries of the decision were the Constitutional Court judges, both individual (for which there were proceedings for violation of anti-corruption legislation) and all in general.

Among other signs of 'anomaly' of the decision is that the case was considered in written proceedings (despite the parties' request for an oral public hearing) and its extremely rapid adoption from the moment of opening.

4. REACTION OF STATE BODIES

This decision outraged Ukrainian society, Ukraine's international partners, as it destroys many anti-corruption achievements. This is the most robust response of the corrupt system to the measures implemented in recent years. As a result of this decision, the Constitutional Court came to be perceived as a threat to reform rather than a critical arbiter between state power branches. This decision was made in the face of an apparent conflict of interest and confronted the political authorities with a difficult choice of dealing with the situation. In just two weeks after the decision was made, more than twenty draft laws on the subject were submitted to parliament.

On 29 October, President Volodymyr Zelensky submitted to the Parliament a draft law,[6] proposing to declare void the Constitutional Court's decision, to restore the force of the provisions of the Law 'On Prevention of Corruption' and the Criminal Code that had been declared unconstitutional, and to terminate the powers fo all Constitutional Court judges. On 2 November, the Chairman of the Verkhovna Rada, Dmytro Razumkov, introduced a similar legislative initiative,[7] but without declaring the Constitutional Court's decision null and void and terminating the powers of judges of the Constitutional Court. There were also proposals to block the Constitutional Court's work by increasing the quorum from 12 to 17 judges[8] (although the Court currently has 15 judges out of 18) or suspending funding.[9] As a result of such unconstitutional initiatives, there is an obvious risk that one arbitrary decision of the Constitutional Court by the effect of dominoes may lead to other arbitrary decisions.

Judges of the Constitutional Court began to talk about pressure on them.[10] In this case, Judge rapporteur, Ihor Slidenko, said that he had been pressured by representatives of the President's Office even earlier.[11] Soon another Constitutional Court judge, Serhiy Sas, a rapporteur in the ongoing case on the interpretation of the Constitution's provisions on land ownership, published his proposed draft decision of the Constitutional Court,[12]

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6 Draft Law 'On Restoration of Public Confidence in Constitutional Judiciary' No 4288 of 29 October 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70282> accessed 10 November 2020.

7 Draft Law 'On Restoration of Certain Provisions of the Law of Ukraine "On Prevention of Corruption" and the Criminal Code of Ukraine' No 4304 of 2 November 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70306> accessed 10 November 2020.

8 Draft Law 'On Amendments to Article 10 of the Law of Ukraine "On the Constitutional Court of Ukraine" No 4311 of 3 November 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70312> accessed 10 November 2020.

9 Draft Law 'On Amendments to the Law of Ukraine "On the State Budget of Ukraine for 2020" (on the transfer of budget funding from the Constitutional Court of Ukraine to the development of educational programs)' No 4308 of 3 November 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70303> accessed 10 November 2020.

10 Statement of the Meeting of Judges of the Constitutional Court of Ukraine to the President of Ukraine V.O. Zelensky, Chairman of the Verkhovna Rada of Ukraine D.O. Razumkov, Prime Minister of Ukraine D.A. Shmygal <www.ccu.gov.ua/novyna/zayava-zboriv-suddiv-konstytuciynogo-sudu-ukrayiny-do-prezydenta- ukrayiny-zelenskogo-v-o> accessed 10 November 2020.

11 Judge of the Constitutional Court Ihor Slidenko claimed to have been pressured by the PO <https://www.youtube.com/watch?v=RipJxPu5ack> accessed 10 November 2020.

12 'Judge of the CCU addressed Ukrainians and showed a draft decision on the interpretation of land articles of the Constitution' (ZN.UA, 4 November 2020) <https://zn.ua/ukr/UKRAINE/zemelna-reforma-suddja-ksu- zvernuvsja-do-ukrajintsiv-ta-pokazav-proekt-rishennja-shchodo-tlumachennja-statej-konstitutsiji.html> accessed 10 November 2020.

which calls land reform into question. According to media reports,[13] four judges who expressed dissenting opinions on the №13-p/2020 decision refused to participate in the Constitutional Court's sittings after the publication of the draft decision until the constitutional crisis was resolved legitimately, rendering it impossible to hold plenary sessions of this court because there is no quorum.

Many civil society organizations, condemning the Constitutional Court's decision, called on the Constitutional Court judges to resign voluntarily[14] and warned the parliament against unconstitutional decisions.[15]

5. FURTHER NECESSARY STEPS

It is impossible to prevent all the negative consequences of the Constitutional Court's decision, but efforts must be made to reduce this negative impact.

The least painful decision for the constitutional order would be the voluntary early termination of the Constitutional Court judges' powers, who voted for this decision on their initiative. According to the Constitution, only the Constitutional Court itself can dismiss a judge of this court. Any international partners' cooperation, civil society organizations with the Constitutional Court should be postponed before such a step.

Future judges of the Constitutional Court must pass competitive selection with a meticulous integrity examination, requiring immediate amendments to the Law 'On the Constitutional Court of Ukraine' and related laws.

The legal solution to the problem will be to update the provisions of the Law 'On Prevention of Corruption' by adopting a law that will return the powers of the NAPC and at the same time provide a separate, preferably more effective, procedure for verifying declarations and monitoring the lifestyle of judges. Responsibility for a knowingly false declaration (non- declaration) should be transferred from the Criminal Code to the Code of Administrative Offenses. Unfortunately, this will no longer bring to justice those who committed such violations before because the new law on liability can only be applied for the future.

It is vital to set out more apparent crime features as adopting knowingly unjust court decisions in the Criminal Code by 11 December this year. This legislation made it possible to prosecute the judges who made these decisions, as these acts were and still are susceptible to punishment. We remind that the current version of the article was

13 'CCU judges, who voted against the repeal of anti-corruption laws, refused to participate in its work' (NV, 5 November 2020) <https://nv.ua/ukr/ukraine/politics/suddi-ksu-vidmovilisya-vid-uchasti-v-yogo-roboti-novini-ukrajini-50122255.html?utm_content=set_lang> accessed 12 November 2020.

14 'Judges of the Constitutional Court of Ukraine must leave' (Transparency International Ukraine, 4 November 2020) <https://ti-ukraine.org/news/suddi-konstytutsijnogo-sudu-ukrayiny-mayut-pity> accessed 10 November 2020.

15 'RPR Coalitions' Position on the Situation that has Developed as a Result of the Constitutional Court's Decision to Declare the Provisions of the Anti-corruption Law And Criminal Liability for Knowingly False Declarations as Unconstitutional' (*Reanimation Package of Reforms*, 4 November 2020) <https://rpr.org.ua/news/pozytsiia-koalitsii-rpr-shchodo-sytuatsii-iaka-sklalasia-pislia-rishennia-ksu-pro-vyznannia-nekonstytutsiynymy-polozhen-antykoruptsiynoho-zakonu-ta-kryminal-noi-vidpovidal-nosti-za- zavidomo-nedostovir> accessed 10 November 2020.

declared unconstitutional in the summer but will be repealed by the Constitutional Court's decision on December 11 this year. If the new law does not enter into force by December 11, then the punishment will be removed by the parliament's fault, and later the adoption of such a law will not have a retroactive effect.

It is essential to fulfilling Ukraine's international obligations to strengthen the High Council of Justice's integrity by verifying candidates' integrity for this body and its members by an independent commission with international experts' participation. Similarly, it is necessary to form a new composition of the High Qualification Commission of Judges. Only this will be able to ensure greater accountability in the judiciary.

In the further legislative activity, not all the Constitutional Court's arguments given in the decision №13-p/2020 can be taken into account (for example, regarding the need to create parallel control bodies in the judiciary). This may result in new appeals to the Constitutional Court, but if its composition is renewed, it will likely depart from this decision.

Amending the legislation, and if necessary, the provisions of the Constitution should lead to the judiciary and the Constitutional Court's accountability because the real independence of judges is impossible without integrity.

Access to Justice in Eastern Europe,
Issue 4 (8) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com
10.33327/AJEE-18-3.4

P Voitovych, R Ennan, V Voloshyna 'Criminal Liability for the Infringement of IP Rights: Ukraine and the European Court of Human Rights Case Law' (2020) 4(8) *Access to Justice in Eastern Europe 291-297*
10.33327/AJEE-18-3.4-n000041

CRIMINAL LIABILITY FOR THE INFRINGEMENT OF IP RIGHTS: UKRAINE AND THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW*

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* Received: 08.09.2020. First revised: 01.10.2020. Second revised: 01.11.2020. Approved: 24.11.2020

Ukraine's national legislation and the European Court of Human Rights's case-law outline Copyright protection. Many cases exist where the public significance and damage from copyright infringement entails holding the guilty person criminally responsible for the transgression. Given copyright infringement cases do not reflect a predominant concern over other crimes, a structured criminal prosecution mechanism does not exist. Thus, the European Court of Human Rights' legal positions and instructions intend to eliminate gaps legally regulating criminal liability for copyright infringement. Hence, the legal regulation, its gaps and ECHR case law impacts on Ukrainian practice were analysed. This structure enabled proposing steps for improving legally regulating criminal liability for copyright infringement in Ukraine.

***Keywords**: author's rights protection, criminal proceedings, ECtHR case law.*

1. INTRODUCTION: UKRAINIAN LEGAL REGULATION AND GAPS

The World Wide Web has given rise to unprecedented copyright infringement cases, requiring a timely state response, especially criminal prosecution. Thus, Art. 176 of the Criminal Code of Ukraine (CC) provides for punishment for illegal reproduction, distribution of works of science, literature, art, computer programs, and databases, and illegal reproduction, distribution of performances, phonograms, videograms, and broadcasting programs, their illegal reproduction, and distribution on audio and videotapes, diskettes, other media, camcording, card sharing or other intentional infringement of copyright and related rights, and the financing of such actions if causing material damage. [1] This CC article provides punishments, including fines, correctional labour, arrest, liberty restraint, and imprisonment.

Criminal liability regulation for copyright infringement related rights has proven challenging to consider, as it raises many questions that need to be answered. Thus, the calculation and material damage proof (compensation and determination of non-pecuniary damage and violation intent degree) have caused significant misunderstandings. The latter is still debated in legal theory. Therefore, according to some experts, intentional guilt characterizes copyright infringement, as any error in using the copyright object does not constitute a crime. Some scholars have suggested appropriately excluding from the disposition of CC Part 1 of Art. 176, the words 'intentional' to criminalize deliberate and negligent. [2]

Criminal liability does not comprise the only legal liability for copyright infringement. Its strictest application, criminal liability, should consider the social danger of action and consequences and the internal personal attitude to intend. Practically, a negligent copyright protection crime is difficult to imagine, for it must lead to material damage to the copyright subject increased danger to societal

1 The Criminal Code of Ukraine (V*erkhovna Rada of Ukraine*, 5 April 2001) <https://zakon.rada.gov.ua/laws/show/2341-14/stru#Stru> accessed 20 October 2020.

2 OO Posykalyuk, 'Balance between the right to information and the right of intellectual property in the practice of the European Court of Human Rights' [2017] International Congress of European Law (Phoenix, Odesa) 328-332.

interests. Another disadvantage of regulating criminal liability for copyright infringement involves the non-exhaustive list of objects, objects of copyright, falling under CC Art. 176. Expressly, liability under this article arises for intentional copyright infringement, broadly interpreting objective sides and copyright the object of a crime.

According to paragraph 17 of Part 1 of Art. 8 of the Law of Ukraine On Copyright and Related Rights, copyright objects include 'other works.'3 The openness of the list (although detrimental to object encroachment certainty within criminal liability) remains progressive, as it leaves space for new human creativity incarnations. The modern information society has encouraged innovative genres, as many copyright objects are currently created based on information technologies. For example, the legality and affiliation of a particular website or account category have remained uncertain. The website should enjoy copyright regulation because of internal content, functionality, design, and purpose. The website can claim a creator created individuality. However, one copyright object can infringe on another object's rights. Thus, websites incorporate copyrighted material, like film, music, and literature. When prosecuting acts committed through websites using CC Art. 176, it should be remembered the website also claims copyrights. When applying the penalty, one should consider the line between copyright infringement and website copyright possibly violated by web blocking. Ukrainian legislation does not provide for copyright crime blocking as a sanction. However, rapid information technology development in modern life has not excluded the possibility of further use of web-blocking as an injunction, including the obligation to refrain from specific actions. When prescribing this measure, it should be borne in mind, copyright is infringed not by the web page's existence, but its content, for example, digitally placing a separate work on the Internet. Other copyrights may be lawfully incorporated in the website, so blocking access to them may violate others' legal rights and interests.

2. ECTHR CASE LAW AND ITS IMPACT ON THE UKRAINIAN PRACTICE

The ECtHR's case-law aims to maintain the general spirit of law and justice, set guidelines for national courts in resolving criminal proceedings concerning copyright infringement, and restore the violated rights. The primary paradigm of intellectual property law, in particular copyright, expressed in the precedents of the ECtHR, combines three components: 1) protection against public authority arbitrary interference; 2) positive state obligation to introduce a mechanism for ensuring intellectual property rights; 3) ensuring minimum and maximum protection intellectual property rights standards. It should be considered a copyright intellectual property feature, including copyright objects, in the sense of the ECtHR falls under the category of property, protected by Art. 1 of the First Protocol to the Convention

3 The Law of Ukraine 'On copyright and related rights' [1994] Vidomosti of the Verkhovna Rada 13/64 (with amendments of 16 June 2020) <https://zakon.rada.gov.ua/laws/show/3792-12#Text> accessed 19 October 2020.

for the Protection of Human Rights and Fundamental Freedoms (Protocol).[4] *Melnychuk v. Ukraine*,[5] Anheuser-Bush Inc. v. Portugal exemplified these decisions.[6] This Protocol also applies to the right to publish a translation (*SC Editura Orizonturi SRL v. Romania*),[7] musical works, and economic license agreement interests (*SIA AKKA / LAA v. Latvia*).[8]

An unusual interpretation of the object of intellectual property rights as property can be justified in terms of the traditional perception and the relationship identification of property damage the crime caused by the object of encroachment. Inclusion property of not only traditional items but also other objects, such as intellectual property, given the binding legal European Court opinions on the interpretation and application of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention), extends the protection mechanism laid down in Article 1 of the First Protocol to legal phenomena beyond the traditional for the Romano-Germanic legal property as a corporeal material world object (things).[9]

The Convention does not directly reference the human right to intellectual property, so the inclusion of this right in this legal category expands the protection of the infringed right through a supranational judicial institution, the ECtHR. After analyzing the ECtHR practice, it can be concluded the cases related to copyright remain significantly inferior in quantitative criteria to other cases, such as cases concerning the property in its typical form.

However, ECtHR case law has indispensably bridged the gap between national law and legal awareness. A striking example, especially within the legal consciousness, entails repeatedly emphasising the ECtHR's decisions on the relationship of copyright with freedom of expression, protected by Art. 10 of the Convention. Thus, according to the plot of Nage and Sunde Colmisoppi v. Sweden's case,[10] the applicants created and promoted a website exchanging files containing various copyrighted objects (cinematographic works, musical works, computer games) between users. A copyright offence was committed because they facilitated the transfer of these files without the copyright holder's proper permission. In its ruling, in this case, the ECtHR expressed states should balance the two competing interests. However, copyright can prevail over the right and freedom of expression and is therefore recognized as a legitimate restriction.

4 Council of Europe, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1952] ETS 009 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009> accessed 19 October 2020.

5 *Melnychuk v Ukraine* (App no 28743/03) Reports of Judgments and Decisions 2005-IX <http://hudoc.echr.coe.int/eng?i=001-70089> accessed 19 October 2020.

6 *Anheuser-Bush Inc v Portugal* (App no 73049/01) ECHR 11 January 2007 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-78981%22]}> accessed 19 October 2020.

7 SC Editura Orizonturi SRL v Romania (App no 15872/03) ECHR 13 April 2008 <http://hudoc.echr.coe.int/eng?i=001-122507/> accessed 19 October 2020.

8 *SIA AKKA/LAA v. Latvia* (App no 562/05) ECHR 10 October 2016 <http://hudoc.echr.coe.int/eng?i=001-164659> accessed 19 October 2020.

9 NE Blazhivska, 'Interpretation of the concept of property in the practice of the European Court of Human Rights' (2018) 10 Entrepreneurship, economy and law 219-223.

10 *Fredrik NEIJ and Peter SUNDE KOLMISOPPI v Sweden* (App no 40397/12) ECHR 19 February 2013 <http://hudoc.echr.coe.int/eng?i=001-117513/> accessed 19 October 2020.

The ECtHR expressed the same position in the judgment in *Ashby Donald and Others v. France,*[11] concerning the prosecution of photographers posting photos from a fashion show on the Internet without the fashion designers' permission. The clothes were shown at the show and displayed in the relevant photos. In this case, the ECtHR also recognized the priority of designers' copyright over photographers' freedom of expression. However, this position cannot be accepted unconditionally because, in this case, the copyright to various objects: fashion designers (clothes depicted in photographs), and photographers (photograph as a separate art form) possess copyright. Along with its judgment in *Akdeniz v. Turkey*,[12] the ECtHR ruled 'when it comes to striking a balance between potentially conflicting interests, such as the right to freedom of information and the protection of copyright – Public authorities have a particularly wide margin of discretion.' In *Ahmet Yildirim v. Turkey,*[13] the ECtHR found a violation of Art. 10 of the Convention and applied a measure of completely blocking the applicant's access as owner and user of Google Sites services to these services (including access to his account). However, the crime (violation of Ataturk's memory) was committed only on one of these service pages. This illustrates the punishment should be commensurate with the crime committed and ensure the established balance between the parties' interests in the dispute.

Liability for copyright infringement is often accompanied by illegal property rights infringement in standard interpretation. Thus, at the beginning of the year, the ECtHR in *Pendov v. Bulgaria*[14] considered the lawfulness of the law enforcement agencies' detention of a server under Art. 8, 10 of the Convention,[15] and Art. 1 of the Protocol.[16] Thus, during the criminal proceedings, the criminal justice authorities confiscated from the applicant a server on which a website had been partially placed, utilizing a book with copyright infringement had allegedly been uploaded to the Internet. These authorities did not consider another website owned by the infringer was also hosted on the removed server. Presently, the website represents a specific material value because, in particular, it embodies the conventional expectations within the limits of Art. 1 of the Protocol are recognized by the ECtHR as property. The ECtHR found the server's retention was disproportionate since the information required for the criminal proceedings and copyright infringement could be copied and deleted without removing the server, as it contained the information necessary to the applicant's professional activities. By this decision, the ECtHR recognized Bulgaria's

11 *Ashby Donald and Others v France* (App no 36769/08) ECHR 10 January 2013 <http://hudoc.echr.coe.int/eng?i=001-115845> accessed 19 October 2020.

12 *AKDENİZ v TURKEY* (App no 25165/94) ECHR 31 May 2005 <http://hudoc.echr.coe.int/eng?i=001-69196> accessed 19 October 2020.

13 *AHMET YILDIRIM v TURKEY* (App no 3111/10) ECHR 18 December 2012 <http://hudoc.echr.coe.int/eng?i=001-115705> accessed 19 October 2020.

14 *PENDOV v BULGARIA* (App no 44229/11) ECHR 26 March 2020 <http://hudoc.echr.coe.int/eng?i=001-201890> accessed 19 October 2020.

15 Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 19 October 2020.

16 Council of Europe, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1954] ETS 9 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009> accessed 19 October 2020.

violation of Art. 1 of the Protocol (property rights)[17] and Art. 10 of the Convention (right to freedom of expression).[18]

The ECtHR decision in *Pendov v. Bulgaria* also reflects the case law of Ukraine, as the Verkhovna Rada of Ukraine has a Draft Law on Amendments to the CPC and the CC of 15 January 2020, establishing within the procedural measures for temporary access to things and documents, access will be provided only for the information extraction contained on servers or information technology material objects.[19] Hence, hardware seizure will be allowed only if an information destruction risk without a seizure is proven.

The Law of Ukraine On Copyright and Related Rights classifies as copyright infringement any actions for deliberate circumvention of technical means of protecting copyright and related rights. However, Ukraine's criminal legislation does not provide criminal liability for these actions' commission, unveiling an omission to which the Ukrainian legislator should pay attention. The Law of Ukraine On Copyright and Related Rights defines technical means of protection as technical devices or technological developments designed to create a technological barrier to copyright infringement or related rights in the perception or copying of protected (encrypted) records in phonograms (videograms) and broadcasts of broadcasting organizations or to control access to the use of copyright and related rights. In practice, technical means of protection encompass hardware (technical devices) and software products (technological schemes and solutions).[20]

A situation technically circumventing protection, the actual commission of copyright infringement could be performed with computer development or a program to which the copyright regime also applies. In this case, deciding in favour of the first author would infringe on another's copyright, even though the relevant copyright object was created to achieve an illegal purpose.

Having analyzed the ECtHR's case-law, the authors have not found a specific solution to the question comparing competing copyrights. This issue should spark further copyright infringement research.

3. CONCLUDING REMARKS

Legally regulating criminal liability for copyright infringement in Ukraine should be considered insufficient due to many reasons, including:

1. insufficient state attention paid to copyright infringement;

17 Protocol (n 18).

18 Convention (n 17).

19 Draft Law 'On Amendments to the Criminal Procedure Code of Ukraine and the Criminal Code of Ukraine' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67872> accessed 19 October 2020.

20 O Rassomakhina, 'Technical means of protection of copyright and related rights on the Internet: issues of legal regulation' (2012) 11 Yurydychna Ukraina 70-71 <http://nbuv.gov.ua/UJRN/urykr_2012_11_13> accessed 19 October 2020.

2. relatively fledgling and not fully formed institution of copyright protection within substantive and procedural legislation (civil, administrative, and criminal jurisdictions);
3. delayed state response to new modern challenges, particularly digitalization;
4. legal nihilism and negative legal awareness.

After analyzing the ECtHR copyright protection, the central positions related to private law regulation emerged. Criminal law copyright protection in Ukraine remains, in most cases, declarative and does not properly fulfill its functional purpose. Thus, ECtHR's case-law determines the vector of development and improvement of the national legal system within the provision, protection, and defense of intellectual property and the courts' practical activities and other criminal justice authorities in Ukraine's criminal proceedings.

Access to Justice in Eastern Europe,
Issue 4 (8) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com
10.33327/AJEE-18-3.4

I Basysta, I Shepitko, O Shutova 'Protection and Risks of Illegal Divulgation of Banking Secrecy in Ukrainian Criminal Proceeding' (2020) 4(8) *Access to Justice in Eastern Europe 298-305*
10.33327/AJEE-18-3.4-n000042

PROTECTION AND RISKS OF ILLEGAL DIVULGATION OF BANKING SECRECY IN UKRAINIAN CRIMINAL PROCEEDING*

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* Received: 18.09.2020. First revised: 03.10.2020. Second revised: 01.11.2020. Approved: 24.11.2020.

Divulgation. – 4. Limits of Legal Divulgation in Criminal Proceedings. – 5. Concluding Remarks.

The authors contribute to the national reform discussion to improve Ukrainian society's banking system confidence, approaching the European standards of financial services. Public confidence in banks focuses on performance, necessary for financial institutions, but negative feedback from the media, relatives, acquaintances regarding banks has bred significant mistrust. Among the root causes of an unflattering bank, image engenders the financial institution's inability to ensure customer information confidentiality regarding the banking secrecy. This article reviews the protection and illegal disclosure risks of banking secrecy, access to it within criminal proceedings, legal uncertainty of the Laws of Ukraine 'On Banks and Banking' and 'On Currency and Foreign Exchange Transactions', and proposed elimination method. Also provided are particular risks and recommendations for dealing with bank secrecy's apparent risks to continue improving adequate bank secrecy disclosure compliance with the FATCA Agreement.

Keywords: *banking secrecy, banking secrecy protection, divulgation of banking secrecy, criminal proceedings.*

1. INTRODUCTION

A challenge for the National Bank of Ukraine and other banks, including branches of foreign banks, established and operating in Ukraine following Ukrainian laws, comprehensively strengthen Ukrainian societal confidence in the Ukrainian banking system. While in 2015, only 19%[1] of Ukrainians did not trust banks, in 2017, this index rose to 53%.

According to the first quarter of 2018, the Austrian Raiffeisen Bank Aval, the French UKRSIBBANK, and the American City Bank became the banks' Mind viability rating, an information project assessing large Ukrainian financial institutional reliability. The Dutch ING Bank Ukraine and the Swedish SEB Corporate Bank followed.[2]

In April 2019, the National Bank of Ukraine stated public confidence in the Ukrainian central bank and other public authorities remained low, although some noticed positive trends.[3] During the year, Ukrainians increased the volume of UAH deposits in banks by 15%, as the head of the National Bank of Ukraine, Yakiv Smolii, articulated in his speech in the Verkhovna Rada.[4]

1 'The level of confidence of Ukrainians in banks last year fell almost three times' (Mind.ua, 7 June 2018) <https://mind.ua/news/20185603-riven-doviri-ukrayinciv-do-bankiv-minulogo-roku-vpav-majzhe-vtrichi> accessed 18 September 2020.

2 O Zaruba, O Butenko, Ye Shpytko, R Kornyliuk, 'Rating of banks: the state of financial institutions in the first quarter of 2018' (Mind.ua, 16 May 2018) <https://mind.ua/publications/20184781-rejting-bankiv-yak-pochuvalisya-finustanovi-v-i-kvartali-2018-roku> accessed 18 September 2020.

3 'The level of public confidence in the banking system of Ukraine remains low' (Espreso.tv, 9 April 2019) <https://espreso.tv/news/2019/04/09/riven_doviry_do_bankiv_v_ukrayini_zalyshayetsya_nyzkym_nbu> accessed 18 September 2020. ; Official Facebook page of the National Bank of Ukraine <https://www.facebook.com/NationalBankOfUkraine/photos/a.150551338299616 2/2261146620766164/?type=3&theater> accessed 18 September 2020.

4 'Trust in banks increases among Ukrainians: amount of deposits raised by 15% during the year – NBU' (TSN.UA, 17 January 2019) <https://tsn.ua/groshi/v-ukrayinciv-zrostaye-dovira-do-bankiv-za-rik-obsyag-depozitiv-zris-na-15-nbu-1282206.html > accessed 18 September 2020.

Public confidence in banks resides not only on performance, necessary for financial institutions, but also the trust of bank relatives, friends, and acquaintances. A study of consumer Ukrainian financial service awareness about the deposit guarantee system indicated 49% of respondents from the working group of the Expert Council of the Deposit Guarantee Fund identified the factors they pay attention to when choosing a bank.[5] The communication channels Ukrainians trust the most, in terms of financial services, entailed television, the Internet, friends and family.

These constituents reflect the generalised citizen bank perceptions and confidence in the banking system the institutional ability to maintain banking secrecy. However, the available Internet posts and media reports partly call into question some banks' ability. Ulteriorly, information interpreted among ordinary citizens disseminates, fostering distrust. Notably, many Ukrainian personal data posts include those related to property status, often falling into fraudulent hands, and one leakage source constitutes banks collecting clients' data. The state only legally guarantees bank secrecy preservation. However, is it reliably protected?

The other side of the problem relates to the fact the Law of Ukraine 'On Ratification of the Agreement between the Ukrainian and United States of American Governments to improve tax compliance and applies US Foreign Account Tax Compliance Act (FATCA)',

> according to the official web portal of the Verkhovna Rada of Ukraine, was returned on 4 November 2019 with the signature of the President.[6] Both economists and lawyers ambiguously perceived this, in particular, eloquent headlines of publications, both in economic and legal columns, such as 'A step towards the abolition of bank secrecy.[7]

This assertion makes it urgent and appropriate to outline the issue related to such subjects to protect bank secrecy from illegal disclosure risks (divulgation), criminal proceedings access, distinguishing those to be urgently addressed, and propose appropriate road maps to offset adverse impacts. This action will generally raise confidence in the Ukrainian banking system to a respectable level.

The publication aims to study the banking secrecy protection and risks of illegal disclosure (divulgation), criminal proceedings access, identify specific problems of such activities, gaps and conflicts in legislation, eliminating and subsequently strengthen Ukrainian banking confidence.

2. BANKING SECRECY GUARANTEES AND NONDISCLOSURE IMPORTANCE

Art. 61 of the Law of Ukraine On Banks and Banking Activity obliges Ukrainian banks to maintain banking secrecy. The same article provides mechanisms for maintaining

5 https://www.fg.gov.ua/storage/editor/files/dgf-survey-18may2020-ua-covers_1594302558.pdf

6 Draft Law of Ukraine 'On Ratification of the Agreement between the Government of Ukraine and the Government of the United States of America to Improve the Implementation of Tax Rules and the Application of the Provisions of the US Law on Foreign Account Tax Compliance Act (FATCA)' [2019] Official web-portal of the Verkhovna Rada of Ukraine <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66759> accessed 18 September 2020.

7 O Makeieva, 'A step towards the abolition of bank secrecy. What will change' (*NV Business*, 11 November 2019) <https: //nv.ua/ukr/biz/experts/ugoda-fatca-shcho-v-niy-ukrajina-za-krok-do-skasuvannya-bankivskoji-tayemnici-50052685.html> accessed 18 September 2020.

banking secrecy, which at first seems appropriate. Banks should guarantee each client's data revealed to the bank during servicing transactions, including private or third parties relationships, will not be disclosed and used to benefit bank employees.[8]

Thus, according to the Law, bank employees must sign a commitment to banking secrecy upon taking office. Moreover, contracts and agreements between the bank and the client must stipulate banking secrecy and accountability for its disclosure. Furthermore, banks must limit the number of persons who have access to confidential data, provide special record-keeping sensitive documents, and technically prevent unauthorized access to electronic and other media.

Banking secrecy non-disclosure is presented both in departmental regulations, emphasized in the Law of Ukraine № 3163-IV of 1 December 2005 and legislatively. The National Bank of Ukraine holds top place, legislating storage, protection, use, and disclosure of banking secrecy data and an interpreting rule application. Banks commonly disclose sensitive information, illegally collected or used. The latest innovations introduced in banking secrecy entail the Law of Ukraine № 2473-VIII of 21 June 2018[9]. As a result, the third part of Art. 60 of the Law of Ukraine 'On Banks and Banking' was amended to protect client financial information, collected during banking and currency supervision, and designated to banking secrecy.[10]

These two Laws' wording differs slightly due to different conjunctions the legislator used, in particular, in Art. 60 of the Law of Ukraine On Banks and Banking in the phrase 'information about banks or clients'[11] the conjunction 'or' is used and in the Law of Ukraine № 2473-VIII of 21 June 2018 'On Currency and Currency Transactions' they use the conjunction 'and (or).'[12] As far as we are concerned, the law enforcement practice may encounter several challenges under the circumstances. After all, the conjunction 'or' can be interpreted by some lawyers like the one that is used when combining homogeneous members of a sentence and parts of a complex sentence to indicate that of some listed objects, and phenomena only one is possible, and others – as the one used in the meaning of the connecting conjunction 'and.'[13]

In both cases, the parties will be right. Given this duplicity, the legislator should avoid such legal uncertainty.

The Criminal Code of Ukraine (CC) establishes liability for these illegal acts in Art. 231 of the Law of Ukraine– for intentional actions aimed at obtaining data constituting banking secrecy (illegal collection), for disclosure or other data use, and illegal data use, if it has caused significant harm to the business entity. In turn, CC Article 232

8 The Law of Ukraine 'On Banks and Banking' [2001] Vidomosti of the Verkhovna Rada 5-6/ 30 (last updated on 17 October 2019) <https://zakon.rada.gov.ua/laws/show/2121-14> accessed 18 September 2020.

9 Law (n 10).

10 The Law of Ukraine 'On Currency and Currency Transactions' [2018] 30/229 <https://zakon.rada.gov.ua/laws/show/2473-19> accessed 18 September 2020.

11 Law (n 7).

12 Law (n 10).

13 'Dictionary of the Ukrainian language. Academic Explanatory Dictionary (1970-1980)' <http://sum.in.ua/s/chy> accessed 18 September 2020.

holds those intentionally disclosing banking secrecy without owner consent and aware banking secrecy in connection with professional or official activities accountable if they committed such an illegal act for selfish or other personal reasons and caused significant harm to the business.[14] Empirical data has indicated the number of convictions for this offence remains negligible. However, this does not mean such criminal transgressions are not committed. Researchers emphasising criminal activity prevention and cessation in banking (financial) services cannot ensure criminal law enforcement, illuminating the need for a comprehensive approach.[15]

Scrutinising the Unified State Register of Court Decisions has established only three criminal proceedings under CC Art. 231 of which no convictions resulted. According to the search details of the qualification under CC Article 232 placed in this Register, the three convictions did not entail commercial or banking secrecy disclosure.[16]

In most countries, the disclosure of bank or trade secrets is associated with industrial espionage, considered a crime in Austria, Belgium, Bulgaria, Denmark, Lithuania, Germany, the United States, and Switzerland. This act investigates people's trade secrets and the person to whom they were entrusted disclosing the secrets.[17] Creating visible legitimacy of obtaining and disclosing secrets should be added to this list of acts. Unfortunately, such activities may include the commencement of criminal proceedings, in such a procedure will facilitate the disclosure of bank or trade secrets.

3. PROCEDURE OF BANKING SECRECY DISCLOSURE AND RISKS OF ITS ILLEGAL DIVULGATION

Art. 62 of the Law of Ukraine 'On Banks and Banking Activity' regulates the procedure for disclosing information to legal entities and individuals containing banking secrecy. This norm details the general procedure and the grounds, conditions, and banking secrecy disclosure subjects. The same article highlights the persons guilty of violating banking secrecy disclosure and use remain liable under the laws of Ukraine.[18] Consequently, the eloquent titles of publications such as 'A Step Towards the Abolition of Banking Secrecy'[19] seem somewhat dissonant, as it has already been realised. As follows from her text analysis, the author of that post professionally dealt with all issues related to the FATCA Agreement signing in Ukraine. The author's predictions about the next legislative steps were compelling. Explicitly, the FATCA Agreement would only work in Ukraine when the relevant amendments to the current Ukraine legislation have been

14 Criminal Code of Ukraine, edition of 18 October 2019 <https://zakon.rada.gov.ua/laws/show/2341-14> accessed 18 September 2020.

15 VYu Shepitko, MV Shepitko, BV Shchur, MO Voloshyna, 'Bankivska diialnist v Ukraini: Negatyvni vyklyky suchasnosti I zlochynni vplyvy' ['Banking in Ukraine: negative challenges of modernity and criminal influence'] (2019) 2 (29) Financial and credit activities: problems of theory and practice 86 <fkd.org.ua/article/download/ 171937/173377> accessed 18 September 2020.

16 Unified state register of court decisions <http://reyestr.court.gov.ua> accessed 18 September 2020.

17 VN Dodonov, OS Kapinus, SP Shcherba, *Comparative criminal law. Special part: monograph* (Yurlitinform 2010).

18 Law (n 7).

19 Makeieva (n 6).

made. In the short run, the Verkhovna Rada of Ukraine considered the relevant draft laws developed to implement the FATCA Agreement, namely Bills 2102 and 2103. Draft Law 2102 supplementing Art. 62 Procedure for Disclosure of Banking Secrecy of the Law of Ukraine On Banks and Banking.[20]

Thus, it should be noted the author of the analyzed article, declaring its 'conflicting' title, correctly perceives all the innovations and gives a thorough prediction of further legislative steps to be taken. At the same time, it would be more logical to link the declarative names with changes and additions to the procedure for disclosure of information on legal entities and individuals, which contains banking secrecy, rather than with 'abolition of banking secrecy, which, in our view, is unacceptable in a democratic and legal society. The objective of the specified FATCA Agreement, in the first instance, does not consist in abolishing banking secrecy, but, as stated on the official web portal of the Verkhovna Rada of Ukraine,

> … to improve the implementation of tax rules. The agreement aims to increase compliance with international tax law and ensure the application of the FATCA Law provisions through internal reporting and automatic information exchange.[21]

Along with the legal guarantees for preserving banking secrecy, the standardized procedure for disclosing data on legal entities and individuals containing banking secrecy. Risks of illegal disclosure (divulgation) of banking secrecy still exist.

Among disclosure risks and the conditions contributing to this, researchers have identified an illegal market where such information is bought and sold. A potential source of personal data leakage involves photocopying various citizens' documents, which many organizations perform. Also, the primary risks associated with banks in liquidation (when transferring documents surface during liquidation from current managers to temporary administrators, many bottlenecks occur when financial institutions weaken internal security, control over compliance with data protection. When the interim administration is operational, the bank no longer has the technical, financial, or human resources to protect the respective information fully.[22]

Access to banking secrecy in criminal proceedings frequently occurs when investigating the so-called economic criminal offences. For example, in the pre-trial investigation, the investigator can access sensitive documents when performing criminal proceedings (Art. 159-166 of the Criminal Procedure Code of Ukraine (CPC). Hence, the legislator has classified information, contained items and documents, and constitutes a bank secret and protected by law (CPC paragraph 5 of part 1 of Art. 162). The investigating judge determines temporary access to articles, data, and material (CPC part 2 of Art. 159), for which the parties to the criminal proceedings have the right to apply to the investigating

20 Makeieva (n 6).

21 The Law on Ratification of the Agreement between the Government of Ukraine and the Government of the United States of America was adopted to improve the implementation of tax rules and the application of the provisions of the US Law on Foreign Account Tax Compliance Act (FATCA). Official web-portal of the Verkhovna Rada of Ukraine <https://www.rada.gov.ua/news/Novyny/183499.html> accessed 18 September 2020.

22 V Avdieienko, 'Banking secrecy in Ukraine: why things are not going so well' <https://politerno.com.ua/papers/bankivska-tayemnytsya-v-ukrayini-chomu-vse-duzhe-pogano/> accessed 18 September 2020.

judge during the pre-trial investigation or trial during the proceedings (CPC part 1 of Art. 160). In the case of a request for access to an article, item, or material, containing a secret protected by law, the subjects submitting it should indicate data use as evidence and illustrate the data cannot be secured by another means (CPC paragraph 6 of part 2 of Article 160). According to CPC part five of Art. 163, the investigating judge or court shall grant temporary access if the party to the criminal proceedings meets these criteria.[23]

4. LEGAL DIVULGATION LIMITS OF BANKING SECRECY IN CRIMINAL PROCEEDINGS

The investigated criminal proceedings in which access to banking secrecy was provided can be reduced to the following example. On 13 August 2012, the Zdolbuniv District Prosecutor's Office's senior investigator asked the court to enable the Bank to disclose the LLC's banking secrecy and seize documents containing banking secrecy. The investigator substantiated the request by the fact the Zdolbuniv District Prosecutor's Office was investigating criminal proceedings against the Chief State Tax Auditor of the Inspector of the Department of Control and Verification of the Department of Taxation of Individuals of the State Tax Inspectorate in Rivne on the grounds of abuse of office and forgery under CC Article 364, paragraph 3, Art. 366, paragraph 2. During the pre-trial investigation, it became necessary for the Bank to disclose banking secrecy and seize the LLC documents containing banking secrecy. To verify the facts of LLC financial and economic transactions with the private entrepreneur Peter Sidorovskyi, they had to examine the cash flow of Peter Sidorovskyi for the period from 1 January 2008 to the present to determine the number of payments, their type, designation and the date of their transfer to the counterparty. At the court hearing, the prosecutor and the investigator supported the request. After assessing the request, the criminal proceedings' materials, and hearing the investigator and the prosecutor's opinion, the court considered the request was subject to satisfaction. As a result, the court decided to allow the Bank to disclose client banking secrecy– the LLC, regarding deposits and cash flows in personal accounts, and to seize from official client bank documents– the LLC: cases on the legal account implementation, including cards with samples of signatures and the enterprise seal, the bank cash flow statement in connection to these accounts indicating the transaction date, the name, and the counterparty code, the amount and purpose of payment in originals and in full for the period from the moment of account opening to the day of the order.[24]

According to the CPC, the subjects of a petition for temporary access to an article, thing, or material containing a secret protected by law are obliged to indicate the item's use as evidence and the impossibility otherwise obtaining it. This issue is not considered in the given an example, and its solution lies within the evaluation (hypothetical) limits. Thus, the law encourages access to banking secrecy items only as a last resort, but the list of such cases is not provided, leaving justice to the judge's discretion. A legal gap can lead to bank secrecy violations. This may be particularly the case in situations where a pre-

23 Criminal Code of Ukraine (n 14).

24 Unified register (n 16).

trial investigation in which banking secrecy led to the conclusion no crime transpired. In this case, the violation of the banking institution's everyday activities, banking secrecy disclosure, posed no urgent need.

5. CONCLUDING REMARKS

Banking secrecy protection, provided both by the Law of Ukraine On Banks and Banking and other Ukrainian laws and departmental regulations, remain appropriate. However, the declared system of guarantees of banking secrecy non-disclosure is not exhaustive and sufficiently effective.

Hence, for better implementing the FATCA Agreement, it is expected:

- eliminate existing illegal disclosure risks (divulgation) of banking secrecy, regulate documents circulation and preservation containing banking secrecy, including during liquidation proceedings; take a more careful approach to staff selection and responsibilities;
- agree on the wording of Art. 60 of the Law of Ukraine On Banks and Banking and the provisions of the Law of Ukraine On Currency and Currency Transactions by using the same conjunction and state the phrase in both laws in the following wording: 'information on banks and (or) clients';
- list emergency cases in Art. 160, 163 of the CPC of Ukraine, when banking secrecy may be disclosed.

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Certificate of state registration of the print media KB No 23634-13474P

Typeset by Iryna Roina, Dakor.

Cover-list by Alona Hrytsyk.

Printed by Publishing House VD "Dakor": Bandery Stepana str., 20A, Kyiv, 04655, Ukraine

Email: vd_dakor@ukr.net. www.dakor.kiev.ua. Tel: +38 (044) 461-85-06

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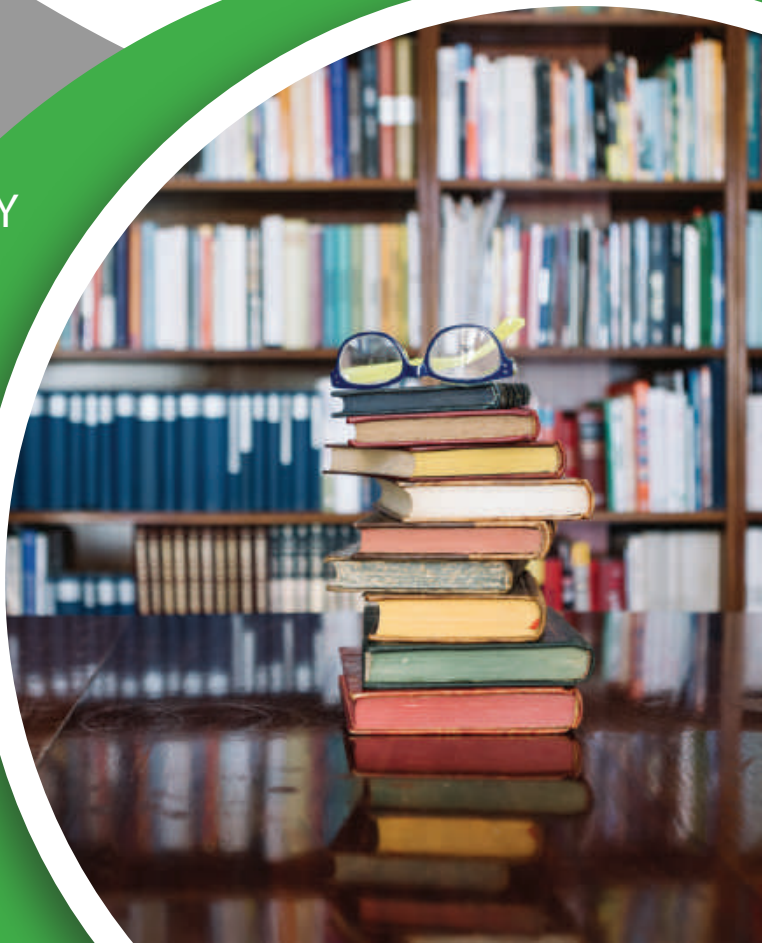

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