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Collection of Scientific Papers
of the Research Platforms
2022

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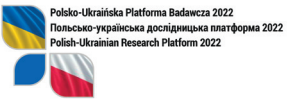
Wydawnictwo Instytutu Wymiaru Sprawiedliwości **Warszawa 2024**



The publication was written within the framework of the international scientific projects 'Polish-Croatian Research Platform', 'Polish-Slovak Research Platform', and 'Polish-Ukrainian Research Platform', conducted by the Institute of Justice in Warsaw in 2022

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ISBN 978-83-67149-42-6

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BOUND AND PRINTED BY *"Elpil", ul. Artyleryjska 11, 08-110 Siedlce*

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Preface

Issues such legal aspects of artificial intelligence, reform of the administrative judiciary, legal protection of older people and mediation in court proceedings are important for modern societies in the twenty-first century. Artificial intelligence and the changes it brings require the legislator's response by introducing wise and effective legal measures. Administrative justice often touches the affairs of ordinary people, their daily routine, which is the reason administrative court proceedings require clear regulations, enabling them to pursue cases as part of an effective and fair trial. Elderly people, who are often weak, helpless or ill, need to take care of their own affairs. It is our duty to protect our elderly and to show them duel gratitude. Just as the law protects children and pregnant women, it should also pay special attention to the protection of the elderly. Mediation in court proceedings, in particular criminal and civil proceedings, aimed at an amicable settlement of the case, significantly affects the dynamics of the entire judiciary. The efficiency of this, however, requires strengthening and the universality needs to be attributed to legal measures based on mediation.

All these topics, although different in essence, have a common denominator. This common denominator is a strong, fair and efficient state. Only such a state is able effectively to face the challenges posed by artificial intelligence, to guarantee a fair and efficient

administrative trial, to take care of the elderly and introduce effective, functional working mediation. Such observations are not without significance for the assumptions of this scientific monograph, the result of the implementation of three interrelated international research projects (a Polish-Croatian Research Platform; a Polish--Slovak Research Platform; a Polish-Ukrainian Research Platform). These projects were implemented at the Institute of Justice in 2022. The link between the projects is substantive. Each of the projects deals with the same defined major themes. The aim of the first topic was to propose a relevant legal framework for the application of measures governing the practical use of artificial intelligence. The aim of the second topic was to propose a relevant legal framework for conducting administrative proceedings fairly. The aim of third topic was to propose a relevant legal framework for more effective protection of old people in the context of the current threats resulting imposed by today's society. The aim of fourth topic was to propose new or improve current ways to increase the effectiveness and universality of mediation in court proceedings with particular emphasis on mediation in civil and criminal proceedings. The authors of this monograph have efficiently combined scientific priorities defined in this way, showing the importance of the scope of the analysis. They examined their selected research areas that fit into the basic objectives of international research projects carried out by the Institute of Justice in Warsaw. The scientific arguments conducted are thoroughly considered and constitute a logically compatible whole. The monograph discusses tort liability for damages caused by artificial intelligence systems, artificial intelligence and criminal law, mediation in the light of the concept of restorative justice, the application of mediation in commercial (economic) and arbitration courts, the reform of administrative justice, legal protection of older people from the perspective of criminal law, a fair trial in administrative justice and the rights of the elderly.

The publication that we present to readers is an extremely interesting, important and innovative study. The book is worth recommending to everyone interested in legal aspects of artificial intelligence, reform of the administrative judiciary, legal protection of the elderly and mediation in court proceedings. Comments,

observations and recommendations made by the authors may interest not only legal theoreticians, but also practitioners and legislators. All this makes the scientific monograph intended for legislators, judges, prosecutors, attorneys-at-law, academics, doctoral students, students and those generally interested in the topic at hand. It will be an interesting source of knowledge in the field of current and legally important issues that stimulate further fruitful reflection. Thanking all authors for their hard work on the publication and implementation of the above-mentioned international research projects, we wish the readers pleasant reading.

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Trnava University | DOI: 10.32041/9788367149426/1

Chapter 1. Tort Liability for Damages Caused by Artificial Intelligence Systems

1.1. Introduction

Certain forms of artificial intelligence are already present in our lives, although we may be unaware that we use them, e.g. AI-powered web browsers. Although we are not seeking here to define artificial intelligence or autonomous (robotic) systems, since it would not even be realistically possible within the limits of this article, to define what is responsible for the harm caused by or attributable to the action of artificial intelligence, it is necessary least to frame the concept briefly. For the purpose of this paper, we understand a system controlled by artificial intelligence as a system capable of operating in a real (external) environment independently of any form of external control or influence[1], which is able to change its behaviour (its algorithms) even without direct and immediate external intervention, while a characteristic feature of this system is its ability to learn and adapt to new environments. This concept of artificial intelligence is also used by the European Commission, which, in its working document, defines artificial intelligence as a combination of certain specific characteristics, in particular:

[1] G.A. Bekey, *Autonomous Robots: From Biological Inspiration to Implementation and Control*, Massachusetts 2005.

1) the complexity of the system, consisting in the possibility to learn (artificial intelligence may learn from other artificial intelligence);
2) autonomous system behaviour, manifested as the ability to acquire knowledge, communicate, plan intelligently, perceive, learn and manipulate objects;
3) dependence on the data that the AI collects, processes and analyses;
4) openness, which enables AI in conjunction with hardware to produce new products or services[2].

A characteristic feature, and at the same time a problematic aspect in relation to the attribution of harm, is that the space for self-decision and action created by man for such a system leads in the end to limited predictability and imprecise traceability of the system's actions, where the programmer himself may never be sure what algorithms of behaviour the system has acquired through learning and what its specific reaction will be in certain situations. Digital technology products are also open to software extensions and updates once they have been released and are in use. Any change to the system software may, however, affect the behaviour of the whole system and its individual components, or may extend its functionality, which may change the risk profile of these technologies in relation to causing harm.

Infliction harm with such set variables raises legitimate questions about the essential legal nature of liability, about the subject to whom such harm may be attributed, about the definition of causality[3] in general or in cases of complicated networking of different

[2] European Commission Staff Working Document: Liability for emerging digital technologies, https://ec.europa.eu/knowledge4policy/publication/european-commission-staff-working-document-liability-emerging-digital-technologies_en [access 14.12.2022].

[3] For more on causation see: C. Müller-Hengstenberg, S. Kirn, *Kausalität und Verantwortung für Schäden, die durch autonome smarte Systeme verursacht werden. Eine Untersuchung der deliktischen Haftung für den Einsatz autonomer Software-agenten*, "Computer und Recht" 2018, Vol. 34, Issue 10.

co-operating systems, etc., primarily discussed in relation to civil liability[4] for the harm caused.

1.2. Tort risks realisable in relation to AI systems

The use of artificial intelligence systems in *hardware* capable of doing harm through its action in the physical world raises the need to define the risks, specific and new in relation to this, and the closely related question of their diversification among the entities that should bear these risks and the extent to which they should bear them. The way these risks are distributed and who will bear them in the first instance if harm occurs through the action of AI is a task for tort law. In particular, the initial risk element outlined above is the association of computer control with its own decision-making component and components that may demonstrate their power in the *real world*[5], whether in terms of the physical, chemical or other properties of these components. Such coupling of software and hardware may generate particular risks if a software error creates a direct mechanical hazard[6]. In terms of frequency of occurrence, it is the mechanical effects of the hardware that are more likely to cause bodily harm or loss of life than a software fault alone.

Another risk factor is be the mobility of autonomous systems, which increases the ambit of possible harmful consequences, unlike static systems. While not limiting them to laboratory or industrial spaces and deploying them in real public environments increases the risk due to the higher level of unpredictable situations that an autonomous system may encounter[7]. Risk in this context also increases with the increasing intensity of human contact, as human behaviour is to some extent 'irrationally unpredictable'. Even the networking of information processing systems, where it is increasingly difficult to

[4] H. Zech, *Zivilrechtliche Haftung für den Einsatz von Robotern – Zuweisung von Automatisierungs- und Autonomierisiken*, [in:] *Intelligente Agenten und das Recht*, S. Gless, K. Seelmann (eds.), Baden-Baden 2016.

[5] G.A. Bekey, *Autonomous Robots…*, *op. cit.*

[6] H. Zech, *Zivilrechtliche…*, *op. cit.*

[7] *Ibidem.*

conceive of these systems in isolation, increases to a great extent the risk of incorrect data being passed to this common network, leading to a subsequent misassessment of the situation within these systems.

A specific, novel and typical risk in relation to autonomous systems is that arising from the fundamentally unpredictable behaviour of self-learning algorithms[8], i.e. the risk of the autonomous nature of the systems themselves. In the current state of scientific and technical knowledge, due to the unpredictable behaviour of autonomous systems, even the assessment of the nature, extent and frequency of risk realisation is itself difficult, as it is not proven whether an autonomous system is as reliable and safe as currently used human-dominated systems, or, conversely, whether autonomous systems may be considered more or less safe[9].

The theory of traditional tort law works with a number of concepts that may be used to reach a decision on which of the entities involved in the creation, functioning or use of a particular source of danger should be held liable for damages caused by the realisation of the risks in question[10], irrespective of the fault or wrongful conduct of these entities. At the same time, it is necessary to deal with the standards in relation to which, on the basis of the actions of a certain entity leading to the occurrence of harm, it will be possible to attribute to that entity the infliction of the given harm and to impose on it the obligation to compensate. The mutual *weighting* of the various concepts should then generate a group of responsible subjects who are, or will be, normatively obliged to bear the adverse consequences. In terms of the traditional concepts of risk allocation in tort law, these will be, in particular, the concept of general life risk, in which the harm is borne by the one who incurs it as a consequence of the expression of his own risk to his life, the concept of risk control, in which the risks should be attributed to the one who, due to the risk originating in his sphere of competence,

[8] *Ibidem*.

[9] T.M. Gasser, *Grundlegende und spezielle Rechsfragen für autonome Fahrzeuge*, [in:] *Autonomes Fahren. Technische, rechtliche und gesellschaftliche Aspekte*, B. Lenz, H. Winner (eds.), Berlin 2015.

[10] S. Meder, *Risiko als Kriterium der Schadensverteilung*, "Juristen Zeitung" 1993, Vol. 48, No. 11.

is capable of controlling and managing it[11], the concept of deriving benefits from risk or the concept of increased risk, imposing the obligation to bear the risk on the one who has caused the increased risk by his actions.

Several of the above-mentioned concepts of risk allocation in traditional civil law acquire deep argumentative cracks in relation to their application to autonomous systems, since autonomous systems are not programmed to perform a certain activity, but to learn to perform the relevant activities themselves, continuously generating their own code (programme) independently of their original creator[12]. The self-learning of a system, in which both internal and a number of external influences are involved, leads to any actors involved in the process of the creation, functioning and use of the systems in question losing to a significant extent the potential to control the system. The problem is demonstrated at two levels: at the level of normative decision-making on the distribution of risks, in the sense of defining the entity to which, and under what conditions, it will be held liable for the damage caused by the autonomous system on the basis of a legal and political decision of the legislator; and at the level of the formal fulfilment of the conditions (in the sense of the possibility and ability to demonstrate their fulfilment) required for the establishment of a liability relationship. In the latter case, it is primarily a question of establishing causality between the cause of the damage itself and the adverse consequence, or the explicit or analogous subsumption of the functioning of autonomous management systems under the already existing concepts of liability in tort law.

[11] H.B. Schäfer, C. Ott, *Lehrbuch der* ökonomischen *Analyse des Zivilrechts*, 1. Auflage, Berlin–Heidelberg–New York 1986, p. 152.

[12] R. Polčák, *Responsibility of Artificial Intelligence and Information Units without Legal Personality*, "Bulletin of Advocacy" 2018, No. 11, p. 24.

1.3. Definition of the entity responsible for the harm caused by an AI-driven system

The fundamental question in relation to the delineation of liability of an AI-driven system is who may be held accountable for any misbehaviour of the autonomous system and how the risks associated with the development, production, *operation* and use of autonomous control systems may be distributed in such a way that the legitimate interests of the various actors that enter into relationships involving autonomous control systems are respected and taken into account[13].

Tort law is broadly based on the premise of a certain legally relevant damage (injury). The starting point is the consideration that not all damage caused to someone is a compensable damage. A person who has suffered damage as an adverse consequence in his or her property or personality is entitled to compensation against another entity only if the law attributes the damage to that other entity.

As subjects to which it would be possible to attribute the infliction of damage by autonomous systems, it is precisely those subjects who create abstract or concrete risks associated with the systems, benefit from them or are able to some extent control them, that are considered. Theoretically, the manufacturer, developer, programmer, contractor, operator an user of the system may be such entities[14].

The grounds for imputability may be identified in legal systems as fault (if the damage was intentional or negligent) or another normatively formulated ground for imputability. Such other grounds include an enumeration of specific cases of strict liability.

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[13] G. Spindler, *Roboter, Automation, künstliche Intelligenz, selbst-steuernde Kfz – Braucht das Recht neue Haftungskategorien?*, "Computer und Recht" 2015, Vol. 31, Issue 12, p. 766; S. Horner, M. Kaulartz, *Haftung 4.0. Verschiebung des Sorgfaltsmaßstabs bei Herstellung und Nutzung autonomer Systeme*, "Computer und Recht" 2016, No. 1.

[14] T.M. Gasser, *Grundlegende…*, *op. cit.*; S. Horner, M. Kaulartz, *Haftung…*, *op. cit.*; H. Zech, *Gefährdungshaftung und neue Technologien*, "Juristen Zeitung" 2013, Vol. 68, No. 1.

1.3.1. CULPABILITY AS A LEGAL GROUND FOR IMPUTABILITY

The starting point for the imputability of damage is generally the fault of the person who caused the damage, whether in the form of negligence or intent. In the case of harm caused by artificial intelligence, however, the applicability of the principle of fault is severely limited, since the greater the degree of autonomy of the system in question, the less realistic it seems to be to attribute fault to the user of such a system for any harm caused by its use. It is precisely the complexity of the system, rising hand in hand with technical and technological progress and the new risks that the autonomy of systems' decision-making will bring with it, that lead in principle to the behaviour of an autonomous system. If they are not completely unpredictable for the average user, they at least extremely difficult to predict[15]. Its behaviour will be largely uncontrollable given the absence of the need for a human element of control[16].

Imputation of fault to the user of the system would come into play if the user himself, in relation to the autonomous control system, fails to comply with the expected standard of behaviour which he is obliged to observe in relation to the system. The limit of this solution, however, is precisely the degree of autonomy of the control, where the higher the degree of autonomy, the lower the extent of the user's obligations in relation to dealing with non-standard situations and the system's erroneous patterns of behaviour. The question of the standard of care is therefore very closely related to the degree of automation of the system. The higher the degree of automation, the higher the expectation of the user and other stakeholders that the system will recognise and prevent hazards without external human intervention.

Of course, in establishing a standard of care, it is also necessary to take into account the nature of the particular autonomous system, manifested both in the duties of care relating to the operation of the system and in the duties in relation to the degree of operability and control of the system. Although at first sight it might

[15] H. Zech, *Zivilrechtliche…*, *op. cit.*
[16] S. Horner, M. Kaulartz, *Haftung…*, *op. cit.*, p. 8.

appear that the higher the degree of automation of the system, the lower the care requirements in relation to the operation and control of the system required by the user, since, as the degree of automation increases, these control and operation functions will be assumed by the system, this premise does not hold absolutely. This is due to the interconnection of functionalities with lower and higher levels of automation within a single system (e.g. in the case of an autonomous vehicle), as well as the potential faulty responses of the autonomous system, where a lower standard of care is sufficient in the case of a faultless correct functioning than in the case of a system defect, where a higher standard of care is required with respect to the nature of the defect in order to avert possible damage (if the user detects a defect in the system in use, cannot, in view of the nature of the defect and the nature of the autonomous system, leave its operation to automated control to the extent that this is usual, but is duty-bound to intervene actively or passively if the standard of care in the situation so requires).

The use of an autonomous control system does not *per se* exclude the user's liability for damage caused by the autonomous system[17]; on the contrary, such liability is established by the user's dereliction of duty in terms of the expected level of care.

As the origin of the source of the defect in the case of an autonomous system may be increasingly dependent on the technical design of the system, it is likely that in the context of the definition of the responsible entity there will be an increasing shift in the duty of care to those entities in whose sphere it will be possible to formulate such duties due to the complexity of the systems (e.g. manufacturers, programmers)[18].

The imputability of fault as a legal basis for the creation of an obligation to compensate for damages may arise in relation to the manufacturer of an autonomous system if the manufacturer acts in breach of his or her contractual or legal obligations and, as a result of a culpable breach of such an obligation, damage is caused to another person (e.g. if the manufacturer fails to withdraw the autonomous

[17] S. Horner, M. Kaulartz, *Haftung…*, *op. cit.*, p. 8.
[18] *Ibidem*, p. 9.

system from circulation after security risks have been identified or if the manufacturer fails to address a risk known to him or her by updating the software)[19]. To specify the obligations of the manufacturer of an autonomous system, technical standards offer a basic orientation, but in this context they represent a minimum standard of protection, followed by taking into account scientific and technical standards (state of the art science and technology), so that, in relation to safety measures to prevent the occurrence of harm, a level of protection is maintained that is available and practically feasible in accordance with the existing state of scientific knowledge[20].

It is clear that the manufacturer of the autonomous system is liable on the one hand with obligations intended to protect the user and third parties from risks arising from the appropriate use of the autonomous system, but he or she is equally obliged regarding protecting the user and third parties from risks arising from the use of the autonomous system in manners and for a purposes for which it was may not have been intended. The expected standard of care of the manufacturer should therefore include the obligations to develop (if the manufacturer also develops the system) and manufacture the autonomous system in a safe manner, to secure the system against unauthorised interference, whether by the user or by third parties, to instruct properly and provide relevant information to the user of the system, to comply with the control and care obligations towards the system even after it has been placed on the market, e.g. to ensure that the system is not subject to any of the following.

A significantly limiting factor in the standard of care in relation to autonomous systems is their very nature, based on a process of self-learning, whereby they make their own decisions as a result of the algorithms available to them and acquired through learning. These are influenced not only by the technical solutions directly from the manufacturer, but also by the information they

[19] M. Novotná, M. Jurčová, *Liability for damage caused by autonomous and semi-autonomous vehicles under Slovak law*, Košice 2018.

[20] It is clear that the obligation to maintain standards of science and technology affects those that have been tested in practice as the most effective and have therefore been generally accepted.

have acquired from the external environment via *learning*. If these systems are able to learn certain behaviours and learn to use them independently, they have the advantage that they do not need to be provided with strategies in advance to cope with particular problems because there is no need to consider all potential problems cannot in advance. On the other hand, this makes the behaviour of the system somewhat unpredictable[21]. The above may result in situations where a faulty algorithm or other error in an autonomous vehicle control software, for example, may lead to damage, incorrect evaluation of a situation based on learned behavioural patterns and situations in which damage was caused to a decision taken by the autonomous system (crashing into an oncoming vehicle in order for the system to avoid a pedestrian who unexpectedly entered the carriageway, for instance), but the control system showed no defect. Indeed, the vehicle may have acted in accordance with the algorithm.

The question is what impact this has on the standard of care itself, particularly in relation to the manufacturer. From an objective point of view, it is probably unreasonable to expect a reduction in the standard of care in such cases; on the contrary, it is a legitimate expectation that the manufacturer should eliminate such erroneous decisions by the system to the greatest possible extent[22]. The ability and capability of the entity to minimise or eliminate such risks is a focal factor in relation to the determination of an objective standard of care. If the risks are known to the producer or other actor involved, he or she might even work with them. It may be possible to first check what the system has learned and only after verification to include it in the decision-making process, but it is not possible to eliminate these risks completely due to the diversity of situations the system may come into contact with, its constant *learning* and the various experiences of the different systems acquired through learning[23].

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[21] G. Hornung, *Rechtsfragen der Industrie 4.0. Datenhoheit – Verantwortlichkeit – rechtliche Grenzen der Vernetzung*, Baden-Baden 2018.

[22] T. Hey, *Die außervertragliche Haftung des Herstellers autonomer Fahrzeuge bei Unfällen im Strassenverkehr*, Wiesbaden 2019.

[23] S. Kirn, C.D. Müller-Hengstenberg, *Rechtliche Risiken autonomer und vernetzter Systeme*, Oldenbourg 2016.

1.3.2. IMPUTABILITY ON GROUNDS OTHER THAN FAULT

Given the limits of the principle of fault as grounds of imputability in autonomous management systems, non-fault liability is an important element of tort law protection[24]. This is a characteristic feature that is linked to an essentially legally approved action, the creation of an abstract risk, the realisation of which might lead to harmful consequences. In such a case, risk is quantified on the basis of the amount and likelihood of harm occurring, typically the risks arising from the operation of certain equipment or the marketing of certain products or the introduction of certain technologies. Strict liability is generally normatively imposed where there is a particularly wide disparity in the ability to prevent the occurrence of damage and the ability of the injured party to avoid that damage. This is particularly the case where liability is imposed on an entity which has the legal and factual ability to dispose of the system in question, such disposition being for a longer-term purpose. It is therefore the entity on whose account, at whose risk and in whose interest the operation of the system is carried out, i.e. the person who predominantly benefits from the operation of the system, has an interest in the operation of the system and bears the financial costs of its operation. Such imputation of damage to an entity that may have had no real involvement in causing it requires specific regulatory provisions in order that a more stringent form of such liability may be imposed on the entity (currently, particularly in relation to autonomous vehicle control systems).

Another option for imposing enhanced liability under a prescriptive system is to impose it on the developer or manufacturer of the system in question. The mere development of a technology is unlikely to give rise to liability *per se*, as such liability would be akin to liability for a scientific result. What could be considered for the future, in line with the risk-utility theory, however, is to impose liability on the developers if they benefit economically from the system, which presupposes the function of the system, and if they

[24] H. Zech, *Gefährdungshaftung…*, *op. cit.*, p. 21.

expose the public to the risk of the system[25]. In many cases, the developer and the manufacturer merge somewhat and the developer is already subject to liability for defects in the products he has manufactured and released onto the market, based on Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products[26]. By releasing a product onto the market, the manufacturer creates a risk which he has the potential to influence in the development and production of the product or, after the product has been released onto the market, to minimise or eliminate by a proactive approach the harmful consequences by, for instance, withdrawing defective products from the market[27].

Liability in this context is imposed on the manufacturer only if the product was defective, so that the injured party would have to prove that, for example, the autonomous vehicle at the time of its introduction onto the market had a defect in the control system software or other construction, design, or another defect that caused the damage, while the product is considered defective if it fails to guarantee safe use, a reasonable expectation[28]. If autonomous systems become commercially available, the ordinary consumer has the right to expect at least as much safety as may be expected from a non-autonomous system. Expectations of safety may even be higher for autonomous systems than for non-autonomous systems[29].

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[25] H. Zech, *Gefährdungshaftung…*, *op. cit.*

[26] In the Slovak legal system Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products was transposed by Act No. 294/1999 Coll. on liability for damage caused by defective products.

[27] Either product liability may be asserted against the supplier of the product if the manufacturer cannot be identified, or contractual liability may be considered in the context of contractual liability for damages if failure to comply (non-compliance with the terms of the implicit and explicit content of the contractual arrangements) has resulted in the damages.

[28] M. Novotná, M. Jurčová, *Liability…*, *op. cit.*

[29] M.A. Geistfeld, *A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation*, "California Law Review" 2017, Vol. 105, No. 12, pp. 1611–1694.

The applicability of the legal regulation, which was created unaware of the advent of autonomous technologies, is limited in this respect, resulting in particular from its nature as a pro-consumer oriented regulation, granting active legitimacy only to such an injured party who has suffered injury to life or limb, or damage to an object other than the defective product itself, while this other object must normally be intended for personal use or personal consumption and serve the injured party predominantly for this purpose.

Product liability excludes liability for development risks, which are virtually always associated with the introduction of new systems. The manufacturer is exempt from liability if he or she establishes that the state of scientific and technical knowledge at the time the product was introduced onto the market made it impossible to detect the defect in the product[30].

Specific considerations in relation to the definition of the entity to which the harm caused may be attributed is the question of the imposition of such liability on the autonomous system itself. This consideration is based primarily on the nature of the autonomous system as a *subject* endowed with intelligence, capable of reasoning and making decisions on its own on the basis of the processing and evaluation of the information available to it, to which subjectivity would be attributed in the sense of the status of a form of *electronic person*[31]. As in the case of the liability of the controller and given the nature of this *electronic person*, it would be all the more necessary to link the liability of the autonomous system to some form of specific liability insurance at the same time as adopting such a solution. As Gless and Janal point out, however, even in the case of autonomous systems, there is nothing significant to be gained by

[30] The Directive gives Member States the potential to derogate from this rule and exclude developmental defects among the grounds for liberalisation. Dogmatically, the exception for development risks is often justified as evidence that product liability is a specific, strict liability with elements of fault.

[31] On the status and analysis of the conditions for granting legal personality to artificial intelligence, see A. Krausová, *Status of an electronic person in European law in the context of Czech law*, "Právní rozhledy" 2017, No. 20; S.M. Solaiman, *Legal personhood of robots, corporations, idols and chimpanzees: a quest for legitimacy*, "Artificial Intelligence and Law" 2017, Vol. 25, No. 2, pp. 155–179.

such a construction compared to the liability operating at the same time. Even if an autonomous system is found to be legally and tortiously capable, the transfer of assets belonging to that system would make no economic sense, since such assets could only be used to cover the damage caused or to provide insurance benefits. Any such competent system would also have to be represented by a natural person at all times when expressing its will (entering into an insurance contract, paying premiums, paying compensation, etc.)[32].

1.4. Conclusion

Although the current law responds to some extent to some of the liability challenges associated with new technologies involving aspects of artificial intelligence, it cannot, according to Gasser[33], fully and satisfactorily answer all the associated legal questions and there is a direct proportionality between these difficult or directly unanswerable questions of imputation of liability for damages and the increasing degree of autonomy of the system[34]. This state of affairs is, however, understandable, since the existing legal norms regulate relationships and situations which, at the time of the creation and further development of the norms in question, required regulation or anticipated the need for such regulation. If the human factor is replaced by software, the legal framework for the operation of artificial intelligence and autonomous systems will in the future, have to be created in a way that reflects a change in the overall concept of the elements of liability, either by modifying existing legal categories, so that they are also applicable to these systems or by creating a new category reflecting their specific features and meaning.

[32] S. Gless, R. Janal, *Hochautomatisiertes und autonomes Autofahren: Risiko und rechtliche Verantwortung*, "Juristische Rundschau" 2016, No. 10.
[33] T.M. Gasser, *Grundlegende…*, *op. cit.*
[34] *Ibidem.*

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Chapter 2. Theoretical and Legal Aspects of the Development and Normative Consolidation of the Rights of Elderly People

2.1. Introduction

The ageing population is a highly controversial phenomenon. On the one hand, this trend represents a great achievement, signifying, as it does, an improvement in society's quality of life, as improved nutrition, medical advances, health care, education and economic prosperity mean people are living longer. On the other hand, an ageing population poses a challenge to the entire global community and compels states to adopt measures that promote and protect the rights of older people.

Over the past 50 years the ageing of the global population has been developing rapidly and any neglect may be damaging for particular nations. In 2022 the global population reached about 8 billion and ten percent of the population was 60 years or over. According to the UN, in 2022 the age of almost ten percent of the global population exceeded 65 years. In 2050 this proportion is set to increase from 9.3% to 15.9%[1].

[1] *World Population Prospects 2022: Department of Economic and Social Affairs Population Division*, https://population.un.org/wpp/Download/Standard/Population/ [access 31.12.2022].

This means that large numbers of elderly people will increase the pressure on private pension funds and public budgets. To maintain economic health, governments will need to implement comprehensive pension reforms; often unpopular reforms. At the World Economic Forum, the problem of the growing burden on pension funds is referred to as a ticking time bomb because the development of medicine and demographic changes mean that there will be many more pensioners and insurance funds will have insufficient funds to go round.

If pension systems remain unchanged, in 2050 they will slow down global GDP growth by 2% annually. The increase in budget deficits will increase public debt by 180% in developed countries and by 130% in emerging countries[2].

2.2. Definition of an older person

At what point in life old age begins and at what age a person might be considered elderly need to be ascertained, As do whether old age is connected with retirement, reaching retirement age, or whether it refers to a person's internal, mental state.

The terms *elderly person* and *old age* are neither precise nor unambiguous, which is clear from the literature on these issues, both psychological and gerontological literature.

In both cases it is necessary to have a working definition of *older persons* or *old age*. We may alternatively adopt an approach that addresses all forms of age discrimination; against younger as well as against older persons irrespective of their age. This approach has been adopted in some international organs and some national legislation. Thus far, however, discussions at the Open-ended Working Group on Ageing have focused on the older end of the ageing spectrum, an approach justified by the specific experiences of persons

[2] Мірошниченко Б. Населення Землі швидко старіє, не вистачає працівників. Чи готова до цього світова економіка і що чекає на Україну?, "Українська Правда" 2022, https://www.epravda.com.ua/publications/2022/01/26/681778/ [access 31.12.2022].

in the middle and later stages of their lives. Those experiences and the social implications of having reached the latter stages of life mean that the nature of the discrimination experienced by older people is different in important respects from age discrimination against younger people, although the practice of stereotyping people on the basis of their age may be common to both groups. The stereotypes are different in each case: for example, discrimination against a younger person on the basis of age is not based on assumptions that their age means they have lost the capacity or willingness to learn or the ability to carry out particular tasks, but these attitudes are frequently seen in terms of age discrimination against older persons.

The challenges of defining *older persons* and *old age* are well-known. The ageing process is continuous and the significance of the stage of life which a person has reached and their designation as old varies according to social context, so choosing a specific chronological age is problematic in defining the onset of old age. The realities of peoples' lives at any given age may vary enormously depending not only on the way they are ageing biologically but also on factors such as their race, sex, gender, poverty, disability and socio-economic status among others and their experiences earlier in life. In 2018 the European Union Agency for Fundamental Rights (FRA) noted the various components of ageing. Age and ageing are usually discussed and addressed from four distinct but intersecting perspectives:

- chronological age based on date of birth;
- biological age, linked to physical changes;
- psychological age, referring to mental and personality changes during the life cycle;
- social age, which defines the change of an individual's roles and relationships as they age[3].

A certain conventional age from which point a person is considered elderly. In its reports the European Committee of Social Affairs

[3] *Update to the 2021 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons. Working paper prepared by the Office of the High Commissioner for Human Rights*, March 2021, p. 59.

assumes that an elderly person is someone who has reached retirement as prescribed by social security law in the Member States. The United Nations recognises that the elderly section of the population includes people over 60 years of age. The World Health Organisation (WHO), considering the health situation of the population and the social situation, considers the population over 60 as elderly. It therefore considers the age of 60 to be the onset of old age and distinguishes three main stages: from 60 to 75 years of age, so-called early old age; from 75 to 90 years of age, so-called late old age; 90 years of age and above, so-called longevity[4].

In the fields of geriatrics and gerontology one may justify the notion that older people's physiological and psychological traits change significantly every five years. People aged between 60 and 65 have different needs from people aged between 65 and 70, and the needs of people aged between 70 and 75 differ from those of people aged between 75 and 80[5].

Using chronological age alone may therefore be inappropriate in many cases, as the assessment of whether a person has reached an older stage in life is made in a social context by dint of a matrix of different factors that may include, but are by no means limited to, chronological age. When assessing a person's needs, abilities or interests for a particular purpose (e.g. whether they would benefit from subsidised travel or enrolment in further education to improve their employability or for other purposes), chronological age is generally a poor indicator of these criteria. In many cases, governments and others nevertheless find it administratively convenient to use chronological age in order to determine eligibility for certain entitlements or assistance programmes, even though these programmes are often based on generalisations or stereotypes about what reaching a certain chronological age means for an individual.

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[4] A. Malarewicz-Jakubów, *Wsparcie prawne osób starszych*, Warszawa 2017, p. 259.

[5] М.С. Багній, О.Я. Коваль, *Збірка «Захист прав людей поважного віку: успішні історії»/Громадська організація «Суспільство і право»*, Львів 2019, p. 44.

Even in cases when governments and international bodies use chronological age, the ages they use vary considerably. The United Nations use 60 as the threshold for certain purposes but accepts that this may be too high in certain circumstances and may also be too low in others. Pension and retirement ages vary among countries and sometimes between women and men within countries. During the COVID-19 pandemic the age thresholds for older persons who were urged or required to self-isolate or restrict their movements ranged from 58 to 80 and many other ages in between.

Whether an individual is old may well depend on the reason one is asking the question. A 40-year old refused employment because he or she is assumed to be unable to fit in with a group of younger employees or to have limited IT skills is the victim of age discrimination, which is covered by legislation in some countries, but would not be governed by provisions that set the lower threshold for old age at 60 years. On the other hand, the use of a chronological age for determining eligibility for certain forms of social protection is convenient for governments in the administration of social programmes, although these programmes themselves are also sometimes based on ageist assumptions. Defining the elderly or old age in any new normative organ is likely to require a flexible definition that takes into account these factors, as well as allowing governments to have workable criteria for the administration of policies and programmes. If a definition of an older person is indeed necessary in any context, however, then it is likely to vary from one situation to another[6].

It should be noted that in recent decades, countries have significantly changed the retirement age. The average retirement age in Austria, Belgium, Great Britain, Greece, Spain, Canada, Portugal, Sweden and Switzerland is 65 years for men and 55–57 years for women, but in France it is 60 years and in the USA 70 years.

In the USA there is no clear statutory definition of *retirement age*. A 62-year-old may apply for social security upon retirement, but at 65 would be entitled to medical care under the state programme for

[6] *Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons*, *op. cit*.

the elderly (Medicare). Upon reaching the age of 67 a person may retire and receive social security benefits and, anyone who works until the age of 70 will receive additional pension upon retirement. Most elderly Americans try to lead an active life as long as possible. The residents of American nursing homestend to be (54%) over the age of 85. A little more than a quarter are between 75 and 85, and a further 20% consists of people aged between 65 and 75 or younger. The statistics suggest that there are many more women in such communities than men: 74% to 26%.

According to WHO data, Canada is in the top ten countries in the world in terms of average life expectancy. It ranks ninth in the world with average ages of 84 years for women and 80 years for men. A variety of factors also mean that the life expectancy of Canadians is increasing relatively quickly. Between 1980 and 2016 the average life expectancy there increased by 8 years for men and 5 years for women. If in 2001 there were only 3,795 people aged over 100 living in Canada, in 2011 there would be 5,825, and by 2061, 81,000.

France has the highest life expectancy in Europe at 81 years. Life expectancy in France is currently 82 years for women and 70 years for men. France has one of the most complex pension insurance systems. The French, both men and women, generally retire at the age of 62.

The German population is aging faster than the European Union average. Today the number of people over 65 constitutes a fifth of the country's total population. Germans currently retire at the age of 67. When the German parliament decided to raise the retirement age, there was a great deal of controversy, but the majority came to agree that it was justified.

In Poland the number of old people's homes is also on the increase due to the aging population. There are two types of retirement age in Poland:

1) the general retirement age is the age that applies to all people outside certain social groups with a lower retirement age or the right to early retirement;
2) a lower retirement age is provided for persons who work in particularly difficult or dangerous conditions; it is usually

between 5 and 15 years lower than the general retirement age.

In Italy the proportion of people over the age of 60 will increase to 42.3% by 2050. In Italy those between 55 and 64 are the pre-elderly and the elderly are those who have reached the age of 65[7].

Statistics from research conducted by the Australian Bureau of Statistics (ABS) and the Australian Institute of Health and Welfare (AIHW) tend to define older people in Australia as those over 65 years of age. Significant differences in life expectancy among different population groups, however, may affect the concept of old age. For example, their lower life expectancy and younger age structure means that Aboriginal and Torres Strait Islander people are often considered old at 50 or 55 years of age.

2.3. UN and the Human Rights of older persons

The UN has identified ageing as one of the most important global issues, noting that virtually every country in the world is experiencing an increase in the number and proportion of older people in its population and predicts that ageing will become one of the most important social issues of the 21st century, affecting almost all sectors of society, including the labour and financial markets, the demand for goods and services (e.g. housing, transport and social welfare) and family structures and inter-generational relations.

This process is leading, on the one hand, to a reduction in the economic potential of countries by reducing the proportion of people of working age and, on the other hand, to an increase in social spending on the elderly.

Loneliness, disability, illnesses leading to social exclusion, age discrimination (ageism), the exploitation of the elderly, credulity are terms that may be attributed to old age. Today, the cult of youth dominates. The elderly are treated as a burden to the modern world

[7] F. Megret, *The Human Rights of Older Persons: A Growing Challenge*, "Human Rights Law Review" 2021, Vol. 1, pp. 37–66.

of the beautiful and the young. Older people are often unwilling and unable to accept their old age.

From an individual perspective, the greatest problems associated with ageing are reduced mobility, more health problems, reduced intellectual capacity, feelings of discomfort, changes in social roles and increased dependency on others.

All over the world the problems of the elderly are the same and remain unresolved. It should be borne in mind that although the rights of older people are enshrined in international human rights organs, they are not singled out.

Article I of the Universal Declaration of Human Rights: *'all human beings are born free and equal in dignity and rights'*[8]. This equality does not change with age: older men and women have the same rights as the young.

Article 9 of the 1966 International Covenant on Economic, Social and Cultural Rights on the right of everyone to social security, including social insurance[9] implicitly recognises the right to old--age benefits.

The rights of the elderly who are disabled are protected under the Convention on the Rights of Persons with Disabilities[10].

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families[11] also explicitly prohibits discrimination on the basis of age (Article 7).

There are currently three specific international documents on the protection of the rights of the elderly.

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[8] Universal Declaration of Human Rights on 10 December 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights [access 31.12.2022].

[9] International Covenant on Economic, Social and Cultural Rights on 16 December, www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights [access 31.12.2022].

[10] Convention on the Rights of Persons with Disabilities, 2008, www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with--disabilities.html [access 31.12.2022].

[11] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection--rights-all-migrant-workers [access 31.12.2022].

Special issues relating to the situation of older people were first addressed at the First World Assembly on Ageing held in Vienna in 1982. It was considered necessary to provide the elderly with an adequate standard of living, opportunities for self-fulfilment and participation in social and family life.

This was followed in 1991 by the drafting and adoption of the United Nations Principles of Action for Older Persons[12], which set out the rights of the elderly and relate to specific areas of life. In April 2002 the Second United Nations World Assembly on Ageing was held in Madrid, which produced the International Strategy for Action on Ageing as a response to the opportunities and challenges of ageing societies and individuals in the 21st century. The ultimate goal of the strategy is to improve conditions for the development of age-friendly societies[13].

We also know about the draft UN Convention on the Protection of Older Persons where 53 votes were cast in favour and there were 109 abstentions.

Although the process began 10 years ago, it is yet to be completed. Opponents of the Convention give the following arguments:

- greater protection of the rights of older people should be developed through more effective implementation of existing instruments and mechanisms;
- the implementation of existing documents dedicated to older people should be improved

These three plans or principles are the only international documents dedicated to ageing and, while they carry moral weight, they are not legally binding.

These documents do not provide for independent monitoring or accountability mechanisms to assess progress or a body to investigate violations and non-compliance.

[12] United Nations Principles of Action for Older Persons, 1991, https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-principles--older-persons [access 31.12.2022].

[13] The Madrid International Plan of Action on Ageing, 2002, https://unece.org/population/ageing/mipaaris [access 31.12.2022].

Human rights legislation has never been applied comprehensively to older people or to the issue of ageing. As a result there is a lack of legal certainty and clarity, which jeopardises the equal protection of the rights of the elderly. Improved implementation of existing policy documents alone will not close this protection gap.

Implementation gaps are just one type of loophole faced by the elderly around the world. Addressing one gap and not others may lead to a range of problems, including weak legal standards, high theoretical standards that are not applied in practice, low levels of accountability and a failure to engage in dialogue.

Current international human rights law fails clearly to identify and address the persistent acts, circumstances and institutional factors that currently deprive the elderly of their dignity.

This leads to the conclusion that the most effective way to address the protection gap is to systematically articulate the way human rights apply in the context of old age and to the elderly in legally binding standards dedicated to the rights of the elderly.

Today the most important task for the effective protection of the rights of the elderly is therefore the adoption of a **single universal international act**.

There exist regional acts.

Regional human rights legislation also fails to guarantee systematic and comprehensive protection of the rights of the elderly.

In undermining universality, instruments of regional human rights may complement the standards of international human rights. The development of regional instruments in the absence of international standards on which these regional instruments may be based has, however, resulted in different standards and legislation in different regions, undermining the concept of universal human rights.

While no single universal document has been adopted, many positive developments in this direction are in evidence.

2.4. Legal regulations in support of the rights of the elderly in Poland and Ukraine

Legal acts of importance for legal support of the elderly in Poland are:

1) the Act of 11.09.2015 on the elderly[14],
2) the Act of 12.03.2004 on social assistance[15],
3) the Act of 17.12.1998 on pensions and disability pensions of the Social Insurance Fund[16],
4) the Act of 24.01.1991 on veterans and some of the victims of war and post-war repressions[17],
5) the Act of 27.08.2004 on health care services financed from public funds[18],
6) the Act of 19.08.1994 on mental health care[19].

Since 2012 successive governments have introduced programmes aimed at facilitating the organisation of support for the elderly (ASOS, Senior – Wigor, now Senior +, Care 75+, Medicines 75+)[20].

On 1.01.2016 the law of 11.09.2015 on the elderly came into force. This is a crucial law in the Polish legal order, the guiding objective

[14] Ustawa z dnia 11 września 2015 r. o osobach starszych, https;//isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20150001705/T/D20151705L.pdf [access 31.12.2022].

[15] Ustawa z dnia 12 marca 2004 r. o pomocy społecznej, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20040640593 [access 31.12.2022].

[16] Ustawa z dnia 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19981621118 [access 31.12.2022].

[17] Ustawa z dnia 24 stycznia 1991 r. o kombatantach oraz niektórych osobach będących ofiarami represji wojennych i okresu powojennego, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19910170075 [access 31.12.2022].

[18] Ustawa z dnia 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20042102135 [access 31.12.2022].

[19] Ustawa z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19941110535 [access 31.12.2022].

[20] Międzynarodowa Konwencja o Prawach Osób Starszych, https://www.infor.pl/prawo/prawa-seniora/3063289,Miedzynarodowa-Konwencja-o-Prawach-Osob-Starszych.html [access 31.12.2022].

of which is to carry out activities for the benefit of the elderly, in particular to analyse information on the income, housing conditions, professional activity, family situation, social and cultural activities.

Article 4(1) formulates a definition of an elderly person. An elderly person, it states, is someone over 60 years of age. Article 4(2) on the other hand, defines the concept of a senior citizenship policy, which is a set of activities of public administration bodies and other organisations and institutions that carry out tasks and initiatives that shape the conditions for dignified and healthy ageing[21].

Poland is currently a party to the most important international agreements and treaties concerning human rights. Legal regulations supporting the rights of the elderly and human freedoms in Poland are ensured by state institutions established, *inter alia*, for this purpose state institutions such as the common courts, the Supreme Administrative Court, the Constitutional Tribunal, the Ombudsman and non-governmental organisations. The observance of human rights is guaranteed by international documents ratified by Poland and institutions acting in accordance with their institutions: the Human Rights Committee in Geneva, the European Commission of Human Rights and the European Court of Human Rights in Strasbourg[22].

The rights of the elderly in Ukraine are guaranteed, in particular, by the following:

1) the Constitution of Ukraine, 28.06.1996[23];
2) the Decree of the Council of Ministers 'On approval of the action plan for the implementation of the Strategy of Social Development for 2021–2022'[24];

[21] Ustawa z dnia 11 września 2015 r. o osobach starszych, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20150001705/T/D20151705L.pdf [access 31.12.2022].

[22] A. Malarewicz-Jakubów, *Wsparcie prawne osób starszych*, Warszawa 2017, p. 258.

[23] Конституція України, 1996, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text [access 31.12.2022].

[24] *Про схвалення Стратегії державної політики з питань здорового та активного довголіття населення на період до 2022 року*, https://zakon.rada.gov.ua/laws/show/10-2018-%D1%80 [access 31.12.2022].

3) Law of Ukraine of 17.01.2019 No. 2671-VIII 'On social services'[25];
4) Law of Ukraine of 16.12.1993 No. 3721-XI 'On state social standards and Social Guarantees'[26];
5) Law of Ukraine of 5.10.2000 No. 2017-III 'On the basic principles of social protection of labour veterans and other elderly citizens in Ukraine'[27];
6) Law of Ukraine dated 9.07.2003 No. 1058-IV 'On compulsory state pension Insurance'[28];
7) Law of Ukraine of 5.11.1991 No. 1788-X 'On pension regulations'[29];
8) Law of Ukraine of 6.10.2005 No. 2961-IV 'On rehabilitation of Disabled in Ukraine'[30];
9) Law of Ukraine of 9.04.1992 No. 2262-XII 'On pension provision for persons discharged from military service and some other persons'[31];
10) Law of Ukraine of 18.02.1991 No. 796-XII 'On the status and social protection of the population affected by the Chernobyl disaster'[32];

[25] Закон України «Про соціальні послуги», https://zakon.rada.gov.ua/laws/show/2671-19#Text [access 31.12.2022].

[26] Закон України «Про державні соціальні стандарти та соціальні гарантії», https://zakon.rada.gov.ua/laws/show/2017-14#Text [access 31.12.2022].

[27] Закон Україн «Про основні засади захисту ветеранів праці та інших людей похилого віку», https://zakon.rada.gov.ua/laws/show/3721-12#Text [access 31.12.2022].

[28] Закон України «Про загальнообов›язкове державне пенсійне страхування», https://zakon.rada.gov.ua/laws/show/1058-15 [access 31.12.2022].

[29] Закон України «Про пенсійне забезпечення», https://zakon.rada.gov.ua/laws/show/1788-12#Text [access 31.12.2022].

[30] Закон України «Про реабілітацію осіб з інвалідністю в Україні», https://zakon.rada.gov.ua/laws/show/2961-15#Text [access 31.12.2022].

[31] Закон України «Про пенсійне забезпечення осіб, звільнених з військової служби та деяких інших осіб», https://zakon.rada.gov.ua/laws/show/2262-12#Text [access 31.12.2022].

[32] Закон України «Про статус і соціальний захист громадян, які постраждали внаслідок Чорнобильської катастрофи», https://zakon.rada.gov.ua/laws/show/796-12#Text [access 31.12.2022].

11) Law of Ukraine of 1.06.2000 No. 1767-IIII 'On pensions for special merits to Ukraine'[33];
12) Law of Ukraine of 12.01.2006 No. 3334-IV 'On the social housing fund'[34] and others.

The Ministry of Social Policy of Ukraine is responsible for the management of the elderly and the provision of social services.

The lack of any special law in Ukraine means that there are many problems with the legal regulation of the protection of the rights of the elderly. There is, for example, no definition of the concept of an elderly person, nor monitoring of the situation regarding the enactment of the rights of the elderly. Regardless of these and other legal shortcomings, in general the system of protection of the rights of the elderly in Ukraine fulfils its function.

An analysis of the Ukrainian legislation on the protection of the rights of the elderly reveals that the greatest attention is paid to the social protection of the elderly from among war veterans and children of war, whose livelihood is supported by a system of benefits and compensations. In accordance with the Law of Ukraine 'On the Status of War Veterans, Guarantees of their Social Protection', the state guarantees war veterans an adequate standard of living, satisfaction of various vital needs, provision of various types of social assistance by:

- informing the population about services and programmes to support the elderly;
- the creation of conditions for healthy aging and active longevity;
- the organisation of medical care;
- ensuring the right to work in accordance with professional training, work skills, taking into account their state of health;
- ensuring the right to social services, creating a network of institutions and establishments that provide social services and involve non-governmental sector social service providers

[33] Закон України «Про пенсії про особливі заслуги перед Україною», https://zakon.rada.gov.ua/laws/show/1767-14#Text [access 31.12.2022].

[34] Закон України «Про житловий фонд соціального призначення», https://zakon.rada.gov.ua/laws/show/3334-15#Text [access 31.12.2022].

(through social services commissioning, public-private partnership, competition of social projects, social programmes, etc.);
- ensuring the strengthening and development of the material and technical bases of institutions and facilities that provide social services;
- the formation of a positive attitude in society towards the elderly;
- the provision of lifelong learning for the elderly;
- the provision of pensions and social assistance;
- the provision of housing;
- the promotion of the re-integration of older persons from among internally displaced persons into the social life of the population[35].

In order to ensure conditions adequate for the elderly to live independently, the Law of Ukraine 'On the Social Housing Fund' was adopted. In pursuance of this act, the Decision of the Cabinet of Ministers No. 76 of 31 January 2007 'On approval of the procedure for establishing a specialised home for war and labour veterans, elderly and disabled citizens and for providing living quarters in such a home and the standard regulations for a specialised home for war and labour veterans, elderly and disabled citizens' was drafted and adopted.

According to the Law of Ukraine 'On Social Services', the state guarantees the right to social services to the elderly. Social assistance to the elderly who have partially or completely lost the ability to take care of themselves, at their request, may be provided either in the relevant social institution (residential home, regional centre of social services, veterans' home, boarding house for the elderly), where they are temporarily or permanently, or at home.

The basis for the organisation of social services and the provision of social services to citizens is the conclusion of the medical and preventive institution on the person's degree of loss of ability to take care of him or herself. Social workers provide single disabled

[35] Закон України «Про статус ветеранів війни, гарантії їх соціального захисту», https://zakon.rada.gov.ua/laws/show/3551-12#Text [access 31.12.2022].

persons and disabled persons with social services in accordance with the contract. Such an agreement is concluded between a single disabled citizen and the regional centre or department of social assistance at home.

The activities of residential institutions for the elderly are constantly being improved, modern social service technologies and methods of social work are introduced, and individual assessment of the need for assistance and social services is launched. Along with the strengthening of existing residential institutions, the main trend in the development of the social service system for the elderly is the creation of new types of residential institutions.

A network of residential homes and in-patient departments with a small number of residents is being formed in Ukraine. The creation of such social institutions in the community makes it possible to bring in-patient social services closer to the usual place of residence of the elderly and to avoid disrupting family and social ties that have developed over a lifetime.

In an effort to strengthen the social protection of citizens who are in difficult life circumstances and are entitled to social services in accordance with the law, it was decided to introduce a new type of social service. The procedure for the appointment and payment of compensation to individuals who provide social services was approved. The introduction of this type of services made it possible to avoid restricting the right of elderly people social services to in-patient institutions or through a regional centre. A person in need of services may receive them as he or she wishes, so social services have been brought closer to the places of residence of the elderly in need of constant care[36]. A modern form of the provision of social services for accommodation is the creation of specialised residential buildings in the regions of Ukraine for single war and labour veterans, pensioners and disabled persons, including social and health-care services, medical care and the provisions of conditions for leisure activities.

[36] *Територіальні центри соціального обслуговування*, Міністерство соціальної політики України, https://www.msp.gov.ua/content/centri-zahistu.html [access 31.12.2022].

2.5. The right to work and access to the labour market for the elderly

In accordance with the Law of Ukraine 'On the basic principles of social protection of labour veterans and other elderly citizens in Ukraine', the elderly have the right to work on an equal footing with other citizens, which is additionally guaranteed by state targeted programmes, regional and local employment programmes insofar as the refusal to hire or the dismissal of an employee by an employer on the grounds of the employee's having reached the retirement age is prohibited. Discrimination against elderly persons in the labour market is therefore prohibited.

The Law of Ukraine 'On Employment'[37] provides incentives for employers to create new jobs and employ unemployed citizens who are insufficiently competitive in the labour market. An employer who employs someone who will within 10 years reach retirement age for a newly-created job at the direction of the State Employment Service, requiring additional guarantees in promoting employment, will for two years receive monthly compensation in the amount of the expense of a single contribution to the obligatory state social insurance for the respective person for the month for which it was paid.

It should also be noted that it is very difficult today for older people to find a job, especially officially, despite their qualifications, practical skills and work experience. The problem lies not only in the objectively low competitiveness of the older generation in comparison with the young, but also in the biased attitude of employers towards the elderly.

Age discrimination in the Ukrainian labor market, although prohibited by law, persists. There are frequent cases of employers refusing to employ people because of their age.

The norm on protection against all forms of discrimination in the field of labour (including on the basis of gender and age) is clearly reflected in the Law of Ukraine 'On Employment'. It is also

[37] Закон України «Про зайнятість населення», https://zakon.rada.gov.ua/laws/show/5067-17#Text [access 31.12.2022].

prohibited to indicate age restrictions for candidates in vacancy announcements (advertisements).

The provisions of the Law of Ukraine 'On the Principles of Prevention and Combatting Discrimination in Ukraine'[38] seek to combat all types of discrimination (on the grounds of race, skin colour, political, religious and other beliefs, gender, age, disability, ethnic or social origin, citizenship, marital and property status, place of residence, language or other grounds). The issue of age discrimination is not properly described in it.

In order to ensure the success of the Sustainable Development Goals adapted for Ukraine, approved by the leaders of the countries at the meeting of the UN General Assembly in September 2015, in creating favourable conditions for healthy and active longevity, the Cabinet of Ministers of Ukraine approved the Strategy of State Policy on the Healthy and Active Longevity of the Population for the period up to 2022 by the Order of the Cabinet of Ministers of Ukraine No. 10-r dated 11.01.2018. In order to achieve the objectives of the Strategy the Government approved the Action Plan (No. 688-p of 26.09.2018)[39] for the implementation of this Strategy, which in particular provides for the implementation of the International Labour Organisation's norms No. 162 on older workers in the national legislation, which aimed at expanding opportunities for older workers to contine to work, ensuring the flexible organisation of work and working hours for such workers and analysing labour legislation with a view to identifying the norms that may lead to discrimination against the elderly.

In order to expand the opportunities for older workers to continue to work, to ensure flexible organisation of work and working hours for such workers, national legislation needs to be improved, in particular by implementing the provisions of the International Labour Organisation Recommendation No. 162

[38] Закон України «Про засади запобігання та протидії дискримінації в Україні» від 06 вересня 2012 року No. 5207-VI, https://zakon.rada.gov.ua/laws/show/5207-17#Text [access 31.12.2022].

[39] Про схвалення Стратегії державної політики з питань здорового та активного довголіття населення на період до 2022 року, https://zakon.rada.gov.ua/laws/show/10-2018-%D1%80 [access 31.12.2022].

on older workers and best international practices regarding the employment of workers of pre-retirement age, taking into account the peculiarities of gender.

2.6. Education, lifelong learning and the capacity for development

Lifelong education in Ukraine is carried out within the framework defined by the Constitution of Ukraine, the Law of Ukraine 'On Education', other laws in the field of education ('On General Secondary Education', 'On Extracurricular Education', 'On Vocational Education', 'On Higher Education', 'On Scientific and Scientific-Technical Activity') and regulatory legal acts.

The Law of Ukraine 'On Education' (No. 2145-VIII)[40] provides for the realisation of the human right to lifelong education, its contribution to professional and social aspects of life by ensuring the necessary level of literacy. The provisions of Article 18 stipulate that adult education, which is an integral part of lifelong learning, aims to realise the right of every adult to lifelong learning, taking into account their personal needs, priorities of social development and the needs of the economy.

The Decree of the President of Ukraine of 30 September 2019 No. 722/2019 'On the Sustainable Development Goals of Ukraine for the period until 2030[41] defines inclusive and equitable quality education and the promotion of lifelong learning opportunities for all.

On the basis of current legislation it falls to public authorities and local government bodies to create the conditions for formal, non-formal and informal adult education.

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[40] Закон України «Про освіту» від 05 вересня 2017 No. 2145-VIII, https://zakon.rada.gov.ua/laws/show/2145-19#Text [access 31.12.2022].

[41] Указ Президента України «Про цілі сталого розвитку України на період до 2030 року» від 30 вересня 2019 року, https://zakon.rada.gov.ua/laws/show/722/2019#Text [access 31.12.2022].

The components of adult education are post-graduate education; vocational training of employees; retraining and advanced training courses; continuous professional development; any other elements provided by law, proposed by the subject of educational activity or independently determined by it.

The legislation stipulates that a person has the right freely to choose an educational institution, institution, organisation, other subject of educational activity, the types, the forms, the pace of training and educational programme in adult education.

Post-graduate education involves the acquisition of new and improvement of previously acquired competencies on the basis of higher, vocational (vocational-technical) or professional higher education and practical experience.

In order to improve the situation in Ukraine, amendments have been made to the legislation on the particular nature of education for the elderly. The Ministry of Education and Science of Ukraine has established a working group to develop a draft Law 'On Adult Education'[42]. As of 1.01.2022, there are 381 adult universities in Ukraine, where about 47 thousand elderly people study.

2.7. Social security and social protection for the elderly

The right of citizens to social protection, including social security, is defined by Article 46 of the Constitution of Ukraine. According to the Constitution, the system of social protection has a complex structure, the elements of which are pension provision, social insurance, social security and social assistance[43].

The basic principles of state policy on the elderly are regulated by the Law of Ukraine 'On the basic principles of social protection of labour veterans and other elderly citizens in Ukraine'.

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[42] Проєкт Закону України «Про освіту дорослих» No. 7039 від 01.04.2022, https://www.kmu.gov.ua/bills/proekt-zakonu-pro-osvitu-doroslikh [access 31.12.2022].

[43] Конституція України, 1996, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text [access 31.12.2022].

The Law defines the following regulatory elements of the right of the elderly to social protection:

1) the right to an old age pension (the procedure and conditions of pension provision are established by the Law of Ukraine 'On Compulsory State Pension Insurance' and other laws);
2) the right of persons not entitled to a pension to receive state social assistance; the right to state social assistance for the care of persons who, according to medical institutions, need constant out-patient care (the Law of Ukraine 'On state social assistance to persons not entitled to a pension and persons with disabilities'[44]);
3) the right to receive social services at home and in special institutions (the Law of Ukraine 'On Social Services' and a number of by-laws adopted for its implementation);
4) the right to guardianship and trusteeship (Civil Code of Ukraine), etc.

According to the above laws, the state also guarantees the creation of conditions for maintaining health and active longevity in accordance with modern scientific developments.

The right to an adequate standard of living and adequate social protection is violated due to the biased definition of the basic state standard *subsistence minimum*, on which most social and pension payments depend, an indicator that is only half what it needs to be. This state standard is therefore subject to revision.

In the context of decentralisation reform, the implementation of certain rights in the field of social protection guaranteed at a national level to the elderly depends on the financial capacity of the community in which the person lives.

The involvement of the private sector in the provision of social services is not large-scale and mostly focuses on meeting the specific needs of their recipients.

[44] Закон України «Про Про державну соціальну допомогу особам, які не мають права на пенсію та особам з інвалідністю» від 18 травня 2004 року No. 1727-IV, https://zakon.rada.gov.ua/laws/show/1727-15#Text [access 31.12.2022].

Measures to prevent homelessness and identify homeless persons, as well as to ensure their social protection, as defined by law, are not fully implemented.

For homeless persons, local governments in collaboration with non-governmental organisations provide mainly social services (clothing, food).

As a consequence of the latest amendments to the legislation on the provision of housing subventions to the population to reimburse part of the costs of housing and communal services, a large number of the elderly have lost the right to obtain such. This leads to an increase in arrears for the relevant services, which further aggravates their welfare.

The state social protection policy, especially that regarding the elderly, requires improvement in order to increase its impact on the eradication of poverty.

2.8. Legal framework of the pension system in Ukraine

The Government is taking measures gradually to increase the level of the pension and social security systems, but they do not meet the real social needs of the elderly and do not allow them to lead a full life, especially those who belong to vulnerable demographics.

The conditions and mechanism for calculating pensions defined by the legislation do not encourage people to make insurance contributions during their working life.

Considering the low level of the pension, a significant number of people in receipt of it have to continue working after retirement. Those receiving pensions are subject to compulsory state pension insurance on an equal footing with other working persons. At the same time, the introduction of an additional insurance period after reaching retirement age has no significant affect on the size of pension.

Based on the data of the Pension Fund of Ukraine, as of 01.04.2022, about 73% of pensioners in Ukraine received a pension

below or at subsistence level as defined by the UN for Central and Eastern Europe (5 USD per day)[45].

Considering the correlation between the life expectancy of the retired and their financial expenditures, a simple conclusion is drawn that under the existing solidarity pension model financed from current revenues, the demographic crisis will inevitably lead either to an increase in the burden on the state budget or to a reduction in pensions. Pensions in Ukraine are already the lowest of all European countries. The ratio of pensions to wages has also decreased to 29% in three years. Over time, this ratio will fall even lower, although there have been times when the ratio of pensions to wages was as high as 60%. According to the standards of the International Labour Organisation, this ratio should not fall below 40%, and in Europe's most developed countries the replacement rate is currently between 80% and 95%[46].

Ukraine is not alone in seeking to resolve pension problems in such a relatively simple way, but it does have some specific peculiarities.

First of all, it is the ratio of pensioners and tax-payers who make the social contributions. The problem of replenishing the Pension Fund from which pensions are paid is largely that about 11.2 million pensioners in Ukraine currently receive pensions, and the single social contribution that replenishes the Pension Fund is paid by 10.3 million tax-payers (employees for whom the employer pays). There are other categories of taxpayers, however, almost a million individual entrepreneurs who pay the minimum contribution (from 1 January 2021, UAH 1320). There are also 1.4 million people for whom the minimum contribution is paid by the state. These are workers on parental leave (mostly women), conscripts and some other categories. We therefore have 12.8 million contributors to the Pension Fund, which is still more than pensioners. There are,

[45] *Розмір пенсії в Україні станом на 01 квітня 2022 року*, https://www.ukrinform.ua/rubric-society/3473717-serednij-rozmir-pensij-v-ukraini-stanovit-4370-griven.html [access 31.12.2022].

[46] О. Пищуліна, *Чи потрібно підняти пенсійний вік?*, https://razumkov.org.ua/komentari/pidniaty-pensiinyi-vik-chogo-domagaietsia-i-kogo-dobie-vlada-svoimy-ideiamy [access 31.12.2022].

1.1 workers per 1 pensioner in Ukraine, while in Germany the ratio is 2.2 and in the USA 2.6. At the same time there are about 3.5 million workers in the country who pay no contributions whatsoever. All this indicates large-scale disproportions, hence the initiatives to raise the retirement age. The higher the age, the fewer new pensioners and the more contributors to the fund. These should, however, be temporary measures.

The second difference is the low level of employment. Compared to the EU countries, our employment rate is generally below average and, if we remove the so-called informal employment, it is very low. Given the high labour migration, especially when Ukrainian citizens work and pay contributions abroad, it is catastrophic.

Of course, the retirement age plays a significant role in ensuring the sustainability of the pension system and its balanced functioning. The regulation of this issue for the sake of budget deficit should, however, not become an end in itself. The task of pension reform should be to ensure a fair distribution of income and guarantees of pension payments. The Ukrainian pension system should be friendly to ordinary Ukrainians and give them confidence in the future.

The Ukrainian pension system remains complex and opaque, in terms both of legal regulation and organisation of financial flow. Despite certain steps to differentiate pension programmes by sources of funding, there remains a deal of confusion and uncertainty in the inter-budgetary relations between the Pension Fund and the state budget. There is a good deal of confusion and ambiguity[47].

There is a three-tier pension system in Ukraine: solidarity, accumulation and private pension system.

The main source of income for Ukrainian pensioners is the state solidarity pension system (Pillar 1). The system is financed on the basis of solidarity and is administered by the Pension Fund of Ukraine. Participation in the state pension system is mandatory for all citizens, enterprises (public or private), foreigners and stateless persons working under employment or civil law contracts, as well as for the self-employed.

[47] L. Tkachenko, *Pension system and pension reform in Ukraine 2018*, https://library.fes.de/pdf-files/bueros/ukraine/14044.pdf [access 31.12.2022].

The solidarity system, however, provides only minimal benefits to pensioners. As a rule, they attain no more than between 30% and 35% of the average income of the employee before retirement[48].

The second level is the mandatory state pension insurance system.

The third level is a system of voluntary non-state pension provision.

In Ukraine the three-tier pension system exists only as a formality. The second and third tiers are implemented on a voluntary basis and this is the main flaw in the pension system and the lack of funds for pensions. Economic problems, lack of inflationary indexation of pensions and wages and distrust in the banking system mean that workers simply have too little by way of funds to participate in the second and third tiers. The second tier is therefore yet to begin to function and the third remains insignificant in terms of volume and it is used if there is insufficient length of service for retirement, so the vast majority of pensions in Ukraine are accrued and paid for at the expense of the Pension Fund. The solidarity system alone is unable to cope with the existing detrimental financial and demographic factors in the country.

According to the Pension Fund of Ukraine (PFU), as of October 1, 10.7 million pensioners are registered in Ukraine. Of these 2.7 million continue to work. The average pension is UAH 4,539.36 for working pensioners, UAH 4,759.20. 38.4% of pensioners receive payments ranging from UAH 2,001 to UAH 3,000. Another 23.5% from UAH 3,001 to UAH 4,000[49].

Simplification of participation in pension insurance ('the Law on Amendments to Certain Laws of Ukraine on the Simplification of the Mechanism of Participation in Mandatory State Pension Insurance')[50] was introduced.

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[48] Закон України «Про збір та облік єдиного внеску на загальнообов›язкове державне соціальне страхування» від 8 липня 2010 року No. 2464-VI, https://zakon.rada.gov.ua/laws/show/2464-17#Text [access 31.12.2022].

[49] *Пенсійний фонд України*, https://www.pfu.gov.ua/2154582-pensijnyj-fond-ukrayiny-informuye-128/ [access 31.12.2022].

[50] Проект Закону про внесення змін до деяких законів України щодо спрощення механізму участі у загальнообов'язковому державному

According to current legislation, in order to retire at the age of 60, one must have accumulated at least 30 years of service[51]. At the age of 63 20 years of experience must have been accrued and at 65 between 15 and 20 years. An insurance grace period may be purchased or work continued after 60 years. Article 12 of the Law of Ukraine 'On Compulsory State Pension Insurance' stipulates that persons who do not have the required insurance period may voluntarily participate in the solidarity system or in the accumulative pension insurance system, or simultaneously in both systems in accordance with the concluded agreement on voluntary participation in the compulsory state social insurance system in accordance with the Law of Ukraine 'On Collection and Accounting of the Single Contribution to Compulsory State Social Insurance'[52].

The current procedure for voluntary payment of a single contribution to the mandatory state pension insurance tends to cover the vast majority of people who have insufficient insurance to acquire the right to a pension, and disqualifies those who are dissatisfied with the level of their participation in the mandatory state pension insurance (low earnings, etc.) to improve it.

In view of the above, there is a need to transform voluntary participation in the mandatory state pension's insurance system by expanding the list of its participants (lifting the restriction on participation in the payment of voluntary contributions for working people) and simplifying the implementation mechanism by dint of the modern capabilities of the Unified State Web Portal of Electronic Services (*Action*) and the Pension Fund of Ukraine's web portal of electronic services for applying to participate in such, verifying the information of those, concluding an agreement in electronic form. In accordance with the explanatory note to the draft Law of Ukraine

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пенсійному страхуванні. Законопроект No. 7649, https://itd.rada.gov.ua/billInfo/Bills/Card/40193 [access 31.12.2022].

[51] Ст. 26 «Умови призначення пенсії за віком», Закон «Про загальнообов'язкове державне пенсійне страхування». 9 липня 2003р. No. 1058-IV. Поточна редакція - Редакція від 6 листопада 2022р., підстава – 2682-IX.

[52] Закон України «Про збір та облік єдиного внеску на загальнообов›язкове державне соціальне страхування» від 8 липня 2010 року No. 2464-VI, https://zakon.rada.gov.ua/laws/show/2464-17#Text [access 31.12.2022].

'On Amendments to Certain Laws of Ukraine on Simplification of the Mechanism of Participation in Compulsory State Pension Insurance'[53] requires regulation of the issue of charitable contributions, which may be both impersonal and personalised.

The new law on simplifying the mechanism of participation in the mandatory state pension insurance (the Law on Pensions in Action) was registered in Parliament in August 2022 and was quickly voted in during its first reading and in general on 4 November. This law is something of a compromise between the option of mandatory funded pension insurance, which was not voted on, and voluntary funded pensions, which, while they exist now, do so in a different format and are accumulated through non-state pension funds.

The main innovations of the Law on the simplification of the mechanism of participation in the mandatory state pension insurance are: voluntary payment of insurance contributions for compulsory state pension insurance; sponsored (so-called charitable) pensions[54] and treasury retirement plans.

The current financial prerequisites for the formation of the funded system in Ukraine cannot therefore contribute to its apropriate development, which means that the introduction of the funded pension system should begin only once economic growth has been determined in Ukraine; a growth that will enable the effective placement and use of the funds of the funded pension system. The collected funds will otherwise fail to provide the desired profit for the this system to function normally and discredit the very idea of such pension insurance.

There is clearly an urgent need to develop, improve and transform the pension system in Ukraine and at the same time any changes that affect a significant part of the population should, firstly, fully take

[53] Пояснювальна записка до проекту Закону «Про внесення змін до деяких законів України щодо спрощення механізму участі у загальнообов'язковому державному пенсійному страхуванні», https://itd.rada.gov.ua/billInfo/Bills/pubFile/1429510 [access 31.12.2022].

[54] О. Пищуліна, *Система пенсійного забезпечення громадян: чи можна врятувати пенсії для українців*, https://razumkov.org.ua/statti/systema-pensiinogo-zabezpechennia-gromadian-chy-mozhna-vriatuvaty-pensii-dlia-ukraintsiv [access 31.12.2022].

into account the existing realities, risks and challenges. It should also be developed with the involvement of a wide range of participants including government officials, social partners, independent experts, scientists and other stakeholders and individuals. They should also be submitted for broad public discussion and take into account the results of this discussion.

2.9. Legal protection of the rights of older people during the war in Ukraine

Since the outbreak of the war in Ukraine on 24 February 2022 there has been a devastating escalation of violence, resulting in the large--scale displacement of some 14 million people within Ukraine, to neighbouring countries and far beyond. This is the largest refugee outflow in Europe since the Second World War.

Everyone living in Ukraine has felt the impact of this war, but in a country where one in four people is over 60 the impact on older people, including those with disabilities, has been extraordinary. In Donetsk and Luhansk regions alone, where some of the most intense fighting has taken place, approximately 30% of the population is elderly.

The health, rights and well-being of older people are under threat. The long-term consequences in this regard began as early as 2014 in the first years of this crisis. Against the backdrop of the ongoing war, the elderly face increasing challenges in their access to pensions, healthcare and other basic services.

In areas of intense fighting older people who choose to remain at home often face particular challenges in finding a safe place, basic necessities and food, due to disabilities, limited social connections, lack of digital literacy, etc. The war has also brought forced separation and isolation. Older people who moved to other parts of Ukraine faced difficult journeys due to life-threatening risks, lack of access to basic health care and other needs, while far from their families and loved ones. Many of those who remained in their home towns also have limited access to services and limited social contacts.

It is therefore crucial that all humanitarian actors and state authorities pay special attention to the elderly and their specific needs, whether they choose to stay in place or move.

Necessary life-saving assistance must be provided, as well as necessary evacuation assistance to those unable or unwilling to leave their homes, including those living in institutions. The elderly who have fled the main areas of conflict must also have their specific health and humanitarian needs met through access to a full package of essential services, including food and water, appropriate shelter, medical care, essential medicines and assistive technologies, mental health and psychosocial services, as well as other rights, such as access to pensions, transport and information.The risk to the elderly in Ukraine is real and must not be neglected.

2.10. Main causes of criminal acts against the elderly (crimes against property, family violence) and ways to prevent them

In recent years criminals have increasingly targeted the elderly, those least protected and weakest among the population, as victims of socially dangerous attacks. Despite the fact that criminal legislation defines the commission of a crime against an elderly person as an aggravating circumstance[55], statistics show that every 13th crime is committed against pensioners in Ukraine and this trend is steadily growing. In 2021 a total of 426,651 people were victims of crime in Ukraine, of which 33,119 were elderly[56].

The commission of crimes against the elderly is explained, first of all, by their physiological, psychological and social peculiarities characteristic. The physiological peculiarities of the elderly

[55] Вчинення злочину стосовно особи похилого віку: ВС визначив вік, з якого особа може вважатися особою похилого віку. Постанова ВСУ по справі No. 739/639/20 від 02 грудня 2021 року, https://iplex.com.ua/doc.php?regnum=101712315&red=1000036a4adefddef5e430c0b9d8da990c8bff&d=5 [access 31.12.2022].

[56] Статистична інформація за 2021–2022, https://www.gp.gov.ua/ua/stat.html/ [access 31.12.2022].

include physical weakness and visual and hearing impairments; the psychological include excessive gullibility, good-naturedness, recklessness, self-esteem that is too high or too low, an inability quickly to navigate through difficult life situations and make prudent decisions; and among the social are an insufficient level of knowledge due to the rapid development of the latest technologies, restricted social activity, marital status (the absence of relatives or rather unharmonious family relations), discontent due to the inability to continue to work, etc.[57]

If in childhood, adolescence and even in maturity we develop, then in old age biological processes diminish. The pace and nature of human aging are associated with both innate factors and environmental influences. A distinction is made between normal, or physiological, and premature, or pathological, aging. In physiological aging people remain practically healthy until old age, they are capable of taking care of themselves, remain active and retain an interest in others. Premature aging is characterised by early development of age-related changes largely due to previous diseases and the impact of detrimental environmental factors[58].

The emergence of physiological limitations during old age changes the behaviour of the elderly. The physical world with which they directly interact becomes increasingly narrow. Things that perform an auxiliary function become especially necessary for them: glasses, dentures, a wheelchair for transporting goods, a walking cane. Due to physiological limitations, danger increasingly awaits them on the street, in the park and even in their own homes. Elderly people therefore behave with care[59]. Social activity is especially reduced and tends to be limited to family circles and restricted to the immediate environment. Many of them feel lonely. Continuing

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[57] Д.В. Казначеєва, *Вчинення злочинів щодо осіб похилого віку: аналіз та прогнозування*, "Вісник Кримінологічної асоціації України" 2014, No. 6, pp. 118–127.

[58] А.В. Андрушко, *Геронтологічна злочинність: кримінологічна характеристика, детермінація та запобігання: монографія Ужгород*, Поліграф центр «Ліра», 2011, p. 248.

[59] О.А. Плашовецький, *Поняття та значення похилого віку потерпілого в кримінальному праві*, "Форум права" 2015, No. 1, p. 252.

their professional activity or any other work helps them to overcome loneliness and maintain material wellbeing.

Psycho-physiological changes mean that an elderly person often becomes more self-centred and irritable, grumpy, mean (sometimes petty), pedantic, suspicious and stubborn. These traits may clearly provoke conflict and crime. It is no coincidence that the majority of murders and grevous injury inflicted on the elderly take place in the family home and the domestic sphere, where daily life with so-called difficult elderly people is at its most difficult because of the privacy involved. If in prosperous families such cases are quite rare, in families where relations between the immediate family have never been exemplary, conflict, even that that ends in the commission of a crime, are commonplace.

Andrushko (2011, 248) points out that elderly people fall victim to domestic crime with greater frequency than do children. Most of these cases go unreported, especially in rural areas, where the closed environment and the social isolation of the elderly mean that such acts remain largely unknown to law enforcement agencies[60].

As for the fact that these crimes tend to go unreported, it should be noted that there are various reasons for the elderly to fail to report crimes committed against them.

1) victims do not always know how to act in such cases;
2) sometimes victims are intimidated by the perpetrators, as a result of which they have insufficient courage to report the crime to law enforcement agencies;
3) some of them neglect to inform their relatives and friends about a crime committed against them out of shame;
4) Crime that remains unknown to law enforcement agencies has a harmful impact on the social and psychological climate in society. At the same time, it gives rise to doubt among the elderly about the ability of law enforcement agencies to ensure their safety from criminal assault, including those of a financial nature.

[60] А.В. Андрушко, *Домашнє насилля щодо осіб похилого віку Права людини у філософському, політологічному, соціологічному та правовому вимірах: тези міжнар. наук.-практ. конф. Х.*, 2018, pp. 156–158.

The elderly who have impaired senses and perception are more likely to fall victim to theft and those in poor health fall victim to crimes such as robbery and assault.

Analysis of statistical data shows that burglaries against the elderly are committed mainly in cities and urban settlements (61%), including 25% in regional centres and 39% in rural areas. Burglaries tend to be committed during the day (between 9 a.m. and 4 p.m.) (29%), in transport and on the street in the evening (between 4 p.m. and 10 a.m.) (43%). Criminal offences generally target money and mobile telephones via pickpocketing. The elderly victims of theft fall into the following age groups: 60–70 years of age 64.3%, over 70 years of age 35.7%.

Robberies are usually committed on the street (46.4%), in transport, in markets and in the entrances of residential buildings (35.7%). Robberies are mainly committed in cities and urban settlements (83%), including 39% in regional centres and 17% in rural areas. The most frequently stolen items are bags, wallets and mobile telephones. The elderly victims of robberies fall into the following age groups: 60–70 years of age 72.6%, over 70 years of age 27.4%.

Robberies against the elderly are most frequently committed on the street (55.6%) and the entrances to buildings (for example, in elevators), during the evening and at night (73%). This type of crime tends to be committed in cities and urban settlements (69%), including 26.5% in regional centres and 31% in rural areas. The elderly victims of robberies fall into the following age groups: 60–70 years of age 48.5%, over 70 years of age 51.5%.

Those unaware of legal issues because of insufficient education may fall victim to fraud. Excessive gullibility, good-naturedness, an inability swiftly to navigate through difficult (unforeseen) situations, etc. play their role here. Committing any crime against the elderly is especially dangerous, as it is extremely difficult to protect them and the consequences of criminal attack on the elderly may be much more severe due to their increased vulnerability. The commission of a crime against elderly victims tends to result in greater suffering as the elderly's diminished physical abilities mean that they are often unable to resist their attackers. This is clearly understood

by the criminals, but their callous overconfidence urges them on in their crime against the elderly.

The elderly are therefore particular victims of crime. This particularity is due to their physiological, psychological and social characteristics making the elderly particularly vulnerable to criminal attack. The study of physiological, psychological and social determinants of crime against the elderly will contribute to the development of tactics to prevent this category of crime. One of the most effective ways to prevent the commission of such crimes is victimological prevention.

The applying of prognostic research methods make it possible to predict the probability of the formation of the following trends that characterise the commission of crimes against the elderly:

- there is a detrimental trend in the growth of both absolute and relative quantitative and qualitative indicators of crimes, the victims of which are elderly people (since 2020, there has been a tendency for a steady increase in the level of victimisation of of elderly victims (by 5% in total);
- there is a tendency to withhold reporting of the victimisation of the elderly, both objective (natural) and subjective (artificial), which compromises the gathering of information on the dynamics of the state and structure of victimisation from crimes committed against the elderly;
- the analysis of the growth rate of the dynamics of the structure of victimisation from the main types of crimes shows that in recent years all main types of crime committed against the elderly demonstrate stable indicators, the most common being crimes against property for financial reasons (theft, robbery, fraud). The most common crime committed against the elderly is theft (approximately 70%).

2.11. The main paradigm shifts

Understanding the nature of the ageing process and the extent and impact of ageism is crucial to any attempt to combat human rights violations against the elderly. Ageism and behaviour based

on discriminatory attitudes are a critical component and often the root cause of age-related human rights violations. Other factors also combine with ageist attitudes and practices to create disadvantages that affect certain groups of older people, such as race, ethnicity, gender, etc. (the concept of intersectionality). Factors such as the structure of labour markets also create an environment in which ageism leads to discrimination against the elderly.

The term *ageism* originated in relation to discrimination against the elderly, but it is also used to refer to discrimination against people of any age on the basis of their age.

The American sociologist, Butler who first coined the term in the 1960s in a joint publication with sociologist Myrna Lewis, described it as the systematic stereotyping and discrimination of people because on the basis of their age, just as racism and sexism are related to skin colour and gender. The elderly are referred to as senile, unintelligible in thought and manner, old-fashioned in morals and skills. Ageism allows the younger generation to see older people as different from themselves; thus, they imperceptibly cease to identify with their elders as human beings. Since the 1960s there have been significant developments in the understanding of ageism and its consequences, a large body of literature showing its nature and extent; that ageism is often invisible or accepted as a normal way of thinking and behaving; and that it may be significantly physically and mentally harmful to individuals and damaging to society as a whole.

Ageism may be implicit or explicit, negative or positive (i.e. outwardly benevolent) and may take many forms. It may manifest itself at different levels, so micro, meso or macro levels of ageist attitudes may exist in the individual's own mind, in the attitudes and behaviour of one person towards another; or at the institutional and political level. Ageist attitudes are widespread, including among the elderly themselves, and such internalisation leads to a range of harmful consequences[61].

[61] *Analytical summary study on normative standards in international human rights law relating to older persons. Working paper prepared by the Office of the United Nations High Commissioner for Human Rights*, March 2021, https://www.

There are three main types of ageism. These types may occur separately or act together when discriminating against an age group:

1. Cognitive: cognitive ageism involves stereotypes being used to think about people in relation to their age. For example, thinking that an older person will work slower than a younger person is an example of stereotyping.
2. Emotional: this type of ageism refers to a person's biased attitude towards other people due to their age. Prejudice is often linked to emotions.
3. Behavioural: the behavioural dimension of ageism involves people physically or verbally demonstrating their discrimination against people based on their age.

There are also several major ways in which ageism is expressed among individuals and in our society. These ways include at the microlevel, when ageism is practiced among individuals rather than among groups or societies; at the meso level, when gender discrimination is ingrained in social media and forms a common belief held by users of that network; and at the macro level, when gender discrimination is observed and practiced within a culture or institution.

Research has also found that there are several major stereotypes associated with ageism. These stereotypes are most commonly held by young people and reflect the way young people think older people should behave. These stereotypes include:

– inheritance, which refers to a young person believing that older people have 'had their turn' and should make way for younger people;
– consumption, which describes the way young people believe that limited resources should be used to benefit younger generations rather than older ones;
– identity, which refers to the belief that older people should 'act their age' or 'act like older people'[62];

ohchr.org/en/documents/outcome-documents/ohchr-working-paper-update-2012-analytical-outcome-study-normative [access 31.12.2022].

[62] Y.F. Parker, *Ageism and Discrimination against the Elderly*, https://florinroebig.com/age-discrimination/ [access 31.12.2022].

- dehumanisation, which involves the deprivation of signs of belonging to the human race, bestowing on people the characteristics of an object or a unfavourable state with the words *disabled*, *hag*;
- invisibilisation, which neglects or eliminates certain groups, e.g. age groups, from public life, ignoring their needs and interests;
- infantilisation, which involves deliberate and intentional public association of the elderly with immature groups, similar to children, leading to the perception of them as inept and limited in abity;
- medicalisation, which attributes a state of disease to certain categories of the population: for example, adjectives such as *sick*, *ancient*, *decrepit*, *senile* are often used in relation to the elderly;
- patronage, which portrays this age group as one that requires constant care and attention, and supplementary social benefits, rather than overcoming the difficulties that prevent it from independently participating economically, politically and socially[63].

Today, ageism towards the elderly is unreasonably manifested in comparing the elderly unfavourably with those younger. Everyone who belongs to this group is characterised by diminished physical and mental abilities, poverty, feebleness, outdated thinking and views rather than considering the individual characteristics of each person. It is interesting that the elderly who suffer no health problems, keep up with scientific and technological progress and develop are equally tainted by ageism and still constantly face harassment. It is unsurprising that rejuvenating procedures are becoming increasingly popular.

This may be explained by the fear of one is losing one's social and professional authority, becoming an object of ridicule because of the way one's appearance has changed. A person acquires internal complexes, becomes afraid of failing to conform to established

[63] О. Макарова, *Гоцудяк О. Питання ейджизму в Україні*, "Молодий вчений" 2020, pp. 74–77.

stereotypes, feels socially unattractive and sometimes even superfluous[64].

The legislative framework of Ukraine to combat ageism needs to be improved. Despite the formal prohibition of discrimination in all spheres of life, regulated by Article 24 of the Constitution of Ukraine[65], in practice ageism is becoming increasingly widespread, impeding equal rights and opportunities for everyone. It should be emphasised that Ukraine's anti-discrimination legislation is only represented by the Law of Ukraine 'On the Principles of Preventing and Combatting Discrimination in Ukraine', which establishes the agents empowered to prevent and combat discrimination, the general procedure for appealing against decisions and actions or omissions on discrimination, as well as stating that those guilty of violating the requirements of the legislation on preventing and combatting discrimination bear civil, administrative and criminal liability[66]. There remains, however, no effective mechanism to combat age discrimination. No state or non-state institutions exist that would monitor compliance with the principles of equality and justice in society.

Analysis of the problems caused by harmful and biased attitudes towards people based on their age advise us to emphasise the need to improve the legal framework in Ukraine. It is particularly necessary to adopt special laws to regulate in detail the relations between each age group in all spheres of life. The state should also actively pursue a social and legal educational policy in order to increase levels of tolerance, respect and acceptance of the population. An important task is the protection and moral support of the age groups that are

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[64] М. Єлігулашвілі, І. Федорович, С. Пономарьов, *Організація навчання з питань дискримінації. Практичний посібник*, Київ 2015, p. 136.

[65] *Конституція України: Закон України від 28 червня 1999 р. No. 254к/96-ВР/ Верховна Рада України*, "Відомості Верховної Ради України" 1996, No. 30, p. 141, http://zakon5.rada.gov.ua/laws/show/254%D0%BA/96- %D0%B2%D1%80 [access 31.12.2022].

[66] *Про засади запобігання та протидії дискримінації в Україні: Закон України від 06.09.2012 No. 5207-VI / Верховна Рада України*, "Відомості Верховної Ради України" 2013, No. 32, p. 412, https://zakon.rada.gov.ua/ laws/ show/5207-17#Text [access 31.12.2022].

most often subject to harassment. For this purpose it is necessary to organise free problem-solving groups, psychological training, legal activities and consultations that would help everyone, regardless of their age, to feel safe, confident and relaxed in society, as well as, in case of a case of discrimination, to be able thoroughly to protect themselves and defend their rights.

2.12. Conclusion

The human rights of the elderly are an issue that has increasingly attracted the attention of national and international legislators in recent years due to the growing demographic importance of this group. In order to assess whether there is a need for a specific human rights approach to the elderly, this report highlights some of the specific issues faced by the elderly under Ukrainian and international law. Existing international human rights laws fail clearly to identify and provide for the continuum of acts, circumstances and institutional factors that currently deprive older people of their dignity, which has led to the existing protection gap.

While there are a number of options for creating new human rights organs to address this problem, it is clear that no single soft law on the rights of the elderly, drafted and adopted at different times, focusing on different thematic issues and in different bodies, could provide the comprehensive framework needed to protect the specific circumstances of all elderly people.

We therefore believe that the most effective way to address this protection gap is systematically to articulate the way human rights apply in the context of old age and to the elderly in legally binding standards dedicated to the rights of the elderly.

The International Agreement on the Rights of Older Persons and the international mechanism for the protection of the rights of older persons, created under it, should be concluded on the basis of consensus, taking into account the different national and regional specificities of the concept of old age.

Indeed, with the notable exception of indigenous peoples and sexual minorities, the elderly are one of the last global demographics

without its own human rights regime. In a period when such specific instruments have come to be seen as important tools in the arsenal of human rights protection it seems that such an international convention on the rights of the elderly is a justified addition to the existing system of international human rights protection. Indeed, failure to gain specific recognition may lead to a particular issue being considered less worthy of attention from a human rights perspective than others.

The main problem of legal regulation of the protection of the rights of the elderly in Ukraine is the lack of a comprehensive legal act. This means that there are many gaps and, in particular, there is no definition of the concept of an elderly person, nor any system of state authority whose powers would include comprehensive monitoring of the situation with the realisation of the rights of older people. Despite these and other shortcomings of the legislative framework, in general the system of protection of the rights of the elderly in Ukraine fulfils its function. There is therefore a need to develop a special law based on international standards, which will define the concept of *elderly people* be they citizens of Ukraine, foreigners or stateless persons legally domiciled in Ukraine, who have reached the age of sixty.

The primary task for the protection of the elderly in Ukraine is a comprehensive reform of financial security, based not only on the criterion of raising the retirement age. The retirement age doubtless plays an important role in ensuring the sustainability of the pension system and its balanced functioning.

The regulation of this issue for the sake of the budget deficit should not be an end in itself. The task of pension reform should seek to ensure a fair distribution of income and guarantees of pension payments. The Ukrainian pension system should be friendly to the elderly and give them confidence in the future.

In Ukraine the network of residential institutions for the elderly requires immediate reform by creating new types of residential institutions with a reduced number of residents. The creation of such social institutions at the place of residence will make it possible to bring in-patient social services closer to the usual place of

residence of the elderly rather than breaking family and social ties that have developed over a lifetime.

According to the Ukrainian legislation, elderly citizens have the right to work on an equal footing with other citizens. It should, however, be noted that in modern conditions it is extremely difficult for elderly people to find a job, especially officially, despite their qualifications, practical skills and work experience. Age discrimination in the Ukrainian labour market, although prohibited by law, unfortunately remains widespread. We consider it necessary to address the issue of age discrimination in the legislation properly.

In order to expand opportunities for the continuation of work for older workers, to ensure a flexible organisation of work and working hours for such workers, national legislation also needs to be improved, in particular by implementing the provisions of the International Labour Organisation Recommendation No. 162 on older workers and best international practices of the employment of citizens of pre-retirement age, taking into account specific gender issues.

The state social protection policy, especially with regard to the elderly, needs to be improved in order to enhance its impact on the reduction of poverty. After all, the right to an adequate standard of living is violated by the biased definition of the basic state standard *subsistence minimum*, on which most social and pension payments depend. This indicator is half what it needs to be. This state standard requires revision.

The full-scale invasion of the Russian Federation in Ukraine and the introduction of martial law in Ukraine have presented a huge challenge for the system of legal protection of the rights of the elderly. The risk for the elderly, especially in the occupied territories, is extremely high and must not be neglected. It is necessary to simplify as much as possible the bureaucratic procedure for the elderly to obtain social services, to transfer them to an *extraordinary mode*.

In Ukraine today there is a worrying trend in the growth of crime, the victims of which are elderly people. To improve the way in which this type of crime is combatted, we consider it necessary to create a special law enforcement body in Ukraine to consider crimes against the elderly.

Overcoming age discrimination in Ukraine is possible only if the state is genuinely interested in solving this problem. Ageism is a serious obstacle to building a social democratic state. The problem of imbalance in relations between different age groups has recently become increasingly relevant and widespread, and therefore needs to be addressed urgently. To counteract ageism it is first of all necessary to direct efforts to improve the social and legal culture of the population, which will change the attitude of middle-aged people to younger and older age groups, as well as to *destroy* the myths about their lack of ability to be full and actively involved members of society.

It should be emphasised that, although the norms of Ukrainian legislation establish important provisions of general application regarding relations related to the prohibition of discrimination, there is currently a legal gap in the context of a holistic understanding of the concept of age discrimination in most of the analysed normative acts. The lack of consensus on this issue, in our opinion, should be resolved through the formation and implementation of a single categorical concept of ageism, since the use of a single categorical definition will not only contribute to the effective combatting of discrimination, but also minimise the ambiguous interpretation of existing legal norms related to the prohibition of discrimination on the basis of age.

Finally, an important element in establishing an effective system of protection of the rights of the elderly is the involvement of the public in the proposed reforms. All reforms should be accompanied by an informational and promotional campaign, as well as sector reforms aimed at structural changes in the economy, strengthening the policy of the employment of the elderly, development of medical and social infrastructure, etc.

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загальнообов'язковому державному пенсійному страхуванні. Законопроєкт від 08.08. 2022 року No. 7649, https://itd.rada.gov.ua/billInfo/Bills/Card/40193 [access 31.12.2022].

Проєкт Закону України «Про освіту дорослих» No. 7039 від 01.04.2022, https://www.kmu.gov.ua/bills/proekt-zakonu-pro-osvitu-doroslikh [access 31.12.2022].

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Закон України «Про державну соціальну допомогу особам, які не мають права на пенсію та особам з інвалідністю» від 18 травня 2004 року No. 1727-IV, https://zakon.rada.gov.ua/laws/show/1727-15#Text [access 31.12.2022].

Закон України «Про житловий фонд соціального призначення» від 12 січня 2006 No. 3334-IV, https://zakon.rada.gov.ua/laws/show/3334-15#Text [access 31.12.2022].

Закон України «Про загальнообов›язкове державне пенсійне страхування» від 09 липня 2003 року No. 1058-IV, http://zakon.rada.gov.ua/laws/show/1058-15 [access 31.12.2022].

Закон України «Про зайнятість населення» від 05 липня 2012 року No. 5067-VI, https://zakon.rada.gov.ua/laws/show/5067-17#Text [access 31.12.2022].

Закон України «Про засади запобігання та протидії дискримінації в Україні» від 06 вересня 2012 року No. 5207-VI, https://zakon.rada.gov.ua/laws/show/5207-17#Text [access 31.12.2022].

Закон України «Про збір та облік єдиного внеску на загальнообов›язкове державне соціальне страхування» від 8 липня 2010 року No. 2464-VI, https://zakon.rada.gov.ua/laws/show/2464-17#Text [access 31.12.2022].

Закон України «Про збір та облік єдиного внеску на загальнообов›язкове державне соціальне страхування» від

8 липня 2010 року No. 2464-VI, https://zakon.rada.gov.ua/laws/show/2464-17#Text [access 31.12.2022].

Закон України «Про освіту» від 05 вересня 2017 No. 2145-VIII, https://zakon.rada.gov.ua/laws/show/2145-19#Text [access 31.12.2022].

Закон України «Про основні засади захисту ветеранів праці та інших людей похилого віку» від 16 грудня 1993 No. 3721-XII, https://zakon.rada.gov.ua/laws/show/3721-12#Text [access 31.12.2022].

Закон України «Про пенсії про особливі заслуги перед Україною» від 01 червня 2000 року No. 1767-III, https://zakon.rada.gov.ua/laws/show/1767-14#Text [access 31.12.2022].

Закон України «Про пенсійне забезпечення осіб, звільнених з військової служби та деяких інших осіб» від 09 квітня 1992 року No. 2262-XII, https://zakon.rada.gov.ua/laws/show/2262-12#Text [access 31.12.2022].

Закон України «Про пенсійне забезпечення» від 09 квітня 1992 року No. 2262-XII, https://zakon.rada.gov.ua/laws/show/1788-12#Text [access 31.12.2022].

Закон України «Про реабілітацію осіб з інвалідністю в Україні» від 06 жовтня 2005 року No. 2961-IV, https://zakon.rada.gov.ua/laws/show/2961-15#Text [access 31.12.2022].

Закон України «Про соціальні послуги» від 17.01.2019 No. 2671-VIII, https://zakon.rada.gov.ua/laws/show/2671-19#Text [access 31.12.2022].

Закон України «Про статус ветеранів війни, гарантії їх соціального захисту» від 22 жовтня 1993 року No. 3551-XII, https://zakon.rada.gov.ua/laws/show/3551-12#Text [access 31.12.2022].

Закон України «Про статус і соціальний захист громадян, які постраждали внаслідок Чорнобильської катастрофи» від 28 лютого 1991 року No. 796-XII, https://zakon.rada.gov.ua/laws/show/796-12#Text [access 31.12.2022].

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Chapter 3. Mediation in the Light of the Concept of Restorative Justice with the Focus on the Croatian Model

3.1. Introduction: Development of restorative justice

Mediation is a method of resolving cases by involving third parties that is usually used in civil law. The use of mediation in criminal law aims at a restorative effect both for the victim and the offender, as well for the community as a whole. The modelling of the concept of restorative justice opened the way to rethinking the purpose of punishment and addressing injustice in a more pragmatic way. Mediation as part of the wider concept of restorative justice represents an important step in the culture of non-violence the correct application of mediation need not be limited to petty crimes. This paper will provide an in-depth analysis of restorative justice and its normative expression within the criminal law in Croatia. It will strive to provide an insight into the core of this concept through the existing legal measures in different countries with the focus on mediation. Analysis of the practical aspects of the implementation of mediation in Croatia will be made.

Conventional criminal justice systems focus their resources largely on applying the law, assessing guilt and administering

punishment[1]. In recent decades, however, criminal law has transformed its substantive and functional outlines through two paradigmatic changes. The first refers to a shifting of the focus of criminal law from the perpetrator to the victim. Creating the so-called victim-orientated criminal justice systems was a direct consequence of the broader demands for the humanisation of criminal law[2]. The new, victim-centred approach has manifested itself through the strengthening of the role of the victim in the procedure, providing additional guarantees and specific compensations. Behind such a process lies the symbolic, cultural, legal and philosophical transformation of the purpose of criminal law. The second change refers to criminal policy change, which transformed from retributive to a more preventative justice that focuses on the harm done[3]. The repressive orientation of criminal policy is older in a historical sense and predominated until the end of the 19th century[4]. In the 20th century, however, it was acknowledged that the traditional legal system (the retributive justice system) focuses on rules and laws, *often losing sight of the harm done to specific victims by the offender and the offence*[5]. The focal point in the construction of such transformation in the second

[1] UNODC, https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html [access 12.11.2022]

[2] The need for such a change was suggested by certain authors: "*…change in the focus of the entire* '*criminal justice*' *system away from punishing criminals and toward* '*victim justice*' *through compensation for victims* (L.B. Benson, *Let's focus on victim justice, not criminal justice*", "The Independent Review" 2014, Vol. 19, Issue 2, p. 209).

[3] M. Pifferi, *From Repression to Prevention: The Uncertain Borders between Jurisdiction and Administration*, [in:] *Reinventing Punishment: A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries*, M. Pifferi (ed.), Oxford 2016, p. 199, https://doi.org/10.1093/acprof:oso/9780198743217.001.0001 [access 19.10.2022].

[4] Ž. Horvatić, L. Cvitanović, *Politika suzbijanja kriminaliteta*, Zagreb 1999, p. 94.

[5] H. Zehr, *Restorative Justice: The Concept*, "Corrections Today" 1997, Vol. 59, Issue 7, p. 68.

half of the 20th century was the creation of state compensation programmes[6] in many developed countries[7].

These two changes have stimulated reflections on the purpose of punishment and re-examination of the basic concepts of criminal law, providing a fertile ground for building a system of restorative[8] justice. The most influential developments within criminal justice policy in recent years have been the rise of a victim-focused agenda and the emergence of a distinctive set of practices known as restorative justice[9]. While under the retributive model, crime is a violation of the laws of the state and the state is viewed as the victim, to whom the offender owes an obligation to suffer punishment[10], in restorative justice, the configuration is different. The latter marks the approach in which the victim is an individual who deserves his or her harm to be repaired.

Across the literature there has been a certain degree of conceptual confusion with regard to the definition of the restorative justice[11]. The term tends to be used in reference to practices such

[6] The *ratio legis* of such programmes is based on the idea of the state's responsibility for failing to protect its citizens from crime. Given that the state has a monopoly on force and plays a major role in the prevention of criminal acts, so, if it fails, it must bear a certain share of the responsibility (see: M. Spinedi, *State responsibility v. individual responsibility for international crimes – Tertium non datur*, "European Journal of International Law" 2002, Vol. 13, Issue 4, pp. 895–899).

[7] New Zealand enacted the first such programme in 1963 (The New Zealand Criminal Compensation Act, see: B. Cameron, *The New Zealand Criminal Compensation Act, 1963*, "The University of Toronto Law Journal" 1965, Vol. 16, No. 1, p. 178), and among European legal systems, Germany was the pioneer in 1976 (Opferentschädigungsgesetz).

[8] The term restorative justice comes from the English word *restore*, which means to return to a previous state, re-establish, restore, compensate, restore the original values, set in the initial position.

[9] J. Dignan, *Understanding victims and restorative justice*, Berkshire 2005, p. i.

[10] K.L. Joseph, *Victim-Offender Mediation: What Social & Political Factors Will Affect Its Development?*, "Ohio State Journal on Dispute Resolution" 1996, Vol. 11, p. 216.

[11] Albert Eglash (1977) is usually credited as the original author of the coin (although the meaning of restorative justice broadened considerably beyond the notion of Eglash's initial formulation) – J. Dignan, *Understanding…*, *op. cit.*, p. 11.

as victim-offender mediation, but its meaning is far wider insofar as it includes various forms of rights and duties within the criminal law system: support organisations, the development of victim compensation schemes, etc. for victims; and community service, reparation and financial compensation orders imposed on offenders.

The most widely accepted definition was formulated by *Marshall*:

> *Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve the way to deal with the aftermath of an offence and its implications for the future.*[12]

The underlying core of this concept lies in the relative theories based on the utilitarian relationship of the criminal law's reaction to the goal to be achieved. In this sense it may be said that restorative justice is an expression of striving for alternative measures, which will seek to have a stronger focus on the victim and repair than on, as before, the perpetrator and punishment.

The meaning of the modern concept of restorative justice complements or even replaces procedure and punishment and was affirmed in the legal frameworks of the Council of Europe, the United Nations and the European Union, as well as the frameworks of other states across the world. The Council of Europe's Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters, defines the following:

> *'Restorative justice' refers to any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party*[13].

This definition suggests that in the framework of restorative justice the role of both the victim and the perpetrator is important

[12] T.F. Marshall, *Restorative Justice: An Overview*, London 1999, p. 5.

[13] Recommendation concerning restorative justice in criminal matters 2018.

in the effort to repair the damage caused by the criminal act. It also suggests the participation of an impartial third party who, in place of the court, will participate in the process of restorative justice, emphasising the fact that it is essentially an alternative instrument of resolution.

Another definition, which also emphasises the element of repair within the restorative justice system, goes as follows:

> *Restorative justice is a procedure in which all interested parties who have come into contact with an illegal act, have the opportunity to discuss the way the illegality affects them and decide how to repair the damage*[14].

According to *Braithwaite*, restorative justice *'must have a restorative effect on both the victim and the perpetrators and for the community as a whole'*[15]. This definition emphasises the precisely humane dimension of criminal justice systems that is stressed today more than ever before.

It is also worth mentioning that the concept of restorative justice holds many benefits for all involved, the perpetrator, the community and the victim. *Umbreit, Coates* & *Kalanj's* recent research revealed high levels of client satisfaction and perceptions of fairness, as well as reduced fear and anxiety among victims of crime, as well as an increased likelihood that an offender will successfully complete the obligation of restitution[16]. All these findings provide encouraging and plausible empirical support that the restorative justice system and its components, e.g. mediation, are effective.

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[14] J. Braithwaite, *Restorative justice and de-professionalisation*, "The Good Society" 2004, Vol. 13, No. 1, p. 28.

[15] J. Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford 2002, p. vii.

[16] See: M.S. Umbreit, R.B. Coates, B. Kalanj, *Victim Meets Offender: The Impact of Restorative Justice and Mediation*, Monsey 1994.

Today most countries apply some of the restorative models of justice[17]. They are applied in different areas[18], such as disciplinary actions in educational institutions, divorce proceedings and international and commercial disputes, as well as being applied after mass violations of human rights or conflict in the form of transitional justice[19]. In the following table, the difference between the approach of restorative justice and that of punitive and rehabilitative justice (dominant until recently) is graphically presented.

Table 3.1. Comparison of the three different approaches[20] within the criminal justice system

Detailing	**Punitive approach**	**Rehabilitative approach**	**Restorative justice approach**
Who or what is in focus?	the criminal act	the perpetrator	the victim and the society
Goals and methods	society's security through intimidation, retaliation and isolation	rehabilitation of offenders and reduction of recidivism	*restitutio in integrum*; compensation for damages
State's role?	broad	medium	limited

[17] *Well over 80 countries use some form of restorative practice in addressing crime; the actual number could be closer to 100* – D. Van Ness, *An Overview of Restorative Justice Around the World, Eleventh United Nations Congress on Crime Prevention and Criminal Justice*, Vancouver 2005, p. 1.

[18] Within the area of criminal law, restorative justice tends to be used in less serious offences than crimes of a more serious nature, esp. in the cases of juvenile offenders (White Code, 2022, https://viamediationcentre.org/readnews/Mzky/Restorative-Justice-in-relation-to-Mediation [access 12.12.2022]).

[19] T. Džamonja Ignjatović, N. Žegarac, *Restorativna pravda između filozofije i empirije*, "Godišnjak Fakulteta političkih nauka u Beogradu" 2008, Vol. II, No. 2, p. 466; D. Ranđelović, *Efikasnost i neki domeni primjene medijacije između žrtve i počinioca*, "Godišnjak za psihologiju" 2006, Vol. 4, No. 4–5, p. 192.

[20] In 1977 Albert Eglash described the three different approaches to criminal justice system as follows: restorative justice (as an approach based on repairing damage caused by a criminal offence with the participation of victims and perpetrators), retributive justice, based on punishment, and distributive justice, based on the therapeutic treatment of the offender (A. Nylund, K. Ervasti, L. Adrian, *Nordic mediation research*, Cham 2018, p. 1, https://doi.org/10.1007/978-3-319-73019-6 [access 19.10.2022]).

Basic procedure	punishment	treatment	personal interactions between perpetrator and victim
Principles	state and offender are key elements blame-fixing central crime defined by violation of rules	offender as the key element re-socialisation central perpetrator's needs and rights central	victim and offender are key elements problem-solving central victim's needs and rights central crime defined by harm to people and relationships

Source: The idea of the table is taken and partially adjusted from N. Koller-Trbović, A. Žižak, A. Mirosavljević, H. Pirnat Dragičević, L. Schauperl, *Izvansudska nagodba u kaznenom postupku prema mladima u sukobu sa zakonom u Republici Hrvatskoj*, Zagreb 2013, p. 12; and K.L. Joseph, *Victim-Offender Mediation: What Social & Political Factors Will Affect Its Development?*, "Ohio State Journal on Dispute Resolution" 1996, Vol. 11, p. 223.

Restorative justice is implemented in several ways. One is mediation, which will be analysed in the following chapter.

3.2. Mediation[21]

The process of mediation is based on the principle of restorative justice (as opposed to the retributive or distributive approach). In essence the term mediation is used when describing the form of the alternative solution of disputes that seeks to conclude a dispute in a settlement, without protracted, costly judicial proceedings[22]. *Gorghiu* defines mediation as *'a way to resolve conflicts amicably by means of a trained third party, as the mediator, an alternative to the traditional state-run courts'*[23], and *Retnanigrum* defines it as *'a method*

[21] Sometimes the term conciliation is used as a synonim for mediation (e.g. European e-Justice Portal, 2022, https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?FINLAND&member=1 [access 17.10.2022]).

[22] P. Stączek, *Mediation in criminal cases*, 2022, http://karne.pl/en/mediation.html [access 1.11.2022].

[23] A.-S. Gorghiu, *Perception of Civil Society on Mediation in Criminal Matters*, "Procedia – Social and Behavioral Sciences" 2013, Vol. 92, p. 365.

to solve cases by involving third parties aiming at making the perpetrators aware that their criminal act is wrong and to percieve that the victims need to be compensated"[24]. It is inevitable that a peaceful, non-repressive procedure based on the voluntary participation of both the perpetrator and the victim, aiming at a resolution of a conflict and reparation of the damage caused, has a huge potential for creating an atmosphere for a culture of non-violence. In recent years mediation has therefore broadened its ambit and is used more frequently. Mediation is used in both civil matters and criminal matters. In criminal matters mediation may be used for crimes that are assessed as eligible for mediation, taking into account the nature and method of the offence, the relationship between the perpetrator and the victim and other issues related to the crime as a whole[25]. *Laflin* underlines the two common elements of mediation: (1) a third party neutral who helps facilitate a dispute, but who (2) lacks power to dictate the resolution[26]. The limited power of the neutral third party over the outcome of the dispute is merely a to ensure the parties' self-determination[27]. Another key element would also be (3) voluntary participation. Without the will of both offender and victim, the mediation might fail to fulfil its main goals. There are several reasons individuals might want to participate in mediation. Victims' might seek to recover their losses, to participate directly in the criminal justice system, helping offenders stay out of trouble, to explain their injury, so that the offenders understand the harm they have caused[28].

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[24] D.H. Retnaningrum, *Penal Mediation from the Perspective of Criminal Law (Study of the Settlement of Criminal Cases by Mediation)*, "SHS Web of Conferences" 2018, Vol. 54, p. 1, https://doi.org/10.1051/shsconf/20185408009 [access 12.11.2022].

[25] European e-Justice Portal, 2022, https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?FINLAND&member=1 [access 17.10.2022].

[26] M. Laflin, *Remarks on Case-Management Criminal Mediation*, "Idaho Law Review" 2004, Vol. 40, p. 575.

[27] See: N.A. Welsh, *The Thinning Vision of Self-Determination in Court – Connected Mediation: The Inevitable Price of Institutionalization?*, "Harvard Negotiation Law Review" 2001, Vol. 6, Issue 1.

[28] R.B. Coates, J. Gehm, *An Empirical Assessment*, [in:] *Mediation and Criminal Justice: Victims, Offenders and Community*, M. Wright, B. Galaway (eds.), London 1989, p. 253.

Although victims may initially be nervous about meeting the offender, they participate voluntarily and generally do not feel pressured to interact with the offender[29]. Offenders' might seek to participate in mediation to avoid harsher punishment, to get the whole experience of crime and consequences behind them, and to make reparation[30]. Although offender participation is generally portrayed as voluntary, a study has found this not always to be the case[31].

Not only do the offender and the victim benefit from mediation, but so do the justice system and society. Mediation provides an efficient, less costly alternative to criminal litigation and relieves the overburdened criminal court system[32], and improved rehabilitation of the offender and reduced recidivism mean that the community is spared future criminal conflict and victimisation[33].

Although mediation is more often applied in civil matters[34], this paper will the focus on mediation in criminal matters.

3.2.1. MEDIATION ACROSS EUROPE

While the USA is often considered the mother-country of mediation, the European Union has promoted its own mediation policies over

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[29] R.B. Coates, J. Gehm, *An Empirical Assessment*, *op. cit.*

[30] *Ibidem*.

[31] *Ibidem*. The study found that the offenders thought that their punishment would be reduced if they participated in the mediation.

[32] H. Mika, *The Practice and Prospect of Victim-Offender Programs*, "SMU Law Review" 1993, Vol. 46, Issue 5, p. 2199.

[33] H. Mika, *The Practice and Prospect of Victim-Offender Programs*, *op. cit.*

[34] Mediation is most commonly used in civil disputes, particularly in minor civil cases. European e-Justice Portal, 2022, https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?FINLAND&member=1 [access 17.10.2022]. The key concepts of mediation on the European level are also defined in the Code of Conduct for Mediators (which also refers to civil and commercial matters: "*This code of conduct sets out a number of principles to which individual mediators may voluntarily decide to commit themselves, under their own responsibility. It may be used by mediators involved in all kinds of mediation in civil and commercial matters*" (Preambule). European Code of Conduct for Mediators of the European Commission, 2004, www.euromed-justice.eu/en/document/eu-european-code--conduct-mediators [access 12.11.2022].

the past decades. First, it improved public awareness of the mediation benefits and also enacted non-binding mediation legislation, and obliged states to encourage individuals to use mediation as an alternative[35].

In 1999 the Committee of Ministers of the Council of Europe adopted the Recommendation on mediation in criminal matters (henceforth the Recommendation 1999)[36]. The Recommendation 1999 was soon followed by the Council Framework Decision of the European Council on the standing of victims in criminal proceedings[37] (henceforth the Framework Decision), which prescribed that each member state should encourage mediation between victims and perpetrators of a criminal offence (Article 10)[38]. In 2002 the Economic and Social Council of the UN adopted Basic principles of the use of restorative justice programmes in criminal matters[39]. At the level of the European Union in 2012 the Framework Decision was replaced by the Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime[40] (henceforth the Directive 2012/29), which mentions restorative justice services described in the preamble of the Directive 2012/29:

> *Restorative justice services, including for example victim-offender mediation, family group conferencing and*

[35] K. Jessen, *Mediation development in Europe*, 2022, p. 1, https://www.lexology.com/library/detail.aspx?g=da1f4579-913d-4df1-8ded-cd9720955ee2 [access 12.11.2022].

[36] Council of Europe, 1999, Recommendation No. R (99) 19 concerning mediation in penal matters.

[37] Council of Europe, 2001, Framework Decision of the European Council on the standing of victims in criminal proceedings 2001/220/JHA.

[38] Article 10: "*Penal mediation in the course of criminal proceedings: 1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure. 2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account*".

[39] Economic and Social Council, 2002, Basic principles of the use of restorative justice programmes in criminal matters.

[40] European Parliament & Council of Europe, 2012, Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime.

> *sentencing circles, can be of great benefit to the victim, but require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation. Such services should therefore have as a primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm. Factors such as the nature and severity of the crime, the ensuing degree of trauma, the repeat violation of a victim's physical, sexual or psychological integrity, power imbalances and the age, maturity or the intellectual capacity of the victim, which might limit or reduce the victim's ability to make an informed choice or might prejudice a positive outcome for the victim, should be taken into consideration in referring a case to the restorative justice services and in conducting a restorative justice process. Restorative justice processes should, in principle, be confidential, unless agreed otherwise by the parties, or as required by national law due to an overriding public interest. Factors such as threats made or any forms of violence committed during the process may be considered as requiring disclosure in the public interest*[41].

According to Article 25 paragraph 4 of the Directive 2012/29, member states are also obliged to encourage the training of employees for restorative justice services:

> *Through their public services or by funding victim support organisations, Member States shall encourage initiatives enabling those providing victim support and restorative justice services to receive adequate training to a level appropriate to their contact with victims and observe professional standards to ensure such services are provided in an impartial, respectful and professional manner.*

[41] Unfortunately, the official translation of the directive into Croatian failed to adopt the foreign term *restorative justice*, but the term *damage repair services,* a slightly more ungainly term that does not cover the full variety of matter that such services should deal with.

Finally, in 2018 the Committee of Ministers of the Council of Europe adopted a new *Recommendation concerning restorative justice in criminal matters* (henceforth the Recommendation 2018)[42]. The scope of the Recommendation 2018 is defined in Article I (1):

> *This Recommendation aims to encourage member States to develop and use restorative justice with respect to their criminal justice systems. It promotes standards for the use of restorative justice in the context of the criminal procedure, and seeks to safeguard participants' rights and maximise the effectiveness of the process in meeting participants' needs. It also aims to encourage the development of innovative restorative approaches – which may fall outside of the criminal procedure – by judicial authorities, and by criminal justice and restorative justice agencies.*

Article II (3) provides the definition:

> *Restorative justice refers to any process that enables those harmed by crime and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party (henceforth the facilitator).*

The Recommendation 2018 discusses the ways in which states might use restorative justice in order to increase the effectiveness of mediation between victims and perpetrators and is the most advanced and the most sophisticated international legal instrument in this area[43].

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[42] Council of Europe, 2018, Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters.

[43] A. Maršavelski, K. Ivanušić, *Restorativna pravda u kaznenopravnoj teoriji i praksi*, "Hrvatski ljetopis za kaznene znanosti i praksu" 2021, Vol. 28, No. 2, p. 484, https://doi.org/10.54070/hljk.28.2.10 [access 13.11.2022].

Many Member States have adopted separate laws on mediation, in particular Austria[44], Croatia[45], Germany[46], Ireland[47], Italy[48] and Spain[49]. Some of the mediation models of chosen European countries will be discussed below.

3.2.1.1. Italy

Although mediation has long been known in Italy, it only began to seriously to develop it as an alternative dispute mechanism over the last fifteen years or so[50]. The major normative framework regarding mediation has already been mentioned above, the Italian Law on Mediation, enacted in 2010. This law, however, refers only to mediation in civil and commercial disputes: *'Anyone can access mediation for resolving civil and commercial disputes concerning available rights'*. In Article 1 paragraph 1 mediation is defined as: *'the activity, however denominated, carried out by an impartial third party and aimed at assisting two or more subjects in seeking an amicable agreement for the settlement of a dispute, also with the formulation of a proposal for its resolution'*[51]. Judges tend not to be permitted to send cases to mediation, but may only advise the parties during the process to try to mediate their case before them. Only in those disputes in which a mandatory mediation attempt is required by law prior to a court case is it necessary that the parties try a prior mediation procedure.

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[44] Bundesgesetz über Mediation in Zivilrechtssachen, 2003 (StF: BGBl. I Nr. 29/2003).

[45] Zakon o mirenju, 2011, Narodne novine 18/11.

[46] Mediationsgesetz, 2012 (BGBl. I S. 1577, 2012).

[47] The Mediation Act, 2017, http://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/html [access 23.11.2022].

[48] Decreto Legislativo 2010, No. 28 Attuazione dell'articolo della legge giugno, No. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali (10G0050) (GU Serie Generale No. 53 del 05-03-2010).

[49] Ley 5/2012, de mediación en asuntos civiles y mercantiles, "Boletin Oficial del Estado" 2012, 162, Sec. I.

[50] See: A. Bruni, *Mediation in Italy*, 2011, https://www.mediate.com/mediation-in-italy/ [access 17.10.2022].

[51] Decreto Legislativo 2010.

The mediation process may last up to three months, after which the mediation attempt is considered complete[52]. Mentioned law does not regulate penal mediation, which in Italy is possible via the Italian Penal Code. Criminal mediation, however, is used only in cases in which offences are prosecuted upon complaint and in juvenile proceedings. Social workers employed by the Juvenile Criminal Justice Department are the only professionals involved in mediation.

Even though mediation began in Italy in 2003, it remained unknown to the majority of potential users and its use did not increase there[53]. Italy's Constitutional Court then declared the compulsory character of mediation to be illegitimate, i.e. the unconstitutionality of the provisions that affect the ability to gain access to a court prior to recourse to the mediation process was established. The result of that was that mediation has rarely occurred since and mediations that do occur have low settlement rates. Lawyers also oppose mediation and raise doubts about its legitimacy (as limiting access to justice in the courts), resulting in a severe limitation on discussions of mediation possibilities[54]. In Italy, victim-offender mediation does not take place in any uniform or structured way and the decision to implement mediation is reliant on the judge's discretion[55].

3.2.1.2. Portugal

Portugal has enacted its Law on Mediation[56]. The Portuguese mediation model is based on the voluntary and free decision of the parties

[52] Article 6.1 of Decreto Legislativo 2010. Previously the mediation was supposed to last no longer than 4 months, but this paragraph was changed in 2013 (Legislative Decree 21 June 2013, No. 69, converted, with amendments, by Law of 9 August 2013, No. 98).

[53] K. Jessen, *Mediation…*, *op. cit.*

[54] *Ibidem.*

[55] A.C. Baldry, *Victim-Offender Mediation in the Italian Juvenile Justice System: The Role of the Social Worker*, "The British Journal of Social Work" 1998, Vol. 28, Issue 5, p. 741, https://doi.org/10.1093/oxfordjournals.bjsw.a011388 [access 17.10.2022].

[56] Ley 5/2012, de mediación en asuntos civiles y mercantiles, "Boletin Oficial del Estado" 2012, 162, Sec. I.

and on the intervention of a mediator, which is intended as an active intervention in order to resolve the controversy by the parties themselves. This law applies to mediations in civil and commercial matters, including cross-border conflicts, whenever they do not affect the rights and obligations that are not within the ambit of the parties given the applicable legislation. By default, of express or tacit submission to this law, the same will be applicable when at least one of the parties has its domicile in Spain and the mediation takes place in Spanish territory. The penal mediation, however, is explicitly excluded from this law. Portuguese mediation law is characterised by a considerable level of state control: state institutions function as the first port of call for mediation and supervise the admission of mediators. The cost of mediation proceedings are kept low for the parties and outside the formalised structures they are denied legal support[57]. In Portugal there are currently public and private mediation systems. In the field of public mediation we may also distinguish between the mediation of generic competence and the specialised mediation in the labour, criminal and family area. Penal Mediation is prescribed in Law No. 21/2007[58] and deals with private crimes and some semi-public crimes (with the exception of crimes punished by terms of imprisonment longer than five years, crimes against liberty or sexual self-determination, embezzlement by a public officer, corruption or influence peddling, whenever the offender is younger than 16 years of age, or the accused is a corporate person) or when the summary procedure is applicable (*processo sumári*). Portugal provides mediation through the so-called Courts of Peace and institutional Arbitration Centres.

[57] J.P. Schmidt, *Mediation in Portugal: Growing Up in a Sheltered Home*, [in:] *Mediation: Principles and Regulation in Comparative Perspective*, K.J. Hopt, F. Steffek (eds.), Oxford 2012, p. 809, https://doi.org/10.1093/acprof:oso/9780199653485.003.0015 [access 12.11.2022].

[58] Criminal Mediation System 2007, dealing with private crimes and some sem-ipublic crimes. On this matter, see M.F. Monte, *Um balanço Provisório sobre a Lei de Mediação Penal de Adultos*, [in:] *Homenagem de Viseu a Jorge Figueiredo Dias*, Coimbra 2011, pp. 113–127.

3.2.1.3. Norway

In Norway restorative justice is dealt with by the Conflict Council[59], which resolves more than four criminal cases and as many civil cases annually[60]. In Norway there are also 22 regional offices of the National Mediation services. Norway has no classic court mediation in criminal proceedings initiated before the court. Mediation is, however, crucial for criminal prosecution because the state attorney may condition the initiation of criminal proceedings by participating in mediation[61]. When imposing a suspended sentence, the court may also, as a special condition, i.e. as a special obligation to order mediation between the perpetrator and the victim, mediation may also be part of work for the common good[62]. In proceedings against juvenile offenders the court may as an alternative sanction mediation[63]. The general mediation services offered may also be used for minors who are under the age of criminal responsibility. There are separate rules for mediation of criminal cases. Annually about 4,500 cases are referred to victim-offender mediation in Norway[64]. For penal mediation the basic act is Norway's Criminal Code and the National Mediation Services Act, which prescribes that victim--offender mediation be allowed only when the crime committed is appropriate[65]. Crimes considered appropriate may not be serious, and tend not to involve violent acts.

[59] Konfliktraadet, 2022, https://konfliktraadet.no [access 13.11.2022].

[60] A. Nylund, *Introducing to the Preparatory Stage on Civil Proceedings*, [in:] *Current Trends in Preparatory Proceedings. A Comaparative Study of Nordic and Former Communist Countries*, eds. L. Ervo, A. Nylund, 2014, p. 108.

[61] A. Maršavelski, K. Ivanušić, *Restorativna…*, *op. cit.*, p. 485.

[62] *Ibidem*.

[63] *Ibidem*.

[64] A. Nylund, *Restorative justice and victim-offender mediation in Norway*, Cham 2019, p. 5.

[65] *Ibidem*, p. 6.

3.2.1.4. Netherlands

In contrast to Norway, in the Netherlands there is mediation in criminal matters that come before the courts, where mediation offices have been established[66]. There are no legal restrictions that would exclude the possibility of the application of mediation in criminal proceedings, nor from the aspect of the criminal offence, nor from the aspect of the prescribed punishment for the criminal offence relevant to the case. If a criminal case is suitable for mediation, a public prosecutor or a judge may offer it as an option. This form of mediation does not replace the criminal law proceedings; it is intended to remedy the emotional and material damage that has occurred as a result of the offence. The mediation office will contact the offender and the victim and explore the possibility of initiating mediation. If mediation is possible, the mediation office will appoint two specialist criminal law mediators and schedule the individual intake sessions. The intake interviews are usually followed by a mediation session between the offender and the victim, which is held in the court's dedicated mediation room. Mediation is available free of charge to parties to criminal proceedings[67].

3.2.1.5. Spain

The first pilot projects took place around 1997 and later on with their establishment around 2015, the restorative justice system and mediation have been characterised by the constant demonstration of the validity and of the practical results in Spain. Mediation is defined in the Spanish Act on mediation in civil and commercial matters (Spanish Act 5/2012)[68] as a:

[66] See: https://www.rechtspraak.nl/Onderwerpen/mediation/mediation-in-strafzaken [access 13.11.2022].

[67] See: https://www.rechtspraak.nl/English/Pages/mediation.aspx [access 13.11.2022].

[68] Real Decreto-ley 5/2012, de mediación en asuntos civiles y mercantiles.

> *dispute resolution method, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.*

Penal mediation is recognised in the Spanish Penal Code. Despite the many advantages of mediation, such as efficiency and economy, Spain continues to be very rooted in recourse to the courts. Court-integrated or judicial mediations are unpopular and, even when courts propose mediation to the parties, the proposal is often rejected because the parties only trust judicial decisions[69]. Limitation periods differ depending on the type of action being brought. The only type of case where mediation is not allowed is domestic violence (Organic Law No. 1/2004 about Measures of Comprehensive Protection against Domestic Violence).

3.2.1.6. Slovenia

The Act on Alternative Dispute Resolution in Judicial Matters (ZARSS, Uradni List RS (UL RS; Official Gazette of the Republic of Slovenia) Nos. 97/09 and 40/12 – Fiscal Balance Act (ZUJF)), which was adopted on 19 November 2009 and came into force on 15 June 2010, requires first-instance and second-instance courts to adopt and bring into force a programme of alternative dispute settlement to allow parties alternative means of settlement in disputes on commercial, labour, family and other civil-law matters. Mediation may be used in civil, family, commercial, labour and other property-related matters with regard to claims which may be fall within the ambit of the parties to resolve. Mediation is also admissible in other matters, as long as it is not excluded by law. Mediation is most common in civil, family and commercial matters. Slovenian Law on Criminal Procedure[70] in Article 161a stipulates that a state attorney may file an indictment or an indictment for a criminal offence for

[69] N. Andrés, C. Carrasco, L.J. Morón, *Mediation Q & A: Spain*, London 2018, p. 6.
[70] Slovenian Law on Criminal Procedure, U.l. RS no. 32/2007.

which a fine or a prison sentence of up to three years is prescribed and due to special circumstances also for criminal acts of grievous bodily harm, aggravated theft, tax evasion and damage to another's property, or, if the report is filed against a minor or for other criminal offences for which the Penal Code prescribes a prison sentence of up to five years. In doing so, the type and nature of the offence, the circumstances in which it was committed, the personality of the perpetrator, his previous convictions for similar or other criminal offences and the degree of his criminal responsibility are all taken into account. The settlement is led by the mediator, who is obliged to initiate the case in the procedure. A settlement may only be implemented with the consent of the suspect and the injured party. The regulator is independent in his or her work. The adjuster must try to ensure that the content of the agreement is proportionate to the severity and consequences of the actions. Once he or she has received the notification about the fulfilment of the agreement, the state attorney rejects the application. The expert is also obliged to inform the state attorney about the failed settlement and the reasons for it. The deadline for the execution of the agreement cannot be longer than three months. In criminal cases the legal text does not use the term 'mediation', but 'settlement procedure'. The method, procedure and other rules on settlement in criminal cases are defined by the Ordinance on Settlement in Criminal Matters, Law No. RS, No. 114/2004. The goal of the settlement is to conclude an agreement that brings certain moral or material satisfaction for the injured party, and to reach it in the settlement process. The settlement procedure and the content of the agreement are secret, if such is necessary to protect privacy as dictated by law, to protect public order and morality, and to protect the personal and family life of the suspect or injured party or parties, the interests of a minor suspect or injured party, or if, in the opinion of the arbitrator, the public has violated the interests of justice.

3.3. Analysis development of the normative framework regarding restorative justice and mediation in Croatia

3.3.1. LEGAL REGULATION

The Croatian criminal law framework allows the application of restorative justice to a greater or lesser extent in the following 7 situations:

> *1. application of general principles of opportunity and application of the principle of opportunity towards minors;*
> *2. agreement between the state attorney's office and the defendant;*
> *3. mediation in private lawsuits, conciliation in proceedings at the suggestion of the injured party and mediation with the injured party as a subsidiary claimant;*
> *4. imposition of special obligations;*
> *5. adhesion procedure;*
> *6. restorative justice in the execution of a prison sentence;*
> *7. other possibilities of applying restorative justice*[71].

It may be concluded that according to the normative framework, the Croatian criminal justice system in principle provides a broad range of opportunities for the application of restorative justice in criminal matters. Each of these aspects will be analysed below.

3.3.1.1. Principle of opportunity

According to Article 206d of the Croatian Criminal Procedure Act (henceforth the CCPA)[72], the state attorney may, with the consent of the victim or injured party, conditionally postpone or waive criminal prosecution in cases in which offences are being prosecuted *ex officio* and for which the prescribed sentence is a fine or

[71] A. Maršavelski, K. Ivanušić, *Restorativna…*, *op. cit.*, p. 488.
[72] Zakon o kaznenom postupku, 2008.

a prison sentence of up to five years[73], if the perpetrator accepts one of the six obligations listed, including those of a restorative nature. Those obligations are to repair or compensate for damage caused by a criminal offence; to pay for due obligations to a public institution, humanitarian or charitable purpose. A similar provision may be found in the law that regulates the treatment of minors. According to the provisions of Article 64 of the Juvenile Courts Act (henceforth the JCA)[74], a state lawyer may decide to withdraw from criminal prosecution towards the minor offender and make it conditional on the prior fulfilment of certain obligations. Some of these obligations have a restorative character, for example, an apology to the victim, repair of the damage caused by the criminal act, involvement in the mediation process through an out-of-court settlement, involvement in the work of humanitarian organisations and other obligations that are commensurate with the criminal offence committed and the minor's personal and family circumstances. In order for the state attorney to be able to issue a decision on postponing the initiation of criminal prosecution (as well as the existence of the three conditions stated), prior consent of the injured party and the consent and readiness of the suspect to fulfil the order obligation to him are required. Logically, prior consent of the injured party is not applicable in the case of criminal offenses that have no injured party, e.g. criminal offence, abuse of narcotics drugs. The consent of the victim as a prerequisite for the application of this indicates the importance of the victim's participation in the procedure and consideration for his or her needs, which is all rooted in the principles of restorative justice.

[73] The laws before the current law on criminal procedure prescribed much narrower options for conditional postponement of the procedure. Initially, the application of the principle of expediency was only possible for criminal offences carrying sentences of between one and three years in prison, so that today it would be possible for all offences carrying potential sentence of up to five years. This suggests that the Croatian legislator is striving to expand the application of this institute, taking into account contemporary trends in the application of the principles of restorative justice.

[74] Zakon o sudovima za mladež, 2011.

The social and political significance of restorative justice have recently become increasingly prominent. The increased significance of the socio-political purpose is best seen in relation to the position of the victim. Reinforced respect for the interests of the victim is also in line with the tendencies in criminal substantive and procedural law.

In the decision the state attorney will determine the deadline within which the defendant is obliged to fulfil the obligations imposed on him

The specified deadline for fulfilling the obligation cannot be longer than one year. The decision on the imposition of special obligations is delivered to the defendant, as well as to the injured party and the victim. No appeal is allowed against that decision.

Applying a conditional suspension of criminal prosecution obviates criminal proceedings against the suspect, most often in the case of minor crimes and sometimes sentencing in criminal proceedings due to the parties' already having found the suspect 'sanction' (in the form of a fulfiled obligation) ordered by the state attorney. If the suspect fulfils the obligation, the state attorney must then dismiss the criminal case. Within the deadline imposed on the defendant for the fulfilment of special obligations, the court terminates the initiated criminal proceedings until a deadline.

3.3.1.2. Agreement between the state attorney's office and the defendant

According to the CCPA, the offender and state attorney may negotiate the terms of a plea of guilty and agree on a sanction (Article 360). The state attorney also has the power to negotiate and agree with the defendant on a plea of guilty and a sanction. Such an agreement must contain the following:

1) a description of the criminal offence that is the subject of the charge;
2) the perpetrator's statement on the admission of guilt for that criminal offense;

3) an agreement on the type and extent of the punishment, caution, suspended sentence, partially suspended sentence, special obligations, custody, confiscation of objects and costs of the procedure (Article 360 paragraph 4);
4) a statement of the defendant on the submitted property claim;
5) a statement of the defendant on acceptance of the state attorney's proposal for the imposition of security measures and confiscation of the property benefit realised by the criminal offence;
6) signature of the parties and defence counsel.

Upon their final agreement, the state attorney is obliged to notify the victim or injured party (Article 360 paragraph 5 of the CCPA). If it is a crime against life and limb or against sexual freedom which carries a prison sentence of more than five years, the state attorney must obtain the consent of the victim for negotiation. If the victim has died or is incapable of giving consent, consent will be requested from the following persons: his or her spouse or common-law partner, life partner or informal life partner or descendant, and if there are none, distant relatives, a brother, sister or a dependants of the victim.

3.3.1.3. Mediation in private lawsuits, mediation in proceedings at the suggestion of the injured party and mediation with the injured party as a subsidiary claimant

When a private lawsuit comes before the court and peace councils operate in the catchment area of the court and both parties are domiciled in that area, the parties may be referred to these councils for the purpose of reconciliation. The court will set a deadline in which mediation will be attempted and will stop the court process. After the expiry of that period or if mediation fails, the process will continue (Article 527 paragraph 1 of the CCPA).

Peace councils do exist, however, in Croatia as local institutes in the way they are prescribed, but their role is taken by court mediators established at almost every court in the country.

For criminal offences that are prosecuted by motion, the motion for prosecution must be submitted within three months of the day when the authorised natural or legal person became aware of the criminal offence and the perpetrator. At that stage the injured party may reconcile with the perpetrator and not submit a proposal to the state attorney's office, and mediation may be sought later and the proposal withdrawn. The state attorney must then cease criminal prosecution. According to informal court practice, at the time the indictment is filed at the request of the injured party the court advises the injured party and the defendant to participate in mediation[75].

According to the CCPA, the state attorney is obliged to inform the victim that he or she has dismissed the criminal report or gives up the criminal prosecution, and in this case the victim may take over the criminal prosecution as the so-called subsidiary prosecutor. By taking over the criminal prosecution the subsidiary prosecutor actually takes the place of the state attorney, meaning that the further conduct of the criminal proceedings and their outcome depends on the subsidiary prosecutor himself (Article 55 CCAP). This shows that this institute is also characterised by elements of restorative justice because here the victim has the full role of determining the course of the proceedings, among other things seeking reconciliation with the perpetrator.

3.3.1.4. Imposition of special obligations

According to Article 62 of the Croatian Criminal Code[76] (henceforth the CCC), a court hearing a case that carries a suspended sentence or a partially suspended sentence may impose special obligations on the offender, of which some may be of restorative nature: repairing the damage caused by the offence, paying a certain amount of money into a fund for compensation for damages to the victims of criminal acts and paying compensation and other financial

[75] A. Maršavelski, K. Ivanušić, *Restorativna…*, *op. cit.*, p. 490.
[76] Kazneni zakon, 2011.

obligations. In Article 10 paragraph 2 of the JCA, an apology to the injured party may also be a special obligation. Special obligations from paragraph 2 items 6–9 are carried out by the competent authorities for probation with the help of the police. Unreasonable and impossible obligations and those that insult the dignity of the offender may not be imposed. The restorative, rather than retributive notion of these obligations is seen from the provision which states that these obligations may only be imposed with the consent of the perpetrator Special obligations may be imposed for a duration of up to three years.

3.3.1.5. Adhesion procedure

Solving victim's property claim in criminal proceedings is indubitably restorative. A property claim that arises as a result of the commission of a criminal offence will be discussed at the proposal of the injured party in the criminal proceedings, on condition that it not significantly delay the proceedings. A property claim may refer to a claim that may be filed in a lawsuit (Article 153 CCAP).

3.3.1.6. Restorative justice during the execution of the sentence prison

According to Article 14 of the Act on the Execution of Prison Sentences[77] penitentiaries and prisons encourage and help prisoners in repairing the damage caused by criminal acts and in reconciliation with the victims. During the prison sentence, prison staff will encourage and assist prisoners in repairing the damage caused by the criminal offence and in assisting a reconciliation between the victims of the criminal. In order to develop a sense of personal responsibility, the prisoner is encouraged to participate voluntarily in the creation and implementation of the execution programme. The attitude of the victim or the victim's family may be considered when deciding on individual benefits for prisoners, which should

[77] Zakon o izvršavanju kazne zatvora, 2021.

further encourage the perpetrator to seek reconciliation with the victim. At the request of the prison, before granting leave to visit the place of residence or residence or another place or to visit family members or other people as well as leave to use annual leave in the place of residence or residence or another place, the competent probation office submits a report[78]. This report with victim's or victim's family's opinion on such a leave has the significance of restorative justice in a broader sense, as it enables the victim to have a clear influence on part of the execution of the prison sentence, which may be an incentive for the perpetrator to come to terms with his or her, i.e. to try to repair the damage caused.

Before filing a criminal report, defence counsels usually try to reach a settlement, so that no criminal charges are filed (even without the help of a third independent party, a mediator).

Elements of restorative justice are known within the criminal law. According to Article 48 paragraph 2 of the CCC, the court may impose a lighter sentence than that prescribed for a specific criminal offence when special extenuating circumstances prevail, especially if the perpetrator has reconciled with the victim, if he or she has compensated him or her in full or for the most part for the damage caused by the criminal offence, or if he or she has made serious efforts to compensate this damage, and the punishment may be achieved with such a milder penalty. it is clear that this provision is an expression of encouragement to the perpetrator to attempt to reconcile with the victim in order to receive a lighter sentence. Article 80 paragraph 1 point 4 again provides for the release of the perpetrator from punishment when the perpetrator has attempted to eliminate or reduce the consequences of the criminal act committed through negligence and compensated for the damage he or she caused or when the perpetrator of a criminal offence that carries only a fine or a prison sentence of up to one year has reconciled with the victim and compensated the damage. Of course, due to the issue of fairness from society's perspective as well as bearing in mind general prevention, it is clear that this is intended for minor

[78] In accordance with the law governing probation matters.

criminal offences (e.g. basic forms of bodily harm, grievous bodily harm due to negligence, threat, intrusive behaviour).

3.3.2. MEDIATION PRACTICE

Over the last few decades the Croatian legislator, in accordance with the models of mediation in neighbouring countries, has carried out various normative activities aimed at creating an adequate normative framework for mechanisms of restorative justice, primarily mediation. Firstly, the National Programme for the Implementation and Development of the Judicial System Mediation was enacted. The main features of the mediation procedure are informality and flexibility, voluntariness and non-obligation, the orientation of interest and a wide range of possible solutions, prospective and regulatory and relatively economic and fast[79]. The strategy mentioned that the purpose of mediation is not to determine which party is right, but to find a solution that is acceptable to both parties[80]. In 2003 the first *Act on mediation* was passed[81]. The law standardised mediation in civil, commercial, labour and other property-related disputes regarding the rights that the parties may freely address. The purpose of that Act is to facilitate access to mediation as an appropriate dispute resolution procedure, to ensure the availability of mediation, to strengthen the awareness of mediation by encouraging the application of mediation, and to ensure a balanced relationship between mediation and court proceedings. After the adoption of the two documents mentioned, out-of-court mediation centres were established across country and several training courses and educational seminars for mediators were conducted. These training courses were mainly intended for civil court and commercial court judges. In the same year as the Act on Mediation, the Croatian Association for

[79] A. Uzelac, *Mirenje kao alternativa suđenju – mirenje u građanskim, trgovačkim i radnim sporovima*, Zagreb 2004, p. 22.

[80] N. Čičin Šain, *Aspekti pravnog uređenja mirenja u Hrvatskoj*, "Stari pravnik" 2010, No. 88, p. 111.

[81] Zakon o mirenju, 2003.

Mediation was founded on 19 September 2003. Their members are all on the list of mediators before the Croatian Chamber of Commerce, Croatian Craftsmen Chamber, the Croatian Association of Employers and the list of mediators at the Commercial Court in Zagreb and the High Commercial Court of Croatia. According to the statute of the association, their goal is to promote and improve mediation in Croatia, by which they will perform the following activities: mutual exchange of experiences, knowledge and skills of members of the association, regular training of members of the association, by organising counselling and study trips, by promoting mediation in Croatia, by proposing legal solutions related to mediation, co-operation with international associations of mediators, by organising workshops and exercises for mediators, by organising meetings and counselling of mediators, by promoting mediation among young people, by introducing workshops on mediation in schools, by creating a code of professional conduct[82]. Strategies for judicial reform and development (2011–2015 and 2013–2018) were enacted, in which the strengthening of peaceful dispute resolution is defined as one of the strategic goals. The new act on mediation was adopted in 2011[83]. Through practice, however, the term 'mediation' has proved to be insufficiently clear because it implied to the parties that they would be obliged to reconcile with the party with whom they are in dispute. About 69% of the participants in mediation surveyed, however, expressed satisfaction with the mediation procedure and only 32% of the participants in the litigation procedure expressed satisfaction with the litigation procedure[84]. Although the parties in mediation had significant constructive experiences of the process, voluntary mediation programmes still show it is rarely utilised[85]. An attempt to increase the number of mediation procedures may be observed before municipal and commercial courts in Croatia. Mediation in the courts, although not as widespread as expected,

[82] N. Čičin Šain, *Aspekti…*, *op. cit.*, p. 116.

[83] Zakon o mirenju, 2011.

[84] S. Šimac, *Mirenje kao generator promjena u pravosudnom sustavu i pravnoj profesji*, Doctoral dissertation, Faculty of Law, University of Zagreb, 2013, p. 17.

[85] K. Knol Radoja, *Obvezno mirenje – osvrt na rješenja iz komparativnog i hrvatskog prava*, "Pravni vjesnik" 2015, Vol. 31, No. 2, p. 111.

still leads the way in the implementation of mediation in contrast to mediation centres that have levelled off in this regard or record poor results, as research confirmed[86]. Croatia does not have publicly available statistical indicators for mediation in criminal proceedings, i.e. for use by the above institutes above in the field of criminal law. Indicators from the field of civil and commercial law, however, may inevitably serve as a general indicator of the success or failure of this institution. The most recent strategic document regarding mediation is *the National plan of justice system development 2022–2027*[87], enacted in 2021. The document, however, lacks propositions on the development of mediation and definitions of the procedures to enhance it. Mediation is mentioned in only 1 place within the whole document referring to the accommodation of the Mediation Centre, where it is suggested that it should be made accessible to people with disabilities and other categories of the population, in order to improve equal opportunities in access to the judiciary.

There is a lack of statistics regarding mediation on a national level. Statistics regarding the mediation from a statistical overview of the work of the courts in the Croatia is scant[88]. The Ministry of Justice and Administration, as the highest authority for judicial administration, collates statistical and other data on the work of courts. The statistical overview contains general information about judicial bodies:

- numerous state of judicial bodies;
- the number of personnel in judicial bodies (judicial officials, court officials and court employees);
- data on the work of the courts;

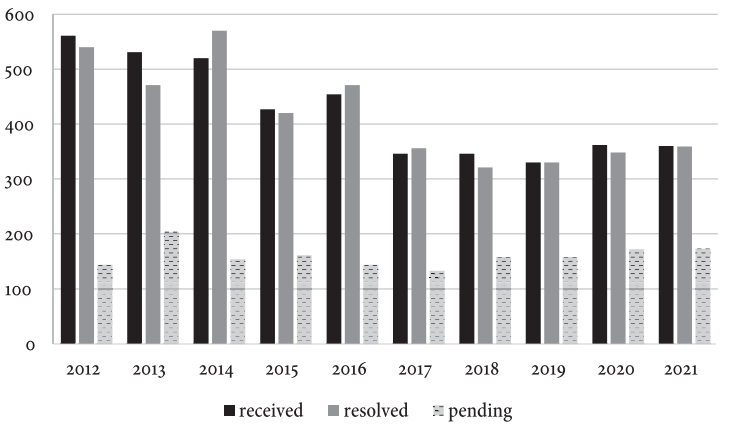
[86] Croatian Ministry of Justice, 2022, https://mpu.gov.hr/print.aspx?id=6719&url=print [access 13.11.2022].

[87] *Nacionalni plan razvoja pravosudnog sustava 2022–2027*, 2021, https://mpu.gov.hr/UserDocsImages/dokumenti/Strategije,%20planovi,%20izvje%C5%A1%C4%87a/Nacionalni%20plan%20razvoja%20pravosudnog%20sustava%20za%20razdoblje%202022_2027.pdf [access 13.11.2022].

[88] *Statistical overview of the work of the courts in Croatia from 2012–2021*, 2022, https://mpu.gov.hr/statisticki-pregled-o-radu-sudova-26209/26209 [access 13.11.2022].

- data on trends in the number of cases in courts (number of received, resolved and pending cases with the rate of promptness);
- information on the way a case is resolved;
- data on the duration of certain types of court proceedings in certain types of cases.

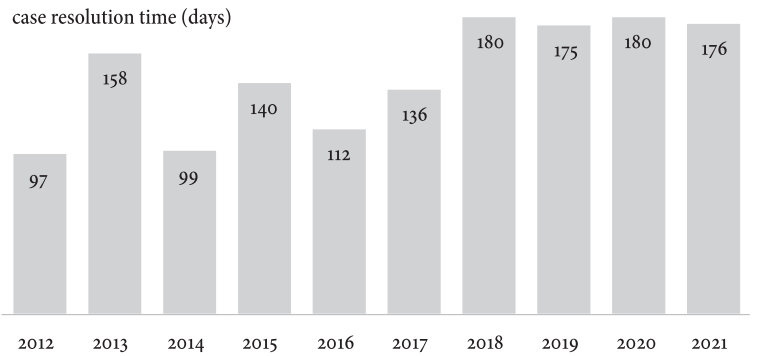
Graph 3.1. Mediation in municipal courts from 2012 until 2021



Source: Own elaboration.

Regarding mediation in the court proceedings data from the municipal courts alone exist. Graph 1 presents the number of cases received, the number of cases resolved and the number of cases pending at the municipal level. It is important to notice that criminal cases are lacking. The number of cases dropped during the period observed. The recent Mediation Act was established in 2011 (no data before 2012). It is important to mention that graph 1 shows nothing about the positive or negative outcome of the settlement in the mediation process. It only ascertains whether the mediation was finalised.

Graph 3.2. Duration of mediation cases at the municipal courts from 2012 until 2021



Source: Own elaboration.

The duration of the all mediation cases at the municipal courts presented is less than 6 months (180 days). The longest period was in 2018 and 2020 when there was a low number of cases (see Graphs 3.1 and 3.2). The duration of the mediation was shortest in 2012, when there were the most cases. Further analyses needs to be undertaken to ascertain the reason the duration has been increasing over the years.

In order to be able to draw conclusions about the mediation itself, we need more detailed statistics, which are currently unavailable.

One of the problems of mediation is the fact that the implementation of these procedures is dispersed among several institutions, especially outside courts, and citizens often do not know who they can turn to for a solution to their dispute[89]. According to the results of one of the surveys, in order to utilise this, the majority of professional mediators (68%) agree that sanctioning an unjustified refusal to participate in mediation influenced the increase in the number of mediations.

[89] A. Kutlić, A. Tkalčević, *Div koji spava: Mirenje iz perspektive pravnih profesionalaca*, "Pravnik" 2018, Vol. 52, No. 1, p. 85.

3.3.3. PENAL MEDIATION IN CROATIA[90]

For criminal cases that are prosecuted by private lawsuit the parties are allowed to settle in mediation (conciliation), regardless of whether criminal proceedings have begun. Crimes against reputation and honour, some property crimes and some crimes against personal freedom and life and limb are classified among the criminal offences that are prosecuted under private lawsuit. Article 527 of the CCPA prescribes that, if peace councils operate within the jurisdiction of the court and both parties reside in that area, the court may refer the parties to those councils for an attempt at mediation. In that case the court will set a deadline by which mediation will be attempted and will stop the procedure, and after the expiration of that deadline or if the mediation fails, the procedure will resume. Judges may conduct mediation themselves. In practice, however, they do not do this, but rather instruct the parties to address authorised institutions for mediation and authorised mediators. The legislators' goal is to enable the parties to resolve their disputes quickly and efficiently by their own efforts with the help of a mediator, without being exposed to the difficulties and long-term duration of criminal proceedings. Parties may unanimously choose a mediator from a list of authorised mediators before or after they are referred to mediation. If the parties are unable to agree on a mediator, authorised associations for mediation will suggest a mediator. It is common to have one mediator, but, should the parties request, more mediators may participate. In practice the deadline for resolution of the dispute and conclusion of the mediation procedure ranges from 3 months to a year. Depending on the willingness of the parties to participate in mediation in good faith, mediation may be very brief.

One of the benefits of mediation is that it is not a strictly formal procedure, but the main creators of the procedure are the parties themselves. The parties may present their side of the story and everything that is important to them. The role of the mediator is vital as the professional and neutral third party between the parties who helps them reach their own creative solution that suits both of

[90] Croatian mediators association, 2022, https://medijacija.hr/ [access 12.11.2022].

them, without imposing a solution. Any solution that is neither illegal nor immoral, nor against the interests of third parties, is allowed. Lawyers, as parties' attorneys, also participate in mediation and play an important role in representing the interests of their clients, and do so in a different way from that in criminal proceedings. Their role is usually to provide them with personal and professional support, as well as with information about legal positions and possible outcomes of criminal proceedings. They may also present the facts and undertake other activities.

Mediation in which the parties have reached an agreement concludes with a settlement. The parties and their lawyers participate in drafting the settlement, and a mediator may also participate or assist in drafting it. The parties voluntarily execute the settlement in mediation that they have reached by themselves and within the agreed deadline.

In the event that the criminal proceedings continue, the settlement contains the decision on its termination (statement on the withdrawal of the lawsuit) and the conditions for the termination of the proceedings and any other obligations that the parties have agreed upon.

In the event that the parties in the mediation fail to reach a settlement, they are issued with a certificate stating that they have participated in mediation which ultimately failed. This certificate the parties must submit to the court. The criminal procedure then continues under the same conditions under which it began. There is no obstacle for the parties to try again to find a solution in mediation, in the event that the conditions for this are subsequently created between them. Data confidentiality is important in mediation. Everything said in the mediation is confidential and has no effect the evidence in the criminal proceedings, and the mediators, lawyers and parties are bound by a signed statement on the confidentiality of all content presented in the mediation. Mediation is initiated by a proposal submitted to one of the mediators' associations. In the event that only one party submits such a proposal, associations will address the other party in order to obtain consent regarding the proposal for mediation.

3.4. Conclusion

Mediation is an excellent alternative mechanism of court proceedings ultimately reflected in the reduction of the long-term litigations and leading to greater efficiency in the work of the court. It is also desirable to introduce informative meetings before mediation itself, in which the parties would be introduced to the specific features of this institution, and the decision on whether to take their dispute to court would be facilitated. In addition to informing citizens, the education of experts involved in mediation is also a key strategic element. As for mediation in criminal proceedings, unlike that in civil and commercial proceedings, which is regulated in detail, a holistic approach to penal mediation is lacking. It is necessary systematically to promote alternative dispute resolution methods in order to reduce the number of cases in the courts. The main goal of the future strategy of the justice system should be to encourage co-operation and mutual exchange of the experiences of all participants and citizens. The legislators' efforts and the political will to strengthen the institution of mediation must be expressed through key strategic documents of the judiciary. In the last strategic document Croatia was not guided by that vision.

In conclusion, it could therefore be underlined that it is high time for the parties to be invited to take over responsibility for their disputes rather than relying exclusively on the state and its courts by thereby spending, often unnecessarily, state resources without first trying to resolve their disputes peacefully by mutual agreement.

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Chapter 4. Reform of Administrative Justice

4.1. Administrative justice as a legal institution: essence and characteristics

In order correctly and fully to clarify the content of administrative justice as a legal institution, one should turn to the relevant conceptual apparatus, i.e. to define the categories 'administrative justice', 'globalisation', and 'human rights protection' from the point of view their doctrinal interpretation. Administrative justice, as noted by Roos[1], is the activity of administrative courts regarding the consideration and resolution of administrative cases in the manner established by law.

The globalisation of the protection of human rights from the standpoint of Jafari[2] is the development of unified, universal approaches, methods and mechanisms for the protection of human

[1] R.C. Alberts, F.P. Retief, C. Roos, D.P. Cilliers, T.B. Fischer, J. Arts, *EIA decision making and administrative justice: an empirical analysis*, "Journal of Environmental Planning and Management" 2021, No. 1–18, p. 296, in press, https://doi.org/10.1080/09640568.2021.1952857 [Taylor & Francis Online].

[2] J. Jafari, J. Khaleghian, J. Maleki, *The legal system governing Tari's claim in the courts of law and the Court of Administrative Justice*, "The Journal of Modern Research on Administrative Law" 2022, p. 12, https://doi.org/10.22034/mral.2022.552438.1301 [access 10.01.2023].

rights and their dissemination throughout the globe. At the same time, in order to protect human rights they must be unified.

The problem was finding a compromise between the freedom of management actions, defining their limits for addressing administrative tasks and protecting the individual's rights. The problem remains relevant to this day in the Ukrainian judicial system and is a clear distinction between the competence of administrative courts from other judicial bodies. Fischer[3] identified two ways in which the issue of competence may be settled. The first method is to enumerate an exhaustive list of cases in which the case is subordinate to the administrative court, and the second method is to establish a general principled definition of it.

In Austria two groups supported one of the options. Administrative departments lobbied for the first casuistic approach in determining the competence of administrative courts[4].

Accordingly, the second point of view that prevailed in Austria, but did not recognise the possibility of a casuistic list of cases determining the jurisdiction of administrative courts. History, however, is known for examples of choosing a method when defining the competence of bodies of administrative justice, which allows the enumeration of issues to be resolved by these bodies. This is the path taken by Prussia, whose law contained a significant list of cases for which the protection of administrative courts may be applied. In France, from the position of Zubov[5], in addition to the general formula, numerous exceptions and additions are used, i.e. we may discuss a mixed method of determining the competence of bodies of administrative justice.

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[3] T.B. Fischer, *Taxonomies of sustainable investment and existing decision support approaches of EIA, SEA and CBA – a silver bullet for sustainable development? A response to Dusík and Bond*, "Impact Assessment and Project Appraisal" 2022, Vol. 40, p. 119, https://doi.org/10.1080/14615517.2022.2033926 [access 31.08.2022].

[4] T.B. Fischer, *Taxonomies of sustainable investment…*, *op. cit*., p. 120.

[5] O. Zubov, *Administrative procedures for fair and effective justice in Ukraine*, "Entrepreneurship, Economy and Law" 2022, Vol. 3, No. 96–99, p. 97, https://doi.org/10.32849/2663-5313/2022.3.14 [access 10.01.2023].

As noted by Vişan[6], with the help of administrative jurisdiction:

> *the protection of certain social goods and values (public order, public safety, rights and freedoms of citizens) is ensured by the implementation of bodies executive power of jurisdictional activity in connection with an administrative offense, in the process of which these bodies conduct an investigation, accuse the guilty person of committing an illegal act, consider a case about this act, issue a decision on the application of an administrative penalty to the offender, execute the judgement adopted*[7].

Săraru[8] includes three types of administrative justice as jurisdictional: justice in cases of administrative offenses, disciplinary justice and justice regarding citizen complaints.

Administrative jurisdiction was also defined as the legally regulated activity of an authorised body of state power, an official in relation to the resolution of individual administrative cases (disputes) related to the administrative-legal relations of a citizen or a non-governmental organisation with a state body (its official) in the exercise of public power by this body, as a rule, executive. According to Murali[9], this definition of administrative jurisdiction is not entirely justified, since in this case the content of administrative-jurisdictional activity is expanded to the limits of consideration of any individual case, i.e. to the limits of the entire administrative process.

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[6] V. Vedinaş, L. Vişan, D.I. Pasăre, *Argumentare juridică europeană în favoarea necesității modificării Legii contenciosului administrativ. Succintă prezentare a Legii nr. 262/2007*, "Revista de Drept Public" 2007, No. 3, pp. 70–78.

[7] V. Vedinaş, L. Vişan, D.I. Pasăre, *Argumentare juridică europeană*…, *op. cit.*, p. 75.

[8] C.-S. Săraru, *Administrative litigation systems in Europe*, "Juridical Tribune" 2017, Vol. 7, Issue 1, June, pp. 213, 227–235.

[9] T. Murali, *Judicial precedent is a source of Law. Pleiades. Intelligent legal solutions*, 28 December 2020, p. 28 https://blog.ipleaders.in/judicial-precedentsource-law [access 17.01.2022].

The jurisdictional activity of the bodies of executive power may therefore consist of the consideration of complaints of citizens and legal entities by the bodies of executive power, although such activity must be accompanied by the adoption of a decision to eliminate violations of the regime of legality and, if necessary, apply state-coercive measures to the offender. It is therefore possible to agree with the opinion of some scientists, according to whom the system of jurisdictional justice includes justice regarding the complaints of citizens.

Nevertheless, in the literature jurisdiction is most often identified with judicial justice[10]; the sub-department jurisdiction of resolved cases[11]; the authority to decide cases and apply sanctions[12].

Professor Tomlinson[13] notes that:

> *jurisdiction is an independent type of law enforcement activity, and a central one at that. Its appearance is associated with the beginning of management with the help of law, the opportunity to seek protection of interests from a competent authority, a judge. The jurisdictional method of protecting public interests is reasonably considered to be the antithesis of "self-righteousness and revenge, these wild types of justice".*

[10] I.V. Boiko, O.M. Soloviova, *Yevropeiski standarty ta ukrainskyi kontsept administratyvnoi protsedury. Modern research: progress of the legislation of Ukraine and experience of the European Union. Riga: Izdevniecība*, "Baltija Publishing" 2020, pp. 1, 442–462 [in Ukrainian].

[11] I.V. Boiko, O.M. Soloviova, *Yevropeiski standarty ta ukrainskyi kontsept…*, *op. cit*., p. 443.

[12] A.J. Bond, T.B. Fischer, J. Fothergill, *Progressing quality control in environmental impact assessment beyond legislative compliance. An evaluation of the IEMA EIA Quality Mark certification scheme*, "Environmental Impact Assessment Review" 2017, No. 63, pp. 160–171, https://doi.org/10.1016/j.eiar.2016.12.001 [access 31.08.2022].

[13] J. Tomlinson, R. Kirkham, *Revisiting the Administrative Justice Legacy of New Labour*, [in:] *The New Labour Constitution*, A. Tucker, M. Gordon (eds.), Oxford 2022, p. 22.

It is worth noting that wild justice cannot be considered justice; it is arbitrariness. Tom Barkhuysen[14] considers jurisdiction as a special kind of law-enforcement activity, the content of which is the consideration of a case about an offence, about a dispute on the merits, with the adoption of a decision on it.

The most appropriate is Shkolnyi's general definition[15] where it is noted that jurisdiction is understood as the legally established powers of certain bodies to consider and resolve cases in accordance with their competence.

Summarising the views of administrative scientists on the essence of administrative jurisdiction, Salmond[16] notes that administrative-jurisdictional activity entails the following peculiar features:

- the presence of a legal dispute (or offence); jurisdiction arises only when it is necessary to resolve a dispute about the right or in connection with a violation of current legal norms; regarding administrative jurisdiction, such disputes arise between parties to social relations regulated by administrative-legal norms, acquiring the character of administrative-legal disputes;
- the basis of administrative-legal disputes, in resolving which a legal assessment of the behaviour (actions) of the parties is carried out, are individual administrative cases; consideration of only specific controversial cases is the content of the jurisdictions of its administrative process, such as the consideration of cases of administrative offence, citizens' complaints);
- due to its social significance, administrative-jurisdictional activity requires proper procedural and legal regulation;

[14] T. Barkhuysen, W. Ouden, Y.E. Schuurmans, *The Law on Administrative Procedures in the Netherlands*, "NALL – Netherlands Administrative Law Library" 2012, April–June, pp. 1–26, https://www.researchgate.net/publication [access 17.01.2022].

[15] Y. Shkolnyi, *Chomu zakon pro adminprotseduru vazhlyvyi dlia vstupu Ukrainy do yes?*, "Reanimatsiinyi Paket Reform", 27.05.2022, p. 24, https://rpr.org.ua/news/chomu-zakon-pro-adminprotseduru-vazhlyvyy-dlia-vstupu-ukrainy-do-yes/ [in Ukrainian] [access 17.01.2022].

[16] J.W. Salmond, *The Theory of Judicial Precedents*, "The Law Quaterly Review" 1900, Vol. XVI, No. 64, pp. 13–24.

establishing and establishing events and facts, their legal evaluation is carried out within the framework of a particular procedural form, which is essential and mandatory for the jurisdiction[17];

– administrative jurisdiction differs significantly from other types of jurisdiction activity within the framework of criminal and civil processes; firstly, it is a less detailed procedural activity.

So, administrative jurisdiction may be divided into three types:

1) administrative-regulatory, i.e. the competence to resolve administrative cases arising on other grounds, except for the emergence of a dispute about the right and the commission of an administrative offence (cases on the issuance of licences, state registration of motor vehicles, etc.);
2) administrative-judicial, i.e. the competence of administrative courts to resolve relevant cases;
3) administrative-delict, i.e. competence to resolve cases of administrative offences and issue resolutions on them.

It should be noted that the concept of administrative-delict jurisdiction should be distinguished from the idea of 'administrative--criminal jurisdiction', which is its sole component.

It is worth noting that in determining jurisdiction the literature states that the activity of the state, which is related to the consideration of a case of an offence or a legal dispute and the adoption of a decision thereupon, determines the content of the jurisdictional activity of any state authority.

Ryndiuk[18] informs us that the subject of administrative law is a set of social relations that arise in the process of the powerful activity of subjects of public executive power and the implementation of administrative justice. One of the groups of social relations belonging to the subject of administrative law consists of relations related to administrative justice.

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[17] J.W. Salmond, *The Theory of Judicial Precedents*, *op. cit*., p. 13.

[18] V. Ryndiuk, *Legislation as a hierarchic system of decisions of normative content of public authorities*, "Visegrad Journal on Human Rights" 2019, Vol. 3, No. 5, pp. 118–122.

Perlingeiro[19] believes that the following are ways by which the legal protection of citizens in the sphere of public administration may be ensured:

- the administrative method: general judicial; consideration and resolution by courts of general jurisdiction when using the civil procedural form of complaints against actions;
- the quasi-judicial (Anglo-American, Anglo-Saxon);
- judicial specialised, i.e. the creation of specialised courts; characterises administrative justice to resolve disputes on individual administrative cases arising in the sphere of the functioning of administrative bodies.

The third independent type of administrative process is administrative justice as an organic procedural element of organisational justice. In the generally accepted sense of this concept, administrative justice means judicial control over the legality of acts and actions of public administration.

Retief *et al.* (2020)[20] researching the distinction between administrative jurisdiction and other types of jurisdiction in the field of judicial competence, distinguishes the concepts of administrative justice.

Adhering to a broad understanding of administrative justice, Retief points out that the second includes consideration of administrative disputes rather than administrative cases, in a particular (administrative) procedure for review by judicial and extra-judicial (quasi-judicial) administrative-jurisdictional bodies.

Administrative justice, as a component of the administrative process, is considered by Reshota[21]. Reshota discribes administrative justice as a consideration in the order of cases established by law, the subject of the decision or one of the participants of which is

[19] R. Perlingeiro, *Comparative Analysis of Administrative Justice Systems in Latin America*, "Estudios Socio-Jurídcos" 2022, Vol. 24, No. 1, pp. 233–265, https://doi.org/10.12804/revistas.urosario.edu.co/sociojuridicos/a.10825.

[20] F. Retief, T.B. Fischer, R.C. Alberts, C. Roos, D.P. Cilliers, *An administrative justice perspective on improving EIA effectiveness*, "Impact Assessment and Project Appraisal" 2020, No. 2, pp. 151–155.

[21] V. Reshota, *Precedent as a source of administrative law in Ukraine*, "Visegrad Journal on Human Rights" 2018, Vol. 2, No. 3, pp. 39–141.

the executive body of the state or local government, which exercises powers of an authoritative nature concerning other subjects of law and which exercises the competence to perform state functions.

Sarpekov (2022) understands administrative justice as a unique form of judicial power exercised by authorised judicial bodies (judges) based on the statements of citizens and other legal subjects in connection with the appeal of decisions and actions (inaction) of public bodies of administration, their officials and normative and non-normative legal acts, the purpose of which is to resolve public legal disputes, administrative cases and exercise judicial control over public administration.

Considering administrative justice in the context of the formal content of administrative justice, Sarpekov defines it as a complex institution of state and administrative law that regulates the activities of judicial bodies to resolve public legal disputes in the sphere of state administration.

Public administration must exercise its powers within the framework of ensuring the maintenance of constitutional law and order in the state and the rights, freedoms and legitimate interests of all individuals and legal entities. The subject of management has the appropriate legal status endowed with mighty powers, which shows the inequality of the parties in the legal relationship between the managing subject and the managed object and the possibility of the forced exercise of public powers by the managing subject[22].

It should be noted that private relations differ from the socio-legal interests of state administration due to their legal content. The action of administrative justice extends into the sphere of the state administration's social and legal claims. As early as 1907 Anschütz (1970) noted that administrative justice, when resolving an administrative-legal dispute, cannot apply the analogy of resolving private law claims; such a dispute should be resolved in accordance with the norms of current legislation and public interests[23].

[22] H. Baron, L.B. Aretino, *Humanistisch-philosophische Schriften: Mit Einer Chronologie Seiner Werke und Briefe*, 1928th edition, 1 January 1928, pp. 163, 284.

[23] G. Anschütz, *Justice and administration*, "Journal of the Ministry of Justice" 1907, No. 7, pp. 18–25.

The task of administrative justice also coincides with the general functions of justice, mainly in the restoration of personal rights and freedoms injured parties.

The immediate object of administrative justice is the resolution of public legal disputes in public administration.

The central characteristic task of administrative justice is the termination of an illegal normative-legal act of management, since it is with the help of administrative justice that judicial control and supervision of the activities of state authorities and local self--government bodies is carried out, and rights, freedoms and legitimate interests are protected and order is restored throughout the state.

In analysing administrative justice, it is necessary to pay attention to the models of its organisation, which are determined by historical and legal reasons. Many elements that exist in accordance with the principles of judicial procedure are common to a number of organisational models of administrative justice, in particular: competition between the parties, the impartiality of the court, publicity, equality of parties before the court and the law, etc.

Despite the various views of specialists in the field of administrative procedural law on the essence, place and nature of the norms regulating administrative justice, their analysis indicates two established approaches to the problems of this legal institution. Representatives of the first approach equate administrative justice with justice in cases of administrative offences or, to some extent, include them in its structure while broadly interpreting the category of 'administrative case'. The second approach defines administrative justice as an element of administrative justice, understanding it as judicial control.

An integral element of justice is the completeness of judicial power, which assumes that all persons without exception are equal before the law and the court, and should be placed in the same conditions. This hypothesis is confirmed by socio-historical practice and supported by international legal documents on human rights. According to Article 8 of the Universal Declaration of Human Rights, every person has the right to effective restoration of rights

by competent national courts in cases of violation of his or her fundamental rights granted to him by the constitution or law[24].

Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms states that the purpose of ensuring the independence of the judiciary is to guarantee every person the fundamental right to a trial by a fair court only on legal grounds. This is a basic principle of the rule of law.

At the same time, judicial control over administrative actions should be available to individuals and legal entities.

Ovcharuk[25] supports this view because it fully corresponds to the best traditions of legal democracy and satisfies modern domestic requirements and expectations of society regarding the functioning of effective control over the actions of public administration. The judicial control introduced also has a double purpose: on the one hand, it protects individuals and legal entities from abuse of power by administrative bodies and, on the other hand, it contributes to the improvement of the activities of administrative bodies in the interests of society as a whole[26].

This makes it possible to determine the particular purpose of administrative justice as a procedural and control activity of an administrative court in public-legal relations.

Today the issue of separating administrative courts from the system of courts of general jurisdiction is important. We may agree with Ovcharuk[27], who believes that this is due to the modern level of administrative justice in Ukraine, as well as supportive foreign experience. The proposed concept was introduced, in particular in France and Germany, whose legal systems, including administrative justice, are considered classic and are perceived as an example in many countries of the world.

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[24] M. Holkebeer, *'Out of the Crooked Timber of Humanity: Humanising Rights in South Africa'*, [in:] *To Repair the Irreparable Reparation and Reconstruction in South Africa*, E. Doxtader, Ch. Villa-Vicencio (eds.), Cape Town 2004, pp. 149–165.

[25] S.S. Ovcharuk, *Administratyvni protsedury v umovakh formuvannia pravovoi derzhavy* [*Administrative procedures in the conditions of formation of the rule of law*], Extended abstract of doctoral thesis, Kyiv 2015 [in Ukrainian].

[26] S.S. Ovcharuk, *Administratyvni protsedury v umovakh formuvannia…*, *op. cit*.

[27] *Ibidem.*

The separation of administrative courts from the system of courts of general jurisdiction today has a significant basis and will be directed exclusively to the improvement of the judicial system.

In the case of *Kress v. France*, 7 June 2001 the European Court of Human Rights agreed that, compared to the courts of general jurisdiction, the administrative courts of France have, for historical reasons and unique distinguishing characteristics. The introduction and existence of the institution of administrative courts is clearly the most significant achievement of the rule of law, especially since the right to make decisions regarding the actions of administrative bodies was granted to these courts not without some resistance. Even today the way administrative courts are staffed, the special status of their representatives, which is different from the status of the representatives of courts in general jurisdiction, and the other principles of the functioning of the system of these courts demonstrate the difficulty experiences by state officials of the executive branch of power in accepting that its actions may become the object of court review[28].

Administrative justice is therefore not only an element of the globalisation of administrative justice, but the globalisation of the application of international standards and norms of international law regarding the protection of human rights and freedoms is also manifest. Taking into account the processes of globalisation, important international legal acts were adopted, including the Universal Declaration of Human Rights of 1948, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil law and Political Rights of 1966 and many other universal and regional international legal documents in the field of human rights.

An extensive array of international legal acts on the protection of human rights has transformed and been implemented into the national legislation of Ukraine through the ratification of such

[28] Case of *Kress v. France*, Application No. 39594/98, Judgement, Strasbourg, 7 June 2001, https://www.menschenrechte.ac.at/orig/01_3/Kress.pdf [access 17.01.2022].

actions by the legislative body, or new laws are adopted that reflect and enshrine universal principles and mechanisms for the protection of human rights.

The globalisation of human rights is manifested in the legal system and specific human rights standards are established internationally. Their guarantee, implementation, and protection are henceforth urgent issues. The model of the system of administrative courts and the principles of implementation of administrative justice was borrowed from Germany and France. Even under globalisation, certain aspects of the judicial system remain purely Ukrainian. In other words, despite the globalisation and consequent universality of the standards of the judicial protection of human rights, freedoms and interests, in Ukraine, based on national traditions, customs, the legal system, scientific research, judicial practice and their approaches to solving particular problems in ensuring the protection of human rights, freedoms, and interests in the sphere of public-legal relations, which do not contradict and are not inferior to their international counterparts.

This norm is general and establishes the right of everyone to apply to the court if their rights or freedoms are violated, or obstacles thwart their rights, or if there is another limitation to their rights and liberties. This norm also obliges the courts to accept applications for consideration even in the absence of a special provision in the law regarding judicial protection.

When people exercise the right to legal protection and apply to the court, they reflect in the lawsuit their subjective perception of the violated right or protected interest and its security method.

Accessibility to the court, however, does not depend on whether the court is next door to the applicant or whether the applicant may step over the threshold into the court. The main determining factor in the accessibility of the court is a fair resolution to the dispute, and in the case of doubt regarding this, the right of a person to appeal such a decision to the courts of higher instances.

The globalisation of administrative justice consists of the application by administrative courts of the practice of the European Court of Human Rights, especially in disputes concerning social benefits. It should be noted that globalisation is somewhat different from

internationalisation. The latter is primarily characteristic of the evolutionary development of various connections at an international level, while globalisation involves rapid growth on a worldwide scale and the corresponding impact on national structures.

The principles of administrative justice are in turn the bases, starting points and guiding provisions of its functioning. They are guarantees of implementing judicial tasks and compliance with the procedural form of protection.

The principles of administrative justice are norms of direct action and may be applied directly, not necessarily in combination with a more specific model. These principles include:

1) the rule of law: the court, when deciding a case, is guided by the principle of the rule of law, according to which, in particular, a person, his or her rights and freedoms are recognised as the highest values determining the content and direction of the state's activities;
2) legality: the court resolves cases in accordance with the Constitution and laws of Ukraine, as well as international treaties; the court applies other normative legal acts adopted by the relevant body on the basis, within the limits of authority and in the manner prescribed by law;
3) equality of all participants in the administrative process before the law and the court: all participants in the administrative process are equal before the law and the court; there can be no privileges or restrictions on the rights of the participants in the administrative process based on race, skin colour, political, religious, and other beliefs, gender, ethnic and social origin, property status, place of residence, language or other characteristics;
4) competition of the parties, dispositiveness and official clarification of all circumstances in the case: consideration and resolution of cases in administrative courts are carried out based on the competition of the parties and their freedom in providing the court with their evidence and in establishing their persuasiveness to the court; the court considers administrative cases in no other way, as per the statement of the

claim filed in accordance with the legislation, and cannot go beyond the limits of the claim requirements;

5) publicity and openness of the administrative process: persons participating in the case, as well as persons who do not participate in the case, if the court decided the issue of their rights, freedoms, interests or obligations, cannot be limited in their right to receive in the administrative court both oral and written information about the results of the consideration of the case;
6) provision of appellate and cassation appeals against administrative court decisions;
7) bindingness of court decisions: the resolutions and decisions of the court in administrative cases that have entered into legal force are mandatorily implemented throughout the country; non-compliance with court decisions entails liability established by law.

The rule of law is a dynamic doctrine that develops and has new features and characteristics in accordance with the trends of development of the modern world. It is believed, however, that its constant is defined in the Report 'Rule of Law', approved by the Venice Commission at the 86th plenary session (25–26 March 2011):

> *In the sense in which it should be understood, 'the rule of law' is an integral part of any democratic society. This concept requires that all those empowered to make decisions treat everyone with respect, equality and reasonableness in accordance with the law and that everyone has the opportunity to challenge the illegality of decisions in an independent and impartial tribunal, where everyone must be provided with fair procedures*[29].

The principle of the rule of law is also emphasised in the Resolution of the European Parliament of 9 June 2016 on the open, efficient,

[29] Report on the rule of law adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e [access 17.01.2022].

and independent administration of EU (2016/2610 (RSP))[30] and in other international documents.

One of the critical areas of application of this principle is justice because the rule of law, one of the main principles of a democratic society, involves judicial control over interference with every person's right to freedom.

The functioning of the independent judiciary in the state is inextricably linked to the doctrine of the rule of law. It is therefore the courts first and foremost that must implement the principle of the rule of law. Krusian argues that the goal of the rule of law is more than just formal maintenance of the order provided for by laws and other regulatory acts established by the state. Establishing such a legal order that limits the absolutism of the state, primarily executive power, puts it under the control of society, creating appropriate legal mechanisms for this[31].

The primary purpose of the rule of law is first and foremost to limit the state's power over people and to ensure against the arbitrary intervention of the state and its bodies in certain spheres of human activity. Here judicial law enforcement activity acquires particular importance. After all, it is the courts in a democratic legal state that must assume the role of defenders not only of the law but also of human rights. It is also the principle of the rule of law that enables judges to make decisions taking into account the general principles of law: the priority of human rights, the prohibition of discrimination, reasonableness, justice, etc.

In the science of administrative law and its dissemination, the thesis concerns the need to supplement the list of legally established principles of administrative justice with others. The proposal to expand them could therefore look more innovative since it is simultaneously essential for both theory and practice.

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[30] European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610 (RSP)), OJ C 86, 6.3.2018, pp. 126–139.

[31] A. Krusian, *Judicial precedent as a source of the Ukrainian judicial administrative procedural law*, "Visegrad Journal on Human Rights" 2020, Vol. 1, No. 1, pp. 157–161.

First of all, it is necessary to formulate the content of the principle of specialisation of the consideration of cases on public legal disputes and justify the importance of its legislative fixation as one of the procedural bases of administrative justice.

Administrative justice, as a specialised type of judicial activity, became the constitutionally and legally enshrined mechanism that expanded a person's opportunities to exercise the right to judicial protection against illegal decisions, actions or inaction of subjects of power. The results of the systematic analysis of the specified international legal norms give grounds for asserting that the separation of jurisdictional powers between general and specialised courts is subject to guaranteeing the realisation of the right of every person to adequate judicial protection.

The first aspect of the content of the application of the principle of the rule of law in administrative justice is:

> *the court, when deciding a case, is guided by the principle of the rule of law, according to which a person, his rights and freedoms are recognised as the highest values and determine the content and direction of the state's activities.*

Rule of law is a dynamic doctrine that develops and incorporates new features and characteristics in accordance with the trends of development of the modern world. It is, however, believed that its constant is defined in the Report 'Rule of Law', approved by the Venice Commission at the 86th plenary session (25–26 March 2011):

> *In the sense in which it should be understood 'the rule of law' is an integral part of any democratic society. This concept requires that all those empowered to make decisions treat everyone with respect, equality, and reasonableness in accordance with the law and that everyone has the opportunity to challenge the illegality of decisions in an independent and impartial tribunal, where everyone must be provided with fair procedures*[32].

[32] Report on the rule of law adopted by the Venice Commission…, *op. cit*.

The principle of the rule of law is also emphasised in the Resolution of the European Parliament of 9 June 2016, on the open, efficient and independent administration of EU (2016/2610 (RSP))[33] and in other international documents.

One of the critical areas of application of this principle is justice because the rule of law, one of the main principles of a democratic society, involves judicial control over interference with every person's right to freedom.

The functioning of the independent judiciary in the state is inextricably linked to the doctrine of the rule of law. It is therefore the courts first and foremost that must implement the principle of the rule of law. Krusian[34] argues that the goal of the rule of law is more than mere proper maintenance of the order provided for by laws and other regulatory acts established by the state. Setting such a legal order that limits the absolutism of the state, primarily executive power, puts it under the control of society, creating appropriate legal mechanisms for this.

The primary purpose of the rule of law is to limit the state's power over a person and to ensure against the arbitrary intervention of the state and its bodies in certain spheres of human activity. Here the activity of the judicial law enforcement acquires particular importance. It is after all the courts in a democratic legal state that must be defenders not only of the law but also of rights. It is also the principle of the rule of law that enables judges to make decisions taking into account the general principles of law: the priority of human rights, the prohibition of discrimination, reasonableness, justice, etc.

The science of administrative law and the dissemination process concerns the need to supplement the list of legally established principles of administrative justice with others. The proposal to expand them therefore looks more innovative insofar as it is simultaneously essential in both theory and practice.

First of all, it is necessary to formulate the content of the principle of specialisation of consideration of cases on public legal disputes

[33] European Parliament resolution of 9 June 2016…, pp. 126–139.

[34] A. Krusian, *Judicial precedent as a source of the Ukrainian…*, *op. cit.*, p. 158.

and justify the importance of its legislative fixation as one of the procedural bases of administrative justice.

It should be assumed that *specialised* is intended for work or use in any particular field with a special purpose, etc.

The word *specialisation* (from the Latin 'special') means the specification, detailing the specialty, the acquisition by a person of properties to perform individual tasks and duties that have some peculiarities, etc. Based on the common language understanding of these words, specialisation as a principle of judicial justice may be defined as the basic principle of judicial justice, according to which the jurisdiction of the court in some instances is determined by the category and peculiarity of such cases (public legal or economic disputes, issues of administrative offence or criminal offences, civil and family conflicts, etc.) and the powers of the court regarding their consideration. It should be clarified that the proposed definition must be considered final. It clearly needs to be refined, but its wording is an attempt to lay the foundations for a discussion on the problematic issues of administrative justice.

Applying the practice of the European Court of Human Rights is one of the components of the implementation of the principle of the rule of law in resolving administrative disputes. Despite the norms of budget legislation, which in some cases limit the rights of citizens to social benefits and the amounts of these benefits, today, because of the decision of the European Court of Human Rights, administrative courts therefore apply the prescriptions of basic social laws, which grant these rights to individuals.

Administrative justice, as a specialised type of judicial activity, became the constitutionally and legally enshrined mechanism that expanded a person's opportunities to exercise the right to judicial protection against illegal decisions, actions or inaction of subjects of power. The results of the systematic analysis of the specified international legal norms give grounds for asserting that the separation of jurisdictional powers between general and specialised courts is subject to guarantee the realisation of the right of every person to adequate judicial protection.

The first aspect of the content of the application of the principle of the rule of law in administrative justice is:

> *the court, when deciding a case, is guided by the principle of the rule of law, according to which a person, his rights and freedoms are recognised as the highest values and determine the content and direction of the state's activities (REFERENCE).*

This aspect of the application of the principle of the rule of law determines the actualisation of such a scientific and practical concept of judicial enforcement, which is based on the ideology of 'the state for man', the service of the state to the interests of man, the recognition of the priority and role of man and citizen in state-power relations, as is embodied in administrative the legal doctrine of *anthropocentrism*.

It seems incorrect, however, to identify such principles as the rule of law and the priority or supremacy of human rights, although the understanding of the principle of the rule of law as the 'supremacy of human rights' has firmly entered administrative and legal science and practice.

In most Ukrainian sources the principle of the rule of law is proposed to be doctrinally interpreted as a two-fold requirement that ensures:

- the recognition of the priority of fundamental human rights over all other values in a democratic, social, legal state;
- the subordinating of the activities of all state institutions without exception to the goals of realising and protecting human rights[35].

This theoretical approach maintains its 'position' in modern administrative-legal theory and practice. On the contrary, it may be characterised as an 'anthropological interpretation' of the political--legal phenomenon of the rule of law. At the same time, it is theoretically argued and practically determined to distinguish the principle of the rule of law from the principle of the priority of the rights and freedoms of a person and a citizen.

[35] O. Bratasyuk, O. Shevchuk, *Protection of children's information (digital) rights who were illegally exported from the territory of Ukraine during the war or in occupation*, "Visegrad Journal on Human Rights" 2022, No. 2, pp. 21–26.

This conclusion is primarily justified by the fact that international and domestic normative legal acts and documents trace the differentiation of these principles.

Article 2 of the Treaty on the European Union (Maastricht, 7 February 1992)[36] stipulates that *'the Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'*. Based on the content of this article, it is logical to conclude that it singles out such principled provisions as the 'rule of law', one of the characteristics of which is the principle of the rule of law; and 'respect for human dignity, freedom… observance of human rights', which is a meaningful manifestation of the principle of the priority of human rights. The priority of human rights as an independent principle may also be traced in other international documents.

Article 2: 'Human Priority' of the Convention 'On the Protection of Human Rights and Dignity in the Application of Biology and Medicine: Convention on Human Rights and Biomedicine' defines *'The interests and well-being of a person prevail over the exclusive interests of the entire society or science'*[37]. Highlighting the principle of the priority of human rights and freedoms in the relationship 'man-society-state' may also be traced in domestic legislation.

The trend of gradual expansion and strengthening of the international and national normative-legal, institutional-functional, scientific-theoretical basis for the establishment, provision, and protection of the rights and freedoms of a person and a citizen should also be summarised based on the fundamental principle: the priority of the rights and freedoms of a person and a citizen in

[36] Treaty on European Union (TEU)/Maastricht Treaty signed in Maastricht (The Netherlands) 7 February 1992, Entry into force: 1st November 1993, https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/maastricht-treaty [access 17.01.2022].

[37] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Oviedo, 4 April 1997, https://rm.coe.int/168007cf98 [access 17.01.2022].

relation with the state, as well as other collective, corporate rights. This conclusion is justified as follows:

1) the existence of a system of international documents in the field of human rights recognised by the world community as international standards in the field of human rights (Universal Declaration of Human Rights of 1948[38]; International Covenant on Economic, Social and Cultural Rights[39]; International Covenant on Civil and political rights[40] and the Optional Protocol to the second Covenant of 1966; Conventions on human rights within the framework of the United Nations (henceforth UN) on the elimination of racial discrimination (Convention of 1965)[41], on the elimination of all forms of discrimination against women (1979 Convention)[42], against torture and other cruel, inhuman or degrading treatment and punishment (1984 Convention)[43], on the rights of the

[38] Universal Declaration of Human Rights, 10 December 1948, https://www.google.com/search?q=Universal+Declaration+of+Human+Rights+of+1948&rlz=1C1CHZO_ukUA981UA981&oq=Universal+Declaration+of+Human+Rights+of+1948&aqs=chrome.69i57j46i512j0i22i30l8.901j0j15&sourceid=chrome&ie=UTF-8 [access 17.01.2022].

[39] International Covenant on Economic, Social and Cultural Rights adopted 16 December 1966 by General Assembly resolution 2200A (XXI), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights [access 17.01.2022].

[40] International Covenant on Civil and Political Rights, 16 December 1966, General Assembly resolution 2200A (XXI), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights [access 17.01.2022].

[41] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UN General Assembly resolution 2106 (XX), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial [access 17.01.2022].

[42] Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly, 18 December 1979, https://www.google.com/search?q=on+the+elimination+of+all+forms+of+discrimination+against+women+(Convention+of+1979)&rlz=1C1CHZO_ukUA981UA981&oq=on+the+elimination+of+all+forms+of+discrimination+against+women+(Convention+of+1979)&aqs=chrome.69i57.644j0j15&sourceid=chrome&ie=UTF-8 [access 17.01.2022].

[43] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the 'Torture Convention') was adopted by the

child (1989 Convention)[44], on the protection of all persons from enforced disappearances (2006 Convention)[45] and other issues; and other international universal and regional documents);

2) the creation of an international universal institutional system (bodies and mechanisms) for the protection of human rights, including the UN General Assembly, the UN Human Rights Council and its subsidiary bodies and mechanisms, the UN Security Council and a number of its specialised mechanisms, the UN Economic and Social Council and the Commission on the Status of Women functioning in accordance with it and the UN Permanent Forum on Indigenous Peoples, the UN International Court of Justice, the UN Secretariat and its separate divisions, treaty (conventional) bodies with human rights, some specialised UN institutions: the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organisation, temporary and unique mechanisms for the protection of human rights created by UN bodies), as well as regional mechanisms (in particular, the Council of Europe is actively engaged in the protection of human rights and ECHR, Inter-American Commission on Human Rights, etc.);
3) the development of international law in the direction of distinguishing such components as 'international humanitarian law', 'international protection of human rights', 'international co-operation in ensuring human rights', etc.;

General Assembly of the United Nations on 10 December 1984 (resolution 39/46), https://legal.un.org/avl/ha/catcidtp/catcidtp.html#:~:text=The%20Convention%20against%20Torture%20and,been%20ratified%20by%2020%20States [access 17.01.2022].

[44] Convention on the Rights of the Child signed 20 November 1989, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child [access 17.01.2022].

[45] International Convention for the Protection of All Persons from Enforced Disappearance, 23 December 2010, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced [access 17.01.2022].

4) the development of domestic legislation in ensuring and protecting human rights;
5) the development of domestic jurisprudence and the legal system in the direction of the introduction and development of innovative fields of law (for example, humanitarian constitutional law).

It is therefore reasonable to single out the principle of priority of the rights and freedoms of a person and a citizen as an independent principle in the field of procedural law aimed at judicial protection of the rights and freedoms of a person and a citizen. Particular attention should be paid to the systematic and logical analysis of the Report 'Rule of Law' approved by the Venice Commission (European Commission 'For democracy through law') at the 86th plenary session on 25–26 March 2011 (Report)[46].

Summarising the possibility of consensus regarding the mandatory elements of the concept of 'the rule of law', as well as the same features of the idea of 'Rechtsstaat', which are not only formal but also substantive or material (materially Rechtsstaatbegriff), among others, such an element is defined as '*… Observance of human rights…*' (paragraph 41 of the Report)[47].

'Respect for human rights', according to this concept, is one of the elements of the content of the rule of law. At the same time, paragraph 59 of the Report states that *'respect for the rule of law and respect for human rights are not necessarily synonymous. To a great extent, however, both concepts coincide and many rights enshrined in documents such as the ECHR also relate to the rule of law explicitly or implicitly'*.

It is therefore logical to conclude that not all human rights, in particular their observance, guarantee, protection, etc., are meaningful manifestations of the rule of law. The following paragraph of the Report clearly defines the rights that are most clearly related to the rule of law as follows:

1) the right to access to justice;
2) the right to a legal and competent judge;

[46] Report on the rule of law adopted by the Venice Commission…, *op. cit.*
[47] *Ibidem*.

3) the right to express one's position (the right to be heard);
4) inadmissibility of double jeopardy (double punishment for the same act) (Article 4 of Protocol 7 to the ECHR);
5) the legal principle according to which measures imposing burdens cannot have retroactive effect;
6) the right to effective means of legal protection in any dispute (Article 13 of the ECHR);
7) presumption of innocence: all people are considered innocent of committing a crime until proven guilty;
8) the right to a fair trial, or, in the Anglo-American tradition, the principle of natural justice or the principle of fair (legal) procedure; must be ensured, including a fair and open hearing of the case, absence of bias and hearing and resolution of the case within a reasonable time (paragraph 60 of the Report)[48].

Although this legal position concerns the human right to judicial protection, i.e. the disclosure of the content of the principle of the rule of law, it is also valid for the direction of the priority of human rights and freedoms. At the same time, as defined by the ECHR:

> *the question of whether a fair balance was observed between the general interests of society and the requirements for the protection of the fundamental rights of an individual arises only when it is established that the contested intervention met the requirement of legality and was not arbitrary (Decision in the case of Iatridis v. Greece (No. 31107/96, paragraph 58, ECHR 1999-II)*[49].

Regarding the principle of proportionality in the implementation of administrative justice, it is worth noting that it should ensure compliance with the appropriate balance between any harmful consequences that may be caused to the rights, freedoms or interests of the participants in the legal relationship, as well as the set goals of the administrative agreement.

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[48] *Ibidem.*

[49] *Iatridis v. Greece* (Article 41), Application No. 31107/96, ECHR, 19 October 2000, https://www.legal-tools.org/doc/b01366/pdf [access 17.01.2022].

The principle of proportionality provides for:

1) the use of means proportional to the pursued goals;
2) ensuring, through the implemented measures, a precise balance between public interests and the rights and interests of private individuals.

When recognising the priority of the rights and freedoms of a person and a citizen in the man-society-state relationship, to ensure 'fair' justice in the implementation of administrative justice, it is important to ensure the proportionality of public and private interests when considering public legal disputes.

A systematic analysis of the practice and, accordingly, the legal positions of the ECHR provides an opportunity to determine the substantive requirements of the rule of law that must be implemented in the field of administrative justice. One of these requirements is protection against the arbitrariness of subjects of power. The individual's defense against the authorities' arbitrariness means that the intervention of the issues of power in human rights must be subject to effective control.

It should be a judicial review that best provides guarantees of independence, impartiality and the due process of law. This is precisely what the ECHR stated in its Decision of 6 September 1978, in the case of *Klass v. Germany*. The Court noted that one of the fundamental principles of a democratic society is the principle of the rule of law, enshrined in the Preamble to the Convention. According to this principle, the intervention of the state administration in the scope of personal rights should be subject to effective control, which judges usually carry out since judicial control is the best guarantee of independence, impartiality and due process[50].

The Court in the case *Kruslin v. France* also determined that *'in national law, there must be a remedy against arbitrary interference by state authorities with the rights guaranteed by paragraph 1…'* (paragraph 30 of the Decision)[51].

[50] *Klass and Others v. Germany* (1979), 2 EHRR 214 is a Human Rights Law case concerning Article 8 ECHR, https://simplestudying.com/klass-and-others-v-germany-1979-2-ehrr-214/ [access 17.01.2022].

[51] *Kruslin v. France*, 24 April 1990 (The Case of *Kruslin v. France*), https://www.google.com/search?q=%22Kruslen+v.+France%22+dated+April+24%2C+1990

Qualitative legal protection of a person against arbitrariness by public authorities is possible only if a person has access to an independent, impartial court, the justice of which meets the requirements of a fair trial. This is especially important in relations in administrative law because public authorities' decisions or actions always directly impact the rights and freedoms protected by the Convention on the Protection of Human Rights and Fundamental Freedoms.

Article 6 of the Convention enshrines the right of everyone to a fair trial. The formal and logical analysis of the text of the first part of this Article provides grounds for concluding that it respects the content of the right to judicial protection, i.e.

- the right of everyone to a fair and public trial;
- consideration of the case by an independent, impartial, *legal* (established by law) court;
- publicity of the announcement of the court decision.

According to the legal positions of the ECHR in many cases, a component of the right to a court is the right of access to the Court, in the sense that a person must be provided, first of all by the state, with the opportunity to go to Court to resolve a disputed issue. The ECHR focuses on this, noting that:

> *the Court reiterates that the right of access to a court was determined by the right to a trial in accordance with paragraph 1 of Article 6 of the Convention (the case of Holder v. the United Kingdom, paragraphs 28–36). The Court also recognised the right to access the Court as an integral aspect of the guarantees enshrined in Article 6 of the Convention, referring to the principles of the rule of law and the prevention of arbitrariness of power, which underlie most of the provisions of the Convention. Clause 1 of Article 6 of the Convention therefore guarantees everyone the right to apply*

&rlz=1C1CHZO_ukUA981UA981&oq=%22Kruslen+v.+France%22+dated+April+24%2C+1990&aqs=chrome.69i57.1089j0j15&sourceid=chrome&ie=UTF-8 [access 17.01.2022].

> *to the Court with a claim regarding his or her rights and obligations of a civil nature*[52].

In the case of *Bellet v. France,* the ECHR noted that:

> *Article 6 paragraph 1 of the Convention contains guarantees of a fair trial, one of the aspects of which is access to Court. The level of access provided by national legislation must be sufficient to ensure the individual's right to a court, taking into account the principle of the rule of law in a democratic society. For access to be effective a person must have a clear practical opportunity to challenge actions that interfere with his or her rights*[53].

At the same time, the right of access to the Court must be ensured, so that a person might exercise his or her right without hindrance. The ECHR also indicates this significant component of the concept of access to justice: *'the right to access to the court must be "practical and effective" and not "theoretical or illusory"'.* This observation is particularly relevant to the guarantees enshrined in Article 6 of the Convention, given the importance of the right to a fair trial in a democratic society.

In its decisions, the ECHR repeatedly emphasised that:

> *whilst the right of access to the Court is not absolute and may be subject to restrictions, they are allowed indirectly because the right of access by its very nature requires regulation by the state, which may change in time and place according to the needs and resources of society and individuals. In establishing such rules, the Contracting States enjoy*

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[52] *Golder v. the United Kingdom*, ECHR, 21 February 1975, https://swarb.co.uk/golder-v-the-united-kingdom-echr-21-feb-1975/#:~:text=G%20was%20a%20prisoner%20who,determination%20of%20his%20civil%20rights%20.%20 [access 17.01.2022].

[53] *The Case of Bellet v. France* (21/1995/527/613), https://www.worldcat.org/title/case-of-bellet-v-france-211995527613-judgement/oclc/34689338 [access 31.08.2022].

> *a certain freedom of discretion. Although the final decision on compliance with the requirements of the Convention is entrusted to the Court and not authorised to substitute any other assessment of what could be the best strategy in this area of assessment of national authorities. The restrictions imposed, however, should allow the access granted to individuals in such a way or to such an extent that the very essence of this right is maintained.*

A restriction will be incompatible with paragraph 1 of Article 6 of the Convention if it does not pursue a legitimate aim and if there is no reasonable proportionality between the means used and the purpose sought to be achieved (the case of *Zubac v. Croatia*, item 78)[54].

Another requirement of the principle of the rule of law is the need for access to the administrative Court, which must be an independent, impartial, *legal* (established by statute) court; and the right to a fair and public trial.

4.2. Peculiarities of conducting administrative justice under martial law in Ukraine

By the Decree of the President of Ukraine No. 64/2022 of 24 February 2022 martial law was introduced in Ukraine[55].

The introduction of martial law does not formally affect the judicial process. In accordance with Article 26 of the Law of Ukraine 'On the Legal Regime of Martial Law'[56], shortening or speeding up any

[54] *Zubac v. Croatia*, Application No. 40160/12, https://www.google.com/search?q=Zubac+v.+Croatia&rlz=1C1CHZO_ukUA981UA981&oq=Zubac+v.+Croatia&aqs=chrome..69i57.1788joj15&sourceid=chrome&ie=UTF-8 [access 31.08.2022].

[55] 'On the introduction of martial law in Ukraine': Decree of the President of Ukraine dated 24 February 2022, No. 64/2022/, https://www.president.gov.ua/documents/642022-41397 [access 31.08.2022].

[56] 'On the legal regime of martial law' Law of Ukraine, 12 May 2015, No. 389-VIII (Date of application 11/15/2022), https://zakon.rada.gov.ua/laws/show/389-19#Text [access 31.08.2022].

forms of judicial justice in conditions of martial law is prohibited. In practice, however, things are different.

In national legislation the Law of Ukraine 'On the Judiciary and the Status of Judges' defines the highest judicial self-government body, which acts as the executive body of the Congress of Judges of Ukraine, as the Council of Judges of Ukraine (RSU)[57].

In order to settle the issue of the organisation of judicial justice during martial law, the RSU and the Verkhovna Rada of Ukraine (parliament) adopted certain important decisions of a recommendatory nature.

On 24 February 2022 the decision was made.

Regarding urgent measures taken to ensure the stable functioning of the judiciary in Ukraine in the conditions where the powers of the Supreme Council of Justice are suspended and under martial law because of the armed aggression by the Russian Federation[58].

According to this decision, the RSU adopted the following:

- to draw the attention of all the courts of Ukraine to the fact that, even in conditions of war or state of emergency, the work of the courts cannot be suspended;
- to suspend the execution of judicial justice in the event of a threat to the health, life or safety of court visitors and employees, until the circumstances that caused the danger are eliminated;
- to develop recommendations to the courts regarding the procedure for carrying out evacuation measures and transfer of cases;
- to solve urgent issues, create an operational headquarters consisting of members of the Council of Judges, the chairman

[57] Pro sudoustrii i status suddiv [On the Judiciary and the Status of Judges: The Law of Ukraine]: Zakon Ukrainy vid 02.06.2016 r., Vidomosti Verkhovnoi Rady Ukrainy, 2016, Nr 31, St. 545.

[58] 'Regarding taking urgent measures to ensure the stable functioning of the judiciary in Ukraine in the conditions of termination of the powers of the Supreme Council of Justice and martial law in connection with armed aggression by the Russian Federation', Decision of the Council of Judges of Ukraine dated 24 February 2022, No. 9.

of the Supreme Court, the head of the State Security Service and the head of the Court Security Service.

On 2 March 2022 recommendations were developed regarding the work of courts, including administrative courts, under martial law, chief among them:

1) the specifics of the court's work are determined based on the current situation in the relevant region;
2) when determining the conditions of the court's work in wartime, it is necessary to be guided by the actual current circumstances that have developed in the region;
3) a responsible person is determined in each court, who must ensure up-to-date accounting of staff and judges, taking into account the determined form of court work (remote, etc.);
4) all available court employees are transferred to remote work.

Citizens are informed about the possibility of postponing the consideration of cases in connection with military actions and the possibility of considering issues in video conference mode.

Admission to court sessions is limited to persons who are not participating.

Cases are postponed whenever possible (except urgent trials), considering that many participants in court justice not always have the opportunity to apply for postponement of the case or cannot appear in court due to danger to life.

Cases that are not urgent are considered only with the written consent of all participants in the court.

Procedural terms are extended at least until the end of martial law.

It is necessary to focus exclusively on conducting urgent court justice (detention, extension of imprisonment).

In cases when, under objective circumstances, a participant in the justice cannot attend the court session the court may allow such a participant to take part in a video conference using any other technical means, including its own.

In cases when justice is served collegially and the necessary panel of judges cannot meet in one room it is permissible to view cases from different rooms, including using their technical devices.

On 3 March 2022 the Verkhovna Rada adopted the Law 'On Amendments to the Law of Ukraine On the judicial system and

the status of judges regarding the change of jurisdiction of courts' (draft law No. 7117)[59].

The law stipulates that under the influence of a natural disaster, military operations, measures to combat terrorism or other extraordinary circumstances the work of the court may be suspended with the simultaneous determination of another court that will administer justice in the region of the court that has ceased to operate and that is the most geographically close.

In circumstances when the High Council of Justice is inactive the power to change the regional jurisdiction of court cases is passed to the head of the Supreme Court.

On 03 April 2022 the chairman of the Supreme Court issued an order on organisational issues regarding the establishment of a special mode of operation and appropriate organisational measures were introduced.

In the event of a threat to the life, health or safety of court visitors, court staff and judges, decisions on the temporary suspension of judicial justice by a particular court will be made promptly.

Cases that are not urgent will be considered only with the written consent of all participants in the court proceedings.

Court hearings at which the issue of choosing or continuing a preventive measure in detention must be considered cannot be postponed.

In order to ensure the safety of participants in court justice and court visitors, the personal reception of citizens by the court management ceases and the admission to court sessions of persons who are not participants in court sessions is limited.

In cases when the court has not ceased conducting justice the participants in court proceedings have the opportunity to submit an application for the postponement of the consideration of cases in connection with military actions and for the consideration of issues

[59] On amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges' regarding additional methods of informing about court cases and conducting meetings of judges in conditions of martial law or a state of emergency, Law of Ukraine dated 27 July 2022, https://zakon.rada.gov.ua/laws/show/2461-20#Text [access 31.08.2022].

in video-conference mode using any technical means, including their own.

It should also be considered that the introduction of martial law in a particular region is a valid reason for renewing procedural terms.

Based on the normative acts that were adopted, the mode of operation of each specific court must therefore be determined separately. In practice this is carried out by dint of the heads of courts on organisational issues issuing orders and by making decisions of the Meetings of Judges of each court, changes to the Principles of using the court's automated document management system.

The court's work tends to depend on the situation in the region where the court is located.

4.2.1. CHANGES IN THE REGIONAL JURISDICTION OF CASES

With the introduction of martial law in Ukraine on 24 February 2022, taking into account the impossibility of administering justice in specific regions, changes in the operation of regional jurisdiction of court cases took place.

As of July 2022 the Supreme Court therefore published a list of courts in various regions of Ukraine whose regional jurisdiction had changed due to the impossibility of administering justice during martial law.

The Supreme Court also periodically publishes information on the restoration of regional jurisdiction of courts in regions where active hostilities are no longer taking place.

Courts located in conditionally safe areas continue to work as usual.

4.2.2. RENEWAL OF PROCEDURAL TERMS

The introduction of martial law in Ukraine did not stop procedural terms in court cases.

Even at the beginning of the full-scale invasion the Supreme Court noted in its messages on the website of the Judiciary of

Ukraine that the introduction of martial law in Ukraine is a valid reason for renewing procedural terms.

In practice, courts sometimes refuse to renew the procedural term, justifying the refusal by citing that the territory of the applicant's place of residence (location) is not (or was not) a direct combat zone.

The Supreme Court therefore emphasises that the issue of the renewal of the procedural period in a case of its omission due to reasons related to the introduction of martial law in Ukraine be resolved in each specific case, taking into account the arguments given in the application for renewal of such a period. The fact of the introduction of martial law in Ukraine alone cannot be a reason for renewing the procedural term. The circumstances that arose as a result of the introduction of martial law and made it impossible for a participant in the court process to perform procedural duties within the time limit established by law may constitute such a reason (decision of the Civil Court of Cassation as part of the Supreme Court of 21 July 2022, in Case No. 127/2897/13)[60].

The courts therefore renew the missed procedural terms if the party to the case establishes in the application for the renewal of such a term the presence of circumstances that have arisen as a result of the introduction of martial law and have made it impossible to perform the procedural action promptly.

The Supreme Court therefore would recognise as valid the reasons for missing the deadline for a cassation appeal and would renew it if the application was substantiated by the fact of being in military service (decision of the Cassation Administrative Court as part of the Supreme Court dated 15 July 2022, in Case No. 460/14618/21)[61].

When determining the validity of the reasons for missing the procedural term, the courts take into account the location, the location of the court, the current course of hostilities and the fact that

[60] Decision of the Civil Court of Cassation as part of the Supreme Court of 21 July 2022 in Case No. 127/2897/13-ts.

[61] Decision of the Administrative Court of Cassation as part of the Supreme Court of 15 July 2022 in Case No. 460/14618/21.

a specific person has the real opportunity to apply to the court in compliance with the procedural deadline.

4.2.3. EXTENSION OF THE GENERAL AND SPECIAL STATUTE OF LIMITATIONS

On 15 March 2022 the Verkhovna Rada of Ukraine adopted the Law 'On Amendments to the Tax Code of Ukraine and other legislative acts of Ukraine regarding the effect of norms during the period of martial law', which added a separate clause to the Civil Code of Ukraine (henceforth the Civil Code of Ukraine) on the statute of limitations, which extended the statute of limitations in some instances.

It should be noted that the extension of the statute of limitations does not apply to the terms of appeal to the court in the order of administrative justice in public disputes, since the latter are procedural terms regulated by the procedural law (CPC of Ukraine), and are not a statute of limitations in the sense of the norms of substantive law.

In cases when the deadline stipulated by the administrative, procedural legislation is missed, anyone who wishes to apply to the court for the protection of his violated rights and interests must submit to the court a petition for the renewal of the missed procedural deadline with proper justification of the gravity of the reasons for missing such a deadline.

4.2.4. APPLICATION OF ONLINE JUSTICE

As has been mentioned above, even at the beginning of the legal regime of martial law, the Council of Judges of Ukraine emphasised the need, if possible, to postpone the consideration of cases with the exception of urgent issues (detention, extension of the terms of imprisonment) and to remove instances from consideration, taking into account the fact that a large number of participants in the legal process are unable to appear in court for fear of their lives, or are

unable to submit an application for the adjournment of the case or for a video conference in connection with work on objects critical to infrastructure, the introduction to the ranks of the Armed Forces of Ukraine, regional defence, etc.

At the beginning of the military aggression, most court cases were essentially not considered, and their decisions were not adopted, even if a court was in a relatively peaceful region of Ukraine. This was because impartial parties did not appear at court hearings or requested that they be postponed due to martial law, perhaps also because of concern for their own life and wellbeing.

Specific exceptions were cases that were considered in written justice (without summoning the parties). This is the right of the parties, which they may exercise by filing a petition with the court to consider cases in their absence (Article 194 of the Civil Code of Ukraine). According to Article 194 of the Civil Procedure Code of Ukraine, a party to the case has the right to file a motion to consider the matter in his or her absence. If all the participants in the case make such a request, the judicial review of the case is carried out in written justice based on the materials available to the court.

Within no more than thirty days from the opening of proceedings, the court considers specific categories of cases provided for in Article 263 Code of Administrative Justice of Ukraine.

Those courts located in conditionally safe regions are, however, increasingly actively considering civil, administrative, economic and criminal cases in court sessions.

Bearing in mind that given the military aggression against Ukraine, personal participation in a court hearing may have been dangerous for the participants of the case and the courts issued decisions (Article 212 of the Code of Criminal Procedure of Ukraine, Article 195 of the Civil Code of Ukraine) upon request of the participants to participate in the court hearing outside the premises of the court in video conference mode (for example, using the EasyCon video conference system).

Court practice in Ukraine shows that such requests are mostly granted. Participation in the court session is ensured in video conference mode outside the court premises if there is a reasonable technical possibility.

The Grand Chamber of the Supreme Court, considering the cassation appeal, noted in its decision dated 7 June 2022 in Case No. 910/10006/19 that given the conditions and environment under which justice must be administered and the need to observe the principles of the equality of all participants in the judicial process before the law and the court; transparency and openness of the judicial process; competitiveness of the parties and reasonable terms of consideration of the case, applying to the court with a request for review of the case in the mode of video conference will allow an investigation and evaluation of the arguments of the cassation appeal without violating the specified principles of judicial procedure and at the same time guarantee and not expose the visitors to the court session to danger and potential threat to their life, health and security that may arise because of the military aggression against Ukraine.

Taking into account that many courts not always have the technical ability to hold court hearings in video conference mode (the rooms may not be equipped, there may be insufficient Internet connection or no Internet connection at all or there may be a lack of funding for the Internet), the participants in the case must be active and clarify relevant information in court in advance by telephone. It may also be due to the availability of the appropriate technical equipment in the particular court.

The Law on Judicial proceedings in Administrative Courts in Poland allows meetings to be held outside the court premises under the conditions of compliance with security requirements. During open hearings, technical means are used in order to facilitate cases remotely. In the case of an online hearing the judicial panel considering the case is in the courtroom and the participants may participate in this meeting if they are in another court where procedural actions are to be taken. The general principle is to consider cases and make decisions in an open court session. A cassation appeal against a lower court decision may be considered in a closed session if the complainant refused an open hearing. In March 2020, however, to overcome the consequences of the pandemic, it was legally

permitted to hold court hearings online and the participants in the cases need not be on the premises of another court[62].

Martial law in Ukraine therefore made its corrections in the process of consideration of court cases. Even under martial law, however, a person's constitutional right to judicial protection may not be limited. The measures currently implemented by the judicial authorities therefore aim to ensure the possibility of considering court cases and avoiding endangering the life and wellbeing of the participants in the legal process.

4.3. Reform of the administrative judiciary of Ukraine as a guarantee of increasing the efficiency of administrative courts in the protection of human rights

The field of human rights protection is of global concern and of particular importance in Ukraine, especially at this stage in history. The right to access to justice and a fair trial within a reasonable time are some of the main features of the rule of law.

According to Part 2 of Article 3 of the Constitution of Ukraine, human rights and freedoms and their guarantees determine the content and direction of the state's activities. The state is responsible to the people for its activities. Affirmation and provision of human rights and freedoms are the state's primary duty[63].

Administrative justice is the only effective tool capable of adding actual content to the declaratory principles. The introduction of administrative justice is a matter of state importance that affects the interests of the entire society and every ordinary citizen and must therefore be ensured at the highest level. The activity of administrative courts is indubitably a manifestation of democratic orientation,

[62] The Act of 25th July 2002 Law on the system of administrative courts (Consolidated text Journal of Laws of the Republic of Poland of 2017, Item 2188; as amended by: Journal of Laws of the Republic of Poland of 2018, Item 3 and 1443).

[63] Konstytutsiia Ukrainy [Constitution of Ukraine]. Pryiniata Verkhovnoiu Radoiu Ukrainy 28.06.1996 r., Vidomosti Verkhovnoi Rady Ukrainy, 1996, Nr 30, p. 141.

intended to increase the authority not only of the judiciary but also of the head of state, state management bodies and self-government bodies in Ukraine.

Adopted by the Verkhovna Rada of Ukraine on 6 July 2005, the Code of Administrative Justice of Ukraine guarantees the protection of the rights and legitimate interests of individuals and legal entities against the arbitrariness and illegal actions of officials who illegally interfere in the personal space of a citizen[64].

The legal protection provided by administrative courts is not aimed at punishing illegal behavior but, if such has occurred, at restoring the legal status and the rights of the injured party. The specified Code testified to the authenticity of the intentions of the Ukrainian state to implement the principle of the rule of law and to act transparently and impartially in the interests of every ordinary citizen.

Creating a system of administrative courts led by the Supreme Administrative Court of Ukraine is therefore one of the most significant achievements of judicial reform in Ukraine. Under the current difficult conditions that have developed in the state, however, the judiciary, like all the authorities in the state, must take measures to restore people's faith in justice because of trust in the judiciary in general and in the court in particular.

The judicial system, courts and judges are under a barrage of devastating criticism. It is unfortunate, but it must be admitted that there are many problems in the judicial system and in the judicial environment. There is also an element of corruption, which exists in the State in general. There are disreputable representatives of the legal profession who should be removed. To overcome these problems, however, one must choose a legal way, in particular by reforming the judicial branch of power[65].

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[64] Kodeks administratyvnoho sudochynstva Ukrainy [Code of Administrative Justice of Ukraine: Law of Ukraine], Zakon Ukrainy vid 06.07.2005 r., Vidomosti Verkhovnoi Rady Ukrainy, 2005, Nr 35–37, St. 446.

[65] P. Martynenko, *Pravo hamantsia i nezalezhnist sudu*, "Yurydychnyi visnyk Ukrainy" 1998, Nr. 9, pp. 98–104.

The Republic of Ukraine took an important step and created a system of administrative courts. An equally important step that must now be taken by Ukraine, however, is to strengthen the constitutional foundations of justice within the framework of judicial reform, securing administrative judges at the constitutional level. First of all, the constitutional provisions regarding the order of formation, re-organisation and liquidation of courts and the definition of their network need to be changed. The constitutionally established status of administrative courts will guarantee the independence of administrative courts from other branches of government and subjects of political relations.

The improvement of procedural legislation is currently of importance. Amendments to the Code of Administrative Justice of Ukraine aimed at improving the efficiency of the administrative process, preventing the abuse of procedural rights and protecting human rights and freedoms.

In the Republic of Poland in accordance with the first part of Article 45 of the Constitution of 2 April 1997 everyone has the right to a fair and open trial without unreasonable delay and by a competent, independent, impartial and independent court[66].

The right to a trial is one of the fundamental human rights guaranteed by the Constitution of the Republic of Poland. According to the principle of the rule of law and the guaranteed right to a fair court (paragraph one of Article 45 of the Constitution of the Republic of Poland) and paragraph 2 of Article 77 of the Constitution the law cannot bar the way to the resolution of violated freedoms or rights in court. The implementation of the function of objective protection involves the legal order regulated by Article 184 of the Constitution of the Republic of Poland, which establishes that the judicial administration is designed to protect rights, its primary function[67].

[66] Articles 16, 146, 165 – The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of the Republic of Poland of 1997 No. 78, Item 483, as amended.

[67] *Ibidem*.

Such a mechanism was initiated to build a mechanism related to the levers of the regulation of the human right to access to court, which is outlined in the subsection 'Measures for the protection of fundamental freedoms and rights' of the second chapter, while Article 184 of the Constitution is contained in Chapter VIII, 'Courts and Tribunals', which regulates the constitutional construction of the judicial system of justice[68].

The Constitution of the Republic of Poland envisages such features of administrative courts as separation from general courts; a developed system of administrative courts; judicial independence during consideration of public legal disputes; and regulation of the basic principles of the activity of administrative courts in the Constitution.

Article 184 of the Constitution of the Republic of Poland stipulates that the Supreme Administrative Court and other administrative courts, exercise control over the activities of public administration within the limits set by law. Administrative courts have to protect individual rights. This is their primary function and is related to the implementation of the principle of protection of human rights in court, which is outlined in the Constitution in the subsection 'Measures for the protection of freedoms and rights' of the second chapter. Courts and tribunals (Article 184 of the Constitution of the Republic of Poland) function in the judicial system of measuring justice, which indirectly influences the activities of state authorities.

The review of decisions in administrative courts helps improve the quality of work of state bodies, systematises the interpretation of the provisions of administrative law and strengthens the law. Decisions may be challenged in an administrative court due to their incompatibility with the principles and procedures outlined in separate legislative acts. In Poland priority was therefore given to creating an independent structure of specialised administrative courts. Polish researcher Minenkova writes that control over decisions made by administrative courts helps to improve the quality of

[68] *Ibidem.*

work of state bodies, standardise the interpretation of administrative law and strengthen the law[69].

The principle was formulated that the decisions of the state authority may be appealed in the administrative court due to their inconsistency with the provisions on regulations and procedures outlined in separate legislative acts. According to Article 1 paragraph 1 of the Law 'On the System of Administrative Courts' administrative courts administer justice by controlling the activities of public administration and resolving disputes on issues of competence and jurisdiction between bodies of subjects of territorial self-government, appellate boards of self-government bodies and between these bodies and bodies of government administration. Thus, the first step in implementing administrative procedures is in effect. The administrative court may protect rights after the decision has already been made by the authority and administrative appeal. At the same time, judicial control referred to in Paragraph 1, is carried out on the subject of legal compliance with the decisions of the authorities. This control is carried out in accordance with the law insofar as the control is directed and based on the criteria of legality: administrative procedural law.

According to Article 1 paragraph 1 of the Law 'On the System of Administrative Courts', administrative courts administer justice by controlling the activities of the state administration. Control is carried out regarding compliance with the provisions of the law, which restricts the rights of a person from the body of the subject of power during an administrative appeal in this body (administrative procedures), whether there were mistakes in the application of this law to the extent that such circumstances may affect the outcome of the case.

In legal literature, along with the general principles of the administrative process, are also customary rules enshrined in the Constitution of the Republic of Poland, i.e. according to European standards, as well as taken from the Convention on the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental

[69] N. Minenkova, *Sud pochynaietsia z povahy*, "Zakon i Biznes" 2009, Nr 5, http://www.zib.com [access 31.08.2022].

Rights of the European Union, recommendations of the Committee of the Ministers of the Council of Europe No. 31/77 and case law of the Court of the European Union[70].

The rules (laws) contained in the provisions of the Constitution of the Republic of Poland are as follows:

a) the principle of building a democratic legal state;
b) the principle of work of state bodies according to the law (principle of the rule of law);
c) prohibition of excessive intervention (principle of proportionality);
d) principle of certainty and immutability of the law (principle of legal certainty);
e) the principle of citizens' trust in the state and its laws;
f) the principle of settlement of disputes for the benefit of the parties (*in dubio pro tributario*);
g) the right to compensation for damage caused as a result of illegal actions of a subject of authority;
h) human right to equality (equality before the law);
i) the principle of two-instance administrative justice and an administrative court;
j) the right to a fair trial and process;
k) the right to appeal;
l) the right to protect personal rights;
m) the right to submit petitions, complaints and opinions;
n) the principle of non-retro-activity of the law (*lex retro non agit*);
o) the principle of protection of legal rights;
p) the principle of conservation (the law of release);
q) the principle of social justice.

It is important to pay attention to the principles contained in the articles of general administrative legislation:

[70] European Charter on the Status of Judges Law, Lisbon, 10 July 1998, http://zakon3.rada.gov.ua/laws/show/ru/994_236 [access 31.08.2022].

1) the principle of equal treatment of all parties in the case;
2) the principle of consideration of disputes in accordance with the limits of authority if the authority uses the principle of administrative discretion in resolving issues;
3) the principle of waiving the possible occurrence of unfavourable consequences for legal entities that challenge the decisions and actions of the subjects of authority;
4) the principle of impartiality;
5) the principle of ensuring the non-occurrence of unfavourable legal consequences for individuals and legal entities as a result of possible illegal decisions and actions of state authorities;
6) the principle of interpretation of the provisions of the legislation, based on which the subject of the powers of administration acts in a way that does not endanger the rights of the individual;
7) prohibition of 'clarification and change' of administrative or judicial decisions by excluding measures on this issue from the scope of its regulation;
8) the principle of the application of specific provisions of civil legislation in matters not settled by the administrative process if the state body made a decision or took actions taking into account the state of the case;
9) the principle of the priority of protection of rights and obligations if the supremacy of the law as a whole is mandatory or when it follows directly from the nature of these rights or obligations, and the lack of adequate protection of rights may cause the limitation of such rights.

Administrative courts therefore act according to the principles in the field defined by law and exercise control over public administration activities. This control also consists of the court issuing a decision in compliance with the laws of various resolutions (decisions) of local self-government bodies and normative acts of local government administration bodies.

Judicial independence, guaranteed by the Constitution of the Republic of Poland and legislative acts, is of great importance for the clear functioning of administrative justice. Independence is the basic principle of justice, according to which judges obey only

the Constitution and laws. This means that no state body or official has the right to influence the decisions of judges. Article 181 of the Constitution of the Republic of Poland determines that a judge cannot be held criminally liable or arrested without the consent of a court determined by law. If a judge is caught red-handed, however, and his detention becomes necessary in order to ensure the proper course of the process, he may be arrested[71].

The legislative basis for administrative courts in Poland is the Law 'On the Organisation of Administrative Courts'[72] and the Law 'On Justice in Administrative Courts' which entered into force on 1 January 2004[73].

Administrative justice in the Republic of Poland is a two-instance court: the Supreme Administrative Court of the Republic of Poland and voivodeship administrative courts. Cases falling within the jurisdiction of administrative courts are considered in the first instance by voivodeship administrative courts. The Supreme Administrative Court of the Republic of Poland supervises the activities of voivodeship administrative courts about decisions issued in accordance with the procedure established by law and considers cassation appeals against the findings of these courts, makes decisions with clarifications of legal positions in specific categories of cases, and exercises other powers provided by law.

The President of the Republic appoints the Chairman of the Supreme Administrative Court of the Republic of Poland for six years from among the candidates proposed by the general meeting of judges of this court and also approves its organisational structure. Based on the proposals of the Minister of Justice and at the request of the Supreme Administrative Court the President establishes and dissolves voivodeship administrative courts. The Supreme Administrative Court of the Republic of Poland supervises the activities of

[71] Articles 16, 146, 165 – The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of the Republic of Poland of 1997 No. 78.

[72] The Act of 25th July 2002 Law on the organization of Administrative courts, Journal of Laws of the Republic of Poland of 2002 No. 153, Item 1269.

[73] The Act of 30th August 2002 Law on justice before Administrative Courts (Consolidated text Journal of Laws of the Republic of Poland of 2018, Item 1302; as amended by: Journal of Laws of the Republic of Poland of 2018, Item 1467).

voivodship administrative courts in the area of decision-making in accordance with the procedural law; considers cases in the appeal procedure against the decisions of these courts; makes decisions interpreting legal provisions; and also regulates the procedure for conducting administrative justice.

Administrative court judges are appointed to judicial positions by the President of the Republic of Poland on the proposal of the National Council of Justice of Poland, which includes representatives of the judicial system, the Ministry of Justice and members of parliament. A judge may retire after 20 years of judicial service. Disciplinary justice against administrative court judges are carried out in the the Supreme Administrative Court of the Republic of Poland by special disciplinary commissioners.

It should be noted that in the administrative justice of the Republic of Poland that there is a mandatory appeal of the decisions of state bodies or institutions in a pre-trial procedure, which is a compulsory when applying to an administrative court. It is therefore possible to appeal to the court only after an administrative appeal (appeal to the authorised body of the subject of power), which the relevant person must carry out. If the law provides no other ways of protecting rights in court, it is necessary to apply to the body to remedy the violation of the right and to appeal the relevant decision in the future.

It is an interesting provision that the submission of an administrative lawsuit to the court does not stop the execution of the decision of the authority and does not stop the implementation of actions, but at the request of the party, if there is a danger of harming the interests of the complainant, or at the initiative of the court, the court may take so-called security measures and stop the action, act or the performance of specific activities[74].

As mentioned above, there is a principle according to which administrative courts in Poland are not limited to claims. The court cannot fail to make a decision in favour of the plaintiff if it finds a violation of the provisions of the law. If the complaint is not

[74] I. Nowak, *Postępowanie administracyjne. Podręcznik akademicki z orzecznictwem*, Kielce 2012, pp. 64–65.

satisfied, the court returns the complaint to the complainant and if the deadline for filing the complaint is missed, the court rejects it. Having considered the complaint against the acts or actions of bodies, establishing the existence or non-existence of powers, recognising the inconsistency of the act or action with the law, the court cancels the contested act or recognises the action as having no consequences. Satisfying the statement of the party in the case, the court makes a decision by which it recognises, confirms or establishes the right or obligation arising from the provisions of the law.

When making a decision to satisfy a complaint about the body's inaction, the court obliges the body to issue an act, perform an action or establish a right or obligation. The court resolves cases by making decisions (provided the complaint is considered on the merits) or resolutions (when resolving procedural issues).

The specialisation of administrative courts in Poland regarding the consideration of public legal disputes builds an effective mechanism for the implementation of the European system of protection of human rights and fundamental freedoms and implementation of the principle of the rule of law. Enshrining the basic principles regarding the activity of administrative courts in the Constitution of Ukraine on the example of Poland will help the implementation of the principles established by the provisions of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms because everyone has the right to a fair and public hearing of his or her case within a reasonable time by an independent and impartial court established by law that will resolve a dispute regarding his or her civil rights and obligations or confirm the validity of any criminal charge brought against him or her.

Administrative courts should also be separated from general courts and judicial independence when considering public legal disputes. It should be noted that in the administrative justice of the Republic of Poland, there is a mandatory appeal against the decisions of state bodies or institutions in a pre-trial procedure, which is a compulsory condition when applying to an administrative court. Such a mechanism may be used when working on drafting the Administrative Procedure Code of Ukraine. It is possible to resort

to the court after using all types of administrative appeals that may be used by the relevant person.

The provisions of the Constitution of the Republic of Poland provide for the activities of the Supreme Administrative Court of the Republic of Poland, which occupies an independent place in the country's judicial system and the system of checks and balances of state authorities. Implementing the principle that administrative courts in Poland are not limited to established claims is quite effective and hopeful. The court cannot fail to decide in favour of the plaintiff if it finds a violation in the provisions of the law. The same application of such a principle in practice, together with the principle of going beyond administrative requirements, will be very positive when considering cases of administrative jurisdiction in Ukraine with the aim of proper and complete protection of the rights, freedoms and interests of the individual.

The European Court of Human Rights currently has 57 complaints, which in one way or another relate to the activities of the National Council of Justice, an analogue of the Supreme Council of Justice in Ukraine. The situation in many ways also resembles that that is developing today around the formation of the ethics council and the future composition of the Supreme Council of Justice.

The National Council of Justice appeared in Poland's judicial system in 1989. Previously the law provided that the judges elected its members at various judicial power levels. At the end of 2017, however, a law was passed through the *Sejm* that transferred such powers to the legislature. The reform was criticised by EU bodies, however, and the extraordinary General Assembly of the European Network of Councils of the Judiciary (ENCJ) discontinued the Poland's membership of National Council of Justice, establishing that it no longer met the requirements of independence.

Even before all these events the judge of the Myslovic District Court, Monika Dolinska-Fichek, decided to transfer to work at the District Administrative Court. She submitted the necessary documents and recommendations to the National Council of Justice, including a 'qualification assessment report', where the quality of her work over the past four years was positively assessed. It was also concluded that the judge had a great deal of knowledge in the field

of administrative law and had fulfilled all the conditions for applying for a new position. Her colleagues also supported her, recommending the transfer with the judgement 'very good'[75].

The new composition of the National Council of Justice, however, believed that the applicant 'had not demonstrated the knowledge, skills and abilities necessary for a positive assessment of her application'.

An attempt to appeal the refusal in the Supreme Court was unsuccessful. A three-judge Emergency Supervisory and Public Affairs panel dismissed the appeal, saying it had no jurisdiction to consider the merits of judicial candidates or to decide which of them should be recommended to the president for judicial appointment. She said that the Supreme Court's significant intervention in the council's decision was unacceptable, as it would encroach on the sphere of extraordinary powers of the National Council of Justice[76].

The second applicant, the judge of the Lublin Local Court Artur Ozimek, applied to be transferred to the appellate instance. He also attached the necessary documents and recommendations to the application, but his candidacy also raised doubts among the members of the National Council of Justice. So instead, other judges were appointed to the positions.

Ozimek appealed to the Supreme Court against the refusal and requested that the court not consider his appeal until the Court of Justice of the European Union issued a preliminary decision at the request of the Supreme Administrative Court of Poland. He believed that the council was not independent and was created in violation of the constitution (Does this need a citation?).

The justification was the same: only the board's compliance with the procedure, not its assessment of the candidate's professional qualities, was subject to judicial review. All the Supreme Court could

[75] The proceedings before the administrative courts, Act of 30 August 2002, Journal of Laws of 20 September 2002, No. 153, Item 1270; Law on the Organisation of Administrative Courts, Act of 25 July 2002, Journal of Laws of 2002 No. 153, Item 1271.

[76] J. Regulski, *Samorząd III Rzeczypospolitej. Koncepcje i realizacja*, Warszawa 2000, p. 5; W. Zając, *Zasadniczy trójstopniowy podział terytorialny Polski*, Warszawa 1999, pp. 30–38.

do was to check whether the NCJ applied *'transparent, equal, and fair selection criteria'* to all participants in the appointment procedure[77].

4.3.1. EVALUATION PRECEDENT

In the decision dated 8 November 2021, in the case of *Dolińska-Ficek and Ozimek v. Poland*, the ECHR noted that it was not an isolated case that the complaints concern either the question of whether the newly created chamber of the Supreme Court could be considered a *'court established by law'* in accordance with paragraph 1 of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms, or issues of the disciplinary chamber on the part of disciplinary justice against judges, prosecutors and representatives of the legal profession. Some cases also concern allegations that judicial institutions, including judges appointed by the President of Poland on the recommendation of the new NCJ, fail to meet the requirements of a statutory court[78].

There are also two cases concerning the premature dismissal of judges of the old council and a lack of access to the Court to challenge the dismissal. One of these cases, *Grzeda v. Poland* was under consideration by the Grand chamber of the Court.

The ECHR emphasised that, in this case, its task does not concern an analysis of the legality of the reorganisation of the Polish judicial system in general. He took into account, however, that the evaluation of the procedure for the appointment of judges with the participation of the NCJ will have direct consequences for other Polish cases, both pending and in the future.

In accordance with its precedent practice, the starting point for evaluation was the Court's determination of the provisions of the legislation and their interpretation by the courts. In this context the First Chamber of the Supreme Court, which considered the

[77] S. Biernat, *How to Assess the Independence of Member State Courts?*, 2018, https://doi.org/10.17176/20180730-100627-0 [access 31.08.2022].

[78] J. Gudowski, *Sąd Najwyższy. Pozycja ustrojowa, funkcje i zadania (spojrzenie sędziego cywilisty)*, "Przegląd Sądowy" 2015, nr 11–12.

complaints of the applicants, emphasised that the right to equal access to public service, guaranteed by the constitution, requires a judicial review of its observance.

As the ECHR noted, the applicants had the right to equal access to public positions. This was accompanied by the procedural right to seek a judicial review of the council's decision in the Supreme Court in accordance with Article 6 of paragraph 1 of the Convention. In the terms of the Convention, this right must also be defined as civil, considering that the trial concerned a career and the right to promotion. The outcome also had potentially severe implications for personal rights, including status and property.

4.3.2. ABOUT THE 'LEGITIMACY OF THE BENCH'

Faced with two fundamentally opposing views from the Polish higher courts on the reform, the Court emphasised that it tends to rely on the courts' interpretation if their conclusions cannot be regarded as arbitrary or unfounded.

As soon as a violation of the relevant norms is established, the assessment by the courts of the legal consequences of such a violation must be carried out based on the appropriate precedent practice of the application of the convention and the principles arising from it. Accordingly, and although the ECHR permitted the right of the courts independently to determine the way to achieve the appropriate balance, they are obliged to comply with the obligations arising from the convention.

At the same time, the process of appointing judges requires strict control. A violation of the law governing this process may render the participation of the judge concerned in the justice irregular, given the relationship between the appointment procedure and the 'legitimacy of the bench' on which such a judge subsequently sits.

In this context, the ECHR referred to the statement in the previous decision of the Court of Justice of the European Union dated 19 November 2019:

> *The degree of independence enjoyed by the NCJ vis-à-vis the legislative and executive branches of government in the performance of the duties assigned to it in accordance with national legislation… may be of importance in establishing that, whether the elected judges meet the requirements of independence and impartiality arising from Article 47 of the Charter*[79].

The Court then recalled the essentially unanimous opinions of international organisations, according to which changes in the procedure for appointing members of the NCJ led to the fact that the council ceased to be independent. As a result of this, it failed to fulfil its constitutional duty to protect the independence of courts and judges.

In 2018 the legal community also boycotted the process of forming the Council: only 18 candidates applied for 15 vacancies; 6 out of 15 judges were unanimously appointed by the *Sejm* in the previous six months and the Commissioner for Human Rights of the Council of Europe expressed his concern that most of the current NCJ are either members of the ruling party, have held government positions or have been elected by the parliament on the recommendation of the ruling party.

The Supreme Court, in its resolution dated 23 January 2020, established that the Minister of Justice, who was also the Prosecutor General, influenced the formation of the National Council of Justice. This was confirmed by the official statement of the minister himself in the Senate.

There were also disagreements regarding the non-disclosure of the lists of those who recommended new council members. There should have been either 2,000 citizens or 25 judges). This made it

[79] W. Żurek, D. Mazur, *Wymiar sprawiedliwości w Polsce u progu 2017 r. Wyzwania i zagrożenia*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2017, nr 1, pp. 25–36.

impossible to ascertain whether the candidates received the required signatures[80].

In the opinion of the Court, a situation where the public needs to be given an official explanation as to whether the formal requirement of obtaining sufficient support for the candidates for the council has been met may raise doubts about the legality of the process of electing its members. The procedure for the formation of the EP also prohibits demands from candidates who have been recommended by international organisations any documents confirming their compliance with the requirements established by law.

The lack of scrutiny of those who supported NCJ candidates may raise suspicions about the qualifications of the members and their direct or indirect ties to the executive branch.

4.3.3. UNDER EXTERNAL INFLUENCE

In light of this, the ECHR concluded that the 2017 law deprived the judiciary of the right to elect members of the National Council of Justice, a right granted under previous legislation and recognised by international standards. As a result, the ECHR agreed that the legislative and executive branches of government influenced the composition of the Council. The law practically eliminated the previous representative system and guaranteed judicial independence in this regard. This allowed direct or indirect intervention in appointing judges, which these bodies took advantage of.

The Court also noted that the situation worsened further with the subsequent appointment by the president of the judges of the Chamber of Extraordinary Supervision and Public Relations. The National Council of Justice, however, recommended stopping the process of their appointment.

Taking into account all the circumstances mentioned, the ECHR concluded that the legislation violations stem from a failure

[80] J. Olszanowski, *The Model of Supervision over Administrative Courts in Poland*, "Bratislava Law Review" 2020, Vol. 4, No. 2, pp. 173–188, https://doi.org/10.46282/blr.2020.4.2.195. P.75 [access 31.08.2022].

to observe the principles of the rule of law, and the separation of powers and the independence of the judiciary, tainted the contested appointment procedure.

As a result of the first violation, candidates for the position of a judge were to the chamber of extraordinary supervision and, in connection with were, recommended by the public by a body that lacked independence from the legislative and executive branches of power. This violation was compounded by the president's clear violation of the rule of law to render judicial review of the decisions of the National Council of Justice on the recommendation for the appointment of other candidates meaningless.

The ECHR therefore emphasised that the procedure for appointing judges, which reveals the influence of the legislative and executive branches of power on the appointment of judges, is incompatible with paragraph1 of Article 6 of the Convention. This also affects the entire recruitment process, jeopardising the legitimacy of the Court, which consists of judges appointed in this way.

The ECHR concluded that the violations in the procedure for appointing judges to the Supreme Court Chamber were so severe that they limited the very essence of the applicants' right to a 'court established by law'. The very nature of the right guaranteed by paragraph1 of Article 6 of the Convention was violated[81].

To make Warsaw more aware of the consequences of violating the fundamental principles of the Convention, each judge would have to pay €15,000 in compensation.

The administrative justice system of Ukraine also went through a similar difficult path of reform. Analysing the experience of the administrative justice reform in Ukraine, we will note its most positive points:

[81] K.S. Paschenko, *The legal adjusting of judicial charges in the administrative legal proceeding: Poland experience*, "Scientific Papers of the Legislation Institute of the Verkhovna Rada of Ukraine" 2016, No. 1, pp. 102–107, https://instzak.com/index.php/journal/article/view/311 [access 31.08.2022].

4.3.4. THE PRINCIPLE OF TRANSPARENCY

Following the new procedural legislation, the so-called free listeners who wish to observe the court session must have an document of identification. This Article places restrictions on the access of free listeners to court sessions due to the lack of free seats in the courtroom. The provisions regarding video recording are rather ambiguous. In accordance with the updated code of administrative justice, videotaping of court justice may therefore be carried out without obtaining separate permission from the court, but video broadcasting online requires the approval of a judge.

4.3.5. THE OPENNESS OF INFORMATION ABOUT CASES AND ELECTRONIC JUSTICE

According to the provisions of the new procedural legislation, which applies not only to the Code of Administrative Procedure of Ukraine[82], the so-called Unified Judicial Information and Telecommunication System is implemented in the courts. Unlike the previous automated court document flow system, this system will not only appoint judges, provide information about the case and register correspondence, but will also allow the court and the parties to the case to conduct correspondence in electronic form. According to the provisions of Article 18 of the updated the Code of administrative justice of Ukraine[83], lawyers, notaries, private executors, judicial experts, state bodies and local government bodies, economic entities of the state and communal sectors of the economy must register official electronic addresses in the Unified Judicial Information and Telecommunication System. With registered users, the court will therefore communicate exclusively in electronic format, but the Code of administrative justice of Ukraine[84] does not prohibit

[82] Kodeks administratyvnoho sudochynstva Ukrainy, Zakon Ukrainy vid 06.07.2005 r., Vidomosti Verkhovnoi Rady Ukrainy, 2005, Nr 35–36, 37, St. 446.
[83] Kodeks administratyvnoho sudochynstva Ukrainy…, *op. cit.*
[84] *Ibidem.*

submitting documents to the court in paper form. It should be noted that virtually any person may register in the electronic court system if they have a digital signature.

4.3.6. FORMS OF ADMINISTRATIVE JUSTICE AND CATEGORIES OF CASES

In addition to the usual special categories of cases defined by Chapter 6 of the current Code of administrative justice of Ukraine, the updated establishes general categories: cases of minor complexity that are resolved in a simplified procedure and all other cases that are resolved in a general procedure. Currently, simplified court justice is used only in criminal justice and therefore the introduction of this procedure in the code of administrative justice is an undeniable innovation in national legislation. Although the updated Code of administrative justice of Ukraine[85] defines a list of cases of minor complexity, it is not exclusive. Cases of minor complexity therefore include, in particular, cases regarding acceptance, passing and dismissal from public service, appeals against the inaction of subjects managing public information, appeals by natural persons of decisions, actions or inaction of subjects of authority regarding calculation, appointment, recalculation, implementation, provision and receipt of pension payments. The court, at its own discretion or the request of a party, may classify the case as of minor complexity and appoint a simplified procedure for its resolution. For the most part, the simplified procedure for solving cases differs from the general procedural terms. The term of consideration of the case according to the rules of the simplified procedure may not exceed 60 days, and the full text of the resolution in cases considered in the simplified procedure is drawn up within 5 days, in contrast to 10 days in general. Another feature of the simplified procedure is the absence of preparatory justice. The court appoints the first court session no later than 30 days after the start of the case.

[85] *Ibidem*.

4.3.7. REVIEWS, OBJECTIONS AND EXPLANATIONS

The reformed code introduces a new concept: 'statements on the merits of the case'. According to the provisions of Article 159 of the Code of administrative justice, such statements are: statements of claim, responses to a statement of claim (response), reactions to a response, objection, explanation of the third party regarding a claim or responses. A complex system of presenting opinions on a claim and presenting evidence to the court and the parties in the case is being introduced. The already-familiar Lawsuit↔Objection scheme recedes into the background. The new code stipulates that the defendant has the right to prepare a response to the statement of claim, which is submitted to the court no later than 15 days before the day of the first hearing on the case and evidence of sending it to other participants in the case is attached to the response, as well as evidence on which the provisions set out in the response are based. In turn, after receiving a response, the plaintiff presents his or her explanations, considerations and arguments regarding the provisions cited by the defendant in the response and sends a response to the court and the parties in the case. The defendant, having received this answer, may then object to it and send it to the court and the parties in the manner prescribed by this Code.

4.3.8. CHALLENGING LEGAL ACTS

The new version of the Code of Administrative Justice supplements the provision of the Article on challenging regulatory legal acts with the clause according to which the burden of establishing the violation of the rights, freedoms and interests of the plaintiff by the regulatory legal act rests with the plaintiff. This norm is consistent neither with the provisions of Articles 6 and 19 of the Constitution of Ukraine [63] nor with the principles and goals of administrative justice.

Individuals and legal entities under private law are guided by the generally permissive legal formula *ubi jus incertum, inoculum* ('what is not prohibited is permitted'). In contrast to them, state bodies and

local self-government bodies, in accordance with Article 19 of the Basic Law, are governed by the exact opposite legal formula. State bodies and bodies of local government are obliged to act only on the basis, set out by the Constitution and Laws of Ukraine. This provision of the Basic Law establishes the obligation of authorities to be guided in their activities only by the current legislation of Ukraine and that their activities must be as fully and accurately regulated as possible to prevent the possibility of causing harm to a person, society, or the state. Any gaps, conflicts and other deficiencies in law should not be interpreted and used in favour of local local government bodies.

Placing the burden of proof on the plaintiff in cases of contesting legal acts therefore undermines the very essence of administrative justice.

4.4. Exemplary case

Another fundamental change in the current Code of Administrative Procedure of Ukraine [64] will be the actual introduction of case law. The new Code of administrative justice will therefore introduce the concepts of typical and exemplary cases.

Typical administrative cases are administrative cases in which the defendant is the same entity of power (its separate structural subdivisions), in which the dispute arose on similar grounds, in relations governed by the same norms of law and in which the plaintiffs declared similar requirements.

An exemplary administrative case is a typical administrative case accepted for justice by the Supreme Court as a court of the first instance for rendering an exemplary decision.

The specifics of this category of cases are the grounds for their appeal. The grounds for appeal of typical cases are exclusive in that the court of the first and appellate instance neither take into account in its decision the conclusions of the Supreme Court of Ukraine regarding the exemplary case nor whether the case in which the court rendered a decision corresponds to the characteristics of a typical case.

Signs of typical cases of specific categories are indicated in the decision of the Supreme Court of Ukraine in an exemplary case. An exemplary case may be reviewed by the Grand Chamber of the Supreme Court on appeal. The decision of the Grand Chamber is final and not subject to appeal.

It should be noted that the above innovations are reminiscent of the pilot decisions of the European Court of Human Rights, which note the nature of the systemic problem, which is presented to categories of the same type of cases with the same grounds and signs of violation of the Convention on the Protection of Human Rights and Fundamental Freedoms.

4.5. Conclusion

The main indicator in the activity of judges in Poland and Ukraine is the person (a human) because the most important thing is that everyone may exercise his or her constitutional right to an independent and fair court to protect fundamental rights, freedoms and interests. The courts of administrative jurisdiction are the bodies that are called to ensure the protection of human rights in their interaction with the state, as well as to control the legality of the exercise of the powers granted to them by state authorities and officials. In my opinion, a court that makes quality decisions within a reasonable period, which is implemented, is effective.

Under these conditions, we may talk about the reality of the protection of human rights and freedoms in the state, and therefore it is through the implementation of decisions that we may assess their quality. To increase the effectiveness of the court decision, the procedural legislation of Ukraine and Poland provides tools that the judge must use. This is a separate decision; an electronic court; the institution of representation is introduced; judicial control over the execution of the court decision; the institution of an exemplary case. There are many practical problems, however, related to the way the effectiveness of the execution of the court decision may be improved.

Despite the war with Russia, the difficult economic and energy situation, Ukraine still took several qualitative new steps that will help people better protect their rights in public legal relations and that are aimed at the effectiveness of administrative justice as a whole:

1. the introduction of an electronic court, which should simplify access to justice and facilitate work; an open court;
2. the regulation of the legal regime of electronic evidence and the determination of the criteria for their admissibility by the court;
3. the regulation of the dispute settlement procedure with the participation of a judge (mediation), the purpose of which is the peaceful settlement of disputed legal relations before the start of the case on the merits of the claims;
4. the introduction of the institution of representation, when only a lawyer or a legal representative may act as representatives in court, the exception being cases of minor complexity; at the same time, the institute of free legal aid was introduced, when a person who does not have sufficient financial resources may receive professional legal aid free of charge;
5. the institution of an exemplary case, which will make it possible to unify judicial practice in the consideration of typical cases, shorten the time frame for settlement and reduce the workload of administrative courts.

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Chapter 5. Mediation in Slovakia

5.1. Briefly on the development of the legislation

The legal regulation of mediation (civil, not criminal) is primarily contained in Act No. 420/2044 Coll. on Mediation and on the Amendment of Certain Acts, as amended. Its content derives in particular from the UNCITRAL Model Law on International Commercial Conciliation and the European Union Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters and related materials. Similarities may also be found with the law on arbitration, which seems to have been one of the starting points. When the law was drafted, a debate was opened on whether a mediator had to have a law degree (or even whether he or she had to have any degree at all), a debate that has continued to the present day. Until the adoption of this law, mediation as a legal institution in the legal order of the Slovak Republic could not be discussed.

5.2. Mediation in the Slovak Republic

Mediation is regulated (in particular) in the following legislation:

1) Act No. 420/2004 Coll. on Mediation and on the Amendment of Certain Acts, as amended: this is the primary regulation to which space is devoted below;

2) Act No. 99/1963 Coll. on the Code of Civil Procedure (in force until 30 June 2016), as amended: this is a civil procedural code that was in force in the past, so it is not dealt with in detail.

Act No. 160/2015 Coll. on the Civil Procedure Code (in force from 1 July 2016): this is a procedural code that is currently in force. The link between civil procedural law and mediation is insufficient. The relatively brief provision in this regulation referring to mediation is included only exceptionally. The court may refer the parties to the dispute to the possibility of using mediation, but there is no obligation for the court to do so. In particular, the provision in Section 170(2) is: '*Where it is possible and expedient to do so, the court shall attempt to resolve the dispute amicably or, where appropriate, shall recommend that the parties attempt to settle the dispute by mediation*'. Such an approach in the law may be seen as a conclusion that, if court proceedings have already commenced, mediation cannot be used in them, which is an *a priori* unhelpful attitude towards the possibility of amicable settlement of the dispute. A link between the Civil Procedure Code and the Mediation Act may also be found in the fact that, if an agreement representing the result of the mediation process is approved by a court by way of an amicable settlement, it is a form of agreement whose enforceability has greater legal force and may be enforced; otherwise it is not in accordance with the provision of Section 15(2) (b) of the Mediation Act.

Act No. 161/2015 Coll. on the Civil Procedure Code (in force since 1 July 2016): in the case of this procedural code, it is possible to point out the role of mediation, which is accentuated in family cases. In divorce proceedings, the possibility is provided for the court (again, we state that this is not an obligation for the court, but an option) to invite the spouses to try to preserve the marriage with the help of a mediator (provision of Article 96(2)). Likewise, in cases involving minors the court is given the option to resolve such situations with the assistance of a mediator (paragraph 118(2)). The role of the mediator in family matters is thus emphasised. In both cases, the wording of the legislation is the same: *'If it is expedient and the circumstances of the case so permit, the court may invite the parties to attempt to reach an amicable solution by mediation*'. In addition,

the role of the mediator is also mentioned in the enforcement of the judgement (paragraph 381): *'If expedient, the court may, before enforcement of the judgement, order the parties to appear before a mediator registered in the register of mediators'*.

Decree of the Ministry of Justice of the Slovak Republic No. 543/2005 Coll. on the Administration and Registry Rules for District Courts, Regional Courts, Special Courts and Military Courts, as amended: in general, courts are obliged to inform the public about the possibility of resolving disputes through mediation, and this corresponds to the obligation of courts to inform the public about mediation as such (paragraph 9). It is questionable to what extent this obligation is implemented in practice and whether such an obligation may be well implemented at all. Premises have also been created in courts where mediators might provide their services. The contribution of this regulation is seen, for example, in the fact that it lays down in considerable detail the procedure for conducting mediation in criminal cases (paragraph 83d), but it is a procedure which is not mediation within the meaning of the Mediation Act, but mediation under a special regulation: Act No. 550/2003 Coll. on Probation and Mediation Officers and on Amendments and Additions to Certain Acts, as amended, which may be a reason for incorrectly confusing the institute of mediation under different legal regulations. In principle, however, this need not cause problems, as this legislation applies to mediation in criminal law cases and there is no overlapping of institutions, which could cause legal chaos. In order to promote a fair trial conducted within a reasonable time and to unify the procedure of courts in the handling of the court agenda and the court administration agenda this Decree regulates the basic rules and principles of the internal organisation of the court and the individual organisational units of the court, including the organisation of work; the roles of court employees in the administration of justice and in the administration of the court; the re-imbursement of necessary expenses to persons of the costs incurred by persons participating in the proceedings; certain procedures of the courts in handling civil and criminal cases, including the execution of certain decisions in these proceedings; the procedure of the notary in inheritance proceedings; in proceedings for the redemption of

a deed and in the performance of acts in notarial deed proceedings; the performance of administrative and clerical work at the court in the administration of justice; and the administration of the court.

Decree of the Ministry of Justice of the Slovak Republic No. 482/2011 Coll. on the publication of court decisions: this is a marginal regulation for the purposes of mediation, which regulates the publication of court decisions; in relation to mediation, it is stated that the data on the mediator shall not be anonymised.

Act No. 71/1992 Coll. on court fees and the fee for the criminal record extract, as amended: this Act does not directly regulate mediation or the process related to it, but it does benefit the parties to the proceedings from the point of view of the obligation to pay court fees if the court proceedings are terminated in a different way, e.g. earlier by withdrawing the action before the first hearing or by concluding a court settlement (paragraph 11).

Act No. 550/2003 Coll. on Probation and Mediation Officers and on Amendments and Additions to Certain Acts, as amended: as mentioned above, this is the legal regulation governing mediation in criminal cases. This legislation does not refer to a mediator, as is the case with the Law on Mediation, but to a mediation officer, which may be seen as a terminological difference. The essential difference is due precisely to the area of mediation covered by the two pieces of legislation. According to this Act, mediation is the out-of-court mediation of a dispute between an injured party and the accused (Section 2(1) (b)), which is intended to fulfil the role of restorative justice, and according to the Mediation Act, '*mediation is an out-of-court activity in which the persons involved in mediation, with the assistance of a mediator, resolve a dispute arising out of their contractual relationship or other legal relationship*' (2(1)). This Act must be seen in the context of the related provisions of Act No. 301/2005 Coll., the Criminal Procedure Act, as amended, which regulates criminal procedure ('*The Criminal Procedure Act shall regulate the procedure of law enforcement authorities and courts so that criminal offences are duly established, their perpetrators are justly punished in accordance with the law, and the proceeds of crime are confiscated, while the fundamental rights and freedoms of natural persons and legal entities must be respected*', paragraph 1).

Act No. 391/2015 Coll. on Alternative Dispute Resolution for Consumer Disputes and on Amendments and Additions to Certain Acts, as amended: this Act transposes Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes, amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC. The aim of the law is to ensure a high level of consumer protection and at the same time to contribute to the proper functioning of the internal market by ensuring that, in the event of a dispute with a seller, consumers have recourse to an alternative dispute resolution body that will carry out independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures for consumer disputes. This is a competing procedure to mediation, i.e. if mediation is taking place, alternative dispute resolution proceedings cannot take place at the same time and *vice versa*.

Act No. 365/2004 Coll. on equal treatment in certain areas and protection against discrimination and on amending and supplementing certain acts (Anti-discrimination Act), as amended: this Act regulates the application of the principle of equal treatment and provides for legal remedies if this principle is violated (paragraph 1). This legislation also emphasises the role of mediation, which may help to protect rights: '*Everyone has the right to have his or her rights protected out of court through mediation*' (paragraph 9(5)).

Act No. 327/2005 Coll. on the Provision of Legal Aid to Persons in Material Need and Supplement to Act No. 586/2003 Coll. on Advocacy and on Amendments and Additions to Act No. 455/1991 Coll. on Trade Enterprise (Trade Licensing Act), as amended, and Decree No. 337/2011 Coll. of the Ministry of Justice of the Slovak Republic. The purpose of this Act is to establish a system for the provision of legal aid and to ensure its provision to the extent provided for by this Act to natural persons who, as a result of their material need, are unable to use legal services for the proper exercise and protection of their rights (paragraph 1). The remuneration of the mediator in the performance of his or her activities under this Act is as follows: 20 EUR if the persons conclude an agreement to initiate mediation, 50 EUR if the persons participate in at least three meetings with the mediator in order to resolve the dispute between

them, or 100 EUR if the persons conclude an agreement resulting from the mediation. The fee may be increased if the mediation covers several matters that are factually related to the dispute that the mediator is resolving or several persons. It is also possible to request an increase in the fee in the case of a particularly difficult or factually complex case. The fee also includes fees for administrative work and other work carried out in connection with the mediation.

Act No. 305/2005 Coll. This Act regulates the social protection of children and social guardianship to ensure the prevention of crisis situations in the family; the protection of the rights and legally protected interests of children; the prevention of the deepening and recurrence of disturbances in the psychological development, physical development and social development of children and natural persons of legal age; and the prevention of the growth of socio-pathological phenomena (Section 1). If the authority for social protection of children and social guardianship finds that a child, a parent or a guardian of a child needs help because they are unable to solve problems in the family, to resolve conflicts in the family, to adapt to new circumstances in the family, or if it is a family with a specific problem, it shall propose, as part of the measures to be implemented, to carry out or ensure the carrying out of mediation as a professional method to facilitate the resolution of conflict situations in the family. Mediation under this Act, however, is not an out-of-court activity under the Mediation Act. Mediation to resolve disputes in matters of social protection of children and social welfare may only be carried out by natural persons who have completed professional accredited training as mediators. In practice, mediation as a professional method is carried out by employees of the Office of Labour Social Affairs and Family who have undergone professional training as mediators, in which case it is possible to speak of mediation being carried out directly by the Office, but not by mediators.

Decree of the Ministry of Justice of the Slovak Republic No. 424/2015 Coll. on further training and examination of mediators. This decree regulates the details of further training and examination of mediators by the Ministry.

5.3. The basic features of mediation

According to the Law on Mediation, mediation may be used to resolve disputes arising from civil law relationships (including consumer law), family law relationships, commercial obligation relationships and employment law relationships, but it must also be a dispute arising from a contractual relationship or other legal relationship. According to the Act on Probation and Mediation Officers, disputes arising from criminal law, in particular claims by an injured party against the accused, may also be resolved through mediation. The range of disputes that may be resolved through mediation has changed as the legislation developed.

The person conducting the mediation is referred to as a mediator in civil law cases; in criminal law cases we speak of a mediation officer.

The legal effects of (the initiation of) mediation should also be such as to provide legal certainty for the parties to the mediation in terms of the setting of legal time limits; otherwise mediation would not fulfil its role as the equivalent of a legal framework for the resolution of legal disputes. In this respect it is significant that the commencement of dispute resolution before a mediator also has an impact on the limitation or prescription periods. The recording of the agreement to commence mediation and the recording of the termination of mediation in the mediation book under the Mediation Act has the same legal effect on the running of the limitation period and the extinction of a right as the assertion of a right in a court of law. A certified copy of the agreement on the commencement of mediation and of the entries in the mediation book, bearing the mediator's stamp and the date of the deposit of the agreement or the making of the entries in the mediation book, shall also be issued by the mediator to the court for the purposes of the court proceedings. The mediator shall always instruct the parties in writing that, if any of the parties or the mediator does not agree to the commencement of the mediation prior to its commencement, the mediation shall commence with the deposit of the agreement on the commencement of the mediation entered into by the persons participating in the mediation or by the representatives acting within the scope of the

authority to act for the party represented and the mediator in the Notarial Central Register of Deeds established pursuant to a special law, and the mediation shall be terminated with the deposit of the confirmation of the termination of the mediation in the Register of Deeds. For this purpose, the mediator shall verify the identity of the persons, their authorisation and the extent of their authorisation to act in the mediation. The deposit of the agreement on the commencement of mediation and the certificate of the end of the mediation in the register of deeds shall have the same legal effects as the exercise of a right in court for the purposes of the limitation period and the extinction of a right. The certificate of termination of mediation shall contain, in particular, the precise identification of the persons involved in the mediation, the identification of the agreement on the settlement of the dispute by mediation or the agreement on the commencement of the mediation with an indication of the time of its deposit and the indication of the manner in which the mediation was terminated. The situation of concurrent exercise of rights in court and in mediation, or whether time limits rest during the mediation (without a substantive agreement), however, is not addressed, as different rules are laid down in commercial and civil law.

5.4. Problematic aspects of mediation activities

The performance of the mediator's work is considered to be a business (the performance of mediation according to the Act on Probation and Mediation Officers falls under the performance of civil service in an employment relationship as an employee of the court), while it is not a trade within the meaning of Act No. 455/1991 Coll. on Trade Enterprise (Trade Licensing Act), as amended, but a business activity carried out on the basis of a special authorisation.

5.4.1. DUTIES OF THE MEDIATOR

In the performance of mediation the mediator is obliged to comply with generally binding legal regulations and respect the decisions of public authorities which relate to the dispute which is the subject of mediation and of which he or she has or must have knowledge in the course of the mediation; to carry out his or her work personally, honestly, conscientiously, independently, impartially, consistently and with due professional care, while taking care to ensure the expediency and economy of the conduct of the mediation; to behave in a manner that does not detract from the dignity and respectability of the mediation, the person of the mediator, the persons participating in the mediation and the persons invited by the mediator; to inform, before the mediation commences, his or her position in the mediation, the conduct of the mediation, the principles, purpose and manner of conducting the mediation, the means of terminating the mediation, the amount of the fee for conducting the mediation and, upon request, to inform the persons involved in the mediation of the training and experience acquired; to instruct the persons involved in the mediation, before the mediation commences, of their rights which may be affected by the mediation and of the consequences of the mediation; respect the views of the persons involved in the mediation and create the conditions for communication between them and for an amicable solution which takes account of their interests; sign the agreement resulting from the mediation or refuse to sign the agreement resulting from the mediation if it is clear that it contravenes the law, circumvents the law or is contrary to good morals; record in the minutes of the mediation any refusal to sign and, on request, issue the person involved in the mediation with a written confirmation of the reasons for refusing to sign the agreement resulting from the mediation; to issue the persons participating in the mediation with a certificate of the end of the mediation and issue a certificate of participation in the mediation to those invited to the mediation if requested by the mediator; inform the persons involved in the mediation without undue delay of any facts for they may be excluded from the mediation if, having regard to their relationship to the case or to those involved in the mediation

or to their representatives, their impartiality may be doubted; keep a mediation book and, in it, keep a clear record of the mediations which he or she conducts.

The mediator shall not: decide alone on the dispute that is the subject of mediation, or coerce the persons involved in the mediation to accept the solution of the dispute proposed by him or her; mediate a dispute if, in the same or a related dispute, he or she has provided legal services, notarial services or advice and professional assistance to another person whose interests conflict with those of the person requesting the mediation; to mediate a dispute where his or her interests or the interests of persons close to him conflict with the interests of the persons requesting the mediation.

5.4.2. DUTY OF CARE AND DUTY TO INSTRUCT

Related to the above enumerations of obligations and prohibitions is the question of the care that a mediator is required to exercise.

Under the statutory calculation there is a requirement to act with professional diligence and at the same time to instruct the persons involved in the mediation prior to the commencement of the mediation on their rights that may be affected by the mediation and on the consequences of the mediation. Such broad requirements are almost unclear. It is unclear what exactly the instruction on the rights that may be affected by the mediation is supposed to include. The basic obligation to instruct in the scope of the processing of personal data is considered, but an interpretation that the mediator is obliged to instruct on the substantive rights of the parties to the mediation is also envisaged. A broader scope of the obligation to instruct could even be counter-productive to the achievement of the objective of the mediation. On the other hand, a narrow scope instruction may constitute prejudicial to the rights of the persons involved in the mediation and also a breach of the mediator's obligations towards his clients, which may harm affect the mediator's ability to continue to carry out his activity as such.

5.4.3. REQUIREMENT OF PROFESSIONAL CARE AND NATURE OF THE ACTIVITY (PROVISION OF PSYCHOLOGICAL OR LEGAL SERVICES)

The willingness of people (subjects) to resolve their legal disputes through mediation is always gratifying. On the other hand, if the parties to a particular legal relationship already need another person to resolve the contentiousness of their mutual rights and obligations, the parties to the dispute need to be approached appropriately. Whether that appropriateness is to consist in a psychological approach or a so-called informative approach is questionable. A combination of the two may certainly be considered the most appropriate.

The question arises, however, whether mediation may be regarded as the provision of psychological counselling or legal advice. If the mediator has a psychological or legal background, it is still impossible to conclude that mediation should consist of psychological therapy or legal services, as these are separate activities for which a separate business (or other) licence is required and cannot be mixed with mediation.

As stated above, the scope of the mediator's duty to instruct is very broad and therefore the question of the scope of the duty to instruct has a significant impact on whether mediation may be regarded as the provision of legal services. In terms of the qualitative manner in which mediation services are provided, the question of whether it is the mediator's task (arising from the law and, therefore, a duty) to conduct the mediation in such a way as to help to achieve an amicable settlement of the case by his or her approach, from a psychological point of view too, comes to the fore.

The correct solution to the considerations outlined is clearly that mediation is neither the provision of psychological counselling nor the provision of legal services. On the other hand, however, it is necessary for the mediator to apply something of each in his or her activities, the scope of which is not evident.

In the conditions of the Slovak Republic only a lawyer (barrister) may provide legal services.

5.5. Liability of the mediator

The mediator shall be liable for any damage caused to the parties to the mediation in the course of his or her activities, in accordance with the general provisions on liability for damages. Once the above questions have been addressed (whether the mediator is obliged to exercise professional care as a psychologist or a lawyer and what the mediator must inform in or her clients about), the scope of liability for damages may be assessed.

The question whether the mediator may also be liable for the agreement (its content) concluded between the parties to the mediation is also present in legal practice. The legal regulation, however, gives no clear answers to these questions.

In this respect it is possible to perceive a considerable degree of uncertainty on the part of mediators. More precise legal regulation is therefore welcome, but the problematic aspects of mediation are yet to be addressed by the legislator.

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Chapter 6. AI and Criminal Law: What Should We Expect from the AI Act and National Legislators?

6.1. Introduction

According to the *Lasswell and McDougal* approach[1], objects of research cannot be analysed outside of their social context. In research, values and positions from which the topic is observed and the hierarchy of values need to be presented. Ethics Guidelines for Trustworthy Artificial intelligence (henceforth: AI) from 2019, by High Level Expert Group on Artificial intelligence set up by the European Commission, (henceforth: Ethical Guidelines)[2] underline

[1] This approach is based on the policy-orientated New Haven School, which viewed international law as a system of decision-making towards the attainment of values: the post-Second World War image of international law devoted to building a humane global public order. See more in: H.D. Lasswell, M.S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, "Yale Law Journal, Faculty Scholarship Series" 1943, Vol. 52, No. 2, pp. 203–296. H.D. Lasswell, M.S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy*, New Haven 1992. I have used this approach in my book (based on my Ph.D. research). S. Roksandić Vidlička, *Prosecuting Serious Economic Crimes as International Crimes: A New Mandate for the ICC?*, Berlin 2017, pp. 7–8.

[2] A High-Level Expert Group on AI (HLEG) had *an inclusive and broad composition of 52 well-known experts tasked to advise the Commission on the implementation of the Commission's Strategy on Artificial Intelligence*. In April 2019, the Commission supported (European Commission, Building Trust in

the way we need to develop, deploy and use trustworthy AI systems so that it adheres to the ethical principles of respect for human autonomy, prevention of harm, fairness and explicability. In this research, the values are therefore the ethical principles: respect for human autonomy, prevention of harm, fairness and explicability. AI should not be seen as an end in itself, but as a tool to serve people, with the ultimate aim of improving human well-being, human capabilities and safety[3]. This is even more evident in the area of criminal law. Those ethical principles will serve as a starting point for evaluation of the draft provisions of the Draft EU Artificial Intelligence Act that is under legislative procedure on an EU level. In addition to these principles, the European Commission has often stressed that the European approach towards AI should be based on common values, on respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities[4].

The European Parliament Resolution of 6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial

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Human-Centric Artificial Intelligence, COM(2019)168 the key requirements set out in the HLEG ethics guidelines for Trustworthy AI (HLEG, Ethics Guidelines for Trustworthy AI, 2019), which had been revised to take into account more than 500 submissions from stakeholders. The key requirements reflect a widespread, common approach, as illustrated by a plethora of ethical codes and principles developed by many private and public organisations in Europe and beyond, that AI development and use should be guided by certain essential value-orientated principles. The Assessment List for Trustworthy Artificial Intelligence (ALTAI, HLEG, Assessment List for Trustworthy Artificial Intelligence (ALTAI) for self--assessment, 2020) made those requirements operational in a piloting process with over 350 organisations.

[3] S. Roksandić, N. Protrka, M. Engelhart, *Trustworthy artificial intelligence and its use by law enforcement authorities: where do we stand?*, [in:] *45th Jubilee International Convention on Information, Communication and Electronic Technology (MIPRO)*, K. Skala (ed.), Opatija 2022, pp. 1395–1402, https://doi.org/10.23919/MIPRO55190.2022.9803606, https://ieeexplore.ieee.org/document/9803606 [access 18.01.2023].

[4] More in S. Roksandić Vidlička, L. Elīna Liepiņa, S. Ostapchuk, *Bioethical and Legal Challenges of Artificial Intelligence and Human Dignity*, [in:] *Human rights in 21st century*, J. Miodrag, V. Tibor (eds.), The Hague 2020, p. 271.

authorities in criminal matters (henceforth: Resolution)[5] underlines that AI, as well as benefits, carries great risks for the fundamental rights and democracies based on the rule of law. The Resolution should be seen as a forerunner to a Regulation on AI in the EU that has direct implications for criminal law. The Resolution states that the rapid advances in disruptive technology such as AI have prompted concerns about the potential for their misuse and calls for government regulation. Few laws and regulations currently exist to address the specific challenges of AI outside the regulation of autonomous vehicles and drones in a number of states[6].

The Proposal for a Regulation of the EU Parliament and of the Council to decree harmonised rules on AI (AI Act) and amend certain EU legislative acts is under way[7]. As emphasised in the Draft AI Act itself, this proposal delivers on the political commitment by President von der Leyen, who announced in her political guidelines for the 2019–2024 Commission 'A Union that strives for more'[8], that the Commission would put forward legislation for a co-ordinated European approach on the human and ethical implications of AI. Following that announcement, on 19 February 2020, the Commission published the White Paper on AI: a European approach to excellence and trust[9]. It supports the objective of the Union as a global leader in the development of secure, trustworthy and ethical

[5] European Parliament Resolution of 6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters (2020/2016(INI)).

[6] *Artificial Intelligence and Crime*, A Research Report for the Korean Institute of Criminology, Australian National University, Cybercrime Observatory, 2018, p. 35, citing in: M. Guihot, N.P. Suzor, A.F. Matthew, *Nudging Robots: Innovative Solutions to Regulate Artificial Intelligence*, "Vanderbilt Journal of Entertainment and Technology Law" 2017, Vol. 20.

[7] The Draft, Document 52021PC0206, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM/2021/206 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206 [access 18.01.2023].

[8] https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf [access18.01.2023].

[9] European Commission, White Paper on Artificial Intelligence: A European approach to excellence and trust, COM(2020)65 final, 2020.

artificial intelligence, as stated by the European Council[10], and ensures the protection of ethical principles as specifically requested by the European Parliament[11].

This Research therefore stresses some of the concerns that should be borne in mind while using AI in criminal cases[12], taking into account the aforementioned values and principles, and provisions, as set out in the Resolution and in the Draft AI Act. It is also clear that *'the horizontal nature of the proposal*[13] *requires full consistency with existing Union legislation applicable to sectors where high-risk AI systems are already used or likely to be used in the near future.'*

6.2. Approaches to the concept of AI

Information technology, with the ever increasing proliferation of complex decision making algorithms and complex machines (AI in a wider sense) into our daily lives already brings with its a number of legal and ethical challenges that occur at such a pace that legislation seems unable to keep pace. Human longing for immortality, our desire for godlike abilities and our pursuit of happiness[14] drive

[10] European Council, Special meeting of the European Council (1 and 2 October 2020): Conclusions, EUCO 13/20, 2020, p. 6.

[11] European Parliament Resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies, 2020/2012(INL).

[12] See also M. Kritikos, *Artificial Intelligence ante portas: Legal & ethical reflections, European Parliamentary Research Service, Scientific Foresight Unit (STOA)*, 2019, https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/634427/EPRS_BRI(2019)634427_EN.pdf [access 18.01.2023].

[13] This refers to the Draft of AI Act. The proposal for a Regulation concerning AI (the AI Act or AIA) presented by the European Commission (EC) on 21 April 2021 is one of the first attempts at horizontal AI regulation that harmonises rules for the development, placement on the market and use of AI systems. Another attempt is, for instance, the US National AI Initiative Act, which came into force on 1 January 2021. See more in European Parliament, Regulatory divergences in the draft AI Act, Study, Panel for the Future of Science and Technology, May 2022, p. 1.

[14] Y. Harari, *Homo Deus. A Brief History of Tomorrow*, London 2016. Also cited in S. Roksandić Vidlička, L. Elīna Liepiņa, S. Ostapchuk, *Bioethical…*, *op. cit.*, p. 269.

that technological progress to a great extent. Highly intelligent algorithms are already often in charge of important decision-making with little or no human contribution. None of this should be considered harmful *per se*, but, as with all technology, certain detrimental effects should not be overlooked. Such technologies may prove to be a breeding ground for even deeper inequality and new forms of discrimination. Algorithms are, in the end, created by humans, and they need to be *taught* before being able to operate. An algorithm that is fed with biased[15] data will therefore be discriminatory in decision-making. Some safeguards are already in place, notably Article 22 of the European Union's GDPR Regulation[16] that allows EU citizens an opt-out from being subject to a decision based solely on automated processing. The particular challenges of AI's increasing development and usage is evident in the area of criminal law. The EU has chosen to address and regulate those questions based on the risk they possess. Before addressing some of those challenges, however, it is important to provide a definition of AI relevant to this research and that is used on an EU level.

Among criminal lawyers not specialised in AI there are misconceptions regarding the meaning of AI that continue to cause difficulties in understanding the way legal constrains may be imposed on its usage while still preserving its attendant advantages. One might stress that the term AI is commonly used to refer to *'a range of*

[15] According to the European Commission´s High-level Expert Group on Artificial Intelligence, its Draft Ethic Guidelines for Trustworthy AI, bias is a prejudice for or against something or somebody that may result in unfair decisions. It is acknowledged that humans are biased in their decision-making. Since AI systems are designed by humans, it is possible that humans inject their bias into them, even in an unintended way. Many current AI systems are based on machine learning data-driven techniques. One predominant way to inject bias may therefore be in the collection and selection of training data. If the training data is uninclusive and insufficiently balanced, the system could learn to make unfair decisions. At the same time, AI has the potential to help humans to identify their biases, and assist them in making less biased decisions.

[16] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016, http://data.europa.eu/eli/reg/2016/679/2016-05-04 [access 18.01.2023].

technologies such as software, algorithms, processes, and robots that, unlike machines that act exclusively on human command, are able to acquire analytical capabilities and to perform tasks (often on the basis of "machine learning" and "big data" techniques)'[17].

In the Communication of EU Commission ('Artificial Intelligence for Europe') *'AI refers to systems that display intelligent behaviour by analysing their environment and taking actions, with some degree of autonomy, to achieve specific goals*'[18]. Well established features of AI may also be found in the definition of AI in the Position Paper of the American Chamber of Commerce to the European Union[19]. According to this, *'AI is a combination of technologies which allows systems to understand, reason, and learn*' and they may *'determine meaning from data inputs, form hypotheses, prioritise suggestions, continuously learn, [and] accumulate insight through interactions.*' As the Communication underlines, AI-based systems are already used across many sectors (e.g. energy, education, financial services, construction, and transport) in order to provide different services (e.g. self-driving vehicles, speech recognition and interpretation, face recognition, medical diagnosis) and AI is transforming society.

In the Ethics Guidelines, AI refers to systems designed by humans that, given a complex goal, act in the physical or digital world by perceiving their environment, interpreting the collected structured or unstructured data, reasoning on the knowledge derived from these data and deciding the best action(s) to take (according to pre-defined parameters) to achieve the given goal. AI systems may

[17] Communication on Artificial Intelligence for Europe, 2018, http://europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-artificial--intelligence-for-europe [access 18.01.2023].

[18] European Commission, Communication from the European Commission to the European Parliament, the European Council, the Council, the European Economic and Social committee and the Committee of the Regions (COM(2018)237 final), Artificial Intelligence for Europe, 2018, p. 1, https://ec.europa.eu/digital--single-market/en/news/communication-artificial-intelligence-europe [access 18.01.2023].

[19] American Chamber of Commerce to the European Union, *Fostering Artificial Intelligence in Europe Building a strong public-private partnership*, 2018, p. 2, http://www.amchameu.eu/system/files/position_papers/amcham_eu_position_on_artificial_intelligence_in_europe_0.pdf. [access 18.01.2023].

either use symbolic rules or learn a numeric model, and they may adapt their behaviour by analysing the way the environment is affected by their previous actions[20]. As a scientific discipline, AI includes several approaches and techniques, such as machine learning (of which deep learning and reinforcement learning are specific examples), machine reasoning (which includes planning, scheduling, knowledge representation and reasoning, search and optimisation), and robotics (which includes control, perception, sensors and actuators, as well as the integration of all other techniques into cyber-physical systems)[21]. In the criminal justice field all of these aspects are of relevance, although they differ according to the stage of the proceedings. In the investigating phase more emphasis is placed on real-time surveillance techniques, whereas in the prosecuting and judicial phase data analysis and reasoning play a major role[22].

According to the Draft AI Act, Article 3 paragraph 1, 'an artificial intelligence system' (AI system) is software that is developed with one or more of the techniques and approaches listed in Annex I[23] and may, for a given set of human-defined objectives, generate outputs such as content, predictions[24], recommendations or decisions influencing the environments they interact with. It seems that this definition will be most relevant for criminal law.

As EU policy-makers have invoked it, one could generally conclude that the approach to AI in the EU should be based on fundamental rights and EU values. The latter are enshrined in Articles 2

[20] European Commission's High-level Expert Group on Artificial Intelligence, Draft on Ethics Guidelines for Trustworthy AI by High-Level Expert Group on Artificial Intelligence, 2018, p. 4, https://ec.europa.eu/digital-single-market/en/news/draft-ethics-guidelines-trustworthy-ai [access 18.01.2023]. The same definition was kept in the final version of Ethics Guidelines, p. 36.

[21] European Commission's High-level Expert Group on Artificial Intelligence, Draft on Ethics Guidelines for Trustworthy AI by High-Level Expert Group on Artificial Intelligence, 2018, p. 4. Also in Ethics Guidelines as published in April 2019, p. 36.

[22] S. Roksandić, N. Protrka, M. Engelhart, *Trustworthy…*, *op. cit.*, pp. 1395–1402.

[23] Annex I of the AI Act.

[24] See e.g. F. Rehnström, *How Capable is Artificial Intelligence (AI) in Crime Prediction and Prevention? A literature review of reviews*, Örebro 2021.

and 3 of the Treaty on the European Union[25] and in the Charter of Fundamental Rights of the EU[26]. The Resolution also mentions different legal documents, sometimes even their specific articles, including the European Convention on Human Rights, which should be borne in mind ('having regard to') when regulating AI in criminal law and its use by the police and judicial authorities in criminal matters.

6.3. Addressing the long-term challenges and opportunities related to AI using ethical principles

In the European Commission's High-level Expert Group on Artificial Intelligence Guidelines for Trustworthy AI the following ethical principles are outlined: respect for human autonomy, prevention of harm, fairness and explicability[27]. Trustworthy AI also has three components, which should be met throughout the system's entire life cycle:

1) it should be lawful, complying with all applicable laws and regulations;
2) it should be ethical, ensuring adherence to ethical principles and values; and

[25] EU, 2007 The Treaty on European Union, Official Journal C326, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A12012M%2FTXT [access 18.01.2023].

[26] EU, 2007 Charter of Fundamental Rights of the European Union, Official Journal C303, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:12007P/TXT [access 18.01.2023].

[27] Independent High-level Expert Group on Artificial Intelligence set up by the European Commission, Ethics Guidelines for Trustworthy AI. The Ethics Guidelines were presented on 9 April 2019, p. 2, https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai [access 18.01.2023]. Compare listed principles with principles in bioethics, see e.g. T.L. Beauchamp, J.F. Childress, *Principles of biomedical ethics*, New York 2013, pp. 13–14, respect for the autonomy, non-maleficence, beneficence and justice. See more in S. Roksandić Vidlička, L. Elīna Liepiņa, S. Ostapchuk, *Bioethical…*, *op. cit.*, pp. 269–288.

3) it should be robust, both from a technical and social perspective, since, even with good intentions, may AI systems cause unintentional harm[28].

It is clear then that respect for fundamental human rights is a basis for the development of trustworthy AI in Europe. Here the respect for human dignity takes precedence. As stated in Ethics Guidelines:

> *Human dignity encompasses the idea that every human being possesses an "intrinsic worth," which should never be diminished, compromised or repressed by others; nor by new technologies such as AI systems. In this context, respect for human dignity entails that all people are treated with the respect due to them as moral subjects, rather than merely as objects to be sifted, sorted, scored, herded, conditioned or manipulated. AI systems should hence be developed in a manner that respects, serves and protects humans' physical and mental integrity, personal and cultural sense of identity, and satisfaction of their essential needs*[29].

The Resolution emphasises that some countries, including several EU Member States, make more use of AI applications or embedded AI systems in law enforcement and the judiciary than others, partly due to a lack of regulation and regulatory differences that enable or prohibit AI use for certain purposes; the increasing use of AI in the fields of criminal law is based in particular on the promises that it would reduce certain types of crime and lead to more objective decisions. These promises, however, do not always hold true (Recitle, C.). As this statement seems to hold true, it is even more necessary to evaluate whether the AI applications used in different jurisdictions are compatible for information exchange, for instance, and whether lack of regulation at the level of the EU provides both law enforcement authorities and organised criminal networks opportunities for the *forum shopping* that leads either to

[28] The Ethical Guidelines, p. 4.
[29] *Ibidem*, p. 10.

more or fewer criminal proceedings that would be impossible if the joint regulation establishing standards throughout EU existed.

As stated in the draft AI Act (27), high-risk AI systems should only be placed on the EU market or put into service if they comply with certain mandatory requirements. Those requirements should ensure that the high-risk AI systems available in the EU or whose output is otherwise used in the EU pose no unacceptable risks to important EU public interests as recognised and protected by EU law. AI systems should only be identified as high-risk when they have a significant harmful impact on the health, safety or fundamental rights of persons in the EU and such limitation minimises any potential restriction to international trade, if any.

It is also worth mentioning that the civil society organisations called on the Council of the European Union, the European Parliament and all EU member state governments to ensure that the forthcoming AI Act achieve the 9 goals as follows:

1. a cohesive, flexible and future-proof approach to 'risk' of AI systems;
2. prohibitions on all AI systems posing an unacceptable risk to fundamental rights;
3. obligations on users of high-risk AI systems to facilitate accountability to those impacted by AI systems;
4. consistent and meaningful public transparency;
5. meaningful rights and redress for people impacted by AI systems;
6. accessibility throughout the AI life-cycle;
7. sustainability and environmental protections;
8. improved and future-proof standards for AI systems;
9. a truly comprehensive AI Act that works for everyone[30].

[30] See, e.g., Civil Society and EDF reacts to European Parliament's Artificial Intelligence Act draft Report 4.05.2022, https://www.edf-feph.org/civil-society-and-edf-reacts-to-european-parliaments-artificial-intelligence-act-draft-report/ [access 18.01.2023].

6.4. AI and criminal law: some challenges[31]

As underlined by *Roksandić, Protrka* & *Engelhart* (2021), the criminal justice system is not yet among the most fields of AI fields, but is one of the most rapidly growing fields, as it holds promise: massive data sets could be processed more rapidly[32], prisoner flight risks could be assessed more correctly and crime or even terrorist attacks might be foreseen and averted (in more effective preventative policing. Online platforms already use AI to identify and respond to illegal and unacceptable online behaviour. AI is therefore expected to be employed increasingly in crime prevention, a domain mainly presided over by the police but also by intelligence agencies[33], and in the detection and prosecution of criminals[34]. The rapid growth of AI systems also poses potential risks and potentially violates human rights. This may, as underlined in the research above and perhaps surprisingly, on the one hand stem from an underuse of AI systems. Underuse of AI may mean missed chances for the EU and may also result in inadequate implementation of significant programmes[35]. As *Roksandić, Protrka* & *Engelhart* continue, on the other hand,

[31] This Section is based on the paper: S. Roksandić, N. Protrka, M. Engelhart, *Trustworthy…*, *op. cit.*, pp. 1395–1402.

[32] See, e.g., latest 'Sky' and 'Anom' cases that are now challenged throughout the EU national jurisdictions.

[33] See, e.g., D. Gerstner, *Predictive Policing in the Context of Residential Burglary: An Empirical Illustration on the Basis of a Pilot Project in Baden-Württemberg, Germany*, "European Journal for Security Research" 2018, Vol. 3, pp. 115–138; see also L. Sommerer, *Geospatial Predictive Policing: Research Outlook. A Call For Legal Debate. NK Neue Kriminalpolitik. Forum für Kriminalwissenschaften*, "Recht und Praxis" 2017, Issue 2, pp. 147–164, https://www.nomoselibrary.de/10.5771/0934-9200-2017-2-147/geospatial-predictivepolicing-research--outlook-a-call-for-legal-debate-jahrgang-29-2017-heft-2 [access 18.01.2023]; H. Tzu-Wei, Y. Chun-Ping, *On the person-based predictive policing of AI*, "Ethics and Information Technology" 2021, Vol. 23, pp. 165–176.

[34] See here also: Microsoft Germany, *Künstliche Intelligenz bewährt sich im Einsatz gegen Kinderpornografie*, 2021, https://news.microsoft.com/de-de/kuenstliche-intelligenz-im-einsatzgegen-kinderpornografie/ [access 18.01.2023].

[35] Underuse might be due to public and industry distrust of AI, insufficient infrastructure, a lack of initiative, low investments, or fragmented digital marketplaces, as AI's machine learning is data-dependent.

and this is often much more in the public focus, the overuse of AI may have injurious effects on human rights, also as mentioned above. Overuse may be troublesome, e.g. when AI applications or the specific use of AI turn out to be ineffective, such as when used for explaining complicated social issues. This is especially true in the sphere of anti-social behaviour and hence in regard to the core field of anti-social behaviour, criminal delinquency. In this regard, the overuse of AI, or untrustworthy usage of AI or usage that might infringe human rights calls for caution particularly in criminal matters and when used extensively for prevention, in law enforcement and within prison systems. This holds true especially for member states of the Council of Europe and the EU with their high human standards of human rights[36]. So-called *forum shopping* could occur for either law enforcement authorities or organised criminal networks based on the AI systems that are used in some countries within the EU or Council of Europe.

The pace of the implementation of AI varies substantially among countries. Some countries, including several EU Member States, make more use of AI applications, or embedded AI systems, in law enforcement and the judiciary than others, which is partly due to a lack of regulation and regulatory differences which enable or prohibit the use of AI for certain purposes. The increasing use of AI in the field of criminal law is based in particular on the promises of much greater effectiveness, e.g. that it would reduce certain types of crime and that it would lead to more objective decisions, and efficiency, which is greatly attractive in overloaded justice systems, whereas these promises, however, are not always realised[37].

The examples demonstrate that AI has the potential to boost efficiency and effectiveness, but that one has to look in detail at the application of AI systems and whether their usage should be allowed at all, depending also on the Ethics Guidelines on AI. This especially means that the development and usage of AI in law enforcement

[36] S. Roksandić, N. Protrka, M. Engelhart, *Trustworthy…*, *op. cit.*

[37] European Parliament resolution of 6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters (2020/2016(INI)), Recital C.

within EU and Council of Europe member states must accord with human rights concerns and be regulated according to already guaranteed procedural rights and levels of guaranteed human rights. The Resolution states that, whereas fundamental rights and freedoms enshrined in the Charter should be guaranteed throughout the life cycle of AI and related technologies, notably during their design, development, deployment and use, and this should apply to the enforcement of the law in all circumstances (Recital, D).

In that vein, among others, the Resolution expresses its great concern over the use of private facial recognition databases by law enforcement actors and intelligence services, such as US based privately owned company Clearview AI, a database of more than 10 billion pictures collected from public web sources, including social networks and other parts of the Internet, including from EU citizens[38]; The general use of a service such as Clearview AI by law enforcement authorities in the European Union would not be consistent with the EU data protection regime. One may imagine narrow exceptions such as the use of the data in order to identify war criminals or victims in conflicts such as the war in the Ukraine[39]. To that extent the general call for a ban on the use of private facial recognition databases in law enforcement, the position of the Resolution, '*demonstrates a typical problem of the current debate thinking in black and white boxes, which does not do justice to the complexity of AI applications*'[40]. This seems not to be the case with the Draft AI Act. It may be different for other aspects. A ban on the AI-enabled mass scale scoring of individuals [also provided for by the Resolution[41]] seems quite reasonable, as any form of normative citizen

[38] European Parliament resolution of 6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters (2020/2016(INI)), paragraph 28.

[39] D. Paresh, J. Dastin, *Exclusive: Ukraine has started using Clearview AI's facial recognition during war*, 14 March 2022, https://www.reuters.com/technology/exclusive-ukraine-has-started-using-clearview-ais-facial-recognition-during-war-2022-03-13/ [access 18.01.2023].

[40] S. Roksandić, N. Protrka, M. Engelhart, *Trustworthy…*, *op. cit.*

[41] European Parliament resolution of 6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters (2020/2016(INI)), paragraph 32.

scoring on a large scale by public authorities, in particular within the field of law enforcement and the judiciary, would lead to the loss of autonomy, endanger the principle of non-discrimination and thus seriously impede core fundamental rights (the right to privacy, the general freedom to act and, in particular, human dignity).

As concluded in *Roksandić, Protrka & Engelhart* (2021) recent developments show that the EU is openly aware of concerns over the extensive usage of AI in law enforcement and judiciary and does not unreservedly welcome the dynamic technical revolution. Every day new AI applications in criminal justice emerge, paving the way for future opportunities to assist the criminal justice system and, in turn, promise to improve public safety. Data-pattern analysis might be utilised to disrupt, degrade, and indict illegal operations and activities. Algorithms might also help criminal justice professionals protect the public in previously unimagined ways by preventing victims and prospective offenders from turning to crime. AI technology has the potential to provide situational awareness and context to law enforcement, allowing officers to make better-informed decisions in potentially dangerous situations. AI has the potential to become a permanent part of our criminal justice system, supporting investigators and law enforcement authorities in their efforts to better safeguard the public. This technical development should be accompanied by a sound and reasonable legal framework effectively providing for human rights safeguards. It is therefore especially to be recommended that the Ethical Guidelines on AI not only set the main principles to be used in the development and usage of AI in the EU, but also that they take up much more of the already existing diversification of AI applications and provide for specific criteria to differentiate between useful and harmful applications and a legal protection mechanism that takes these differences into account. It would represent substantial progress if the AI Act would take up follow those principles[42].

[42] S. Roksandić, N. Protrka, M. Engelhart, *Trustworthy…*, *op. cit.*

6.5. The Draft AI Act and criminal law: on the example of biometric identification

The Draft EU AI Act proposes *'different regulatory burdens depending on the AI system at hand – it bans certain types of systems, regulated under the umbrella of a high-risk regime such that pose a threat to fundamental rights and safety, and places voluntary constraints on less risky systems – thereby following a risk-based approach'*[43].

We should welcome the fact that the European Parliament in preparation of the Draft AI Act:[44]

> *has come to the conclusion that as with any novel technology some basic legal questions need to be taken into account before deciding on a regulation strategy*[45]*:*
>
> *(i) Which rules apply in this sector, and what are the rationales for those rules? A rule may, for example, aim to protect a human right, or express a legal principle, such as equality, contractual freedom, or the right to a fair trial. Economic rationales also differ from sector to sector. (…)*
> *(ii) How is or could AI decision-making be used in this sector, and what are the risks? For instance, false positives are a serious problem in the context of criminal law. (…) By contrast, if an incorrect decision is made by an AI system for price discrimination meaning a consumer pays too much, the effect is often less harmful than when an incorrect AI decision leads to someone being arrested by the police.*
> *(iii) Considering the rationales for the rules in this sector, should the law be improved in the light of AI decision-making? Does AI threaten the law's underlying principles or undermine*

[43] European Parliament, Regulatory divergences in the draft AI Act, Study, Panel for the Future of Science and Technology, May 2022, p. 1.

[44] European Parliament, Regulatory divergences in the draft AI Act, Study, Panel for the Future of Science and Technology, May 2022, p. 7.

[45] *AI rules: what the European Parliament wants*, https://www.europarl.europa.eu/news/en/headlines/priorities/artificial-intelligence-in-the-eu/20201015STO89417/ai-rules-what-the-european-parliament-wants [access 18.01.2023].

> *the law's goals? If the current law leaves important risks unaddressed, amendments should be considered. (…)*[46]

It is, however, doubtful whether the proposed AI Act addressed all the above questions and was in line with Ethics Guidelines and already established human rights standards pertinent to criminal law within the EU.

The above-mentioned biometric system was *'one of the primary regulatory targets'* of the proposed AI Act. As stated in the Study:[47]

> *AI-enabled biometric systems were one of the primary regulatory targets.* (…) *In fact, the Act explicitly refers to three types of biometric systems – emotion recognition systems (ERS), biometric categorisation systems (BCS) and remote biometric identification systems (BIS). In the case of the latter, the proposal further distinguishes between real-time and post BIS. While real-time BIS accomplish their task instantaneously or without significant delay based on live (or near-live) material, the post BIS are run after a significant period of time based on data from private devices and/or CCTV cameras. The AIA*[48] *thus assigns them different societal gravity and therefore regulatory approaches.* (…) *Some biometric systems are prohibited for public actors, but categorised as high-risk in the use of the private sector. Yet other AI systems underlie (mere) transparency obligations for private actors, while the same transparency obligations are lifted for law enforcement.*

According to Article 3 paragraph 33 of the Draft AI Act, *biometric data* means personal data resulting from specific technical

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[46] CEN-CENELEC, CEN-CLC Response to EC White Paper on AI, June 2020, https://www.cencenelec.eu/media/CEN-CENELEC/Areas%20of%20Work/Position%20Paper/cen-clc_ai_fg_white-paper-response_final-version_june-2020.pdf [access 18.01.2023].

[47] European Parliament, Regulatory divergences in the draft AI Act, Study, Panel for the Future of Science and Technology, May 2022, p. 19.

[48] The AI Act.

processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data. In the same Article, biometric categorisation systems are defined (Article 3 paragraph 35), as are remote biometric identification systems (Article 3 paragraph 36), real-time remote biometric identification systems (Article 3 paragraph 37), post remote biometric identification systems (Article 3 paragraph 38), publicly accessible spaces (Article 3 paragraph 39), law enforcement authorities (Article 3 paragraph 40) and law enforcement (Article 3 paragraph 41). Knowing the number of problems the definitions could represent for criminal law, it is to be recommended that the AI Act provides relevant definitions leaving little room for interpretation of the afore-mentioned notions. It seems, however, that there are many exceptions to the rule of absolute prohibition of such data.

According to Article 5 paragraph 1(d) of the Draft AI Act, among the prohibited AI practices, are:

> *the use of 'real-time' remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement, unless and in as far as such use is strictly necessary for one of the following objectives:*
> *1) the targeted search for specific potential victims of crime, including missing children;*
> *2) the prevention of a specific, substantial and imminent threat to the life or physical safety of natural persons or of a terrorist attack;*
> *3) the detection, localisation, identification or prosecution of a perpetrator or suspect of a criminal offence referred to in Article 2(2) of Council Framework Decision 2002/584/JHA*[49] *and punishable in the Member State concerned by a custodial sentence or a detention order for a maximum*

[49] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.07.2002, p. 1).

period of at least three years, as determined by the law of that Member State.

The use of *real-time* remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement for any of the objectives referred to in paragraph 1 point (d) of Article 5 of the Draft AI Act shall take into account the following elements:

- the nature of the situation giving rise to the possible use, in particular the seriousness, probability and scale of the harm caused in the absence of the use of the system;
- the consequences of the use of the system for the rights and freedoms of all persons concerned, in particular the seriousness, probability and scale of those consequences.

The use of *real-time* remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement for any of the objectives referred to in paragraph 1 point d) shall comply with necessary and proportionate safeguards and conditions in relation to its use, in particular as regards the temporal, geographic and personal limitations (Article 5 paragraph 2)[50].

[50] As regards paragraphs 1 point (d) and 2 of Article 5, each individual use for the purpose of law enforcement of a *real-time* remote biometric identification system in publicly accessible spaces shall be subject to a prior authorisation granted by a judicial authority or by an independent administrative authority of the Member State in which the use is to take place, issued upon a reasoned request and in accordance with the detailed rules of national law referred to in paragraph 4. In a duly justified situation of urgency, however, the use of the system may be commenced without an authorisation and the authorisation may be requested only during or after the use.

The competent judicial or administrative authority shall only grant the authorisation where it is satisfied, based on objective evidence or clear indications presented to it, that the use of the *real-time* remote biometric identification system at issue is necessary for and proportionate to achieving one of the objectives specified in paragraph 1, point (d), as identified in the request. In deciding on the request, the competent judicial or administrative authority shall take into account the elements referred to in paragraph 2 (Article 5 paragraph 3 of the Draft AI Act). A Member State may decide to provide for the possibility fully or partially to authorise the use of *real-time* remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement within the limits and under the conditions listed in paragraphs 1 point (d), 2 and 3. That Member State shall lay down in its national law the necessary detailed

On the other hand, the Draft AI Act (Recital, paragraph 18) states that the use of AI systems for *real-time* remote biometric identification of natural persons in publicly accessible spaces for the purpose of law enforcement is considered particularly intrusive in the rights and freedoms of the persons concerned, to the extent that it may affect the private life of a large part of the population, evoke a feeling of constant surveillance and indirectly dissuade the exercise of the freedom of assembly and other fundamental rights. The immediacy of the impact and the limited opportunities for further checks or corrections in relation to the use of such systems operating in *real-time* carry heightened risks for the rights and freedoms of the persons that are concerned by law enforcement activities.

The use of those systems for the purpose of law enforcement should therefore be prohibited, except in three clearly enumerated and meticulously defined situations, where the use is strictly necessary to achieve substantial public interest, the importance of which outweighs the risks. Those situations involve the search for potential victims of crime, including missing children; certain threats to the life or physical safety of natural persons or of a terrorist attack; and the detection, location, identification or prosecution of perpetrators or suspects of the criminal offences referred to in Council Framework Decision 2002/584/JHA[51] if those criminal offences are punishable in the Member State concerned by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined in the law of that Member State. Such a threshold for the custodial sentence or detention order in accordance with national law contributes to ensure that the offence should be sufficiently serious potentially to justify the use of *real-time* remote

rules for the request, issuance and exercise of, as well as supervision relating to, the authorisations referred to in paragraph 3. Those rules shall also specify which of the objectives listed in paragraph 1, point (d), including which of the criminal offences referred to in point (iii) thereof, the competent authorities may be authorised to use those systems for the purpose of law enforcement (Article 5 paragraph 3 of the Draft AI Act).

[51] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.07.2002, p. 1).

biometric identification systems. Of the 32 criminal offences listed in the Council Framework Decision 2002/584/JHA, some are in practice also likely to be more relevant than others insofar as the recourse to *real-time* remote biometric identification will foreseeably be necessary and proportionate to highly varying degrees for the practical pursuit of the detection, localisation, identification or prosecution of a perpetrator or suspect of the different criminal offences listed and having regard to the likely differences in the seriousness, probability and scale of the harm or possible harmful consequences (The Draft AI Act, Recital, 19)[52].

In order to ensure that those systems are used in a responsible and proportionate manner, it is also important to establish that, in each of those clearly enumerated and meticulously defined situations situations, certain elements should be taken into account, in particular as regards the nature of the situation giving rise to the request and the consequences of its use for the rights and freedoms of all persons concerned and the safeguards and conditions provided for with its use. The use of *real-time* remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement should also be subject to appropriate limits in time and space, having regard in particular to the evidence or indications regarding the threats, the victims or perpetrators. The reference database of persons should be appropriate for each use in each of the three situations mentioned above (The Draft AI Act, Recital, paragraph 20)[53].

Each use of a *real-time* remote biometric identification system in publicly accessible spaces for the purpose of law enforcement should be subject to an express and specific authorisation by a judicial authority or by an independent administrative authority of a Member State. Such authorisation should in principle be obtained prior to employment, except in duly justified situations of urgency, i.e. situations where the need to use the systems in question is such as to make it effectively and objectively impossible to obtain authorisation before commencing use. In such situations of urgency the use should be restricted to the absolute minimum necessary and be subject to

[52] The Draft AI Act, Preamble (paragraph 19).
[53] The Draft AI Act, Preamble (paragraph 20).

appropriate safeguards and conditions, as determined in national law and specified in the context of each individual urgent use case by the law enforcement authority itself. The law enforcement authority should in such situations also seek to obtain authorisation as soon as possible, whilst providing the reasons for not having been able to request it earlier (the Draft AI Act, Recital, paragraph 21)[54].

One needs to be familiar with the Recital provisions of the Draft AI Act in interpreting the provisions of Article 5 of the Draft AI Act and their evaluation, but it remains difficult to disagree with some of the repeated arguments of critics regarding what might be considered a long list of envisaged exceptions. It has to be re-iterated that, as was done in the Resolution (Recital, Q), that modern criminal law is based on authorities' reacting to an offence after the fact, without the assumption that all people are dangerous and need to be constantly monitored in order to prevent potential wrongdoing.

It is clear that some usage of AI could infringe human rights and would be contrary to human dignity. The Resolution states that the use and collection of any biometric data for remote identification purposes by conducting facial recognition in public places, for example, as well as at automatic border control gates at airports, may pose specific risks to fundamental rights, the implications of which could vary considerably depending on the purpose, context and scope of its use. It goes on to highlight that the contested scientific validity of affect recognition technology, such as cameras detecting eye movement and changes in pupil size, in a law enforcement context and it is of the view that the use of biometric identification in the context of law enforcement and the judiciary should always be considered high risk and therefore be subjected to additional requirements, as per the recommendations of the Commission's

[54] The Draft AI Act, Preamble (paragraph 21). It is also appropriate to provide, within the thorough framework set by this Regulation that such use in the territory of a Member State in accordance with this Regulation should only be possible where and in as far as the Member State in question has decided to expressly provide for the possibility to authorise such use in its detailed rules of national law. Member States consequently remain free under this Regulation to deny such a possibility at all or to provide only for such a possibility in respect of some of the objectives capable of justifying authorised use identified in this Regulation (paragraph 22).

High-Level Expert Group on AI[55]. In the Proposal of the EU AI Act[56] the regulation of real time biometric AI use (Article 5) is constructed as a general prohibition with a number of exceptions that leave the impression that the exception is rather the general rule[57]. The requirements for exceptions themselves are vague and the protection mechanism for individuals is scarce, although the measure is not even classified as high-risk AI use, but as a prohibited AI application. Insofar as the Proposal delimits the actions by law enforcement authorities and reduces the existing significant degree of power imbalance with its risks of the over use of surveillance, arrest of a natural person or deprivation of his or her liberty, together with other adverse impacts on fundamental rights. It fails, however, to give clear guidance or any specific protection mechanism for criminal proceedings[58].

6.6. Conclusion

As stated above, the EU should base approach to artificial intelligence on fundamental rights and EU values. The latter are enshrined in Articles 2 and 3 of the Treaty on the European Union[59] and in the Charter of Fundamental Rights of the EU[60]. The EU Resolution of

[55] *Fair Trials calls for an EU Artificial Intelligence Act for fundamental rights*, 30 November 2021, https://www.fairtrials.org/articles/news/fair-trials-calls-eu-artificialintelligence-act-fundamental-rights/ [access 18.01.2023].

[56] European Commission, Proposal for the Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, Brussels, 21.04.2021, COM(2021)206 final, 2021/0106(COD).

[57] See also EU Artificial intelligence Act for Fundamental Rights. A Civil Society Statement (2021), 31 December 2021, https://www.fairtrials.org/app/uploads/2022/01/Political-statement-onAI-Act.pdf [access 18.01.2023].

[58] *Ibidem*.

[59] EU, 2007 The Treaty on European Union, Official Journal C326, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A12012M%2FTXT [access 18.01.2023].

[60] EU, 2007 Charter of Fundamental Rights of the European Union, Official Journal C303, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:12007P/TXT [access 18.01.2023].

6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters emphasises that one should also have regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms, when regulating AI in criminal matters. With the case law of the European Court of Human Rights concerning, the right, for instance, to a fair trial, the protection of the principle of legality is of utmost importance together with the already established rights as provided in EU directives in the field of criminal law.

The guaranteed protection of human rights, including the right to fair trial and the rights of the accused, principles and obligatory provisions of EU and national criminal law, should not be disregarded or infringed when deciding which AI systems should be allowed to enter the arena of criminal law. It is also clear that the Law Enforcement Directive[61] would have an impact on the Draft AI Act structure[62]. As emphasised above, it is necessary to read the Recital provisions of the Draft AI Act in interpreting the provisions of Article 5 of the Draft AI Act and their evaluation, but it is still hard to disagree with some of the repeated arguments provided among critics of such a 'broad' list of envisaged exceptions to the usage of AI prohibited by law enforcement authorities, as is the case with the real time biometric data. It should be noted that, as was the case in the Resolution (Recital, Q), modern criminal law is based on the idea that the authorities react to an offence after the fact, i.e. once it has been committed, without assuming that everyone is dangerous and needs to be constantly monitored in order to prevent potential wrongdoing. The exceptions must be strictly construed. The Ethics Guidelines for Trustworthy Artificial intelligence from 2019 emphasise the way it is necessary to develop, deploy and use trustworthy AI systems so that they adhere to the ethical principles of respect

[61] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119/89.

[62] Page 201.

for human autonomy, prevention of harm, fairness and explicability. The values of those ethical principles of respect for human autonomy, prevention of harm, fairness and explicability when we regulate *trustworthy AI* should be particularly borne in mind in regulating AI in criminal law and its use by the police and judicial authorities in criminal matters. The Resolution states that the following should also be on the minds of the regulators: AI is used by law enforcement in applications such as facial recognition technologies, e.g. to search suspect databases and identify victims of human trafficking or child sexual exploitation and abuse, automated number plate recognition, speaker identification, speech identification, lip-reading technologies, aural surveillance (i.e. gunshot detection algorithms), autonomous research and analysis of identified databases, forecasting (predictive policing and crime hotspot analytics), behaviour detection tools, advanced virtual autopsy tools to help determine cause of death, autonomous tools to identify financial fraud and the financing of terrorism, the monitoring of social media (scraping and data harvesting for mining connections), and automated surveillance systems incorporating different detection capabilities (such as heartbeat detection and thermal cameras); the aforementioned applications, alongside other potential or future applications of AI technology in law enforcement, may have vastly varying degrees of reliability and accuracy and have an impact on the protection of fundamental rights and on the dynamics of criminal justice systems; many of these tools are used in non-EU countries but would be illegal under the Union Data Protection aquis and case law; the routine deployment of algorithms, even with a small false positive rate, may result in false alerts far outnumbering correct alerts. The possibility of being wrong, as is always the case when only AI is used to identify a person based on collected data, for instance, on social media, should be taken as red flag in the regulation of the usage of AI in matters of criminal law. As stated above, AI applications may offer great opportunities in the field of law enforcement, but not at the expense of the human rights and rights to a fair trial that exist

within the EU and the Council of Europe member states[63]. A balanced approach is needed[64]. In any case, lack of regulation and regulatory differences which enable or prohibit AI use for certain purposes should be addressed seriously among all Member States of the EU.

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American Chamber of Commerce to the European Union, Fostering Artificial Intelligence in Europe Building a strong public-private partnership, 2018, http://www.amchameu.eu/system/files/position_papers/amcham_eu_position_on_artificial_intelligence_in_europe_0.pdf [access 18.01.2023].

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[63] As stresses in the Resolution (See more in Recital, D), Fundamental rights and freedoms enshrined in the Charter should be guaranteed throughout the life cycle of AI and related technologies, notably during their design, development, deployment and use, and should apply to the enforcement of the law in all circumstances.

[64] See also T.C. King et al., *Artificial Intelligence Crime: An Interdisciplinary Analysisof Foreseeable Threats and Solutions*, "Science and Engineering Ethics" 2020, Vol. 26, pp. 89–120, https://doi.org/10.1007/s11948-018-00081-0 [access 18.01.2023]: Artificial intelligence (AI) research and regulation seek to balance the benefits of innovation against any potential harms and disruption. One unintended consequence of the recent surge in AI research, however, is the potential re-orientation of AI technologies to facilitate criminal acts.

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Roksandić Vidlička S., Elīna Liepiņa L., Ostapchuk S., *Bioethical and Legal Challenges of Artificial Intelligence and Human Dignity*, [in:] *Human rights in 21st century*, J. Miodrag, V. Tibor (eds.), The Hague 2020, pp. 269–288.

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Chapter 7. Legal Protection of Older People from the Perspective of Criminal Law in Croatia: High Legal Principles and Poor Practice

7.1. Introduction

On a daily basis we read in the media about violent criminal offences committed against older people: swindles and frauds, thefts and aggravated thefts. Today's media are not only the bearers of bad news, but they inform and punish all generations on specific types of crime that particularly target vulnerable groups either via organised crime or individual criminals. In Croatia the family tends still to be perceived as a safe place, full of love, warmth and respect. We may wonder, however, whether this is really still the case and what the amount of neglect, violence and abuse of older people in families is. The aim of this research is to answer three questions: to what extent are the rights of older people protected within the current legal framework? What are the neuralgic points regarding the reality of the legal position of older people? Is there room for improvement in the legal framework and attendant practices? Before answering those questions, however, the very notion of older persons or older people should be determined.

Paragraph 9 of the General Comment No. 6 of the UN Committee on Economic, Social and Cultural Rights it states that the terminology used to describe older persons varies considerably even

in international documents[1]. It goes on to explain that the Committee opted for the term *older persons* which was employed in General Assembly resolutions 47/5 and 48/98, after that covers persons aged 60 and above according to the practice in the United Nations statistical services[2]. Eurostat, the EU statistical service, however, considers *older persons* to be persons aged 65 or above in line with the most common age of retirement[3]. Some earlier initiatives and documents on the promotion of the rights of older persons, such as the UN General Assembly Resolution 3138 (XXVIII): Social security for the aged[4], International Plan of Action on Ageing adopted by the World Assembly on Ageing and endorsed by the General Assembly in its resolution 37/51 of 3 December 1982[5] and United Nations Principles for Older Persons adopted by the General Assembly resolution 46/91 of 16 December 1991[6] lack the ambition to define older persons. The Political Declaration and Madrid International

[1] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, 8 December 1995, E/1996/22, https://www.refworld.org/docid/4538838f11.html [access 19.12.2022].

[2] UN Committee on Economic, Social and Cultural Rights (CESCR), *op. cit*.

[3] *Ibidem*.

[4] UN General Assembly Resolution 3138 (XXVIII). Social security for the aged, 2201st plenary meeting, 14 December 1973, http://www.worldlii.org/int/other/UNGA/1973/117.pdf [access 19.12.2022].

[5] International Plan of Action on Ageing adopted by the World Assembly on Ageing and endorsed by the General Assembly in resolution 37/51 of 3 December 1982, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/425/29/IMG/NR042529.pdf?OpenElement [access 19.12.2022]. This was the first UN human rights instrument on ageing. Its recommendations included avoiding segregation of the elderly, making available home-based care for elderly persons, rejecting stereotypical concepts in government policies and recognising the value of old age. M. Fredvang, S. Biggs, *The rights of older persons. Protection and gaps under human rights law*, "Social Policy Working Paper" 2012, No. 16, p. 12, https://social.un.org/ageing-working-group/documents/fourth/Rightsofolderpersons.pdf [access 19.12.2022].

[6] United Nations Principles for Older Persons adopted by General Assembly resolution 46/91 of 16 December 1991, https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-principles-older-persons [access 19.12.2022].

Plan of Action on Ageing from 2002 reiterated the age of 60 years[7]. Article 2 of the Political Declaration states that *'We recognise that the world is experiencing an unprecedented demographic transformation and that by 2050 the number of persons aged 60 years and over will increase from 600 million to almost 2 billion and that the proportion of persons aged 60 years and over is expected to double from 10 to 21 percent. The increase will be greatest and most rapid in developing countries, where the older population is expected to quadruple during the next 50 years. This demographic transformation challenges all societies to promote increased opportunities, in particular opportunities for older persons to realise their potential to participate fully in all aspects of life'*. The two main goals of the Madrid International Plan of Action on Ageing were the full realisation of fundamental rights and freedoms for older persons as well as ensuring the full enjoyment of the economic, social and cultural rights and the civil and political rights of older persons, and the elimination of all forms of violence and discrimination against older persons[8]. The European charter of the rights and responsibilities of older people in need of long-term care and assistance, developed by AGE with a network of 11 partner organisations as part of the DAPHNE Eustacea project (2008–2010) of the European Commission's Daphne III Programme aimed at recognising and affirming the rights of the most vulnerable older people[9]. Neither does it provide a definition of elderly people[10]. Once all previously mentioned documents have

[7] Political Declaration and Madrid International Plan of Action on Ageing, United Nations, Second World Assembly on Ageing, Madrid, Spain, 8–12 April 2002, https://www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf [access 19.12.2022].

[8] M. Fredvang, S. Biggs, *The rights of older persons. Protection and gaps under human rights law*, *op. cit.*

[9] *European charter of the rights and responsibilities of older people in need of long-term care and assistance, together with the Accompanying Guide* is available at: https://age-platform.eu/publications/eu-charter-rights-and-responsibilities-older-people-need-long-term-care-and-assistance [access 19.12.2022].

[10] This promotes the right to dignity, physical and mental well-being, freedom and security of older people, the right to self-determination, the right to privacy, the right to high quality and tailored care, the right to personalised information, advice and informed consent, the right to continued communication,

been analysed, we may conclude that legal sources guaranteeing and promoting the rights of older people are reluctant to provide a definitive definition of the elderly. Legal theory on the other hand offers as the best definition of old age one that will be both fluid and adaptable in spatial and temporal dimensions, binding the formal legal appearance of older age (and thus the possibility of exercising rights belonging to older persons) with the average life expectancy of a certain area[11].

Croatian law on pension insurance includes four different varieties of old-age retirement: old-age retirement, early retirement, old--age retirement for someone with long-term insurance and finally early retirement due to the employer's bankruptcy[12]. The right to an old-age pension is granted to the insured when they reach the age of 65 and have 15 years of pensionable service[13]. The right to early retirement is granted to the insured when they reach the age of 60 and have 35 years of pensionable service[14]. The right to old--age retirement for someone with long-term insurance is granted to the insured when they reach the age of 60 and have completed 41 years pensionable service[15].

participation in society and cultural activity, the right to freedom of expression and freedom of thought/conscience: beliefs, culture and religion, the right to palliative care and support, and respect and dignity in dying and in death, the right to redress in cases of mistreatment, abuse or neglect.

[11] *Cit*. S. Roksandić Vidlička, S. Šikoronja, *Legal protection of folder persons (including elderly with mental disorders) from the Croatian perspective: why we need a special UN convention on the rights of the older persons*, "Collected Papers of the Faculty of Law" 2017, Vol. 38, No. 3, p. 1106, https://hrcak.srce.hr/file/285781 [access 19.12.2022].

[12] Law on pension insurance, OJ 157/13, 151/14, 33/15, 93/15, 120/16, 18/18, 62/18, 115/18, 102/19, 84/21 and 119/22, https://www.zakon.hr/z/91/Zakon-o-mirovinskom-osiguranju [access 19.12.2022].

[13] *Ibidem*, Article 33.

[14] *Ibidem*, Article 34.

[15] *Ibidem*, Article 35.

7.2. To what extent are the rights of older people protected within the current legal framework?

7.2.1. THE OMBUDSMAN'S REPORT

In the Ombudsman's report for 2021 on the analysis and evaluation of the state of protection of human rights and equality Tena Šimonović Einwalter emphasises the fact that, according to the latest available data from the Croatian Bureau of Statistics, every fifth resident of the Republic of Croatia is aged 65 or older and almost a third of them are vulnerable to poverty[16]. For people older than 65 who live alone 52.1% were susceptible to poverty for 2020, which represents an increase on 2019[17]. As particularly sensitive areas regarding the vulnerability of older people's legal status and personal integrity the Ombudsman has distinguished three issues: violence against older persons, homes for older and disabled persons and contracts on life and death maintenance.

7.2.1.1. Violence against the elderly

Although global information such as data from an independent UN expert on the rights of the elderly note a significant increase in violence against and neglect of the elderly during the pandemic, both in institutions for the elderly and in family homes, exact data concerning the Republic of Croatia cannot be presented because such data is collected in each system separately[18]. Regarding violence against residents in homes as observed during inspections, the Ombudsman stresses that it tends to be treated as an aberration at work and

[16] The ombudsman's report for 2021 on the analysis and evaluation of state of protection of human rights and equality, Zagreb, March 2022, p. 52, available at: https://www.ombudsman.hr/hr/download/izvjesce-pucke-pravobraniteljice-za-2021-godinu/?wpdmdl=13454&refresh=63a2c3e3b07b81671611363 [access 18.12.2022].

[17] The ombudsman's report for 2021 on the analysis and evaluation of state of protection of human rights and equality, *op. cit.*

[18] *Ibidem*, p. 51.

a deadline is set for its elimination. As a result, it is often treated as a misdemeanour that passes without criminal consequence for the perpetrators[19]. On the violence experienced by the elderly in their own homes there is only partial data, among others obtained through research carried out by associations in certain parts of the Republic of Croatia. The research of the association *Duga Vukovar* therefore showed that almost a third of the elderly respondents experienced some form of violence and half of them neglected to report the violence to anyone out of fear of the consequences and social exclusion. In addition to fear, research by the *Centre for the Quality of Life 50+* also identified shame, lack of information and distrust in institutions as reasons. Illness, disability, immobility and alcoholism are especially highlighted as risk factors on the part of the victim. The research carried out by the *CERANEO* association in five counties in northern Croatia showed that an important factor in the vulnerability of the elderly is broken family relationships and traditional patterns in which the inheritance of property is expected at the expense of availing oneself of the property for one's own well-being in old age[20].

The ombudsman substantiated the results of these researches in her own practice. During 2021 her office received complaints from neighbors on several occasions, stating that they witnessed violence against elderly people in the family, but the victims, despite visible injuries, denied such allegations[21]. The perpetrators of violence were people who lived in the same household and the victims sought to protect them, which made it impossible for further action to be taken[22].

According to data from the Report on the work of the Commission for monitoring and improving the work of criminal and misdemeanour procedure bodies and the execution of sanctions related to protection against domestic violence for the year 2020, 314 elderly victims came before the courts, representing an increase on 2018

[19] *Idem.*
[20] *Idem.*
[21] *Idem.*
[22] *Idem.*

and 2019, although the total number of victims is on the decrease. In 2021 the Ministry of Internal Affairs recorded 760 victims over 65 of domestic violence, which represents a fall on 2020 (1,095 victims of domestic violence over 65). According to the records of social care centres, 289 cases of neglect of the needs of elderly people were recorded, representing a slight increase on 2019[23].

It may therefore be concluded that the current method of collating and publishing the collected data fails to provide a comprehensive, systematic insight into the issue of violence against the elderly because the structure of the perpetrators of violence against the elderly (whether they be children, grandchildren, partners or others), the type of violence against the elderly (whether physical or economic violence could be said to predominate) and the measures taken (whether the perpetrators were sanctioned and in what way)[24].

7.2.1.2. Homes for the elderly and the disabled

In the Republic of Croatia there were three state homes for the elderly, 45 decentralised homes, 121 non-state homes and 379 family homes. Out of a total of 22,364 residents in homes for the elderly and disabled 1,252 subsidise the cost of accommodation due to residents' low income, and the rest of the cost is covered by the state, while for 846 residents the cost of accommodation is completely covered by the state[25].

The attention of the Ombudsman was attracted as a result of reports on special violations and the need for her action with regards to homes for the elderly and disabled was clear. During the periods when there was a ban on visiting the residents of homes, the Ombudsman received several complaints from former employees of private and family-run homes for the elderly and disabled, in which it was openly stated that the homes scrimped on the users, both in terms of food and heating; that the staff was unprofessional;

[23] *Idem*.
[24] *Ibidem*, p. 52.
[25] *Ibidem*, p. 48.

and that staff members were not available to residents during the night; that the residents were bound; and that some deaths were even directly attributed to the actions of the staff[26]. A case was recorded in which members of the resident's family complained about inadequate and negligent care during the period when visits were banned, as a result of which the resident became immobile and developed bed-sores in the month-and-a-half he spent in the home, after which he passed away[27].

From the reports on inspections carried out in homes for the elderly and disabled, it is evident that in most of them there is a shortage of nurses and social workers; that some of the staff are unqualified to work independently; that the nurses have not completed nursing courses; and that medical personnel from neighboring countries are employed illegally or not employed at all[28]. The homes were also overcrowded.

7.2.1.3. Contracts on lifetime and death maintenance

Those who receive emergency benefits are in an extremely vulnerable position in the event of abuse or non-fulfilment of obligations by the benefit provider. Unlike lifetime maintenance contracts, in death maintenance contracts, the maintenance provider acquires the objects and rights that are the subject of the contract during the lifetime of the recipient of the benefit. The motive for concluding a maintenance contract on the part of the maintenance recipient, usually an elderly person, may be to cover the monthly cost of accommodation in a home for the elderly, help with meeting daily needs, e.g. cooking, doing household chores, taking care of hygiene and health among other things. Due to meager pensions, a significant number of elderly people are unable independently to pay for the services they need due to poor health. This is also a consequence of the insufficiency of social services, for example,

[26] *Ibidem*, p. 49.
[27] *Idem*.
[28] *Ibidem*, p. 50.

the restrictive census for the home help service, or the limited duration of project activities that provide help at home, such as *Zaželi*. Of course, the motive for entering into maintenance on the part of the maintenance provider may be very positive, but it is necessary to regulate the conclusion of these contracts, so that abuses are prevented where possible.

In case of default by the maintenance provider, the contract can be terminated, however in practice these court proceedings take too long, especially considering the high age of the maintenance recipient, who sometimes die before the termination. Even after the abuses that left them without property and care, maintenance recipients could not exercise their rights in the social welfare system[29]. This problem was resolved by the new Law on social care, which stipulates that maintenance recipients who initiated proceedings for termination due to non-fulfillment of obligations can now be granted the right to allowance for help and care, help at home and accommodation service[30].

7.2.2. PROTECTION OF ELDERLY PEOPLE IN THE CASE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS[31]

7.2.2.1. Right to life (Article 2 of the European Convention on Human Rights)

The case *Dodov v. Bulgaria*[32] concerned the disappearance of the applicant's mother, who suffered from Alzheimer's disease, from a state-run nursing home for the elderly. The applicant alleged that his mother's life had been put at risk through the negligence of the nursing home staff, that the police had not undertaken all necessary measures to search for his mother immediately after her

[29] *Ibidem*, p. 52.
[30] *Idem*.
[31] Facts and explanations in the text under this subtitle are taken over from the Factsheet: *Elderly people and the ECHR*, pp. 1–11, https://www.echr.coe.int/documents/fs_elderly_eng.pdf [access 20.12.2022].
[32] *Dodov v. Bulgaria*, Application No. 59548/00, Judgement of 17 January 2008.

disappearance and that the ensuing investigation had not resulted in criminal or disciplinary sanctions. He further complained about the excessive length of the civil proceedings to obtain compensation.

The Court held that there had been a violation of Article 2 (right to life) of the Convention. It found it reasonable to assume that the applicant's mother had died. It also found that there was a direct link between the failure to supervise his mother, despite the instructions never to leave her unattended, and her disappearance. In the instant case, the Court observed that, despite the availability in Bulgarian law of three avenues of redress – criminal, disciplinary and civil – the authorities had not, in practice, provided the applicant with the means to establish the facts surrounding the disappearance of his mother and bring to account those people or institutions that had breached their duties. Faced with an arguable case of negligent acts endangering human life, the legal system as a whole had thus failed to provide an adequate and timely response as required by the State's procedural obligations under Article 2. The Court further held that there had been no violation of Article 2 of the Convention concerning the reaction of the police to the applicant's mother's disappearance. Bearing in mind the practical realities of daily police work, it was not convinced that the reaction of the police to the disappearance had been inadequate. Lastly, the Court held that the civil proceedings, which had lasted 10 years, had not corresponded to the reasonable time requirement, in violation of Article 6 paragraph 1 (right to a fair trial) of the Convention.

7.2.2.2. Prohibition of torture and inhuman or degrading punishment or treatment (Article 3)

The case *Senchishak v. Finland*[33] concerned the threatened removal from Finland of a 72 years old Russian national. She claimed that she would not have access to medical care in Russia, it being impossible

[33] *Senchishak v. Finland*, Application No. 5049/12, Judgement of 18 November 2014.

for her to obtain a place in a nursing home there, and because she would be separated from her daughter, a Finnish national.

The Court held that there would be no violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention if the applicant were to be expelled to Russia. It found that neither the general situation in Russia nor the applicant's personal circumstances would put her at real risk of inhuman or degrading treatment if she were expelled. In particular, she had failed to provide evidence to prove her allegation that she had no access to medical treatment in Russia, there being both private and public care institutions there or the possibility of hiring external help. The Court was also assured that her state of health at the time of her removal would be taken into account and appropriate transportation – by ambulance for example – would be organised.

In the case of *Farbtuhs v. Latvia*[34] the applicant, who was found guilty in September 2009 of crimes against humanity and genocide for his role in the deportation and deaths of tens of Latvian citizens during the period of Stalinist repression in 1940 and 1941, complained that, in view of his age and infirmity, and the Latvian prisons' incapacity to meet his specific needs, his prolonged imprisonment had constituted treatment contrary to Article 3 (prohibition of inhuman or degrading treatment) of the Convention. In 2002 the domestic courts finally excused the applicant from serving the remainder of his sentence after finding inter alia that he had contracted two further illnesses while in prison and that his condition generally had deteriorated. The applicant was released the next day.

The Court held that there had been a violation of Article 3 (prohibition of degrading treatments) of the Convention. It observed that the applicant was 84 years old when he was sent to prison, paraplegic and disabled to the point of being unable to attend to most daily tasks unaided. Moreover, when taken into custody he was already suffering from a number of serious illnesses, the majority of which were chronic and incurable. The Court considered that when national authorities decided to imprison such a person, they had to be particularly careful to ensure that the conditions of detention

[34] *Farbtuhs v. Latvia*, Application No. 4672/02, Judgement of 2 December 2004.

were consistent with the specific needs arising out of the prisoner's infirmity. Having regard to the circumstances of the case, the Court found that, in view of his age, infirmity and condition, the applicant's continued detention had not been appropriate. The situation in which he had been put was bound to cause him permanent anxiety and a sense of inferiority and humiliation so acute as to amount to degrading treatment. By delaying his release from prison for more than a year in spite of the fact that the prison governor had made a formal application for his release supported by medical evidence, the Latvian authorities had therefore failed to treat the applicant in a manner that was consistent with the provisions of Article 3 of the Convention.

In the case *Contrada (no. 2) v. Italy*[35], the applicant, almost 83 alleged in particular that, in view of his age and his state of health, the authorities' repeated refusal of his requests for a stay of execution of his sentence or for the sentence to be converted to house arrest had amounted to inhuman and degrading treatment.

The Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. It observed in particular that it was beyond doubt that the applicant had suffered from a number of serious and complex medical disorders, and that all the medical reports and certificates that had been submitted to the competent authorities during the proceedings had consistently and unequivocally found that his state of health was incompatible with the prison regime to which he was subjected. The Court further noted that the applicant's request to be placed under house arrest had not been granted until 2008, that is to say, until nine months after his first request. In the light of the medical certificates that had been available to the authorities, the time that had elapsed before he was placed under house arrest and the reasons given for the decisions refusing his requests, the Court found that the applicant's continued detention had been incompatible with the prohibition of inhuman or degrading treatment under Article 3 of the Convention.

[35] *Contrada (no. 2) v. Italy*, Application No. 7509/08, Judgement of 11 February 2014.

7.2.2.3. Prohibition of slavery and forced labor (Article 4)

The case *Meier v. Switzerland*[36] concerned the requirement for a prisoner to work beyond the retirement age.

The Court held that there had been no violation of Article 4 paragraph 2 (prohibition of forced labour) of the Convention. It noted in particular that there was insufficient consensus among Council of Europe member States regarding compulsory work for prisoners after retirement age. Accordingly, it emphasised, on the one hand, that the Swiss authorities enjoyed a considerable margin of appreciation and, on the other, that no absolute prohibition could be inferred from Article 4 of the Convention. The compulsory work performed by the applicant during his detention could therefore be regarded as *'work required to be done in the ordinary course of detention'*, for the purpose of Article 4 of the Convention. Consequently, it did not constitute *'forced or compulsory labour'* within the meaning of that Article.

7.2.2.4. Right to liberty and security (Article 5)

In the case of *Vasileva v. Denmark*[37], the applicant, a 67-year-old woman in poor health, had an argument on a bus with a ticket inspector who accused her of travelling without a valid ticket. The police were called and she was arrested for failing to disclose her name, address and date of birth to the police on request. She was taken to the police station, where she was detained from 9.30 p.m. until 11 a.m. the next day, after she had identified herself. Following her release, the applicant collapsed and was hospitalised for three days with high blood pressure. She complained that her detention was unlawful.

The Court held that there had been a violation of Article 5 paragraph 1 (right to liberty and security) of the Convention, finding

[36] *Meier v. Switzerland*, Application No. 10109/14, Judgement of 9 February 2016.

[37] *Vasileva v. Denmark*, Application No. 52792/99, Judgement of 25 September 2003.

that the authorities had failed to strike a fair balance between the right to liberty and the need to ensure the fulfilment of an obligation prescribed by law. The detention had admittedly been in accordance with the Administration of Justice Act, which obliged every person to disclose his name, address and date of birth to the police upon request, and aimed at securing the fulfilment of this obligation. The Court also acknowledged that it was fundamental for the police to be able to identify citizens in discharging of their duties, as well as legitimate for transport companies to involve the police in disputes concerning the validity of a bus ticket. However, as regards the length of the detention, depriving the applicant of her liberty for thirteen and a half hours had been longer than necessary, and not proportionate to the purpose of her detention, taking into account that efforts to establish her identity had not been undertaken during the full detention period. In addition, the applicant had not been attended by a doctor, which would have been justified given her advanced age and could have also served to overcome the communication impasse between her and the police.

7.2.2.5. Right to a fair trial (Article 6)

The case of *X and Y v. Croatia*[38] concerned proceedings brought by the social services to divest a mother and a daughter of their legal capacity. The first applicant, who was born in 1923, was bedridden and suspected to be suffering from dementia. She was first appointed a guardian in July 2006 and was divested of her legal capacity in August 2008. She alleged that these proceedings had been unfair as she had not been notified of them and had therefore not been heard by a judge or been able to give evidence.

The Court held that there had been a violation of Article 6 paragraph 1 (right to a fair trial) of the Convention in respect of the first applicant, finding that she had been deprived of adequate procedural safeguards in proceedings resulting in a decision adversely affecting her private life. As regards in particular the reasons adduced by the

[38] *X and Y v. Croatia*, Application No. 5193/09, Judgement of 3 November 2011.

domestic court for its decision, the Court could not but observe that in order to ensure proper care for the ill and elderly, the State authorities had at their disposal much less intrusive measures than divesting them of legal capacity.

7.2.2.6. Right to respect for private and family life (Article 8)

The case *Gross v. Switzerland*[39] concerned the complaint of an elderly woman – who had wished to end her life but had not been suffering from a clinical illness – that she had been unable to obtain the Swiss authorities' permission to be provided with a lethal dose of a drug in order to commit suicide. The applicant complained that by denying her the right to decide by what means and at what point her life would end the Swiss authorities had breached Article 8 (right to respect for private and family life) of the Convention.

In its Chamber judgement in the case on 14 May 2013, the Court held, by a majority, that there had been a violation of Article 8 (right to respect for private life) of the Convention. It found in particular that Swiss law was not clear enough as to when assisted suicide was permitted.

The case was subsequently referred to the Grand Chamber at the request of the Swiss Government. In January 2014 the Swiss Government informed the Court that it had learned that the applicant had died in November 2011. In its Grand Chamber judgement of 30 September 2014 the Court has, by a majority, declared the application inadmissible. It came to the conclusion that the applicant had intended to mislead the Court on a matter concerning the very core of her complaint. In particular, she had taken special precautions to prevent information about her death from being disclosed to her counsel, and thus to the Court, in order to prevent the latter from discontinuing the proceedings in her case. The Court therefore found that her conduct had constituted an abuse of the right of individual application (Article 35 paragraphs 3 (a) and 4 of

[39] *Gross v. Switzerland*, Application No. 67810/10, Judgement of the Grand Chamber of 30 September 2014.

the Convention). As a result of this judgement, the findings of the Chamber judgement of 14 May 2013, which had not become final, are no longer legally valid.

7.3. What are the neuralgic points of the reality of the legal position of older people?

7.3.1. POLICE STATISTICS

In order to determine neuralgic points of legal position reality of older people we wanted to establish what criminal offences are older people the most frequent victims. As Croatian Ministry of Interior publishes each year Statistical overview of fundamental safety indicators and work results we have distinguished those offences from 2017 to 2021[40].

Table 7.1. Victims older than 60 years of the criminal offences 2017–2021

Victims (60+) and criminal offences by year	2017	2018	2019	2020	2021
Theft	2542	2277	2357	2405	2345
Aggravated theft	3331	3294	3027	2520	2220
Threat	646	710	873	1135	1212
Causing a traffic accident	611	574	469	456	500
Fraud	447	447	403	411	435
Computer fraud	301	419	653	321	368
Damage to other's property	184	141	234	286	328
Bodily injury	97	96	129	231	270
Aggravated bodily injury	90	99	101	117	122
Family violence	89	107	218	335	345
Endangering by a generally dangerous action or means	78	63	91	100	87
Unauthorised use of personal data	37	33	45	130	103

[40] https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-mup-a-i-bilteni-o-sigurnosti-cestovnog-prometa/283233 [access 19.12.2022].

Forgery of an official document	17	0	18	8	120
War crime	109	121	73	45	58

Source: https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

Police statistics showed that older people are at most victims of criminal offences against property: theft and aggravated theft. All other criminal offences are represented on lower occasions. In relation to them prevail threat and causing a traffic accident. Older people are often victims of fraud and computer fraud. Police warning on the high potential of this risk is particularly often in the media as part of preventive and protection actions. Other offences represented in a three-digit numbers are damage to other's property, bodily injury and aggravated bodily injury. Following are: family violence, endangering by a generally dangerous action or means, unauthorised use of personal data and forgery of an official document. As a special feature of Croatia and a consequence of a Homeland war in nineties there are still huge numbers of older people as victims of war crime.

Our scientific curiosity was also attracted by data on older people as perpetrators of criminal offences.

Table 7.2. Perpetrators older than 59 years and criminal offences 2017–2021

Perpetrators (59+) and criminal offences by year	**2017**	**2018**	**2019**	**2020**	**2021**
Threat	463	485	571	726	798
Causing a traffic accident	277	285	265	231	243
Bodily injury	77	84	95	166	186
Theft	179	173	163	162	181
Damage to other's property	63	73	86	91	92
Fraud	72	59	47	70	90
Document forgery	51	54	70	71	101

Source: https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

We can see from the previous table that older people are mostly perpetrators of the same criminal offences they are victims of.

7.3.2. DATA OF THE CROATIAN BUREAU OF STATISTICS (CBS)

In order to confirm police data on older persons as the perpetrators and victims of the specific criminal offences we wanted to compare those data to the data of the Croatian Bureau of Statistics. But we have faced a few methodological problems. The first consisted in the fact that only available data of the Croatian Bureau of Statistics that could inform us about the age of perpetrators of criminal offences are data on 'Accused adult persons, by types of criminal offences, type of decision, sex and age'. So, instead of precise data on the particular criminal offence as above, we could only serve data on the types of criminal offences – protected legal goods. The second problem was in the fact that CBS categorises the perpetrators as 60 and over, while police statistics 59 and over. And the third problem is that CBS provides no data on victims.

Table 7.3. Perpetrators older than 60 years and types of criminal offences 2017–2021

Perpetrators (60+) and types of criminal offences by year	**2017**	**2018**	**2019**	**2020**	**2021**
Total	**885**	**931**	**1072**	**1004**	**1042**
Against personal freedom	200	214	256	264	271
Against safety in traffic	138	176	202	183	153
Against property	152	172	201	153	178
Against life and limb	66	60	80	68	69
Against public order	77	82	66	79	85
Against counterfeiting	53	51	48	54	62

Source: https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

Although there was no insight into specific offences, but types of criminal offences, police data are confirmed by CBS data. Namely,

threat is an offence against personal freedom, causing a traffic accident is offence against safety in traffic, theft and aggravated theft, as well as damage to other's property and fraud are offences against property. Finally, bodily injury is an offence against life and limb.

7.4. Case-study

Croatian legislator continuously enhances the legal protection of older persons. Lately, in 2019 amendments to the Croatian Criminal Code were proclaimed, which entered into force on January 1, 2020. The amendments were initiated with the aim of strengthening criminal law protection against domestic violence and suppression the legal criminal law policy of punishing certain criminal acts committed to the detriment of a close person. In the part of the Criminal Code that refers to criminal offences against personal freedom (threat), in addition to the existing qualifying circumstances, a threat committed out of hatred towards a close person or towards a person who is particularly vulnerable due to their age, serious physical or mental disability or pregnancy was added[41]. Namely, by introducing new qualifying circumstances, the legislator provided additional protection to close persons due to their recognised exposure to this form of illegal treatment[42]. Likewise, the need to provide enhanced protection to vulnerable people due to their special vulnerability resulting from their dependence on others was also observed[43].

In this chapter we wanted to present three judgements of the Croatian county courts in which older people were victims.

[41] B. Ilijazović, *Novelties in the Criminal Code*, https://www.iusinfo.hr/aktualno/u-sredistu/40245 [access 19.12.2022].
[42] *Idem*.
[43] *Ibidem*.

7.4.1. AGGRAVATED MURDER OF 89 YEARS OLD WOMAN[44]

7.4.1.1. Facts of the case

Minor A.O. was accused for committing an aggravated murder of a person particularly vulnerable because of her age in an insane state in a cruel manner. Namely, on 27 September 2020, around 5:30 p.m. in S., in S. street, in a state of severe mental disturbance, with a paranoid psychotic episode, due to which he could not understand the meaning of his act or manage his actions, after ringing and knocking on the door of several tenants, he rang also at the door of victim, H.M., 89 years old woman. After she opened the door, he forcibly entered the apartment. She could not resist him due to her age and helplessness. In order to murder her he punched her in the head, and after she started shouting and calling for help, he continued hitting her with his fists and after she fell to the ground, he dragged her into another room, and despite her wails, he continued to hit her head with his hands and feet, as a result of which the victim H.M. suffered great physical pain and psychological suffering, during which she received numerous abrasions and bruises and wounds on her face, a multiple fracture of the nasal bones, bone parts of both eye sockets, multiple fractures of both cheekbones and both upper jaws, as a result of which she died.

7.4.1.2. Conviction

As the perpetrator was *tempore criminis* in a state of severe mental disturbance, with a paranoid psychotic episode, the court found that he has committed an illegal act with the legal features of the aggravated murder – an offence described and punishable under Article 111 items 1 and 2 of the Criminal Code and imposed a measure

[44] Judgement of the County Court in Split, Km-2/2020-57, 4 July 2021.

of forced accommodation in a psychiatric institution in duration of six months[45].

7.4.1.3. Age as qualifying circumstance

In this case it was disputable whether the offence could be legally qualified as an aggravated murder in a cruel manner to the detriment of a person particularly vulnerable due to her age. Article 111 item 2 of the Criminal Code stipulates that imprisonment of at least ten years or long-term imprisonment shall be imposed on whoever kills a person particularly vulnerable for her age, serious physical or mental disability or pregnancy. The court reasoned as following: *'It should be noted that the victim H.M. was 89 years old at the time of the commission of the crime, so she was undoubtedly a person who was very old and who was particularly vulnerable because of her age. On the incriminated occasion, the minor forcibly entered the victim's apartment and found her alone in the apartment, and during the physical attack, she was unable to defend herself in a way to save her life from the minor, who was far physically stronger than her. Therefore, it is beyond doubt that the qualifying element related to the fact that the crime of murder was committed against a person who was particularly vulnerable because of her age'*[46]. In this judgement the court restrained himself in pure noting the fact that victim was 89 years old, but justified the qualification in detail explaining the connection between victim's old age and her vulnerability.

[45] In accordance with provisions of Criminal Procedural Code and Law on the protection of persons with mental disorders.

[46] Judgement of the County Court in Split, Km-2/2020-57, 4 July 2021, p. 32.

7.4.2. AGGRAVATED MURDER OF 92 YEARS OLD MAN AND ATTEMPTED AGGRAVATED MURDER OF 87 YEARS OLD WOMAN[47]

7.4.2.1. Facts of the case

L.J. was accused for committing an aggravated murder and attempted aggravated murder. Namely, on 24 January 2019, between 6:20 p.m. and 6:35 p.m., he entered the apartment of the spouses S.U and V.U. in S., at the address S.R., with the premeditated intention of murdering them and then keeping their valuables for himself, aware that due to their old age, infirmity and poor mobility, they could not resist him. He repeatedly hit S.U. in the head and hands with a hammer and a meat mallet. He also hit V.U. in the head and hands with a hammer several times and stabbed him once in the left side of the stomach with a knife, as a result of which V.U. received multiple gooey wounds on the head, laceration gooey wounds on the head and right hand, a blood bruise on the scalp, right elbow and right hand, a fracture bones of the fingers of the right hand, hemorrhaging of the soft head of the area of the purulent wounds, a stab wound to the abdomen with damage to the small intestine and pancreas and bleeding into the abdominal cavity from which he died immediately, while S.U. received serious and life-threatening injuries in the form of hemorrhaging of both eyes, hemorrhaging of the face and head, fracture of the left upper jaw without movement, contusion of the brain left parietal and right temple, fracture of the fifth bone of the wrist of the right hand, hemorrhaging of both hands, multiple lacerations of the right hand, laceration of the left hand. Afterwards he took a watch and a small amount of jewelry from the apartment, some metal coins, chocolates, lighters and paper clips, damaging S. and V.U. for an unspecified value.

[47] Judgement of the County Court in Split, K-408/2019-95, 8 February 2021.

7.4.2.2. Conviction

L.J. was found guilty for committing an aggravated murder described and punishable under Article 111 items 2 and 4 of the Criminal Code and attempted aggravated murder described and punishable under Article 111 items 2 and 4 in connection to Article 34 of the Criminal Code because he has murdered out of greed a person particularly vulnerable due to his age and concluded an action that spatially and temporally immediately precedes murdering out of greed another person particularly vulnerable due to her age. L.J. was imposed to long-term imprisonment in duration of fifty years.

7.4.2.3. Age as qualifying circumstance

In this case it was also disputable whether there is a qualified form of the offence in terms of determination of victims as persons especially vulnerable for their age. The court found out that:

> *…the victim V.U. was at the time of the commission of the criminal offence 92 years old, and the victim S.U. 87 years old, so it is beyond doubt that they were persons who were in old age and because of that age they were particularly vulnerable. Furthermore, their son S.U. testified that they remained with a smaller and smaller circle of friends because of their high age, so in the end they didn't have visitors for a while, how his parents lived alone in the apartment, and how his mother since the summer stopped leaving the apartment, she didn't feel safe on her feet, while his father used to leave sometimes the building, but less often than before (sheet 256 of the file). Such statements by S.U. were also confirmed by the witness E.M., a neighbor of the married couple V. and S.U. who stated "… As far as I know, and what I have seen, the late V. lately rare left the apartment, he was mostly on the balcony, from which he would call me when I came to the building. He used to go to the terrace at the top of the building, but he hasn't done that in the last*

> *year. I assume that it was tiring for him. Mrs. S. mostly stayed in the apartment, sometimes she would come to us for a coffee or to ask us to buy something for her in the store and bring it…" (sheet 302 files). Therefore, these allegations also indicate the state in which the victims V. and S.U. were, more precisely, because of their old age, they mostly stuck to their apartment and did not leave it*[48].

It is important to note that the court found as aggravating circumstances when imposing the punishment: the fact that the perpetrator was a neighbor of the victims so he misused their trust when entering their apartment as well as persistence and brutality in committing the offence (the knife and hammer used during the commission of the crime were broken by the blows).

7.4.3. ATTEMPTED AGGRAVATED MURDER OF 81 OLD WOMAN[49]

7.4.3.1. Facts of the case

M.Š. was accused for attempted aggravated murder and bodily injury of his mother in concurrency. On 13 November 2020, from 5:00 p.m. to around 7:00 p.m., in the house in X, in a severely drunken state with a blood alcohol concentration of at least 3.37 g/kg, angry that his mother talks on the phone took her phone and threw it on the floor, followed her into her room where she went to sleep, took a pillow and, with intent to kill her, placed the pillow over her face and pressed with both his hands the pillow over her nose and mouth in order to prevent her in breathing. In one moment victim, A.Š. managed to grab him by the hair and push him away so that he fell from the bed to the floor, and due to his state of intoxication he could not get up, which is why he failed in his plan to murder A.Š. Accused lived with his mother in a shared household, and for the past two to three years he was violent towards her, physically assaulting her, humiliating her every day and insulting her, telling her that she is

[48] *Ibidem*, p. 10.
[49] Judgement of the County Court in Sisak, K-10/2021-28, 12 October 2021.

a whore, a gossip, why didn't she die so that he can get married and live normally. Victim was 81 years old and hardly mobile.

In addition, M.Š. was accused that on an unspecified day in the period from 1 to 12 November 2020 hit his mother with his hand in the area of the left side lower jaw and grabbed her face with his hand and pressed her in the cheek area with his fingers, during which he caused her injuries in the form of hemorrhaging in the left area sides of the lower jaw and two round blood vessels in the left cheek area, and with his hands he grabbed both of her hands in the area of the forearms, and held them with his fingers pressed, causing her injuries in the form of several intradermal blood clots on both forearms.

7.4.3.2. Conviction

M.Š. was found guilty for attempted aggravated murder described and punishable under Article 111 items 2 and 3 in connection to Article 34 of the Criminal Code because he has concluded an action that spatially and temporally immediately precedes murdering a close person whom he has been previously abused and a person particularly vulnerable due to her age. He was also found guilty for committing bodily injury at the detriment of a close person whom he has been previously abused and a person particularly vulnerable due to her age, described under Article 117 paragraphs 1 and 2 of the Criminal Code. He was imposed to imprisonment in duration of three years and six months and security measure of compulsory treatment of addiction.

7.4.3.3. Age as qualifying circumstance

The court noted that: *'The victim was tempore criminis 81 years old, in addition, she was hardly walking, from which it follows that she was a particularly vulnerable person due to her age, of which the defendant was certainly aware'*[50].

[50] Judgement of the County Court in Sisak, K-10/2021-28, 12 October 2021, p. 9.

7.5. Conclusion

this research testified high political support and continues efforts in promoting rights of older people. They are approved by great number of different legal sources; resolutions, planes or declarations as well as systematical improvement of legal status of older people as victims of criminal offences. But high legal principles are in current social reality perceived as no more than noble wishes or dreams. Is it result of deficiency of knowledge of individuals applying the norms, institutions incapacity to protect and help or just resistance to behave humanly towards particularly vulnerable group – older people?

Cases from the case-study showed that older people may be victims of particularly violent crimes, totally unexpected and as a result of perpetrator's severe mental disturbance (infra 4.1). There are cases where older people became victims when they act with trust (towards a neighbor) and altruistic motives (infra 4.2). Finally, violence in a family, an issue that is now very fashionable to talk about and be disgusted, but still rarely effectively stopped. The last case (infra 4.3) clearly verified facts determined in the Ombudsman's report about violence in families towards older, as well as the heartbreaking attitude of the victims: rejection to report crime and testify in the court.

Instead of finding it sufficient to formally guarantee the rights of older people, it is the final moment to act proficiently, decisively and effectively.

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Chapter 8. Perspectives of the Application of the Mediation Procedure in Commercial (Economic) and Arbitration Courts in Ukraine

8.1. History of alternative dispute resolution in Ukraine

8.1.1. THE BEGINNING OF ALTERNATIVE DISPUTE RESOLUTION AS A COURT PROCEDURE IN UKRAINE

The development of business caused a change in the attitude to dispute resolutions specifically for foreign traders and corporations. On 1 May 1803, Tsar Aleksander I issued a decree regarding *'The orders for Odessa city concerning the establishment there of a commercial dispute resolution office, two fairs and a pawnshop*'[1]. This office was intended to help traders from different countries resolve disputes in Odessa, the newly formed seaport and business centre of the empire. The temporary Charter of Commercial Court in Odessa was approved on 16 March 1808. A Commercial court was opened on 26 November 1808. The opening heralded the implementation of international trade law procedures and customs for Russia's Imperial Court system in what was Ukraine. The practice of a new method of dispute resolution was successful so, on 14 May

[1] V.L. Rasskasov, *Creation commercial court and their legal positions*, https://cyberleninka.ru/article/n/sozdanie-kommercheskih-sudov-i-ih-pravovoe--polozhenie-v-pervoy-treti-hih-v/viewer [access 19.12.2022].

1832 Tzar Nikolay I issued, a decree regarding commercial courts and their charter and procedure[2].

The concept of commercial courts comprises:

- the equality of parties;
- the competitiveness of parties;
- the possibility of dispute resolution before the court application;
- arbitrage with a third party;
- negotiation processes for settlement;
- short term procedure;
- trust in the commercial procedure.

The regulation regarding *Arbitration Tribunals* was came into force in 1831 and became a part of the Code of Laws of the Russian Empire 1833, 1842, 1857. Parties in commercial disputes would have the opportunity to assign a mediator and choose the method of procedure and the time frame[3].

Commercial courts tended to be governed lawyers, elected by business establishments and approved by the top levels of government after application from the Ministry of Justice. This mode of governance gave the commercial court's arbiters the authority and power to make valid and executable decisions.

8.1.2. TIME OF ADR DECLINE 1864–1918

After the reform of the court system in 1864 the authority and role of commercial courts and arbitrages decreased. Partially commercial cases were directed to newly established Justice of the Peace courts and other parties to commercial courts under the Charter of Trade Court procedure or the Charter of Civil Court procedure issued on

[2] L. Bilousova, *Foundation of Odessa commercial court as a resource for the study of the business life of Odessa*, http://history.org.ua/LiberUA/978-966-02-6645-2/4.pdf [access 19.12.2022].

[3] A.U. Miroshnichenko, *Organisational and legal establishments and development of arbitration courts in Russia*, https://cyberleninka.ru/article/n/organizatsionno-pravovoe-stanovlenie-i-razvitie-treteyskih-sudov-v-rossii--xii-nachalo-xx-veka/viewer [access 19.12.2022].

20 November 1864. The procedure changed from arbitrage hearings to civil court procedure trials.

Mediation was not officially promoted but was used as negotiation dispute resolution before applying to the court. Best practice as equality of parties, the competitiveness of parties, the possibility of dispute resolution before application to the court, negotiation process for settlement and short-term procedure were adopted by post-reformed courts in the Russian Empire[4].

Attorneys at law tended to assume the role of mediators and negotiators in commercial and civil dispute resolution.

8.1.3. ALTERNATIVE DISPUTE RESOLUTION DURING THE PERIOD OF NEW SOVIET JUSTICE 1917–1922

The new Soviet government decided to dismantle the court system of the Russian Empire 'Decree #1 regarding courts', dated 22 November 1917, eliminated all legal and court system laws and legal acts, and announced a new system of justice. The concept of new justice was taken from commercial courts and arbitrages with a simple procedure, short-term time-frame for decision making and judges, democratically elected by the people[5].

With 'Decree #2 regarding courts', dated 7 March 1918 had it that court claims between government enterprises were not allowed (Article 15). When no rights of private property were admitted, no commercial or business arbitrage procedure existed[6]. The period from 1917 to 1922 was chaotic for the court system, but productive for alternative dispute resolutions, possibly including negotiations with the participation of a third party, a mediator.

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[4] V.B. Vilenskiy, *Court reform v, 1–2, 1915, Court reform and counter-reform*, https://www.booksite.ru/fulltext/1/001/008/107/343.htm [access 19.12.2022]. Court charters, https://civil.consultant.ru/reprint/books/115/ [access 19.12.2022].

[5] The decree about the court No. 1, http://www.hist.msu.ru/ER/Etext/DEKRET/o_sude1.htm [access 19.12.2022].

[6] The decree #2 about court, http://www.hist.msu.ru/ER/Etext/DEKRET/o_sude2.htm, https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

The decree 'On referee court' dated 16 February 1918 gave authority to elected mediators to make decisions in civil cases and to use simple procedures and defined time frames for the procedure[7].

8.1.4. THE GOVERNMENT ARBITRAGE 1922–1992, MEDIATOR AS A CONFLICT NEGOTIATOR

The document dated 21 September 1922 'The regulation about the resolution of property disputes between government institutions and enterprises' gave a new perspective for ADR through national and local arbitrage commissions[8]. The procedure was a mixture of civil court procedure and simple procedure of the referee court. In March 1931, after nine years of existence, arbitrage commissions were abolished to 'unify the court system'. The number of business cases was so great that it was impossible for civil courts to proceed and after two months a new organisation was established under the name *Government Arbitrage*[9]. For the soviet arbitrage function of supervision of business, institutions were added. If officers of government arbitrage were informed about a breach of contract or negligence, they would issue a note to the controlling government organisation or prosecutor's office. Government arbitrage was therefore an organisation with the mixed function of dispute resolution and control of the implementation of the soviet repressive legal system in business relationships of government enterprises. This has led to the formalisation of the participation of the parties in the arbitrage procedure, non-appearance of the representatives of

[7] The decree 'On third party court', http://www.hist.msu.ru/ER/Etext/DEKRET/18-02-16.htm, https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

[8] The regulation about property disputes resolution between government institutions and enterprises, https://ru.wikisource.org/wiki/, https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

[9] The Status of Government arbitrage, https://istmat.org/node/24293, https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

the parties and the suppressing of important information. Parties understood that their information might be used against them and passed all decision-making processes to the arbiter. The process was not confidential, just and transparent, and there was no trust in the soviet government arbitrage system.

The resolution 'About the Improvement of the Work of Government Arbitrage' was issued on 23 June 1959. The Authority of the Government Arbitrage was expanded and the settlement procedure 'before court claim' became mandatory. Parties had to establish that they had taken the necessary steps: written claims with a response, acts of reconciliation and different letters as proof of negotiation undertaken. The resolution 'On Government Arbitrage' on 17 January 1974 and the law 'On Government Arbitrage' 1979 gave Government arbitrage a new dimension for international co-operation with socialist countries, and created new possibilities for international dispute resolution[10]. All institutions and enterprises the USSR had the responsibility to complete a mandatory procedure to resolve disputes before application to the government arbitrage. It helped to reduce the number of cases dealt with by arbitrage. All acts of the USSR government had legal force in the Ukrainian Soviet Socialist Republic.

From this period the role of the negotiator in helping to resolve a conflict before the parties passed the case to government arbitrage grew in importance. The role of mediator between soviet organisations had been played by somebody from the organisation's middle management with good communication skills, such as bookkeepers, legal consultants and commercial managers. Sometimes the role was taken by officials from upper-level organisations or quarters of regional industrial or communist party offices. We may assume that negotiators would use some tools of mediation, but they were not independent and alternatives to the Soviet organisation procedure and negotiations were not confidential.

[10] Stages of changing the competence of State Arbitration in USSR, https://cyberleninka.ru/article/n/etapy-izmeneniya-kompetentsii-gosudarstvennogo-arbitrazha-v-sssr/viewer, https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

This procedure existed as a part of the arbitrage procedure until the new Arbitrage (later renamed *Commercial*) Procedural Code of Ukraine was empowered in 1992.

8.1.5. THE MODERN PERIOD 1992–2022, ALTERNATIVE BUSINESS RESOLUTION, MEDIATION

'The Arbitrage Procedural Code of Ukraine' came into force on 1 March 1992, and contained an Article concerning dispute resolution before applying to court[11]. In 2001 the Code was renamed 'The Code of Commercial Procedure of Ukraine'[12], and the Arbitrage Court was renamed the Commercial Court (or Economic Court). The history and experience of the arbitrage procedure with its role of in the decision-making and pre-court dispute resolution was not brought into focus and the arbitrage procedure became a court procedure similar to civil court. In 2021 additions about possible dispute resolution by mediation were added to the code. The referee courts acting under specific law form another institution devoted to dispute resolution[13]. This organisation was created in order to help people to resolve disputes without application to a government court. The arbiter is a *referee judge*, but the procedure is based on the principles of the Commercial Court in Odessa, with court-like rules. The possibility of mediation was added to the referee court procedure in 2021.

For international commercial dispute resolutions the International commercial arbitration court with the International Chamber of Commerce of Ukraine was created, operating under The law 'On International Commercial Arbitrage', 1994 and the Regulation of

[11] The Arbitrage Procedural Code, https://zakon.rada.gov.ua/laws/show/1798-12/ed19950423#Text, https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

[12] The Code of Commercial Procedure of Ukraine, https://zakon.rada.gov.ua/laws/show/en/1798-12#Text, https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

[13] The law 'On Referee Court', https://zakon.rada.gov.ua/laws/show/1701-15#Text, https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

Procedure[14]. It has a court-like procedure, with the application of arbitrage elements with the aim of resolving business conflicts in international transactions. New regulation was issued in 2022 after the law 'About Mediation' came into force and mediation and mediators did not become a part of the new document produced by the major ADR organisation in Ukraine[15].

In Ukraine three institutions for the resolution of business disputes exist and different procedures have a long history of the implementation of different rules and practices.

8.2. The law 'On Mediation'

8.2.1. THE PURPOSE OF THE LAW

The law 'On Mediation'[16] came into force on 15 December 2021. In the preamble, the law defines the legal foundations and the order of mediation as a non-court procedure of conflict (dispute) resolution, principles of mediation, the status of the mediator, training requirements and other issues connected with this procedure.

Mediation is a non-court, voluntary, confidential, structured, procedure. Using mediation parties with the help of a mediator (mediators) parties try to prevent or settle a conflict (dispute) by means of negotiation (Article 1.4) According to The Code of Commercial Procedure of Ukraine[17], the parties of the dispute have the right to refer a dispute falling within the jurisdiction of the commercial court to a referee court or international commercial arbitration (Article 22). Three possible institutions for commercial dispute resolution were

[14] The law 'On International Commercial Arbitrage', https://zakon.rada.gov.ua/laws/show/4002-12#Text, https://www.mirovina.hr/novosti/starije-osobe-su-najcesce-zrtve-ali-i-pocinitelji-ovih-nedjela/ [access 19.12.2022].

[15] Rules with Amendments That Are Effective as of 1 July 2022 Kyiv 2022 of the International Commercial Arbitration Court, https://icac.org.ua/wp-content/uploads/Reglament_ICAC_ENG_2022.pdf [access 19.12.2022].

[16] The law 'On Mediation', https://zakon.rada.gov.ua/laws/show/1875-20#Text [access 19.12.2022].

[17] The Code of Commercial Procedure of Ukraine, *op. cit.*

mentioned in this article, but a mediation procedure was not mentioned because it is not a court procedure.

The procedure of mediation used in commercial disputes is therefore not intended by law to be used as part of court procedure or an alternative to legally defined court procedure (Article 3.1). It may be conducted before or parallel to court procedure.

8.2.2. A MEDIATOR

A mediator is a private person who performs a mediation procedure. A mediator has appropriate training and is neutral, independent and impartial (Article 1.2).

A mediator is specifically trained in Ukraine or abroad. A mediator (mediators) may use two instruments to help the parties: negotiation skills and structured procedure. Article 10 of the law gives a definition of the training required:

- the duration of the course may not be less than 90 hours;
- the content of the programme is not defined by law;
- the ratio between theoretical study and practical skills is 50/50, i.e. not less than 45 hours of theoretical study and not less than 45 hours of practical training.

The requirements in terms of education and experience of those wishing to enter the programme are not stipulated in law. The status of a mediator is a crucial matter for the parties and for trust-building and the validity of documents issued in the procedure of mediation. The mediators' qualifications come in the form of a certificate with personal data issued by the training-provider. This training-provider is required by law to have a register of certified mediators trained there. The list of skills and knowledge obtained during training must be attached to the certificate.

Restrictions on becoming a mediator are defined by law. No one with a criminal record or with a legally diminished civil capacity or a legal incapacity may become a mediator (Article 9.2).

Additional requirements for a mediator concerning special training, age, education and experience may be stipulated by parties of mediation, government and social institution interested in the

service of a mediator. The unions of mediators and organisations that facilitate mediation may also necessitate additional requirements regarding special training, age, education and experience, etc. (Article 9.3).

The training providers may have further requirements of those seeking to enrol on the mediators' training programme, although they are not defined in law.

The Ukrainian Centre of Mediation, for example, provides basic level training for mediators and has no requirements for entering the programme on their site[18], but they specify that training will be useful for lawyers, psychologists, managers, executives and consultants.

The Ukrainian Academy of Mediation[19] also provides basic level courses for mediators and has no special requirements for entry. If a person wants to become a member of an organisation, he or she must have not less than 90 hours of training and be older than 18 years of age.

In order to become a member of the National Association of Mediators of Ukraine[20] a private person must be older than 18 years of age and have basic training in mediation of not less than 40 hours, the normal length of training before the law of mediation came into force in 2021.

A mediator in Ukraine may therefore be a private person older than 18 years of age and trained for no less than 90 hours as verified by a certificate issued by a training provider.

[18] The Ukrainian Centre of Mediation, https://progs.ukrmediation.com.ua/p/bnm [access 19.12.2022].

[19] The Ukrainian Academy of Mediation, https://mediation.ua/navchannya/bazovyi-kurs [access 19.12.2022].

[20] The National Association of Mediators of Ukraine, http://namu.com.ua/ua/resources/publications/statut.pdf [access 19.12.2022].

8.2.3. QUALITY OF MEDIATION TRAINING

Accordingly to the law 'On Mediation'[21] and the law 'On Education'[22], there are no requirements for the certification of quality, government accreditation or licencing for a course of basic mediation training.

Only one organisation verifies the quality of mediation training; the same organisation that facilitates or provides this training. No external organisation to verify the quality of training exists.

8.2.4. PROFESSIONAL RIGHTS AND OBLIGATIONS OF THE MEDIATOR

A mediator therefore has no professional rights defined by specific law to participate in court proceedings in the role of mediator.

Accordingly to the procedure The Code of Commercial Procedure of Ukraine[23], neither are there definitions of procedural rights and obligations of the procedural role of mediator.

A mediator in a court trial may not play a procedural role such as a representative of the party in the same trial where he or she is involved as a mediator (Article 59.3).

Table 8.1. Rights and obligations of the mediator

Clause 11. Rights of the mediator	**Clause 12. Obligations of the mediator**
The mediator has the right: – independently to define the method of procedure in the frame of the law, rules of mediation and norms of professional ethics – to receive from parties information about the conflict (dispute) in quantity sufficient for the mediation procedure	The mediator has an obligation: – to prepare for mediation and carry out the procedure according to this law, the rules of mediation and the code of professional ethics – during preparation for mediation, the mediator should make the parties of the conflict aware of the code of ethics under which conditions the mediator works

[21] The law 'On Mediation', *op. cit.*

[22] The law 'On Education', https://zakon.rada.gov.ua/laws/show/en/2145-19#Text [access 19.12.2022].

[23] The Code of Commercial Procedure of Ukraine, *op. cit.*

– to be reimbursed with all costs for preparation and for performing the mediation procedure and for a fee as defined by the contract, law or rules of mediation – to collect and share impersonal information about the quantity, duration and results of mediation performed by him or her – to reject participation in mediation A mediator may conduct mediation free of charge or for payment, as an employee, subject of mediation facilitation, by the mediators' union or individually Individually a mediator may perform as a private person or as a private entrepreneur A mediator working individually may open a bank account, have stamps and blanks with name, last name and father's name	– not to disclose information received during mediation – to inform parties about any possible conflict of interests, and relationships with parties which may influence the neutrality, independence or prejudice of the mediator – to stop mediation in the case of conflict of interests with the parties, and conflict of personal and professional interests of the mediator which may influence the neutrality, independence or prejudice of the mediator and other circumstances that may lead to the termination of mediation claims – to inform parties and other participants of mediation about their rights and obligations, the principles and rules of the structure of procedure of the mediation, possibilities to receive a consultation with specialists (experts), the consequences of entering into a contract about mediation, or agreement with results of mediation in written or verbal form, and about professional experience and competences – to manage the mediation procedure – to seek professional advancement – to perform other duties in accordance with the law, other legal acts connected with this law, a contract for the performance of mediation, or rules of the performance of mediation

Source: Own elaboration.

According to Code[24] those who must by law hold back information entrusted to them during professional legal assistance or mediation services in non-court dispute resolution may not be interrogated as witnesses about this undisclosed information (Article 67.2) Therefore the mediator cannot be interrogated about secret

[24] The Code of Commercial Procedure of Ukraine, *op. cit.*

information entrusted to the mediator during mediation procedure. The same is pointed out in articles 6, 5 of the law 'On mediation'[25].

It is an attorney-at-law who provides professional legal aid (legal assistance), a legal professional performing under the conditions of the Constitution of Ukraine[26], the law 'On Advocacy and Advocacy Activities'[27], 'the Ethics of Advocates'[28] and other legal acts. Mediation is not a legal service and the mediator is not a professional who delivers professional legal aid (assistance).

Mediators may be part of professional unions of mediators, voluntary professional organisations created with the purpose of protecting the rights of members and promoting mediation. There are no specific organisations defined by the law, and all professional unions and organisations of mediators are equal, despite the names they may use, such as *national*, *all – Ukrainian*, *regional*, etc. Such organisations have their own obligatory code of ethics for mediators who were members of the union.

No unified obligatory code of ethics exists for all mediators.

8.2.5. PRINCIPLES OF MEDIATION

According to the law 'On Mediation'[29] Articles 1 and 4, mediation is a no-court, voluntary, confidential, structured procedure. Using mediation parties with the help of a mediator (mediators) in order to try to prevent or settle a conflict (dispute) by means of negotiation.

Mediation may be performed with mutual agreement of the parties of mediation observing principles such as voluntariness, confidentiality, neutrality, independence and impartiality, self-determination and equality of the parties of mediation.

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[25] The law 'On mediation', *op. cit.*

[26] Constitution of Ukraine, https://zakon.rada.gov.ua/laws/show/en/254%D0%BA/96-%D0%B2%D1%80#Text [access 19.12.2022].

[27] The law 'On Advocacy and Advocacy Activities', https://zakon.rada.gov.ua/laws/show/5076-17#Text [access 19.12.2022].

[28] The rules of advocates' ethics, https://unba.org.ua/assets/uploads/legislation/pravila/2017-06-09-pravila-2017_596foodda53cd.pdf [access 19.12.2022].

[29] The law 'On Mediation', *op. cit.*

The Commercial Procedural Court mentions the right of parties to settle a dispute also with the help of mediation, during all stages of court proceedings (Article 46).

The result of the settlement consensus may be formalised with a settlement agreement.

The key principle of mediation according to the law 'On Mediation'[30] is the mutual agreement of parties to execute a mediation procedure voluntarily and with self-definition and equity of the parties (Article 4).

Mediation is a procedure for equal parties who voluntarily decide to resolve a dispute by means of negotiations in the frame of mediation procedure and with the help of the mediator(s). We may presume that the parties agree to carry out their responsibilities as defined in the mediation process because it is possible to enter into an agreement about the results of mediation verbally, with no written documents. From the beginning of the procedure, at the preparation stage, such principles as voluntariness and equity must be emphasised by the mediator and understood by all participants of the procedure. Participation in the mediation procedure is an expression of free will. No one may be forced to participate in mediation for dispute resolution. This position must be changed if there are plans to make mediation a mandatory pre-court trial procedure.

The right to apply to the court to defend personal rights, freedoms and interests, protected by laws is granted by the Constitution of Ukraine[31] (Article 55). All disputes, including business disputes, may therefore be resolved in a governmental competent court. Parties have to apply for the help of a mediator because they hope to receive a resolution to a dispute with particular benefits, such as being involved in making a common decision for further execution. If parties do not intend to execute their own decision, the procedure of mediation loses its purpose.

For this reason, in order to conduct effective mediation parties mindfully pick the mediator(s) personally, identify the list of

[30] The law 'On Mediation', *op. cit.*

[31] Constitution of Ukraine, *op. cit.*

questions to be discussed, variants of conflict resolution, the content of an agreement about the results of mediation, terms and methods of execution, and other questions about the dispute and ways of conducting the mediation. Other participants (other than mediators) of the mediation may consult and offer recommendations to parties, but only the parties make decisions.

A mediator may not give the parties consultations and recommendations about decision-making for the substance of the conflict, but may give consultations and recommendations concerning the procedure of the mediation and confirmation of its results. A mediator may not make a decision about the core of the conflict, but helps parties to communicate, reach a mutual understanding and conduct the negotiations.

The law 'On Mediation'[32] determines mediation as a procedure to help the parties to come to their own decision by means of communication, negotiations and mutual understanding of the nature of the conflict. Mediation is not a legal consulting procedure, group therapy or business coaching for the parties. It is a structured procedure, whereby the mediator constructs a frame for communication for those involved in the conflict resolution. Before mediation begins the mediator makes preparations with the parties for the factual or possible conflict, together or individually, to clarify possibilities for conducting the mediation with the purpose of preventing or settling the conflict, particularly meetings, the collecting and exchanging of information, documents necessary for making the decisions by parties of the conflict (Article 16).

During the preparation period the mediator explains to the parties and other participants the nature and rules of mediation. One of the first questions concerns whether the parties want to undertake mediation voluntarily and whether they have the intention to execute in time their obligations taken during the mediation.

[32] The law 'On Mediation', *op. cit*.

8.2.6. AGREEMENT ABOUT MEDIATION; AGREEMENT ABOUT THE RESULTS OF MEDIATION

With mutual agreement the parties have the right to identify the conditions of the agreement about mediation, invite other participants to the mediation, change mediator(s), refuse to participate in the mediation and apply to the Government Court, the Referee Court or International Commercial Arbitration if the conditions of the Agreement about the results of mediation are not duly executed. The parties may settle other rules, obligations and rights in the frame of law, agreements and rules of mediation. The parties in the mediation undertake the obligation to follow the terms of The law 'On Mediation', the agreement about mediation and the rules of the mediation procedure, and execute the conditions of the Agreement about the results of mediation in the order and terms settled by the agreement (Articles 18 and 19).

As part of the preparation for mediation, the parties create an agreement about mediation, the document concerning conflict prevention or dispute resolution with the participation of the parties, mediators and other persons. This agreement may be entered in written or verbally (Article 1.1).

The agreement regarding mediation at the beginning of mediation and the agreement regarding the results of mediation may be entered verbally and such agreements are symbols of trust and a readiness to execute mutually agreed resolutions. Trust and agreements, however, may be broken and the parties then have the opportunity to apply to other institutions. If trust is broken and the party has no intention of executing the obligations, it is better to apply to the Commercial Court of Ukraine as prescribed by law with the help of an attorney-at-law.

8.3. Settlement agreement and the agreement as a result of mediation

8.3.1. SETTLEMENT AGREEMENT IN THE COMMERCIAL COURT

The law 'On Mediation' describes an agreement about the results of mediation as an agreement which confirms the results of negotiations between parties of mediation and approves them verbally or in writing considering the norms of the law (Article 1.9).

The content of an agreement about the results of mediation defined by the law 'On Mediation'[33] as follows:

The agreement about the results of a mediation determines:

1) the date and place of the signing of the agreement;
2) information about the parties of mediation and of their representatives;
3) the mediator (mediators), someone who hosts a mediation (if one exists), information about the mediation agreement and the rules of mediation;
4) the approval by parties of the mediation obligations, ways and terms of its execution and the consequence of failure to execute or non-due execution;
5) other conditions determined by the parties of the mediation.

In the agreement about the results of mediation, parties may go beyond the frame of the conflict, indicated in the mediation agreement, beyond the frame of the claim of the court trial, in mediation performed as a no-court procedure during period before the court claim, court trial, of referee court trial, arbitrage trial or during the execution of the decisions of the court, of the referee court or international commercial arbitrage (Article 21).

The agreement concerning the results of the mediation may not contain provisions that violate the rights of others, or the interests of the government or society. Once the mediation is complete, parties may choose between a written agreement and a verbal agreement. A verbal agreement may not, of course, be delivered to the court as evidence in a court trial.

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[33] *Ibidem.*

Article 18.6 of this law contains the norm regarding not executing or not duly executing the agreement about the results of mediation. If parties are dissatisfied with the conditions described in the agreement, they may apply to the court, referee court or international arbitrage as specified by law.

The Code of Commercial Procedure of Ukraine[34] stipulates that this agreement may be used a written form is signed as written evidence, which means that documents (except for electronic documents) that contain information about the circumstances relevant to the proper dispute resolution (Article 91.1).

If the conditions of the agreement of mediation are breached, the dissatisfied party must initiate the court claim anew if mediation was performed as a settlement procedure before the court or written agreement of the results of the mediation may be added to trial files as written evidence.

The main factual document resulting from the mediation is the agreement about the results of mediation and by itself it is not a binding document and cannot be delivered to the State Executive Service for enforced execution in accordance to the law of Ukraine 'On Enforcement Proceeding'[35] (Article 3).

The Code of Commercial Procedure of Ukraine[36] forms the norms about the settlement agreement of the parties as follows:

> *A settlement agreement shall be concluded by the parties for the purpose of settling a dispute on the basis of mutual concessions and shall concern only the rights and obligations of the parties. In a settlement agreement the parties may go beyond the subject of the dispute, provided that the settlement agreement does not violate the rights or legally protected interests of third parties. The parties may conclude a settlement agreement and notify the court thereof by making a joint written statement at any stage of the proceedings.*

[34] The Code of Commercial Procedure of Ukraine, *op. cit.*

[35] The law 'On Enforcement Proceeding', https://zakon.rada.gov.ua/laws/show/1404-19#Text [access 19.12.2022].

[36] The Code of Commercial Procedure of Ukraine, *op. cit.*

This definition shares similarities with the Agreement about the Results of Mediation. A crucial difference exists, however, in the way it is recognised by the court procedure and judge. The judge in the trial must proceed with this document and participate in making a resolution about the settlement agreement. Before the adoption of a judgement in connection with the conclusion of a statement agreed by the parties, the court must explain to the parties the consequences of such a judgement and ascertain whether the representatives of the parties are limited in their powers to take appropriate actions. The statement concluded by the parties shall be approved by a court ruling, the operative part of which shall specify the terms of the settlement agreement. In approving the settlement agreement, the court shall close the proceedings with the same decision (Article 192).

The court shall issue a ruling on a refusal to approve the settlement agreement and shall continue the judicial proceedings if:

1) the terms of the settlement agreement contradict the law or violate the rights or legally protected interests of others; are unenforceable; or
2) one of the parties to the settlement agreement is represented by his or her legal representative, whose actions are contrary to the interests of the person he or she represents.

The settlement agreement is therefore under the legal supervision of the judge and its legal validity is confirmed in court procedure.

The Code[37] shows the legal way to enforce the settlement agreement. The court approves the settlement agreement by resolution and it shall be carried out by the persons who concluded it, in the order and in the terms provided for by this agreement. The ruling on the approval of the settlement agreement is an executive document and shall meet the requirements for the executive document established by the Law of Ukraine 'On Enforcement Proceeding'[38]. In the case of settlement the agreement approved by the court with the resolution and the order for execution may be submitted for

[37] The Code of Commercial Procedure of Ukraine, *op. cit.*

[38] The law 'On Enforcement Proceeding', https://zakon.rada.gov.ua/laws/show/1404-19#Text [access 19.12.2022].

its enforcement in the manner prescribed by 'On Enforcement Proceedings' (Article 193).

A settlement agreement approved by the court with written court resolution is therefore a binding document and may be executed with a legally enforced execution process defined by law.

Because mediators need not be lawyers, legal advisers or attorneys-at-law, they may lack knowledge about the rules of the preparation of court documents. If mediation concludes with an agreement about the results of mediation, it is advisable to create such a document as a settlement agreement for the court case with the help of an attorney-at-law in a court case or with other legal professionals.

8.3.2. THE SETTLEMENT AGREEMENT IN THE PROCEDURE OF THE 'REFEREE COURT'

Article 33 of the law 'On Referee Court'[39] outlines the frame of a settlement agreement. The court has to investigate with the parties possibilities of dispute resolution by a settlement agreement with the help of mediation and further contribute to the dispute resolution by settlement agreement at every stage of the process.

Parties have a right to conduct a no-court dispute resolution by means of mediation and terminate the court case with the settlement agreement before the court trial begins, and at any stage before the court decision is made.

Once the parties have applied, the court approves the settlement agreement with a written resolution and gives a written settlement of the agreement's final decision.

According to this law, the court's decision is binding and has to be voluntarily executed by the parties in the terms defined in a court decision or immediately after the decision is issued. If the parties fail to execute the decision, it may be enforced after the approval of a competent government court with the issuing of the court decision and an enforcement execution document. The settlement agreement under this law is therefore binding, but may not be enforced itself.

[39] The law 'On Referee Court', *op. cit.*

It may only be enforced after the government's competent court issues a decision and enforced execution resolution on this settlement agreement (Article 55).

During the above-mentioned procedure parties may conduct a mediation procedure completed with an agreement concerning the results of mediation with no power of enforced execution, or with a settlement agreement with no power of enforced execution. In both cases, if the joint decision is not executed voluntarily and duly, parties must apply to the government court for a resolution of a new conflict based on the first conflict and the next consequential conflict concerning the execution of the mutual agreement for the first conflict.

The competent government court in business disputes is the Commercial Court of Ukraine. The Code of Commercial Procedure of Ukraine[40] stipulates that the procedure for issuing an order for enforcement for the arbitral award shall be considered by the court upon the application of the person in whose favour the arbitral award was made (Article 352). The issuance of an order of enforcement for the enforcement of the arbitral award shall be submitted to the commercial court of appeal at the venue of arbitration within three years from the date when the arbitral award was made. The application on the issuance of an order of compulsory enforcement for the arbitral award shall be considered by the judge sitting alone within fifteen days of the date of its receipt at the court hearing with notification of the parties (Article 354).

8.3.3. THE SETTLEMENT AGREEMENT IN INTERNATIONAL COMMERCIAL ARBITRATION

According to the Ukrainian law 'On International Commercial Arbitration'[41], if during arbitration proceedings, the parties settle the dispute with the means of mediation, the arbitration tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitration tribunal, record the settlement in

[40] The Code of Commercial Procedure of Ukraine, *op. cit.*
[41] The law 'On International Commercial Arbitrage', *op. cit.*

the form of an arbitration award on agreed terms. An arbitration award on agreed terms shall be made under the provisions of law and shall state that it is an arbitration award. Such an arbitration award has the same status and effect as any other arbitration award on the merits of the case (Articles 30, 1, 2).

The law emphasises that settlement may be formalised with a written arbitration award if parties request such. No defined name is required by this law from the parties for the document after the settlement on agreed terms. It may be an agreement about the results of the mediation, the terms of which will be recorded in the arbitration award.

Article 35 of this law indicates the steps of recognition and enforcement of an arbitration award. An arbitration resolution, irrespective of the country in which it was made, shall be recognised as binding and shall be enforced subject to the provisions of this law at the time of filing a written motion to the competent court. The party relying on an arbitration award or filing a motion for its enforcement shall supply the duly certified original arbitration award or a duly certified copy thereof and the original arbitration agreement referred to in above Article or a duly certified copy thereof. If the arbitration award or agreement is made in a foreign language, the party shall supply a duly certified translation thereof into Ukrainian.

> *Rules with amendments that are effective as of 01 July 2022 of the International commercial arbitration court at the Ukrainian Chamber of Commerce and Industry (16) regulate amicable dispute resolution. The text regarding the arbitral award on agreed terms. contains no mention about mediation. If in the course of the arbitral proceedings, the parties settle their dispute by the conclusion of an amicable agreement, the arbitral tribunal may, at the request of the parties and in the absence of its objections, record such settlement in a form of the arbitral award under the agreed terms. The arbitral award made under the agreed terms shall be subject to the respective provisions of the present rules. Such an award shall have the same status and effect as any other award on the merits of a dispute.* (Articles 61, 60.)

We see that despite the last version of these rules coming into force after the law 'On Mediation' came into force and changes were made in the law 'On International Commercial Arbitration' in terms of the rules, mediation was not mentioned in all.

According to the rules, the arbitral award shall be final and binding on the parties from the date of its adjudication (Article 66). The arbitral award shall voluntarily be implemented by the parties within the period of time fixed in the award. If no time period is fixed in the award, the award shall be implemented immediately. The arbitral award that is not implemented voluntarily within a fixed period of time shall be enforced according to the procedural legislation and international agreements of the country in which the enforcement of the award is sought. For these cases with awards issued by the International commercial arbitration court of Ukraine the competent court is the Local General Jurisdiction Court. According to the Civil Procedure Code of Ukraine[42], granting permission for the enforcement of an international commercial arbitral award, if the place of arbitration is in Ukraine shall be carried out by the court. Application on recognition and granting permission for enforcement of an international commercial arbitral award shall be submitted to the court of appeal, whose jurisdiction extends to the city of Kyiv (Article 482). An application on the recognition and granting of permission for enforcement of an international commercial arbitral award shall be considered by a sole judge within two months of the date of its receipt by the court (Articles 475.3; 477.1).

According to different terms of different laws regarding the procedure of amicable settlement, if parties fail to execute the conditions of the settlement agreement, such voluntary execution of the settlement agreement cannot be enforced without a resolution about such enforced execution issued by the competent government court of Ukraine, the Commercial Court of Appeal (in a district designated by law) or the Kyiv Court of Appeal. The government courts verify the resolutions of the Referee Court and of the International

[42] Civil Procedure Code of Ukraine, https://zakon.rada.gov.ua/laws/show/en/1618-15#Text [access 19.12.2022].

Commercial Arbitration Court on the settlement agreement and approve its enforced execution.

If after mediation parties enter into a mutual agreement to an amicable resolution of the dispute and apply with a settlement agreement to the Referee Court or International Commercial Arbitration Court of Ukraine and receive from one of these institutions a resolution about closing the trial because of settlement agreement, such awards do not give permit an enforced execution in case of voluntary non-execution. The government competent courts must issue court decisions and a court order for enforced execution by government or private enforcement agents.

A mediation procedure performed and completed with such documents as an agreement about the results of mediation or the settlement agreement, but with no intention or possibility to execute the conditions of these documents will not help parties to resolve the dispute, but create a new problem regarding receiving a court decision and court order from a government competent court for enforced execution.

From the point of view of commercial dispute resolution, mediation may be successfully used if parties understand the nature and consequences of the procedure.

8.4. The international best practice of mediation

8.4.1. SINGAPORE CONVENTION

One of the important documents for further implementation of mediation in Ukraine is the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the Singapore Convention on Mediation) with the date of adoption: 20 December 2018, open for signature: 7 August 2019 in Singapore and, thereafter, at the United Nations headquarters in New York[43].

[43] United Nations Convention on International Settlement Agreements Resulting from Mediation, https://uncitral.un.org/sites/uncitral.un.org/files/

Ukraine joined this Convention on 7 August 2019. The convention is not implemented in the national legal system, so its terms are not for direct application but for the study and understanding of the perspectives after implementation. The Singapore Convention on Mediation applies to international settlement agreements resulting from mediation (settlement agreement).

It establishes a harmonised legal framework for the right to invoke settlement agreements and for their enforcement.

The Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. Being a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation, thereby contributing to the Sustainable Development Goals (SDG), mainly SDG 16, which seeks *'to promote just, peaceful and inclusive societies'*[44].

8.4.2. INTERNATIONAL SETTLEMENT AGREEMENTS

The convention applies to international settlement agreements resulting from mediation, concluded in writing by parties to resolve a commercial dispute and lists the exclusions from the ambit of the convention, i.e. settlement agreements concluded by a consumer for personal, family or household purposes, or relating to family, inheritance or employment law (Article 1).

A settlement agreement that is enforceable as a judgement or as an arbitral award is also excluded from the ambit of the convention in order to avoid possible overlap with existing and future conventions, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)[45], the Convention

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media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf [access 19.12.2022].

[44] Sustainable Development Goals (SDG), https://www.un.org/sustainabledevelopment/peace-justice/ [access 19.12.2022].

[45] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf [access 19.12.2022].

on Choice of Court Agreements (2005)[46] and the Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters (2019)[47].

The key obligations of the Parties to the convention with respect to both enforcement of settlement agreements and the right of a disputing party to invoke a settlement agreement are covered by the convention. Each Party to the convention may determine the procedural mechanisms that may be followed where the convention prescribes no requirement. Article 4 covers the formalities for relying on a settlement agreement, such as the disputing party supplying to the competent authority the settlement agreement signed by them and evidence that the settlement agreement results from mediation. The competent authority may require any necessary documentation in order to verify that the requirements of the convention are complied with (Articles 3, 4).

The Convention defines the grounds upon which a court may refuse to grant relief at the request of the disputing party against whom it is invoked. These grounds may be grouped into three main categories:

- in relation to the disputing parties;
- the settlement agreement; and
- the mediation procedure.

Article 5 includes two additional grounds upon which the court may, on its own motion, refuse to grant relief. Those grounds relate to public policy and the fact that the subject matter of the dispute cannot be settled by mediation. With the aim to provide for the application of the most favourable framework for settlement agreements, the convention foresees the application of the more favourable law or treaty (Article 7).

The scope of the application of the convention applies to an agreement resulting from mediation and concluded in writing by parties

[46] The Convention on Choice of Court Agreements, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52014PC0046 [access 19.12.2022].

[47] The Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters, https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 [access 19.12.2022].

to resolve a commercial dispute (settlement agreement) which, at the time of its conclusion, is international insofar as:

1) at least two parties to the settlement agreement have their places of business in different states; or
2) the state in which the parties to the settlement agreement have their places of business is different from either:
   - the state in which a substantial part of the obligations under the settlement agreement is performed; or
   - the state with which the subject matter of the settlement agreement is most closely connected (Article 1.1).

We see that the convention applies to a commercial dispute resolved by mediation and with a finalising document, a written document with a defined name with the legal nature of a settlement agreement. The convention gives an agreement resulting from mediation, a settlement agreement, an important role in mediation because its form and content directly influence the possibility of enforced execution. Possible enforced execution is therefore an important point from the beginning of the mediation procedure.

8.4.3. MEDIATION PROCESS

Mediation in the context of the convention means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (the mediator(s)) lacking the authority to impose a solution upon the parties to the dispute (Article 2.3). Definition of the mediation under the terms of the Ukrainian law 'On mediation' meets these requirements for the mediation procedure.

8.4.4. SETTLEMENT AGREEMENTS AND COMPETENT COURTS

The settlement agreement is the main document for the terms of this convention because it contains information about the state, or place of business, the place in which a substantial part of the obligations

under the settlement agreement is performed. A settlement agreement is written if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by electronic communication if the information contained therein is accessible so as to be useable for subsequent reference (Article 2.2).

The Convention does not apply to settlement agreements that have been approved by a court or concluded in the course of proceedings before a court, or are enforceable as a judgement in the state of that court or settlement agreements that have been recorded and are enforceable as an arbitral award (Article 1.3).

If a settlement agreement comes under the aegis of a competent court, or is concluded during the proceedings before a court, this convention does not apply. As mentioned above under the national law of Ukraine, settlement agreements as a court procedural documents must be checked and approved by the government court to close the case or enforce execution with a written resolution. An arbitral award may also be enforceable under the written resolution and order of a government court. The Convention may be applicable for settlement agreements not produced as a procedural document under court or arbitrage proceedings, but as a result of a no-court or parallel-to-court mediation procedure.

8.4.5. REQUIREMENTS FOR RELIANCE ON SETTLEMENT AGREEMENTS

A party relying on a settlement agreement under this convention shall supply to the competent authority of the party to the convention where relief is sought: the settlement agreement signed by the parties; evidence that the settlement agreement resulting from mediation, such as: (i) the mediator's signature on the settlement agreement; (ii) a document signed by the mediator indicating that the mediation was carried out; (iii) an attestation by the institution that administered the mediation; (iv) in the absence of (i), (ii) or (iii) any other evidence acceptable to the competent authority.

Special requirements exist for a settlement agreement to be signed by the parties or, where applicable, the mediator, is met in

relation to an electronic communication if: a) a method is used to identify the parties or the mediator and to indicate the parties' or mediator's or mediators' intention in respect of the information contained in the electronic communication; and b) the method used is either: (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or (ii) proven in fact to have fulfilled the functions described in sub--paragraph (a) above, by itself or together with further evidence (Article 4).

This attitude to the formal form of the settlement agreement as for legally valid documents shows the importance of this document in international dispute resolution procedure and application of this convention. It is a legal procedural document, recognised and accepted by courts but issued in the no-court procedure.

An interesting condition of the settlement agreement is that it must be based on a mediation procedure with two possible proofs. The first is the presence of the signature of the mediator in the body of the settlement agreement itself. The second is a document signed by the mediator indicating that the mediation was carried out. It may be a document defined by the Ukrainian law 'On Mediation'[48] as an agreement about the results of mediation. Similar to the Ukrainian legislation settlement agreement the agreement about the results of mediation may exist as two different documents. Court procedure, however, now recognises only one, settlement agreement.

This example may be used in future to improve the Ukrainian legislation system regarding mediation by amendments to the laws with definitions about the signature of the mediator in the body of the settlement agreement or with reference to the agreement about the results of mediation signed by the mediator and parties to the mediation and accompanying settlement agreement.

[48] The law 'On Mediation', *op. cit.*

8.4.6. AN ATTESTATION OF THE SETTLEMENT AGREEMENT

Some organisations with the authority to facilitate mediation issue an attestation. Ukrainian law does not identify these organisations but give a range of possibilities for different organisations to become such institutions. Associations of mediation may, for example, be legally dreated voluntary unions, 'On Public Association'[49] for executing and defending the rights and freedoms of members of such associations and for the development of mediation and the promotion of a culture of amicable conflict (dispute) resolution, and for professional self-government, and for providing services of mediation. Other entities providing mediation, legal entities of any kind of organisational legal form that provide mediation service and maintain the register of mediators as defined by the law 'On Mediation' (Articles 1.5 and 8).

No specific feathers are required for this kind of organisation and any of them may issue an attestation to confirm the mediation process was conducted under the rules of this organisation.

As was mentioned above, Ukrainian law regards government courts as competent organs where relief is sought. All settlement agreements issued by parties with or without mediation, referee court or arbitrage, must be checked and approved by government courts according to the law of Ukraine.

If a party to the settlement agreement seeks relief in a Ukrainian court, the application has to be made in accordance with the requirements of Ukrainian laws, regulating the enforced execution of settlement agreements.

As an interim conclusion, we may point out that the main institution in the development of mediation as a tool for business conflict resolution is the government court system because only the government court system has the authority to provide enforced execution when parties fail in their agreed obligations.

[49] The law 'On Public Association', https://zakon.rada.gov.ua/laws/show/en/4572-17#Text [access 19.12.2022].

8.5. Conclusion

8.5.1. THE DIRECTIVE 2008/52/ES AS A ROADMAP FOR MEDIATION IN UKRAINE

The European practice of mediation provided under Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[50] and defined by the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee[51] is an example of mediation in Ukraine on its way to European Union. The terms of the directive and the report adopted by EU for mediation became a pattern for national litigation between residents of member states. The directive was introduced to facilitate access to alternative dispute resolution, promote the amicable settlement of disputes and ensure that parties seeking mediation may rely on a reliable legal framework. This policy objective remains valid today and for the future: mediation helps avoid unnecessary litigation at the taxpayers' expense and reduces the time and cost associated with court-based litigation.

Mediation may provide a cost-effective and speedy extra-judicial resolution to disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be obeyed voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations characterised by cross-border elements. The directive should apply to cases in which a court refers parties to mediation or in which national law prescribes mediation. Insofar as a judge

[50] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32008L0052 [access 19.12.2022].

[51] Report from the Commission to the European Parliament, the Council and the European Economic And Social Committee, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0542&from=EN [access 19.12.2022].

may act as a mediator under national law, this directive should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in the dispute. The directive should not, however, extend to attempts made by the court or judge seized to settle a dispute in the context of judicial proceedings concerning the dispute in question or to cases in which the court or judge seized requests assistance or advice from a competent person (point 6.12).

The agreement resulting from mediation is therefore referred to as a settlement agreement (in Ukrainian law they are different documents) intended for voluntarily compliance, so with plans to execute the obligation of such an agreement, but in different scenarios, agreement resulting the mediation may be seen as a valuable document for court proceedings, especially if mediation was prescribed or recommended by a judge in a court case. Today's legislation system in Ukraine has no term for obligatory mediation assigned by a judge or conducted by a judge. The Code of Commercial Procedure in Ukraine[52] provides for the settlement of a dispute with the participation of a judge, but it is not a mediation procedure and is of a different nature similar to arbitrage (Articles 186–190). During the joint meetings, the judge shall clarify the grounds and subject of the claim; the grounds for objections; explain to the parties the subject of proof in the category of the dispute under consideration; invite the parties to make proposals for peaceful settlement of disputes; and take other actions aimed at the peaceful settlement of the dispute by the parties. The judge may suggest to the parties a possible method of peaceful dispute settlement. During closed meetings, the judge shall have the right to draw the party's attention to the case law in similar disputes and to offer the party possible ways of peaceful dispute settlement (Articles 188.5 and 6).

To change the situation addenda may be added to the legislation of Ukraine with a clear definition of the agreement resulting from mediation, its legal meaning and nature, connections with the settlement agreement and ability and order of enforced execution.

[52] The Code of Commercial Procedure of Ukraine, *op. cit.*

8.5.2. QUALITY STANDARDS OF PROCEDURE AND TRAINING OF MEDIATORS

The directive based on sound experience in mediation the world over suggests ways to make mediation beneficial for parties and ensure necessary mutual trust with respect to confidentiality, limitation and prescription periods, and the recognition and enforcement of agreements resulting from mediation says that member states should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services. Such mechanisms must be defined and may include having recourse to market-based solutions, and should not be required to provide any funding in that respect. The mechanisms should aim at preserving the flexibility of the mediation process and the autonomy of the parties and at ensuring that mediation is conducted in an effective, impartial and competent way.

Mediators in Ukraine should be made aware of the existence of the European Code of Conduct for Mediators[53] which should also be made available to the general public via the Internet. Mediators' associations in Ukraine shall encourage, by any means which they consider appropriate, the development of and adherence to voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services and shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

For the future development of mediation in Ukraine, it is necessary to create high standards for education, quality control for education, develop the professional skills of mediators, and follow the ethical rules of the European Code of Conduct for Mediators[54].

[53] European Code of Conduct for Mediators, https://www.kearns.co.uk/wp-content/uploads/2017/06/European-code-of-conduct-for-mediators.pdf [access 19.12.2022].

[54] European Code of Conduct for Mediators, *op. cit.*

In Ukraine the initiative to move towards European values of dispute resolution may be led by the Ministry of Justice of Ukraine with the methodical assistance of the Ministry of Education and Science of Ukraine. This highly respected institution may create a basic education programme for entry-level mediators and a programme for advanced skills for experienced professionals and any other way in which they may create quality standards of a mediation training programme for training centres. The unification of ethical rules and holding the European Code of Conduct for Mediators as an example will help to make the procedure clearer and render it more comprehensible to clients. The results of the report[55] raise questions about the unification of education requirements for mediation training and discussion is necessary.

This code[56] contains an important condition for the document resulting in the mediation, settlement agreement or agreement about the results of mediation:

> *The mediator must take all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent and that all parties understand the terms of the agreement. The parties may withdraw from the mediation at any time without giving any justification. The mediator must, upon request of the parties and within the limits of his competence, inform the parties as to how they may formalise the agreement and the possibilities for making the agreement enforceable.*

In order to inform the parties as to how they may formalise the agreement and the possibilities for making the agreement enforceable a mediator must have basic expertise in enforcement,

[55] Report from the Commission to the European Parliament, the Council and the European Economic And Social Committee, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0542&from=EN [access 19.12.2022].

[56] European Code of Conduct for Mediators, https://www.kearns.co.uk/wp-content/uploads/2017/06/European-code-of-conduct-for-mediators.pdf [access 19.12.2022].

so this information has to be included in the mediators' training programme, which is unusual in training programmes for mediators in Ukraine.

8.5.3. ENFORCEABILITY OF THE DOCUMENT RESULTING FROM MEDIATION

The enforceability of the document resulting from mediation is crucial for the development of mediation in Ukraine. The declaration emphasises that mediation should not be regarded as second best to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the goodwill of the parties. member states should therefore ensure that the parties to a written agreement resulting from mediation may have the content of their agreement made enforceable. The content of an agreement resulting from mediation which has been made enforceable should be recognised and declared enforceable in the other member states in accordance with applicable community or national law (points 19 and 20). The document resolving mediation to be enforced in other member states, in order to be enforceable in another member state must be enforceable in the member state in which the agreement was concluded (Article 6 point 24).

As mentioned above, the agreement as a result of mediation is not enforceable in Ukraine without the creation of such a procedural document as a settlement agreement, which has to be approved by court resolution and enforced by the issue of an order for enforced execution. If mediation is completed and the obligation is not executed, the parties must initiate a court trial, and mediation is considered a waste of time and money. To make mediation attractive for business dispute resolution it is insufficient to define the reduction of court cost in the law, but it is necessary to show a simple, transparent method to have this deduction during court proceedings. The Code of Commercial Procedure of Ukraine[57] declares the return of 60% of the court fee to the plaintiff if the parties resolve their dispute

[57] The Code of Commercial Procedure of Ukraine, *op. cit*.

by means of mediation (Article 130), but the same code declares the document to confirm this settlement is a settlement agreement, which may be composed by parties without any real procedure of mediation because the law requires no proofs that the mediation procedure was actually executed (Article 192).

8.5.4. MEDIATION CULTURE

There is a lack of *mediation culture* in Ukraine. This concerns not the tools of mediation nor negotiation skills nor the role of the mediator, but it is the lack of understanding of the usability and acceptability of this service. Trust in the state court system tends to be low and parties use all possible tools to avoid resorting to court. Most settlement negotiations are conducted by lawyers or representatives with relevant authority and skills. The purpose mediation and mediators without the power of agreement regarding the results of mediation being executed without additional application to courts is not understood by the parties and is not recommended by legal professionals. Judges and courts remain reluctant to refer parties to mediation. Where the transposition of the directive triggered the adoption of substantial changes to the existing mediation framework or the introduction of a comprehensive mediation system, an important step forward in promoting access to alternative dispute resolution and achieving a balanced relationship between mediation and judicial proceedings must be taken with government institutions playing an active role[58].

[58] Report from the Commission to the European Parliament, the Council and the European Economic And Social Committee, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0542&from=EN [access 19.12.2022].

8.5.5. MEDIATION AS A MANDATORY PRE-TRIAL PROCEDURE FOR SETTING A BUSINESS DISPUTE

The Constitution of Ukraine[59] proclaims that the law may stipulate a mandatory pre-trial procedure for settling disputes (Article 124).

The Commercial Procedure Code of Ukraine[60] defines the mandatory requirement for a statement of claim to contain information on the adoption of measures for pre-trial dispute settlement if the law establishes an obligatory pre-trial dispute settlement procedure (Articles 16 and 2). The main provisions of the pre-trial dispute settlement have the parties taking measures for the pre-trial dispute settlement by mutual agreement or in cases where such measures are required by law (Article 19.1).

The Economic Code of Ukraine[61] prescribes a method of pre-trial procedure: parties to economic relations, which have violated the property rights or legitimate interests of other parties shall restore them before a claim or appeal is submitted to the court. If there is a need for compensation for losses or application for other sanctions, an economic entity or other legal entity, a party to economic relations whose rights or legitimate interests have been violated, for the purpose of direct settlement of a dispute with a violator of these rights or interests may file a written claim, unless otherwise provided for by law. Documents confirming the applicant's claims shall be attached in original or duly certified copies. Documents available to the other party may not be attached to the claim. The claim shall be signed by a person authorised by the claimant or his or her representative and sent to the addressee by registered or value payable letter or delivered to the addressee against a receipt. The claim shall be considered within one month from the date of its receipt unless another period is provided for by this code or other legislative acts. The claim's recipient shall satisfy the applicant's justified claims. When considering a claim, the parties, if needed,

[59] Constitution of Ukraine, *op. cit.*

[60] The Code of Commercial Procedure of Ukraine, *op. cit.*

[61] The Economic Code of Ukraine, https://zakon.rada.gov.ua/laws/show/en/436-15#Text [access 19.12.2022].

shall verify calculations, conduct an expert examination or perform other actions to provide pre-action settlement of the dispute. The applicant shall be notified in writing of the findings of the claim's consideration. The response to the claim shall be signed by an authorised person or representative of the claim's recipient and sent to the applicant by registered or value payable letter or delivered against receipt (Article 222).

For agreements of transportation and related disputes there are different conditions. Prior to filing a claim to a carrier arising from a cargo transportation agreement, one may first file a complaint against it. Complaints may be filed within six months; complaints in respect of payment of fines and bonuses shall be filed within forty--five days. A carrier shall consider a filed complaint and notify the applicant of its satisfaction or rejection within three months, and as for a complaint related to transhipment transportation, it shall be considered within six months. Complaints in respect of payment of a fine or bonus shall be considered within forty-five days. Should a complaint be rejected or there be no response to it within the time period specified in part 3 of this article, an applicant shall be entitled to apply to the court within six months from the date of receipt of the response or the expiration of the time limit set for the response. For a carrier to file claims against consignors and consignees arising from transportation, a six-month period shall be established (Article 315).

This pre-trial method is well-developed and has a long history of application. In the earlier version of the code[62] it was written that it was mandatory that one first file a complaint. According to the amendment to the law No. 2705-IV of 23 June 2005, it was changed to *'one may file a complaint'*[63].

The first version of the Commercial Procedure Code of Ukraine under the name *Arbitration Procedural Code of Ukraine*[64] contains terms about mandatory pre-trail procedures. *'A dispute may be*

[62] The Economic Code of Ukraine, *op. cit.*

[63] Law of Ukraine No. 2705-IV of 23 June 2005, https://zakon.rada.gov.ua/laws/show/2705-15#Text [access 19.12.2022].

[64] The Arbitrage Procedural Code, *op. cit.*

handed over to Arbitrage Court with conditions of implementation established for such disputes for pre-arbitrage trial for settlement' (Article 5). Extensive and detailed conditions for pre-arbitrage trial settlement define all stages in Chapter 2 in Articles 5–11. This procedure dates back to the time of Government Arbitrage, during the period of the USSR. It was impossible to apply to the Arbitration Court without a pre-trail procedure. Parties therefore used all kinds of settlement procedures, such as written and verbal negotiations of companies' official representatives, mediation, attorney-at-law negotiation. In many cases, disputes were settled at this stage. Pre--trial settlement procedure ceased to be mandatory after the decision of the Constitutional Court of Ukraine # v015p710-02 dated 9 July 2002[65] which has the court stipulating that the requirement of law or of the agreement for pre-trial settlement procedure with the declaration of will of the parties is no restriction for the jurisdiction of courts or rights for court defence. Now the pre-trial settlement procedure as mediation may be used, but only in good faith and voluntarily, and may not be suggested or required by a judge or referee.

The possibility for using a mediation procedure in an Economic Court, Referee Court or International Commercial Arbitrage depends on the quality of the mediation procedure, authority and recognition of mediators' training and the possibility for the agreement about results of mediation to be enforceable without additional court procedure, or with a quick and simple procedure. To make mediation mandatory addenda are required to the legislation of Ukraine after discussion with legal professionals and society. Mediation in Ukraine may be used as an appointed-by-judge mandatory procedure before a court trial or suggested by the judge during court proceedings if the quality of procedure and education of mediators will be at an advanced level and the procedure will be recognisably helpful and not time consuming and expensive.

[65] The decision of Constitutional Court of Ukraine # v015p710-02 dated 9 July 2002, https://zakon.rada.gov.ua/laws/show/v015p710-02#Text [access 19.12.2022].

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Chapter 9. What Constitutes a Fair Trial in Administrative Justice?

9.1. Introduction

The importance of the justice system's functioning without delays that might threaten its efficiency and credibility requires court proceedings to be conducted within a what is considered to be a reasonable time. This is guaranteed by Article 6 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR), which protects the right to a fair trial. An effective judiciary is a crucial pillar of a democratic society. Trust in state institutions and in the judiciary is important for the relationship between the people and the state. Administrative judiciary plays a special role, as it represents the most direct contact for the citizen with the state. The perception of administration and of administrative judiciary is therefore crucial for trust in the state. Working on an improvement of administrative judiciary may contribute to a better balance in the state-citizen relationship and strengthen democracy.

The legislative framework of administrative judiciary should provide a judicial system which ensures swift procedures in resolving administrative disputes, as well as one that preserves the rights of individuals. Administrative law refers to the exercise of legitimate civil rights. The aforementioned rights are exercised in

administrative proceedings before an administrative authority, while judicial protection is exercised in an administrative dispute before an administrative court. Unlike civil and criminal judicial proceedings, judicial protection in administrative affairs is usually preceded by mandatory proceedings before an administrative authority. In administrative matters and upon a court decision, there are also stages in which the administrative authority finally decides on the merit. In line with Article 6 (the right to a fair trial) of the European Convention on Human Rights *'in the determination of the civil rights and obligations, everyone is entitled to a fair and public trial within a reasonable time'*. Considering the specifics of exercising civil rights in administrative affairs, the question arises as to how to determine the length of the proceedings in these matters, i.e. the starting point and the end point when calculating the length of the proceedings: whether it be only the judicial procedure calculated, or whether it should also include the mandatory administrative procedure before an administrative authority that preceded the court protection; likewise, whether the determination of the length of the procedure should include the time after the court decision is rendered, when the administrative authority is obliged to decide on the merits of the citizen's claim. Article 6 of the European Convention on Human Rights (the right to a fair trial) states that *'everyone is entitled to a fair and public trial within a reasonable time'*. What needs to be decided, however, is what the frame of reference is for measuring the time of proceedings in Administrative Justice.

9.2. Right to a trial within a reasonable time

The right to a fair trial includes assurances regarding one's access to court, the right to a public trial and the right to an independent and impartial court established by law, as well as the protection of the right to a trial within a reasonable time[1]. The Croatian legal framework regulating the right to a trial within a reasonable time consists of

[1] See: S. Stražnik, *Europski sud za ljudska prava i standardi upravno sudskog postupka*, "Hrvatska javna uprava" 2010, god. 10, br. 4, pp. 920–924.

international and national provisions. In line with the Croatian Constitution *'international agreements concluded and ratified in accordance with the Constitution and made public, and which are applicable, shall be part of the internal legal order of the Republic of Croatia and in terms of legal effects shall be above the law'*[2]. The Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) is therefore part of the Croatian internal legal order and the legal effects of its provisions are above national legal provisions.

The protection of the right to a trial within a reasonable time derives from Article 6 paragraph 1 of the ECHR. It represents one of the central provisions of the Convention and is a basic element of the concept of the rule of law[3]. The guarantee contained in Article 6 paragraph 1 of the ECHR comprises the obligation of the contracting states to organise their legal systems in such a way as to enable the courts to act in accordance with the various requirements (procedural guarantees) of that article[4]. Article 6 of the Convention states that *'in the determination of the civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'*. Its conceptual substratum is the firmness that the subjects, whose rights are protected in court proceedings, should not be exposed to protracted uncertainty with regard to the final outcome of the proceedings and that they have the right to have their legal issues resolved in foreseeable and relatively predictable time limits. Excessive delays in the administration of justice constitute an important danger, in particular with regard to the rule of law[5]. The purpose of the reasonable time guarantee is

[2] See: *Article 141 of the Constitution of the Republic of Croatia*, "Official Gazette" 2010, No. 85.

[3] See: S. Wolf, *Trial within a Reasonable Time: The Recent Reforms in the Italian Justice System in Response to the Conflict with Article 6(1)*, "European Public Law", Vol. 9, Issue 2, p. 194.

[4] See: Ž. Potočnjak, *Zaštita prava na suđenje u razumnom roku nakon stupanja na snagu novog Zakona o sudovima*, "Hrvatska pravna revija" 2006, br. 4, p. 15.

[5] See: T. Zoroska Kamilovska, *Legal Remedies for the Protection of the Right to a Trial within a Reasonable Time – Macedonian Perspective*, "Iustinianus Primus Law Review 3" 2012, No. 1, p. 1.

to protect *'all parties to court proceedings … against excessive procedural delays'*[6]. To clarify the application of Article 6(1), the ECHR developed a substantial body of case law.

When deciding whether a violation has taken place or whether a trail has been conducted within a reasonable time, the ECHR first determines the beginning and end of the duration of the procedure, and then assesses whether that time might be considered reasonable[7]. The beginning and the end of the relevant period is not always easy to determine[8]. The method of calculating the relevant period will differ depending on the type of proceedings, i.e. whether they are proceedings in civil, criminal or administrative matters[9]. It is a notion that is difficult to define and it is individually determined in each case, taking into account the different elements and peculiarities of each procedure. When deciding whether a certain procedure has been completed within a reasonable time, the complexity of the case, the manner in which the authorities handled the case, any special circumstances and the behaviour of the claimant are taken into account[10]. These criteria are evaluated in order to determine whether judgement has been rendered within a reasonable time. Whether

[6] Article 6(1) ECHR applies to all parties to court proceedings and its aim is to protect them against excessive procedural delays. In criminal matters, especially, it is designed to avoid a person charged being required to remain too long in a state of uncertainty about his fate. See: ECHR Judgement in the case of *Stögmüller v. Austria*, Application No. 1602/62 from 10 November 1969, paragraph 5, p. 35.

[7] See: B. Britvić Vetma, *Europska konvencija za zaštitu ljudskih prava (članak 6) i Zakon o upravnim sporovima*, "Zbornik radova Pravnog fakulteta u Splitu" 2012, god. 49, br. 2, pp. 396–397.

[8] See: L. Yanev, *Honouring the Right to a Fair Trial within a Reasonable Time: The Bulgarian Criminal Justice System*, "European Journal of Crime, Criminal Law and Criminal Justice" 2012, Vol. 20, No. 4, pp. 448–450.

[9] Unlike civil matters, in criminal matters the right to a fair trial applies to the court proceedings, but also to the investigation. The fairness of the trial, however, must be considered in light of the whole criminal proceedings. See: J. Vuille, L. Luparia, F. Taroni, *Scientific Evidence and the Right to a Fair Trial under Article 6 ECHR*, "Law, Probability and Risk" 2017, Vol. 16, No. 1, March, p. 56.

[10] See: I. Goranić, *Suđenje u ‚razumnom roku' – jedan od uvjeta za pravično suđenje (članak 6. st. 1. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda)*, "Vladavina prava" 2000, br. 6, pp. 52–53.

a reasonable time has been exceeded, however, will depend in many cases on a close examination of the circumstances and the causes of any delay rather than merely on the length of time in question[11].

Whether the subject is complex is generally a difficult question. The court gives weight to certain aspects such as the nature of the fact to be established, the need to obtain a file for a trial conducted in another country, any connection with another case and the involvement of other persons in the proceedings. Factual and legal issues may be complex. The judicial burden is generally not taken as an excuse[12]. The demeanour of the claimant and that of the competent authorities are criteria which have an opposing effect. If the Court establishes that the delays were caused by the claimant, his complaint against the protraction of the process is weakened. A finding that such delays are attributable to the state authorities, however, has quite the opposite effect and it strengthens the applicant's complaint pursuant to Article 6(i) ECHR[13]. In assessing and deciding on this reasoning the ECtHR also considers what is at stake for the applicant in the dispute. The ECtHR requires expediency in cases concerning divorce proceedings, dismissals of disabled persons who thereby stand to lose their means of subsistence and in exceptional compensation proceedings. Special diligence is also required in pension disputes[14].

The right to an effective remedy from Article 13 of the Convention is closely related to the protection of the right to a fair trial, since the recognition of the right to compensation for any violation of the right to a trial within a reasonable time is directly related to the use of legal remedies. The judgement rendered in the case of Kudla was

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[11] See: S. Wolf, *Trial within a Reasonable Time…*, *op. cit*., p. 197.

[12] See: B. Britvić Vetma, *Europska konvencija za zaštitu ljudskih prava (članak 6)…*, *op. cit.*, p. 397.

[13] See: L. Yanev, *Honouring…*, *op. cit*., p. 451.

[14] See: ECtHR Judgement of 30 January 2003, Application No. 37437/97; *Kubiszyn v. Poland*, paragraph 34; ECtHR Judgement of 28 June 1990, Application No. 761/85; *Obermeier v. Austria*, paragraph 72; ECtHR Judgement of 2 July 2002, Application No. 71891/01; *Halka and Others v. Poland*, paragraphs 29–31; ECtHR Judgement case *Počuča v. Croatia*, Application No. 38550/02, 2006, p. 10; ECtHR Judgement case *Šikić v. Croatia*, Application No. 9143/08, 15 July 2010, p. 10.

a turning point in the practice of the European control mechanism in a manner that the ECtHR for the first time simultaneously considered and found a violation of Article 6 and of Article 13 of the ECHR, taking the general position that Article 13 of the ECHR provides the right to effective legal remedy before a national authority for any violation of the right under Article 6 of the ECHR, including the right to a trial within a reasonable time[15]. Article 13 stipulates that *'everyone whose rights and freedoms, as set forth in this Convention, are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'*[16]. The term *national authority*, *'may not necessarily be a judicial authority but, if it is not, its powers and the guarantees are relevant in determining whether the remedy before it is effective'*[17]. The fundamental meaning of the existence of a legal remedy for the protection of the right to a trial within a reasonable time is primarily its effectiveness in the course of the proceedings, the length of whose duration is called into question. This means that the legal remedy is effective if it prevents the alleged violation or its continuation (mechanism of preventing delays or accelerating proceedings). The effectiveness of the legal remedy is undisputed, however, even in cases in which there are procedures providing for redress for unreasonable delays in proceedings, whether continuing or concluded (mechanism of compensation). In different national legal systems there may also be several legal remedies for the protection of the right of a trial within a reasonable time, which individually might be ineffective, but which combined have that quality[18]. What Article 13 of the ECHR requests is a remedy, available to the individual in his/her particular case, hence a remedy in the sense of an individual, subjective right (claim)[19].

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[15] See: ECtHR Judgement in the case of *Kudla v. Poland,* Application No. 30210/96, Judgement of 26.10.2000.

[16] See: Article 13 of the ECHR, https://www.echr.coe.int/documents/convention_eng.pdf [access 31.12.2022].

[17] T. Zoroska Kamilovska, *Legal Remedies…*, *op. cit.*, p. 3.

[18] *Ibidem*, pp. 4–5.

[19] A. Galic, *Remedies in case of a Violation of the Right to a Trial within Reasonable Time: The Slovenian Model*, "Actualities of Civil Procedural Law. National and Comparative Legal Theoretical and Practical Achievements" 2017, p. 124.

Protection of the right to a trial within a reasonable time is a right protected by the Constitution of the Republic of Croatia. The Constitution stipulates that *'Everyone shall be entitled to have his/her rights and obligations, or suspicion or accusation of a criminal offence, decided upon fairly and within a reasonable time by an independent and impartial court established by law'*[20]. In order for the protection of this right to be realised, however, the possibility of submitting a constitutional complaint to the Constitutional Court of the Republic of Croatia is essential and provided by the Constitutional Act on the Constitutional Court of the Republic of Croatia[21]. Article 62 prescribes the right to submit a constitutional complaint to the Constitutional Court when an individual act violates human rights or fundamental freedoms guaranteed by the Constitution. A prerequisite for filing a constitutional lawsuit, however, is that the available legal remedies have been exhausted. In contrast, Article 63 paragraph 1, stipulates that *'the Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when a competent court did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated'*. It is important to point out that, in accordance with the established jurisprudence of the Constitutional Court, one of the prerequisites for the admissibility of a constitutional complaint filed on the basis of Article 63 of the Constitutional Law is that the applicant has previously used a legal remedy allowed against the unreasonable length of the procedure[22].

[20] See: *Article 29 of the Constitution of the Republic of Croatia*, "Official Gazette" 2010, No. 85.

[21] See: *Article 62 and 63 of the Constitutional Act on the Constitutional Court of the Republic of Croatia*, "Official Gazette" 2002, No. 49.

[22] See: Decision of the Constitutional Court of the Republic of Croatia No. U-IIIA-4885/2005, 20 June 2007. Also, the Decision of the Constitutional Court of the Republic of Croatia No. U-III-5282/2019, 15 September 2022.

When the Constitutional Court determines that a violation of the right to a trial within a reasonable time has taken place, the Constitutional Court will set a deadline for a competent court to pass a judgement whereby that court will decide on the merits of the rights and obligations. At the same time, the court will determine the appropriate compensation for the applicant due to the violation of his/her constitutional rights[23]. Article 63 therefore foresees the possibility of using a combined, accelerating-compensating remedy. In cases in which a constitutional lawsuit is grounded this provision authorises the Constitutional Court to accelerate the procedure by imposing a deadline within which the regular court must take a decision, but also to award compensation in respect of non-pecuniary damage suffered. The ECtHR has recognised this legal remedy as effective within the meaning of Article 13 of the Convention.

9.3. Development of the legal framework for the protection of the right to trial within a reasonable time in Croatia

In Croatia the development of the legal framework for the protection of the right to a trial within a reasonable time has gone through several stages[24]. Formally, legal protection of the right to trial within a reasonable time was introduced into the Croatian legal order in 1997 with the ratification of the ECHR[25]. Pursuant to Article 141 of the Constitution of the Republic of Croatia, right to a fair trial then became part of the internal legal order of the Republic of Croatia[26]. Until the ratification of the Convention, there were in

[23] See: *Article 63 paragraphs 2 and 3 of the Constitutional Act on the Constitutional Court of the Republic of Croatia*, "Official Gazette" 2002, No. 49.

[24] See*: Report of the Constitutional Court of the Republic of Croatia on 1 March 2021*, "Official Gazette" 2021, No. 21.

[25] *Vidi*: *Konvencija za zaštitu ljudskih prava i temeljnih sloboda*, "Official Gazette – International treaties" 2000, No. 18/97, 6/99 – consolidated text, 8/99, 14/02 i 1/06.

[26] See: *Article 141 of the Constitution of the Republic of Croatia*, "Official Gazette" 2000, No. 124.

the Croatian legal system no rules to protect citizens from excessive procedural delays. Until the amendments in 2000, the Constitution of the Republic of Croatia did not comprise on provisions to protect the right of citizens to a trial within a reasonable time. The exception was the provisions that determined the principles of action within certain deadlines in criminal proceedings[27].

After the ratification of the Convention, legal activity began in Croatia and continues today, the purpose of which is to establish an effective legal mechanism that ensures citizens' protection against violation of the right to a trial within a reasonable time. In this quest Croatia has changed a number of mechanisms, some of which were confirmed by the ECtHR as effective remedy, while others were declared ineffective and contrary to the obligations contained in the Convention.

The right to a fair trial could not be included in the fundamental human rights and freedoms guaranteed by the Constitution for several years once the Convention for the Republic of Croatia had come into force. This happened with the amendments to the Constitution from 2000[28]. This was the time when the Constitutional Court began developing standards for the interpretation of the legal concept of 'the right to a trial within a reasonable time'[29]. The right to a trial within a reasonable time is prescribed by Article 29 of the Constitution of the Republic of Croatia. Since then, the protection of the right to a trial within a reasonable time has therefore become a right guaranteed by the Constitution. In order to protect that right it was also necessary to amend Constitutional Acts in the Constitutional Court of the Republic of Croatia (hereinafter: the Constitutional Act), which came into force on 15 March 2002[30].

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[27] See: ECtHR Judgement case *Šikić v. Croatia*, *op. cit*., p. 335.

[28] See: *Amendments to the Constitution of the Republic of Croatia from 2000*, "Official Gazette" 2000, No. 113, or *Consolidated text of the Constitution of the Republic of Croatia*, "Official Gazette" 2000, No. 124.

[29] See: J. Omejec, *'Razumni rok' u interpretaciji Ustavnog suda Republike Hrvatske, Ustavni sud u zaštiti ljudskih prava – interpretativna uloga Ustavnog suda*, J. Crnić, N. Filipović (ur.), Organizator, Zagreb 2000, p. 131.

[30] See: *Constitutional Act on amendments to the Constitutional act on the Constitutional Court of the Republic of Croatia*, "Official Gazette" 2009, No. 29.

The Constitutional Act allowed the participants in lengthy court proceedings to file a constitutional complaint with the Constitutional Court within a reasonable period of time for the purpose of protecting the right to a fair trial. In the event of such a justified complaint, the Constitutional Court has the power to set the competent court a deadline for rendering a decision, by which that court shall decide on the merits and award the applicant appropriate compensation for the violation of the constitutional right[31].

By introducing the protection of the right to a fair trial into the Constitution of the Republic of Croatia, the Constitutional Court became competent for the protection of the right to a trial within a reasonable time and a constitutional complaint was the only legal remedy in the Republic of Croatia for the protection of that right. The ECtHR shortly thereafter determined that this new constitutional remedy is an effective national remedy for the protection of the right to a trail within a reasonable time. As per the above, the number of constitutional complaints seeking protection for a trial within a reasonable time has progressively increased. This has resulted in a backlog of cases in the Constitutional Court, which is no longer capable of resolving cases within a reasonable time[32]. The Constitutional Court therefore reported to the Croatian Parliament on the observed problems and proposed that the protection of the right to a trial within a reasonable time be placed under the jurisdiction of regular and specialised courts, and that the Constitutional Court remain competent to decide only after the parties have used all means of protection of that right before competent courts[33].

In order to resolve the issue, the Law on Courts was amended in 2005 and a new legal remedy was introduced to protect the right to

[31] See: *Article 63 paragraphs 2 and 3 of the Constitutional Act on the Constitutional Court of the Republic of Croatia*, "Official Gazette" 2002, No. 49. Also see: Ž. Potočnjak, *Zaštita prava na suđenje u razumnom roku nakon stupanja na snagu novog Zakona o sudovima*, *op. cit.*, pp. 16–17.

[32] See: M. Šikić, *Pravo na suđenje u razumnom roku u postupcima pred upravnim sudom Republike Hrvatske*, "Zbornik Pravnog fakulteta Sveučilišta u Rijeci" 2009, br. 1, p. 341.

[33] See: *Report of the Constitutional Court no.: U-X-835/2005 from 24 February 2005*, "Official Gazette" 2005, No. 30.

a trial within a reasonable time[34]. By this, the parties in the court proceedings were given the opportunity to submit a request for protection of the right to a trial within a reasonable time directly to a higher court. All courts that are competent to decide on such claim, may award compensation for the excessive length of the procedure and at the same time set a deadline for the lower court to render its decision[35]. This legal remedy was therefore combined with compensatory-accelerating because it may be used to accelerate the procedure, but also to provide appropriate compensation for the delays that have already occurred. With the introduction of this new legal instrument the Constitutional Court has ceased to be competent in the first instance for the protection of this right insofar as after exhausting the available remedies foreseen by Articles 27 and 28 of the Courts act from 2005, on the grounds of Article 62 of the Constitutional Act the parties had the opportunity of filing a constitutional complaint to the Constitutional Court for protection of the right to a trial within a reasonable time[36].

This was followed by the 2009 amendments to the Courts Act[37]. These legal changes introduced a new legal remedy, i.e. an appeal to the Supreme Court panel, as last instance court. The protection of the constitutional right to a trial within a reasonable time was thereby ensured in regular court. The Constitutional Court therefore remains competent to decide on the violation of the constitutional right to a trial within a reasonable time if the Supreme Court, the last instance of the proceedings, fails to decide on a legal remedy within a reasonable time.

Motivated by the need to limit the amounts paid by the state in compensation for damages due to the violation of the right to a trial within a reasonable time, the legislator has amended the Courts Act

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[34] See: *Articles 27 and 28 Courts act*, "Official Gazette" 2005, No. 150.

[35] See: *Article 28 paragraph 1 Courts act*, "Official Gazette" 2005, No. 150.

[36] See: M. Šikić, *Pravo na suđenje u razumnom roku u postupcima…*, *op. cit*., pp. 343–347. Also see: Ž. Potočnjak, *Zaštita prava na suđenje u razumnom roku nakon stupanja na snagu novog Zakona o sudovima*, *op. cit*., pp. 14–15; J. Crnić, *Razmišljanja o (ne)ustavnosti nekih odredaba (novog) Zakona o sudovima*, "Informator" 2005/2006, br. 5405–5408, pp. 29–32.

[37] See: *Article 7 of the Act amending Court Act*, "Official Gazette" 2009, No. 153.

in 2013. These amendments to the Act have changed the model of protection of the right to a trial within a reasonable time. The Courts Act from 2013 contains several provisions related to the protection of the right to a trial within a reasonable time. These are Articles 63 to 70 which establish a procedure for the protection of the right to a trial within a reasonable time. Article 64 provides for two legal remedies: a request for the protection of the right to a trial within a reasonable time, and a request for the payment of appropriate compensation for the violation of that right[38]. The new model therefore includes two legal remedies: a request for the protection of the right to a trial within a reasonable time (the so-called accelerated legal remedy) and a request for the payment of adequate compensation due to the violation of the right to a trial within a reasonable time (the so-called combined accelerated-compensatory legal remedy).

A key change has occurred in relation to the procedure to be followed in order to protect this right. A party in court proceedings that observes that the competent court has not decided within a reasonable time on his/her claim holds the right to a legal remedy: a request for the protection of the right to a trial within a reasonable time[39]. This request should be submitted to the same court where proceedings are conducted. The presiding judge of the court decides on the request. When deciding on the request submitted, the president of the court will determine the type of case, the factual and legal complexity of the case, the conduct of the parties and the court's conduct. The presiding judge is obliged to decide on the request submitted within 60 days of the day he/she received it[40]. If the presiding judge determines that the request is justified, he will (in principle) set a maximum deadline of six months within which the judge shall adjudicate on the case[41]. If the presiding judge determines that the request is unjustified, he will reject it through a decision against which the party has the right of appeal within eight days of the day it is issued. The presiding judge of the higher court decides

[38] See: *Article 64 of the Court Act*, "Official Gazette" 2013, No. 28.
[39] See: *Article 63 of the Court Act*, "Official Gazette" 2013, No. 28.
[40] See: *Article 65 of the Court Act*, "Official Gazette" 2013, No. 28.
[41] See: *Article 66 of the Court Act*, "Official Gazette" 2013, No. 28.

on the appeal[42]. As per the new concept, a request for protection of the right to a trial within a reasonable time, as first mandatory step, is therefore a tool exclusively to accelerate the proceedings. If the judge fails to adjudicate on the case within the prescribed time-frame for the request for a trial within a reasonable time, the party may, within the period of six months, submit a request for payment of appropriate compensation for the violation of the right to a trial within a reasonable time to the higher court. The higher court is obliged to set a time-frame of six months as a deadline by which the court, where proceedings are pending shall resolve the case and allocate appropriate compensation to the plaintiff due to the violation of his/her right to a trial within a reasonable time. As per the above, the primary remedy for protecting the right to a trial within a reasonable time is that that serves to accelerate the procedure. The compensatory-accelerating legal remedy is available only in exceptional circumstances, i.e. in those cases when the judge assigned to the case fails to act in accordance with the time-frame for the decision set by the presiding judge of the court.

In 2020 in the case of *Mirjana Marić v. Croatia* the ECtHR became involved in the general assessment of the effectiveness of legal remedies for protecting the right to a trial within a reasonable time provided in the 2013 Courts Act[43]. In particular, Article 68 of the 2013 Courts Act was considered a challenging provision, to which the ECtHR found might not be considered an effective remedy for the protection of the right of a trial within a reasonable time insofar as. the possibility of submitting a request for appropriate compensation for the violation of the right is conditioned by the failure of the court to resolve the case as per Article 65 of this Act within a certain time[44]. The ECtHR underlined that the 2013 Courts Act, which entered into force on 14 March 2013, introduced a purely acceleratory remedy as the primary remedy. A combined compensatory and acceleratory remedy, identical to that under the previous

[42] See: *Article 67 of the Court Act*, "Official Gazette" 2013, No. 28.

[43] See: ECtHR Judgement in Case of *Mirjana Marić v. Croatia*, Application No. 9849/15, 2020, pp. 1–25.

[44] See: *Article 68 of the Court Act*, "Official Gazette" 2013, No. 28.

legislation was made available only in limited circumstances as a complementary remedy[45], i.e. it may be used by the applicant only in cases when the judge who has been ordered by the presiding judge to make a decision within a reasonable period of time upon the party's claim for protection of the right to a trial fails to do so within that period. He may primarily use the accelerating legal remedy from Article 64 paragraph 1 of the 2013 Courts Act before addressing his claim to the ECtHR. The ECtHR concluded that for the same reasons such a remedy may not be considered effective in terms of Article 13 of the Convention. It shall be emphasised that if violation of systemic nature is found for one applicant, that is, if it is established that the behaviour that caused the violation is frequent in the state and towards other natural or legal persons, the state bodies are obliged to undertake the so-called general measures to prevent such similar violations of human rights in the future. These general measures may also include legislative changes if necessary[46].

In addition to Article 68 of the 2013 Courts Act Article 69, which legally defines the maximum amount of compensation is appropriate in one case, could prove to be controversial in the future. The amount may not exceed HRK 35,000.00, i.e. according to the ECtHR, the compensation awarded should be adequate and satisfactory, which largely depends on the length of the court proceedings. With regard to an equitable assessment of the non-pecuniary damage sustained as a result of the length of proceedings, the ECtHR considers that a sum varying between EUR 1,000 and EUR 1,500 per year's duration of the proceedings (rather than per year's delay) is a base figure for the calculation. The outcome of the domestic proceedings, whether the applicant loses, wins or ultimately reaches a friendly settlement, is immaterial to the non-pecuniary damage sustained on account of the length of the proceedings. The aggregate amount will be increased by EUR 2,000 if the stakes involved in the dispute are considerable, such as in cases concerning labour

[45] See: ECtHR Judgement in Case of *Mirjana Marić v. Croatia*, paragraphs 39–41.

[46] See: S. Stražnik, *Europski sud za ljudska prava i standardi upravno sudskog postupka*, *op. cit*., p. 914.

law, civil status and capacity, pensions or particularly serious proceedings related to a person's health or life. The basic award will be reduced in accordance with the number of courts dealing with the case throughout the duration of the proceedings, the conduct of the applicant, particularly the number of months or years due to unjustified adjournments for which the applicant is responsible, what is at stake in the dispute, for example where the financial consequences are of insignificant to the applicant, and on the basis of the standard of living in the country concerned. A reduction may also be envisaged where the applicant has been only briefly involved in the proceedings, having continued them in his or her capacity as heir[47]. The Constitutional Court, probably aware of the ECtHR jurisprudence on this matter, assessed that the 2013 Courts Act limit was too low in establishing HRK 38,000.00 as appropriate compensation for the violation of the right to trial within a reasonable time[48].

Recognising the need to amend the Law on Courts from 2013, the Constitutional Court submitted a Report to the Parliament of the Republic of Croatia in 2021 in which the necessity for legal changes was highlighted in order to ensure that the protection of the right to a trial within a reasonable time in the Croatian courts once more becomes an effective remedy in the sense of Article 13[49]. In that report the Constitutional Court indicated that:

> *there is no doubt that the most effective solution for preventing the unduly long duration of court proceedings is a legal remedy intended to accelerate the proceedings before the violation has taken place. Such a legal remedy should initially serve the purpose of prevention, in order to prevent the violation of the right to a trial within a reasonable time from occurring in the first place. Practice shows, however, that the remedy for accelerating the procedure provided for*

[47] See: Judgement in Case *Apecilla v. Italy*, 10 November 2004, Application No. 64890/01, paragraph 26.

[48] See: Decision of the Constitutional Court of the Republic of Croatia No. U-IIIA-1357/2021, dated 4.05.2022, "Official Gazette" 2022, No. 63.

[49] See: *Report of the Constitutional Court of the Republic of Croatia on 1 March 2021*, *op. cit.*

> *in Article 64, paragraph 1, point 1 of 2013 Court Act fails to fulfil its preventative role because the request for the protection of the right to a trial within a reasonable time will, as a rule, be accepted only if the procedure has already lasted too long. This remedy cannot therefore be used to prevent an impending violation of the right to a trial within a reasonable time. Neither may a legal remedy intended only to speed up the procedure be effective in correcting those situations in which the right to a trial within a reasonable time has already been violated. It must therefore be accompanied by a compensatory remedy*[50].

The Constitutional Court therefore concluded that such a combined, expediting-compensatory remedy as envisaged by the current legislative model flies in the face of Article 13 of the Convention. As already mentioned, it is ineffective because it may only be used in a situation in which the judge fails to make a decision within the prescribed time limit. The Constitutional Court noted that it reacts to the problems observed in individual cases by determining appropriate compensation for the violation of the right to a trial within a reasonable time, attempting to compensate for the shortcomings in the existing legislative model[51].

The above is extremely important since it supports the Constitutional Court in overcoming the shortcomings of the 2013 Courts Act in individual cases[52]. The actions of the Constitutional Court in individual cases, however, cannot replace the necessity of legislative intervention. Despite the warnings of the Constitutional Court regarding the weakness of the 2013 Courts Act, the relevant provisions have remained unchanged by the recent Amendments to the Courts Act in 2022, The disputed provisions therefore remain in force[53]. Finally, it needs to be mentioned that ECtHR jurisprudence

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[50] *Ibidem*.

[51] See: Decision of the Constitutional Court of the Republic of Croatia No. U-IIIA-5285/2020, dated 13.04.2022; Decision of the Constitutional Court of the Republic of Croatia No. U-IIIA-2210/2022, dated 14.07.2022.

[52] *Ibidem*.

[53] *Vidi*: *Law on amadment of the Court Act*, "Official Gazette" 2022, No. 21.

played a decisive role in the advancement of the Croatian legal framework regarding the protection of the right to a trial within a reasonable time and particularly on the amendments to the Croatian Constitution and the Constitutional Act on the Constitutional Court of the Republic of Croatia[54]. The ECtHR has also had an impact on Constitutional court jurisprudence. With its decisions in the Počuča cases, and later in the Marić case, the ECtHR has led to a change in the jurisprudence of the Constitutional Court of the Republic of Croatia[55].

9.4. Specifics of the protection of the right to a trial within a reasonable time in administrative disputes

The administrative procedure requires the administrative authority to resolve administrative disputes by adopting an administrative act (decision). An administrative dispute is considered any dispute in which a public legal authority decides in an administrative procedure on the rights, obligations or legal interests of a natural or legal person, or other parties, by directly applying laws, other regulations and general acts governing the corresponding administrative area[56]. In the event of an administrative act being challenged, it falls to the administrative court to determine in the administrative dispute whether a decision has been rendered legally by the administrative

[54] See: M. Šikić, *Utjecaj prakse (presuda) Europskog suda za zaštitu ljudskih prava na upravno sudovanje*, "Zbornik radova Pravnog fakulteta u Splitu" 2013, br. 50, pp. 458–460.

[55] See: Decision of the Constitutional Court of the Republic of Croatia No. U-IIIA-4885/2005, dated 20.06.2007. Decision of the Constitutional Court of the Republic of Croatia No. U-IIIA-5285/2020, dated 13.04.2022; Decision of the Constitutional Court of the Republic of Croatia No. U-IIIA-2210/2022, dated 14.07.2022. See aslo: B. Britvić Vetma, F. Staničić, B. Horvat, *Transformacija upravnog sudovanja zbog primjene nadnacionalnog prava*, "Godišnjak Akademije pravnih znanosti Hrvatske" 2021, Vol. XII, No. 1, pp. 51–53.

[56] See: *Article 2 paragraph 1 of the General administrative procedure Act*, "Official Gazette" 2009, No. 47.

authority[57]. In administrative proceedings and administrative disputes, administrative matters are therefore decided. The question arises whether 'administrative matters' may be considered as the '*civil rights and obligations*' referred to in the ECHR, i.e. as pointed out earlier, Article 6 paragraph 1 of the European Convention stipulates that *'in the determination of the civil rights and obligations … everyone is entitled to a fair and public trial within a reasonable time, by an independent and impartial tribunal established by law*'.

In applying Article 6 of the Convention, it is insufficient that the right that is protected be a 'civil right' by nature and it is also necessary that it be a right that is recognised by the internal law of the member state in question. It is also important that there be a real dispute, and that the realisation of a specific right depend on the outcome of the dispute. The notion of *civil rights and obligations* itself, by the ECtHR is interpreted autonomously and quite broadly, considering that Article 6 of the Convention must be applied not only in classic civil law proceedings, but also in proceedings when the outcome has a direct impact on legal positions, which according to the continental-European understanding are considered to be civil law. At the same time, it is not decisive whether the decision in the specific procedure are made by applying provisions of a private law or public law and neither is it decisive whether both parties in the dispute are natural persons, or whether one party is the public authority, as it is not decisive who, according to internal law, is competent to decide in a specific case.

The ECtHR has so far refused to provide an abstract definition of the concept of *civil rights*, considering it more appropriate to determine the scope of application of Article 6 of the Convention by its rulings in specific cases, whereby until now this field of application has been constantly and gradually expanding[58]. The ECtHR will therefore determine the application of Article 6 to *civil rights*

[57] See: B. Britvić Vetma, N. Pičuljan, *Pravo uređenje i glavna obilježja upravnog postupka u Republici Hrvatskoj*, "Zbornik radova Veleučilišta u Šibeniku" 2016, br. 3–4, p. 39.

[58] See: J. Garašić, *O upravnom sporu pred Upravnim sudom Republike Hrvatske u svjetlu čl. 6. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda*, "Zbornika Pravnog fakulteta Sveučilišta u Rijeci. Supplement" 1998, pp. 968–969.

and obligation on a case-by-case basis, respecting some basic guidelines[59]. Article 29 paragraph 1 of the Constitution of the Republic of Croatia was drafted based on Article 6 of the Convention, but took a step forward in protecting the right to a trial within a reasonable time insofar as it guarantees protection in terms of all types of court proceedings without making reference to *civil* rights and obligations, so such a constitutional provision doubtless also includes administrative matters[60].

The purpose of the notion of a *trial within a reasonable time* from Article 6 of the Convention is to ensure legal certainty, i.e. to allow sufficient pace in the resolution of cases before the courts, in order to support the parties in their uncertainty regarding the outcome of the dispute. The above is indispensable in a fair trial. In deciding on the issue of the violation of the right to a trial within a reasonable time in administrative disputes two complex legal problems arise: the calculation of the time period in which the violation may have occurred and the criteria by which it may be determined whether the procedure respected the standard of a reasonable time. In order to receive an answer, it is necessary to begin from the relevant provisions governing administrative procedural law. At the same time, it is advantageous to consult the practice of the Constitutional Court of the Republic of Croatia in assessing violations of the reasonableness of the length of proceedings in administrative disputes and to compare it with the ECtHR's jurisprudence and draw relevant conclusions based on that.

The Administrative Disputes Act defines the objective of an administrative dispute as to *'ensure the legality of the rights and legal interests of natural and legal persons and other parties violated by individual decisions or actions of public authorities'*[61]. From the aforementioned legal provision, we may conclude that the purpose of an *'administrative dispute is not only to ensure that public*

[59] See: I. Goranić, *Suđenje u 'razumnom roku'…*, *op. cit*., p. 49.

[60] See: M. Šikić, *Utjecaj prakse (presuda) Europskog suda za zaštitu ljudskih prava na upravno sudovanje*, *op. cit*., p. 337. See also: I. Jažić, *Utjecaj europskih standarda na upravni spor u Republici Hrvatskoj*, *op. cit*., p. 4.

[61] See: Article 2 Administrative Dispute Act.

authorities respect the law, but also that individuals are protected from the administration"[62]. The quality of the administrative court's decisions may be measured according to the pace criteria[63]. The judicial activity should be guided by the principle of economy in proceedings before the courts, which expresses itself as a postulate of the quality of judicial protection, and through the working methods applied by the courts in the proceedings[64]. The court is therefore obliged to try to conduct the proceedings without delay and incurring as few costs as possible. The same rule applies in administrative disputes. The specific monopoly in public administration means that there is a constant danger of abuse either by illegally denying citizens' requests or by delaying or failing to resolve requests. In the latter case, a well-known problem is the silence of the administration. Instead of rendering a decision in favour or against the party, the administrative authority might remain silent, thereby creating an uncertain legal situation for the party[65].

In recent years in Croatia administrative disputes have been shortened significantly, guaranteeing the parties swifter access to administrative justice. Statistical data from the Ministry of Justice and Public Administration show that the average time-frame for the resolution of administrative disputes in Croatia today is less than one year[66]. It should be borne in mind, however, that this is the average length of administrative disputes, as in some complex administrative disputes court proceedings may last much longer[67]. An administrative dispute is still burdened by the problems of non-execution of court decisions by certain public authorities,

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[62] See: I. Ježić, *Utjecaj europskih standarda na upravni spor u Republici Hrvatskoj*, *op. cit*., p. 7.

[63] See: B. Britvić Vetma, *Europska konvencija za zaštitu ljudskih prava (članak 6) i Zakon o upravnim sporovima*, *op. cit*., p. 409.

[64] See: J. Omejec, *'Razumni rok' u interpretaciji Ustavnog suda Republike Hrvatske, Ustavni sud u zaštiti ljudskih prava…*, *op. cit*., p. 131.

[65] *Ibidem*, p. 132.

[66] For statistical indicators on the work of administrative courts in Croatia, see: https://sudovi.hr/hr/statistike/upravni-sudovi [access 31.12.2022].

[67] See: D. Đerđa, P. Šamanić, *Recentna stajališta suda Europske unije o zakonskom propisivanju rokova za rješavanje upravnih sporova*, "Hrvatska pravna revija" 2020, p. 39.

subsequently affecting the total length of proceedings in administrative matters[68].

It is also important to underline that administrative disputes in Croatia are closely linked to the previous, compulsory administrative procedure. As a rule, an administrative dispute is preceded by an administrative appeal procedure before an administrative authority. After the judgement by which the claim is rendered against a public authority, the case is returned to the administrative authority for additional administrative procedure. In resolving some of their rights and interests in administrative matters, citizens are therefore first directed to initiate administrative claims in front of the administrative authorities. By submitting a request they enter the legally regulated time-frames for administrative procedure. The deadlines for rendering decisions and for the provision of legal protection are regulated by the General Administrative Procedure Act and the Administrative Disputes Act[69]. The aforementioned legislation contains a number of provisions with clear deadlines for ruling on administrative disputes, upon citizens' requests and remedies if such deadlines are missed. These provisions are included in Articles 101, 119 and 121 of the General Administrative Procedure Act and Articles 8, 12 and 58 of the Administrative Disputes Act.

The General Administrative Procedure Act prescribes short time-frame for resolution on parties. The administrative authority must render its decision within 30 or 60 days from the date of submission of the formal request[70]. The party is entitled to a legal remedy for **failure to respond,** that may be used in cases of any disrespect of these deadlines[71]. A citizen has the right to file a complaint to the second-instance administrative authority or to initiate

[68] See: A. Rajko, *Hrvatsko uređenje izvršenja presude donesene u upravnom sporu u svjetlu preporuka i drugih dokumentata vijeća Europe*, "Croatian Academy of Legal Sciences Yearbook" 2022, Vol. XII, No. 1, p. 107–122.

[69] See: *The General Administrative Procedure Act*, "Official Gazette" 47/09 and 110/21; *Administrative Dispute Act*, "Official Gazette" 20/10, 143/12, 152/14, 94/16, 29/17, 110/21.

[70] See: Article 101 paragraphs 1 and 2 of the General Administrative Procedure Act.

[71] See: Article 101 paragraph 3 of the General Administrative Procedure Act.

an administrative dispute before an administrative court. The General Administrative Procedure Act clearly also defines the appeal procedure when the first-instance authority fails to respond, and sets a new deadline for the decision[72]. The General Administrative Procedure Act also lists the deadline within which it is necessary to render a second-instance decision. The second-instance authority must render a decision on appeal as soon as possible; no later than 60 days from the date of submission of the formal appeal unless otherwise prescribed by law[73].

The Administrative Disputes Act contains provisions that aim to improve the effectiveness of administrative disputes. In accordance with the principle of efficiency the court must conduct the administrative dispute swiftly and without delay, while avoiding unnecessary actions and costs, thereby preventing abuse of the rights of the parties and other participants in the dispute and rendering a decision within a reasonable time[74]. Administrative courts decide on the action for failure of response via a public authority within the legally prescribed time-frame[75]. The administrative court will consider the claim legally grounded if it finds that the public authority failed to render a decision within the prescribed period. The court will resolve the dispute itself, unless it cannot do so because of the nature of the matter. In the latter case, the administrative court will order the administrative authority to render a decision within the given deadline[76].

It may be concluded that the existing legal framework contains the presumption that the request is rejected if the administrative authorities fail to respond within the legal deadlines and it is therefore impossible for the administrative procedure to take an unreasonably long time. For quite some time the Constitutional Court

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[72] See: Article 119 paragraphs 2 and 3 the General Administrative Procedure Act.

[73] See: Article 121 of the General Administrative Procedure Act.

[74] *Vidi*: Article 8 Administrative Dispute Act. See also: B. Britvić Vetma, N. Pičuljan, *Pravo uređenje i glavna obilježja upravnog postupka u Republici Hrvatskoj*, "Zbornik radova Veleučilišta u Šibeniku" 2016, pp. 3–4, 41.

[75] *Vidi*: Article 12 paragraph 2 Administrative Dispute Act.

[76] *Vidi*: Article 58 Administrative Dispute Act.

of the Republic of Croatia held such a position, stating that the Croatian legal framework has adequate rules for cases in which the administration fails to respond. These legal rules provide the party with protection. On the basis of such a position the Constitutional Court considered that the obligation to render a decision within a reasonable time applied exclusively to the judicial authority[77]. This conclusion is based on the fact that the provisions of the administrative-procedural law to the Administrative Court. It was therefore the Constitutional Court's opinion that in terms of Article 63 paragraph 1 of the Constitutional Law unreasonable protraction of administrative procedures should be impossible.

In its judgements in the cases *Božić v. Croatia*, *Počuča v. Croatia and Smoje v. Croatia* the ECtHR clearly indicated that the stance of the Constitutional Court of the Republic of Croatia is at odds with the established jurisprudence of the European Court[78]. In the case *Božić v. Croatia* the Court initially observed that the administrative authorities rendered seven decisions. By doing so the statutory time-frames were not always strictly monitored. The protracted character of the proceedings, however, resulted only partly from the failure of those authorities to give their decisions duly. In the court's view the main cause for the delay was rather a deficiency in the procedural system, allowing for repeated remittals mandated by incomplete fact-finding. Since an appeal and an action for failure to respond are neither designated for remedying that deficiency nor capable of doing so, the court is unable to conclude that their use would, in the circumstances of the present case, improve the effectiveness of a constitutional complaint. The ECtHR therefore concluded that in administrative matters the constitutional complaint alone cannot

[77] *Vidi*: Decision of the Constitutional Court of the Republic of Croatia No. U-IIIA-995/2002, dated 18.12.2002.

[78] See: ECtHR judgement in the case of *Počuča v. Croatia*, 29 September 2006. ECtHR judgement in the case of *Božić v. Croatia*, 29 June 2006, paragraphs 23, 31 and 34. ECtHR judgement in the case of *Smoje v. Croatia*, 11 January 2007, paragraphs 34 and 45.

be considered an effective remedy for the length of administrative proceedings[79].

The impact of ECtHR jurisprudence means that the Constitutional Court changed the previous judicial practice in 2007 and acknowledged the existence of deficiencies in the procedural system of administrative law in the Republic of Croatia. After the Constitutional Court assessed that the remedies against the administration's failure to respond are frequently ineffective in speeding up the administrative procedures themselves, as is clearly demonstrated by the administrative practice in the Republic of Croatia, it concluded that its previous legal position on the matter should change. The Constitutional Court therefore determines that the inactivity or ineffectiveness of state administration in deciding administrative proceedings, viewed together with the duration of the administrative dispute initiated, may lead to a violation of Article 29 paragraph 1 of the Constitution and Article 6 paragraph 1 of the Convention in reference to the reasonable length of proceedings. The length of an administrative dispute itself in the Administrative Court of the Republic of Croatia does not show the actual length of the *disputed* period of deliberation on a specific administrative matter. In the future, therefore, when deciding on eventual violation of Article 29 paragraph 1 of the Constitution and Article 6 paragraph 1 of the Convention with reference to the reasonable time, a relevant period should include not only the administrative dispute but also the duration of the previous administrative procedure in the same administrative matter. Calculation of the period should begin from the day when the *dispute* arose in the sense of Article 6 paragraph 1 of the Convention[80].

The Constitutional Court pointed out that it is necessary to distinguish between those situations in which the unjustifiable length of administrative proceedings and administrative court proceedings is affected by the fact that the Administrative Court repeatedly returns

[79] See: ECtHR judgement in the case of *Božić v. Croatia*, 29 June 2006, paragraph 36.

[80] See: Decision of the Constitutional Court of the Republic of Croatia, No. U-IIIA-4885/2005, 20 June 2007, paragraph 4.2.

an administrative matter for retrial in administrative proceedings. Such practices indicate significant deficiencies in the system of procedural administrative law in the Republic of Croatia. Since neither the appeal nor the failure to respond are intended to correct these deficiencies, nor to be corrected by these legal remedies, the Constitutional Court concludes that the legal remedies of failure to respond, *per se*, represent no effective domestic legal remedy for the situations. The Constitutional Court therefore determines that in situations of repeated administrative proceedings due to the annulment of administrative acts and the return of the case to re-administrative proceedings by the Administrative Court, there is a reasonable justification to count the total length of administrative and court proceedings together, and thereby assess a possible violation of the right to a trail within a reasonable time[81]. In administrative judicial procedural law, it is therefore necessary to take into account the particularities of assessing the rationality of the length of the proceedings in administrative disputes, and to emphasise the particularities of administrative court proceedings in relation to other court proceedings in the Croatian legal system.

When assessing whether an administrative procedure has been completed within a reasonable time, the beginning and the end of the relevant period must first to be determined. It is then assessed whether the period may be considered reasonable[82]. Some Croatian legal observers and scholars of jurisprudence have assessed this reasonable time in administrative proceedings differently[83]. Initially the Constitutional Court of the Republic of Croatia and some observers contended that the time period refers only to the administrative dispute, which meant that the relevant period begins with the filing of the action with the administrative court. The Constitutional Court's decision U-IIIA-9995/2002 of 2002 concluded that *'it is*

[81] See: *Ibidem*, paragraph 4.3.

[82] See: I. Goranić, *Suđenje u ,razumnom roku'…*, *op. cit*., p. 52.

[83] In her text Otočan analyses the right to a trial within a reasonable time in an administrative dispute without taking into account the administrative procedure that preceded it. See: S. Otočan, *Načelo učinkovitosti upravnog spora u svjetlu konvencijskog prava na suđenje u razumnom roku*, "Zbornik radova Pravnog fakulteta u Splitu" 2020, god. 57, broj. 1, pp. 179–193.

clear that the obligation to render decisions within a reasonable time applies exclusively to judicial authorities'. The Constitutional Court further elaborated that:

> *in order that the proceedings in the Constitutional Court are initiated as per Article 63 of the Constitutional Law, a constitutional complaint on failure to respond in an administrative dispute may be admissible solely in cases of failure to respond by the Administrative Court, when it concerns the cases of non-responsiveness of the administrative authorities. A constitutional complaint may not therefore be submitted directly against the administrative authorities' failure to respond*[84].

The Constitutional Court later considered the relevant period for assessing a reasonable time in administrative matters to be the period from the moment an action is filed with the Administrative Court until the moment a constitutional complaint is filed[85]. The Administrative Court even considered that rendering a verdict in an administrative dispute before the end of the proceedings in the Constitutional Court to be a reason for inadmissibility of the constitutional complaint. Although the applicant of the constitutional complaint referred to different ECtHR jurisprudence concerning the assessment of the relevant period in administrative matters, with administrative authorities and the Administrative Court alike, the ECtHR considers both to be a relevant period for counting a reasonable time, the Constitutional Court decided to reiterate its earlier views[86]. As per the above, the Constitutional Court clearly took the same approach in assessing a reasonable term for all types of procedures without taking into account the particularities of procedures

[84] See: Decision of the Constitutional Court of the Republic of Croatia, No. U-IIIA-995/2002, dated 18.12.2002. *Vidi:* Ž. Potočnjak, *Zaštita prava na suđenje u razumnom roku nakon stupanja na snagu novog Zakona o sudovima*, *op. cit*., p. 15.

[85] See: Decision of the Constitutional Court of the Republic of Croatia No. U-IIIA-1694/2002, dated 9.06.2004.

[86] *Ibidem*.

in administrative matters[87]. The Constitutional Court, in deciding on the rationality of the length of proceedings in administrative disputes, therefore acted in opposition to the ECtHR jurisprudence[88].

In the case of *Počuča v. Croatia*, the ECtHR criticised such interpretation of the reasonable time and emphasised that a remedy available to a litigant at a domestic level for raising a complaint about the length of proceedings is effective in terms of Articles 13 and 35 paragraph 1 of the Convention, only if it is capable of covering all stages of the appealed proceedings and, in the same way as the Court delivers a decision, of taking into account their overall length[89]. A reasonable period can not be precisely determined in advance as valid in all cases, but is a legal standard that the ECtHR assesses on a case by case basis. In assessing the rationality of the proceedings the ECtHR takes in consideration following elements: the complexity of the case, the way in which the authorities have dealt with the case, the behaviour of the applicant who might have contributed to the prolongation of the procedure, special circumstances that might justify the prolongation of the procedure, the significance of the outcome of the procedure for the party, i.e. the need for certain procedures, such as labour or social issues, parental rights, adoption cases, etc. and exigencies.[90]

The ECtHR has determined the moment when the reasonable period of time begins as the moment when the dispute began. In situations in which the court proceedings are conditioned by previous mandatory administrative proceedings, the dispute exists from the moment the appeal is filed against the first-instance administrative decision, the use of which is an obligatory precondition for submitting an action to the administrative court. This would mean that the administrative procedure that preceded the administrative

[87] See: M. Šikić, *Utjecaj prakse (presuda) Europskog suda za zaštitu ljudskih prava na upravno sudovanje*, *op. cit*, p. 353.

[88] See: N. Vajić, *Duljina sudsko postupka u Hrvatskoj i praksa Europskog suda za ljudska prava*, "Zbornik Pravnog fakulteta u Zagrebu" 2001, br. 51, p. 985.

[89] See: ECtHR Judgement in case *Počuča v. Croatia*, 29 June 2006, paragraphs 34–35.

[90] See: J. Garašić, *Regarding criteria for 'reasonable time'*, p. 996. See: I. Goranić, *Suđenje u 'razumnom roku'…*, *op. cit*., pp. 52–54.

dispute should also be included in the calculation of the relevant period of reasonable time[91]. The moment an appeal is submitted to the second-instance administrative authority should be considered the beginning of the relevant period. The ECtHR therefore concludes that a constitutional complaint in relation to the protection of the right to a trial within a reasonable time before an Administrative Court cannot be measured as an effective means, since the Constitutional Court does not take into account the entire duration of the procedure, excluding the procedure prior to the administrative authorities[92]. The ECtHR reiterated its views on the onset of the period of reasonable time and its assessment on the effectiveness of legal remedies in its judgement in the case of *Božić v. Croatia*[93]. As a result of the above, the overall duration of proceeding in deciding on administrative disputes (covering all stages of the proceedings) should be concluded within three years at the latest from the moment an appeal is filed within the administrative procedure, and this moment counts as beginning of the dispute between the party and the public authority. This 3-year period should also include cases in which the case has been returned several times to the public authority for re-trial and in such ciecumstances the relevant period opens with first appeal filed in that case. It may then be concluded that proceedings were conducted within a reasonable time[94].

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[91] *Ibidem*, paragraph 36.

[92] ECtHR stated, *'The above-cited practice indicates that the Constitutional Court, when deciding a constitutional complaint concerning the length of proceedings pending before the Administrative Court does not take into consideration their overall duration. It excludes the period during which the case was pending before the administrative authorities on account of a special means available for speeding up proceedings before those authorities. That approach of the Constitutional Court differs from that of the Court, as it does not cover all stages of the proceedings. It follows that a constitutional complaint cannot be considered an "effective" remedy in respect of the length of administrative proceedings'*. See: *Ibidem*, paragraph 37.

[93] See: ECtHR Judgement in case of *Božić v. Croatia*, No. 22457/02 from 2006, paragraphs 32–34.

[94] See: D. Đerđa, P. Šamanić, *Recentna stajališta suda Europske unije o zakonskom propisivanju rokova za rješavanje upravnih sporova*, "Hrvatska pravna revija" 2020, p. 39.

On the subject ECtHR judgements the Constitutional Court of the Republic of Croatia accepted the views expressed and changed its own practice in assessing the reasonable time in administrative court proceedings. In its Decision No. U-IIIA-4885-2005 from 2007 the Constitutional Court pointed out that the length of the administrative procedure in a specific administrative matter is counted from the day the dispute arose in the sense of Article 6 paragraph 1 of the European Convention, i.e. from the day the appeal is filed against the first-instance decision.

It is equally important to determine the end of the relevant period as the onset. In this respect, Croatian jurisprudence also had deviations from that of the ECtHR. The Constitutional Court reduced that time-frame by considering the moment a constitutional complaint is filed as an end to that period, albeit the court proceedings on the merits may not at the time be concluded. In administrative disputes the decision on the rights of citizens is not completed even after the administrative court's verdict has been announced. In such cases, therefore, the end of the relevant period should be understood as the day the Constitutional court establishes the violation of the right to a trial within a reasonable time through a decision.

9.5. Conclusion

The development of the legal framework for the protection of the right to a trial within a reasonable time in Croatia was far from plain sailing. The system was gradually consolidated by changes to the Courts Act in 2005 and 2009, only to be largely thwarted by the changes in 2013. This was recognised both in the jurisprudence of the ECtHR and in the Constitutional Court of the Republic of Croatia. The ECtHR pointed out that the request for the protection of the right to a trial within a reasonable time cannot be considered an effective remedy, since it significantly limits the possibility of compensation for a violation of rights that has already occurred. The Constitutional Court reported this problem to Parliament, indicating the need to change the 2013 Courts Act. At the same time, however, through a change in its jurisprudence in concrete cases the

Constitutional court sought to mitigate the shortcomings of the legal framework by awarding compensation in cases where the violation of the right has been established. As per the above, we may conclude that the practice of the ECtHR and the Constitutional Court of the Republic of Croatia significantly influenced the strengthening of the protection of citizens' rights in relation to procedural guarantees related to a trial within a reasonable time.

Finally, it should be noted that until 2013 the Croatian legal framework for the protection of the right to a trial within a reasonable time respected the Convention standards and was solidly structured. There is therefore an urgent need for amendment of the 2013 Courts Act in such a way as to ensure an effective legal remedy for obtaining compensation when the violation of the right to a trial within a reasonable time has already occurred. The problem that needs to be solved is related to administrative law and the law on procedures of the administrative court, related to the lack of resources in preventing cases from being repeatedly returned for re-trial (the so-called *pin pong effect*). This problem directly affects the excessive duration of decision-making in administrative disputes. It should be borne in mind that future normative changes seek better to regulate the execution of judgements (by which a case is returned to the public authority), and in order to ensure strict and consistent compliance with administrative court ruling by the administrative authority.

The jurisprudence of the ECtHR and the Constitutional Court of the Republic of Croatia removed all doubts as to whether administrative matters were covered by procedural guarantees for the protection of the right to a trial within a reasonable time[95]. In doing so, it should be remembered that a trial within a reasonable time in administrative disputes comprises some important differences from court proceedings in civil and criminal cases. Unlike civil and criminal court proceedings, judicial protection in administrative disputes is usually preceded by mandatory proceedings before an administrative authority. Accordingly, the time period

[95] See: J. Garašić, O *upravnom sporu pred Upravnim sudom Republike Hrvatske…*, *op. cit*., pp. 967–971.

for calculating a reasonable time also includes the procedure that preceded the administrative dispute. The procedure is not conducted by 'an independent and impartial tribunal established by law' but by the administrative authority. At the same time, the moment from which the beginning of the period for calculating the reasonable time is the moment the dispute comes into existence. In administrative disputes this is the moment an appeal is filed against the first-instance decision of the administrative authority. In administrative matters the case is not finalised even after the court ruling, as it is usually sent back to the administrative authority for a final decision on its merits. This leads to another peculiarity of the protection of the right to a trial within a reasonable time in administrative court proceedings, since in administrative matters it is possible for the same case repeatedly to establish a violation of the right to a trial within a reasonable time, and for the party to be repeatedly awarded compensation for the violation of that right within the same case-law.

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