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Preface

It is our privilege and sheer delight to introduce to our audience the compilation of academic articles from the Comparative Research Platform 2023. Matters such as the nature of the legislative process adopted to amend the Constitution (in the light of European integration and constitutional identity), the rule of law, administrative justice reform and the efficiency of the justice system, stand as significant subjects, viewed through the lenses of both legal academia and real-world application, especially within the contemporary framework of the 21st-century community.

The initiative of the Comparative Research Platform 2023 was conducted at the Institute of Justice in Warsaw during the year 2023, engaging scholars hailing from: Georgia, Slovakia, Romania, Slovenia, the Czech Republic, Croatia, and Ukraine.

The project goals were delineated based on the thematic focus of each research group, categorised into one of four overarching themes:

I. Rule of law – clarification of the concept of the rule of law (rationale, evaluation, implementation, correlation of the rule of law with the EU rule of law, etc.).
II. The constitutional amendment process – the nature of the legislative process adopted to amend the Constitution (in the light of European integration and constitutional identity), what does it mean clarification of the mechanisms and factors influencing

the constitutional amendment process in a democratic state under the rule of law.

III. Efficiency of the justice system – examination of the efficiency, i.e., the efficiency, duration and complexity of cases handled in the courts.

IV. Administrative justice reform – clarification of mechanisms, structure and organisation, as well as the functioning of the administrative judiciary in order to conduct administrative proceedings in a reliable manner.

While each of these subjects varies in essence, they share a unifying factor: the necessity for a robust, equitable, and effective government. Only under such governance can a state effectively confront the complexities presented by constitutional, rule of law, administrative justice and efficiency of the justice system challenges. Such insights hold considerable importance for the foundations of this scholarly manuscript, an outcome derived from the execution of the project.

The publication we offer to readers represents an exceptionally captivating, significant, and groundbreaking exploration. This book comes highly recommended to all individuals intrigued by the rule of law, administrative justice reform, the efficiency of the justice system, and legal dimensions surrounding the legislative procedures for the nature of the legislative process adopted to amend the Constitution (in the light of European integration and constitutional identity).

Similar to the previous year, the comments, insights, and recommendations provided by the authors hold the potential to captivate not only legal theorists but also practitioners and lawmakers alike. This renders the scientific manuscript relevant for legislators, judges, prosecutors, legal practitioners, scholars, doctoral candidates, students, and anyone with a general interest in the subject matter. It serves as a compelling source of knowledge addressing contemporary and legally significant issues, stimulating further fruitful contemplation.

We extend our heartfelt gratitude to all the authors for their dedication and diligence in bringing forth this publication and executing the aforementioned international research endeavour. We wish the readers an enjoyable and enriching reading experience.

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PART I

RULE OF LAW

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Chapter 1. A Critical Analysis of the Effects That Some Decisions of the Court of Justice of the European Union Produce Upon National Legal Systems. The Rule of Law Perspective

1.1. Introduction

The general concept of rule of law is very large, and represents the basis on which fundamental human rights are developed, as this concept aims to eliminate all arbitrariness and state abuse of power. The rule of law means that no one, including government, is above the law, and no one can be put in a privileged position in respect to the application of the law. It implies a set of common standards for action, which are defined by law and enforced in practice through procedures and accountability mechanisms for reliability, predictability and "administration through law".[1]

The concept is widely recognised as an international level although sometimes it is highly disputed as discussions among theorists about the "rule of law" are riven by disagreements over what it means, its elements or requirements, its benefits or limitations, whether it is a universal good, and other complex questions.[2]

[1] *Rule of law*, [in:] *Government at a Glance 2013*, OECD Publishing, Paris 2013, https://doi.org/10.1787/govglance-2013-9-en [access: 14.10.2023].

[2] B.Z. Tamanaha, *A concise guide to the rule of law*, [in:] *Florence workshop on the rule of law*, N. Walker, G. Palombella (eds.), Oxford 2007.

The Rule of Law has been proclaimed as a basic principle at the universal level by the United Nations – for example in the Rule of Law Indicators – and at regional level, and it is mentioned in the Preamble to the Statute of the Council of Europe as one of the three "principles which form the basis of all genuine democracy", together with individual freedom and political liberty. Furthermore, the Rule of Law, as expressed in the Preamble and in Article 2 of the Treaty on European Union (TEU), is one of the founding values that are shared between the European Union (EU) and its Member States.[3]

In the US legal system, it was shown that on the whole, there was not a lot of thought given to the Rule of Law, as not even the Supreme Court engaged in any extended discussion of the Rule of Law as an abstract question, the emphasis being on the independence of the judiciary that can therefore effectively protect basic rights and check abuses of executive and administrative power. As a concept, the Rule of Law is regarded to be on one hand the subjection of governmental authority to legal restraint and on the other the due process of law, namely, that no person shall be deprived of life, liberty or property except in accordance with law and in accordance with the procedures established by law.[4]

The Rule of Law also implies non-discrimination[5] and the independence of the judiciary that implies, in respect to the US Supreme Court, that since the Court's formal position in the structure of constitutional power is a relatively weak one, its strength and independence depend ultimately on its moral authority as measured by the public trust, respect, and confidence generated by the Court's reputation for disinterestedness, integrity, and a sober sense of responsibility in the discharge of its important and delicate tasks.[6] This was identified as the reason why the Court is subject to the

[3] See: The Venice Commission of the Council of Europe: Rule of law checklist, https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf [access: 14.10.2023].

[4] P.G. Kauper, *The Supreme Court and the Rule of Law*, "Michigan Law Review" 1961, Vol. 59, Issue 4, pp. 531–532, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=6436&context=mlr [access: 14.10.2023].

[5] P.G. Kauper, *The Supreme Court…*, *op. cit.*, p. 538.

[6] Idem, p. 541.

corrective process of public judgment. Moreover, public opinion exerts an invisible influence in determining the policy and value norms, or, if you prefer, the prepossessions and predilections, that enter into the substance of the judgment process. Judges, by virtue of their education, training, and the development of their intellectual and emotional processes and responses, cannot divorce themselves from the movement of ideas and events that shape contemporary political, social, and economic developments. It is true in this sense, as Dooley once observed, that the Supreme Court follows the election returns.[7]

Within the Council of Europe, the development of the principle of rule of law is substantial. On one hand, within the Venice Commission a series of Benchmarks were established. The first benchmark is the legality one and it implies the supremacy of the law and compliance with the law. Therefore, state action must be in accordance with and authorised by the law. Additionally, the legislative procedure must be the act of Parliament and not of the Executive, as in this field unlimited powers of the executive are, *de jure* or *de facto*, a central feature of absolutist and dictatorial systems. The second benchmark refers to legal certainty which implies accessibility of legislation and court decisions and the foreseeability, stability, and consistency of law. The third benchmark is the prevention of abuse or misuse of powers, followed by equality before the law, non-discrimination and the access to justice which implies the independence and impartiality of the judiciary, a fair trial, access to courts, and the presumption of innocence.[8]

On the other hand, the European Court of Human Rights has developed a constant jurisprudence regarding the rule of law and its role within the human rights system, as this principle is embedded in the preamble of the European Convention of Human Rights. Referring to the Court's jurisprudence, Professor Bîrsan noted that starting with the judgment pronounced in the *Golder v. United Kingdom* from 1974, in which the Court mentioned for the first time the notion of the "rule of law" in relation to the provisions

[7] Idem, p. 542.
[8] Idem.

of Article 6 paragraph 1 of the Convention, which enshrines the right to a fair trial, and until the most recent judgments, this kind of reference has practically become a true style clause in the argumentation of the pronounced solutions. However, the European jurisdiction has never defined this notion. Moreover, jurisprudential references to the notion in question are not uniform.[9] In *Iatridis v. Greece*, the Court stated that the rule of law is one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention, and entails a duty on the part of the State or other public authority to comply with judicial orders or decisions against it.[10] Furthermore, aspects such as the legality of the crime and punishment guaranteed by Article 7 of the Convention, the need to ensure respect for human rights, the right to a tribunal, the access to justice, the sanctioning of arbitrary behaviour of national authorities or the principle of legality which implies the existence of sufficiently accessible, precise and predictable internal rules, are essential elements of the pre-eminence of the right.[11]

1.2. The Concept of the Rule of Law in Romania

Traditionally, it can be argued that the principle of rule of law is very old in the Romanian legislation. Aspects that are part of this principle were embedded in the 1923 Constitution, which provided that all the powers of the State emanate from the nation, which can only exercise them by delegation and according to the principles and rules laid down in the Constitution,[12] and regulated the principle

[9] C. Bîrsan, *Convenția Europeană a Drepturilor Omului. Comentariu pe articole*, Bucharest 2010, pp. 6–12.

[10] ECHR Judgement in the case of Iatridis v. Greece, Application No. 31107/96, Judgement of 25.03.1999, paragraph 58, https://hudoc.echr.coe.int/eng#{%22display%22:[%220%22],%22languageisocode%22:[%22ENG%22],%22appno%22:[%2231107/96%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22],%22itemid%22:[%22001-58227%22]} [access: 14.10.2023].

[11] C. Bîrsan, *Convenția Europeană…*, *op. cit.*, p. 9.

[12] Article 33 of the 1923 Constitution of Romania, Official Gazette 1923, No. 282.

of separation of powers in the state[13] and the equality of citizens in front of the law.[14]

The 1991 Constitution stipulated within Article 1 paragraph 3, as a constitutional principle, that Romania is a state governed by the principle of rule of law. However, this is not the only provision in respect to the rule of law. As Romania is a member of the EU, the second article of the treaty of the EU is also applicable directly as is the rule of law concept establish within the European Court of Human Rights jurisprudence.

But things are not always as straightforward as they seem. In 2007 Romania was accepted as a member of the EU, but nevertheless the great European family considered the judiciary system unprepared to meet EU standards, especially in respect to the concept of rule of law.

Therefore, the Commission Decision of 13 December 2006 was adopted, and it established a mechanism for cooperation and verification (MCV) of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption in order to ensure the existence of an impartial, independent and effective judicial and administrative system properly equipped, inter alia, to fight corruption.[15] This decision was in effect for over 16 years as it was repealed through the Commission Decision of 15 September 2023, repealing Decision No. 2006/928/EC.

This mechanism aimed to ensure the respect of the Rule of Law, but however, in itself instituted a prejudice against Romania's capacity to be a member of the EU, as it suggested that Romania lacked the capability to respect the Rule of Law, a situation that had no precedent in the whole history of the European Union.

In our opinion, this mechanism made Romania to be regarded as a second-grade member of the EU which, considering all the premises of the integration process, is absurd and undignified. Such

[13] Articles 34–41 of the 1923 Constitution of Romania, Official Gazette 1923, No. 282.

[14] Article 8 of the 1923 Constitution of Romania, Official Gazette 1923, No. 282.

[15] See: paragraph 3 of the Preamble of the Commission Decision, 2006/928/EC, 2006.

an attitude would have other consequences, as we are going to show within this study.

The Romanian doctrine was however very receptive to the concept of the Rule of Law due to its French inspiration. The institution was characterised both as being a postulate or an axiom by some authors and a judicial nonsense, a futile concept by others.[16] It has been showed that on the foundation of the rule of law lies the idea of rationalisation of the law system and the development of its efficiency.[17]

The Rule of Law has been defined as the condition in which the State that takes the form of representative democracy, organised on the basis of the principle of separation of powers in the state, a separation that implies the independence of the judiciary. In accordance with the rule of law the State aims, through its legislation, to promote the rights and freedoms inherent in human nature and ensures the strict observance of its regulations by all its organs in their entire activity.[18]

The characteristics of the Rule of Law are considered to be: the constitutional regime; popular legitimacy; equality of all people before law and justice; the non-retroactivity of the law; the need for the law to express the sovereign will of the people and the need to adopt it through consecrated procedures; ensuring the supremacy of the Constitution; the institutionalisation and functionality of administrative litigation; the right to defence based on the legal presumption of innocence correlated with the independence and impartiality of the judiciary; the real performance of an authentic democracy; free elections carried out at certain intervals by universal, equal, direct and secret vote; the guarantee of civil rights and freedoms enshrined in the Constitution.[19]

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[16] See: I. Deleanu, *Instituții și proceduri Constituționale*, C.H. Beck Publishing, Bucharest 2006, p. 69.

[17] I. Deleanu, *Instituții și proceduri…*, *op. cit.*, p. 75.

[18] See: T. Drăganu, *Introducere în teoria și practica statului de drept*, Cluj-Napoca, Edit. Dacia, 1992; idem, p. 80.

[19] C. Ionescu, *Tratat de drept constitutional Contemporan*, C.H. Beck Publishing, Bucharest 2008, pp. 640–641.

Some of these characteristics have been categorised as fictions and others as premises or consequences of the Rule of Law, therefore it has been argued that essentially two elements are always present: the relationship between the state and the law and the subordination of the state to the law.[20]

Therefore, the Rule of Law under the Romanian doctrine implies: the subordination and equality of all people to the law; a democratic regime that is opposite of absolutism and totalitarianism, as the rule of law is incompatible with such undemocratic political regimes; establishing and guaranteeing fundamental rights and freedoms and a coherent and properly ranked legal order that implies the legality principle, the respect of the constitution and the independence and impartiality of the judiciary.[21]

The Romanian legal system underwent a series of transformations as the communist regime collapsed, and all of them were in the spirit of the enhancement of the Rule of Law principle. More recently a series of alterations of the legislation regarding the judiciary took place and the question of the independence of the judiciary as part of the rule of law was raised. Several bodies, including the Venice Commission the CJEU and the Constitutional Court, expressed opinions.

The Venice Commission maintained that the reform of the "Justice Laws" of Romania led by the Ministry of Justice had the aim to enhance the quality of the laws and ensure legal certainty and coherence in Romania's national legal framework with respect to the judiciary. It recorded that the Government has introduced a memorandum on 20 January 2021, setting out a timetable for the adoption of "essential legal provisions aimed at consolidating the organisation and functioning of the judiciary". To that end, the Government proposed two steps, the first of which was to approve the draft law for dismantling the Section for the Investigation of Offences committed within the Judiciary (a special branch of the General Prosecutor's Office that investigated crimes perpetrated by the Judiciary), and the second was to adopt three draft laws, one on

[20] I. Deleanu, *Instituții și procedure…*, *op. cit.*, p. 81.
[21] Idem, pp. 83–85.

the status of judges, another on judicial organisation and the last one on the Superior Council of Magistracy. In its delivered opinion the Commission welcomed the Romanian authorities' intention to reform the judiciary and to restore the competence of the specialised prosecutors' offices, such as the DNA and DIICOT and the dismantling of the Section for the Investigation of Offences committed within the Judiciary. Furthermore, although it encouraged the reform, it argued that some of the proposals were incongruent with the rule of law, for instance introducing a new type of inviolability for judges and prosecutors that goes far beyond functional immunity. Also, a new competence of the Superior Council of Magistracy to decide on actions in criminal matters against judges and prosecutors was criticised, as criminal proceedings that fall outside the remit of functional immunity should not fall within the competence of the SCM and should be brought directly before the courts of law, without the SCM's prior screening.[22]

With respect to the creation of the Section for the Investigation of Offences committed within the Judiciary, the Romanian Constitutional Court noted in its Decision No. 33 of 23 January 2018 that the objective sought was "to establish a specialised structure with a determined investigative purpose and constitutes a legal guarantee of the principle of the independence of the judiciary, under the aspect of its individual component, the independence of the judge […]." The Constitutional Court, however, also noted "that the rules on the jurisdiction of the courts competent to hear criminal cases concerning judges and prosecutors remain unchanged […]." It also stated that "the establishment of special jurisdiction rules regarding a certain category of persons is not an element of novelty in the current criminal procedural framework" and that it does not infringe the principle of equality of rights under the ECHR (the Court referred to military courts as an example) nor the right to

[22] See: European Commission for Democracy Through Law (Venice Commission): Opinion on the draft law for dismantling the section for the investigation of offences committed within the judiciary, pp. 3, 14–15, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)019-e#topOfPage [access: 14.10.2023].

access to justice. Hence, the Constitutional Court of Romania did not oppose the creation of the specialised structure as such.[23]

On 18 May 2021, the Court of Justice of the European Union rendered a Preliminary Ruling (C-83/19) with respect to the question of whether "national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to investigate offences committed by judges and prosecutors is compatible with EU law". The CJEU explained that in order to be compatible with EU law, the legislation creating the Section:

> *must be justified by objective and verifiable requirements relating to the sound administration of justice and must* […] *provide the necessary guarantees ensuring that those criminal proceedings cannot be used as a system of political control over the activity of those judges and prosecutors and fully safeguard the rights enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.*

For the CJEU, the legislation would infringe the requirements of Article 19(1), second subparagraph of the Treaty on European Union (TEU) as well as Romania's specific obligations under Decision No. 2006/928 (the MCV) in relation to the fight against corruption if it were to have the effect of exposing judges and prosecutors dealing with corruption cases to any direct or indirect influence of the legislature or executive liable to have an effect on their decisions. The CJEU, while identifying a number of elements in its judgment which would cast doubt on whether the national legislation in question complies with the above-mentioned conditions which are necessary to ensure its compatibility with EU law, concluded that it is ultimately for the referring courts to rule on that matter, taking into account all the relevant factors.[24]

On 8 June 2021, the Constitutional Court of Romania rendered Decision No. 390 of 8 June 2021 following the CJEU's judgment in which it argued that the regulation providing for the establishment

[23] Idem, p. 4.
[24] Idem.

of the Judiciary Crime Investigation Section is an option of the national legislature, in accordance with the constitutional provisions contained in Article 1(3) on the rule of law and Article 21(1) and (3) on free access to justice, the right to a fair trial and the resolution of cases within a reasonable time and, implicitly, in accordance with the provisions of Articles 2 and 19(1) TEU, thereby setting out that it is for the legislature, i.e., Parliament, to set up (and dismantle) structures such as the SIOJ. The Court further referred to the importance of the rule of law notably of legal certainty and the role of national courts in maintaining it:

> *in so far as certain courts disapply national provisions of their own motion which they consider to be contrary to European law while others apply the same national rules, considering them to be in compliance with the European law, the standard of predictability of the rule would be severely affected, which would entail a serious legal uncertainty and hence the violation of the rule of law principle.*[25]

The rule of law principle was also invoked in a series of other decisions of the CCR, the most notable of them being Decision No. 63 from 8 February 2017 regarding requests for the resolution of legal conflicts of a constitutional nature between the executive authority – the Government of Romania, on the one hand, and the legislative authority – the Parliament of Romania, on the other hand, as well as between the executive authority – the Government of Romania, on the one hand, and the judicial authority – the Superior Council of the Magistracy, on the other hand, entered by the President of the Superior Council of the Magistracy, respectively by the President of Romania.

In this decision the Constitutional Court underlined the separation of powers as the premise of the Rule of Law stating that traditionally, constitutional doctrine recognises three powers in the state: the legislative power, which creates and amends the law, the executive power, which executes and enforces the law, and the

[25] Idem, p. 5.

judicial power, which interprets and applies the law. The rule of law requires that these powers exercise their prerogatives independently of each other, as their functions must be distinct. In other words, those who make the law must not be involved in enforcing it; those who enforce it must not be involved in creating or interpreting it; and those who interpret and apply the law must not be involved in creating or changing it. Thus, by virtue of the principle of separation of powers, enshrined in Article 1 paragraph 4 of the Constitution, as well as the provisions of Article 61 paragraph 1, the Parliament and, by legislative delegation, under the conditions of Article 115 of Constitution, the Government has the power to establish, modify and repeal legal norms of general application. The courts, the Public Ministry and the Superior Council of Magistracy, components of the judicial authority by virtue of Chapter VI, of Title III of the Constitution of Romania, have the constitutional mission to do justice, inter alia to resolve, by applying the law, disputes between legal subjects regarding the existence, extent and exercise of their subjective rights, to represent the general interest of society and to defend the legal order, in judicial activity, without having any role in the activity of drafting normative acts, through participation in the legislative procedure. The Court established that for the judicial authority, the proper conduct in accordance with the Constitution is evident from the above, namely the exercise of the powers established by law in accordance with the constitutional provisions relating to the separation of powers in the state and, therefore, refraining from any action that would have the effect of subrogation in the attributions of another public authority, given also the obligation of reserve that exists in respect to magistrates.[26]

[26] See: paragraphs 109–111 of the Romanian Constitutional Court (CCR), Decision No. 63/8.02.2017, https://www.ccr.ro/wp-content/uploads/2020/10/Decizie_63_2017.pdf [access: 14.10.2023].

1.3. The Specific Issue Regarding CJEU Decisions and the Rule of Law

1.3.1. CONTEXT

In 2014, Romania adopted the New Romanian Criminal Procedure Code and the New Criminal Code that entered in effect on the 1 February 2014. Both in the jurisprudence and the doctrine there were a series of critical analysis, as any new legislation tends to manifest imperfections immediately after being put in effect. Such critical points of view are, in our opinion, more than welcome, as they contribute to the constant improvement of law.

The Romanian Constitutional Court has taken alongside the Romanian High Court of Cassation the leading role in identifying imperfections of the legislation and ruled upon several aspects, both in respect to the Criminal Procedure Code and the Criminal Code. Two of the Decisions issued by the Romanian Constitutional Court created waves within the judicial system and attracted the attention of the Court of Justice of the European Union.

The first one, Decision No. 51/16.02.2016, was adopted in relation to interception of communications done by Romanian Intelligence Service. According to the Romanian legislation (Article 142.1 NCPC), the prosecutor executes the technical supervision (interception of communications) or may order that it be carried out by the criminal investigation body or by specialised workers from the police or other specialised state bodies. In practice, the prosecutor obtained the warrant for the interception from the judge and then instructed the Romanian Secret Service to execute that warrant. The Romanian Intelligence Service was put in the position to intercept all communications of the designated target, select relevant communications and perform the operation for transcribing the content of the communication in a minute that was forwarded to the prosecutor. Furthermore, an inter-institutional cooperation protocol was signed between the Ministry of Justice, the Prosecutor's Office and the Romanian Intelligence Service, although within the Office there was a technical service that could have operated and

that could have ensured technical supervision of the interception of communications.

Through its decision, the Court noted that the legislator included, in the content of Article 142 paragraph 1 of the Criminal Procedure Code, in addition to the prosecutor, the criminal investigation body and specialised workers from the police and other specialised state bodies. As these specialised state bodies were not defined either expressly or indirectly in the Criminal Procedure Code, and as the criticised norm did not provide for their specific field of activity, the Court found the phrase "or other specialised organs of the state" to be unconstitutional, as it lacked clarity, precision and predictability, not allowing the subjects to understand who these organs, capable of carrying out measures with a high degree of intrusion in the private life of people, are.[27]

To reach this conclusion, The Court further noted that according to special regulations,[28] the Romanian Intelligence Service has powers exclusively in the field of national security, not having criminal investigation powers according to Article 13 of Law No. 14/1992. It also considered that within the Romanian legal system there are other services with attributions in the field of national security as well as a multitude of specialised state bodies with attributions in various fields, such as, for example, the National Environmental Guard, the Forest Guards, the National Authority for Consumer Protection, the State Inspectorate for Construction, the Romanian Competition Authority, and the Financial Supervision Authority, all of them subject to be qualified as 'other specialised organs of the state', but none of which have criminal investigation powers.

As a consequence of establishing the unconstitutionality of the text, every interception of communications executed by the Romanian Intelligence Service was to be regarded as void and subsequently excluded. The Constitutional Court showed in this sense,

[27] Romanian Constitutional Court Decision No. 51/16.02.2016, paragraph 38.

[28] Articles 1 and 2 of Law No. 14/1992 regarding the organization and functioning of the Romanian Intelligence Service and Articles 6 and 8 of Law No. 51/1991 regarding the national security of Romania.

that by Decision No. 383 of 27 May 2015,[29] the Constitutional Court found that the criminal procedural law conceptually delimits the three notions: evidence, means of evidence and evidentiary procedure. Although, often, in the current legal language, the notion of evidence, in a broad sense, includes both the evidence itself and the means of evidence, from a procedural technical aspect, the two notions have distinct contents and meanings. Thus, the evidence consists of elements of fact, while the means of evidence are legal methods used to prove the elements of fact. The difference between the means of evidence and the evidentiary procedures, notions in an etiological relationship, was also emphasised. For example, the statements of the suspect or the defendant, the statements of the injured person, the civil party or the civilly responsible party, witness statements and expert statements are means of evidence obtained by hearing these persons or by auxiliary evidentiary procedures, such as confrontation or video conference; documents and material, as means of proof, can be obtained through evidentiary procedures such as search, requisition of objects and documents, investigation of the crime scene, reconstitution of the crime, delivery and search of postal items; expert reports, as means of evidence, are obtained through expertise, as evidentiary procedures; and the minutes, as means of evidence, are obtained through evidentiary procedures such as identification of persons and objects, special methods of surveillance or search, fingerprinting of the suspect, the defendant or other persons or the use of undercover investigators, those with real identity or collaborators; the photograph, as means of evidence, is obtained through the evidentiary process of photography.

The Court further showed that evidence obtained illegally through illegal means of evidence or evidentiary procedure is sanctioned implicitly by the provisions of Article 102 paragraph 3 of the Criminal Procedure Code,[30] with absolute or relative nullity,

[29] Published in the Official Gazette of Romania, Part I, No. 535/27.07.2015, paragraph 20.

[30] The article reads: "The nullity of the act by which the administration of evidence was ordered or authorized or by which it was administered determines the exclusion of the evidence, as well as the physical removal from the case file of the evidence corresponding to the excluded evidence".

depending on the nature of the illegality. This sanction implies that such evidence cannot be used in the criminal process.[31]

These arguments led the Court to conclude on one hand that the minutes drawn up by the prosecutor or the criminal investigation body, in which the results of the performed technical surveillance activities are transcribed, constitute a means of evidence. On the other hand, taking into account the reasoning in the above-mentioned Decision No. 383, the Court found that the illegality of the ordering, authorisation, recording or executing the interception of communications as an evidentiary procedure sanctioned with absolute or relative nullity if done in violation of the legal conditions provided for in Articles 138–146 of the Code of Criminal Procedure, including those related to the bodies empowered to execute the supervision mandate, has the effect of the nullity of the evidence thus obtained and, consequently, the impossibility of using them in the criminal process, according to Article 102 paragraph 3 of the Criminal Procedure Code.[32]

The Court argued that the acts performed by the bodies empowered to execute the interception of communication represents evidentiary procedures that form the basis of the record of the technical surveillance activity, which constitutes a means of proof. For these reasons, the bodies that can participate in their realisation are only the criminal investigation bodies listed in Article 55 paragraph 1 of the Code of Criminal Procedure, respectively the prosecutor, the criminal investigation bodies of the judicial police and the special criminal investigation bodies,[33] so therefore any interception of communications or procedural acts performed within this evidentiary procedure by the Romanian Intelligence Service cannot be used in criminal cases and must be excluded.

The second one, Decision RCC 297/2018, related to the statute of limitations in respect to criminal liability. The Constitutional Court

[31] Romanian Constitutional Court Decision No. 383/27.05.2015, paragraph 22, https://legislatie.just.ro/Public/DetaliiDocumentAfis/169843 [access: 14.10.2023].
[32] Romanian Constitutional Court Decision No. 51/16.02.2016, paragraph 32, https://legislatie.just.ro/Public/DetaliiDocumentAfis/176576 [access: 14.10.2023].
[33] Romanian Constitutional Court Decision No. 51/16.02.2016, paragraph 34, https://legislatie.just.ro/Public/DetaliiDocumentAfis/176576 [access: 14.10.2023].

took into consideration the constitutionality of the provision of Article 155 paragraph 1 of the Criminal Code that stipulates, "The course of the prescriptive period of criminal liability is interrupted by the fulfilment of any procedural act". The Court showed that unlike the previous regulation, which provided for the interruption of the period only as a result of the completion of a procedural act that had to be communicated, according to the law, to the accused or the defendant, the provisions of Article 155 paragraph 1 of the Criminal Code in force provide for the interruption of the prescriptive period of criminal liability upon the execution of any procedural act, regardless of its nature.[34]

The Court held earlier that the statute of limitations represents the time interval in which the judicial bodies can exercise their right to hold accountable criminally responsible persons who commit crimes and to apply punishments for the committed acts. Therefore, the fulfilment of this term has upon the judicial bodies the effect of forfeiting the previously mentioned right.[35] It further noted that the legislator expanded the number of causes that interrupt the statute of limitations, with the consequence of restricting the incidence of this institution. That being the case, the issuance of procedural documents such as subpoenas addressed to some participants in the criminal process, the various minutes concluded by the criminal investigation bodies or the rulings that refer to the competence of the criminal investigation body (acts that must not be communicated to the suspect/accused), produced the interruptive effect provided by Article 155 of the Criminal Code.[36]

The Court showed that as the statute of limitations is an institution of substantial criminal law, the legal provisions regulating the prescriptive periods of criminal liability and the manner of their

[34] Romanian Constitutional Court Decision No. 297/26.04.2018, paragraph 19, https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_2972018.pdf [access: 14.10.2023].

[35] Romanian Constitutional Court Decision No. 443/22.06.2017, https://legislatie.just.ro/Public/DetaliiDocumentAfis/194211 [access: 14.10.2023].

[36] Romanian Constitutional Court Decision No. 297/26.04.2018, paragraph 21, https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_2972018.pdf [access: 14.10.2023].

application are of considerable importance, both for the activity of the judicial bodies and for people who commit crimes. There is an obvious need for predictability regarding the effects of the provisions of Article 155 upon the person who committed an act prescribed by the criminal law. This includes ensuring the possibility for him to know the aspect of the intervention of a cause that interrupts the course of prescription and the beginning of a new period of prescription.[37]

The Court found the previous legislative solution that provided for the interruption of the prescription of criminal liability only by an act which, according to the law, had to be communicated, met the conditions of predictability imposed by the constitutional provisions and therefore stated that the legislative solution that provides for the interruption of the criminal liability limitation period by fulfilling "any procedural act in question", from the provisions of Article 155 paragraph 1 of the Criminal Code, was unconstitutional.

Under Article 147 paragraph 1 of the Romanian Constitution,[38] the legislator had the obligation to intervene, but Parliament chose to disregard the provisions of Article 147 of the Constitution, ignoring the mandatory effects of Decision No. 297 of 26 April 2018. Through a subsequent decision (Decision No. 358/26.05.2022), the Constitutional Court ruled that the consequence of this inactivity was the creation of a more serious vice of unconstitutionality and appreciated that subsequent to the 2018 Decision the law did not provide for any case of interruption of the criminal liability limitation period. It also stated that for restoring the state of constitutionality, it is necessary for the legislator to clarify and detail the provisions

[37] Romanian Constitutional Court Decision No. 297/26.04.2018, paragraph 28.

[38] That stipulates: The provisions of the laws and ordinances in force, as well as those of the regulations, found to be unconstitutional, cease their legal effects 45 days after the publication of the decision of the Constitutional Court if, during this interval, the Parliament or the Government, as the case may be, does not correlate these provisions with the provisions of the Constitution. During this period, the provisions found to be unconstitutional are suspended.

relating to the statute of limitations, in the spirit of what is stated in the considerations of the previously mentioned decision.[39]

1.3.2. RULINGS OF THE CJEU

Within the judiciary system, some Courts raised the problem whether or not to apply these Romanian Constitutional Court rulings, as the Romanian Intelligence Service was instrumental in a series of high-profile cases, and under the Romanian law all evidence derived from the excluded interception must also be excluded. Furthermore, if an interruption of the statute of limitations in respect to an act that was not communicated to the defendant could not be taken into consideration, most of the crimes could no longer be pursued.

But the problem of the Courts that wanted to ignore these rulings was that not abiding CCR decisions constitutes a disciplinary offence for the judge sanctioned even with the exclusion of the judge from the judicial body. So, they addressed the CJUE with the following questions in respect to the first Decision of the Constitutional Court:

1. Is Decision No. 2006/928 and the reports drawn up on the basis of that decision binding on Romania?
2. Must Article 19(1) TEU, Article 325(1) TFEU and Article 4 of Directive (2017/1371), adopted pursuant to Article 83(2) TFEU, be interpreted as precluding the adoption of a decision by a body outside the judicial system, the (*Curtea Constituțională* (Constitutional Court)), which requires re-examination of corruption cases decided within a specific period, and which are at the appeal stage, on grounds of failure to establish, within the supreme court, panels seized of the cases which specialise in that field, also recognising the speciality of the judges of which they were composed?
3. Must Article 2 TEU and (the second paragraph of) Article 47 of the (Charter) be interpreted as precluding a body outside the

[39] Romanian Constitutional Court Decision No. 358/26.05.2022, paragraphs 75–76, https://www.ccr.ro/wpcontent/uploads/2022/06/Decizie_358_2022.pdf [access: 14.10.2023].

judicial system from declaring unlawful the composition of the panel seized of the case of a chamber of the supreme court (panel composed of judges in office who, at the time of their promotion, satisfied, inter alia, the specialisation requirement laid down for promotion to the supreme court)?

4. Must the primacy of Europe Union law be interpreted as permitting a national court to disapply a decision of the constitutional court delivered in a case relating to a constitutional dispute, which is binding under national law?

Additionally, with the following 3 questions in respect to the second Decision cited above:

1. Should Article 2 TEU, the second subparagraph of Article 19(1) TEU and Article 4(3) TEU, read in conjunction with Article 325(1) TFEU, Article 2(1) of the PFI Convention, Articles 2 and 12 of the PFI Directive and Directive (2006/112), with reference to the principle of effective and dissuasive penalties in cases of serious fraud affecting the financial interests of the European Union, and applying (Decision No. 2006/928), with reference to the last sentence of Article 49(1) of the Charter, be interpreted as precluding a legal situation, such as that at issue in the main proceedings, in which the convicted appellants seek, by means of an extraordinary appeal, to set aside a final judgment in criminal proceedings and request the application of the principle of the more lenient criminal law, which they allege was applicable in the course of the substantive proceedings and which would have entailed a shorter limitation period that would have expired before the case was finally concluded, but which was revealed only subsequently, by a decision of the national Constitutional Court which declared unconstitutional legislation on interrupting the limitation period for criminal liability (judgment No. 358/2022 of the Constitutional Court), on the ground that the legislature had failed to act to bring the legislation in question into line with another decision of the same Constitutional Court delivered four years earlier (judgment No. 297/2018 of the Constitutional Court) – by which time the case-law of the ordinary courts formed in application of (that judgment No. 297/2018) had already established that the

legislation in question was still in force, in the form understood as a result of (that judgment No. 297/2018) – with the practical consequence that the limitation period for all the offences in relation to which no final conviction had been handed down prior to (judgment No. 297/2018 of the Constitutional Court) is reduced by half and the criminal proceedings against the defendants in question are consequently discontinued?

2. Should Article 2 TEU, on the values of the rule of law and respect for human rights in a society in which justice prevails, and Article 4(3) TEU, on the principle of sincere cooperation between the European Union and the Member States, applying (Decision No. 2006/928) as regards the commitment to ensure the efficiency of the Romanian judicial system, with reference to the last sentence of Article 49(1) of the (Charter), which enshrines the principle of the more lenient criminal law, be interpreted, in relation to the national judicial system as a whole, as precluding a legal situation, such as that at issue in the main proceedings, in which the convicted appellants seek, by means of an extraordinary appeal, to set aside a final judgment in criminal proceedings and request the application of the principle of the more lenient criminal law, which they allege was applicable in the course of the substantive proceedings and which would have entailed a shorter limitation period that would have expired before the case was finally concluded, but which was revealed only subsequently, by a decision of the national Constitutional Court which declared unconstitutional legislation on interrupting the limitation period for criminal liability (judgment No. 358/2022 of the Constitutional Court), on the ground that the legislature had failed to act to bring the legislation in question into line with another decision of the same Constitutional Court delivered four years earlier (judgment No. 297/2018 of the Constitutional Court) – by which time the case-law of the ordinary courts formed in application of (that judgment No. 297/2018) had already established that the legislation in question was still in force, in the form understood as a result of (that judgment No. 297/2018) – with the practical consequence that the limitation period for all the offences in relation to which no final conviction had been handed down

prior to (judgment No. 297/2018 of the Constitutional Court) is reduced by half and the criminal proceedings against the defendants in question are consequently discontinued?

3. If (the first and second questions are answered in the affirmative), and only if it is impossible to provide an interpretation in conformity with EU law, is the principle of the primacy of EU law to be interpreted as precluding national legislation or a national practice pursuant to which the ordinary national courts are bound by decisions of the national Constitutional Court and binding decisions of the national supreme court and may not, for that reason and at the risk of committing a disciplinary offence, of their own motion disapply the case-law resulting from those decisions, even if, in light of a judgment of the Court of Justice, they take the view that that case-law is contrary to Article 2 TEU, the second subparagraph of Article 19(1) TEU and Article 4(3) TEU, read in conjunction with Article 325(1) TFEU, in application of (Decision No. 2006/928), with reference to the last sentence of Article 49(1) of the Charter, as in the situation in the main proceedings?

Court of Justice of the European Union ruled upon the first four questions through Decision C-357/2019. It stated that the compliance with the values referred to in Article 2 TEU constitutes a precondition for the accession to the European Union of any European State applying to become an EU member, and it is in that context that the CVM was established by Decision 2006/928 in order to ensure that the value of the rule of law is complied with in Romania.[40] Therefore, Commission Decision No. 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption is, as long as it has not been repealed, binding in its entirety on Romania. The benchmarks in the annex to that decision are intended to ensure that Romania complies with the value of the rule of law, set out in

[40] See: CJEU Decision C-357/2019 of 21 December 2021, paragraph 161, https://curia.europa.eu/juris/document/document.jsf;jsessionid=4EA3B84B187331EEA5BF8D2B54D4A161?text=&docid=251504&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=600458 [access: 14.10.2023].

Article 2 TEU, and are binding on it, to the effect that Romania is required to take the appropriate measures to meet those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.

The court also added that Article 325(1) TFEU, read in conjunction with Article 2 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995, and Decision No. 2006/928 are to be interpreted as precluding national rules or a national practice under which judgments in matters of corruption and value added tax (VAT) fraud, which were not delivered, at first instance, by panels specialised in such matters or, on appeal, by panels all the members of which were selected by drawing lots, are rendered absolutely null and void, such that the cases of corruption and VAT fraud concerned must, as the case may be, further to an extraordinary appeal against final judgments, re-examined at first and/or second instance, where the application of those national rules or that national practice is capable of giving rise to a systemic risk of acts constituting serious fraud affecting the European Union's financial interests or corruption in general going unpunished. The obligation to ensure that such offences are subject to criminal penalties that are effective and act as a deterrent does not exempt the referring court from verifying the necessary observance of the fundamental rights guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union, but does not allow that court to apply a national standard of protection of fundamental rights entailing such a systemic risk of impunity.[41]

Thirdly, considering the need for judiciary independence as part of the rule of law, the Court argued that Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision No. 2006/928 are to be interpreted as not precluding national rules or a national practice under which the decisions of the national constitutional court are binding on the ordinary courts, provided that the national

[41] Idem.

law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, those provisions of the EU Treaty and that decision are to be interpreted as precluding national rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability.[42]

Last but not least, the Court found that the principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision No. 2006/928.[43]

In relation to the other 3 questions the Court of Justice of the European Union ruled upon them through Decision C-107/23.[44] In its decision the Court stated that Article 325(1) TFEU and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the protection of the European Communities' financial interests must be interpreted as meaning that the courts of a Member State are not required to disapply the judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if, as a consequence of those judgments, a considerable number

[42] Idem.

[43] Idem.

[44] See: CJEU Decision C-107/23 of 24 July 2023, https://curia.europa.eu/juris/document/document.jsf?text=&docid=275761&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=600976 [access: 14.10.2023].

of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability.

However, those provisions of EU law must be interpreted as meaning that the courts of that Member State are required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*) which makes it possible, including in the context of appeals brought against final judgments, to call into question the interruption of the limitation period for criminal liability in such cases by procedural acts which took place before such a finding of invalidity.

The principle of the primacy of EU law must be interpreted as precluding national legislation or a national practice under which the ordinary national courts of a Member State are bound by the decisions of the constitutional court and by those of the supreme court of that Member State and cannot, for that reason and at the risk of incurring the disciplinary liability of the judges concerned, disapply of their own motion the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to provisions of EU law having direct effect.

1.3.3. CONSIDERATIONS REGARDING THE ABOVE-MENTIONED RULINGS

In essence, through these decisions CJEU identified that the existence of a systemic risk of impunity is incompatible with the requirements of Article 325(1) TFEU and Article 2(1) of the PFI Convention,[45] in respect to serious offences such as VAT fraud and corruption.[46] It further noted that the systemic risk that serious fraud affecting the financial interests of the European Union will

[45] See: CJEU Decision C-107/23, paragraph 92.
[46] CJEU Decision C-357/2019, paragraph 193.

escape any criminal penalty constitutes a breach of Article 325(1) TFEU and Article 2(1) of the PFI Convention.[47]

We consider these decisions and the arguments regarding the need to protect the interests of the EU as they were presented to be subject to serious criticism under the Rule of Law principle. We think that the Court has set a dangerous precedent, although even these decisions refer to the Rule of law and at least in part made a correct application of this principle.

We argue that the criminal law, including a decision of the Romanian Constitutional Court that amends it or of the High Court of Cassation and Justice that interprets it, should not be applied or dismissed on the premises of its content or the interest affected.

In this respect, under the principle of the primacy of EU Law,[48] we can accept that a specific EU interest can overcome any national interest. But the question put in front of the CJEU was never in respect to the national interest, but to a particular one, the interest of the person that committed an act of a criminal nature prescribed by the criminal law.

Therefore, the antithesis brought before the court consisted of a conflict between the EU interest ('financial interests of the European Union') and a particular interest of the individual accused or condemned for committing a crime against these interests. This latter interest refers to the proper applying of the legality, *mitior lex* and foreseeability principles, all recognised as general human rights, including within the jurisprudence of the CJUE. *Ergo*, the dispute is between the EU interest and ultimately the respect for fundamental human rights.

In this antithesis, only one interest could prevail and it is obvious it's not the EU one. The EU, just as any other state form, is subject to discipline its conduct according to the need to protect human rights. If the standard for the respect of human rights in general is

[47] CJEU Decision C-107/23, paragraph 121. The first decision also referred to offences of fraud affecting the financial interests of the European Union and offences of corruption in general.

[48] For an overview of this principal see: F. Gyula, *Drept Instituțional Comunitar*, Cluj-Napoca 2004, pp. 64–94.

set by national authorities, this standard becomes mandatory for all EU entities, including the judiciary. Although the substantial issue was avoided, we cannot see who a judge or any person that graduated Law school can accept that, for instance, an interception of communication could be done by the National Forest Guard, in the lack of any such provisions within the law, and still say that human rights were respected.

Not abiding human rights leads to arbitrariness, and selecting the way a general criminal law provision is applied in relation to a state interest (including EU interest) sets us back at least 80 years, to the Stalinist era.

Therefore, we argue that no law provision can be applied or disregarded depending on a particular interest, as such an application/disregard would contradict the Rule of Law principle in respect to equality before the law as described above.

A further argument is that limits on the power of interpretation of CJEU must be enforced as, if the power of interpretation is unrestricted, we are at the mercy of a judicial oligarchy, a situation no more compatible with democratic notions than rule by a dictator or by a triumvirate. We may all agree with Judge Learned Hand that if we have to choose between rule by "a bevy of Platonic Guardians", no matter how wise and well-intentioned, and rule by elected representatives of the people, we should choose the latter.[49]

The ECHR held inter alia that:

> *the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism.*[50]

[49] P.G. Kauper, *The Supreme Court…*, *op. cit.*, p. 541, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=6436&context=mlr [access: 14.10.2023].

[50] ECHR, Decision De Haes and Gijsels v. Belgium from 24 February 1997, https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58015&filename=001-58015.pdf [access: 14.10.2023].

The Romanian Constitutional Court also noted that:

> *the defence of the independence of the judiciary can only be achieved within the framework provided by Constitution, so with respect for all the fundamental rights and freedoms of the person. The protection of this constitutional value cannot affect the existence of other rights and freedoms, exercised in good faith, within the limits established by the constitutional norms.*[51]

Therefore, setting such limits would not affect the independence of the judiciary if those limits are imposed by the need to respect fundamental human rights.

1.4. Conclusions

The need to respect human rights outweighs any state interest, as the opposite would open the door to arbitrariness.

The CJEU argued that national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.[52] Under the ECHR jurisprudence, such optics would lead to the conviction of the State, as the Court has repeatedly stated, that if the national legislation provides for a better standard of protection than the Convention, States are bound by the higher national standards and the Court would analyse the relevant conduct of the State in the light of those higher national standards.

The dispute presented to the CJEU was between the EU interest and ultimately the respect for fundamental human rights, not

[51] See: paragraph 111 of the Romanian Constitutional Court (CCR), Decision 63 from 8 February 2017, https://www.ccr.ro/wp-content/uploads/2020/10/Decizie_632017.pdf [access: 14.10.2023].

[52] CJEU Decision C-107/23, paragraph 110.

between the EU interest and a national interest, and as such the respect for fundamental human rights must prevail.

The CJEU should have set its own limits in responding to the questions addressed and such limits on the power of interpretation of CJEU would not affect the independence of this Court if those limits are imposed by the need to respect fundamental human rights.

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Chapter 2. Access to Justice on Transitive Conditions: The Ukrainian Perspective

2.1. Introduction

Ensuring access to justice is characterised not only by continuous reform of the judicial system but, to a greater extent, by the challenges of our time, demonstrating its new facets and forms. This necessitates an examination of access to justice in contemporary conditions, which transforms in the direction of ensuring the full spectrum of human rights and addressing risks. The development of the information society, processes of globalisation and individualisation influence the formation of modern trends of a comprehensive nature. This interdependence is crucial for societies to defend against modern threats and make strategic decisions to ensure not only justice but also peace and security. It is also justified by the consequences of large-scale armed aggression and numerous crimes of aggression committed on the territory of Ukraine.

The events that are occurring emphasise the issues of ensuring the sustainability and reality of the implementation of justice. Essentially, a new stage of international criminal justice is forming, related to the activation of existing mechanisms for human rights protection and the establishment of a modern international judicial body with special jurisdiction, the Special Tribunal on the Crime of Aggression against Ukraine.

At the same time, all these factors affect the formation of the modern concept of access to justice. The main idea of this concept is the elimination or, at least, the reduction of organisational, financial,

informational, and other obstacles in the realisation of the right to access justice, as well as the application of modern forms and means to make access to justice a reality for everyone. This determines the search for scientifically substantiated answers to questions about normative regulation and effective resolution of legal situations in this area.

In the domestic legal doctrine, access to justice is mainly understood as the possibility of using official judicial means. Modern legal doctrine of foreign countries includes both judicial and extrajudicial forms of realising the right to access to justice in the concept of "access to justice", including constitutional complaints, free legal aid, e-justice, transitional justice, and various alternative dispute resolution methods. Such a systemic understanding is a prerequisite for the effective provision of the right to access to justice in Ukraine under transitional conditions.

The issue of ensuring access to justice has received attention from many legal scholars. However, the majority of scholarly research has a sectoral character in which theoretical aspects of access to justice are illuminated fragmentarily.

2.2. The Current State of Research on Access to Justice

The formation of a modern approach to the right of access to justice began in the second half of the 20th century. The consolidation of the concept of "access to justice" as a fundamental concept reflecting the provision of a real opportunity to seek protection of one's rights, is associated with research conducted by scholars of the Italian school of law on the provision and legal regulation of access to justice. In the 1970s, under the auspices of UNESCO, the Florentine Project took place, aimed at substantiating and shaping a qualitatively new, modern philosophy of justice. Within this project, a comprehensive theoretical concept of accessibility to justice was developed based on reports from representatives of European countries. These reports demonstrated general trends in the development of justice worldwide, highlighted existing problems, and proposed solutions.

It is worth noting that the reports were not limited to the framework of procedural law alone. An attempt was made to examine the conceptual features of justice using specific countries as examples and to compare these features with general trends in the development of justice in the modern world. The ideological inspiration behind the project was Mauro Cappelletti, an Italian professor and author of the work "Access to Justice", who emphasised the need to change the theoretical approach to justice and law as a whole.

According to Cappelletti, the category of "access to justice" serves to focus attention on two main goals of the legal system: a system through which people can assert their rights and/or resolve their disputes under the general supervision of the state. Cappelletti argued for a departure from the understanding of "access to justice" that dominated the 18th and 19th centuries, which merely denoted the formal right of the affected party to conduct legal proceedings or defend their claim. In this paradigm, the state remained a passive observer in situations where vulnerable or poor segments of the population practically had no opportunity to protect their rights and interests.

Cappelletti aimed to build a fundamentally new concept of justice, where rights would have real, not just formal, expression. Behind theoretical considerations lay practical orientation: Cappelletti and his like-minded colleagues sought to identify practical barriers and obstacles to access to the court and to justice. Cappelletti's achievement was the examination of the nature of barriers to access to justice. On the one hand, he recognised that certain barriers in accessing the courts should exist; access to the court cannot be chaotic, so the procedure for going to court must be regulated. On the other hand, such barriers should not violate human rights, making it impossible to protect them.

Among such barriers, Cappelletti highlighted organisational, financial (high cost of the procedure for the parties, exceeding the plaintiff's costs over the claim amount if it is small), temporal (long waiting times for case resolution), economic, and administrative obstacles. He also paid significant attention to the inequality of parties. Individuals or organisations with significant financial resources that can be used for legal proceedings have obvious advantages in filing or defending claims. They can afford the legal process and

endure delays associated with legal proceedings. The inequality is evident in the different levels of awareness of their rights and the right to judicial review, primarily affecting financially disadvantaged populations, but not limited to them.

In summary, Mauro Cappelletti and the Florentine Project aimed to develop a comprehensive and practical approach to the concept of access to justice, addressing both the necessity of regulating court procedures and ensuring that barriers do not infringe on individuals' rights. Cappelletti's work laid the groundwork for a new understanding of justice, emphasising its real, rather than formal, expression and focusing on addressing practical barriers to access to justice.

Mauro Cappelletti's achievement was the examination of the nature of barriers to access to justice. On the one hand, he acknowledged that certain barriers in approaching the court should exist. Access to the court cannot be chaotic; hence, the procedure for accessing the court must be regulated. On the other hand, these barriers should not violate human rights, preventing their protection. Among such barriers, Cappelletti identified organisational, financial (high procedural costs for the parties, exceeding the plaintiff's costs over the claim amount, if it is small), temporal (long waiting times for case resolution), economic, and administrative obstacles.[1] The scholar also paid significant attention to the inequality of the parties. Individuals or organisations with substantial financial resources, which can be used for legal proceedings, have obvious advantages in filing or defending lawsuits. Primarily, they can afford the legal process and endure delays associated with legal proceedings. Additionally, they are capable of withstanding delays associated with legal proceedings.

A vivid example in this regard is the dispute between an individual and a large-scale enterprise or the government. In these disputes, the inequality of financial resources, legal preparation, and experience between the parties is evident. Inequality is manifested in varying levels of awareness of their rights and the right to judicial

[1] B.G. Garth, M. Cappelletti, *Access to Justice: The Newest Wave in the World-wide Movement to Make Rights Effective*, "Buffalo Law Review" 1978, Vol. 27, https://www.repository.law.indiana.edu/facpub/1142 [access: 01.08.2023].

review, primarily affecting financially disadvantaged populations, but not limited to them. Furthermore, the accessibility of justice looks different for those who only occasionally encounter the judicial system and, so to speak, for professional litigants. The judicial protection of community interests is also problematic. For instance, if a government project such as dam construction threatens a community, it is futile to expect someone financially capable of suing the government to intervene.

One of the outcomes of the Florentine Project was the "access to justice movement" – a set of measures aimed at ensuring real access to justice. Therefore, since the 1970s, the content of the definition of "access to justice" has undergone broad interpretation due to the widespread adoption of alternative dispute resolution practices and the recognition of the need to provide legal assistance to vulnerable population groups. Thanks to the "access to justice movement", legal science has reconsidered categories such as class actions, the right to free legal aid, and others. The movement had an interdisciplinary nature, allowing its authors to argue that the opportunities for judicial protection are influenced not only by legal but also by social, economic, and, to some extent, political factors.

By the end of the 20th century, the concept of accessibility to justice had definitively transitioned from the theoretical realm to the practical. A notable example was the judicial reforms in the United Kingdom. In the last third of the 20th century, an archaic judicial system was reformed, culminating in the establishment of the Supreme Court (which began operating in 2009). Simultaneously, procedural law underwent reform. In 1994, Lord Harry Woolf, then a member of the House of Lords, was appointed Lord Chancellor to review the existing rules and procedures of the civil courts of England and Wales. In June 1995, Lord Woolf published an interim report outlining the problems of civil procedure in England and Wales and outlined a reform program, which he released in July 1996 as the final report titled "Access to Justice".[2] Within two

[2] L.H. Woolf, *Civil Justice in the United Kingdom*, "The American Journal of Comparative Law" 1997, Vol. 45, Issue 4, pp. 709–736, https://doi.org/10.2307/841013 [access: 01.08.2023].

years, a comprehensive judicial reform was implemented, changing the culture of judicial activities and expanding access to justice, particularly through the establishment of reasonable timeframes for case resolution.

In summary, it should be noted that for a considerable time, the ideas of access to justice did not receive clear theoretical expression; they were intricately linked with other concepts and theoretical perspectives.

The concept of the right to access to justice has a specific goal in legal regulation – to provide every interested party with the opportunity to participate in the dispute resolution process, defending their rights and interests, regardless of economic or other potential obstacles. The key characteristic of this concept is the notion of "access". It is in this form that the right to access to justice has found its codification at the international level: in international treaties, conventions, recommendatory acts, and in the practice of international human rights bodies.

The history of the development of the concept of the right to access to justice indicates that it was formulated after the adoption of universal and regional human rights conventions and was partly developed by the European Court of Human Rights (ECtHR) and partly by foreign scholars under the influence of the ECtHR's practice.

Thus, the "access to justice" movement in the second half of the 20th century influenced the transformation of society and contributed to the improvement of legislation and the development of unified procedural standards for European countries amid a general crisis in the judiciary.

In Soviet legal literature, access to justice was considered within the framework of procedural law as a principle that, according to the definition formulated by V. Semenov (the term's author), represented the state-guaranteed possibility for any person to address the court in the manner established by law for the protection and defence of their rights and interests in the judicial process.[3]

[3] V.M. Semenov, *Demokratycheskye osnovy hrazhdanskoho sudoproyzvodstva v zakonodatelstve y sudebnoi praktyke: uchebnoe posobye*, UrHU, Sverdlovsk 1979, p. 80.

The democratisation of the state and social order in independent Ukraine stimulated domestic scientific developments on this issue.

The contemporary reform of the judicial system, primarily aimed at bringing the court closer to the population and facilitating citizens' access to justice, assigned crucial importance to this matter at all stages of judicial system reform. The study of the essence and content of the accessibility of justice is not entirely new in the domestic legal environment; representatives of general legal theory, philosophy of law, international law, and various branches of law address this issue, finding their aspects of research.

It is worth noting that under contemporary conditions, "access to justice" belongs to legal categories related to both branches of substantive law and procedural law, having an interdisciplinary nature. Furthermore, "access to justice" is defined as an inter-branch constitutional principle – a legal category that guarantees the provision of the right to judicial protection for human rights and citizens.

The issues of forming the domestic mechanism for legal protection of constitutional rights and freedoms of individuals, as well as various aspects of the right to a fair trial in the activities of the Constitutional Court of Ukraine, are analysed by M. Savchyin. The author approaches the problem of the right to a fair trial by:

a) extrapolating empirical experience in securing the right to a fair trial onto the doctrine of constitutionalism and the dynamics of legal protection institutions;
b) determining the interconnection of social values and human rights and fundamental freedoms;
c) analysing the hierarchy of constitutional values and defining the normative nature of human rights and fundamental freedoms;
d) determining the place of human rights and fundamental freedoms in the constitutional structure and their operation.[4]

Savchyin argued for the necessity of introducing a constitutional complaint as a means of legal protection, considering it an integral

[4] M. Savchyn, *Pravo na spravedlyvyi sud i konstytutsiina yurysdyktsiia: okremi aspekty zghidno z syntetychnoiu teoriieiu konstytutsii*, "Visnyk Konstytutsiinoho Sudu Ukrainy" 2013, No. 2, pp. 96–107.

attribute of constitutional statehood and an instrument to ensure the direct effect of constitutional norms. In his opinion, the constitutional complaint would compensate for the shortcomings of the practice of general jurisdiction courts, which may not always take into account the constitutional and legal specifics of individual cases under their consideration. It is worth noting that the institution of a constitutional complaint in Ukraine was introduced during the constitutional and judicial legal reform of 2016.

The series of scientific works by A. Luzhansky is dedicated to the study of the constitutional nature of the right to access to justice and the characterisation of the features of the constitutional-legal mechanism for guaranteeing such a right.[5] The author examines the right to access to justice as a subjective constitutional right.[6] It is noteworthy that the terms "right to access to justice" and "access to justice" are essentially considered synonymous by the author. The researcher emphasises that in the Constitution, legislation of Ukraine, and in the texts of international treaties to which Ukraine is a party, there is no definition of the concept of "access to justice", and various components of it are revealed in the decisions of the European Court of Human Rights (ECtHR), highlighting the need for legislative clarification of such a fundamental legal category. Ensuring access to justice by the state, the author underscores, is a path from declarations to the actual provision of the right to appeal to the court.

Constitutional and legal research on the peculiarities of implementing and realising regional standards of the right to a fair trial within the Ukrainian legal system has become the subject of study by S. Stepanova. The author notes that:

> *for the purpose of improving the mechanism for implementing the constitutional right of a person to access to the court, it is necessary: to simplify procedures for cases that do not pose particular complexity and expand the category of civil*

[5] A.V. Luzhanskyi, *Konstytutsiina pryroda prava na dostup do pravosuddia v Ukraini*, "Aktualni problemy polityky: zb. nauk. pr." 2010, Issue 40, pp. 57–63.

[6] A.V. Luzhanskyi, *Dostup do pravosuddia yak subiektyvne konstytutsiine pravo*, "Visnyk Verkhovnoho Sudu Ukrainy" 2011, No. 1(125), pp. 41–44.

cases that can be considered through simplified procedures; change conditions hindering the initiation of court proceedings; introduce court fees only at the stage of initiating court proceedings and the absence of payment of court costs when exercising procedural rights by the parties; not delay the resolution of staffing issues related to the appointment of judges; increase funding for judicial activities; introduce judicial oversight of the quality of legal services provided by defenders in criminal proceedings; increase state control over the enforcement of judicial decisions; and prevent judges from excessively formalising the requirements established by law.[7]

O. Kaidash and V. Groholsky draw attention to the fact that in recent years, the legislator has adopted regulatory acts regarding the institution of judicial protection of human rights, which are related to expanding the competence of courts in resolving disputes over violations or unlawful restrictions of personal rights, overcoming many artificially created obstacles to effectively carry out this activity.[8]

The issue of access to justice, from the perspective of legal regulation, is primarily its procedural aspect, which involves developed procedural legislation and the practice of its application by courts, making this area the most researched. According to Y. Bityak, the investigation and resolution of the issue of access to justice are directly related to the search for the optimal model of justice in Ukraine. During the preparation for the establishment of administrative justice in Ukraine, he indicated that the following factors could effectively influence the accessibility of administrative justice in the context of the formation of the judicial system in Ukraine: the effective restoration of human rights and legal protection against public authorities; compliance with international legal standards;

[7] S.V. Stepanova, *Yevropeiski standarty prava na spravedlyvyi sud ta yikh implementatsiia u natsionalne zakonodavstvo Ukrainy: konstytutsiino-pravove doslidzhennia: dys. … kand. yuryd. Nauk: 12.00.02*, Uzhhorod 2018, p. 215.

[8] O.Y. Kaidash, V.P. Hrokholskyi, *Do pytannia dostupnosti do pravosuddia hromadian Ukrainy*, "Prykarpatskyi yurydychnyi visnyk" 2018, Vol. 4, Issue 2(23), pp. 30–34.

provision, if necessary, of free legal aid; establishment of a clear procedure for the consideration of administrative disputes; territorial proximity of administrative courts to the population; training of highly qualified professionals for administrative courts; ensuring the enforcement of decisions; implementation of Council of Europe recommendations; expansion of the participation of non-governmental and civil organisations in providing legal assistance in quasi-judicial forms of dispute resolution; simplification of legal procedures; proper financing of administrative courts to ensure their independence.[9] A significant portion of these recommendations has been implemented, demonstrating the practical significance of doctrinal research on the issue of access to justice.

The procedural aspect of access to justice in civil cases as a standard of fair justice has been analysed in the monographic research by N. Sakara. The author explores the historical and conceptual roots of the issue of access to justice and the process of its institutionalisation.[10] Based on the analysis of the institutionalisation of access to justice in Ukrainian legislation, international norms, decisions, and the precedent practice of the ECHR, the researcher argues that:

> *access to justice should be characterised as a polysystemic phenomenon, which includes institutes that: provide real opportunities for citizens to seek court protection of their rights without limiting the scope of justice to a certain circle of cases; create mechanisms for protecting all human rights, including those belonging to the so-called third-generation rights; ensure that the trial procedure will be fair and the restoration of violated rights will be effective; remove financial barriers by exempting certain categories of persons from paying court costs, providing deferral or instalment*

[9] Y. Bytiak, *Stanovlennia ta shliakhy zabezpechennia dostupnosti pravosuddia v administratyvnomu sudochynstvi*, "Visnyk Akademii pravovykh nauk Ukrainy" 2003, No. 1(32), pp. 51–60, http://dspace.nlu.edu.ua/handle/123456789/4720 [access: 10.08.2023].

[10] *Balo-Balytskyi ta inshi proty Ukrainy: sprava YeSPL*, "Zaiava" No. 2987/20, 10 June 2021, https://minjust.gov.ua/m/stattya-6-pravo?na-spravedliviy-sud-420 [access: 10.08.2023].

> *payments; provide the opportunity to use the services of a representative and receive legal assistance.*

Thus, based on the above, it can be concluded that in N. Sakara's concept, "access to justice is a certain standard that reflects the requirements of fair and effective judicial protection, specified in unlimited judicial jurisdiction, proper judicial procedures, reasonable time frames, and unhindered access to the court by any interested party".

Researchers have not overlooked the issue of access to criminal justice. In particular, V. Shybiko attempted to demonstrate that access to justice is an independent principle of criminal procedure in Ukraine, rooted in the general human right to judicial protection. The scholar argues that ensuring the right to access to justice corresponds to the criteria by which the principles of criminal procedure are determined.[11] It's noteworthy that the distinctive nature of human rights intervention in criminal proceedings requires the introduction of legal guarantees, among which the mechanism for real access to justice holds paramount importance.

I. Hlovyuk, in exploring the essence and correlation of the categories "access to the court" and "access to justice", formulates the concept of access to the court in criminal proceedings as:

> *the availability of the possibility of hearing and deciding on the merits of a criminal law and criminal procedural dispute by the court at both the pre-trial (access to judicial control) and judicial (access to justice) stages, while access to justice is understood as ensuring the possibility of hearing a criminal case on its merits at the judicial stages of criminal proceedings.*[12]

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[11] V.P. Shybiko, *Zabezpechennia prava osoby na dostup do pravosuddia u systemi pryntsypiv kryminalnoho protsesu Ukrainy*, "Visnyk Kyivskoho natsionalnoho universytetu imeni Tarasa Shevchenka. Seriia 'Yurydychni nauky'" 2009, Issue 81, pp. 166–169.

[12] I.V. Hloviuk, *Dostup do sudu u kryminalnomu protsesi: problemy teorii*, "Chasopys Akademii advokatury Ukrainy" 2011, No. 2(11), pp. 1–7, http://dspace.onua.edu.ua/bitstream/handle/11300/2450/%20%20%20%20%20%20%20%20%20%20%20%20%20.pdf?sequence=1 [access: 10.08.2023].

I. Mokrytska, characterising the state of accessibility to justice in criminal proceedings, draws attention to factors hindering its reform: non-compliance of the state's modern strategy for judicial reform with universal and regional standards of criminal justice; inconsistency of the content of the right to a fair trial and the right to legal defence; contradictions in the right to legal aid; imperfections in criminal procedural legislation.

Among the main criteria for access to justice in criminal proceedings, the author identifies: ensuring access to justice in line with European and international standards; the priority of human rights and freedoms; accessibility, transparency, and availability of access to the court, criminal proceedings, procedural decisions, procedures for appealing procedural decisions, and procedures for the enforcement of procedural decisions in criminal proceedings; and, the presence of public control at all stages of criminal proceedings.[13]

The essence of access to justice as a general principle of criminal proceedings is the subject of research by both academic scholars and practicing legal professionals. For instance, O. Balatska writes that access to the court encompasses organisational (judicial) and functional elements.

The first group includes the construction of an accessible court system, taking into account their territorial distribution, the selection of qualified individuals for judicial positions, and the organisational support for the functioning of courts, among other aspects. The second group involves the procedure for initiating a case in court, adherence to procedural timelines, the possibility of challenging the actions or inaction of officials, compliance with the procedure for hearing a case, and the enforcement of decisions.[14] Researching these directions remains relevant for further academic investigations. It is worth noting that the legal codification of these

[13] I.Y. Mokrytska, *Dostupnist pravosuddia yak shliakh do zabezpechennia prava na sudovyi zakhyst u kryminalnomu protsesi: naukovo-teoretychnyi aspekt*, "Chasopys Natsionalnoho uniwersytetu. Seriia 'Pravo'" 2015, No. 1(11), Ostrozka akademiia, pp. 1–13, http://lj.oa.edu.ua/articles/2015/n1/15miynta.p [access: 10.08.2023].

[14] O. Balatska, *Dostup do pravosuddia yak zahalna zasada kryminalnoho provadzhennia*, "Pidpryiemnitstvo, Hospodarstvo i Pravo" 2020, No. 2, pp. 262–268.

elements serves as a state guarantee not only for access to the court but also as a guarantee for a fair and impartial judicial review, the primary goal of which is the protection of rights and legitimate interests of individuals.

Therefore, we can assert that enhancing access to justice is a fundamental direction for the effective reform of procedural legislation.

An analysis of current research demonstrates that the majority of domestic scholars view the right to access to justice through the lens of human rights guarantees. Consequently, it can be argued that the right to access to justice, by its nature, serves as a general legal guarantee for the protection of the rights of individuals and citizens in the judicial process.

2.3. Access to Justice: The Interpretation of the ECtHR and the Ukrainian Reality

The concept of "transitivity" is associated with the instability, contradiction, and uncertainty of constant changes, the absence of integrity in the process of societal and institutional renewal. Regarding judicial and legal reform, in Ukraine, it has been ongoing for the third decade and demonstrates all the characteristics typical of a transitive legal system.

The state and the level of human rights protection in transitional societies, including Ukraine, constitute one of their most significant challenges, with complex manifestations on both domestic and international fronts. Specifically, this concerns the unsatisfactory adherence to the rights and freedoms of individuals enshrined in the Constitution of Ukraine. It is envisioned that accessibility to justice serves as a preventive measure against human rights violations and, simultaneously, an effective means of restoring violated rights and freedoms. Consequently, real conditions are created for the full realisation of the rights and freedoms of each individual.

Given the ongoing and not always consistent transition to the rule of law, Ukrainian society requires acculturation to the achievements of developed legal systems and means of ensuring access to justice. Such experience needs to be implemented through the

efforts of both the state authorities and the activities of civil society institutions in Ukraine. It is precisely in the transitional state of society that individuals exhibit the ability to continually formulate new alternatives for the development of the social and legal system.

The right to access to justice is a fundamental human right recognised by the global community and enshrined in international legal instruments such as the Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and others.[15] However, the content of the right to "access to justice" is not fully elaborated at either the international or national level in any regulatory definition. Typically, these legal instruments contain only general principles or specific components related to access to justice.[16]

Resolution 60/147 of the United Nations General Assembly dated 16 December 2005, titled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", considers accessibility as a necessary characteristic of judicial and administrative mechanisms for the protection of human rights. The resolution explicitly emphasises the need to ensure compliance with international obligations arising from both the right to access to justice and the right to a fair and impartial judicial hearing.[17]

The recommendations of the Committee of Ministers of the Council of Europe (CMCE) significantly influence the creation and application of national law. While these recommendations do not possess formal binding force, they serve as sources of "soft law" and

[15] Zahalna deklaratsiia prav liudyny vid 10 hrudnia 1948 r., https://zakon.rada.gov.ua/laws/show/995_015#Text [access: 15.08.2023].

[16] Konventsiia pro zakhyst prav liudyny i osnovopolozhnykh svobod vid 11 lystopada 1950 r., https://zakon.rada.gov.ua/laws/show/995_004#Text [access: 15.08.2023].

[17] Rezoliutsyia Heneralnoi Assambley OON, No. 60/147, Osnovnye pryntsypy y rukovodiashchye polozhenyia, kasaiushchyesia prava na pravovuiu zashchytu y vozmeshchenye ushcherba dlia zhertv hrubykh narushenyi mezhdunarodnykh norm v oblasty prav cheloveka y sereznykh narushenyi mezhdunarodnoho humanytarnoho prava, http://docs.cntd.ru/document/901966889 [access: 15.08.2023].

are considered by member states of the Council of Europe (CoE) as guidelines for the development of legislation and legal practices. A substantial number of such recommendatory acts are specifically dedicated to the governmental efforts aimed at improving access to justice.

Christophe Poirel, the Director of Human Rights at the Directorate General of Human Rights and Rule of Law of the CoE, highlighted during the open hearings of the Committee on Legal Policy of the Verkhovna Rada of Ukraine on the topic "Issues of Ukraine's Compliance with ECtHR Judgments" (organised with the support of the CoE project "Further Support for Ukraine's Execution of Judgments under Article 6 of the ECHR"), that "71% of cases against Ukraine are under enhanced supervision on the CMCE agenda. This demonstrates the presence of systematic and structural problems that have remained unresolved for decades". Therefore, ensuring access to justice is impossible without complying with ECtHR judgments and adhering to the principle of the rule of law.

The legal basis for the realisation of the right to access justice in the legal system of Ukraine is Article 55 of the Constitution of Ukraine. The first part of this article should be understood to guarantee the protection of rights and freedoms in a judicial procedure for everyone. The court should not refuse justice if a person believes that their rights are violated or obstacles prevent their realisation. The refusal of the court to accept claims and other applications, filed in accordance with the legislation, constitutes a violation of the right to judicial protection, which, according to Article 64 of the Constitution of Ukraine, cannot be restricted.[18]

The right to judicial protection, as envisaged by the Constitution, serves as an independent constitutional right while concurrently performing a safeguarding and restorative function in relation to all other rights and freedoms of individuals. This characteristic of the constitutional right is determined by the special purpose of the judicial power, which is tasked with providing effective protection and restoration of violated rights and freedoms. Ensuring access to

[18] Konstytutsiia Ukrainy: Pryiniata na V sesii Verkhovnoi Rady Ukrainy 28 chervnia 1996 r., https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text [access: 15.08.2023].

justice for all is a priority of the Sustainable Development Goals of Ukraine for 2030.[19] The main strategic priority of the Ministry of Justice of Ukraine is "guaranteeing and protecting human rights in accordance with the principles of the rule of law, actively promoting the judicial reform in Ukraine within its competencies, the purpose of which is to establish an effective, fair, and accessible justice system". Among the main goals and tasks of the state policy and the Ministry of Justice of Ukraine for 2021–2023 in the field of human rights and access to justice, the following should be identified: ensuring the implementation of the National Human Rights Strategy, and ensuring the proper functioning of an effective mechanism for the execution of ECtHR judgments; strengthening the effectiveness of the system for providing free legal aid to those who cannot independently protect their rights and interests; creating conditions for self-governance of judicial experts and expanding individuals' access to the services of judicial experts as a component of access to justice; ensuring proper interaction between state information resources for automatic data exchange and eliminating the need for additional document submission; quick and convenient access to documentary information and other archival informational resources; building an effective system for the execution of court decisions and decisions of other authorities, ensuring the representation of the state in the ECHR during the consideration of interstate cases of Ukraine against Russia, and others.[20]

Ukraine, having been in a state of legal system reform for a long time, gradually brings the sphere of justice in line with international and European standards. This is manifested, in particular, in the direct application by Ukrainian courts of the provisions of international treaties. For the first time, the Constitutional Court of Ukraine (hereinafter: CCU) made reference to the provisions of international treaties in the case of appeals from the residents of Zhovti

[19] Pro Tsili staloho rozvytku Ukrainy na period do 2030 r., Ukaz Prezydenta Ukrainy vid 30.09.2019, No. 722/2019, https://zakon.rada.gov.ua/laws/show/722/2019#Text [access: 15.08.2023].

[20] S.M. Skurikhin, *Morfolohiia i dynamika pravovoi kultury: navch. Posibnyk*, Odesa 2020, p. 314.

Vody on 25 December 1997, No. 9-zp, where it noted that Part 1 of Article 55 of the Constitution of Ukraine corresponds to Ukraine's obligations arising, in particular, from the ratification of the ICCPR and ECHR by Ukraine, which, according to Article 9 of the Constitution of Ukraine, is part of the national legislation of Ukraine.[21]

The absence of regulatory definitions of the right to access to justice has led to the development of an understanding of its content through judicial interpretation. In summary, it can be concluded that, in the interpretation of the ECHR, the key elements of the right to access to justice include: the right to effective access to the court, the right to a fair judicial hearing and timely resolution of disputes, the right to adequate compensation, and the right to the application of principles of efficiency and effectiveness in the administration of justice. It should be emphasised that the practical development of ideas about access to justice has occurred to a large extent thanks to the practice of the ECHR.

The right to a fair trial is guaranteed by Article 6 of the ECHR, which consists of two parts: the first paragraph of the article applies to both criminal and civil proceedings, while the second and third paragraphs constitute the so-called minimum criminal procedural standard. This right is not absolute; it can be limited, as it is subject to legal regulation by the state due to its nature.

No modern study of access to justice issues can do without reference to *Håkan Fransson v. Sweden*, which created a crucial precedent, recognising access to justice as one element of the right to a fair trial.[22] In paragraph 28, the Court noted that paragraph 1 of Article 6 of the ECHR does not explicitly mention access to justice. It declares other rights that stem from the fundamental idea and, taken together, constitute a single right that has not received a precise definition. Therefore, the ECHR is called upon to establish

[21] Rishennia KSU u spravi za konstytutsiinym zvernenniam hromadian Protsenko Raisy Mykolaivny, Yaroshenko Poliny Petrivny ta inshykh hromadian shchodo ofitsiinoho tlumachennia statei 55, 64, 124 Konstytutsii Ukrainy (sprava za zvernenniamy zhyteliv mista Zhovti Vody), No. v009p710-97, 25 December 1997, https://zakon.rada.gov.ua/laws/show/v009p710-97#Tex [access: 16.08.2023].

[22] *Holder proty (Golder) Obiednanoho Korolivstva: sprava YeSPL*, 21 February 1975, https://zakon.rada.gov.ua/laws/show/980_086#Text [access: 16.08.2023].

through interpretation whether access to justice is a component of that right. In paragraphs 35–36 of the decision, the Court states:

> *It would be inconceivable for Article 6 § 1 not to encompass a detailed description of the procedural guarantees provided to the parties in civil cases and not to protect above all what enables those guarantees to be practically exercised, namely access to a court. Characteristics of the process such as fairness, publicity, and speed lose their meaning if there is no actual judicial examination. All the above indicates that the right of access to justice is an integral part of the right guaranteed by Article 6 § 1 of the ECHR.*

The Court considers that the right of access to the court is not absolute (paragraph 38). The absence of a regulatory definition of this right leaves a tacit assumption of the possibility of limiting this right but not touching upon its essential content. In *Ashingdane v. the United Kingdom*, the ECHR clarified that "the right of access to a court is not absolute and may be subject to limitations, but these limitations must not undermine the very essence of the right".[23]

This legal position, in the course of the development of precedent practice, required clarification: What limitations are permissible? What limitations undermine fundamental legal guarantees? To answer these questions, the ECHR examines the intentions of the legislator in imposing limitations on the right of access to justice and identifies the specific goals of individual applicants who faced such limitations.

The intertwining of various cultural types in a transitive society leads to a conflict in the system of legal values and a reduction in the social role of law as a regulatory factor, including in the sphere of human rights protection and access to justice.

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[23] *Eshinhdein proty Spoluchenoho Korolivstva* (*Ashingdane v. the United Kingdom): sprava YeSPL*, "Zaiava", No. 8225/78, 28 May 1985, https://npm.rs/attachments/CASE%20OF%20ASHINGDANE%20v[1].%20THE%20UNITED%20KINGDOM.pdf [access: 21.08.2023].

Among the factors (barriers) in the conditions of transitivity that hinder the realisation and protection of the right to access to justice, we can mention:

i. unstable, situational, imperfect procedural legislation;
ii. shortcomings of legal application in judicial practice;
iii. deficiency of judicial personnel due to numerous unfilled positions;
iv. backlog of court cases due to judges' workload;
v. complicated procedure for citizens to access the court;
vi. high cost of quality legal services;
vii. low level of legal culture and a lack of legal knowledge.

Regarding the first barrier, the prolonged fragmented transformation and protracted unsystematic changes in the judicial system of Ukraine hinder progress towards a rule of law state and pose an obstacle to citizens' access to justice. This includes the lack of planning, the mismatch in the timing of reforms in different segments of the legal system, particularly the gaps in time between changes in substantive and procedural law. From a political perspective, there is no reform of juvenile justice.

Considering the low level of legal culture in society and, at the same time, a high level of corruption (including within the judiciary), and the aspect of its unwillingness to respond to the interests of society, the conclusions regarding the functioning of the state's legal system will be disheartening.

Public trust in the judiciary is a complex phenomenon influenced by various factors, such as the performance of the courts, the assessment of court accessibility, the convenience of court facilities, judicial system reforms, the professionalism of judges, the overall evaluation of the court's work, the assessment of the fairness of court decisions, communication with citizens, citizens' experiences with the court, and stereotypes about it, among many others. The level of trust and respect for the judiciary can be increased through judicial system reform and improvements in court operations.

As for the second barrier, it can be observed that the instability of procedural legislation is evidenced by the significant amount of chaotic and situational amendments made to it. For instance, on 30 March 2020, Law No. 540-IX was adopted, which envisaged

changes to the legislative acts of Ukraine aimed at providing additional social and economic guarantees in connection with the spread of the coronavirus disease. This law simplified the existing procedure, introduced automatic extensions of procedural deadlines, and had a controversial nature in its content.

The positive aspect of these changes was the opportunity to protect the rights of individuals who could not physically attend court due to quarantine restrictions. However, the negative aspect was that, in most cases, these changes significantly prolonged the processing of legal cases. Some of the law's shortcomings were rectified by Law No. 731-IX of 18 June 2020, which made amendments regarding the course of procedural deadlines during the quarantine imposed by the Cabinet of Ministers of Ukraine (hereinafter referred to as the CMU) to prevent the spread of the coronavirus disease (COVID-19). It also stipulated that the procedural deadlines extended by Law No. 540-IX would expire after 20 days.

The functioning of the legal sphere during the COVID-19 pandemic reacted by increasing the burden on the law enforcement system, transforming legal violations, restructuring the operation of the judiciary and legal aid system, and transitioning legal life into new forms.[24]

When it comes to the shortcomings in the application of judicial practice, it is important to emphasise the lack of unity among the courts in applying procedural law norms during case proceedings. Daily judicial practice indicates the presence of procedural, process-related, formal, and economic obstacles for the effective functioning of the legal protection mechanism. One of the reasons for this situation is the absence of up-to-date consolidated judicial practice, which is not in alignment with the updated procedural codes and leads to varying interpretations of their provisions. The European Court of Human Rights (ECtHR) notes in its decisions that there may be cases in which discrepancies in precedent law may lead to violations of Article 6 of the European Convention on Human

[24] European Court of Human Rights, Statistics on Judgments by State, http://www.echr.coe.int/NR/rdonlyres/E6B7605E-6D3C-4E85-A84D6DD59C69F212/0/Graphique_violation_en.pdf [access: 21.08.2023].

Rights. The fact that Ukraine violates the right to a fair trial constitutes 33% of the total number of ECtHR decisions against Ukraine.

With respect to *Serkov v. Ukraine*, the ECtHR observes that:

> *the Supreme Court changed its approach to the interpretation of a legal provision without proper justification and failed to provide arguments explaining the change in interpretation. The ECtHR finds no justification for the change in legal interpretation confronted by the applicant.*

Such lack of transparency, as emphasised by the Court, adversely affects society's trust and belief in the law, so the Court considers that the way in which the relevant legal provisions were interpreted had a negative impact on their predictability.

O. Kopitova notes that ensuring the unity of judicial legal application during the transition period of legislation requires consolidated efforts from all public institutions in Ukraine, not just the courts.[25] The complexity in judicial practice arises from the application of new procedural legislation by the courts.

The consistency of conflicting court decisions leads to a state of legal uncertainty and significantly reduces public trust in the judiciary. Furthermore, the divergence in conclusions by the Supreme Court in similar cases can be considered a violation of the principle of the right to a fair trial. The domestic judicial system should prevent the issuance of conflicting decisions and resolve legal discrepancies through procedural means.

There is a particularly acute need to attend to the issue of the possibility of appealing judicial decisions. The European Court of Human Rights (ECtHR) also devotes attention to this aspect, as evidenced in *Bellet v. France*, where it concluded that:

> *the level of access provided by national legislation must be sufficient to ensure a person's right to a court in light of the*

[25] O. Kopytova, *Zabezpechennia yednosti sudovoho pravozastosuvannia v umovakh tranzytnoho zakonodavstva,* "Pidpryiemnytstvo, Hospodarstvo i Pravo" 2020, No. 9, pp. 160–167.

> *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 constitute interference with their rights.*[26]

Referring to *Berezovskiy v. Ukraine*, the ECtHR concluded that the refusal of the Higher Administrative Court of Ukraine to consider the applicants' cassation appeal due to the applicant having missed the deadline was based on an error, the responsibility for which lies with the judicial authorities rather than the applicants. The European Court noted a violation of Article 6(1) of the Convention.[27]

The analysis of the subject of complaints filed against Ukraine indicates that the majority of complaints concern the excessive (unreasonable) duration of pre-trial investigations, court proceedings, and the enforcement of decisions by national courts as well as the lack of legal remedies to address this issue at the national level. In most cases, the failure to meet reasonable deadlines in cases against Ukraine is associated with: "repeated referrals by the courts for a new hearing; prolonged absence of court sessions; failure to enforce measures against individuals who do not appear at the scheduled session, and many other examples".[28]

For instance, remarking on *Strannikov v. Ukraine*, the Court concluded that "the duration of the impugned proceedings was excessive" (initiated in May 1995, concluded in January 2004) and did not meet the requirement of a "reasonable time". The criteria for evaluating the duration of proceedings include: "the complexity of the case; the behaviour of the applicant; the actions of relevant

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[26] ECtHR Judgement in the case of *Bellet v. France*, Application No. 23805/94, Judgement of 04.12.1995, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Bellet%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22i temid%22:[%22001-57952%22]} [access: 01.09.2023].

[27] *Berezovski proty Ukrainy: sprava YeSPL*, No. 22289/08, 7 November 2019, https://zakon.rada.gov.ua/laws/show/974_e59#Text [access: 01.09.2023].

[28] D.A. Moroz, S.V. Diachenko, *Teoretychni ta praktychni aspekty realizatsii rozumnosti strokiv u tsyvilnomu sudochynstvi*, "Pivdennoukrainskyi Pravnychyi Chasopys" 2019, No. 3, pp. 114–117.

authorities".[29] The violation of the requirement for a "reasonable time" is also recognised by the ECtHR in the case of *Kryvoshey v. Ukraine*, stating that "proceedings, including pre-trial investigation and court proceedings by three instances, lasted more than 10 years and 9 months".[30]

The ECtHR also acknowledged a violation of Article 6(1) in *Savchenko v. Ukraine*, emphasising the prolonged duration of proceedings in national courts (11 years and one month). The ECtHR highlighted that the main cause of delays in the proceedings was procedural violations for which the national courts were responsible.[31]

Additionally, the ECtHR draws attention to the uniformity of complaints filed under Article 6 of the Convention due to violations of the reasonable time requirement in the consideration of cases by Ukrainian national courts. For example, the ECtHR consolidated the cases *Balo-Balitskyi and Others v. Ukraine* and concluded that the duration of the court proceedings in these cases (criminal proceedings) was excessive and did not meet the requirement of a "reasonable time", and the applicants had no effective legal remedy for these complaints, thus finding a violation of Article 6(1) and Article 13 of the Convention.[32] This underscores the need for the implementation of national legal mechanisms that prevent such violations. Remarking on *Zosimov v. Ukraine*, the Court reminds that in criminal cases, the calculation of the "reasonable time" under Article 6 typically starts from the moment when charges are brought against the person.[33] In civil cases, guarantees of a "reasonable time" commence with the start of civil proceedings and conclude with the receipt of the final decision by the national court.

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[29] *Strannikov proty Ukrainy: sprava YeSPL*, No. 49430/99, 3 May 2005, https://zakon.rada.gov.ua/laws/show/980_389#Text [access: 01.09.2023].

[30] *Kryvoshei proty Ukrainy: sprava YeSPL*, No. 7433/05, 23 June 2016, https://khpg.org/1587637445 [access: 01.09.2023].

[31] *Savchenko proty Ukrainy*: *sprava YeSPL*, No. 1574/06, 22 September 2016, https://khpg.org/1589174609 [access: 01.09.2023].

[32] *Balo-Balytskyi ta inshi proty Ukrainy: sprava YeSPL*, No. 2987/20, 10 June 2021, https://minjust.gov.ua/m/stattya-6-pravo?na-spravedliviy-sud-4201 [access: 01.09.2023].

[33] *Zosimov proty Ukrainy*: *sprava YeSPL*, No. 4322/06, 7 July 2016, https://zakon.rada.gov.ua/laws/show/974_c94#Text [access: 01.09.2023].

Compliance with the requirement of a reasonable time for the consideration of cases in courts is one of the fundamental problems not only for our state but also for the legal systems of most countries that are members of the Council of Europe.

Ukrainian society aspires to be inclusively integrated into the community of developed European countries. However, it is worth acknowledging that the level of legal literacy, including understanding the principles and rules of the functioning of effective and accessible justice systems, remains low. C. Skurykhin writes that dynamic processes within legal culture are primarily associated with conflicts between the content of legal culture and social relations, between legal culture and power, between legal culture and personality, within legal activities, and thus, it is crucial to be aware of such contradictions. Regarding legal awareness, the author believes that its crisis during the transitional period arises due to the inconsistency of needs and interests, value orientations and guidelines, norms and traditions, and the conscious and emotional legal images of legal subjects.

It is essential to emphasise that a significant portion of citizens, especially vulnerable population groups, have a low level of legal knowledge regarding the realisation and protection of their rights in a legal manner. Another urgent issue is the limited access to legal services and the low level of legal culture in local communities, especially considering that the process of forming amalgamated territorial communities is currently underway.

It is necessary to create mechanisms to overcome barriers that hinder the realisation and protection of the right of access to justice. In our view, the following strategies can serve as factors for such changes:

1. legal education and legal upbringing on matters of rights, duties, and legal protection of citizens;
2. implementation of procedures that facilitate access to the court;
3. development of e-justice;
4. formation of the judiciary based on open competition with the participation of international experts;
5. promotion of alternative (out-of-court) and pre-trial dispute resolution.

Legal education of the population represents the most crucial social task in the transition from a non-legal to a legal democratic model. Generally, the process of legal education is associated with: the accumulation of legal knowledge and information; the transformation of accumulated information into legal convictions; the habit of lawful behaviour, and the readiness to act based on these legal convictions.[34] In the conditions of society's transitional development period, not all citizens possess the legal knowledge and legal tools to exercise their rights. L. Matviyeva, while studying issues of legal culture in a transitional society, concludes that the problem of legal education in such a society is inseparable from issues of legal information and personal legal awareness. The legal awareness of an individual contributes to the formation of a new type of legal thinking as a necessary condition for their life in the conditions of a transitional society.

A legal innovation is the creation of the Ukrainian School of Practical Knowledge on Access to Justice, which serves as a systematic tool for the dissemination of best ideas in the field of access to justice. The main goal of this school is to unite efforts in searching, researching, systematising, and disseminating best practices to ensure effective and comprehensive access to justice, establishing broad interaction between relevant national and international government and non-government institutions. Teaching influence groups and developing educational, methodological, and informational materials for them are considered a key instrument for reducing the negative consequences of legal issues.[35] Such legal education is of great importance in the activities of legal professionals, enabling them to make the most objective and independent decisions and ensuring the accessibility of justice.

An important factor in positive changes during the transitional period of the reform of the legal system is the creation and operation of non-governmental centres that facilitate the interaction

[34] S.M. Skurikhin, *Spivvidnoshennia pravovoho vykhovannia i stykhiinoi pravovoi sotsializatsii*, "Lex Portus" 2018, No. 6, pp. 64–75.

[35] Ukrainska Shkola Praktychnykh Znan, https://ua2j.school/about/#partners [access: 01.09.2023].

between the judiciary and society and provide legal education. For example, in the Odessa region, within the "New Justice" program, the project "Establishment and Development of Public Centres for Access to Justice in Ukraine" is implemented with the support of USAID (United States Agency for International Development). Public justice centres represent a new model of interaction between society, the courts, government agencies, and legal aid providers. The primary mission of the Public Centre for Justice is to improve access to justice, especially for individuals who cannot afford qualified legal consultations.

In January 2019, a non-governmental Public Centre for Justice was established in the town of Tatarbunary in the Odessa region, with the main goal of improving access to justice in the local community and building partnerships among all stakeholders in this field. The Public Centre for Justice contributes to improving citizens' access to justice, legal aid services, and alternative dispute resolution (especially for vulnerable and marginalised population groups). It also enhances public awareness of judicial reform, the benefits of legal aid, and the use of alternative dispute resolution mechanisms. The centre promotes cooperation between courts, justice sector institutions, and other government bodies with local residents to increase public trust in the judiciary.[36] Studies show that in such cases, public trust in the judiciary gradually increases.

Access to justice should be equal for "vulnerable" population groups, including women, children, the elderly, individuals with disabilities, those with mental disorders, indigenous peoples, stateless persons, and refugees. To facilitate this, in some foreign countries, special brochures (guides) are placed in courts to provide guidance on accessing justice, for example, for victims of domestic violence, containing recommendations for both the individuals themselves and court personnel.

An important component of the access to justice concept is the introduction and dissemination of legal aid programs within the

[36] *Pravovyi khab: v Tatarbunarakh prezentuvaly pilotnyi Hromadskyi tsentr pravosuddia*, https://www.prostir.ua/?news=pravovyj?hab-v-tatarbunarah-prezentuvaly-pilotnyj-hromadskyj-tsentr-pravosuddy [access: 05.09.2023].

national legal system. In Ukraine, the state supports and facilitates organisations that provide legal aid to individuals with minimal income, disabilities, internally displaced persons, military veterans and former combatants, victims of violence, LGBTQ+ communities, representatives of national minorities, and others. These programs contribute to raising legal knowledge and legal culture among the population.

The development of digital technologies opens up new opportunities for people, simplifying the resolution of a wide range of issues and enabling them to order services, pay bills, register in electronic queues, obtain references, and much more. With the introduction of the Unified Judicial Information and Telecommunication System (hereinafter referred to as UJITS) in May 2021, access to justice is becoming closer to citizens. UJITS is an organisational and technical system that ensures the operation of electronic justice in Ukraine and is designed to enhance the efficiency of judicial authorities. It simplifies the communication process between participants in judicial proceedings, making legal procedures more straightforward, convenient, and accessible to citizens.

The evolutionary interpretation of the international standard of access to justice involves not only the accessibility of traditional courts but also the accessibility of alternative dispute resolution methods in contemporary conditions. With the aim of enhancing legal protection, the state creates conditions for resolving legal disputes through alternative and pre-trial procedures. For example, in 2016, a reform of justice was conducted in Ukraine. For the first time, the Constitution of Ukraine established provisions that "by law, a mandatory pre-trial procedure for dispute resolution may be determined" (Part 3, Article 124).

An important task is to inform the population and citizens about alternative and pre-trial procedures as effective tools for conflict resolution and to demonstrate successful experiences in their application.

2.4. Conclusions

The creation and application of national law in ensuring proper access to justice are of great importance, recognised by the international community through international legal acts and institutions such as the Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, UN General Assembly Resolutions, Council of Europe recommendations, and judgments of the European Court of Human Rights, among others. Council of Europe recommendations are categorised as follows: general recommendations, recommendations regarding access to justice for specific categories of individuals, and recommendations regarding access to justice in specific categories of cases.

Among the factors (barriers) in transitional conditions that hinder the realisation and protection of the right to access to justice are: instability in the legal system, which serves as the primary foundation for limiting the right to access to justice; unstable, situational, and imperfect procedural legislation; shortcomings in legal practice; a deficit of judicial personnel due to unfilled vacancies; delays in court case processing due to vacancies in judicial positions and a high caseload; procedural obstacles to access to justice; a complex process for citizens to file claims and excessive regulation of matters related to the content of statements of claim; high costs of quality legal services, and low levels of legal culture and a lack of legal knowledge.

Characteristics of the accessibility of justice during the transitional period include the gradual creation of conditions to ensure access to justice and the implementation of measures to overcome the so-called "barriers" to access to justice. The mechanisms to overcome these barriers include legal education and legal upbringing on matters of rights, duties, and legal protection of citizens; forming a judicial body based on open competition with the participation of international experts; the application of procedures that facilitate access to the court; the development of public justice centres; the implementation and expansion of legal aid programs within the national legal system; enhancing the institution of constitutional

complaints; developing electronic justice; establishing the institute of transitional justice, and promoting alternative (extrajudicial) and pre-trial dispute resolution.

Therefore, the right to access to justice is a fundamental right guaranteed by the state to its citizens and is a legal guarantee of a fair judicial system based on the fundamental principle of the rule of law. In modern conditions, access to justice is considered a comprehensive socio-legal category aimed at providing and ensuring a system of guarantees for the exercise and protection of the rights, freedoms, and legitimate interests of an individual through judicial, alternative, and pre-trial procedures. The modern state must contribute to the development of alternative (extrajudicial) dispute resolution methods. Recognising the "right to access to justice" means that the state is obligated to create the necessary conditions for its implementation.

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Chapter 3. The Limits of Freedom of Speech in the Context of the Rule of Law in Conditions of the War Between Russia and Ukraine

3.1. Introduction

The paper considers how freedom of speech as an element of rule of law can be limited due to the war in a democratic country. In doing so, it reviews first, different approaches to revealing the concept of the rule of law, such as philosophical ideas, a political idea or a constitutional rule. The importance of such an element of the rule of law as the protection of fundamental human rights, including freedom of speech, is explained.

The author emphasises that the independence of the courts plays a major role in the protection of human rights. This paper first outlines how freedom of speech is limited in Ukraine due to the war, and provides a comprehensive analysis of government actions to ensure the country's information security. Then the author makes recommendations on how to counter propaganda, hate speech and fake news, and how to find a balance with freedom of speech. It is specified that the main elements of the rule of law, which directly affect the legality assessment of restrictions on freedom of speech are legality, legal certainty, prohibition of arbitrariness, respect for human rights, non-discrimination and equality before the law.

Today, almost every state in the world emphasises the importance of the rule of law and the protection of human rights and freedoms, and democratic values are reflected in every constitution. However, sometimes these fundamental principles exist only on paper and do

not work in reality. The war prompts public authorities to temporarily resort to additional restrictions on human rights and freedoms as well as to expand the discretionary powers of public authorities. The rule of law is a legal principle which has also become a principle of governance.[1] Undemocratic states allow arbitrariness and abuse of law enforcement agencies and military formations, and disregard existing international norms. Ukraine, as a democratic state, temporarily limited certain human rights and freedoms and adapted the legal system to function in wartime, taking into account the requirements of the principle of the rule of law and its components.

The Constitution of Ukraine emphasises that Ukraine is a democratic, legal state; human rights and freedoms and their guarantees determine the content and direction of state activity; the state is responsible to the person for its activities; affirming and ensuring human rights and freedoms is the main duty of the state; the principle of the rule of law is recognised and applied in Ukraine. The Constitution of Ukraine has the highest legal force; laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and must comply with it. Bodies of state power and the bodies of local self-government and their officials are obliged to act only on the basis of, within the limits of the authority of, and in the manner provided for by the Constitution and laws of Ukraine. Constitutional rights and freedoms are guaranteed and cannot be revoked; when adopting new laws or making changes to existing laws, it is not allowed to narrow the content and scope of existing rights and freedoms.

One of the fundamental freedoms provided for by a number of international agreements is freedom of expression. This right is also provided for by the Constitution of Ukraine. In connection with the Russian aggression against Ukraine, the context for the implementation of this right has changed. In addition, Ukraine suspended its obligations under some rights provided for by the European Convention on Human Rights, which indirectly affected the implementation of the mentioned right. Since freedom of speech is an

[1] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, p. 4.

indicator of the predominance of the rule of law in a democratic state, we will make an attempt to reveal the possibility of limiting a fundamental human right in conditions of war.

In doing so, modern laws, principles, and mechanisms for ensuring the rule of law will be identified through a systematic analysis of the problems of democracy and freedom of speech on the example of Ukraine. It is proposed to use modern global ranking models (*Rule of Law Index*, *Democracy Index*, *Freedom of Speech Index*) in the methodological approach to determining indicators of the rule of law, and of democracy and the freedom of speech.

3.2. Indicating the Essence of the Rule of Law and Showing Whether the Rule of Law Is a Rule of Law, a Philosophical Idea, a Political Idea or, for Example, a Constitutional Rule

Analysing the existing problems in legislation and the implementation of judicial proceedings, one answer can be traced. We need the Rule of Law, especially in times of war. And what it is and how difficult it is to provide, not every lawyer can answer. We propose in this chapter to consider the phenomenon of the Rule of Law in several aspects.

First of all, the rule of law is a universal standard of the modern world, a sign of a civilised legal system. Many international documents indicate this.[2] In our research, we will pay the main attention to the consideration of the concept of the rule of law through the provision of human rights. This is reflected in Article 3 of the Constitution of Ukraine:

[2] European Commission for Democracy Through Law (Venice Commission) in cooperation with the Foreign and Commonwealth Office of the United Kingdom and the Bingham Centre for the Rule of Law under the auspices of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe, Reports of the Conference on 'The Rule of Law as a Practical Concept', Lancaster House, London, 2 March 2012.

> *A person, his life and health, honour and dignity, inviolability and security are recognised as the highest social value in Ukraine. Human rights and freedoms and their guarantees determine the content and direction of state activity. The state is responsible to the people for its activities. Affirmation and provision of human rights and freedoms is the main duty of the state.*[3]

Ensuring freedom of speech is one of the fundamental human rights and is the central interest of this study.

3.2.1. A PHILOSOPHICAL IDEA

The philosophical core of a worldview focused on the rule of law is the image of a person as a self-sufficient individual, his right to freedom and autonomy. The idea of the rule of law is a certain idea that encompasses a special type of interaction between the person and the government. The main task of this idea is to limit power by certain principles and norms. In an ideal dimension, the rule of law acts as an ideal of social regulation, which justifies the system of principles of the organisation and functioning of modern civilised society. In the real dimension, there is a more or less complete embodiment of this ideal in the real-life processes of society, the real supremacy of law over state arbitrariness.[4] A lot of attention was paid to the thin and thick understanding of the rule of law.

The renowned philosopher Joseph Raz posits that the rule of law:

> *means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it*

[3] See: Article 3 of the Constitution of Ukraine, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text [access: 25.12.2023]; Constitution of Ukraine (1996), https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text, [access: 25.12.2023].

[4] С.І. Максимов, *Верховенство права: світоглядно-методологічні засади*, "Вісник Національного університету Юридична академія України імені Ярослава Мудрого" 2016, Серія: Філософія, No. 4, pp. 27–35.

> *possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.*[5]

Since the 'basic intuition' from which the rule of law derives is that "the law must be capable of guiding the behaviour of its subjects", the rule of law has, according to Raz, eight attributes: three formal and five procedural ones. The formal attributes are, first, that "all laws should be prospective, open, and clear"; second, that "laws should be relatively stable"; and third, that "the making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules". The five procedural attributes refer to the accessibility to law institutions and to law protection and are the following: the independence of the judiciary must be guaranteed; the principles of natural justice must be observed; the courts should have review powers over the implementation of the other principles; the courts should be easily accessible; the discretion of the crime-preventing agencies should not be allowed to pervert the law.[6]

3.2.2. THE RULE OF LAW AS A POLITICAL VALUE

There are many disagreements about the nature of the rule of law, reflecting even deeper disagreements about a fundamental moral concept – the concept of personal dignity – and therefore about political legitimacy as well. The political doctrine, as a basic one, acts as the fundamental principle of activity of the subjects of the political process based on a certain political ideology. It reflects the vision of the political system, ways of its functional development, means and methods of solving political problems, and choosing political priorities. With its help, specific directions of exercising political power are determined, the nature of political institutions, value

[5] J. Raz, *The Rule of Law and Its Virtue*, [in:] J. Raz (ed.), *The Authority of Law: Essays on Law and Morality*, New York 1979, p. 212.

[6] N. Tsagourias, *The Rule of Law in Cyberspace: A Hybrid and Networked Concept?*, ZaöRV, 2020, p. 433.

orientations and the content of political principles and norms are changed, and the connection between certain political ideas and political interests is fixed.

Many scientists consider the rule of law as a certain political and legal state, under which the public-authority institutions of the state, civil society and other social subjects act exclusively on the basis of law (in its integrative sense). The phenomenon of the rule of law in the context of modern constitutionalism manifests itself in a set of the following principles: the existence of a rationally necessary and sufficient set (hierarchical system) of normative legal acts that correspond to the principles of justice, freedom, equality, humanity, dimensionality (proportionality) while limiting subjective rights, based on integrative legal understanding; full regulation of social relations that require such regulation; implementation (functioning) of public power exclusively on the basis and within the limits of law, i.e., limitation of public power by law – the supremacy of the legal limitation of public power; recognition of the multifaceted role of law in civil society, its development as a legal society; guaranteeing, ensuring and protecting human rights and freedoms in a legal manner; the corresponding state of public consciousness based on respect for law as a social value and a means of protecting truth and justice, the interests of the entire society as a whole and of each individual person. Thus, law and the principle of the rule of law, man and his constitutional and legal freedom, as well as democracy, as the main political and legal values of modern constitutionalism, determine the perspective vector of the development of Ukrainian society and the state in the direction of the formation of a democratic, legal state and a developed civil society, where a person is recognised as the highest social value.[7]

Although the rule of law is an important legal-political principle, its content is debated. Central to the debates is the question of whether, in order, to achieve its aim of guiding human and institutional action and tame political power, the rule of law should

[7] А.Р. Крусян, *Політико-правові цінності сучасного українського конституціоналізму (в контексті аксіологічного виміру конституційного права)*, Одеса 2012.

have formal and procedural attributes only or also substantive ones. The former view envisages a thin notion of the rule of law, whereas the latter a thick one.[8] The exact details of the rule of law, be it in a material dimension, be it in a formal one, are not always clear. One reason is that this principle is not exclusively a legal concept, but also a political one.[9]

Fuller, for example, emphasises the formal and procedural aspects of the rule of law which are the following: (i) laws must apply equally to everyone across the area of jurisdiction; (ii) laws must be made public; (iii) laws must be applied retroactively; (iv) laws must be clear enough to be followed; (v) laws must not be contradictory; (vi) laws must be possible to obey; (vii) laws must maintain some consistency over some time; (viii) there must be congruence between an official action and the stated law.[10] A thick notion of the rule of law maintains that the rule of law, in addition to the attributes of the thin notion, also promotes certain substantive values which, among others, include justice, human rights, democracy, or liberty.[11]

3.2.3. THE RULE OF LAW AS A CONSTITUTIONAL PRINCIPLE

What is the rule of law in my research and how is it related to freedom of speech? In order to answer this question, it is necessary to pay attention to the fact that the rule of law is one of the most relevant subjects of scientific discourse, its problems are increasingly addressed not only by legal scholars, but also by political scientists,

[8] P. Craig, *Formal and Substantive Conception of the Rule of Law: An Analytical Framework*, "Public Law" 1997, p. 467; B. Tamanaha, *The Rule of Law for Everyone?*, "Current Legal Problems" 2002, Vol. 55, note 4, pp. 91 et seq.

[9] See: M. Canevaro, *The Rule of Law as the Measure of Political Legitimacy in the Greek City States*, "Hague Journal on the Rule of Law" 2017, Vol. 9, Issue 2, pp. 211 et seq.

[10] L.L. Fuller, *The Morality of Law*, Revised Edition, London 1969, pp. 46 et seq.

[11] B. Tamanaha, *The Rule of Law for Everyone?*, *op. cit.*, note 4, pp. 112 et seq.

philosophers, sociologists, and representatives of other fields of humanitarian knowledge.[12]

In accordance with the Part 1 of Article 8 of the Constitution of Ukraine, the principle of the rule of law is recognised and operates in Ukraine.[13] The rule of law is the rule of law in society. The rule of law requires the state to implement it in law-making and law-enforcement activities, in particular in laws, which in their content should be imbued primarily with ideas of social justice, freedom, equality, etc. One of the manifestations of the rule of law is that the law is not limited to legislation as one of its forms, but also includes other social regulators, including moral norms, traditions, customs, etc., which are legitimised by society and determined by the historically achieved cultural level of society. All these elements of law are united by a quality that corresponds to the ideology of justice, the idea of law, which is largely reflected in the Constitution of Ukraine.

This understanding of law does not provide grounds for identifying it with the law, which can sometimes be unjust, including restricting the freedom and equality of a person. Justice is one of the basic principles of law, it is decisive in defining it as a regulator of social relations, one of the universal dimensions of law. Usually, justice is considered as a property of law, expressed, in particular, in an equal legal scale of behaviour and in the proportionality of legal responsibility to the offense committed.[14] The rule of law is proclaimed as a universal European value in the preamble of the Treaty on European Union.[15]

In the democratic construction of the public administration system, there is a limitation of the authorities' powers and the protection

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[12] М.І. Козюбра, *Верховенство права і Україна*, "Право України" 2012, No. 1–2, pp. 30–63.

[13] Constitution of Ukraine, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text [access: 15.12.2023].

[14] Constitutional Court of Ukraine, https://ccu.gov.ua/storinka-knygy/34-verhovenstvo-prava [access: 15.12.2023].

[15] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01), http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0001:0010:EN:PDF [access: 20.08.2023].

of basic human rights, which affects the formation of a free and open society. The main approaches of the mentioned formation are the creation of representative management institutes, the guarantee of human rights (freedom of speech and assembly, the right to privacy, the right to property, freedom of movement, an independent judicial system).

Using the method of structural-genetic analysis and synthesis, it is possible to imagine the rule of law as a pyramid consisting of principles and elements. The base level is the right to assemble; democracy through formal legal processes; access to justice; freedom of speech/press; the right to silence; the presumption of innocence; fair trial & independence of judiciary; citizens and government are accountable by the law; equality before the law.[16]

Therefore, freedom of speech is a kind of brick in the foundation of the pyramid of the rule of law; in turn, the rule of law ensures the creation of conditions under which freedom of speech is guaranteed. In a legal system that operates on the principles of the rule of law, laws are created, applied and interpreted transparently and fairly for all. This allows journalists, publicists, activists and all other persons to freely express their thoughts and ideas, criticise or disagree with the authorities.

In the context of the rule of law, public authorities must comply with laws that guarantee freedom of speech and cannot impose censorship or limit this right without reasonable grounds. Thus, the rule of law creates conditions for ensuring freedom of speech, and freedom of speech, on its part, helps preserve and support the principle of the rule of law by highlighting violations and transparency in the activities of authorities and institutions.

[16] М. Бурдоносова, *Методологічні аспекти розуміння верховенства права в Україні*, "Copernicus Political and Legal Studies" 2022, No. 2, pp. 68–75.

3.2.4. FREEDOM OF SPEECH AS ONE OF THE MAIN ATTRIBUTES OF THE RULE OF LAW

As already mentioned, one of the basic elements is Freedom of Speech/Press. Article 15 of the Constitution of Ukraine establishes that: "social life in Ukraine is based on the principles of political, economic and ideological diversity […] Censorship is prohibited […]". In addition, Article 34 of the Constitution of Ukraine establishes that:

> *Everyone is guaranteed the right to freedom of thought and speech, to the free expression of their views and beliefs; Everyone has the right to freely collect, store, use and disseminate information orally, in writing or in any other way – of his choice.*

This complex of rights forms the basis of the legal institution of freedom of information. These rights can be exercised separately, but without legal guarantees for the realisation of one of them, it will be difficult or even impossible to realise the other rights included in this set of rights. We also note the importance of Part 1 of Article 34, which proclaims freedom of thought and speech, freedom of expression of one's views and beliefs. Consolidation of these rights is duplicated by the Laws of Ukraine: 'On Media', 'On Information'. So, this element of the rule of law pyramid can be formulated as 'freedom of thought and speech, freedom of information'.

The complexity of the situation in Ukraine and Europe in terms of ensuring freedom of speech and the rule of law in general is determined by the military invasion of the Russian Federation on the territory of an independent democratic state governed by the rule of law. It is quite difficult to find a balance between freedom of speech and ensuring the national interests of the state in the conditions of war. Below we will give examples of what exactly is the difficulty of protecting fundamental human rights in conditions of war.

In addition, we note that Putin's ill-conceived 'special military operation' attacks not only the rule of law in Ukraine and Europe, but also the rule of law throughout the Russian Federation. First,

Russia severely restricted and suppressed freedom of assembly, free speech and independent 3M, jailing thousands of protesters and journalists across Russia for opposing or criticising the war, and even for using the word 'war' to describe Putin's so-called 'special military operation'. On 20 October 2022, the UN Human Rights Committee noted that "thousands of cases of harassment and persecution of journalists were recorded, as well as dozens of murders and attempted murders" and that "journalists were also kidnapped and tortured", while "there was no information that these cases were effectively investigated." The Human Rights Committee noted that "hundreds of Russian journalists have been detained for reporting on the war in Ukraine or protesting against the war" and that "a growing number of journalists, lawyers and Russian dissidents have been targeted, killed or detained by Russian forces."[17]

On 28 February 2022, a few days after the start of the war, Ukraine submitted an official application for full EU membership for evaluation by the European Commission. In the Conclusion of 21 June 2022, the European Commission noted that Ukraine has successfully decentralised, strengthened the independence of the judiciary, created anti-corruption bodies, and improved the legal and institutional framework in the field of human rights, which generally meets European and international standards. The Commission believes that "Ukraine has made significant progress in achieving the stability of institutions that guarantee democracy, the rule of law, human rights and respect and protection of minorities", that Ukraine has achieved a "generally satisfactory level of implementation" of European legislation and "has provided sufficient evidence of its commitment to the values, on which the European Union is based". It recommended that the European Council "grant Ukraine the prospect of membership in the European Union" and 'candidate status' on the condition that a number of recommendations

[17] L.S. Sunga, *Чи вб'є війна Росії верховенство права в Україні та Європі?*, Verfassungsblog, 19.12.2022, https://web.archive.org/web/20221224144955id_/https://intr2dok.vifa-recht.de/servlets/MCRFileNodeServlet/mir_derivate_00014565/%D0%84%D0%B2%D1%80%D0%BE%D0%BF%D1%96.pdf [access: 10.11.2023].

are fulfilled. On 23 June 2022, the European Council approved the Commission's Conclusion and granted Ukraine the status of 'candidate' for EU membership.[18]

The status of reforms, the dynamics and success of the implementation of European values, the implementation of the plan of measures for the implementation of the Association Agreement between Ukraine and the European Union can be clearly observed in the government portal 'Pulse of the Agreement'. One of the key directions is justice, freedom, security, human rights.[19]

In the National Strategy of Ukraine in the field of human rights, great attention is paid to ensuring freedom of thought and speech, expression of views and beliefs, and access to information. One of the main tasks of the strategy is to ensure the functioning of effective mechanisms for the realisation by every person in Ukraine of the right to freedom of thought and speech, expression of views and beliefs, and access to information.

The main problems are defined as:

- ensuring the right of citizens to receive objective information,
- inadequate level of protection of journalists and human rights defenders, ineffective investigation of criminal offenses committed against such persons,
- inaccessibility of the information space for persons with disabilities,
- imperfection of mechanisms of access to public information,
- low level of citizens' awareness of the right to access to information and mechanisms for its implementation.

Tasks aimed at achieving the goal:

- ensure the freedom of activity of mass media, which includes, in particular, freedom of editorial policy, transparency of

[18] European Council conclusions on Ukraine, the membership applications of Ukraine, the Republic of Moldova and Georgia, Western Balkans and external relations, 23 June 2022, https://www.consilium.europa.eu/en/press/press-releases/2022/06/23/european-council-conclusions-on-ukraine-the-membership-applications-of-ukraine-the-republic-of-moldova-and-georgia-western-balkans-and-external-relations-23-june-2022/ [access: 15.07.2023].

[19] Puls ugody, https://pulse.kmu.gov.ua/ua/streams/human-rights-justice-and-anticorupption [access: 20.07.2023].

information regarding the ownership and sources of funding of mass media,
- to ensure the protection of the professional activities of journalists and human rights defenders,
- ensure effective investigation of criminal offenses committed against journalists and human rights defenders,
- ensure accessibility of information for persons with disabilities,
- to improve the legislative mechanisms of legal responsibility for violation of the right to information,
- to improve the mechanisms for implementing the right to access to public information.

Fulfilment of the above tasks should lead to the proper functioning and independence of public broadcasting. Journalists and human rights defenders must have access to effective mechanisms for the protection and protection of professional rights and freedom of professional activity. An inclusive and accessible information environment should be available to all. Equal conditions for everyone's access to information, including public information.

The main indicators are:

i. the level of openness according to the *World Press Freedom Index*, the value of the indicator 'Freedom of thought and religion' according to the 'Freedom in the World' rating,
ii. the state of investigation of criminal offenses against journalists and human rights defenders,
iii. share of television product adapted by translation into sign language for perception by persons with hearing impairment,
iv. the share of television airtime adapted with subtitles for perception by persons with hearing impairment,
v. the share of websites of central executive bodies, local state administrations, and local self-government bodies that comply with the provisions of DSTU ISO/IEC 40500:2015 'Information technologies. W3C Web Content Accessibility Guidelines (WCAG) 2.0' not lower than AA level,
vi. part of the state electronic registers, electronic services, mobile applications (including the Unified state web portal of electronic services 'Portal Diya') comply with the provisions

of DSTU ISO/IEC 40500:2015 'Information technologies. W3C Web Content Accessibility Guidelines (WCAG) 2.0' not lower than AA level,

vii. the simplified speech standard was approved,

viii. the number of appeals to the Human Rights Commissioner of the Verkhovna Rada of Ukraine regarding violations of the right to information and the number of violations detected by the Human Rights Commissioner of the Verkhovna Rada of Ukraine.[20]

It is important to stress that national legislation should be compatible with the international rule of law. For example, the German Network Enforcement Act has given rise to human rights concerns particularly in relation to the freedom of expression.[21]

In addition to ongoing debates about the content of the Rule of Law, the question of ensuring the rule of law in cyberspace is raised, because the so-called powers are exercised by the private sector, that is, IT companies and platforms. How to curb their influence? Mention is made of the German law protecting the rights of users in social networks. The state transferred the responsibilities to IT platforms to ensure security and remove illegal content. Here comes the question of ensuring the right to freedom of speech. In scientific circles, there is a wide debate about the shadow ban and the guarantee of the right to freedom of speech.

Regarding the research conducted, it should be noted that the indicators used confirm the opinion that the level of the rule of law is correlated with the general state of democracy in the country and freedom of speech and the press. The factors used can characterise the need to ensure the rule of law by subjects of power in the state administration system, developing democratic principles and

[20] The National Human Rights Strategy, approved by the Decree of the President of Ukraine of 24 March 2021, No. 119/2021, https://zakon.rada.gov.ua/laws/show/119/2021#Text [access: 01.08.2023].

[21] Article 19, The Act to Improve Enforcement of the Law in Social Networks, August 2017, Germany.

supporting political and ideological pluralism and independence of the media in the country.[22]

Ukraine in conditions of war is a threat to ensuring the rule of law in Ukraine and in Europe as a whole. What fundamental rights can be limited in the conditions of war, what minimum remains inviolable. What minimum freedom of speech is inviolable. Finding a balance is a very difficult task.

Countries are evaluated according to certain criteria and a ranking of the *Rule of Law Index* is formed. The state of ensuring the rule of law is not just a measure of the relationship between a person and the state, it is evidence of an appropriate civilisational choice based on respect for human rights and freedoms and the values of democracy.

In view of the above, we have highlighted the problematic issues of ensuring freedom of speech:

1. Prohibition of censorship and the new media law.
2. The problem of regulation in social networks, since it is a civil sector. And how to oblige the private sector to observe the rule of law.
3. Introduction of criminal liability for many expressions in connection with the war, what will happen to these norms after the war.
4. Blogging and criticism of the government. Cooling effect, better not to talk at all.

[22] В. Круглов, *Розвиток Демократії Та Свободи Слова Як Чинники Забезпечення Верховенства Права*, "Науковий Вісник: Державне Управління" 2023, No. 1(13), pp. 241–258.

3.3. An Indication of the Richness of the Interpretation of the Principle of the Rule of Law on the Basis of Ideological Solutions (Political Thought), Dogmatic Solutions (Legal Doctrine) and Legal Solutions (Jurisprudence of the Courts)

Therefore, the category 'rule of law' has many different interpretations, each of which plays an important role in the study of this concept. In the first chapter, it was already noted that it is a basic constitutional principle on which all social relations are based and through which the rights and freedoms of a person and a citizen are realised. The multiplicity of concepts gives us the opportunity to understand the concept of 'rule of law' in its various aspects, as well as to apply it in practical activities in all its manifestations. The rule of law, being one of the basic principles of a democratic society, provides for judicial control over interference with every person's right to freedom.

Let's consider different views for the completeness of the interpretation of the rule of law principle. The main political doctrines (ideologies) – liberalism, socialism, conservatism – evaluate the essence and nature of revolutions in different ways.[23]

From a liberal point of view, the rule of law involves the protection of individual rights and freedoms from arbitrary government actions. It emphasises the importance of clear and consistent laws, due process of law and equal treatment before the law.[24] Conservative views focus on the preservation of tradition, stability, and limited government intervention in interpreting the rule of law. Changes should occur slowly, observing social validity. The leading place is occupied by the search for a balance between order and individual rights.[25] Socialists consider the interpretation of the rule

[23] J. Alexander, *The Major Ideologies of Liberalism, Socialism and Conservatism*, "Political Studies" 2015, Vol. 63, Issue 5, pp. 980–994, https://doi.org/10.1111/1467-9248.12136 [access: 30.07.2023].

[24] J. Waldron, *The rule of law in contemporary liberal theory*, "Ratio Juris" 1989, Vol. 2, No. 1, pp. 79–96.

[25] D.H. Cole, *'An unqualified human good': EP Thompson and the rule of law*, "Journal of Law and Society" 2001, Vol. 28, No. 2, pp. 117–203.

of law in the context of economic balance. The law should contribute to solving socio-economic inequality.[26]

Next, we turn to the rule of law as a legal doctrine, where certain principles and interpretations are established within the framework of the legal profession. Legal scholars and experts explore the phenomenon of the rule of law through their analyses and works. Dogmatic interpretations can include different areas of law. Thus, in constitutional law, the interpretation of the rule of law is carried out within the framework of constitutional provisions that contain the fundamental principles of governance and relations between the government and citizens. The Constitutional Court of Ukraine proceeds from the fact that the observance of the constitutional principles of a social and legal state, the rule of law (Article 1, Part One of Article 8 of the Basic Law of Ukraine) conditions the implementation of legislative regulation of social relations on the basis of justice and proportionality, taking into account the state's duty to ensure decent conditions life of every citizen of Ukraine.[27]

Administrative law examines how the rule of law applies to all the spheres of state administration. Any administrative procedure must ensure and protect the rights and freedoms of individuals and legal entities, and the activities of public administration bodies must be based on legality. Adoption of laws, which are sources of administrative law, should be carried out taking into account international legislation. Harmonisation of acts of domestic and international law facilitates the procedure of their application and reduces the risks of contesting the relevant acts. Also, the principle of the rule of law should be implemented in the practical activities of all state bodies, as well as in their relations with powerful or non-powerful subjects. Decision-making and the implementation of any legally significant actions must take place exclusively within the limits of the law and

[26] L. Lustgarten, *Socialism and the Rule of Law*, "Journal of Law and Society" 1988, Vol. 15, p. 25.

[27] Decision of the Constitutional Court of Ukraine in the case on constitutional petitions of 49 MPs of Ukraine, 53 MPs of Ukraine and 56 MPs of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of paragraph 4 of Section VII 'Final Provisions' of the Law of Ukraine "On the State Budget of Ukraine for 2011" of 26 December 2011, No. 20-rp/2011.

in accordance with the legally defined competence of the subject of power. Exceeding the limits of competence of state bodies should be qualified as a crime. The state must determine the procedure for implementation and protection of rights and freedoms belonging to citizens and guaranteed by the state. After all, the recognition of a corresponding right by a person without determining the procedure for its implementation and creating conditions for protection is not a manifestation of the implementation of the principle of legality, moreover, it is illegal, because there are actual obstacles to the implementation of legally defined rights or freedoms.[28] Enshrining in the Code of Administrative Procedure of Ukraine of 2005 the duty of the court to take into account the practice of the European Court of Human Rights when applying the principle of the rule of law contributed to the understanding by the courts of the general jurisdiction of the rule of law through the prism of its components (elements, requirements, aspects), reflected in the decisions of the European Court of Human Rights.

Criminal law examines how the rule of law affects criminal justice, including a fair trial, the collection of evidence, and the presumption of innocence. Also, taking into account the norms of the Criminal Code of Ukraine and the practice of the ECtHR, ensuring the implementation of the principle of the rule of law is central when applying measures to ensure criminal proceedings in general and preventive measures in particular. The procedure for applying the principle of the rule of law when making procedural decisions regarding the end of a pre-trial investigation, in particular regarding the closing of criminal proceedings, the release of a person from criminal liability, and the application to the court with an indictment is one of the key ones. The content of the rule of law, enshrined in Article 8 of the Criminal Procedure Code of Ukraine, is disclosed through the following provisions: the highest value of the human personality in criminal proceedings; strict observance

[28] Н.Д. Костюченко, Л.В. Шестак, *Принцип Верховенства Права В Адміністративному Праві*, Актуальні питання адміністративного права та процесу: матеріали всеукраїнської наукової конференції молодих вчених (в авторській редакції), (м. Маріуполь, 03 грудня 2021 року), Маріуполь 2021, 297с., p. 133.

of human rights and freedoms; the obligation to take into account the practice of the ECtHR in criminal proceedings. At the same time, the rule of law is mediated not only through general universal democratic values (a person, his rights and freedoms, the obligation to guarantee, ensure, observe and protect human rights), but also through due legal procedure, legal certainty and the prevention of illegitimate or excessive (disproportionate) interference with human rights. The rule of law as the basis of criminal proceedings is a guarantee of the achievement of the objectives of criminal proceedings enshrined in the Criminal Code of Ukraine, aimed at ensuring the rights and freedoms of participants in criminal proceedings, protection against unjustified interference with human rights by subjects of criminal procedural activity, coordination and balance of opposing interests in criminal proceedings by applying conventional standards.[29] Since 2012, courts in criminal proceedings must also take into account the practice of the European Court of Human Rights when applying the principle of the rule of law.

It is clear that the courts play a key role in protecting the fundamental rights and freedoms of the individual, and the courts also interpret and apply the rule of law through their decisions. However, in the process of judicial proceedings, courts face the following challenges:

1. Finding a balance between competing interests, for example between individual rights and freedoms and national security. These judgments demonstrate how this principle works in real-world dilemmas.
2. Adaptation to technology, such as data privacy or artificial intelligence, which demonstrates how the rule of law adapts to new challenges generated by technological progress.
3. Jurisprudence reflects the practical implementation of the principle and adapts it to the changing needs of society. For example, courts can make decisions that clarify how the rule of law interacts with specific situations, such as, for example, freedom

[29] В.В. Михайленко, *Реалізація засади верховенства права у кримінальному провадженні*, Міністерство Внутрішніх Справ України Національна Академія Внутрішніх Справ, Київ 2019.

of speech. These solutions contribute to a subtle understanding of the principle. The precedential nature of acts of judicial power in Ukraine is not based on legal norms, but originates from acts of judicial power as collateral acts that make up judicial practice, established judicial practice, or which contain judicial precedent, legal position, and legal provisions.

The role of the court in Ukraine in the process of law formation is not aimed at formulating legal norms in its acts and has its own characteristics, the main one of which is the subsidiary nature of judges' participation in this process and is conditioned by the requirements of justice. Therefore, the court participates in the process of law formation in the event that the legal position set forth in the act of judicial authority is binding not only for the parties in the case, but also for judges when deciding subsequent cases of a similar nature. The establishment of judicial precedent as a source of law in the legal system of Ukraine in the near future is possible with the recognition of the precedential nature of the acts of the judiciary, mostly related to the official interpretation of the Constitution and laws of Ukraine, as well as the interpretation of legal norms in the process of law enforcement.

So, the wealth of interpretation of the principle of the rule of law arises from a combination of ideological, dogmatic and legal approaches. Each approach brings its own ideas, priorities, and considerations, resulting in a multifaceted understanding that evolves over time in response to changing societal, political, and technological contexts.

3.4. Presentation of the Native (Endemic) Perception of the Rule of Law and the Answer to the Question Whether a Given Local Tradition Introduces New Elements of the Rule of Law or Whether It Accepts a Single Universal Model of the Rule of Law

The analysis of scientific literature, legislation and court practice shows the multifaceted concept of the rule of law, therefore it is practically impossible to give it an unequivocal definition. Analysing

the judicial practice of the Constitutional Court of Ukraine, let's turn to the definition set out in paragraph 2 of subsection 4.1 of clause 4 of the motivational part of the decision of the Constitutional Court of Ukraine dated 2 November 2004 No. 15-rp/2004.[30] The decision states that:

> *the rule of law is the rule of law in society. The supremacy of law requires the state to implement it in law-making and law-enforcement activities, in particular in laws, which in their content should be imbued primarily with ideas of social justice, freedom, and equality.*

More concrete is the position outlined in the Report of the UN Secretary General, 'Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' dated 23.08.2004,[31] that the rule of law is understood as a management principle according to which all persons, institutions and structures, state and private ones, including the state itself, function under the influence of laws that have been publicly adopted, are fully implemented and independently implemented by judicial authorities and are compatible with international norms and standards in the field of human rights. This also requires measures that ensure compliance with the principles of the rule of law, equality before the law, responsibility before the law, impartial application of laws, distribution of power, participation in decision-making, legal certainty, prevention of arbitrariness, and procedural and legal transparency.[32]

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[30] Decision of the Constitutional Court of Ukraine dated 2 November 2004 No. 15-rp/2004 in the case on the constitutional petition of the Supreme Court of Ukraine on the compliance of the provisions of Article 69 of the Criminal Code of Ukraine with the Constitution of Ukraine (constitutionality) (case on the imposition of a lighter sentence by the court), Official Gazette of Ukraine 2004, No. 45, p. 41, Article 2975.

[31] United Nations, The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General, https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/ [access: 15.07.2023].

[32] United Nations, The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General, Doc. S/2004/616, 23 August 2004, paragraph 6, https://undocs.org/en/S/2004/616 [access: 20.07.2023].

The Venice Commission, officially known as the European Commission for Democracy through Law, plays a crucial role in promoting the rule of law, democracy, and human rights across Europe. Although it may not provide a rigid definition of the rule of law, its guidelines focus on several core principles that are essential for its assessment. Thus, in paragraph 37 of the Report of the Venice Commission 'Rule of Law', it is noted that the extended version of the rule of law consists of eight mandatory 'ingredients', which include:

1. accessibility of the law (in the sense that the law must be clear, clear and predictable);
2. issues of legal rights must be resolved by the rules of law, and not on the basis of discretion;
3. equality before the law;
4. power must be exercised in a legitimate, fair and reasonable manner;
5. human rights must be protected;
6. means must be provided to resolve disputes without excessive material costs or excessive duration;
7. the court must be fair;
8. observance by the state of both its international legal obligations and those stipulated by national law.[33]

A thorough analysis of the rule of law as a universal standard and a sign of a civilised legal system was carried out by S.I. Maximov, according to whom it is a certain ideal, a regulative idea, which encompasses a special type of interaction between a person and the government and is oriented towards the fact that the government is limited by certain principles and norms, does not go beyond the defined limits, on a more complete embodiment of this ideal in real processes of the life of society, the real supremacy of law over state arbitrariness. The latter makes it necessary to:

[33] See: The Rule of Law: Report adopted by the Venice Commission at its 86th Plenary Session (Venice, 25–26 March 2011), translated into Ukrainian by S. Holovaty (with the support of the United States Agency for International Development – USAID); Law of Ukraine 2011, No. 10, pp. 168–184, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-ukr [access: 01.07.2023].

> *find a measure in the ratio of the universal requirements of the rule of law and its features in a certain civilisational and cultural environment, as well as to identify the readiness of social subjects to implement the requirements of practical reason in life (first of all, the presence of political will among those in power).*[34]

In general, one can agree with the author's conclusion about the possibility of a double expansion of the idea of the rule of law, which is expressed in its spread not only to the state, but also to society (the society of the rule of law), as well as its embodiment in a system of views on the world (a special worldview, genetically connected with the legal worldview, the basis of which is the ideas of reasonable legislation and human rights, which overcomes the latter's excessive fixation on the state and positive law). However, this provision needs some clarification in terms of the fact that in all its manifestations, the rule of law expresses a certain model of interaction between a person, society, and the state, based on the ideals of justice, the value attitude towards a person, his rights and freedoms. That is why there is a need to define material (substantive) elements that are common characteristics of both the rule of law and a civilised legal state.[35]

In our opinion, the modern perception of the rule of law in Ukraine is related to the protection of the rights and freedoms of citizens. This is manifested in the promotion of equality, justice, accountability and access to legal remedies. By adhering to the principles of the rule of law, society can protect and uphold the rights and freedoms of all people. For the successful application of the principle of the rule of law as an effective tool for the protection of human rights, it is necessary to develop a consolidated position regarding the priority steps of the state, public institutions and individual citizens. It is clear that indicating the principle of the rule of law in legislation is important, but not sufficient. Therefore, it is necessary

[34] А.Є. Краковська, І.В. Стаднік, *Верховенство права як ідеологічна парадигма цивілізованої держави*, "Право і Суспільство" 2020, No. 6.
[35] А.Є. Краковська, І.В. Стаднік, *Верховенство права…*, *op. cit.*

to improve the quality of reforms, in particular constitutional, judicial, anti-corruption, law enforcement and other legal reforms.

3.5. Considering How Historical and Traditional Experiences Influence the Perception and Understanding of the Rule of Law

The term 'the rule of law' was introduced into scientific circulation by the English scientist and politician James Harrington in 1656; the English scholar-constitutionalist Albert Ven Dicey and his followers are also responsible for the formulation of the doctrine of the rule of law. The concept of 'rule of law' entered the circulation of national jurisprudence with the adoption of the Constitution of Ukraine in 1996. So, this phenomenon is relatively new for Ukraine, although it has a long history. And it (history) begins its countdown in ancient times. The problems of the 'ideal state' and the 'rule of law' were studied by such outstanding Classical thinkers as Plato, Aristotle, Cicero and others and by Enlightenment figures such as Locke, Rousseau, Montesquieu, and others. The works of these and many other thinkers became the ideological basis of the classical concept of the rule of law, which at the end of the XIX century, were formulated by Oxford University Law School Professor Albert Dicey. The English classic called the main constituent elements of the mentioned phenomenon: 1) denial of arbitrary power; 2) equality before the law; 3) constitutional law, which is a consequence of individual rights, not their source. Even though Albert Dicey's doctrine of the end of the XIX century may appear to some to be 'unmodern' or to have lost, so to speak, its original 'purity' (because, especially after the Second World War, on the one hand, the active creative development as the conceptual basis of the English constitution, and on the other hand, having gone beyond the boundaries of the Anglo-Saxon legal system, it became a universal doctrine of the modern European legal order, spreading to the continental

legal system), its core will continue to be the aforementioned three classical constituent elements.[36]

The main purpose of the principle of the rule of law is to ensure freedom and human rights, and first of all, in its relations with state power and state bodies. The idea of the rule of law, from the very beginning of its formation, was directed against the tyranny and arbitrariness of monarchical regimes and authoritarianism, which often used formal law to achieve illegal goals.

History is known for successful cases of opposition to monarchy and authoritarianism with the help of the rule of law. Whereas a monarch or a small number of people concentrates all power in their hands, a constitution limits such power and guarantees the rights of citizens. The rule of law provides for an independent judicial system that can review the actions of government officials and intervene in cases where the rights of citizens are violated. A system of checks and balances makes monarchy and authoritarianism more limited and democratic and prevents the spread of authoritarian practices in government. An important part of the rule of law is the idea of equality before the law, regardless of a person's status or office, which is an important counter to any form of authoritarian rule.

The rule of law has historically acted as a tool against monarchies and authoritarian regimes. Here are some examples from history where this concept played an important role in the fight to limit power:

1. Magna Carta in 1215 was concluded in England during the reign of King John the Landless. It established limits on the power of the monarch and protected the rights of the English nobility. This document had a huge impact on the further development of the rule of law.[37]
2. Habeas Corpus Act (1679) was passed in England during the reign of King Charles II. It guaranteed a person's right to be tried

[36] С. Головатий, *Верховенство права: український досвід, Книга третя*, Київ 2006, p. 1452.

[37] J.C. Holt, *A vernacular-French text of Magna Carta, 1215*, "The English Historical Review" 1974, Vol. 89, No. 351, pp. 346–364.

before an independent court, which acted as a deterrent to illegal imprisonment and helped limit the king's power.[38]

3. The American Declaration of Independence (1776)[39] and the US Constitution (1787):[40] both of these documents established the rule of law as the foundation of a democratic regime. The Constitution established a system of separation of powers and limitation of government through a system of checks and balances of power.
4. The revolution in France (1789–1799) led to the formation of various documents and legislation that defined the rights of citizens and limited the power of the monarch. One of the most important is the 'Declaration of the Rights of Man and Citizen' (1789), which established the principles of the rule of law.
5. After World War I, Germany adopted a constitution in 1919, that established the rule of law, an independent judiciary and guaranteed the rights of citizens. However, this constitution was attacked and ignored during the Nazi regime.

These examples demonstrate how the rule of law has been an important tool against monarchies and authoritarian regimes, helping to limit power and protect the rights of citizens.

The purpose of the rule of law is not simply to formally ensure the order provided by laws and other regulatory acts established by the state, but to establish 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. In other words, even an impeccable law, from the point of view of legal technique, is not always a panacea for the rule of law. From this follows the first and, in general, almost indisputable conclusion: the principle of the rule of law acquires an independent meaning, different from the principle of the rule of law, when the law is considered as

[38] A.L. Tyler, *A Second Magna Carta: The English Habeas Corpus Act and the Statutory Origins of Habeas Privilege*, "Notre Dame Law Review" 2015, Vol. 91, p. 1949.

[39] T. Jefferson *et al.*, *The Declaration of Independence (1776)*, Spark Publishing, 2014.

[40] J.N. Rakove, *The Annotated US Constitution and Declaration of Independence*, London 2012.

a phenomenon that is not contained exclusively in laws and other normative acts, that is, when there is a theoretical and practical understanding rights and law.

Today, the European Court has formulated almost fifteen signs of the rule of law. In contrast to this, the Constitutional Court of Ukraine once again used a fairly abstract formula for the concept under consideration: 'the rule of law is the rule of law in society.' But 'rule of law' is a term that is used in various senses and is broader than the principle of legality. It is safe to say that today the final meaning of the concept of the rule of law is uncertain. The principle of the rule of law is understood as the superiority of higher ideas about justice over the norms of current legislation in the event of controversial legal situations. That is, based on ideas about the supremacy of law, it is possible not to comply with the prescriptions of the current legislation that contradict them. This order of things is largely related to the uncertainty of the legal doctrine of Ukraine after the election of independence and the beginning of the creation of its own legal system. As S.P. Holovaty notes, since the principle of the rule of law was implemented in the domestic legal system (Constitutional Treaty of 1995) and standardised as one of the basic prescriptions of the Ukrainian founding act (Constitution of Ukraine in 1996), and until now, Ukraine has not carried out a complex, systematic, special study of the essence of the phenomenon that appeared in the Western world as the Rule of Law.[41] He concludes that any attempts by representatives of domestic legal science to give a formal definition of the concept of 'rule of law' or the corresponding legal principle formed on its conceptual basis are and will be scientifically untenable, and therefore useless; domestic scientists should leave such attempts and stick to the methodology once proposed by the International Commission of Jurists and later confirmed by the practice of the European Court of Human Rights, according to which 'rule of law' is a term suitable for conveying in a generalised form the combination of ideals and what has been

[41] С. Головатий, *"Верховенство Права" Не Працює, Коментар до тексту документа Венеційської Комісії «Доповідь про правовладдя, що її ухвалено на*, "Право України" 2019, No. 11, pp. 25–26.

achieved in practical legal experience in relation to the principles, institutions, mechanisms and procedures that are extremely important for the protection of the individual from the arbitrary power of the state and that provide the individual with the opportunity to possess human dignity.[42]

The study of the rule of law, its essence, various aspects in the context of modern legal reform in Ukraine is certainly relevant. This relevance is largely determined by the doctrinal eclecticism observed in the Ukrainian legal sphere: the official legal ideology gravitates towards the legal doctrine, the central idea of which is the supremacy of law as a principle of legal equality; practice is subordinated to the doctrine that pervades the principle of legality. There is a need for doctrinal certainty of contemporary Ukraine in the legal sphere. Since this doctrine is not humanistic, it is obviously necessary to implement the legal (natural law) doctrine, therefore, highlighting the principle of the rule of law is timely. It is in the context of the natural law doctrine that it is possible to read the principle of the rule of law. It cannot work outside of this doctrine. This led to the declarative character in the legal practice of contemporary Ukraine.[43]

At the World Conference on Human Rights (Vienna, 1993), representatives of 171 states, including Ukraine, confirmed the universality and universality of international human rights standards and emphasised that their implementation is an important factor in the existence of a democratic society in any country. The general recognition of international standards determines the obligation of all the countries of the world to agree to international control of compliance with these standards in the national legal system. The European Court of Human Rights reveals the content of the principle of the rule of law through the formulation of requirements that it derives from it, including: recognition by the state and society of natural inalienable human rights as a truly effective

[42] П. Рабінович, *Верховенство права в інтерпретації Конституційного Суду України*, Інтернет-видання "Юриспруденція", http://www.lawyer.org.ua/?w=r&i=&d=668 [access: 24.08.2023].

[43] В.Г. Градова, *Відображення ідеї верховенства права в українській правовій традиції XIX–початку XX століття*, "Науковий Вісник Національної Академії Внутрішніх Справ" 2011, No. 6, pp. 223–231.

law that cannot be violated; court availability; independence and objectivity of the court; the human right to a fair trial; the authority of the court (the decision made by the court must be accepted as the truth and is not subject to review). The demand for the equality of the law is important. The law is interpreted here as a provision of a normative legal act. First, the law must be accessible to a person, i.e., contain clear and clear wording that would allow him to regulate his behaviour independently or with appropriate consultation. Secondly, it must be predictable, that is, such that a person can predict the consequences of its application. The law must also comply with the principle of proportionality in the relationship between the interests of the individual and society. Another requirement is that the law must meet all other requirements of the rule of law, in particular, it must clearly establish the limits of discretionary powers and the manner of their exercise. This is necessary so that the person is protected from the arbitrariness of the subjects of power (paragraph 27 of the decision of the European Court of Human Rights in *Kruslin v. France* of 24 April 1990).[44]

Certain aspects of the rule of law are revealed in the works of M. Hrushevskyi,[45] S. Dnistryanskyi,[46] B. Kistiakivskyi,[47] V. Vinnichenko[48] and other famous Ukrainian thinkers. All of them defended the natural rights of the Ukrainian people to political independence, national identity, national dignity, free expression of will in any sphere, the right to live on their native land, the right to property, to national cultural assets, free development, improvement, etc. Their works raised the issue of a fair and accessible national court,

[44] Ю.Ю. Білас, *Європейські стандарти прав людини в правозастосуванні сучасної України, дис. … канд. Юрид*, Наук, Київ 2011.

[45] М.С. Грушевський, *Вільна Україна, Українська суспільно-політична думка в XX ст*, "Сучасність" 1983, Vol. 1.

[46] С. Дністрянський, *Погляд на теорії права та держави, Ювілейний збірник Наукового товариства ім. Т. Шевченка у Львові в п'ятдесятиліття основання 1873–1923*, Львів 1925, p. 63.

[47] Б. Кистяковский, *Реальность объективного права, Кистяковский Б. Избранное: в. 2 ч. Ч. 1. – М.*, Росспэн 2010, pp. 255–327.

[48] Ю. Древаль, А. Кузнецов, *Верховенство права як фундаментальний принцип публічного управління*, "Актуальні проблеми державного управління" 2019, No. 1(55), pp. 126–133.

fair laws, the right of the people to protest against any arbitrariness, etc. That is, the idea of the rule of law or the rule of law of the people characteristically resounds in the work of these thinkers

So, in the Ukrainian legal tradition of the 19th and early 20th centuries, such substantive features of the principle of the rule of law have been developed, such as: the requirement that the authorities recognise the natural rights of man and the people as real rights, the principle of respect for human dignity, the idea of humanism, democracy, the principle of justice, a fair and accessible court, democratic power, legal guarantees of the rights of man and the people, etc.[49]

The constitutional reform in Ukraine, which was implemented in 2016, was important for our country, and directly concerns the observance of the rule of law in Ukraine and the strengthening of democracy. The system of ensuring the realisation of the right to judicial protection of citizens was qualitatively improved.

The powers of the President of Ukraine and the Verkhovna Rada of Ukraine were adapted to elect judges to positions in accordance with international standards, and the requirements for the personality and professionalism of judges were significantly increased.

The Rule of Law checklist reflected the most important indicators how to measure the rule of law in the state,[50] and the adoption of this document by Ukrainian lawyer, scientist and Judge of Constitutional Court of Ukraine Serhiy Holovaty with adaptation to Ukrainian realities helped to form blocks of questions for each element of the rule of law.

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[49] В.Г. Градова, *Відображення ідеї верховенства права в українській правовій традиції XIX–початку XX століття*, "Науковий вісник Національної академії внутрішніх справ" 2011, No. 6, pp. 223–231.

[50] European Commission for Democracy Through Law (Venice Commission), The Rule of Law Checklist, https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf [access: 01.09.2023].

3.6. Presentation of the Multifaceted Nature of the Rule of Law (Freedom of Speech, Freedom of Assembly, Independence of the Courts, Proper Definition of the Legitimacy Process) with an Indication That in Each of These Areas the Rule of Law May Be Interpreted Slightly Differently

So, the rule of law is a multifaceted concept. The main attributes include freedom of speech, freedom of assembly, independence of the courts, proper definition of the legitimacy process.

An attempt to solve the question of measuring the Rule of Law in the world was made with the help of The World Justice Project Rule of Law Index®. The *Rule of Law Index* and definition criteria[51] for 140 countries can be seen on the project's official website. Within the framework of this study, we are interested in the criterion of ensuring human rights.

Factor 4 of the WJP *Rule of Law Index* recognises that a system of positive law that fails to respect core human rights established under international law is at best 'rule by law', and does not deserve to be called a Rule of Law system. Since there are many other indices that address human rights, and because it would be impossible for the Index to assess adherence to the full range of rights, this factor focuses on a relatively modest menu of rights that are firmly established under the United Nations Universal Declaration of Human Rights and are most closely related to rule of law concerns. The Factor 4 Fundamental Rights includes 8 points: 4.1. Equal treatment and absence of discrimination; 4.2. The right to life and security of the person is effectively guaranteed; 4.3. Due process of the law and rights of the accused; 4.4. Freedom of opinion and expression is effectively guaranteed; 4.5. Freedom of belief and religion is effectively guaranteed; 4.6. Freedom from arbitrary interference with privacy is effectively guaranteed; 4.7. Freedom of assembly and association is effectively guaranteed; 4.8. Fundamental labour rights are effectively guaranteed. The point 4.4. Freedom of opinion

[51] M. Agrast, J. Botero, J. Martinez, A. Ponce, C. Pratt, *Rule of Law Index® 2012–2013, The World Justice Project*, Washington 2012–2013.

and expression is effectively guaranteed measures whether an independent media, civil society organisations, political parties, and individuals are free to report and comment on government policies without fear of retaliation.

Since the beginning of the war in Ukraine in 2014, a number of laws have been adopted that prohibit the propaganda of the Soviet totalitarian regime, limit the showing of Soviet films, and the listening of Russian music.

According to the report of Freedom house, the Ukrainian government controls the mass media, using the United News platform to prevent the potential spread of Russian propaganda. Authorities have the power to shut down, without a court order, news sites that are not officially registered as mass media, and several journalism groups called it a 'threat to freedom of speech' and a departure from 'European Union standards.' Amendments to the Criminal Code introduced criminal liability for a Ukrainian citizen's public denial of Russia's aggression, glorification of the aggressor state, or insults to the honour and dignity of Ukrainian soldiers. Freedom of speech ratings have worsened as the government has used the vaguely worded new law to prosecute citizens who allegedly cooperated with the Russian military, publicly denounced Russian government aggression, spread Russian propaganda, or insulted the honour and dignity of Ukrainian soldiers.[52]

On 31 March 2023, the Law of Ukraine "On Media", adopted by the Verkhovna Rada on 13 December 2022, entered into force. We remind you that the adoption of this law is one of the requirements for Ukraine's accession to the EU. The main criticism of the law concerns the broad powers of the state regulator – the National Council for Television and Radio Broadcasting. The regulator received the right to cancel the registration of the media or temporarily block it for significant violations. The European Federation of Journalists criticises the law for this, as well as for the procedure for electing members of the National Council by the Ukrainian parliament and the president. The new law "On Media" authorises

[52] Freedom House, *Freedom in the world 2023*, https://freedomhouse.org/country/ukraine/freedom-world/2023 [access: 02.09.2023].

the National Council on Television and Radio Broadcasting to issue fines, order the removal of content in violation of the law, and block websites in cases of noncompliance. The law classifies the dissemination of information that denies or justifies criminal nature of the 1917–1991 communist totalitarian regime and Nazi totalitarian regime, or creates positive image of their leaders; contains any symbols of these regimes, or humiliates or insults Ukrainian language as significant offenses. Additionally, the law prohibits incitement to discrimination based on sexual or gender identity.[53]

> *We see two main problems from the point of view of European legislation on media freedom. The first is the independence of national regulators. We do not think that the structure proposed by this law is that of a fully independent political regulator. The second is how the law expands the range of extrajudicial sanctions against the media,*

said Ricardo Guterres, director of the European Federation of Journalists. According to him, submission to an independent media regulator and court decisions, and not to the decisions of politicians from the government, should be guaranteed for the media.

A number of criminal restrictions on war speech were also introduced. A number of new types of war-related propaganda were criminalised. In 2022, responsibility for propaganda in educational institutions and a ban on justifying the war of the Russian Federation against Ukraine, recognising it as legitimate, denying armed aggression, and glorifying its participants were introduced in Ukraine in 2022.[54]

Freedom of speech is restricted in the country during the war, but if it is due to ensuring national security, then such actions of

[53] M.K. Lavers, *Ukrainian lawmakers pass LGBTQ-inclusive media regulation bill*, Washington Blade, 16.12.2022, https://www.washingtonblade.com/2022/12/16/ukrainian-lawmakers-pass-lgb [access: 05.09.2023].

[54] С. Мазепа, *Про криміналізацію пропаганди в умовах російсько-української війни: вітчизняний та міжнародний досвід*, "Актуальні проблеми правознавства" 2023, No. 3, pp. 176–182.

the government are quite permissible. After all, freedom of speech is not an absolute fundamental right.

During World War I, the American government severely limited freedom of speech. Examples are the Sedition Act and the Espionage Act. In one of the most high-profile examples of censorship during this period, officials arrested prominent labour organiser and Socialist presidential candidate Eugene Debs, who had criticised the war and the draft. Debs said during a speech in Canton, Ohio: "At this time you especially need to know that you are fit for something better than slavery and cannon fodder." Federal officials charged Debs with violating the Espionage Act of 1917. The US Supreme Court upheld his conviction in *Debs v. United States*[55] (1919).

American history confirms that freedom of speech suffers in times of war. The understandable push for safety and order has unfortunately led to excessive efforts to brand many dissenters as disloyal. First Amendment scholar Thomas Emerson aptly wrote in 1968: "The theory of the full protection of the First Amendment is viable in wartime, but it needs further support to survive in reality." On 14 April 2022, the Verkhovna Rada of Ukraine adopted a statement on the value of freedom of speech, guarantees for the activities of journalists and mass media during martial law. One of the key tasks of the government should be to "ensure the constitutionally established guarantees of freedom of speech, free receipt, collection and distribution of information, taking into account the restrictions established by the laws of Ukraine related to martial law". First of all, such restrictions apply to information that contains state secrets. This includes, in accordance with the Law of Ukraine "On State Secrets", information on the content of strategic and operational plans and other documents pertinent to combat management, preparation and conduct of military operations, the mobilisation and strategic deployment of troops, as well as documents on other important indicators that characterise the organisation, numbers, deployment, mobilisation and combat readiness, and the combat and other military training, armament and logistical support of the Armed Forces of Ukraine and other military formations.

[55] K. Sturm, *The Philosophy of the Freedom of Expression: Speech and Press Examined Philosophically and Implemented Legally*, Kansas City 2019.

The example of Facebook shows the enormous power a sole entity may exercise over its users, among others in the area of freedom of speech.[56] By now, Facebook is the largest group of people in the world except for Christianity and Islam.[57] The main problem is wholly obvious: law is a territorial concept; the Internet is a global one. Facebook acting globally is, thus, not easy to 'govern'.

In Germany, legislation was enacted that imposed obligations on online platforms, including Facebook; now they delete everything, one item after another, just in case, in order not to pay high fines. In addition, unlike domestic legislation and regional situations, Facebook does not have a 'court' (yet) that could contribute to the further development of clear principles and the creation of precedents. It also cannot be attributed to a specific set of cases resolved by Facebook, as their internal review and decision-making processes remain confidential. The actual evaluation mechanism is partly automatic, partly people have to make a decision about banning images in a few seconds. Especially the software is kept strictly confidential (rework).

Currently, in Ukraine, in connection with the introduction of martial law in Ukraine, the constitutional rights and freedoms of a person and a citizen:

> *may be temporarily limited for the period of validity of the legal regime of martial law. provided for in Articles 30–34, 38, 39, 41–44, 53, of the Constitution of Ukraine, as well as introduce temporary restrictions on the rights and legal interests of legal entities within the limits of and to the extent necessary to ensure the possibility of introducing and implementing measures of the legal regime of martial law, which are provided for.*[58]

[56] S. Koloßa, *Facebook and the Rule of Law*, ZaöRV, 2020, p. 509, https://beck-online.beck.de/Bcid/Y-300-Z-ZAOERV-B-2020-S-509-N-1 [access: 05.08.2023].

[57] J. Smith, *Facebook is Not Here to Protect Your Freedom of Speech*, "Business Insider", 09.06.2016.

[58] Paragraph 3 of the Decree of the President of Ukraine dated 24 February 2022 No. 64 "On the introduction of martial law in Ukraine."

Thus, according to the Constitution of Ukraine (Article 34), the Law of Ukraine "On Martial Law", freedom of speech can be limited during martial law in order to ensure national security, public order and other priority goals for the state. Usually, in such cases, military censorship (control over the content and distribution of information with the aim of limiting or preventing its distribution) operates, which limits publications and statements that may harm national security or promote the enemy.[59]

My previous research has already looked at trying to find a balance between propaganda and freedom of speech in wartime. This is facilitated by a careful study of the practice of the European Court of Human Rights in solving similar situations in countries in the post-conflict period.

Recalling the case of Ruslan Kotsaba, it is worth recalling the mechanism of possible restriction of freedom of speech. The proportionality test consists of three steps, namely: 1) was the restriction based on law? 2) did it pursue a legitimate aim? 3) was the restriction necessary to pursue the aim?[60] The Ukrainian blogger called for ignoring the mobilisation and justified the war. Court proceedings are currently ongoing.

3.7. Conclusions

The rule of law is the basis of a democratic state. Different approaches to understanding give rise to multifaceted perception. Each judge or lawyer perceives this principle in his own way. We propose to consider the principle of the rule of law as the protection of the rights and freedoms of a person and a citizen in the state with the help of independent courts. Freedom of speech is one of the elements of the rule of law and a fundamental right, but it is not absolute.

[59] Б.Ф. Кормич, *Інформаційна безпека: організаційно-правові основи*, Київ 2004, pp. 16–19.

[60] Freedom of Expression as a Common Constitutional Tradition in Europe Report of the European Law Institute, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Freedom_of_Expression.pdf [access: 10.07.2023].

The war in Ukraine, the pandemic, and political and economic crises have given rise to the spread of digital violence on the Internet. Fake news, disinformation, hate speech and propaganda in the digital sphere can easily spread, manipulate human consciousness and encourage illegal behaviour. The progressive development of modern technologies has necessitated the development of a common regulatory framework and standards for online interaction and decisive counteraction to illegal online content. Just as Rosalyn Higgins' pointed remark shows "[t]he rule of law has become a catchphrase in efforts to address all kinds of global problems from health pandemics to armed conflicts to poverty to terrorism."[61]

The Constitution of Ukraine prohibits censorship, but certain exceptions are allowed when the country is at war. The cyber-police's efforts in the 'Mriya' project to remove criminal propaganda are fully justified. Freedom of expression is a fundamental right, but it is not absolute. This tool of democracy plays an important role.

Accelerated granting of the status of a candidate for EU membership to Ukraine raises concerns about the weakening of the rule of law throughout the European Union. Judicial reform is on its way, and will meet all EU standards. Undoubtedly, Ukraine has a long Soviet past, and it is a real challenge for the state to ensure full observance of human rights and the rule of law in all institutions of power and in civil society. However, the country exercises free and democratic governance in the difficult conditions of wartime, therefore the legitimate aspirations of Ukraine to improve the lives of its people in the hour of greatest need cannot be ignored by the European Union. Ukrainians have proven that they are ready to fight for the institutions and practice of the rule of law at great risk to themselves. Democracy and human rights must be strengthened and people increasingly empowered to flourish in peace, security and human dignity.

The notion 'rule of law' has many different interpretations, each of which plays an important role in the study of this concept. In

[61] R. Higgins, *The Rule of Law: Some Sceptical Thoughts*, [in:] R. Higgins (ed.), *Themes and Theories: Selected Essays*, "Speeches, and Writings in International Law" 2009, pp. 1331, 1334.

our opinion, it is a basic constitutional principle and one of the basic principles of a democratic society, which is used to realise the rights and freedoms of a person and a citizen. The judicial system provides reliable protection and restoration of violated rights. The multiplicity of concepts gives us the opportunity to understand the concept of 'rule of law' in its various aspects, as well as to apply it in practical activities in all its manifestations. The rule of law is a certain aspiration, and therefore the degree of its implementation is important. And freedom of speech is an important indicator of the rule of law in the state.

Representatives of government institutions and civil society are trying to find a compromise between freedom of speech in mass media and state security, as mass media, the blogosphere and social networks are actively used as a tool in 'hybrid' and information wars, as a weapon aimed at destroying the spiritual and value foundations of social consciousness.

It is specified that the main elements of the rule of law, which directly affect the assessment of the legality of restrictions on freedom of speech, are legality, legal certainty, prohibition of arbitrariness, respect for human rights, non-discrimination and equality before the law.

According to international standards and human rights, there is a certain 'inviolable minimum' of freedom of speech that must be protected even in times of war or in situations of threat to national security. This 'hard minimum' in wartime may include the following main aspects:

1. access to news;
2. access to security information;
3. criticism of the government is possible even in times of war, if it does not contain a direct threat to national security;
4. prohibition of discrimination;
5. prohibition of hate speech;
6. prohibition of calls to violence.

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Chapter 4. Compensation for Damage Caused by the State to Individuals as a Manifestation of a Functional Rule of Law

4.1. Introduction

The general aim of this part of the book is firstly to characterise the concept of the rule of law in the Czech Republic and its law in general, to identify the manifestations of the rule of law in the area of state liability for damage caused by the violation of EU law and to propose a solution to the regulation of state liability for damage and the possibility of its regulation in the law of the Czech Republic transferable to the law of the Republic of Poland.

I think it is necessary to stress that the specific content of the legislation will differ from the political agenda pursued by the legislator. Indeed, the view of state responsibility may be different. The Czech Republic or Poland may perceive this legal institution as something imported from outside, which must be resisted. This may be because, from the state's point of view, this type of liability is punitive in nature and represents a mechanism for private enforcement of EU law (i.e., enforcement at the initiative of the individual).[1] The consequence will be a minimalist and restrictive conception of this liability.

However, this legal institute can also be understood as a tool for the protection of individual rights against the arbitrary power of the state. In such a case, national legislation can be set generously.

[1] This distinguishes it from public enforcement of EU law by the European Commission through infringement proceedings under Article 258 TFEU et seq.

Indeed, the legislator is free to adopt a liability regime of a standard which exceeds that required by European Union law. The case law of the CJEU allows such an approach. The requirements set by the Court of Justice can therefore be regarded as the minimum standard for State liability in the European Union.

The term rule of law is an abstract and therefore vague concept. However, certain elements defining this construct are generally well-established. A common and indisputable component of the concept of the rule of law is: a) the principle of bindingness to the law, b) the separation of powers, and c) the imperative to ensure the protection of human rights and freedoms. The state, which is a state governed by the rule of law, has a duty to provide justice (especially in the area of the judiciary) and should also be held accountable for its actions in the broad sense, that is, including the actions of its institutions and their representatives – elected officials.

The trend in recent years has been the transnationalisation of governance. This is characterised by the transfer of a number of tasks typically falling within the competence of the state to supranational levels of decision-making. A typical example is the European Union, which has essentially replaced the state in a number of areas. More broadly, this process also includes various integration projects codified in international treaties. The Council of Europe and the international treaties concluded within its framework are a case in point. The consequence of these processes is that the rights and obligations of individuals are no longer governed exclusively by national law, but also by European Union and international law. The role of the state has been transformed in the field of law-making. It is no longer the sole creator of legal norms, but it participates in the creation of standards through the internal mechanisms of the relevant international organisations. What has not changed, however, is that *vis-à-vis* individuals, the state must respect and enforce these rules created 'elsewhere', even if it disagrees with them. This is not an unusual situation, as supranational institutions tend to be activist, especially on issues sensitive to member states, including those that fall within the framework of national identity.

It follows that the rule of law means that the state is being bound not only by the law of that state, but also by EU and international

law. Bindingness to these systems of law derives from national constitutional law (in the Czech Republic, in particular Article 1(2) of the Constitution and Article 10 of the Constitution). Bindingness to European Union law and the fact that this law is the Member States' own law also follows directly from European Union law (see, for example, the Simmenthal case). The concept of state liability for damage caused to an individual may therefore also include breaches of European Union law and international law.

The starting point of the research is the fact that the traditional concept of state liability for damages is relatively narrow. In Czech law, this liability is specifically regulated by Act No. 82/1998 Coll., the Act on Liability for Damage Caused in the Exercise of Public Authority by Decision or Improper Official Procedure (hereinafter referred to as the "the Act on Liability for Damage"). This legislation limits the liability of the State towards an individual to certain cases concerning maladministration or defects in court proceedings.

In addition to this, a new concept of state liability for damages (*Francovich* liability) has emerged in the case law of the CJEU. This concept of liability is much broader – in favour of the individual and his claims against the State.

Although the CJEU's case law on Francovich-type liability is well established, a number of Member States have not yet fully transposed the CJEU's requirements into their national law. The Czech Republic is one such state. It appears to me from the available sources that Poland too has not yet adopted specific regulation of this type of liability Indeed, the concept of Francovich-type liability in the case law of the CJEU is revolutionary. Its implications undermine another aspect of the rule of law – the balance of power. The consequence of the CJEU's case-law is to strengthen the role of the courts, to the detriment of the traditional and democratic representative of the people – Parliament.

The current and ongoing problem is therefore the contradiction between the existing national legislation governing state liability for damages and the requirements arising from EU law. This problem cannot be solved by applying the general rules contained in the Civil Code, as even these are narrower than the Francovich-type concept of liability in the case law of the CJEU.

The main objective of the chapter will therefore be to propose principles and specific parameters of national legislation that will ensure compliance with EU law and the case law of the CJEU.

The secondary objectives of the chapter are to identify the possible consequences of a situation where the legislation introducing national rules on state liability for damages is not brought into line with EU law and the case law of the CJEU at the level of EU law (would the infringement procedure under Article 258 TFEU apply? Is it possible to enforce the adoption of this regulation through the EU's rule of law enforcement mechanism?); to identify the possible consequences of a situation where the legislation introducing national rules on state liability for damages is not brought into line with EU law and the case law of the CJEU in terms of constitutional law; and to determine whether there are other options to address the problem (codification by secondary EU law? amendment of primary law?).

In the first parts of this research, I will use a descriptive method to determine the content and scope of the Rule of Law in the Czech law in general and in order to determine the requirements that EU law imposes on national regulation. This issue is fairly well researched in the literature and will therefore provide a simple starting point for further research. The Rules of State Liability for Damages will be derived from an analysis of the relevant case law of the Court of Justice and a synthesis of its conclusions. The normative analysis will be used to analyse the Czech legislation on state liability for damages. The analysis will also include the identification of relevant case law of Czech courts concerning the issue of state liability for damages for breach of EU law and public international law (Legal Analysis). The dogmatic approach will prevail in the research, while the use of empirical approaches is not appropriate with regard to the topic.

4.2. The Rule of Law in the Law of the Czech Republic

In view of the comparative nature of this monograph, it is necessary to define the concept of the rule of law in the Czech Republic, taking into account the fact that it is a member of the European Union

like Poland. In this part of the chapter, therefore, the regulation and position of the rule of law in Czech law will be briefly introduced in a rather descriptive manner.

In the Czech Republic, the rule of law is enshrined directly in the Constitution. Article 1 of the Constitution states that the Czech Republic is, inter alia, a democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. Article 2 of the Constitution then concretises the rule of law by defining the separation of powers in the Czech Republic.

Both provisions are not just an empty part of the Czech Constitution, which would have little meaning in practice. It is just the opposite. The Constitutional Court regularly uses the principle of the rule of law in its case law. Indeed, in response to the historical experience of the Czech Republic as a communist country, this court places great emphasis on this principle. The importance the Constitutional Court attaches to this principle is also evident from the way this court works with and defines this concept.

The concept of rule of law in the case law of the Constitutional Court is material. The Court therefore quite often speaks of a material rule of law instead of rule of law without an adjective.

What does that mean? The rule of law can be viewed in Czech law as:

1. in terms of the values, principles and tenets that it protects and that define it in its overall complexity,
   - these values may in themselves set a certain standard for the protection or treatment of an individual, or
   - may be manifested in other legal rules or in the functioning of the state, in terms of how the state and its law should function;
2. as a supporting argument, which the Constitutional Court in particular uses to give weight to the main argument on which it decides a case;
3. as a rule of interpretation and application according to which the courts or other state authorities must act to protect the values mentioned in the previous point effectively and efficiently;[2]

[2] This can be demonstrated, for example, in the decision: "With reference to the already established case law on the modern substantive rule of law, the

4. as a corrective to positive Czech law in a situation where its mechanical (formal) application would lead to a result that would not be defensible (acceptable) in the light of what the rule of law means; the consequence may be a departure from the text of Czech law – a de facto disregard for it.[3]

I stated above that the rule of law is enshrined at the constitutional level, i.e., in the positive law of the Czech Republic. However, it is also evident that in the Czech law, the rule of law is a two-dimensional legal concept/construct. It is a part of not only positive law but also natural law. For example, the Constitutional Court stated that:

> *if the state administration in the concept of the formal rule of law was strictly bound to the law in the formal sense, the material constitutional state is characterized by its adherence to supra-positive values* […] *such as human dignity, freedom, justice, which constitute the essential elements of a democratic rule of law. Respect for and protection of human dignity and freedom is the highest and most general purpose of law.*[4]

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obligation of constitutionally compliant interpretation of even very old legal provisions with regard to the constitutional principles in force today and the value discontinuity with the old regime" (decision the Czech Constitutional Court I. ÚS 3964/14 of 13 June 2016).

[3] In this view, it is possible to deviate from the text of a legal rule and thereby decide contrary to it. In its decision Pl. ÚS 21/96 of 4 February 1997, the Czech Constitutional Court stated: "The court is not absolutely bound by the literal wording of a statutory provision, but may and must deviate from it if the purpose of the statute, the history of its creation, its systematic coherence or one of the principles which have their basis in a constitutionally conforming legal order as a meaningful whole so requires. In doing so, arbitrariness must be avoided; the court's decision must be based on rational reasoning". And this Court also reached a similar conclusion in its decision II. ÚS 2048/09 of 2 November 2009, in which it stated: "Content requirements must also be placed on legal norms, since in a substantive rule of law based on the idea of justice, fundamental rights constitute a corrective to both the content of legal norms and their interpretation and application. Therefore, in the conditions of a substantive rule of law, it is the task of the judge to find a solution that ensures the maximum realization of the fundamental rights of the parties to the dispute". Constitutional Court ruling II. ÚS 2048/09 of 2 November 2009.

[4] Constitutional Court ruling II. ÚS 2268/07 of 29 February 2008.

A characteristic feature of the concept of the rule of law in Czech law is the lack of any attempt to define this concept both legally and judicially. Even the case law of the Czech Constitutional Court does not provide a precise and clear definition. Neither does the Constitutional Court make any particular attempt to do so.

The Court rather defines this concept in the abstract and as such it is concretised through other, still rather general values or principles that define it. These principles are the traditional ones and include:

i. guarantees of fundamental rights and freedoms;
ii. constitutionality and legality;
iii. legal certainty;
iv. sovereignty of the people;
v. separation and control of powers;
vi. limited government;
vii. legitimacy of state power and democracy of state institutions.

In the area of continental Europe and its law, these values are traditional components of what is meant by the rule of law in its totality. In case law, they are used with varying degrees of specificity in the enforcement of the rule of law. Indeed, each of them is subdivided into many different levels and each of them can be further specified as a separate rule.

However, I have mentioned that the rule of law is also used by the Czech Constitutional Court as a supporting argument when advocating a particular legal solution that is primarily justified on the basis of another legal argument.

The role of the rule of law in the enforcement of the law can be demonstrated by the current case law of the Constitutional Court.[5] The application of this principle is as varied as its scope is wide. For example, this Court has held that:

1. "The long-term insecurity of residents regarding their housing can undermine citizens' confidence in the democratic rule of law".[6]

[5] Due to the limited scope of the study, I have selected only cases for the last year between October 2022 and the same month in 2023 for demonstration.

[6] II. ÚS 1387/23 of 25 May 2023.

2. "A democratic state governed by the rule of law, based on respect for the fundamental rights to life and health, has a positive obligation to take appropriate steps to ensure the protection of the lives and health of persons".[7]
3. The court also stated that the democratic rule of law should only use its powers and the clear superiority it has in criminal proceedings "in accordance with certain standards, such as respect for the dignity and autonomy of every human being".[8]
4. "If the state is to be truly considered a substantive rule of law, it must be held objectively responsible for the actions of its organs or for the actions by which state organs or public authorities directly interfere with the fundamental rights of individuals. The State does not have free will, but is obliged to strictly observe the law in its ideal (non-damaging) interpretation".[9]
5. The proper execution of sentences is a very important public interest in the rule of law. It also includes the emphasis that the substantive rule of law places on the protection of society from criminal activity.[10]
6. The rule of law is also reflected in the requirement of a sufficiently strong justification for the possibility of imposing a custodial sentence.[11]
7. The modern rule of law does not abandon the repressive function of criminal law.[12]
8. "The substantive rule of law is built, inter alia, on citizens' trust in law and the legal order", which is manifested by the fact that different (decision-making) practices of courts on identical matters are fundamentally undesirable.[13]
9. "A democratic state governed by the rule of law, as opposed to an authoritarian state, must use these powers in accordance with

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[7] I. ÚS 1594/22 of 31 July 2023.
[8] V. ÚS 1069/23.
[9] III. ÚS 847/23 of 22 May 2023.
[10] Decision of the Constitutional Court III. ÚS 720/23 of 9 May 2023.
[11] Decision of the Constitutional Court I. ÚS 323/23 of 18 April 2023.
[12] Decision of the Constitutional Court II. ÚS 103/23 of 21 March 2023.
[13] Decision of the Constitutional Court I. ÚS 2309/22 of 13 December 2022 and similarly in the decision of the same court IV. ÚS 1132/22 of 15 November 2022.

certain standards, such as respect for the dignity and autonomy of each person".[14]

10. "If the State is truly to be considered a substantive rule of law, it must bear objective responsibility for the actions of its organs by which State organs or public authorities directly interfere with the fundamental rights of the individual […] it is certainly the duty of law enforcement authorities to investigate and prosecute criminal activity; on the other hand, the State cannot absolve itself of responsibility for the actions of those organs if those actions subsequently prove to be erroneous and to interfere with fundamental rights".[15]
11. The judge must be impartial and unbiased.[16]
12. This court also used the rule of law as the standard by which to judge whether the convicted defendant had led an orderly life during his probationary period.[17]
13. "The statutory limits of review in administrative court proceedings must give way if the decisions of the administrative authorities are likely to violate the fundamental principles on which the democratic rule of law is built".[18]

It is further significant from the perspective of the concept of the rule of law that under the Czech Constitution, certain values and principles in our legal order are immutable at its constitutional level. This *ewigkeit* clause (*klauzule věčnosti*) is contained in Article 9 section 2 of the Constitution.[19] This immutable set of values and principles is said to be the material core of the Constitution and is very closely related to the rule of law. And it is by the way this particular area of law where there is a potential for conflict between the Czech law and law of the EU and its principle of supremacy/primacy.

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[14] Decision of the Constitutional Court I. ÚS 2987/22 of 8 December 2020.
[15] Decision of the Constitutional Court I. ÚS 3139/21 of 1 November 2022.
[16] Decision of the Constitutional Court IV. ÚS 2596/22 of 27 October 2022.
[17] Decision of the Constitutional Court III. ÚS 2718/22 of 18 October 2022.
[18] Decision of the Constitutional Court IV. ÚS 2401/22 of 4 October 2022.
[19] Article 9 Section 2 of the Czech Constitution states that: "(2) Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible".

The Czech concept of the rule of law is strongly influenced by external sources. Firstly, there is the case law of the ECHR, which is used as an integral part of Czech constitutional law in a broader sense especially by some chambers of the Constitutional Court.[20]

Another external source is the scientific literature, especially the English-language literature, to which the Constitutional Court refers in its comparative interpretation.[21]

In terms of values, and this is please purely my subjective impression, it seems to me that the Constitutional Court sometimes tends to understand the rule of law and its role in its protection in such a way that this court identifies itself as the last possible instance of protection of individual rights against the state including the legislator or against another individual.

4.3. Rule of Law and State Liability for Damages

National laws include a rule, derived from the rule of law, under which the state is obliged in certain cases to compensate individuals for the damage it has caused them. This rule has also indirectly become part of European Union law. This conclusion is confirmed by a reverse analysis of Article 340 TFEU. That provision provides that, in the event of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or its servants in the performance of their duties. The substantive rules governing the Union's liability for damage caused are derived from that provision. Its content is determined by the common principles, that is to say, it is derived from national legislation. In other words, in order for the Union to be liable, there must also exist in the national legal systems the institutions of liability, the existence

[20] See: D. Sehnálek, *Interpretation of Fundamental Rights in the Czech Republic*, [in:] Z.J. Tóth (ed.), *Constitutional Reasoning and Constitutional Interpretation: Analysis on Certain Central European Countries*, Ferenc Mádl Institute of Comparative Law & Central European Academic Publishing, Miskolc 2021, pp. 245–30.

[21] D. Sehnálek, *Interpretation of Fundamental Rights…*, *op. cit.*

of which is recognised by the Member States in Article 340 TFEU. It is therefore true that the States must also be liable for damage which they themselves cause, at least to the same extent as the Union is liable in similar cases.[22]

This conclusion is further supported by the requirement of loyal cooperation. This is enshrined in Article 4(3) TEU. According to this provision, "[m]ember States shall take all appropriate measures, general or particular, to fulfil the obligations arising out of the Treaties or from acts of the institutions of the Union". The obligation laid down by this Article is, in particular, a manifestation of the principle of pacta sunt servanda, which is also a general principle of public international law. However, in EU law, the duty of loyal cooperation is perceived much more intensely, which is reflected precisely in the existence of Francovich-type liability. In contrast, in public international law, we cannot reach a similar result. The individual is not the subject of this right, and this right cannot therefore confer any individual rights on him, including the right to compensation for the damage he has suffered.

The third argument used to confirm the existence of State liability for damage caused to individuals is based on the interpretative principle of effet utile ("the full effectiveness of EU rules").[23] This is because the full effectiveness of the rules of EU law would be called into question and the protection of the rights they confer would be undermined if individuals were unable to obtain compensation when their rights are infringed by a breach of EU law by a Member State. However, this argument used by the Court in the Francovich decision is problematic in that it is non-legal and therefore has only a supporting role. It has therefore been replaced, or rather supplemented, by arguments based on Article 340 TFEU in subsequent case law.

Apart from the above-mentioned indirect confirmations of the existence of state liability for damage caused to an individual, European primary law does not contain any explicit regulation. This liability has, therefore, been established solely by the Court of

[22] See: Joined cases C-46/93 and C-48/93. *Brasserie du Pêcheur and Factortame*.
[23] See: Joined cases C-6/90 and C-9/90. *Francovich and Bonifaci v. Italy*.

Justice in its judgments. It has been a long and gradual process, and certainly not an obvious one. The Court of Justice derives its power to rule in such a creative manner from the provisions of Article 19 TEU. According to that provision, it is the Court of Justice's task to ensure compliance with the law in the interpretation and implementation of the Treaties. However, such a creative interpretation of EU law could hardly have been foreseen or even desired by the "founding fathers" at the time the Treaties of Rome were signed. This raises the quite legitimate doubt as to whether this case was still one of interpretation of the law at all, and not one of judicial creation for which there is no place in our legal culture and our legal systems.

Franovich-type liability took shape as another means of (private) enforcement against Member States. Indeed, hints of this principle were already present in the early period of the European Economic Community. In the Humblet decision,[24] the Court of Justice held that, where it finds that national legislative or administrative measures are unlawful, the Member State concerned is obliged to abolish such measures and to remedy any negative consequences resulting from such infringement. In view of its relevance for further interpretation, I would emphasise that this decision cannot be interpreted as meaning that the Court's decision must precede further action by the Member State. It may come without it, but once the Court has ruled, the possibility becomes an obligation.[25]

In the Waterkeyn decision,[26] the Court of Justice further held that the purpose of infringement proceedings is to determine the obligations of Member States when they are in breach of their obligations, and that such proceedings and an action for damages – even if they are brought against one body (the State) – are two independent proceedings. The Court of Justice has therefore concluded that an individual's right to compensation does not depend on the judgment given in the infringement proceedings, but arises directly under EU

[24] Case C-6/60-IMM. *Humblet v. Belgian State.*

[25] D. Sehnálek, I. Rohová, *Komentář k vybrané judikatuře soudního dvora EU*, 2. přepracované a doplněné vy, Masarykova univerzita, Brno 2021.

[26] See: Joined Cases C-314/81, C-315/81, C-316/81 and C-83/82. *Procureur de la République v. Waterkeyn.*

law. Again, the Court's decision is not a prerequisite for the national proceedings initiated by the individual. However, it may help the individual in practical terms by confirming the infringement of EU law by the Member State concerned. It is therefore a matter which the national court deciding the individual's proceedings will not have to deal with again. Indeed, it is bound by the Court's conclusions.

It was not until the Francovich decision that the state's obligation to compensate for the damage caused was explicitly established. In the view of the Court of Justice expressed in that decision, the liability of the State for damage caused by a breach of Community (EU) law is one of the principles of EU law. Hence the designation of this liability as 'Francovich-type liability'.

From the Waterkeyn decision, we could infer that state liability can only arise if the state violates directly applicable norms of EU law. But that is not the case. This is confirmed not only by the Francovich case but also by the Brasserie du Pêcheur decision. According to these judgments, the power of individuals to invoke directly applicable Treaty provisions before national courts is only a minimum guarantee and does not in itself ensure the full and complete application of the Treaty. That power, the purpose of which is to ensure that provisions of European Union law are applied in preference to national provisions, cannot in any event ensure that an individual enjoys the rights conferred by that law and, in particular, prevent that individual from suffering damage as a result of an infringement of a right attributable to a Member State.

It is also true that even if a court or authority of a Member State gives direct effect to an EU law, this does not mean that the individual will not suffer damage. Direct effect and State liability for damage are therefore neither mutually exclusive nor conditional.

Czech legal theory defines any liability through four elements. Object, objective aspect, subject and subjective aspect.

The object of the infringement is a value protected by law, and in the case of Francovich-type liability, it is the legal norms of EU law, both those that are directly effective and those that do not have this characteristic. These rules must be aimed at establishing a right for the individual concerned, who is thus the beneficiary or direct

addressee of them. The right conferred on the individual must then be sufficiently precise to be identifiable.

The objective aspect relates to the manner in which the act leading to the damage was committed and its consequences. The objective aspect of a breach of EU law is defined by the unlawful act, which can occur either through active or passive conduct of the State (i.e., the State did not act where it should have acted). In order for the objective aspect to actually be fulfilled, such a breach must have a harmful consequence. Logically, there must also be a causal link between the State's breach of duty and the damage suffered by the victims.

The subject of the violation is the state in the broadest sense. It is therefore irrelevant which Member State authority committed the infringement by its acts or omissions. The infringement may thus be caused by administrative, legislative or judicial authorities, whether they are the central authorities of the State or decentralised units of public administration with a high degree of autonomy. Therefore, in the Czech Republic, municipalities and regions will also have to be regarded as the State. I believe that the term "state" will have to be interpreted in the same broad way as it is interpreted for the purposes of the direct effect of EU law. In practice, therefore, there will be a possible overlap, whereby in the case of private law persons it will be possible to claim compensation for damages under a Francovich-type liability regime or, alternatively, under private law national liability for damages.

The subjective aspect of liability relates to the internal attitude of the person who caused the damage towards his or her actions. It is therefore related to fault in the form of intent or negligence. The subjective aspect of liability of the type is broadly conceived and is essentially objective in nature. Member States cannot therefore make compensation for damages conditional on the existence of intentional or negligent fault on the part of the State.[27] To do otherwise would in fact make it more difficult for an individual to obtain real redress. However, State liability is not absolute. The State is not liable for any breach, but only for one that is sufficiently serious.

[27] Case C-173/03. *Traghetti del Mediterraneo*.

According to settled case law, injured individuals are entitled to compensation if four conditions are met. The Member State is thus liable for the damage:

1. if it breaches an EU legal rule aimed at granting rights to individuals;
2. if the infringement is sufficiently serious;
3. if damage occurs; and
4. where there is a direct causal link between the infringement by the national authority and the damage caused to the victims.

It is true that in its case law, the Court speaks of three conditions because it lumps the third and fourth conditions into one. In reality, however, they are two independent conditions which must be examined separately.[28]

I would only add in passing that the Court was fair in defining the content of the State's liability for Francovich-type damages, since the terms of that liability are exactly the same as those of the European Union's liability for individual damages. In fact, the protection of the rights conferred on citizens by European Union law cannot vary depending on whether the damage is caused by an organ of the State or by an organ of the Union (Joined cases C-46/93 and C-48/93. *Brasserie du Pêcheur*).

Typical examples of breaches of EU law that give rise to liability for breach of EU law include:

i. the country adopts a new law or amends an existing law that is incompatible with EU law;
ii. the state does not repeal the law, i.e., it keeps the law in force and applies it, even if it contradicts EU law;
iii. the country issues an administrative decision in breach of EU law;
iv. the state does not issue an administrative decision, even though under EU law it should;

[28] M. Tomášek, V. Týč, J. Malenovský, I. Pelikánová, D. Petrlík, F. Křepelka, L. Pítrová, V. Šmejkal, T. Kunertová, J. Převrátil, D. Sehnálek, M. Smolek, A. Vondráčková, M. Svobodová, *Právo Evropské unie*, 2. aktualizované vydání, Leges, Praha 2017.

v. the state makes a judicial decision that violates EU law, and at the same time the decision can no longer be subject to judicial review at the initiative of an individual.

In the first two cases, the state acts through the legislature. In the third and fourth cases, it is the action or inaction of an authority, and in the fifth case it is the action of a judicial authority.

The legislative body, typically the parliament, is basically limited only by the constitutional framework of the country.[29] Nevertheless, a situation may arise where it is unable to adopt certain legislation required by EU law because it is prevented from doing so by, for example, the standard of human rights protection enshrined in the constitution. However, much more often, in fact regularly, a state violates EU law by failing to implement an EU directive properly or in a timely manner. This is often done without any ideological reasons. It simply does not get done in time.

It is also a fact that the national administrative or judicial authority is aware that it is (or will be) actually or potentially breaking EU law. However, it has no possibility to act otherwise, as the relevant provision of EU law is not unconditional and sufficiently precise, or the court is deciding a dispute between two individuals and the EU law in question is a directive, the application of which would lead to the imposition of an obligation on one of the parties only on the basis of its provisions. These are therefore situations where the damage cannot be avoided by direct and preferential application of EU law because the conditions laid down by the case law of the Court of Justice are not met.

In the Czech Republic, the emergence of these undesirable but unavoidable situations is eliminated by the somewhat activist approach of the Czech courts to the interpretation of national law and the direct effect of EU law. This positive approach towards the EU law is sometimes unintentional as it happens quite often that the knowledge of the principles of application of EU law is limited. Czech courts are therefore unaware of the limits of these principles and apply EU law even where it is not required by EU law. On occasion this is done deliberately since EU law might be perceived as a tool to

[29] And by external commitments under the international or EU law.

circumvent the "imperfect" Czech law and achieve the desired goal. An obvious example of such an activist utilitarian approach is the decision of the Czech Constitutional Court in *K.F. v. Welltrend, s.r.o.*[30]

This case concerned a consumer contract. The product supplied under that contract was defective. The issue in dispute was who was liable for the defect – the seller or the consumer in his capacity as buyer. The complication from the seller's point of view was that he had concluded the contract with the consumer by e-mail. The e-mail he sent to the consumer did not contain all the information required by the Czech Civil Code (and the EU Directive which was implemented in the Civil Code). The dispute came before the Constitutional Court, which stated that:

> *If the general court does not take into account the protection of the consumer under Article 38 of the Charter of Fundamental Rights of the European Union and the legislation adopted to ensure this protection, it acts in violation of Article 1(2) in conjunction with Article 10a and Article 4 of the Constitution of the Czech Republic, and thereby violates the right of the parties to the proceedings to judicial protection under Article 36(1) of the Charter of Fundamental Rights and Freedoms.*

The Constitutional Court therefore formally applied the Czech Charter of Fundamental Rights and Freedoms. Materially, the EU Directive was applied. In fact, it was given direct effect, despite the fact that this does not follow from EU law and is required neither by this law nor by the Court of Justice. By granting direct effect, the Constitutional Court has removed the condition of a violation of EU law and thus the basis for a possible action for damages.

Thus, such activist decision-making empties the space for the application of Francovich-type accountability. The correct course of action from the perspective of EU law (and I believe also from the perspective of Czech law) should have been that the Constitutional Court should have ruled in favour of the seller. The general Czech

[30] II. ÚS 2778/19 of 5 November 2019.

court, whose decision was reviewed by the Constitutional Court, erred. It should have applied the legislation protecting consumers, not the one in the EU directive, but that in the Civil Code. In the situation where it failed to do so, the Constitutional Court should have dismissed the constitutional complaint, and the consumer should have claimed compensation for damages under Francovich-type liability. In the present case, that damage was caused by the failure to apply the standards laid down by the EU directive, which were clear, specific, and unconditional in national law.

There is no rule in EU law that prevents national authorities from making such a broad application beyond what is required by EU law and what is required by the Court of Justice. The options for the defence of the persons concerned (in the case at hand, the seller-entrepreneur) are therefore very limited. In fact, in the present case, there is no possibility of defence. While the courts' actions may be questionable in light of the separation of powers within the State, there is simply no remedy for these cases. At the same time, it does not appear that anyone is in any way so bothered by the activist application of EU law that they want to address it in any systemic way.[31]

4.4. Problematic Aspects of State Liability for Damages

The European concept of liability for damages in EU law is much broader than that of state liability for violations of federal law in the United States. Indeed, unlike EU Member States, US states generally enjoy immunity which, with rare exceptions, prevents an individual from suing such a state for a violation of US federal law.[32] This is related to the different status of the legislature in the

[31] Some scientific literature nevertheless asks for to make this kind of solution official even under the EU law. See: J. Marson, *Holes in the safety net? State liability and the need for private law enforcement*, "Liverpool Law Review" 2004, Vol. 25, No. 2, pp. 113–134.

[32] D.J. Meltzer, *Member State Liability in Europe and the United States*, "International Journal of Constitutional Law" 2006, No. 4.

two legal cultures. The concept and interpretation of the rule of law itself also differs.[33]

In the European Union, on the other hand, the establishment of state liability for damage caused to individuals is self-evident. As a rule, the State is thus liable for the actions of its administrative bodies and, in some cases, also for the damage caused to individuals by the courts' decisions.

The situation is different in the case of the legislative bodies – the parliament. This body enjoys the advantage of an almost unlimited will to decide on the content of legal norms within the limits of its constitutional norms. If it bears responsibility, it is a political responsibility. It is therefore not customary in domestic law to provide for the liability of the state for damage caused to an individual by a legislative body in the exercise of its powers. This sovereign position of national parliaments has been substantially curtailed, first by the Francovich decision and then by the Factortame case, if only in relation to European Union law. According to the Court, this:

> *principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach. In addition, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied* […] *the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities.*[34]

According to the case law of the Court of Justice, individuals can recover damages under EU law even if they have suffered an infringement of EU law attributable to a decision of a national court

[33] See: D. Kabat-Rudnicka, *The rule of law in the national and supranational context*, "Przegląd Europejski" 2023, No. 2.

[34] Joined cases C-46/93 and C-48/93. *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland* and *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and others*.

of last instance. It does not therefore refer to decisions of any court, but only of the highest courts. It is not possible to determine in advance which court is the court of last instance, since the Court of Justice applies a functional approach. Generally, it will be a court whose decision can no longer be challenged by an individual by any appeal, of his own volition and decision. Such an appeal must, moreover, make it possible to review the legal treatment of the case and, consequently, the legal conclusions of the court expressed in the decision appealed against.

However, given the special nature of the judicial function and the legitimate requirements of legal certainty, the State's liability in such a case is limited. That liability can be established only in the exceptional case where the national court of last instance has manifestly infringed the EU law. In order to determine whether that condition is satisfied, the national court before which the action for damages is brought must take into account not only the aforementioned circumstances characterising the situation in question (the degree of clarity of the rule infringed, the intention to infringe the rule in question, the excusable nature of the error of law, the position taken by the European Union institution), but also whether the court in question has complied with its obligation to refer a question to the Court of Justice for a preliminary ruling under the third paragraph of Article 267 TFEU.[35]

The liability for the decisions of the supreme (highest) courts is also a very problematic construct and an encroachment on the sovereignty of the Member States. State liability for damage caused to individuals is a manifestation of the rule of law. However, interference with an already issued and final judicial decision may undermine the confidence of individuals in the stability and predictability of the entire system and thus, paradoxically, threaten the proper functioning of the rule of law. Liability for damages cannot therefore lead to a change in the decision of the court of last instance, but only to a new decision (by the same or another court) awarding damages.[36]

[35] See: Case C-224/01. *Köbler*.
[36] See: Case C-234/04. *Rosmarie Kapferer v. Schlank & Schick GmbH*.

In this way, the system is reminiscent of the enforcement mechanism of the European Court of Human Rights, which can award just satisfaction to the individual. However, this is a very unique instrument in the context of public international law. The difference, moreover, is that, in the case of liability, the courts of the Member State in question (by the nature of the case at first instance) again decide on damages, rather than a superior judicial institution established under international or EU law, which is the European Court of Human Rights.

4.5. Limitation of State Liability for Damages

Liability of the State for damage caused by a breach of EU law is not absolute. It is possible to limit this liability and the manifestations it may cover on grounds of:

1. severity, i.e., the quality of the infringement;
2. consequences for the Member State and its authorities;
3. the extent of the damage to be compensated.

Ad 1). The state is not liable for any (i.e., all) violations, but only for those that are sufficiently serious. The reason is simple, as a narrower concept could undoubtedly paralyse the work of national legislative and judicial bodies. Rather than risk creating a problem and incurring liability, it is sometimes better to do nothing. But the problem is that doing nothing can also lead to liability for damages.

The decisive yardstick for establishing gravity is whether the Member State concerned has manifestly and seriously exceeded the limits of its discretion.[37] The factors to be considered by the competent national court in this respect include, in particular:

i. the degree of clarity and precision of the violated standard;
ii. the amount of discretion that this standard leaves to national authorities;

[37] Case C-278/05. *Carol Marilyn Robins and Others v. Secretary of State for Work and Pensions.*

iii. the intentional or unintentional nature of the offence committed and the damage caused; the excusability or inexcusability of any error of law;
iv. the fact that the omission may have been contributed to by the conduct of the Union institution and, in particular, by the instructions issued by it, whether binding or non-binding in nature; and
v. the adoption or maintenance of national measures or practices contrary to Union law.

In any event, an infringement of European Union law is manifestly sufficiently serious where it continues to exist despite the judgment establishing the alleged infringement, the judgment in the preliminary ruling procedure or the settled case-law of the Court of Justice on the matter, which show that the conduct in question is unlawful.[38] The requirement that the infringement be of sufficient gravity may therefore be regarded as a corrective to the objectively conceived subjective aspect of liability for damages.

While a sufficiently serious breach of EU law is required in the case of a breach of EU law by a legislative body, an even higher level of breach is required by the case law of the Court of Justice in the case of a breach of EU law by the courts of last instance. In fact, the Court has stated that the liability of a Member State for damage caused by the decision of a court adjudicating at last instance which breaches a rule of EU law is governed by the same conditions. Nevertheless, the second condition of liability concerning the quality of breach, the liability can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.[39]

The term "manifestly infringed the applicable law" brings another uncertainty. What level of breach is sufficient to establish this kind of liability? According to the CJEU this term should be understood that a decision by that national court adjudicating at last instance may constitute a sufficiently serious breach of EU law, capable of giving rise to that liability, only where, by that decision, that court

[38] This conclusion is a given and stable, as confirmed by the Court's recent decision C-261/20. *Thelen Technopark Berlin GmbH v. MN.*
[39] Case C-168/15. *Tomášová.*

manifestly infringed the applicable law or where that infringement takes place despite the existence of well-established Court case-law on the matter. Thus, there are two kind of breaches that give rise to this very specific kind of liability according to the CJEU.

The requirement (of a sufficiently serious breach and, in the case of a court, a flagrant one) is a practical problem. The burden of argument and proof is on the individual who invokes the State's liability in court. It therefore makes it very difficult in practice, virtually impossible, to assert liability unless the violation is actually flagrant. In fact, doubts and problems do not arise if:

- there is a decision by the Court of Justice or a national authority finding an infringement of EU law, or
- if the Member State had only a very limited or even no discretion – typically in a situation where, for example, the Member State has not implemented a directive into national law at all (i.e., it is not a case of incorrect implementation of a directive, but implementation is completely lacking);[40] in such a case, the breach of EU law itself may be sufficient to establish the existence of a sufficiently serious breach; the general or individual nature of the measure taken by the institution is not a decisive criterion in this respect for determining the limits of the institution's discretion.[41]

A separate issue is the establishment of a frame of reference against which the actions of the State and its authorities will be judged. The case-law of the Court of Justice does not yet provide answers in this respect. It can be assumed that the requirements with respect to the legislative body, to the courts (and consequently also

[40] Please note that this is not the case for every non-implemented directive. Three general conditions for state liability must be met. According to the Court: "Failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered". Case C-178/94. *Dillenkofer a další v. Bundesrepublik Deutschland*.

[41] Case C-352/98 P. *Bergaderm and Goupil v. Commission*.

the judges) and to the authorities (and their officials) will be higher than in the case of an ordinary or average person. Therefore, if we are to assess whether the infringement was sufficiently serious, we must, for example:

1. in the case of a court and a judge (and, by analogy, in the case of an administrative body and on official – that they have no power to refer to the Court of Justice for a preliminary question), to proceed on the assumption that:
   - they know all EU law, including how it is interpreted by the Court of Justice,[42]
   - they are able to narrow the range of clarity and precision of the standard using standard interpretation methods,
   - know all the principles of EU law, i.e., the principles of direct effect, indirect effect and primacy,
   - that the court and judge know when it is best to leave a problem of interpretation to the Court of Justice and when it has to ask a preliminary question;
2. in the case of the legislative body:
   - for directives (and other rules of EU law that require national law to be amended or repealed), the parliament is aware of which national laws need to be adopted, amended or repealed, and by when,
   - knows how to achieve the result envisaged by EU law in a legislative and technical way.

In all these cases, we must view the state as professional and expert (including in the field of EU law), even though this is an assumption that may not be fully valid in reality, especially so with respect to administrative authorities.

Ad 2). I believe that the general consequence of the State's liability for damage is not only to compensate for the damage incurred, but

[42] The question of the binding nature of the Court's judgments is a legally interesting question in itself. There is no space to deal with it further here. I therefore refer to: D. Sehnálek, *The European Perspective on the Notion of Precedent – Are EU and Czech Court Decisions Source of Law?*, "European Studies – The Review of European Law, Economics and Politics" 2020, Vol. 7, No. 1, pp. 125–153.

also the obligation of the State to eliminate the cause (the unlawful condition) that led to the damage. This obligation applies generally. An exception and limitation are where the damage is caused by a decision which is final and unalterable. However, there is an exception to this exception as well. The requirement that a final decision which infringes EU law (in a way which may eventually lead to damage) must be unalterable does not apply absolutely.

The exception is where, under national law, the authority which made the decision has the power to withdraw it. For example, the Dutch administrative authorities have such a power. It follows from the case-law of the Court of Justice that:

> *under Netherlands law, administrative bodies always have the power to reopen a final administrative decision, provided that the interests of third parties are not adversely affected, and that, in certain circumstances, the existence of such a power may imply an obligation to withdraw such a decision even if Netherlands law does not require that the competent body reopen final decisions as a matter of course in order to comply with judicial decisions given subsequent to those final decisions.*[43]

In the light of the requirements of EU law, this possibility – a power, may turn into an obligation. However, if national law does not grant the competent national authority (authority or court) such a power, this possibility cannot be inferred from EU law, either.

Ad 3). The total amount of harm that the state can inflict on individuals can be very high. The risk is relatively small in cases where the damage is caused by individual decisions of courts or authorities. However, there will be a real and serious problem for the state budget when the damage is caused by a general normative act of a legislative body, typically a parliamentary law – statute. I therefore ask whether it is possible to legally limit the extent of the damage that should be compensated.

[43] Paragraph 25 of Judgment C-453/00. *Kühne & Heitz NV*.

The Court is clear on this point. Reparation must be commensurate with the loss or damage sustained, that is to say, to ensure effective protection for the rights of the individuals harmed.[44]

This concept sounds very hard for the state. The impact on the state budget can be significant. After all, is it not possible to generalise the damage and compensate only a certain part of it? Based on the case-law of the Court of Justice, I believe that such a solution is indeed not possible.

What is possible, however, is for the State to examine:

> *whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.* […] *Indeed, it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the loss or damage himself… According to the Court's case-law it would be contrary to the principle of effectiveness to oblige injured parties to have recourse systematically to all the legal remedies available to them even if that would give rise to excessive difficulties or could not reasonably be required of them.*[45]

We must also not forget that the apparent harshness of the legislation is relativised by the mere fact that the State is only liable for sufficiently serious breaches of EU law. In conjunction with the fact that the State employs professionals who are experts (it should), it follows that when the relatively high threshold envisaged by the Court of Justice for liability is reached, this is so where the State should have known, or certainly could have known, that its conduct would cause damage to the individual.

The harshness of the regulation is further relativised by the fact that the state can atone for its wrongdoing by:

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[44] Joined cases C-46/93 and C-48/93. *Brasserie du Pêcheur and Factortame.*
[45] Case C-429/09. *Günter Fuß v. Stadt Halle.*

1. In the event of a judicial or official decision, it will have a review mechanism in its legal system to reverse such a manifestly wrong decision (I stress and repeat that EU law itself does not provide for or require such a requirement).[46]
2. In the event of a mistake made by the legislative authority, typically a late or defective implementation of a directive, the state will solve the problem by adopting a new regulation that complies with EU law requirements, which will have retroactive effects. The case law of the Court of Justice allows such a solution. In the Bonifaci and others decision, the Court stated, "Retroactive application in full of the measures implementing Directive 80/987, including a limitation of the guarantee of the institution's liability, enables the harmful consequences of the belated transposition of that directive to be remedied, provided that it has been properly transposed."[47] However, this will only be possible where it would not be contrary to the general prohibition of retroactivity under both the EU and national law.
3. The problem can be prevented by the courts themselves. If national law allows these courts not to apply legislation that is contrary to EU law, even in relations between individuals (i.e., with horizontal effect), and even beyond the requirements arising from the case law of the Court of Justice for the application of EU law, the scope for damage can be "emptied" or even eliminated altogether.

[46] Indeed, the Court of Justice stated: "In that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question […] Therefore, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue."

[47] "[…] unless the beneficiaries establish the existence of complementary loss sustained on account of the fact that they were unable to benefit at the appropriate time from the financial advantages guaranteed by the directive with the result that such loss must also be made good." Ibid.

Finally, the harshness of the legislation governing state liability for damages may be further limited:

i. setting a time limit within which a claim for damages can be brought in court;
ii. setting a limitation period after which the claim for compensation is time-barred.

However, the problem may be to set the (permissible) length of the period required for limitation and the point at which it starts to run in EU law.

It is clear from the case law of the Court of Justice that even limiting the time limit for bringing an action for damages (i.e., the claim) to one year may not be a problem. In fact, in a decision concerning the Spanish law on State liability for damages, the Court of Justice did not address the length of the limitation period, which is precisely one year.[48]

However, the start of the limitation period was problematic. According to the Spanish law "the right to claim compensation is time-barred one year after the publication in the Official Journal of the decision declaring the statutory provision to be contrary to EU law". However, the problem is that the damage can arise without such a decision even existing. It was therefore not the chosen criterion that was unlawful, but the failure to provide for the possibility of claiming compensation in other cases, i.e., where no such decision existed.[49]

As regards the length of the limitation period, the Court stated in principle that "EU law does not preclude the application of a five-year limitation period to claims made against the State, provided that it is applied to similar claims under domestic law".[50] Personally, I would consider that, all things being equal, a three-year limitation period would be sufficient.

[48] Case C-278/20. *European Commission v. Kingdom of Spain*.
[49] Ibid.
[50] Ibid.

4.6. Elements of Liability Left to National Law

The shortcoming of state liability in EU law is that EU law only partially regulates it, and only in the case law of the Court of Justice. What is not covered by EU law is governed by national law. It is this distinction between the EU sphere and the national sphere that is particularly important for the purposes of this study.

On the one hand, the absence of comprehensive EU legislation gives states the freedom to set their own appropriate legal framework and standards. However, EU law (more precisely, the case law of the Court of Justice) also enters into this area. Not in the sense that EU law sets specific standards, but in the sense that:

1. EU law requires certain standards of state liability to be contained in national law (without specifying their specific content). An example is the definition of the harm that the state is obliged to compensate an individual for.
2. Further, by setting minimal limits for the application of national standards. This applies in particular to those cases where, although the requirement of the previous point would be met, the specific standard would be insufficient from an EU law perspective, but these minimum standards are set in general terms, through the principle of effectiveness.
3. EU law provides scope for setting additional requirements governing state liability for damages. These are not required, but are permissible, such as the requirement of a certain prior decision, publication in the statute book or the possibility of limitation.
4. The EU law furthermore demands that the national criteria must not be less favourable than those applying to similar claims based on domestic law (the principle of equivalence).

It is clear from the above that, although the State's liability for damages is composed of two spheres – national and EU, the national legislation adds to the EU legislation and compensates for its non-existence.

The abovementioned principle of equivalence referred to in the fourth point of the summary does not imply absolute equivalence between all the conditions of State liability for damages under EU and national law. Indeed, the Court of Justice has stated:

> *The principle of equivalence thus seeks to set limits on the procedural autonomy enjoyed by the Member States when they implement EU law and when the latter does not make provision in that regard. It therefore follows that, as regards State liability for infringement of EU law, that principle is intended to apply only where that liability is established on the basis of EU law and, therefore, where the relevant conditions* […] *are satisfied* […] *As the Advocate General also observed* […] *that principle cannot form the basis for an obligation on the part of the Member States to allow a right to compensation to arise under conditions more favourable than those laid down by the case-law of the Court.*[51]

It follows that while the conditions for the creation of State liability for damages in the event of a breach of national law (sic) may be more lenient than those for the creation of Francovich-type State liability, the conditions for compensation must be equivalent.

In terms of the above areas left to national law, the most important is undoubtedly the one relating to the definition of the harm to be compensated by the State to the individual. The State has quite a wide range of possibilities to achieve the objective of compensation, for example:

i. review and modify administrative decisions, in some cases even final decisions;
ii. grant rights that should have been granted to individuals under EU law, even retroactively;
iii. restore the situation to its original pristine state (e.g., by removing illegal measures);
iv. compensate for actual damage, both pecuniary and non-pecuniary;
v. to compensate for lost profits;
vi. to compensate for psychological or physical distress;
vii. to compensate for the so-called loss of hope, i.e., damage that is not certain to occur;
viii. provide adequate compensation.

[51] Case C-278/20. *European Commission v. Kingdom of Spain*.

In addition to what has already been stated elsewhere in this chapter, the Court of Justice has further limited the ability of States to regulate or limit liability for damages in its case law by expressly prohibiting what Member States may not do.

1. The State cannot require proof of misfeasance in public office.[52]
2. National law may not require, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible.[53]
3. Prohibited is the condition that the individual harmed has obtained, before any court, a final decision dismissing an action brought against the administrative act which caused the loss or harm, without providing for an exception for cases in which the loss or harm stems directly from an act or omission on the part of the legislature, contrary to EU law, without there being any administrative act open to challenge.
4. The State cannot make compensation for damages conditional on the existence of intentional or negligent fault on the part of the State authority to which the breach is attributable, going beyond a sufficiently serious breach of Community law.[54]

4.7. Linking the Rule of Law, the EU Rules on State Liability and National Law

In Czech law, the regulation of state liability for damages is contained firstly in the Charter of Fundamental Rights and Freedoms,[55] secondly in Act 82/1998 Coll. on Liability for Damage Caused in

[52] Joined cases C-46/93 and C-48/93. *Brasserie du Pêcheur and Factortame.*

[53] Case C-160/14. *João Filipe Ferreira da Silva e Brito and Others v. Estado português.*

[54] Case C-173/03. *Traghetti del Mediterraneo SpA v. Repubblica italiana.*

[55] Relevant to the topic of this chapter is Article 36(2), (3) and (4) of the Charter of Fundamental Rights and Freedoms, which provides:

> "(2) Unless a law provides otherwise, a person who claims that her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and freedoms listed in this Charter may not be removed from the jurisdiction of courts.

the Exercise of Public Authority by Decision or Improper Official Procedure, and thirdly in the Civil Code.

The Charter of Fundamental Rights and Freedoms is essential because it provides for this kind of liability at the highest, constitutional level. The specific conditions must be laid down by law. In the exercise of public authority, the liability of the State for damage is governed by the Act on State Liability for Damage.[56] In private law relations, the State is liable under the rules of the Civil Code. This Code shall also apply as *lex generalis* to the Act on State Liability for Damage in matters not regulated by this act.[57] It follows from the foregoing that the constitutional entrenchment of liability does not constitute an independent legal basis for the liability of the State for damages applicable before the courts.[58] It is, therefore, always the regulation in one of the two statutes that is decisive and relevant.

The Act on State Liability for Damage provides that "The State shall be liable under the conditions set out in this Act for damage caused in the exercise of State authority."[59] The law requires compensation not only for damages but also for non-pecuniary damage.

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(3) Everybody is entitled to compensation for damage caused her by an unlawful decision of a court, other State bodies, or public administrative authorities, or as the result of an incorrect official procedure.

(4) Conditions therefor and detailed provisions shall be set by law".

[56] This regulation is general, therefore it is not excluded that the liability of the state for damage in the exercise of public authority will also be established by special laws. However, this is beyond the scope of this study.

[57] That is, the Act on State Liability for Damages exclusively regulates the establishment of liability, but other elements may be regulated by the Civil Code.

[58] The Constitutional Court has also commented on this issue, stating in its decision I. ÚS 216/07 of 29 July 2008 that: "In the opinion of the Constitutional Court, it cannot therefore be concluded from the above decisions that Article 36(3) of the Charter establishes a direct entitlement to compensation for damage caused by an unlawful decision of a court, other state authority or public administration body or by an incorrect official procedure, irrespective of whether the general conditions for the establishment of state liability for such damage are met".

See also: P. Válečková, *Liability of the State for Damage Caused to Individuals by Violation of EC Law and Consequences for the Czech Republic in Connection with Liability for Legislative Activity*, "Právní Rozhledy" 2003, No. 4, pp. 185–187.

[59] Section 1(1) of the Act.

The state's liability is limited. The law provides that the state is liable under the conditions set out in this law for the damage caused by:

a) a decision rendered in civil proceedings, administrative proceedings, proceedings under the Administrative Procedure Code or criminal proceedings,
b) maladministration.[60]

It follows from the foregoing that the scope of liability is narrower than that of the State's liability for damage caused to an individual. Moreover, the liability of the legislator is completely excluded.

In addition to that, the liability under the Czech law is also narrower, as the very concept of the state differs. The Act on State Liability for Damage speaks of the liability of the state in the case of persons in the exercise of State administration entrusted to them by law or by virtue of law. Union law defines the state more broadly – so that it includes cases where a person is controlled by the state without having to exercise the special functions of power of the state.

An even further narrowing is caused by the fact that in the case of damage caused by an illegal decision, the Act on State Liability for Damage requires prior annulment or modification of the decision in question.[61] However, the review of the case law of the Court of Justice earlier in this chapter suggests the possibility of annulment as one form of response by the State to a breach of EU law committed by it. At the same time, it is clear that EU State liability for

[60] Maladministration is not defined by the State Liability Act. The Constitutional Court, in its decision Pl. ÚS 36/08 of 8 July 2010, defined it as "any procedure of a public authority which, in its exercise, proceeds in contravention of generally binding legal regulations or in contravention of the principles of its exercise" and the Supreme Court defined it negatively as follows: "The issuance of a normative legal act is not an official procedure of the government, but is the result of its normative activity. If the standard-setting activity or inaction of a public authority cannot be regarded as maladministration, the State cannot be held liable for damage caused by maladministration".

[61] See: Section 8(1) of the Act on State Liability for Damage, which provides that: "A claim for compensation for damage caused by an unlawful decision may, unless otherwise provided for below, be asserted only if the final decision has been annulled or reversed by the competent authority on the ground of illegality. The court deciding on compensation shall be bound by the decision of that authority".

damages assumes that sometimes annulment of a decision will not be possible. The Czech courts reflect this fact.[62]

The Act on State Liability for Damage in principle does not provide for liberalisation grounds. This is because they only apply to decisions on detention, sentencing or protective measures, i.e., matters excluded in principle from EU law.[63] Thus, from this perspective, this act complies with EU law.

It is apparent that the Act on State Liability for Damage does not regulate the state's liability for damages to the extent required by the case law of the Court of Justice. It is therefore necessary to assess whether the general rules of the Civil Code can be applied. That law regulates the obligation to compensate another for damage in paragraph 2894 et seq. From the point of view of EU law, it is essential that the obligation to compensate is generally linked to fault. Nevertheless, EU law does provide for such a condition. The civil liability regime is therefore insufficient from an EU legal perspective and therefore unsatisfactory.

Attempts to update the legislation contained in the State Liability Act have so far been unsuccessful. The explanatory memorandum to the first attempt to adapt the regulation to the requirements of EU law stated:

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[62] In this context, the Supreme Court in its decision 30 Cdo 2584/2016 of 12.12.2006: "The Czech Republic is liable for the harm caused to an individual by a violation of EU law by a decision of a court of last instance, including a judgment of the Supreme Court as an appellate court, even if such a decision has not been annulled for illegality, provided that the violated EU law norm grants rights to individuals, the violation is sufficiently serious and there is a direct causal link between the violation of the obligation imposed on the state and the damage suffered by the injured persons.

As also noted above, in the case of the second condition (gravity of the breach), because of the special nature of the court's function, the State is liable only in exceptional cases, namely where the judicial decision at last instance manifestly infringed the applicable law.

In assessing this condition, it is not possible to dispense with the interpretation of the EU law norm in question, not in the sense of what the correct interpretation (application) of the norm in question was in the case under consideration, but in the sense of whether there are circumstances for which the infringement of EU law must be assessed as quite obvious."

[63] See: Section 12 of the State Liability Act.

[...] *there are some other areas of state liability for damage caused by the exercise of public authority which are not covered by Act No. 82/1998 Coll. in its current wording, although these are more than topical issues. In the context of membership of the European Union, the main issue is the liability of the State for damage caused by a breach of EC law and the liability of the State for damage caused by an unlawful legal regulation and a breach of the obligation to issue a legal regulation. Although in these cases the legislation is of fundamental importance, as it establishes (or should establish) the State's liability for damage in non-negotiable areas of the exercise of public authority, this legislation has not been included in the draft law. At present, the analysis of the scope of this liability is still ongoing, as the issues involved are highly ambiguous. In the case of the State's liability for damage caused by a breach of EC law, there are a number of variants, ranging from the State's liability for late or incomplete transposition of EC legislation (especially directives – see the Francovich case) to the State's liability for damage caused by an unlawful decision of a court of last instance (see the Köbler case). Similarly, in the case of the State's liability for damage caused in the legislative sphere, a number of variations are possible, with the need to create new mechanisms and criteria for assessing questions relating to this type of liability (the question of the need to repeal the unlawful legislation on the basis of which the damage was caused – see the Brasserie du Pêcheur and Others case, the question of the authority which will be competent to assess whether the legislation should have been adopted, etc.). The above questions will thus be addressed only after the theoretical basis for these problems has been found.*[64]

[64] 160/2006 Coll., amending Act No. 82/1998 Coll., on liability for damage caused in the exercise of public authority by a decision or improper official procedure and amending Act No. 358/1992 Coll., of the Czech National Council, on notaries and their activities (Notarial Code), as amended, Act No. 201/2002 Coll., 40/1964 Coll., Civil Code, as amended, Parliamentary Document No. 1117/0,

Even today, the Czech supreme courts consider the cited reasons to be up-to-date,[65] although it is not clear whether the reason for this position is that they are up-to-date because the Czech legislator has not yet adopted the regulation foreseen by EU law or because the situation according to which no satisfactory theoretical basis has yet been found still persists.

The exclusion of the state's liability for damages caused to individuals by breaches of EU law from the content of the Act on State Liability for Damages is therefore deliberate on the part of the Czech State and has continued to the present time. However, this creates a deficit in the legislation, as it does not comply with the requirements of EU law.

Czech law has so far dealt with this fact by means of court judgments and the use of analogy. The Constitutional Court stated:

> […] *The Constitutional Court considers it indisputable that a Member State is liable for damage caused by a violation of European law, while this issue is not expressly regulated by the legal order of the Czech Republic* […] *In this situation, where the Czech Republic is a democratic state governed by the rule of law, observing its obligations under international law (cf. Article 1(2) of the Constitution of the Czech Republic), it cannot resign itself to the fulfilment of its obligations under international (i.e., also European) law simply because there is no express legal regulation at national level allowing the Czech Republic to invoke its liability for damage caused by the breach of obligations to which it itself and openly subscribes. For that reason, the applicant cannot be blamed for the fact that, in the proceedings before the general courts, she mixed the two systems of liability, i.e. she used liability for damage caused by a breach of European law only to support her argument that the announcement of the result of the conciliation procedure*

4th term of the Chamber of Deputies of the Parliament of the Czech Republic, explanatory memorandum – 1.

[65] IV. ÚS 1521/10 of 9 February 2011.

constituted an incorrect official procedure under Section 13 of Act No. 82/1998 Coll. It is the duty of the general courts, and in particular the Supreme Court, to interpret the law on State liability and to construct its relationship to the system of liability under European Union law. However, it may not proceed arbitrarily in this interpretation, and the absence of a proper explanation of how and why the chosen solution is consistent with the purpose of the EU legal norm will also be an arbitrary procedure (cf. paragraph 22 of Case No. II ÚS 1009/08).

From a constitutional point of view, it is possible to accept the separation of the system of liability for damage caused by the violation of EU law from the national system existing on the basis of Act No. 82/1998 Coll., as the Supreme Court has done in its case law. Analogously, e.g. the Constitutional Court in the opinion of the plenary in Case No. Pl. 27/09 of 28 April 2009 (ST 27/53 SbNU 885; 136/2009 Coll.), the Chamber of Deputies of the Constitutional Court recognized the relative autonomy of the regime of compensation for the compulsory restriction of the right to property in the public interest, which is directly entitled under Article 11(4) of the Charter. Since this provision 'does not in itself contain any further regulation of a number of practical issues, such as which state authority the claim must be submitted to, within what time limits, etc.', the Constitutional Court stated that "[i]n this respect, it is necessary to proceed by analogy with the provision closest in content and purpose, which is [*Act No. 82/1998 Coll.*]*".*[66]

The Supreme Court followed these conclusions with:

[…] *the existence of a directly effective principle of State liability for breach of European Union law is clear from the settled case-law of the Court of Justice and the Supreme*

[66] Ibidem.

> *Court has no doubt about its application in this respect, even in the absence of corresponding national legislation* […]
>
> […] *in circumstances where there is no adequate regulation of the State's liability for breach of EU law at the national level, the conditions of State liability arising from the case law of the Court of Justice apply in a situation where there is a breach of EU law, in accordance with the principle of priority, and the national Act No. 82/1998 Coll. applies only to the extent that EU law (including the case law of the Court of Justice) does not provide otherwise. In other words, Act No. 82/1998 applies where its provisions are consistent with those of EU law or to matters not dealt with by EU law, provided that they do not in any way impede or unduly hinder the individual's right to obtain compensation.*

There are certain problems with both judgments. The first is factual. The de facto problem of state liability for damage caused by breach of EU law has been solved by the euro-orientated case law of the Czech courts. The consequence is that the Czech legislator has no motivation to solve this problem in a systemic way and to adopt new legislation or to amend the existing Act on State Liability for Damage to include also Francovich-type liability.

The second problem lies in how the Constitutional Court approaches this responsibility. It speaks of two systems of legal responsibility that are perceived as autonomous – separate. This is true, but it distorts the real state of affairs somewhat. In the conditions of the legal system of the Czech Republic, it will be necessary to proceed in one of three possible ways, depending on the circumstances:

1. situations where the infringement arises under EU law, it is, nevertheless, regulated also by the Czech law and is governed by the Act on State Liability for Damage;
2. where the infringement arises under EU law, the law on state liability for damages does not apply because of its limitations, and the civil liability rules must therefore be applied "residually";

3. situations where it is necessary to follow the case law of the Court of Justice and apply the national Czech legislation by analogy.

Another problem in Czech law is the question of which court is the court of last instance in the sense of the Kobler decision. It is obvious that it is necessary to exclude the institutional aspect and to apply a functional approach, this has already been stated earlier in this study. However, even if the functional approach is applied, the question remains whether the Constitutional Court could be the court of last instance. The Supreme Court, in agreement with the Constitutional Court, has concluded that this is not the case. According to this approach:

> *a constitutional complaint constitutes a specific procedural means whose purpose is to ensure respect for, or to provide protection for, fundamental rights and freedoms guaranteed by the constitutional order.*[67]

These values are determined by the Czech legal order and not by EU law. Therefore, the Constitutional Court cannot be considered a court of last resort. The conclusion drawn by the general Czech courts that the European Court of Human Rights could be the court of last instance in some cases is completely incorrect and absurd. The Supreme Court rightly rejected this conclusion as incorrect.[68]

4.8. Conclusions

The legal regulation of state liability for damage is currently anchored in a problematic way. In EU law, it is essentially based only on the case law of the Court of Justice, which has gradually defined it in its decisions. It is difficult to hide the fact that this activity is at the very frontier of legal interpretation, or perhaps rather beyond it in the field of standard-setting. However, such an activity is not within its competence.

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[67] Judgment of the Supreme Court 30 Cdo 3378/2018 of 26 June 2019.
[68] Cf. Supreme Court decision 30 Cdo 3378/2018 of 26 June 2019.

The second problematic point is that the Court is aware of the limitations of its powers. It therefore applies a restrictive approach (to its own activism) by leaving the maximum possible to be regulated by the Member States. However, this means that the outcome of liability decisions depends on national substantive and procedural law and will therefore vary from country to country. Furthermore, the individual's chances of obtaining compensation at all vary from one country to another.

The whole system of EU public liability in its current form is not very workable. If it is meant to serve as an instrument for private enforcement of EU law, then it does not fulfil this function. It has only a very limited reparation function.

The question is what to do about it. There are several options.

First is the possibility to regulate the liability of the State for damages by secondary law. However, this option runs up against the lack of competence of the European Union to adopt such legislation. The only conceivable legal basis is Article 352 TFEU (flexibility clause).[69] However, the link between this provision and the objectives pursued by the EU and its policies rules out the possibility of adopting legislation of this type on the basis of this provision. Therefore, I do not think that this option may solve the problem.

Second is an opportunity to regulate the liability of the state for damages in primary law. This option has two sub-options. The regulation in primary law may be complete (e.g., in a separate provision of the TFEU and a Protocol on State liability for damages), or it may be partial, with the provision of the TFEU being solely the legal basis for specifying this state liability through an act of secondary law. If the second option is chosen, I would recommend the use of the special legislative procedure and the introduction of unanimity for decision-making in the Council. At the same time, I would recommend the explicit exclusion of the national legislator's liability for

[69] According to this provision, "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, he Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures."

damages, with the sole exception of the failure to adopt the directive properly or in time. I would also recommend excluding directly in primary law the liability of the State for damage caused by a court of last instance. For me, this is the preferred option.

The third option is the adoption of legislation in the Czech or Polish legal system in the form of a law. It seems sensible to me to clearly separate a purely national liability regime from the EU regime. Both the substantive and procedural parts should be regulated. The law(s) should clearly define to which authorities or courts an individual should address his/her claim/request for review. Rules should be laid down to define the amount of damages to be compensated, which should include compensation for both pecuniary and non-pecuniary loss. I would consider it prudent to set rules for specific determination of damages or for a blanket determination of damages in cases where the individual has no way of quantifying them. The issue of associated costs, such as interest on late payment, interest to compensate for the impact of inflation, legal costs, etc., should also be addressed. The question of succession to the injured party and the question of limitation should be addressed.

Finally, the interests of the State should also be addressed, i.e., the possibility of claiming recourse compensation. However, the specific form will always depend on the initial policy brief. The legislator will have to ask itself whether it is treating this type of liability as a tool for the protection of the individual and a mechanism for enforcing EU law, or whether it is treating it as a necessary evil which must therefore be limited to cases necessarily required by EU law.

There is also a fourth option. That is to do nothing. Indeed, as the Supreme Court has found, this is the practice in many Member States.[70] This option has its advantages, so far. For it seems that the

[70] "The direct and immediate applicability of the principle of State liability for breach of EU law is also established in the case law of the national courts of other Member States. In its judgment of 25 July 2000 in Case 1 Ob 146/00b, the Austrian Supreme Court held that a claim for damages arising from the State's liability for breach of EU law is directly applicable and that the State's liability may thus be derived by analogous implementation of selected provisions of the national law on State liability (*Amtshaftunsgesetz*), in accordance with the principle of the primacy of EU law in the event of the need to replace or supplement provisions

European Commission is able to take to the Court of Justice those States that have adopted the express regulation, even if only partially incorrectly. On the other hand, it appears to be unable to proceed in this way against those States which have settled everything in the case law of their courts.

I consider the fourth option to be the worst possible. Firstly, it is contrary to the principle of legal certainty and predictability of legislation. Our legal systems are not "used to" the approach typical of the common law. The regulation of state liability for damages in this sense is not transparent to individuals. Moreover, at least in the Czech Republic, it is clear that the current situation is not satisfactory, since the possibility for an individual to claim compensation for damages is in fact only theoretical.[71]

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which are missing or contrary to EU law. Also, in its judgment of 6 October 2000 in Case 1 Ob 12/00x, the Supreme Court of Justice explicitly stated that the possibility of damage giving rise to liability also arises as a result of non-compliance with the constant case-law of the CJEU interpreting the effectiveness of rights under primary law. In the judgment of 30 January 2001 in Case 1 Ob 80/00xx, the liability of a Member State for breach of EU law was described as a new institution introduced into Austrian law after the accession of the State to the EU. A similar approach is also apparent in the German courts, where the case-law on the application of the EU liability system is based on the Court's decisions in the Dillenkofer cases (judgment of the Court of Justice of 8 October 1994 in Joined Cases C-178/94, C-179/94, C-188/94 and C-190/94. *Dillenkofer a další v. Bundesrepublik Deutschland* [1994], preliminary question Landgericht Bonn 1 O 360/93 and subsequent order of the Oberlandgericht Köln 7 U 23/97 of 15 October 1994). The Federal Republic of Germany does not have its own national rules on the liability of the State for breach of EU law and therefore derives its principles only from the directly applicable case-law of the Court of Justice, with the consequent application of selected provisions of the BGB and the Constitution (cf. ZR 144/05 of 4 June 2009, or III. ZR 48/01a of 20 January 2005)." Decision of the Supreme Court 28 Cdo 2927/2010 of 20.08.2012.

[71] Additional reasons can be found in this study which is based on empirical data: R. Condon, B. van Leeuwen, *Bottom Up or Rock Bottom Harmonization? Francovich State Liability in National Courts*, "Yearbook of European Law" 2016, Vol. 35(1), pp. 229–290, https://doi.org/10.1093/yel/yew004.

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Chapter 5. Rule of Law in Slovenia and within the Criminal Law – the Impact of Non-Government Organisations on Criminal Law Legislation

5.1. Introduction

The Rule of Law is one of the ideals of our political morality and it refers to the ascendancy of law as such and of the institutions of the legal system in a system of governance. The Rule of Law comprises several principles of a formal and procedural character, addressing how a state is governed. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society. The procedural principles concern the processes by which these norms are administered, the institutions and an independent judiciary that their administration requires.[1]

In various ways, being ruled through law means that power is less arbitrary, more predictable, more impersonal, less peremptory and less coercive. Therefore, the three main pillars that the rule of law requires are determinacy, clarity, and predictability. The Rule of Law is an ideal in an array of values that dominates liberal political morality.[2] Raz insists, as a matter of analytic clarity, that the Rule of Law in particular must be distinguished from democracy, human rights, and social justice. He confines the focus of the Rule of Law to

[1] *Stanford Encyclopedia of Philosophy. The Rule of Law*, 22 June 2016, https://plato.stanford.edu/entries/rule-of-law/ [access: 30.06.2023].

[2] *Stanford Encyclopedia of Philosophy…*, *op. cit.*

formal and procedural aspects of governmental institutions, without regard to the content of the policies they implement.[3]

For the law to be fair, it should be the same for everyone, so that no one is above the law, and everyone has access to the law's protection. The requirement of access is particularly important, from two perspectives. First, law should be epistemically accessible: it should be a body of norms promulgated as public knowledge so that people can study it, internalise it, figure out what it requires of them, and use it as a framework for their plans and expectations, and for settling their disputes with others. Secondly, legal institutions and their procedures should be available to ordinary people to uphold their rights, settle their disputes, and protect them against abuses of public and private power. All of this requires the independence of the judiciary, the accountability of government officials, the transparency of public business, and the integrity of legal procedures.[4]

The rule of law as a legal ideal cannot survive on its own. A predisposition for its existence is a democratic state with a separation of powers of the legislature, executive, and judiciary. It was Montesquieu in his work on the Rule of Law who insisted on the separation of powers – in particular the separation of judicial power from executive and legislative authority. The judiciary has to be able to do its work as the mouthpiece of the laws without being distracted from fresh decisions made in the course of its considerations by legislators and policy makers.[5]

A state governed by the rule of law is a modern state in which the functioning of state bodies is legally bound and in which fundamental rights are guaranteed. The administration and the independent judiciary, which issue individual and executive acts or perform material actions, are subject to the constitution and laws adopted by the representative body (national assembly, parliament, congress). The state is organised as a democratic state, based on the principle

[3] J. Raz, *The Authority of Law*, Oxford University Press, Oxford 1979, pp. 20–25.

[4] *Stanford Encyclopedia of Philosophy…*, *op. cit.*

[5] C. Montesquieu, *1748, The Spirit of the Laws*, A. Cohler, C. Miller, H. Stone (eds.), Cambridge University Press, Cambridge 1989, pp. 10–15.

of separation of powers and containing a system of checks and balances between the holders of state power.[6]

The rule of law arises as a reaction against the state organisation, in which the activity of the central state bodies is not predetermined or at least determinable by the corresponding general legal acts of the representative body. In continental Europe, the institutions of the rule of law were formed as a reaction to the police state ("*polizeistaat*"). In a police state, the focus of decision-making lies with the administration, which acts in accordance with the state interest ("*staatraison*") as it perceives it. Its decisions are not legally binding and, as such, already evade legal control, which the police state refuses to accept.[7]

On the contrary, in the Rule of Law, legislative, executive-administrative and judicial powers are separated. The judiciary is governed autonomously and is independent from other state institutions. The administration is always subordinate to the law and only acts based on the legal jurisdiction that the law gives it.

The design of the modern rule of law is the fruit of historical development, to which both English and continental European law contributed. The original elements of the rule of law are the supremacy of parliament over other state bodies, the principle of legally non-arbitrary behaviour of state authorities, equality before the law and the protection of fundamental human rights.[8] Fundamental rights already existed before the state authority and determine substantive boundaries that the state authority may not cross.

It is therefore characteristic of the rule of law that the law functions as a system of limiting power. In a constitutional state, the operation of all authorities must be in accordance with the law and the constitution. With this, the European model of the rule of law has theoretically and practically completely merged with the Anglo-Saxon system of the rule of law, which is characterised by the fact that in a legally regulated society everyone is subject to the law, so

[6] M. Pavčnik (ed.), *Pravna država*, GV Založba, Ljubljana 2009, p. 29.

[7] M. Pavčnik (ed.), *Pravna država*, *op. cit*., p. 30.

[8] A.V. Dicey, *Introduction to the study of Law of the Constitution*, Macmillan and Co. Limited, London 1927, pp. 179 and 402.

that the law, not the people, rules. With such an understanding of the rule of law, we can only understand its essence in non-arbitrary governmental action. Encroachments on rights and freedoms by both the authorities and other individuals are permissible only if they are convincingly justified by real reasons in the public interest. If they are not, the interference with individual rights is arbitrary. From this point of view, the rule of law is closely linked to the idea of equal human dignity, which guarantees everyone the right to equality and freedom and requires the state and others not to interfere with these rights arbitrarily.[9]

The aim of this chapter is twofold. First, we want to present the specifics of the rule of law in Slovenia and how the rule of law affects the criminal law. We will also present the basic principles of criminal law that embody the rule of law. The second part will be to present an actual case study of a non-government organisation that has affected the adoption of criminal legislation in Slovenia. The process of adopting the legislation is heavily connected to the rule of law. If this process can be usurped by non-government organisations, then they can force their own agendas into the law, despite the fact that, in Slovenia as elsewhere, non-governmental organisations are never democratically elected by the people.

5.2. Rule of Law in Slovenia

Legality is the central quality of the Slovenian legal system and the foundation of its rule of law. The rule of law means that the constitution, laws, and other formal legal sources treat legal entities equally (the principle of legal equality) and predictably. Legal violations are determined in advance (the principle of *nullum crimen nulla poena sine lege certa* is of particular importance here), as is the procedure in which the competent state authorities determine whether a legal violation has been committed and what legal consequences should be imposed in this regard (the principle of legal certainty).

[9] B. Zalar, [in:] M. Avbelj (ed.), *Commentary of the Constitution of Slovenia*, Nova Univerza, Ljubljana 2019, p. 38.

In Slovenia, the rights and duties of legal entities are determined by law, and the most important of them are contained as fundamental rights and declared in a legally binding manner by the constitution. Legal means are also part of the rule of law, with which legal entities exercise their rights and achieve the fulfilment of their duties.[10]

Among the concrete elements of the Slovenian rule of law, we can include: separation of powers, fundamental rights, the law in the formal sense, which is adopted by the elected representative body, the legality of the administration and the judiciary, which includes adherence to the law, the limitation of state action, which must be measurable and predictable, legal security, prohibition of retroactivity of regulations, the principle of clarity in legislation, the principle of proportionality, the principle of necessity, judicial protection, independent and fair trial, *nullum crimen nulla poena sine lege*, and the existence of the constitution in the formal sense. All these elements are also included in the Slovenian Constitution. This is expressed through numerous provisions of the Slovenian Constitution, but most notably in Article 2 of the Constitution, which defines that Slovenia is a legal and social state. The placement of the article at the very beginning of the constitution indicates the importance of this provision. Since Article 2 is a general provision, we must understand it as a fundamental principle that is not only contained in all other constitutional norms, but has a general effect that extends to the entire Slovenian nation.[11] The provision of the second article of the constitution can be invoked by individuals in legal relationships in all areas of their creation (civil, economic, criminal, administrative, etc.). The provision of the second article must also be respected by all authorities and exercisers of public powers, as well as other individuals.[12]

The principle of the rule of law is intimately and inseparably connected with the principle of democracy, which forms the coherent normative quality of Slovenia as a constitutional democracy. In a constitutional democracy, the rule of law is the core of its being.

[10] M. Pavčnik (ed.), *Pravna država*, *op. cit*., p. 32.
[11] B. Zalar, *op. cit*., p. 38.
[12] Constitutional court decision U-I-12/12.

The general principle of the rule of law is based on several more concrete sub-principles of the rule of law, among which we can distinguish formal and substantive principles of the rule of law.[13]

Formal principles are those that define the formal characteristics of the legal order, legal acts and legal norms in the rule of law. It follows from the constitution, constitutional court decisions and comparative constitutional law that the formal principles of the rule of law in Slovenia are at least the following: the principle of constitutionality and legality in Article 153 of the Constitution, the principle of legality in Article 28 of the Constitution, the principle of separation of powers in Article 3 of the Constitution, the principle of clarity and specificity of regulations, the principle of legal predictability, legal certainty and trust in the law, the principle of publication of regulations in Article 154 of the Constitution, the principle of prohibition of retroactivity in Article 155 of the Constitution, the principle of proportionality, the right to appeal and a fair trial in Articles 23 and 25 of the Constitution. The last two rights already represent a bridge to the substantive principles of the rule of law, which are embodied in the protection of fundamental human rights and freedoms in the second and third chapters of the Constitution. Among these, all procedural and substantive safeguards in criminal, administrative and other proceedings against state bodies and holders of public authority should be highlighted (Articles 17 to 31 of the Constitution).[14]

For the functioning of the rule of law, it is not enough that its formal and substantive elements are provided only in the constitutional text. The key is their implementation in practice. For the actual existence of the rule of law its sociological component is also necessary, which is expressed in the implementation of formal and substantive legal principles of the rule of law in the practice of institutional actors and in the actions of all holders of public authority, as well as in the actions of citizens. This sociological component depends on the integrity of the institutional actors and indeed the universal legal and political culture in a given society.

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[13] B. Zalar, *op. cit.*, p. 39.

[14] Ibidem, p. 39.

Just as "A democracy of evil people will be an evil democracy",[15] this also applies to the rule of law.[16]

The second article of the Constitution is also an optimisation command, which means that those who use the law are obliged to implement it to the extent that is legally possible given the specific circumstances.[17] The achievable optimum is torn between the lower limit, which is still legally correct, and the upper limit, which can be as high as possible (e.g., as predictable a legal regulation as possible, which binds as much confidence in the law as possible). It is in the nature of things that the upper limit changes in time and space and that, considered absolutely, it never reaches the optimum. It is not within the competence of the courts to absolutize the upper limit of legal discretion; it is within their competence to reject or change all those decisions which are already below the lower limit of discretion, within which legally acceptable decisions must be sought. Concrete decisions of the courts (especially the Supreme Court and the Constitutional Court) can significantly strengthen the standards of the rule of law and develop them substantively.[18]

Here it is worth noting the different legal attitude that the constitutional and regular courts have towards the principle of the rule of law (in the meaning of the second Article of the Constitution). The Constitutional Court can apply the principle of the rule of law directly, while the regular judiciary generally does not have this possibility. When assessing the constitutionality of laws and other general legal acts, the Constitutional Court also determines whether these acts are in accordance with the principle of the rule of law. These possibilities open up a relatively wide range of decision-making, which can be very creative. The regular judiciary has this option when it considers that the law it should apply is in conflict with the constitutional principle of the rule of law, so the court

[15] J.H.H. Weiler, *Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4): Some Iconoclastic Views on Populism, Democracy, the Rule of Law and the Polish Circumstance*, [in:] A. von Bogdandy (ed.), *Defending Checks and Balances in EU Member States*, Springer 2021, pp. 3–13.

[16] B. Zalar, *op. cit.*, p. 39.

[17] R. Alexy, *Theorie der Grundrecht. Suhrkamp*, Frankfurt 1986, pp. 75–76.

[18] M. Pavčnik (ed.), *Pravna država*, *op. cit.*, p. 38.

suspends the procedure and submits a request for an assessment of the constitutionality of the controversial law. In cases where a regular court decides on specific cases, the principle of the rule of law is applied through statutory legal principles and legal rules. In all these cases, the principle of the rule of law is a kind of explanatory argument, which is particularly characteristic for the further development of specific acts and of the law in general.[19]

Initially, the practice of the Constitutional Court represented the view that the provision of the second Article of the Constitution does not directly regulate human rights or fundamental freedoms, therefore it is not possible to refer only to the violation of the second Article of the Constitution in a constitutional appeal.[20] In order to successfully invoke the second Article of the Constitution, the complainant must simultaneously demonstrate an interference with one of the constitutionally protected rights or freedoms. Later, however, this practice was deviated from in the case Up-164/15, where the appellant referred directly to the violation of Article 2 of the Constitution. The Constitutional Court wrote that 'although the second article does not directly regulate fundamental rights and freedoms, its content in the judicial process is reflected in individual human rights' and thus found a violation of the constitution. Furthermore, in case U-I-57/06, the Constitutional Court also derived from Article 2 of the Constitution the general principle of legality for functioning of state bodies and their officials, from which the requirement to prevent corruption also arises. In decision U-I-248/08, the Constitutional Court derived the absolute obligation to respect the provisions of the Constitution in all decisions by the courts and the administrative offices.[21]

The argument of the rule of law has therefore become a constitutional principle in the practice of the Constitutional Court of the Republic of Slovenia. The principle of the rule of law contains three

[19] Constitutional court decision Up-345/01; M. Pavčnik (ed.), *Pravna država*, *op. cit.*, p. 38.

[20] Constitutional court decisions U-I-94/18, U-I-127/17, Up-709/17 and Up-838/17.

[21] B. Zalar, *op. cit.*, p. 40.

essential elements, which were developed to the constitutional level by the Constitutional Court through its decisions. These are the principle of proportionality, the principle of protection of trust in the law and the principle of clarity and specificity of regulations.[22]

The principle of proportionality defines that all rights and legal obligations are correlative. Correlativity is manifested in the fact that the holder of the right may not cross its boundaries, while the holder of the duty is entitled to not be hindered by others in his conduct. The principle of proportionality also includes the constitutional test of proportionality, which deals with the permissibility of state restrictions and interference with fundamental rights. State interventions in the rights of individuals are constitutionally acceptable only if they are necessary, appropriate, and proportionate in the narrower sense. This means that the state pursues a legitimate constitutional goal by interfering with the right (e.g., protection against criminal acts), that the goal pursued by the state intervention can be achieved, and that the benefit achieved by the national measure prevails over the interference with the individual's right from the point of view of wider social benefit (e.g., a security check of an individual at the airport for the needs of greater security of all passengers on the plane).

The general principle of proportionality is not an independent criterion for assessing compliance with the constitution, but can only be linked to an established interference with an individual's human right.[23] In the development of judicial practice, the Constitutional Court relied closely on the assessment of the principle of proportionality, as assessed by the European Court of Human Rights. The ECHR talks about a fair balance between the enjoyment of rights and other legally protected interests guaranteed by the European Convention on Human Rights.[24] Even if a country passes

[22] L. Šturm, *Commentary of the Constitution of Slovenia*, Evropska pravna fakulteta, Ljubljana 2002, pp. 53–55.

[23] Constitutional court decisions U-I-219/03, U-I-178/10 and U-I-123/11.

[24] ECHR decision *Hatton and others v. UK*, 26002/97.

the proportionality test, the ECHR repeats it with an outcome that may differ from the most careful national test.[25]

The principle of proportionality under the ECHR test requires that there must be a real and reasonable reason for any limitation of rights. If such a reason is demonstrated, it is necessary to judge in what relation it is to the goal and the effects of the means for its realisation. For legal admissibility, it is not enough that the lawgiver merely pursues a legitimate goal with it. The principle of proportionality is also violated when it can be clearly established that there is no reasonable proportional connection between the means used and the goal to be achieved by the legal regulation.[26]

The principle of trust in the law states that interpretatively predictable legislation is an important element of the rule of law. If this predictability did not exist, despite the same legal text, the content determined by the competent state authorities would constantly change, which would unnecessarily trigger legal and court disputes. There is no trust in the legal system if the legislation is not relatively stable.[27] Law can exercise its function of regulating social life if it is permanent and stable to the greatest extent possible.[28] Abrupt changes in legislation are in principle not admissible; in normal social conditions legislation must gradually adapt and respond to new social conditions.[29] If the legislative changes are very large, a suitable transition from the old to the new regulation must be made possible.[30]

The principle of clarity and definiteness of regulations restricts the legislator to stay within the room for manoeuvre given by the constitution, while not acting arbitrarily. This means that the legal regulations are comprehensible to everyone, but also that they do not interfere with already acquired or expected rights of individuals. The legal addressees of the regulation must be given a transitional

[25] ECHR decision *Marcky v. Belgium*, 6833/74.
[26] ECHR decision *Marcky v. Belgium*, 6833/74.
[27] M. Pavčnik (ed.), *Pravna država*, *op. cit*., p. 49.
[28] Constitutional court decisions Up-609/05, Up-732/06 and Up-33/05.
[29] Constitutional court decision U-I-69/03.
[30] Constitutional court decisions U-I-123/92 and U-I-120/91.

period during which they can adapt to the new regulation.[31] The legislator's decision is arbitrary if it is not based on real and reasonable reasons, which must correspond to the nature of things. The legislator is undeniably acting arbitrarily if the bill is substantively unfounded and if it does not even state the reasons for its adoption. The other extreme is if the reasons are clearly unconstitutional, because in terms of content, they violate the rules of the constitution.[32]

In addition to its substantive framework, the rule of law also contains a procedural framework (a set of rules and principles on legal procedures), which enables legal entities to fulfil their duties, exercise their rights, and for all three powers to function smoothly. The procedural framework of the rule of law is of high quality if it is in proper harmony with the substantive framework and if it offers enough legal avenues to legally enforce what we accept as legitimate. Procedural law, together with procedural justice, which ensures the equality of procedural arms and thus a fair procedure, is an essential element of the rule of law. If this element does not exist or is insufficiently developed, the door is open for arbitrary decision-making. This is precisely why the rule of law and democracy as a form of political system are closely related. The rule of law is hollow if there are no democratic procedures that fill the rule of law with content.[33]

As the rule of law is a part of Slovenian Constitution and part of the practice of the constitutional court, there is no need to change the constitution in order to implement the rule of law. As Slovenia is a democratic republic, there is a distinct division of power between the legislative, the executive, and judicial branches. The rule of law is not only an abstract ideal, but a concrete legal concept (a constitutional rule) that the Constitutional Court regularly uses in its decisions. Human rights are safeguarded on the constitutional level and are therefore above the positive law of the legislator. When the legislator infringes on human rights with its legislation, the Constitutional Court will repeal such law. Each law must be clear,

[31] M. Pavčnik (ed.), *Pravna država*, *op. cit*., p. 51; Constitutional court decision U-I-69/03.

[32] M. Pavčnik (ed.), *Pravna država*, *op. cit*., p. 52.

[33] Ibidem, pp. 35–36.

definite, and predictable, and also constitutionally proportional, meaning that the state pursues a legitimate constitutional goal with the law, that the goal pursued by the state intervention can be achieved with the law, and that the benefit achieved by the law prevails over the interference with the individual's right from the point of view of wider social benefit.

5.3. Rule of Law in Criminal Law

One of the most important demands of the Rule of Law is that people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, ad hoc, or purely discretionary manner on the basis of their own preferences or ideology. It insists that the government should operate within a framework of law in everything it does, and that it should be accountable through law when there is a suggestion of unauthorised action by those in power.[34]

The rule of law is based on established legal rules that bind both state authorities and residents. Here, it is extremely important how these legal rules are adopted. If they are accepted by an absolute ruler arbitrarily, then we cannot speak of a legal state respecting the rule of law, but rather of an abuse of law, with which the ruler only forcibly enforces his arbitrary will. What is missing is the substantive component of the rule of law – the process by which the laws were made was not fair. The process of adopting legal rules is namely of the same importance as the rules that form the rule of law themselves. Thus, the rule of law can only be based on the rules adopted by the democratically elected constitutional body (national assembly, parliament) following a transparent legal procedure foreseen in advance. Adopted legal rules must express the will of the majority of the representative body (and thus the majority of citizens), must be adopted by legal means and must not contradict the already established constitutional principles and legal rules of society nor the dogmatic theories of the field within which the legal rules are

[34] *Stanford Encyclopedia of Philosophy…*, *op. cit.*

adopted. This is especially important in the context of criminal law, where the theory and dogmatic of criminal law have been developed over several centuries with the participation of thousands of legal thinkers and writers. Theoretical constructs of criminal law should therefore not be ignored when adopting criminal law rules. For example, criminal legal theory developed the institute of self-defence over several centuries, which dogmatically led to extreme precision and definition of this institute. Therefore, a legal rule in the criminal code, which is completely opposed to the positions of legal theory and the practice developed on this basis, contradicts the principle of the rule of law. Such a rule can only be legal if it consistently follows established theory and jurisprudence, but not if it is arbitrarily set by a representative legal body that completely ignores or does not know the theoretical knowledge of criminal law science. Therefore, in the context of criminal law, it is crucial that the criminal law profession participates in the adoption of criminal law legislation. When amending the Criminal Code, the legislator should therefore obtain opinions of criminal law experts from the ranks of theorists, judges, state prosecutors and lawyers, or even better, invite them to participate in creating the legislation. These experts can ground the legislator regarding certain unrealistic ideas, or warn him that his text is in complete opposition to the criminal law profession and science. A legal text that opposes and denies the established criminal law profession and science cannot be legitimate, but is politically imposed on judicial practice. The more such an imposed text contradicts the fundamental principles of criminal law, the more it violates the constitutional principle of the rule of law. If the legislator's text is unclear, ambiguous or even contradictory, the constitutional court must intervene, since the legislator has clearly overreached his constitutionally defined manoeuvring space for writing the legislation.[35]

The Constitutional Court ruled that legal rules must be defined clearly and precisely, so that they can be implemented, that they do not allow the executive authority to act arbitrarily, and that they

[35] See also: M. Pavčnik (ed.), *Pravna država*, *op. cit*., p. 40.

unambiguously and sufficiently define the legal position of the entities to which they refer (principle of definiteness).[36]

The legislator's decision is arbitrary if it is not based on real and reasonable reasons, which must correspond to the nature of things. The legislator is undeniably acting arbitrarily if the act is substantively unfounded and if it does not even state the reasons for its adoption. The other extreme is if the reasons are clearly unconstitutional, because in terms of content, they violate the rules of the constitution.[37]

The fundamental substantive and procedural framework of the rule of law is the Constitution. The Constitution is a legal entity of general legal principles and legal rules that derive from and concretise the general principles in the normative part. The Constitution allows the legislator a wide room for manoeuvre, which allows the legislator a very open and extensive area of discretion. The constitutional framework of the rule of law allows the legislator to be creative and to raise the design of the rule of law to a higher level. The principle of the rule of law as an optimisation command means that the legislator must not slip below the level that corresponds to the generally accepted standards of the rule of law. If a constitutional dispute arises, it will be decided by the Constitutional Court. It is not within the competence of the Constitutional Court to decide as if it were the legislator, but it is within its domain to determine whether the legislator moved within the limits of constitutionally permissible possibilities.[38]

If the legislator is competent to move in a certain manoeuvring space, it is a matter of his decision how to search for the most optimal derivation in this space. The Constitutional Court must respect this room for manoeuvre. The Constitutional Court intervenes in the legislator's judgment only when it considers that the legislator has unconstitutionally narrowed its room for manoeuvre or defined the content unconstitutionally. The same applies when the legislator's message is semantically unclear, ambiguous or even illegal.[39]

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[36] Constitutional court decision U-I-312/97.

[37] M. Pavčnik (ed.), *Pravna država*, *op. cit*., p. 52.

[38] Constitutional court decision U-I-328/05; M. Pavčnik (ed.), *Pravna država*, *op. cit*., p. 39.

[39] M. Pavčnik (ed.), *Pravna država*, *op. cit*., p. 40.

With the formula of the rule of law in modern times, a specific ideology is very often asserted, especially when this formula is used in a descriptive and prescriptive simplified action and motivational way. When political actors do this, it is an instrumentalization of law or the rule of law for a political purpose. In doing so, the concept of the rule of law is greatly simplified and expressed in very general categories of order, justice and human rights. Such politically motivated laws often pursue their own political interests and not the interests of society, thereby losing their fairness and being subject to higher evaluation criteria that go beyond the normative legal record.[40] The law therefore does not meet the standard of the rule of law only because it is adopted by the National Assembly according to an established procedure and due to its formal written form, but must also be fair in content and subjected to higher standards of the rule of law, which also includes theoretical discussions on human rights and fundamental legal institutes (of criminal law). Therefore, a law adopted by the legislator that opposes the established criminal law theory and practice cannot be adopted in accordance with the rule of law, but is, however, adopted arbitrarily according to political ideology.

Some theorists draw a distinction between the rule of law and what they call rule by law. They celebrate the one and disparage the other. The rule of law is supposed to lift law above politics. The idea is that the law should stand above every powerful person and agency in the land. Rule by law, in contrast, connotes the instrumental use of law as a tool of political power. It means that the state uses law to control its citizens, but never allows the law to control the state. Rule by law is associated with the debasement of legality by authoritarian regimes.[41] Therefore, in order for the State to declare that it respects the rule of law, the substantive content of the legal norms is of essential meaning. And of course, on the other hand the process in which the law is passed must also adopt to the principle of the rule of law.

[40] M. Cerar, [in:] M. Pavčnik (ed.), *Pravna država*, GV Založba, Ljubljana 2009, pp. 91, 94–95.

[41] *Stanford Encyclopedia of Philosophy...*, *op. cit.*

5.3.1. PRINCIPLES OF CRIMINAL LAW THAT EMBODY THE RULE OF LAW

The fundamental principles of criminal law are the basic assumptions of the functioning of criminal law theory and practice. They represent a guide for decision-makers in criminal proceedings and ensure a coherent system of criminal law. They help the practitioner to interpret the provisions of criminal law and direct him to the meaning pursued by a just society based on the rule of law.

The link between politics and criminal law is always a topical issue that adapts to the existing social regime. This connection can be seen in the amendments to criminal laws, which are sometimes highly politically motivated and pursue a tendency towards greater repression, and manifest as well as in the form of pressure on individual state bodies that directly or indirectly carry out repression. Criminal law is surely one of the pillars of stability and legal security of any democratic state governed by the rule of law, so changes in criminal law must be carefully studied, supported by professional research and in the end, the accepted decision must be supported by sufficiently thorough explanations, based on previous research and statutory procedure. It is certainly inappropriate and irresponsible to rush with novelties and changes. Neither substantive nor procedural criminal law should be changed under political pressure, which if done would be in sharp contrast to the democratic state governed by the rule of law advocated by Slovenia at the time of its independence. However, in the early years of Slovene independence and the building of its own legal system by the ruling party, there have been tendencies and attempts to take over the country's criminal law and repressive apparatus, which is unacceptable in a democratic state governed by the rule of law.[42]

[42] L. Bavcon, *O razmerju med politiko in kazenskim pravom*, "Pravna Praksa" 1999, Vol. 33, No. 99, pp. 1–5; M. Kotnik, M. Šepec, *Slovenia: national regulations in the shadow of a common past*, [in:] E. Váradi-Csema (ed.), *Criminal legal studies: European challenges and Central European responses in the criminal science of the 21st century*, CEA Publishing, Miskolc–Budapest 2022, p. 232.

On the other hand, criminal law should, in addition to following the principle of the rule of law, respect human rights, which are essentially the result of the protection of the fundamental rights of the individual. In the past, these have often been adapted into political slogans in order to gain the affiliation of the general public and gain social power. The reflection of this power is shown in the case of the disintegration of the system of Eastern European 'real socialism', which was previously considered unshakeable.[43] However, even today in the time of modern democracy, such conflicts are not overcome in many regions, where the rule of law as a fundamental principle of democratic order should be uncontested in the consciousness of authorities. Although the EU is strongly committed to it and constantly reminds Member States to respect this principle as a pillar of every modern constitutional democracy as well as human rights, the challenge posed by covert arbitrary decision-making of political elites and disregard for the democratic state governed by the rule of law has still not been overcome. In this context the Commission has recently expressed concern about compliance with this principle in Slovenia.[44]

The rule of law is an EU standard. The criminal law of a democratic state governed by the rule of law should follow ideas that have also been recognised at the international level.[45] Anti-crime measures should be in line with the fundamental principles of democratic states, subjected to the rule of law and subordinated to human rights, and in no way should criminal law be based on ideological

[43] L. Bavcon, *Kratek oris prava človekovih pravic kot nove pravne discipline*, "Javnost" 1994, Vol. 1, No. 1–2, pp. 105–114.

[44] See, for example: European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, further strengthening the Rule of Law within the Union State of play and possible next steps, COM (2019) 163 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163 [access: 06.01.2022]. See also: M. Kotnik, M. Šepec, *Slovenia…*, *op. cit.*, p. 232.

[45] In 1996, on behalf of the leading members of the Council of Europe, the Committee of Ministers issued special Recommendation No. R/96/8 on Europe in a time of change: crime policy and criminal law, which includes guidelines for countries on regulating the relationship between general and criminal policy and criminal law.

and political motives, and in this sense be clearly instrumental and repressive, as this would be professionally controversial.[46] Measures to combat crime that do not respect democratic values, the rule of law and human rights, are thus not acceptable under any circumstances and in any situation in which the country may find itself.[47]

Respect for human rights and fundamental freedoms is therefore one of the fundamental preconditions of a democratic state governed by the rule of law, but these have often been disregarded in the history of other established political regimes. In the context of the above, full respect for the principles of constitutionality and legality is particularly important in the field of criminal law, especially when they appear to be acting against the interests of the ruling authorities, where there is an additional danger of presenting their partial interests as national interest.[48] Criminal law and science also have an important influence on this, as their rules and warnings help to limit the arbitrariness of the authorities, and all this can only be ensured with the guaranteed independence of judges and the judiciary in general.[49]

The independence of the judiciary is one of the fundamental postulates of the rule of law, which politics has in the past tried to affect by abolishing the permanent term of office of a judge, although this is an essential condition for a judge's independence. Individuals

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[46] L. Bavcon, *Zakonodajna politika (Teze)*, "Podjetje in Delo" 2008, No. 6–7, pp. 1186–1188.

[47] D. Korošec, *Kriminalitetna politika evropskih držav v tranziciji – pogled Sveta Evrope*, "Pravna Praksa" 1999, No. 21/22, pp. 43–46; M. Kotnik, M. Šepec, *Slovenia…*, *op. cit.*, p. 233.

[48] The fact that the ruling elite presents its interest as a national one is evident from the case of the crime of terrorism, where people, due to widespread social fear, take for granted the most severe form of repression and inconsistent respect for human rights, which skilled politicians know how to use to consolidate their power and increase their social power. The support of society in disregarding human rights is dangerous, as individuals are usually unaware that their rights are also at a crucial stage, which should in any case be respected always and everywhere in a democratic society. See more: L. Bavcon, *Izzivi in odzivi: človekove pravice, kriminalitetna politika, kazensko pravo, mednarodno kazensko parvo*, Uradni list Republike Slovenije, Ljubljana 2006, p. 112.

[49] L. Bavcon, *Izzivi in odzivi…*, *op. cit.*; M. Kotnik, M. Šepec, *Slovenia…*, *op. cit.*, p. 234.

often do not understand this and are therefore (and due to ignorance of judicial procedures) susceptible to political manipulation, which through the media blames courts for everything that goes wrong, thereby attacking and destroying the institution that is most important for the rule of law. By doing so, they win over the people and increase the risk of subjugation of the judiciary, which can have far-reaching consequences that the lay population neither thinks about nor understands. With a politically guided judiciary, is not only the principle of legality that is threatened, but all the rights that belong to the individual. This is especially dangerous in criminal law. The abuses of criminal law to prosecute and sanction political opponents, as we have witnessed throughout history, should be a sufficient lesson in the dangers to the independence and impartiality of the judge, and of the judiciary as a third branch of government in general. Overall, it was on the experience of attempts at political incursions into the independence of the judiciary that the human right to a fair trial was formed, which in addition to the right to an independent and impartial judge, also includes the right to the presumption of innocence, the principle that when in doubt to rule in favour of the accused (*in dubio pro reo*) and other rules and principles indispensable for fair criminal proceedings.[50]

The fact is that, regardless of the completeness of the legal framework and legislation, it is impossible to prevent abuses and gross violations of human rights. This has always been the case in history, even in the best-developed of countries that we consider to be model democracies. Of course, we can reduce this mainly by limiting and balancing political power.[51] However, this does not mean that it is necessary to remove politics from the law, as criminal law is an instrument of society for the prevention and suppression of crime. Nonetheless, fundamental principles of criminal law and basic human right should always be respected.[52]

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[50] Ibidem.

[51] L. Bavcon, *Človekove pravice in kazensko pravo na slovenskem*, "Raziskovalec" 1992, Vol. 22, No. 1, pp. 12–23.

[52] M. Kotnik, M. Šepec, *Slovenia…*, *op. cit.*, p. 234.

The principles of criminal law are of exceptionally conceptual as well as great substantive importance. They reflect the postulates of a democratic state governed by the rule of law and, in this context, set the basic legal standards for criminal law. The following subsections present the key principles of Slovenian criminal law that constitute the rule of law in the field of criminal law.

5.3.1.1. *Principle of Legitimacy and Restricted Repression in Connection with the Rule of Law*

The is one of the basic principles of criminal law, as in its core protects the basic human rights and freedoms of individuals in criminal procedures. The principle of legitimacy obliges the legislative body to justify every incrimination in the Criminal Code and if that incrimination constitutes a violation of some human right and/or freedom that such an intervention is necessary. The principle of legitimacy also obliges all state authorities of repression, which means that repressive interference with human rights and freedoms must be morally and ethically justified. In the Criminal Code, the principle of legitimacy is based on the fact that the definition of criminal acts and the prescription of criminal sanctions are justified only if the protection of human beings and other fundamental values cannot be guaranteed otherwise. Therefore, when criminalising an act, the legislative body must test whether such an act can be prevented by other measures, and must thoroughly consider whether the use of criminal coercion is really legitimate and unavoidable. Criminal coercion is the ultima ratio, the last means of preventing and suppressing dangerous acts. Repression may only be used to the extent that the fundamental purpose of criminal legislation is achieved – the safety of people and general legal goods – and if the fundamental purpose of criminal legislation cannot be ensured otherwise. Even when the specific act has all the legal signs of a criminal act, the criminal justice authorities must judge whether this criminal act is really so dangerous that it is necessary to enforce it through criminal law.

The criminal law derives its legitimacy from the fact that the public respects the legal norms and the judiciary, and that in general the public submits to criminal law repression. The public will do so only when the criminal law legislation is just and fair. On the other hand, when the legislation presents an abuse of power by politics, it will lose its legitimacy in the public. The public will revolt against unfair judgements and protest against the unjust treatment of people in the judicial system.

The principle of legitimacy and limited repression is the overarching principle of criminal law in a democracy, as it requires the moral, ethical, and legal justification of any repressive encroachment on human rights and freedoms at the legislative level and in practice. This principle is essentially a question of the legitimacy of the political system, individual repressive bodies, procedure, and individual repressive measures.[53]

The issue of legitimacy and repression is always a topical issue adapted in time and space. The modern criminal justice system of the Republic of Slovenia had to abandon past totalitarian patterns of excessive repression, but the extent of repressive activities of individual state bodies has not been checked entirely. Modern repression manifests itself not only in the form of physical violence in the sense of the police and army suppressing riots but, in the postmodern sense, in the form of actual or potential economic coercion as well, which, in practice, manifests itself as bankruptcy, loss of property, flight capital, suspension or relocation of production or operations to another, more economically advantageous country, unemployment, relative or absolute poverty, trade blockade, attacks on the national currency, blackmailing by withholding necessary loans, and other similar cases. However, regardless of the form of repression, in terms of the principle of legitimacy and limited coercion, the question arises as to where the line is between a sanction that benefits the community and one that is already a priori repressive as well as where the limits of permissible or appropriate repression are. The answer may be that repression is only appropriate in a form that is not only necessary to achieve the goal it pursues but also fair

[53] Ibidem, pp. 235–236.

and, for most individuals in the community concerned, perfectly legitimate.[54, 55]

5.3.1.2. *Principle of Humanity and Individualisation of Criminal Sanctions*

The principle of humanity focuses primarily on the issue of punishment (choice and assessment of punishment) and criminal sanctions (implementation of criminal sanctions). In Slovenia, the principle of humanity can be seen in many constitutional provisions, but the Criminal Code deals with them in more detail regarding penal incarceration and similar sanctions. The legal consequences of a conviction must be precisely defined and limited in the Criminal Code. This means that the judge can only issue a punishment that is beforehand specified in criminal legislation. The principle of humanity does not cover only those who are in the criminal procedure, but also those convicted as well as former convicts released from jail sentence. The latter must be allowed to integrate into normal life after serving their sentence.

In criminal procedural law, the principle of humanity is mainly related to the issue of treatment of people, especially defendants, in pre-trial and criminal proceedings or in all phases of law enforcement, while in substantive criminal law the principle of humanity is primarily related to punishment. This is reflected in the prohibition of the death penalty in Slovenia and in the limitation of life imprisonment.

Furthermore, the Criminal Code should give the courts wide possibilities for a humane punishment policy (meaning that not every case should be resolved with a prison sentence). For milder offences a fine or suspended sentence should suffice. The imposition of a sentence that is more severe than prescribed is exceptional and tied to specially defined conditions, while the possibilities for the

[54] Z. Kanduč, *Država, represija in legitimnost, Fakulteta za varnostne vede Univerze v Mariboru*, Maribor 2016, pp. 41–80.

[55] M. Kotnik, M. Šepec, *Slovenia…*, *op. cit.*, pp. 235–236.

imposition of a milder sentence are quite open in the legislation. Historically speaking, there is a trend in Slovenia of reducing punishments from the cruellest, most horrible retaliatory punishments to today's punishments, which are limited to deprivation of liberty and pecuniary punishments.

The principle of individualisation of criminal sanctions means the adaptation of the criminal sanction to the danger of the specific criminal act and the perpetrator's personality. Therefore, in the Criminal Code, the penalty that may be imposed for a specific criminal offence is always determined within a range (e.g., for manslaughter from 5 to 15 years of imprisonment – since the reasons and the intensity of the criminal act are not always the same). The Criminal Code in Article 45(a) defines the purpose of sanctioning with the following text:

> *By punishing according to the provisions of this code, the state protects the fundamental values and principles of the legal order, establishes the awareness of the perpetrator of the crime and others about the inadmissibility of committing crimes, and above all, while respecting the human dignity and personality of the perpetrator of the crime, enables the perpetrator to be decently integrated with the appropriate sanction into a common social environment.*

The principle of humanity is not explicitly stated in the Slovenian Constitution, but it is contained in many provisions, for example in Article 17, which excludes the death penalty, Article 18, which prohibits torture, Article 21, which guarantees respect for human personality and dignity in criminal proceedings and all other criminal proceedings, as well as during deprivation of liberty and the execution of sentences, and in Article 34, which recognises the right of every individual to personal dignity and security.[56]

In the context of the above, it can be concluded that the principle of humanity contributes to the fair conduct of law enforcement

[56] L. Bavcon *et al.*, *Kazensko pravo, splošni del, Uradni list Republike Slovenije*, Ljubljana 2013, p. 133.

agencies and to fairness and efficiency in criminal proceedings in general. This aspect of the principle of humanity is also linked to the principle of individualisation of criminal sanctions, which requires the adjustment of the imposed criminal sanction to the danger of a specific crime and the perpetrator's personality, so that the purpose of criminal sanction is achieved. This principle is not explicitly defined anywhere in criminal law, just as with the principle of humanity, but in many provisions it is shown as a guide of the legislator in establishing criminal law. This is evident from the provision on sentencing in Article 49 of the Criminal Code,[57] mitigation of punishment from Article 50, on conditional sentence and reprimand from Articles 57, 58 and 68, and from the provisions on security measures referred to in Articles 69–73. These provisions contain guidelines for individualisation, fairness, and expediency of sentencing, with fairness taking precedence. Thus, by individualising criminal sanctions for each case and each perpetrator, criminal justice must impose a criminal sanction that strikes a balance between the principle of fairness and efficiency, while not forgetting the protection of society and the re-socialisation purpose of criminal sanctions.[58, 59]

5.3.1.3. *Principle of Legality*

The principle of legality, often expressed in the Latin form *nullum crimen sine lege*, *nulla poena sine lege*, is the basic and most important principle of criminal law. As such, it is the foundation of the modern legal state (Rule of Law, "*rechtsstaatsprinzip*"). With its guarantee function it provides legal security and protection to the inhabitants against the arbitrariness of the ruler or the ruling elite and even against the arbitrary judgement, which departs from legal practice to the detriment of the accused.

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[57] Criminal Code of Slovenia, Uradni list RS 105/22.
[58] L. Bavcon *et al.*, *Kazensko parvo…*, *op. cit.*, pp. 137–140.
[59] M. Kotnik, M. Šepec, *Slovenia…*, *op. cit.*, pp. 237–238.

Today, this overarching principle is divided into four independent principles or requirements, which together make up the concretisation of the principle of legality. These are: the principle of written form (*nullum crimen sine lege scripta*), the principle of certainty (*nullum crimen sine lege certa*), the prohibition of retroactivity (*nullum crimen sine lege praevia*) and the prohibition of analogy (*nullum crimen sine lege stricta*).[60] The principle of certainty and the prohibition of retroactivity mainly refer to the legislator, setting limits for him in adopting the criminal law, while all four principles bind the judge and set limits for him in the interpretation and application of the legal text.

The entire criminal justice system is built on the principle of legality. This is already stipulated in Article 28 of the Slovenian Constitution, which states that no one may be punished for an act for which the law has not determined that it is criminal and has not prescribed punishment for it before the act was committed. Article 2 of the Criminal Code stipulates the same. Accordingly, the provisions of criminal law must be consistent, clear, specific, and made public in advance, so that the individuals to whom these provisions apply are aware of them. No one should be sanctioned for a crime for which the sentence was not specified by law. It is also important to emphasise that criminal offences can only be determined by law and not by bylaws.[61]

The first aspect of the principle of legality is the requirement that the criminal act must be written down in law – that is, that the regulation establishing the criminal act must exist in written form and have the status of law. It is precisely this aspect of the principle of legality that most obviously ensures the rule of law, as it requires laws to be published in writing, thus enabling everyone to become aware of criminal acts before they can be convicted of them. At the same time, this means that the use of customary law – i.e., unwritten law – is prohibited.

The principle of certainty is of particular importance for criminal law, as it requires that criminal offences and acts be precisely defined,

[60] Constitutional court decisions US RS Up-879/14–35.
[61] Judgement of the Higher Court in Ljubljana VII Kp 27863/2013.

understandable and leave no room for doubt as to what is criminal and what is not.[62] This means that each individual criminal law norm and the boundary or method of demarcation between them must be clearly predetermined in the law, so that criminal acts can always be legally distinguished from each other. At the same time, the judge must state and explain in the judgment all the signs of a specific criminal act that the perpetrator is accused of, otherwise the principle of legality will be violated from a constitutional point of view. The accuracy, clarity and certainty of criminal law norms are of key importance for the functioning of the rule of law, as citizens will only be able to act in accordance with the law if they have a clear understanding of it.

The principle of certainty also applies to criminal law sanction, which must be precisely determined for each criminal act. Of course, the legislator can prescribe a sanction in a range that allows the judge to individualise the criminal sanction according to the gravity, nature, and guilt of the perpetrator in a specific case. The excessive range between the minimum and maximum punishment is thus not consistent with the principle of certainty, as it prevents the potential perpetrator from knowing in advance the punishment he may face for committing the crime (this issue is particularly evident in the Rome Statute of the International Criminal Court, which in Article 77 generally determines the range of punishment up to 30 years of imprisonment or life imprisonment for all criminal acts defined in the statute).

The legislature must provide transparent criminal legislation that everyone can familiarise themselves with in advance. If people are not aware of crimes in advance, then criminal law as a system of rules that guides social behaviour loses its meaning. The prohibition of retroactivity therefore ensures legal security and thereby strengthens the rule of law, as every individual is safe from the abuse of state power and can rely on the fact that the state will not prosecute him for a criminal act that was not determined as criminal at the time of his conduct and was also at the time not written in the law.

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[62] L. Bavcon *et al.*, *Kazensko parvo…*, *op. cit.*, p. 132.

It follows from the principle of *lex praevia* that no one may be punished for a criminal act of which he could not effectively become aware, and that no one may be punished for a criminal act that was not defined as such in law at the time of the perpetrator's conduct. The rule is written in the second paragraph of Article 28 of the Constitution (but it can also be found in Article 7 of the European Convention on Human Rights), which stipulates that criminal acts are determined and punished according to the law in force at the time the act was committed, except if the new law is more lenient for the offender (*lex mitior*). This means that the court always applies the law that was in force at the time of the execution of the act, unless the law has already changed between the execution and the trial and the newer law is more favourable to the offender. The ban on retroactivity is therefore only activated if the newer law is stricter or more unfavourable for the offender. If the newer law is milder, the court must apply the newer regulation retroactively. Therefore, we actually have the rule of retroactivity for the newer, milder law.

At the same time, the prohibition of retroactivity also protects against the judicial expansion of the range of incriminations or even the creation of new incriminations, even if the court assessed that the perpetrator's specific behaviour was clearly malicious. In such a case, it is the task of the legislature to define this heinous conduct as a new incrimination in the penal code, and not for the court to merely usurp the legislature's authoritative function.[63]

The prohibition of retroactivity only applies to criminal law provisions of substantive law, while it does not have the same effect in the case of criminal law provisions of procedural law. Namely, the judge will always use the procedural law that is valid at the time of the trial (*tempus regit actum*). An investigative act that was carried out during the period of validity of the procedural law retains its validity and probative value, even if the procedural law is later amended and changes the conditions under which this same investigative act can be carried out.

[63] A. Ashworth, J. Horder, *Principles of Criminal Law*, Oxford University Press, Oxford 2013, p. 57.

Analogy is a method of interpretation used to fill legal gaps in the law. These can be primary (they already existed when the law was adopted) or secondary (they arise after the adoption of the law due to changed circumstances).[64] Prohibition of analogy in criminal law means that it is not permissible to create new crimes or aggravate existing crimes through judicial interpretation of the law through the use of reasoning by analogy. With this, the court would take over the legislative authority that belongs to the legislator.

In order to fill legal gaps in criminal law, only the use of *intra legem* analogy is permissible. This includes cases when the legislator in the legal text with a general clause (for example "or in another way", "in a similar way") directs the interpreter of the regulation to use an analogy, thereby also legalising and justifying it. Since everyone can familiarise themselves in advance with the fact that the court will be able to subordinate situations that are similar to those written in law to this legal norm, this does not contradict the principle of legality. Also, sometimes it will be simply impossible to list all the concretised ways of performing an act in the legal text, therefore the analogy *intra legem* is essential.

5.3.1.4. *Principle of a Fair Trial*

The right to a fair trial is one of the key legal guarantees and implementing provisions of the principle of the rule of law.

For the ECHR, a fair trial is not only a legal guarantee, but a constitutive component of the rule of law. In *Golder v. the United Kingdom*, ECHR said it was very difficult to imagine the rule of law without the possibility of accessing the courts. In doing so, it referred to the Preamble of the Convention, which points out that the rule of law is one of the elements of the common spiritual tradition of the Council of Europe members. Three years later, the ECHR gave the following explanation of the relationship between the principle of the rule of law and a fair trial:

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[64] P. Novoselec, I. Bojanić, *Opći dio kaznenog prava*, Pravni fakultet sveučilišta u Zagrebu, Zagreb 2013, p. 70.

> *The rule of law means inter alia, that the intervention of the executive authorities in the individual's rights must be subordinate to effective control, which should be normally provided by the judiciary at least as the last guarantee, taking into account that judicial control offers the best guarantees of independence, impartiality and good process.*[65]

The aim of the right is to ensure the proper administration of justice. At a minimum, the right to a fair trial includes the following rights in civil and criminal proceedings: the right to be heard by a competent, independent and impartial tribunal; the right to a public hearing; the right to be heard within a reasonable time; the right to counsel; and the right to interpretation.

The principle of a fair trial is the dominating principle of criminal procedural law and derives from several rights of subjects in criminal proceedings. In practice, it is reflected primarily in the right to equality of arms and in this sense the right to counsel and the right to defence, full equality of the parties in criminal proceedings, and the court's obligation to examine all the factual and legal aspects of the current case.[66] Fair procedure, which should be the standard of a democratic system, is ensured by the constitutional principle of legal guarantees in criminal proceedings from Article 29 of the Constitution, and equal protection of rights or the requirement of equality of arms from Article 22 of the Constitution.[67] In addition to the above, the principle of fairness also includes the impartiality of the court, which is determined in Article 23 of the Constitution.[68]

In addition to the rights of the accused, the principle of fair trial has another side, namely effective prosecution. The Public Prosecutor's Office makes an important contribution to this as a law enforcement agency, which helps to ensure the rule of law through fair, impartial and effective prosecution of perpetrators of criminal

[65] ECHR, *Klass and others v. Germany*, 6 September 1978, A 28, p. 17.
[66] Judgement of Higher Court in Maribor VSM II Kp 2474/2019.
[67] Judgement of Higher Court in Maribor VSM II Kp 12533/2012.
[68] M. Kotnik, M. Šepec, *Slovenia…*, *op. cit.*, p. 239.

offenses.[69] Another aspect of a fair trial is the exclusion of evidence obtained illegally or by breach of constitutional rights of the accused. The basic exclusion rule stipulates that a court may base a court decision only on evidence obtained lawfully, as provided for in Article 18 of the Slovenian Criminal Procedure Act.[70]

5.3.1.5. *Coherency of the Criminal Code*

The criminal law doctrine created an internal system, according to which one of the fundamental tasks of the criminal law dogmatics is to ensure that the criminal system as a whole is balanced and internally systemically and logically connected. This internal system of criminal law includes the connection of fundamental criminal law institutes, between which there must be no illogical collision. This represents a coherency of the criminal law. It also includes care for the systematics of special offences, where there must be no illogicality between different individual incriminations. From a punitive point of view, this system provides a logical ratio of criminal sanctions, which are classified according to the severity of the consequences of criminal acts, according to the assets that the crimes attack and according to the degree of damage/threat to these assets. In other words: it would be illogical and systemically unsustainable if the criminal code were to set the same sanction for the theft of a school bag as for grievous bodily harm, if a murder of a person were to be given the same sanction as for breaking a tooth, if rape were to be equated with insulting a person or damage to the property.

The principle of coherency, of course, applies to the entire criminal law, as well as to determining the level of criminal sanctions and punishment-related institutes, which includes the statute of limitations on criminal prosecution. Also, the limitation periods for criminal acts must follow a coherent system and represent a logical

[69] Opinion No. 9 (2014) of the Consultative Council of European Prosecutors for the Committee of Ministers of the Council of Europe on European rules and principles for prosecutors, Strasbourg, 17.12.2014.

[70] M. Kotnik, M. Šepec, *Slovenia…*, *op. cit.*, p. 240.

whole. In this regard, the criminal law dogmatist does not have any special requirements as to how long these limitation periods should be (this is a question of the country's criminal policy), as long as they are determined on a reasonable level (that is, that the limitation periods are not such that they allow the state to prolong the prosecution indefinitely) and that they are proportional to each other according to the gravity of the crimes.

In this regard the Slovenian Criminal Code is not coherent at all, as limitation periods for sexual offences are two to three times longer than for more serious offences against the body or even life. For example, the limitation period for manslaughter is 30 years, while for rape it is 60 years, even though the punishment for manslaughter is higher than punishment for rape. This does not make any legal sense at all. The statute of limitations in the Criminal Code is connected to the degree and length of the sanction. The stricter and higher it is, the longer the limitation period. However, when it comes to sexual offences this rule is no longer valid, as these types of offences have the longest statute of limitations, although the punishment for them is not the strictest (it usually ranges from 1 to 15 years). This again is a clear sign of politics meddling in the criminal legislation without including the legal practitioners and experts, thereby enforcing their own political agenda in the criminal legislation.

5.4. Impact on Criminal Law Legislation by Non-Government Organisations

The legislative framework should provide a fair and just legislative procedure with the inclusion of legal experts. Criminal law legislation should never be written by non-government organisations that follow their own agenda, without the consultation of the legal experts. This is mainly because criminal law is the field of law that most seriously affects a person's rights. We believe that in Slovenia there are certain non-government organisations with political agendas, that have far too much influence on criminal legislations. Their legal amendments to the criminal legislation have been one of the worst amendments to Slovenian criminal legislation.

The significance of this research is to showcase how non-government organisations use non-legal measures to force the naïve legislator into adopting criminal law provisions that harm the rule of law, as they are not adopted in accordance with the proper legal doctrine.

Criminal legislation in Slovenia has traditionally been adopted in a consultative manner. This means that the competent Ministry of Justice always invited selected legal experts and practitioners to a working group, where they jointly prepared a new text of the law, before amending the Criminal Code or the Criminal Procedure Act. The legislator was aware that changing criminal legislation is an extremely sensitive topic, as criminal legislation most invasively encroaches on human rights. Arbitrary amendment of criminal legislation, without the participation of academics, judges, state prosecutors and lawyers, is simply too risky, unprofessional and unwise, as ill-considered changes will have drastic consequences for persons in criminal proceedings. With the cooperation of legal experts, the legislator ensured professional reasonableness and general legitimacy of the criminal legislation.

In 2021, the legislator unwisely abandoned this otherwise long-established practice and succumbed to the media pressure of the NGO with the name of "8th of March' Institute" and adopted by an amendment to the Criminal Code KZ-1H in completely arbitrary fashion, without any consultation with criminal law experts. In fact, the legislator did not adopt the law of his own free will, as he fully accepted the legal text of this interest organisation, which prepared the legal text without professional cooperation, then through media pressure literally forced the legislator to accept the text. In the Criminal Code – the most sacred legal text that needs to be changed with a trembling hand – an unprofessional text was entered, whereby an interest group pursued its political agenda. To this day, not a single criminal law expert has been found in the Slovenian legal space who would describe the amendment of the penal text KZ-1H as good, or even say anything positive about it. On the contrary, the criminal law profession in Slovenia has never been so unanimous about the fact that it is the worst criminal law regulation in our history.

After a controversial judgement where a man received only a sentence of ten months for undressing a woman when she fell asleep

and then had sexual intercourse with her when she was already awake and began to push him away, a wave of proposals to change the model of coercion into a model of consent has been introduced in Slovenia. The Ministry of Justice established an expert working group that studied the comparatively known models of consent (the affirmative consent model and the veto model). The working group initially proposed a veto model "no means no") and cooperated with the Bar Association, the Supreme Court, the Institute of Criminology, and interested non-governmental organisations. Most institutions agreed that the proposed amendment is substantively and technically demanding.[71]

However, no agreement was reached on the choice of the subtype of the consent model. Representatives of non-governmental organisations insisted on defining the crime according to the affirmative consent model. Due to the disagreements, the 8th of March Institute introduced a "yes means yes" campaign. Pursuant to Articles 88 and 97 of the Slovenian Constitution, at least 5,000 voters have the right to propose a law (People's Initiative). With the campaign, which was conducted mainly through social networks (Facebook, Instagram) and in which Slovenian celebrities (e.g., actors) participated, the movement managed to gather enough votes to start changing the criminal law into the affirmative consent model. The essential difference of this procedure, compared to the proposal of the Ministry of Justice for the introduction of the veto model, is that legal experts (the Supreme Court, the Bar Association, the Institute of Criminology, legal scholars, and NGOs) did not have the opportunity to review the proposed amendment and provide comments as was done previously with the proposed veto model.[72] Experts and academics that publicly criticised the new law were quickly cancelled by the media, and the NGO's even proposed to the students where the academic worked to report any kind of misogyny from the academic in order to silence them.

[71] Ž. Šuta, N. Berglez, M. Šepec, *"Yes means Yes": theoretical dilemmas and new definition of rape and sexual assault in Slovenian Criminal Law*, "Problemy Prawa Karnego" 2022, Vol. 6, No. 1, p. 3.

[72] Ž. Šuta, N. Berglez, M. Šepec, *"Yes means Yes"…*, *op. cit.*

According to the new regulation, the interpretation of many sexual offences is so widespread that sexual activity has become one of the riskiest activities in Slovenia. According to the most radical interpretation of the new crime of rape without consent, any essential mistake that affects the validity of consent can be a reason to deny the validity of consent, and thus the opposite party commits rape. According to the new law, cheating on a partner can also be a reason for a charge of rape, since fidelity can be the key to the validity of the partner's consent. The only safeguard against such recklessly written legislation can only be the practice of the courts, which should remain traditionally restrained when interpreting the new legislation and should interpret sexual offenses in the spirit of the older legal regulation.

From the constitutional view, the amendment of KZ-1H is most controversial precisely in terms of legal security. Namely, there is no criminal expert in Slovenia who can, with a high degree of probability bordering on certainty (this should be the standard for predicting behaviour within punitive and repressive legislation. How should an individual adjust his behaviour if even a criminal law expert cannot with a probability bordering on certainty – but not necessarily certainty, as there is always some room for manoeuvre for judicial interpretation – predict how he should act so that he will not be punished?) predict which behaviours within sexual activity are considered to exclude consent, and which ones don't. When the criminal law becomes such that the range of a certain incrimination cannot be foreseen, it is practically impossible for an individual to adjust his behaviour – namely, if one does not know what is criminal, then how is one to know that this behaviour will be in accordance with the law? This is even more problematic because sexual relations are not some side-line activity that humans hardly ever engage in, and because, at least biologically, they are not considered something bad and socially undesirable. The current criminal regulation of sexual relations has thus gained the surface of thin ice on which everyone who engages in sexual activities is skating, while in fact no one knows when the ice will break.

The stated situation arose solely due to the unprofessional manner of adopting criminal legislation. Instead of the law being adopted

in an expert working group, the legislator adopted the legal text prepared by an interested non-expert organisation. Afraid of media pressure and media power behind the 8th of March movement, politicians hastily adopted a law that was completely unverified by experts, which drew heavy criticism in scientific circles and in judicial practice. It is a typical case of the usurpation of the rule of law in criminal law, where the imposed legislation does not reflect the positions of criminal law theory and practice. In addition to the fact that the amendment to the law introduces a large number of dogmatic inconsistencies into the Slovenian criminal law area, its main problem is the absence of legal certainty, as it is not possible to predict a clear interpretation of the new criminal text. Both, however, are clearly at odds with the rule of law within the criminal law. Unprofessional writings in criminal legislation, which cause legal gaps and ambiguities, attack the very essence of criminal law. This is a clearly announced, written definition of prohibited behaviour that guides the behaviour of individuals in a society.

5.5. Conclusions

The rule of law has an important place in the Slovenian legal system. Not just as a theoretical ideal, but as a constitutional principle regularly applied in our jurisprudence. As a constitutional principle, it is enshrined in the second article of the Constitution, but it is also reflected in several other constitutional provisions that define fundamental human rights and regulate the state organisation of the Republic of Slovenia.

In criminal law, the principle of the rule of law has its special place. The rule of law in criminal law is manifested through several principles that regulate the legality and fair treatment of perpetrators in criminal proceedings. In addition to numerous material principles, the procedural aspect of the rule of law is also extremely important in the sense of how criminal law legislation is created. Criminal law legislation is most invasive on the fundamental rights of individuals. Therefore, these regulations must be adopted with extreme caution and after thorough consideration. It is essential

that the criminal law professionals participate in the adoption of criminal law legislation, and with their cooperation protect the people against the recklessness and impulsiveness of the legislator.

Criminal legislation in Slovenia has traditionally been adopted in a consultative manner. This means that the competent Ministry of Justice always invited selected legal experts and practitioners to a working group, where they jointly prepared a new text of the law, before amending the Criminal Code or the Criminal Procedure Act. The legislator was aware that changing criminal legislation is an extremely sensitive topic, as criminal legislation most invasively encroaches on human rights. Arbitrary amendment of criminal legislation, without the participation of academics, judges, state prosecutors and lawyers, is simply too risky, unprofessional and unwise, as ill-considered changes will have drastic consequences for persons in criminal proceedings. With cooperation of legal experts, the legislator ensured the professional reasonableness and general legitimacy of the criminal legislation.

In 2021, the legislator unwisely abandoned this otherwise long-established practice and succumbed to the media pressure of the 8th of March Institute NGO and adopted an amendment to the Criminal Code KZ-1H completely arbitrarily, without any consultation with the experts. This was a crucial mistake as the legal text that was written by the NGO and later accepted by the legislature is one of the worst in Slovenian criminal law history. It has been heavily criticised by theorists as well as legal practitioners for lacking any kind of legal predictability and legal safety for ordinary citizens. By excluding legal experts and adopting a legal text that contradicts the legal theory and practice, the procedural aspect of the rule of law principle was not respected.

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Chapter 6. ADR and Its Legal Outcomes in the Light of Rule of Law and Legal Certainty

6.1. Introduction

The present paper deals with the elements of the rule of law. Discussion is held regarding normative analysis of Georgian legal provisions relating to ADR. ADR would initially appear to complement the legal system when resolving legal conflicts. The purpose of the article is to ascertain whether ADR is an effective way for settling conflicts in Georgia and to identify the key issues that lead to mistrust of people and business entities. It also establishes if the parties' rights are fully guaranteed and secured by the final arbitration award or mediation settlement act. These issues are analysed in the light of the Rule of Law.

It also determines how definite the ultimate arbitration award or mediation settlement are in terms of the legislation. By requiring parties to uphold their agreements and promoting predictability and certainty, they have enabled international trade. As a result, arbitrators have more sway over a disagreement than do merely two private parties. It's also vital to keep in mind that mediation supports the Rule of Law idea. An extremely precise idea is to analyse the ADR and its Legal Outcomes in the Light of Rule of Law and Legal Certainty. For this purpose, the guarantees outlined in Georgia's Constitution and other legal documents will be assessed. Furthermore, Georgian court decisions and legal literature, focusing on Georgia's Supreme Court, will be analysed in context of how Rule of Law principle is exercised regarding ADR mechanisms in Georgian reality.

6.2. The Main Concept of the Rule of Law

The rule of law is based on a properly adopted law, which is also called the principle of the rule of law. This also means that not only the procedure and publicity of the law should be protected, but the adopted laws should be rational and content-wise compatible with the main law of the country – the Constitution. The principle of the rule of law is a guarantee that the state government will be bound by applicable laws and human rights and thus will not have the possibility of arbitrariness and unjustified interference in human rights.

The goal of the Rule of Law was originally to prevent executive branch abuses of power, but it has since evolved into a philosophy that supports the whole world's legal system and offers a framework for resolving conflicts. The goal, according to contemporary literature, is to offer justice in a democratic state by ensuring fair outcomes, due process, and equitable accessibility in a manner that is open and transparent. This interpretation takes into account changing socioeconomic circumstances.[1]

Due to multilevel constitutional checks on abuses of authority and multilevel judicial protection of constitutional justice, such as in the review and recognition of foreign arbitral awards and court judgments, international annulment proceedings, and appellate review of dispute settlement rulings, the rule of law has emerged in international trade and investments. International investment law and arbitration are subject to the rule of law, which calls for multilevel judicial collaboration and a more thorough judicial balance of individual rights and related constitutional duties of countries.[2]

This definition of the rule of law includes "thicker" features connected to specific substantive ideals, such as fundamental human rights, in addition to formal ones such as rule by law and formal

[1] S.A. Martinez, *The Rise of Mediation and Its Erosive Effect on the Rule of Law in Dispute Resolution*, "SOAS Law Journal" 2019, Vol. 6, No. 1, pp. 265–291 (p. 268).

[2] E.U. Petersmann, *International Rule of Law and Constitutional Justice in International Investment Law and Arbitration*, "Indiana Journal of Global Legal Studies" 2009, Vol. 16, No. 2, Summer, pp. 513–534.

legitimacy. The rule of law is obviously interpreted broadly in the UN's work on the subject.[3]

6.2.1. THE RULE OF LAW IN GEORGIA

The principle of Rule of Law in Georgia was reflected in the first constitution adopted in 1921.[4] After the collapse of the Soviet Union, the rule of law principle has already been reflected in the new constitution adopted in 1995.[5]

Generally, the Rule of Law is based on 8 factors: Constraints on Government Powers; Absence of Corruption; Open Government; Fundamental Rights; Order and Security; Regulatory Enforcement; Civil Justice, and Criminal Justice.[6] Accordingly, one of the main factors is Civil Justice, which is a very specific yet broad issue in all the world, and Georgia is no exception.

The rule of law is a crucial component in creating a favourable business environment and a significant element in luring foreign direct investment. It is believed that Georgia must prioritise the Association Agreement as a decision between the state and its citizens, a driver of the rule of law and legal growth, for Georgia to be able to integrate into the European Union. This is in line with the constitutional clause that states as much. In important areas including democracy, good governance, the rule of law, promoting the independence of the judiciary, public administration, and the fight against corruption, the neighbourhood strategy calls for greater cooperation.[7]

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[3] T. Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, "AJIL Unbound" 2019, No. 113, pp. 33–37 (p. 33).

[4] The Constitution of Georgia of 21 February 1921.

[5] The Constitution of Georgia of 24 August 1995, Registration Code: 010.010.000.01.001.000.116.

[6] https://civil.ge/archives/513635 [access: 09.08.2023].

[7] M. Nakashidze, *The Association Agreement and the Implementation of Domestic Reforms Towards Strengthening the Rule of Law, in Georgia, Moldova, and Ukraine*, "International Comparative Jurisprudence" 2021, Vol. 7, No. 1, pp. 51–74.

Effective civil justice is the means by which citizens are able to uphold their substantive civil rights against other citizens.[8] Georgia's tenuous citizen-state ties offer a chance for improved rule of law. Three crucial societal spheres – educators, moral authorities, and media outlets – need to get involved in Georgia's cultural life to support and promote governmental reform if meaningful, beneficial changes are to take place and become self-sustaining.[9]

Georgia's score is 0.53 and is listed as the 68th out of 140 countries. Notably, in 2015, the country's score was 0.63. Within that category, which is scored on 7 factors, Georgia received the following scores in 2022: people can access and afford civil justice (0.63); civil justice is free of discrimination (0.54); civil justice is free of corruption (0.59); civil justice is free of improper government influence (0.39); civil justice is not subject to unreasonable delay (0.34); civil justice is effectively enforced (0.52); and alternative dispute resolution mechanisms are accessible, impartial, and effective (0.73).[10]

Holding those in positions of power responsible, ensuring that the use of power complies with fundamental rights, ensuring equality before the law, and providing effective methods of redress are all components of the local and international rule of law.[11] In other words, no one should be above the law with respect to either the international or local rule of law.[12]

If the rule of law is to be upheld in the resolution of any conflicts, including investment disputes, the independence of judges and the unbiased operation of the adjudicatory system are prerequisites.[13]

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[8] A. Clarke, *Civil Justice: The Importance of the Rule of Law*, "International Lawyer" 2009, Vol. 43, No. 1, p. 39, https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/intlyr43&id=41&men_tab=srchresults [access: 09.08.2023].

[9] R. Godson, D.J. Kenney, M. Litvin, G. Tevzadze, *Building societal support for the rule of law in Georgia*, Washington D.C., October 2003, p. 19.

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[12] J.P. Gaffney, *EFILA Annual Conference 2016 Contributions*, 2016, Chapter 11 "The Rule of Law and Alternatives to Investment Arbitration", p. 272.

[13] G. Catadi, *Book Review (Nollkaemper A., National Courts and the International Rule of Law)*, "European Journal of International Law" 2012, Vol. 23, p. 906.

Judicial independence ensures the impartiality, predictability, clarity, and stability of the legal system in which businesses operate, which is a prerequisite arising from the right to an effective remedy and essential for a favourable investment climate.[14] The rule of law fulfils the roles we want it to play: it helps to enforce rights, it fosters progress, and makes it possible to settle conflicts amicably.[15]

The first part of this study is related to the arbitration of legal disputes arising from investment relations. This is evaluated based on the principle of Rule of Law. It is the principle of Rule of Law that is important regarding the efficiency and predictability of the protection of the rights of the investor, especially the foreign investor.

6.2.2. THE RULE OF LAW AND ADR

One of the main parts of the Civil Justice is Alternative Dispute Resolution (ADR), especially Arbitration and Mediation. In recent years Georgia has taken several steps in order to implement the legal regulation for ADR within the Georgian Legal System. For example, in 2022 Georgia joined the Singapore Convention on mediation. Georgia is also a member of the New York Convention on the Recognition and Enforcement Foreign Arbitral Awards. Nowadays, ADR cannot replace the court. Therefore, the present paper will analyse the modern system of ADR and its legal outcomes in the light of the Rule of Law and legal certainty in Georgia.

ADR would first seem to support the rule of law in the settlement of investment disputes. Disputes can be effectively resolved through the mechanism most appropriate for the parties and the issues at hand thanks to ADR, which is based on the ideas of improved access to justice, increased satisfaction with dispute resolution processes,

[14] The 2015 EU Justice Scoreboard. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2015) 116 final, Brussels, p. 37.

[15] D.W. Rivkin, *The Impact of International Arbitration on the Rule of Law: The 2012 Clayton Utz/University of Sydney International Arbitration Lecture*, "Arbitration International" 2013, Vol. 29, No. 3, p. 329.

and meaningful choices for doing so.[16] ADR may serve as a supplemental dispute resolution paradigm in situations where the rule of law is already well-established, but it is unlikely to advance the rule of law on its own. Good ADR is possible because the legal system is working well. A state under the rule of law should have more options for resolving conflicts thanks to ADR.[17]

Even if ADR might not directly advance the rule of law – other than in a tangential way in a state where the rule of law is upheld – it might help to undermine it. For instance, an authoritarian regime may purposefully retain weak courts in order to avoid political responsibility and a robust legal system. ADR might thus be used to restrict the use of the legal system and rule-based conflict settlement. ADR may develop in this context as a retreat from the rule of law, marginalising already weak legal standards.[18]

Without a question, the 1958 New York Convention has made the biggest contribution to the rule of law in our sector. This alternative structure to national courts has been strengthened by the NY Convention. Because of how well the system works, the great majority of awards are paid without any participation from the courts.[19] This difference highlights the long-lasting value arbitration adds to the rule of law. It indicates that a competent and efficient system of international arbitration is necessary for the success of global trade. The New York Convention and national laws that support arbitration work together to promote commerce by giving firms confidence in their dealings with one another. The New York Convention, which mandates that courts uphold all lawful awards, even if the tribunal made an obvious legal error, is known for its certainty.[20]

Arbitrators have upheld the legislation through arbitration rulings. They have made it possible for international trade by requiring

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[16] D. Levin, *30 years after the historic Pound Conference, a reflection on ADR and justice in the 21st century*, "Online Guide to Mediation", 29 April 2006.

[17] J.P. Gaffney, *EFILA…*, *op. cit.*, p. 271.

[18] H. Fu, *Mediation and The Rule of Law: The Chinese Landscape*, [in:] J. Zekoll *et al.* (eds.), *Formalisation and Flexibilisation in Dispute Resolution*, Brill, Leiden 2014, pp. 108–129.

[19] D.W. Rivkin, *The Impact of International Arbitration…*, *op. cit.*, p. 338.

[20] Ibid, p. 340.

parties to abide by their agreements and by fostering predictability and certainty. Therefore, arbitrators have a bigger influence than just two private parties in a dispute. In addition, with the expansion of investment treaty arbitration, arbitrators' judgments now directly and immediately affect matters of public interest. Arbitrators have established a transnational rule of law that has contributed to the development of common guidelines for proper sovereign conduct.[21]

6.2.3. THE RULE OF LAW AND ADR IN GEORGIA

ADR is important for modern Georgian reality, because in Georgia, as in other countries, civil justice has become a public consumer service, in which litigants are consumers, and the courts are service providers.[22]

The civil justice system is a public service, an essential public service which ensures the lifeblood of democracy. Given this fundamentally important role, it is essential that, as a service, it operates efficiently and fairly. An efficiently and fairly run service is more likely than not to be an effective one.[23]

Unlike justice, ADR contains many aspects that may lead to unreasonable restrictions on human rights. During arbitration and mediation, there may be more risks and unintended consequences for the parties, which may ultimately lead to the violation of their rights. In general, civil justice is carried out by issuing a reasoned decision of the court. The obligation to justify the court decision is related to the principle of the rule of law. Any action of the legal state aimed at restricting any right of a person, requires justification.[24] In the case of ADR, this principle may be ignored, which is obviously unpredictable and ultimately unfair for the participants.

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[21] Ibid, p. 328.

[22] A. Clarke, *Civil Justice…*, *op. cit.*, p. 41, https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/intlyr43&id=41&men_tab=srchresults [access: 09.08.2023].

[23] Ibid.

[24] The Decision of the Supreme Court of Georgia dated 25 May 2023, Decision No. ას-824-2022.

Given the foregoing, there are three primary chapters in this paper. One of the most significant Georgian models (systems) for resolving individual legal issues in the context of the rule of law is discussed in the first chapter. The resolution of private legal issues in Georgian law is briefly evaluated in this chapter, along with any potential alternatives. The second chapter follows, combining the problematic issues with arbitration and discussing the approaches in Georgian law and judicial practice within the context of the Rule of Law to ensure that individuals are treated equally in the arbitration proceedings arising from investment disputes. The arbitration of labour-related conflicts, which is extremely troublesome in Georgian society, is covered in the same chapter as another sort of arbitration. The issue of defending the rights of the employee – the weaker party in the labour relationship – is therefore examined in the context of the Rule of Law because it is particularly difficult in the context of the transparency of justice. The function of mediation as an alternative method of resolving disputes and its significance in the context of upholding the Rule of Law are examined in the paper's third main chapter. There is a conclusion and final remarks at the end of this paper.

6.3. The Methods (Systems) of Civil Dispute Resolution in Georgia

6.3.1. GENERAL CONCEPTS

The Constitution of Georgia (Article 4) states that Georgia is a legal state, and the State acknowledges and protects universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law. The Constitution shall not deny other universally recognised human rights and freedoms that are not explicitly referred to herein but that inherently derive from the principles of the Constitution. Additionally, the article declares that the State authority shall be exercised based on the principle of the separation of powers.

According to the Article 31(1): "every person has the right to apply to a court to defend his/her rights. The right to a fair and timely trial shall be ensured. According to the Civil Procedural Code of Georgia, everyone shall be guaranteed judicial protection of their rights. A court shall start to review a matter based on an application of a person who applies to the court for protection of his/her legitimate rights or interests."[25] Only a court shall administer justice on civil matters based on equality of all persons before the law and the court.[26]

Accordingly, the Court is very important for protecting person's rights in civil cases. However, Georgian legislation is remarkable for its modern and arbitration-friendly approach making Georgia an ideal forum and place for arbitration.

The laws that apply to arbitration in Georgia are the following:

1. The Law of Georgia "On Arbitration." The Georgian Parliament passed the Law on Arbitration on 19 June 2009, and it became effective on 1 January 2010. The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on International Commercial Arbitration in 1985. This law-referred to as the 'UNCITRAL Model Law' – was the foundation for the development of Georgia's arbitration laws and is fully compliant with international standards and best practices. According to its Article 1(1): "This Law establishes the rules of development of arbitral tribunal, conduct of arbitration proceedings and rendering of arbitration awards in Georgia, as well as recognition and enforcement of arbitration awards rendered outside Georgia". Both, local and foreign, arbitration processes are subject to this Law.

   The fundamental idea of party autonomy serves as the foundation for Georgia's arbitration law. The parties are free to decide respective norms and processes besides what is required by law. However, the law also includes a number of requirements. For instance, Article 37(2) of this law has made it essential that an

[25] See: Article 2 of the Procedural Code of Georgia, Registration Code: 060.000.000.05.001.000.301, Parliamentary Gazette, 31.12.1997, pp. 47–48.

[26] The Procedural Code of Georgia, Article 5.

arbitrator does not have the right to refrain from voting during the decision-making process.

The Law mandates that arbitral awards made in Georgia and abroad must be enforced. According to Article 44(1) of this Law, courts of appeal are the competent tribunals for awards rendered on Georgian territory and the Supreme Court of Georgia for awards rendered outside of Georgia.

2. The Civil Procedural Code of Georgia. The Georgia Civil Procedure Code governs a court's participation in arbitration proceedings and the enforcement of an arbitral ruling, Chapter XLIV[3]–Chapter XLIV[5] of Section 7.[1] Only in situations specifically covered by the Georgia Law on Arbitration and in accordance with the guidelines outlined in the Georgia Civil Procedure Code may a court interfere in an arbitration proceeding.
3. The 1958 New York Convention. Georgia is also bound by the New York Convention, which was adopted by a decision of the Georgian Parliament on 3 February 1994. The New York Convention is a treaty that was established by the United Nations on 10 June 1958, and it governs the recognition and enforcement of foreign arbitral awards. That implies that both arbitral awards rendered outside of Georgia and those rendered within Georgia may be recognised and enforced in other countries.

   The Supreme Court of Georgia considers both local law and the provisions of the New York Convention when deciding whether to recognise and enforce foreign arbitral judgements. Foreign arbitration agreements are also enforceable on the Georgian territory of Georgia in accordance with the New York Convention.
4. The Law of Georgia "On Private International Law." Article 1 of the legislation of Georgia on Private International Law states that "this law determines which legal order is applied when there are factual circumstances of a case related to a foreign law, as well as the rules of procedural law that are applied during these proceedings". The provisions of the aforementioned statute may be taken into consideration by the parties where the parties have not decided what substantive law applies to their arbitration agreement and it is up to a court or arbitral institution to make that determination. Therefore, arbitration may also be governed

by the terms of this law. However, there is no precedent for this in Georgia, and it is extremely debatable whether to use the principles of private international law in arbitration.
However, with relation to international arbitral awards, the Georgia Law on Private International Law's provisions governing the acceptance and enforcement of foreign court judgments is implemented.[27] The Minsk Convention of 1993 (a pact between the CIS Countries), whose execution is questioned in theory, is frequently applied by the Georgian Supreme Court when dealing with recognition and enforcement difficulties.[28]

6.3.2. THE CIVIL MATTERS OPEN TO DISPUTE IN ARBITRATION AND MEDIATION

6.3.2.1. *Arbitration Disputes*

The courts are the primary means of resolving civil disputes, as was already mentioned. However, arbitration, is also highly significant and is growing in popularity in Georgia. When parties go to arbitration, they require comprehensive information on the processes and the different types of disputes that could be the subject of the arbitration.

According to Article 1(2.a) of the Georgian Law on Arbitration, the arbitral tribunal may consider the different types of cases.

An arbitral tribunal is entitled to consider a property dispute of a private nature based on the equality of the parties, which can be resolved by the parties between themselves. Consequently, the following are the key factors to think about:[29]

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[27] G. Tsertsvadze, *International Arbitration (Comparative Analysis)*, Publishing House "Meridiani", Tbilisi 2012, p. 701.

[28] G. Tsertsvadze, *Interpretation and Application of the New York Convention in the Republic of Georgia*, [in:] G.A. Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards*, "Ius Comparatum – Global Studies in Comparative Law" 2017, Vol. 23, Springer, p. 326.

[29] G. Tsertsvadze, *Interpretation and Application…*, *op. cit.*, pp. 24–27.

i. a relationship based on the individuals' equality,
ii. a property disagreement; according to Georgia's Law on Arbitration, only a property issue – that is, a conflict that doesn't involve a personal right – can be arbitrated,
iii. the parties themselves may be able to come to an agreement.

Generally speaking, due to the special nature of the arbitration, the parties may not agree to have the dispute decided by the arbitral tribunal if it results in duties to third parties (i.e., those who are not parties to the arbitration agreement).

Some of the disputes that are deemed non-arbitrable and hence cannot be submitted to arbitration, are:

1. family law issues (child custody, divorce, inheritance, etc.) and disagreements involving children,
2. criminal law,
3. public policy,
4. tax law,
5. insolvency law,
6. individuals in certain legal statuses,
7. person-specific capacity issues are all regarded as non-arbitrable.

Laws may occasionally make explicit mention of non-arbitrable matters, while in other instances, the restriction on arbitration may result from implicit legal provisions.

There is no list of conflicts that arbitration cannot be used to resolve under the Code of Civil Procedure or the Law of Georgia "On Arbitration." However, other laws may include such restrictions.[30]

For example: according to Article 296(1) of the Tax Code of Georgia, "A tax dispute may be resolved within the system of the Ministry of Finance of Georgia and in court". Because other competent conflict resolution authorities are established by this article, which specifically precludes the jurisdiction of arbitration over tax disputes, there is no chance that this matter will be reviewed by arbitration.[31]

[30] S. Tkemaladze (ed.), *Arbitration Guide for the First Instance Courts*, Arbitration Initiative Georgia, EU4Justice, UNDP Georgia, 2017, pp. 22–23.
[31] S. Tkemaladze (ed.), *Arbitration Guide…*, *op. cit.*

The rules governing the court's exclusive jurisdiction and the right to apply to the court (including the right to apply to arbitration) are also codified in various statutes. Nevertheless, this does not imply that any such issues that are not expressly forbidden by law must be arbitrated.[32] The Law of Georgia "On Arbitration" itself serves as the foundation for determining the scope of arbitration.

6.3.2.2. *Mediation*

The law on mediation in Georgia was adopted just a few years ago. The association agreement signed between the European Union and Georgia, along with the association agenda, unambiguously determines the commitment of the Georgian state to develop alternative dispute resolution mechanisms, especially mediation and arbitration, and to create favourable conditions for their use.[33]

However, in the society, including among the representatives of the legal profession such as judges and lawyers, there is a low awareness of mediation and a significant degree of mistrust towards it as well as the lack of necessary infrastructure for the development of mediation. Hence, only a few dozen mediation processes have been conducted since 2012. In the light of the total number of civil cases filed in the court during this period, it can be freely said that, as a whole, mediation did not occupy a proper place in the dispute resolution system.[34]

Article 1 of the Law of Georgia "On Mediation" defines the scope of law. In order to promote and to create appropriate conditions for alternative dispute resolution, this Law determines the principles of mediation, the rules of organisation and operation of the professional association of mediators, the powers of a mediator, and other issues related to the mediation process.

Articles 1(2) and 1(3) define the applicability of the Law of Georgia "On Mediation." This Law applies to the mediation conducted

[32] Ibid.
[33] Explanatory Note on the Law of Georgia "On Mediation."
[34] Ibid.

on the basis of a mediation agreement and to the judicial mediation conducted in accordance with Chapter XXI[1] of the Civil Procedure Code of Georgia, taking into consideration the peculiarities of the Civil Procedure Code of Georgia. Furthermore, This Law shall not apply to the notarial mediation provided for by the Law of Georgia "On Notaries."

The adoption of the law contributed to the development and popularisation of the institution of mediation, at the same time it helped to avoid overcrowding of the courts and to improve the situation in this regard. By adopting the Law "On Mediation", the state once again confirmed its readiness to support the development of mediation. By the same law, modern standards were established in the mediation process, an acceptable model of institutionalisation of mediation was introduced and an impetus was given to the smooth development of mediation.[35]

6.3.3. COURT INTERVENTION

In some circumstances, courts may intervene in arbitration disputes. The identity or number of arbitrators, as well as the procedures for choosing them, are subject to the parties' discretion. However, there are instances where the parties might not have been able to agree on the process for choosing arbitrators, or the process they established for choosing arbitrators might not have worked. According to the legislation, one of the parties has the right to apply to the court and ask for the appointment of an arbitrator or arbitrators in such situations. As a result, the court becomes involved in the arbitrators' selection process when the relevant procedural statute specifically calls for it.

If the parties have a written agreement that they do not accept the arbitration rules of the institution that participates in the appointment of the arbitrator(s) and that they shall apply to the court in case of disagreement, then institutional arbitration gives the parties the

[35] Ibid.

right to do so.[36] When an arbitrator is not appointed by the arbitral institution in institutional arbitration for one reason or another, the parties may also appeal to the court.[37]

The Interim Measures are the subject of the second significant case in which the court interferes with the arbitration. To be more exact, a court must uphold a binding interim order that was issued by an arbitral panel. Any termination, suspension, or change of the interim measure granted by the arbitral tribunal must be promptly reported to the court by the party who filed the application for recognition and enforcement of the interim measure or whose request was granted.[38]

The recognition and enforcement of the arbitration's final decision are two of the most significant instances in which the court intervenes in the arbitration process. The New York Convention and the Georgian Law of Arbitration are comparable. The convention is similar to the reasons for refusing to recognise and enforce an arbitration ruling.[39]

6.4. Arbitration and Its Legal Outcomes in the Light of Rule of Law and Legal Certainty

6.4.1. ENSURING PROCEDURAL RIGHTS IN ARBITRATION PROCEEDINGS AND THE RULE OF LAW

It is important to keep in mind that when we discuss the rule of law, it also refers to the rights pertaining to the system of justice. The latter, in turn, also covers the parties' rights with regard to procedure throughout the arbitration process. Georgia received a score of 0.53 in the civil justice component in the Global Rule of Law Index evaluation for 2022, a decline of 0.003 points from the

[36] G. Titberidze, *The Law of Georgia on Arbitration*, *Commentary*, 2nd Edition, Tbilisi 2020, p. 73.
[37] G. Titberidze, *The Law of Georgia…*, *op. cit.*
[38] Article 21 of the Law of Georgia "On Arbitration."
[39] Law of Georgia "On Arbitration", Articles 44–45.

previous year. In this regard, in 2015 the nation scored 0.63 points, its highest-ever rating. Ensuring access to justice and indications of alternative dispute settlement are both necessary for effective civil justice.[40]

The concept of the rule of law places a strong emphasis on ensuring the implementation of procedural rights. Only in terms of fundamental principles is procedural law seen as a component of public policy. When fundamental and widely accepted rules are not followed, eventuating in a conflict with justice and a decision that does not uphold the norms of the rule of law, procedural public policy is disrupted.[41]

Public policy is a topic that comes up frequently when talking about the right to a fair trial. A decision on this issue was made by the Tbilisi Court of Appeals, and the party appealed it based on Articles 42.2.a.(ab) and 42.2.b.(bb) of the Law of Georgia "On Arbitration", and asked for the annulment of the arbitration award. The party argued that it was denied the chance to defend its position, since the tribunal declined to present testimony from the prosecution. The arbitration judgement states that the party failed to demonstrate how the desired testimony related to the matter being reviewed. The tribunal also gave the parties the option of having this person testify orally or in writing during the arbitration proceedings to affirm the same information, but neither party chose to do so. The court declined to set aside the ruling and stated in the public policy section that any procedural judgment, reading of a contract's terms, appraisal of the truth, or legal conclusion that one of the parties disagrees with, cannot be viewed as a breach of the law. The court emphasised that the arbitration ruling must be contrary to the high ideals and fundamental legal principles in order to be declared invalid for reasons of public policy.[42]

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[40] Georgia's results in the 2022 Rule of Law Index, pp. 15–16.

[41] See: The Decision of the Swiss Supreme Court of 8 March 2006, in the case of X.S.p.A. v. Y.S.r.l., paragraph 2.2.1; L. Kartsivadze, T. Zhizhiashvili, T. Morchiladze, G. Kekenadze, *Guide to Arbitration for Judges of Appeal Courts of Georgia*, Tbilisi 2018, p. 163.

[42] Judgment of the Tbilisi Court of Appeal of 14 September 2017, in case No. 2ბ/3782-17.

Although in this particular case, the party failed to prove that the testimony he requested is related to the case, and it is also worth noting that the arbitration gave him the opportunity to confirm the information in a different way. However, even in arbitration the parties enjoy equal rights and opportunities to substantiate their claims, reject or extinguish claims, opinions, or evidence presented by the other party. Parties shall determine on their own on which facts their claims must be based, or which evidence must be used to verify those facts. In this case the party wanted to present the evidence that was not accessible easily and hence requested to present testimony from the prosecution. At one point it can be considered as a rule of law violation because the party was not given enough opportunity to present full evidence related to his case, and because his procedural rights might have been violated, it can then be considered that this is contrary to the rule of law, even when the court did not determine that such procedural rights violation was contrary to the public policy. On the other hand, it is evident from the arbitral award that the party was given another means to present the requested information and hence substantiate the claim, however, in this regard it must be assessed whether presenting testimony from the prosecution and presenting information in any other way would have had the same effect in the sense of presenting the facts. For instance, under Austrian law, a violation of the right of presenting the case or procedural public policy automatically results in the arbitral award being set aside. However, the award must not be set aside if the reasoning contained therein establishes that the violation did not affect the outcome of the award.[43] If in the abovementioned case the other opportunities would not have had the same result as those obtained with the prosecution's testimony, then it is possible to consider that the party was not given enough opportunity to present the case, hence his procedural rights were violated in this regard; when procedural rights are violated, it is contrary to the rule of law principle.

[43] *The Baker Mckenzie International Arbitration Yearbook – Austria*, 11th Edition, 2017–2018, p. 39.

The rule of law is fundamentally based on the exercise of procedural rights. In this regard, if the procedural rights are violated but the court does not deem this violation as a fundamental violation during the consideration, the rule of law may be somewhat threatened. This is why it is important that the court also takes into account the full possibility of exercising the rights of the parties during the process when discussing the procedural rights during the recognition and enforcement of the arbitration decision. In order to avoid jeopardising the exercise of individual procedural rights that assure the protection of the rule of law, it is important to develop acceptable standards on which procedural rights infractions are considered fundamental.

6.4.2. LABOUR ARBITRATION AND THE RULE OF LAW

6.4.2.1. *In General*

Many of the 'ordering' factors are relevant when it comes to the role precedent plays in promoting fair and effective dispute resolution, given that to the extent that predictability and settlement are achievable, the economic and social costs of labour conflicts are reduced. When the rule of law is upheld and there are accessible impartial standards for decision-making, fairness is often fostered. This impersonal aspect is advantageous in labour arbitration as well since it deters placing the focus on the selection of an arbitrator who will rule in a particular party's favour. However, relying on the law also runs counter to the customary pragmatism that has defined arbitration.[44]

It could be argued that arbitration should join the formal legal system, or at least adopt formal legal trappings, in order to ensure fairness, objective consistency, and enforcement in labour arbitration by increasing reliance on the authority of other arbitration opinions. The importance of appeals on the merits would increase,

[44] C.H. Bruce, *A Study of Labour Arbitration – The Values and the Risks of the Rule of Law*, "Utah Law Review" 1967, No. 2, pp. 223–250 (p. 238).

attorneys would be required to participate more frequently, and all arbitration decisions would need to be made public. The current state of arbitration is in-between these opposing views, but it is moving more and more in the direction of the rule of law.[45]

Arbitration may potentially develop into a branch of the formal legal system if the rule of law takes on a greater significance than its adjudicative role. The functions of courts and arbitrators would be unclear in this case, and the current usefulness of private arbitration would be lost.[46]

The emphasis on the rule of law is contrary to labour arbitration's functional reason for operating alongside the judicial process as a different type of procedure, which is one of the arguments against the use of stare decisis in labour arbitration.[47]

Within certain bounds, increased reliance on precedent as a component of the rule of law will also satisfy the demands of efficiency and predictability. However, for arbitration to have a purpose and for its independence from court intervention to be maintained and justified, it must nevertheless maintain its pragmatic, subjective characteristics. Therefore, discretion shouldn't be restricted to the point where labour arbitration loses its legitimacy as arbitration.[48]

6.4.2.2. *Labour Arbitration in Georgia*

The legislation in Georgia provides for the possibility of the arbitration of labour disputes, in particular Article 61(5) provides for the following regulation: "A dispute arising during individual labour relations shall be resolved in compliance with the conciliation procedures provided for by Article 62 of this Law and/or by applying to court or for arbitration." A dispute arising during collective labour relations shall be resolved through the conciliation procedures

[45] C.H. Bruce, *A Study of Labour Arbitration…*, *op. cit.*, p. 241.
[46] Ibid, p. 243.
[47] Ibid, p. 240.
[48] Ibid, p. 248.

provided for by Article 63 of this Law and/or by applying to the court for arbitration.

In the present case, it is natural that the regulation directs us to the law on arbitration, where the general regulation is provided, in particular, where it is not specified what specifics should be discussed directly in connection with labour-law disputes in arbitration.

An important issue that arises in practice is whether it is possible to resolve labour disputes related to discrimination not through court but through arbitration. This issue is important, as Article 61 of the Labour Code considers it possible to consider labour disputes through arbitration, although the Labour Code alone is not sufficient to determine whether arbitration can resolve all types of disputes arising from labour relations. According to Article 1.2.a of the Law of Georgia "On Arbitration": "An arbitral tribunal is entitled to consider: "a) a property dispute of a private nature based on the equality of the parties, which can be resolved by the parties between themselves."

From the cited norm, the word "property" is significant, since the fact of discrimination in labour disputes is not a dispute of a property nature. Accordingly, if one of the claimant's claims in a labour dispute is the establishment of the fact of discrimination and the annulment of the order to dismiss the employee based on it, the arbitration may not have the jurisdiction to consider this claim.

In addition, if the claimant does not explicitly request the determination of the fact of discrimination in a separate claim, but the employee's request is the annulment of the dismissal order and compensation for forced labour, and discrimination is indicated as one of the factual grounds for the annulment of the order, then, by the same logic, it is likely that the arbitration may not be able to review this dispute.[49] However, there is no apparent approach regarding this issue and there is a high probability to review such a case by arbitration.

Naturally, when arbitration does not have the possibility to consider such a dispute, the issue of access to the means of dispute

[49] S. Takashvili, M. Khvedelidze, E. Shengelia, *Practical guidebook on labour law*, Sulkhan-Saba Orbelian University Publishing House, Tbilisi 2021, pp. 28–29.

resolution arises, which implies that in this case, the employee does not have the right to fully demand the realisation of his rights when he submits an arbitration claim. Accordingly, such unavailability directly poses a threat to the implementation of the rule of law principle.

Moreover, when we talk about annulment of the termination of employment agreements by the arbitration, or for instance, the imposition of compensation to the employer, it is interesting that in general the arbitration award is final and the legislation does not provide the possibility of appeal.

According to the legislation on arbitration, it is only possible to set aside the award, in which case the Appeal court does not enter into the substantive discussion of the dispute and only evaluates the grounds for the setting aside of the decision from a procedural point of view.

Naturally, at this time there may be a risk that an unscrupulous employer will try by all means to annul the decision, which requires him to pay compensation or to restore the employment of the employee. In this respect, it is not clear what mechanism will be left for the employee to realise his right, therefore, the lack of access to dispute resolution and decision enforcement directly violates the principle of the rule of law.

The question arises as to what can be done to correct this situation. In this regard, it would be useful if a regulation was included in the Labour Code which would determine the specifics of labour dispute review by arbitration, which would naturally make it easier to access the means of dispute resolution and, at the same time, to enforce it.

In the context of Rule of Law, a Labour Code provision may result in an employee going to arbitration, even winning the case, however it is problematic because of this provision that the award might not be recognised and enforced.

Under Article 39(2) of Law of Georgia "On Arbitration":

> *An arbitration award is binding on the parties to the arbitration agreement. It must be in writing. It must be signed by an arbitrator(s). In arbitral proceedings with more than*

> *one arbitrator, an arbitration award must be signed by the majority of the arbitrators. If an arbitrator refuses to sign the arbitration award and/or holds a dissenting opinion, a respective record shall be made. The arbitration award must specify the decision-making arbitrators, the parties, the date and the place of rendering the arbitration award.*

As for the following provision:

> *The arbitration award must contain the tribunal's reasoning, stating the reasons based on which the arbitration award was rendered by the arbitral tribunal, unless the parties have agreed on not to have the basis of the decision stated or the arbitration award is rendered in accordance with Article 38 of this Law.*[50]

A written motion must be submitted to the court in order for an award to be recognised and enforced, according to Article 44(1) of the Law of Georgia "On Arbitration." Awards issued outside Georgian territory are subject to the competence of the Supreme Court of Georgia, whilst awards rendered on Georgian territory are subject to the competence of the courts of appeal.

Regarding the judicial standard of review of the award, procedural law follows the same pattern represented in the UNCITRAL Model Law – no judicial review of arbitration judgements on the merits. Court procedure, however, does not entirely support this norm. In some circumstances, courts assess the merits of the award on their own initiative during the setting aside or recognition and enforcement stage, relying on the justification that the award is incompatible with domestic public policy.[51]

Article 44 of the Law of Georgia "On Arbitration" concerns issues regarding recognition and enforcement. Article 44(1) fully reflects the provision of Article 1 of the Convention that:

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[50] Article 39(3) of the Law of Georgia "On Arbitration."

[51] G. Titberidze, *The Law of Georgia…*, *op. cit.*, pp. 42–43.

> *This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.*

The legal framework in Georgia clearly lays forth the justifications for rejecting recognition and enforcement. Only one of these grounds, public policy, allows a court to address a substantive portion of an arbitral ruling.[52] Public policy differs on the local, national, and international level. While courts may only consider comparable (substantive or procedural) values of public policy in domestic arbitral awards, they must consider the international nature of the dispute, the needs of international trade, and only those rules as public policy that the Country wants to uphold in the international context as well when deciding on foreign arbitral awards.[53] The New York Convention's 'pro-enforcement attitude' should be given priority by the Supreme Court of Georgia when recognising and enforcing foreign arbitral awards, even though the Georgian Courts have not yet adopted the latter strategy. Additionally, the court should use public policy to limit the recognition and enforcement of foreign arbitral awards to exceptional and uncommon circumstances. The Law of Georgia "On Normative Acts", which grants the international treaty – in this case, the New York Convention – precedence over the law, makes such a strategy necessary.[54]

One would care to know how much the court can enforce such an arbitration decision that serves to eliminate the discrimination of the employee, even though during the enforcement stage the court is not able to discuss substantial issues, opposition to public policy

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[52] S. Tkemaladze, *Public policy as a ground for annulment of the arbitral award or refusal on recognition-enforcement (a brief overview of Georgian practice)*, "Georgian Business Law Review" 2013, No. 2, p. 15.

[53] S. Tkemaladze, *Public policy...*, *op. cit.*, p. 19.

[54] Ibid, p. 20.

is considered one of the grounds for annulment, which is why it is necessary that the law explicitly defines the issue of whether the arbitration can consider disputes related to discrimination. It may be said that a somewhat unscrupulous employee may appeal based on the assertion that the decision is against public policy. The interpretation of public policy by the courts puts at risk both the independence of arbitration and the principle of finality of arbitral awards. Apart from public policy, the court has no avenue to alter the essential part of the decision. Court control should be limited to the purpose of the law, so as not to undermine the essence of arbitration and its benefits.

Accordingly, in this regard, it can be said that the use of the concept of public policy by the court harms the fact of an individual's access to justice to some extent, when it is clear that the court will still use its authority to interpret public policy, and if the practice is established in this regard, it is a fact that the employee will be limited in his right to apply for the enforcement of the arbitration decision to the court, which would limit his access to justice, which directly contradicts the principle of the rule of law.

6.4.3. INVESTMENT ARBITRATION IN GEORGIA AND RULE OF LAW

Investments are one of the main foundations of the economic development of any country. For a small developing country such as Georgia, it is especially important to attract foreign direct investment, as domestic investment is usually in short supply.[55] Investments from wealthy nations' investors are essential for Georgia's development as a developing nation. This decides the nation's will to rationalise national laws, fairly share international norms, and provide a legal framework where any threats to the protection of foreign investments will be properly taken into account. We can conclude that the state is successfully moving toward the aforementioned goal by taking into account the Georgian legal framework and the bilateral

[55] Challenges of Georgia's investment environment, 13 February 2015, Transparency International Georgia.

and multilateral international agreements that Georgia has signed, and the current normative acts and international agreements provide specific guarantees for the protection of foreign investments.

FDI climbed somewhat in 2013, totalling USD 941.9 million. This just slightly outperformed the 2012 results (USD 30.3 million). According to preliminary figures from the first three quarters of 2014, foreign direct investment in Georgia totalled USD 923.3 million, up 29% over the same period in 2013.[56]

Foreign direct investment in Georgia and its ratio to GDP year by year and quarter by quarter is often used as a measure of the country's investment climate and competitiveness. Since 1996, Georgia has attracted a total of approximately USD 21 billion in foreign direct investments.[57]

It should be noted that in Eastern Europe, Georgia is one of the leaders in the ratio of direct foreign investments to GDP, as well as *per capita*.[58]

According to Article 7 of the Law of Georgia "On Promotion and Guarantees of Investment Activity": 1) investments shall be fully and unconditionally protected by the legislation of Georgia; 2) deprivation of an investment may take place only in cases directly determined by law, by court decision and upon urgency determined by the organic law and only with appropriate compensation; 3) decision on deprivation of investments as well as terms of compensation may be appealed to the courts of Georgia unless otherwise provided in the agreement between the parties or in the international agreements of Georgia.

Of course, Georgia's attempt to attract foreign direct investment is welcome, both from a strategic point of view and based on legislation. But in the present case, the question of jurisdiction regarding certain issues remains open. When the state enters into a contract, in the event of breach of obligations, it provides for arbitration as a dispute resolution body, it is clear that the state immediately

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[56] Ibid.

[57] B. Palavandishvili, *Investment Policy of Georgia – Part*, Tbilisi, 10 October 2020.

[58] Vision 2030 Development Strategy of Georgia, https://matsne.gov.ge/ka/document/view/5604706?publication=0 [access: 01.10.2023].

refuses to resolve the dispute through the court.[59] It is interesting that the dispute in this case contains elements of public law, which raises the issue of jurisdiction. Accordingly, it is necessary to clearly define the present issue, so that there are no problems with the implementation of foreign direct investments.

Resolving disputes through arbitration are particularly popular with respect to investment disputes. In this regard, it is interesting to discuss one issue that we find in Article 20(6) of the Law of Georgia "On State Property":

> *If an agreement is unilaterally annulled due to the breach of the privatisation conditions determined by an appropriate agreement entered into for the privatisation of state property, the privatised property shall be returned to state ownership, and the right(s) of mortgage of a third person(s) registered with respect to such property shall be annulled if, before encumbering the property with the mortgage, the relevant information on the privatisation obligation(s) was registered with the Public Registry, in the records concerning the immovable thing. In addition, the State shall not compensate the purchaser for the sums paid and expenses incurred.*

In this case, it is especially important to consider the last sentence, which allows the state to seize the property from the investor with its improvements without compensation.

In this case, we have a problem of jurisdiction, if arbitration has the competence to generally consider such disputes, we have already discussed above that arbitration considers property disputes, which are disputes of a private nature, and here the problem arises when, for example, the court refuses to recognise and enforce the decision on the grounds that that the arbitration did not have the competence to consider a dispute of a similar nature, which naturally limits the individual's ability to access justice and the realisation of his rights, which directly contradicts the rule of law principle.

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[59] G. Tsertsvadze, *International Arbitration…*, *op. cit*., p. 171 ff.

When we talk about dispute resolution through arbitration, it is important to consider issues related to investment disputes in this context. When the state enters into an agreement, where in case of breach of obligations it provides for arbitration as a dispute resolution mechanism, it is clear that the state immediately refuses to resolve the dispute through the court. Accordingly, if expropriation or other confiscation/restriction of the investment takes place, the fact of restriction or confiscation should be appealed not through administrative law, but through arbitration, because the dispute, although it contains elements of public law, is still of private law nature.[60]

Georgian judicial practice has developed quite interestingly since 2007. In particular, the Supreme Court considered the dispute arising from the lease agreement between the State Property Registration and Privatisation Division and a specific investor as an administrative nature dispute. The court pointed out that the subject of the dispute in the case under consideration is the lease-purchase agreement concluded between the Tbilisi State Property Registration and Privatisation Division and the investor.

According to the court's explanation, one of the parties to the said agreement is the state, in the form of Tbilisi State Property Registration and Privatisation Division, and the subject of the contract is state property. Lease redemption is a type of privatisation of state property, and the main terms of transferring of state property are regulated by public law.[61] Accordingly, the Court of Cassation considered this reasoning sufficient to decide whether the dispute was of private or administrative nature and finally noted that the dispute was decided by the administrative case chamber of the court and not by the civil case chambers.[62]

The transfer of ownership of property through privatisation is considered a public legal act according to another decision of the

[60] S. Takashvili, *International Standards for the Protection of Foreign Investments and Compliance of National Legislation with the European and International Investment Regime*, Tbilisi 2018, p. 110.

[61] Decision of the Administrative Case Chamber of the Supreme Court of Georgia, No. ბს-442-420(გ-07) dated 11 October 2007.

[62] S. Takashvili, *International Standards…*, *op. cit.*, p. 111.

Supreme Court of Georgia,[63] according to which the denationalisation of state property – privatisation – belongs to the special public authority of the state. The privatisation process is not a private legal relationship, and in this case the state cannot appear as a private person, as an equal participant in the relationship. Accordingly, the contract concluded for the purpose of privatisation of state property is an administrative contract. Thus, the approach of judicial practice is unequivocal – in the case of privatisation of state property (which in many cases happens with the investment by a foreign investor), the dispute arising from the privatisation agreement belongs to the category of administrative cases.[64]

The Supreme Court points out that the main factor of administrative cases in resolving the issue of jurisdiction, in addition to the fact that one of the parties must be an administrative body, is also the public-legal purpose of the action of the administrative body. The nature of the disputed litigation, and not only the subjective composition, is given priority in deciding the question of adjudication. In order to determine the public-legal character of a dispute, it is not sufficient that one of the parties to the dispute is a subject of public law, since it is possible for a subject of public law to be a party in private-legal relations as well. The Supreme Court shares the opinion of the Tbilisi City Court regarding the fact that the claim arises from administrative (public) legislation, in the event that the aforementioned contract was concluded in accordance with the Law of Georgia "On State Property", regarding the approval of the provision on "Privatisation of State Property in the Form of Direct Sale".[65]

There is a precedent: on 9 December 2016, the National Agency the State Property filed a claim with the Administrative Chambers of the Tbilisi City Court, against the investor, and demanded the imposition of a penalty based on the purchase agreement (investment contract) concluded with the respondent. In the mentioned

[63] Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia, No. ბს-827-789(გ-07) dated 15 November 2007.

[64] S. Takashvili, *International Standards…*, *op. cit*.

[65] Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia, No. ბს-961-952(გ-16) dated 23 February 2017.

case, the issue of jurisdiction of administrative and civil chambers became controversial. In particular, the Chamber of Administrative Cases pointed to the 2nd part of Article 25[1] of the Administrative Procedure Code of Georgia, according to which Disputes with regard to concluding, performing and terminating contracts under public law shall be considered by the general courts in administrative legal proceedings. Disputes with regard to concluding, performing and terminating private law agreements by an administrative body shall be considered in civil legal proceedings.[66]

The Supreme Court pointed out that the main factor of administrative cases in deciding the issue of arbitration, apart from the fact that one of the parties must be an administrative body, is also the public legal purpose of the action of the administrative body. The nature of the disputed case, and not only the subjective composition, is given priority in deciding the question of jurisdiction. In order to determine the public legal nature of a dispute, it is not enough that one of the parties to the dispute is a subject of public law, as a subject of public law can also be a party in private legal relations.[67]

Based on the above, the court of cassation considers that the disputed legal relationship derives from administrative (public) legislation, the claim refers to the dispute arising from the existing public legal relationship between the subject of private law and the administrative body, which is why the given case belongs to the judgment of the court defined by Article 2 of the Administrative Procedure Code of Georgia.

Thus, it follows from the decisions of the Supreme Court of Georgia cited above that, if an investor buys state-owned property from the state and implements an investment project on this property, the property purchase contract will be administrative-judicial in nature and, accordingly, the dispute arising from it will be adjudicated by the administrative panel in the court. Therefore, the issue of arbitration is in question due to the simple reason that the Supreme Court considers the investment contract concluded on the basis of the Law of Georgia "On State Property" to be an administrative contract,

[66] S. Takashvili, *International Standards...*, *op. cit.*, pp. 111–112.
[67] Ibid, p. 112.

which means that, for example, in the case of expropriation, the claimant should make a complaint by the rules that are established for an individual administrative act.

According to the established practice of the court, the arbitration clause in the investment contract may, to some extent, even lose its meaning, which, of course, should not be considered justified. Thus, when it comes to the legal nature of the investment contract, the case law discussed above must be taken into account, because in practice, it is often the case that the investor is in an unclear position and he cannot predict whether the investment contract concluded by him will ultimately be judged by the administrative panel of the court, by civil panel, or by arbitration. Such uncertainty, of course, has a negative impact on the process of development and improvement of the investment environment.[68]

Hence, based on the abovementioned discussion, It is obvious that when there is such ambiguity regarding the nature of the dispute, access to justice is put in jeopardy; the uncertainty regarding jurisdiction makes it difficult for the party to protect its rights; if the court bases its decision on established practice when deciding whether to recognise and enforce the arbitral award, it is only natural that the court will reject it; of course, this negatively impacts the realisation of individual rights and the implementation of justice; and finally, when access to justice is threatened by such ambiguity, this contradicts the rule of law principle.

Moreover, it is possible that in the given case, during the recognition-enforcement of the arbitral award, the court may consider that if the dispute is of public law nature, its recognition-enforcement may be considered against public policy.

Public policy can include both the material (substantive) and procedural part of the dispute. Procedural public policy refers to the process of conducting the arbitration. Procedural or substantive public policy 'best practices' favour their narrow understanding. In relation to procedural public policy, it is considered that the violation of the party's right to present its own interests can only be considered a violation of public policy and, accordingly, a basis for

[68] Ibid, p. 113.

refusing to recognise and enforce the arbitration award, if there is a causal connection between such a violation and the content of the arbitration award, that is, if the violation of the party's procedural right had an impact on the interest of the losing party.[69]

There are general practices that are firmly established in Georgian judicial proceedings, for example, according to the practice of the Tbilisi Court of Appeal, an arbitration award that does not contain a motivational part is considered against public policy and, therefore, is not subject to recognition and enforcement.[70] Also, one of the most frequent cases of refusal to recognise and enforce an arbitral award on the basis of material public policy is the attribution of "disproportionately high" penalties by arbitral awards.[71]

In the case discussed above, the court may refer to procedural public policy. Based on the fact that since the aforementioned dispute may be perceived of public law nature during the recognition-enforcement process by the court, the court may discuss public policy. In particular, if the court views the dispute as a public law dispute and it happens so that the dispute is considered by arbitration, the court may not recognise and enforce it, at which time the court is likely to discuss the issue that since the dispute is a public law dispute, the arbitration had no jurisdiction to consider it, therefore, if the present decision is recognised and enforced, then the court might consider that this may be in conflict with public policy.

Accordingly, the party that acted in good faith and referred to the arbitration in the manner specified by the contract may be refused recognition and enforcement of the arbitral award, which will naturally result in the party not being able to exercise its rights properly in court, which obviously contradicts the principle of the rule of law.

However, in general judicial practice, the situation is different, when the matter directly concerns the recognition and enforcement of ICSID decisions, and not those of other arbitration institutions. In order to improve the investment environment and promote private foreign investments, the Convention on the Settlement of

[69] S. Tkemaladze, *Public policy...*, *op. cit.*, pp. 16–17.
[70] Ibid, p. 21.
[71] Tbilisi Court of Appeal, case No. 2ბ/2747–11, 12 September 2011.

Investment Disputes between States and Citizens of Other States was created,[72] which was crafted by the Executive Directors of the International Bank for Reconstruction and Development and regulates to resolve investment disputes by conciliation and arbitration, the Convention on the Special International Arbitration Institute – International Centre for the Settlement of Investment Disputes is a unique international mechanism, as it creates a comprehensive and self-sufficient regime for the recognition and enforcement of arbitral awards, which is autonomous and delocalised from national judicial control.[73]

ICSID arbitral award is independent of the judicial control of the country of the seat of the arbitration,[74] it is not subject to appeal or other remedy, except as established by the Convention. This emphasises the finality of ICSID arbitral awards and the delocalisation of ICSID arbitration as well as the exhaustive and autonomous nature of the Convention, which makes it a distinctive and truly international mechanism for investment arbitration.[75]

Therefore, the Supreme Court of Georgia is unable to review the ICSID's awards. Accordingly, the Supreme Court will not consider the award contradictory to the public policy because this court does not have a power to review the recognition and enforcement process of the ICSID's decisions. However, we cannot say the same about other arbitration institutions, therefore, there is a high chance that there will be an article in the privatisation agreement (investment agreement) that indicates to the parties that they should choose another arbitration for the consideration of the dispute and that the enforcement of their decision may face a problem in the future, because when the Supreme Court of Georgia reviews the recognition and enforcement of foreign arbitral award there is high probability

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[72] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), 575 UNTS, 1965, p. 159.

[73] L. Reed, J. Paulsson, N. Blackaby, *Guide to ICSID Arbitration*, Kluwer Law International, 2010, p. 181.

[74] C.H. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary*, 2nd Edition, Cambridge 2009, p. 1103.

[75] N. Begalishvili, *State immunity in the process of recognition and enforcement of ICSID arbitral awards*, "TSU Law Journal" 2020, No. 1, p. 118.

that such cases might be deemed against the public policy (because of the public nature of the dispute).

This means that this is contrary to the rights of an individual investor to apply to an independent and impartial court for the enforcement of an arbitral award, which naturally conflicts with the principle of the rule of law. In such situation it is completely impossible to predict the legal outcomes of the investment contract, and the legal certainty might be problematic.

6.5. Mediation

6.5.1. MEDIATION AS AN EFFECTIVE MECHANISM IN ENSURING THE RULE OF LAW PRINCIPLE IN DISPUTE RESOLUTION

Mediation, as an alternative mechanism for resolving a private legal dispute, is an important and necessary institution in all legal states for relieving the burden of the court and resolving the conflict peacefully. Given that the main goal of mediation is to eliminate the conflict and reach an agreement between the disputing parties, it requires legal regulation and protection of the rights of the persons participating in it. Moreover, mediation is uniquely an alternative to justice, and the private legal rights of the persons participating in it are significantly related to conducting the mediation process correctly, objectively and in compliance with the principle of confidentiality. From this point of view, on the one hand, it is necessary to assess the extent to which the Georgian legal framework related to mediation is in compliance with the directives of developed countries, including EU countries. Simultaneously, it is necessary to analyse whether the existing legal framework and practice violate fundamental human rights in the context of the Rule of Law.

In order to assess the above, this chapter analyses the role of court mediation and private mediation, challenges to, and the compliance of this method of dispute resolution in general with respect to the Rule of Law. In order to analyse the issue, an analysis of the Georgian legislative base and practice is presented which mainly relies on Georgian scientific literature and practice. With the mentioned

research methods, a conclusion is made as to how accessible the mediation process is and how far this form of dispute resolution ensures the Rule of Law and its principles in Georgia.

Mediation is much more than just a practical, private, amicable, and alternate method of addressing unwinnable conflicts. The democracy and justice-seeking principles of the Rule of Law, pursued via the public adjudication of law by the courts, are undermined by mediation's primary preoccupation with efficiency. By rejecting the importance of public adjudication, for instance, privatisation of conflicts denies the public access to crucial information, stifles public discourse, and retards the growth of the law. The informalisation of conflict resolution also opposes the application of the law by the courts, failing as it does to uphold rights and downplaying the significance of due process.[76]

To maintain the rule of law and respect for human rights under democratic systems of governance, the symbiosis between mediation and human rights needs to be very successfully harmonised. Contrarily, when there is a breakdown in the rule of law due to ineffective or corrupt judicial systems, horrifying criminal offenses increase significantly, especially when there is a lack of accountability and successful prosecutions. Similar to how ineffective commercial courts force parties to rely on self-help, such as bribery, employing thugs to collect unpaid debts, extortion, or making threats of physical violence or worse, this is a logical result of an ineffective legal system. Human rights concerns in the conflict resolution process must be identified and addressed by mediators if mediation and human rights are to be compatible. Such awareness and attention not only promote peaceful results but also uphold the principles of democracy and the rule of law. The rule of law, respect for human rights, and peaceful, fair, and timely conflict resolution are all interrelated, maintain our liberties, and improve the standard of living for people everywhere.[77]

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[76] S.A. Martinez, *The Rise of Mediation…*, *op. cit.*, p. 265.

[77] V. Schachter, *Human Rights, the Rule of Law, and Mediation*, "Dispute Resolution Magazine" 2017, Vol. 23, No. 4, Summer, pp. 26–29 (p. 29).

The primary focus on efficiency in mediation seriously undermines the Rule of Law in conflict resolution. The mediation often downplays the value of public adjudication, dismisses the merits of the application of the law, and overlooks the advantages of procedural justice via the privatisation and informalisation of conflict settlement. Particularly, by privatising areas of civil mediation with a significant public impact, the alternative forum withholds crucial information from the public, stifles public discourse, and slows the evolution of the law. The alternative system fails to uphold rights and further fosters inter-party inequality by addressing delicate subjects such as violence in such a casual manner during intra-family mediation. The Rule of Law is more seriously weakened by the informalisation of dispute resolution than by its privatisation. With the benefits mediation provides for the field of dispute resolution, the conflict between the Rule of Law and mediation may be resolved.[78]

6.5.2. LEGAL BACKGROUNDS OF MEDIATION IN GEORGIA

6.5.2.1. *International Regulation*

In Georgia on 29 June 2022, the United Nations Convention on International Settlement Agreements Resulting from Mediation enforced.

For Georgian law, the convention is of great importance, because it mentions the mediation process and the agreement reached as a result of mediation already has an international legal basis and support. Prior to the Convention, Georgia had already taken several important steps to introduce mediation as an alternative dispute resolution method at the level of legislation. In particular, several types of mediation have been introduced into the Georgian legal space since 2011. Some of the most important types of mediation are judicial mediation, notarial mediation, labour mediation, and private mediation.

One of the distinguishing features of the Georgian model of mediation regulation is the fact that there is a unified law on mediation,

[78] S.A. Martinez, *The Rise of Mediation…*, *op. cit.*, p. 285.

which is a systematised act and applies to both court mediation and private mediation. Also, separate norms governing mediation apply in certain areas.[79]

With the entry into force of the Convention, businesses around the world will have more assurances to try to resolve international disputes through mediation, as the Convention provides a more effective means of enforcing the results of mediation.

6.5.2.2. *National Legislation*

6.5.2.2.1. Law of Georgia "On Mediation" (Private Mediation)

The Law of Georgia "On Mediation"[80] was adopted by the parliament of Georgia on 18 September 2019. The current legal regulation of Georgia does not provide for the possibility of conducting mediation by a judge.[81] In favour of mediation, it should be noted that, in contrast to court proceedings, it is an absolutely informal 'process', which is not bound by procedure and is focused on the interest of the parties, on the proactive actions of the parties themselves, to outline mutually beneficial positions and reach an agreement, that is, in contrast to court proceedings and arbitration, where, accordingly, the judge and the arbitrator make a binding decision, it is not mandatory to reach a final agreement during mediation, and if an agreement is reached, this result is in accordance with the interests of both parties and is a decision made by the parties, which strengthens the

[79] D. Dzagnidze, *The Georgian Model of Mediation Regulation Against the Background of Legislative Reform, A Collection of Articles, The Importance of Mediation and Development Prospects in Georgia*, Ilia State University Publishing House, Tbilisi 2021, p. 7.

[80] Document No. 4954-I, Registration Code: 060000000.05.001.019578, place and date of publication: website, 27.09.2019.

[81] A. Gurieli, *Legal nature of the institution of mediation, conceptual characteristics and the judge as the leader of the mediation process*, *Alternative Dispute Resolution, Yearbook 2021*, Special Edition, Ivane Javakhishvili Tbilisi State University, p. 9.

trust of the parties in the mutually agreed decision, and promotes the continuation of peaceful and business relations in the future.[82]

A mediator is an independent, impartial person who facilitates the parties in reaching a consensus. The main essence and purpose of mediation, which dominates in case of any form of its manifestation, is to restore and maintain those relations based on the parties' negotiations and in a form that is acceptable to both parties. Therefore, it can be said that one of the goals of mediation is of a social nature and mainly represents the preservation of human relations.[83]

Awareness of the mediator is crucial importance in the mediation process. As a rule, it is often necessary for the party to provide some information to the other party, or to the mediator, or to both the party and the mediator.[84]

Although the agreement in the mediation process depends entirely on the will of the parties and the mediator does not make the decision himself, he/she still plays a big role in reaching the said agreement.[85]

6.5.2.2.2. Court Mediation

In addition to private mediation, Georgian law also provides for court mediation. It is "the mediation that is initiated after a claim has been filed with the court, in accordance with the procedure established by the Civil Procedure Code of Georgia, if the court refers the case to a mediator".[86]

A case that is eligible for judicial mediation may be referred to a mediator once a claim has been filed with the court in order to

[82] I. Kandashvili, *Mediation – A New Form of Alternative Dispute Resolution and the Perspectives of Its Regulation in Georgia*, "Journal of Law" 2017, No. 2, Ivane Javakhishvili Tbilisi State University, p. 116.

[83] A. Gurieli, *Legal nature of the institution of mediation…*, *op. cit*., p. 11.

[84] G. Tsertsvadze, *Mediation, A Form of Alternative Dispute Resolution (General Review)*, Tbilisi 2010, p. 167.

[85] M. Javakhishvili, S. Tsiklauri, *The limits of confidentiality in mediation and the mediator as a guardian of the principle of confidentiality, Alternative Dispute Resolution*, *Yearbook 2020*, Ivane Javakhishvili Tbilisi State University, p. 129.

[86] Law of Georgia "On Mediation", Article 2.b.

resolve the conflict by an agreement between the parties. The decision to send the dispute to a mediator cannot be disputed. Family disputes, with the exception of those involving adoption, annulment of adoption, revocation of adoption, restriction of parental rights, deprivation of parental rights, violence against women, and/or domestic violence; inheritance disputes; neighbourhood disputes; disputes relating to labour law, with the exception of a collective dispute under the Organic Law of Georgia or the Labour Code of Georgia; and disputes relating to the exercise of parental rights may be referred to mediation.[87]

6.5.3. ENFORCEMENT MECHANISM OF MEDIATION SETTLEMENT ACT IN THE CONTEXT OF THE RULE OF LAW

For effective and efficient functioning of the mediation institution, the legal fate of the result of the mediation – the act of mediation settlement – is especially important, as the legal guarantees of its enforcement, since, unlike other institutions, one of the fundamental principles of mediation is voluntariness.[88]

If an agreement is reached between the parties as a result of the mediation process, the mediator ensures that the terms of the negotiation are documented in a written form, which is called the Mediation Settlement Act. The mediator must follow the rule according to which he has no right to suggest the terms and ways of agreement to the parties.[89]

According to 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, the contracting countries undertake to implement internal legislative reforms in order to enable the enforcement of the agreement reached as a result of the mediation

[87] Civil Procedure Code of Georgia, Chapter XXI[1].

[88] T. Akobia, *Legal guarantees for the enforcement of private mediation settlements on the example of comparing the legislation of the EU member states and Georgia, Alternative Dispute Resolution*, *Yearbook 2021*, Special Edition, Ivane Javakhishvili Tbilisi State University, p. 86.

[89] T. Akobia, *Legal guarantees for the enforcement…*, *op. cit.*, p. 88.

settlement. However, the European directive does not make a specific reservation as to how this issue should be implemented.[90]

The unenforceability of the mediation settlement act may lead to the damage of the trust of mediation subjects (including potential subjects). In addition, the existence of a legal leverage for the enforcement of the mediation settlement ensures the relief of the court, because the agreement reached as a result of mediation, taking into account less time and fewer financial resources, will be subject to forced enforcement based on the enforcement letter issued by the court, if the party wishes. Therefore, the mediation participant will no longer have to apply to the court in order to protect his rights.[91]

By giving the court the power to enforce the mediation settlement, the state ensures the protection of the party acting in good faith from the breaching party, who has refused to fulfil the obligation voluntarily assumed to him.[92]

In contrast to judicial mediation, private mediation, as a standalone independent institution of private law, especially requires the legislative regulation of the negotiated settlement in order for private mediation to maintain its purpose – namely, an enforceable outcome based on a voluntary process.[93]

Based on the aforementioned legislative reforms, the legislator considered the directive of the European Parliament and the European Council and made the private mediation settlement subject to enforcement by the court. In this way, the guarantee of enforcement and the principle of voluntariness were somehow balanced, since the wording of the law is of a dispositional type, which emphasises the will of the parties. First of all, after the completion of the mediation process, the legislator leaves the possibility for the parties to voluntarily fulfil the obligations incurred as a result of the mediation settlement within the framework of the party autonomy.[94]

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[90] Ibid, p. 91.
[91] Ibid, p. 93.
[92] Ibid.
[93] Ibid, p. 102.
[94] Ibid, p. 114.

One of the most important advantages of the mediation process is its flexibility and informal nature, within which the parties are given the opportunity to consider and agree on any term that wouldn't be enforceable during litigation. Nevertheless, as much as this factor, on the one hand, positively portrays the mediation process, on the other hand, it may cause problems in terms of its implementation in practice.

The parties may consider such conditions in the settlement, the fulfilment of which cannot be objectively controlled even by the parties themselves, dependent on the occurrence of a future hypothetical event, etc.

In this respect as well, the role and function of the mediator are very important in assisting the parties to draw up a settlement that can be enforced. In addition, the formal requirements that are established for mediation settlements can play an important role in this regard: by establishing such requirements to the agreement document that provide sufficient clarity of the agreed terms and thereby eliminate the risks of the impossibility of enforcement caused due to the ambiguous content.[95]

In a broad sense, legislation consists of legislative and subordinate normative acts of Georgia. In a narrow sense, under the content of contradiction to the legislation can be implied unconformity with the fundamental human rights guaranteed by the legislation. Given the purpose of the settlement and the rationality of its examination by the court, the latter explanation is more acceptable and appropriate. Otherwise, if the element of legality was perceived as a resolution of a dispute under the provisions of the legislation, then the main sign distinguishing mediation from the court would lose its sense. The criterion while assessing the legality of mediation settlement mustn't be the fact how the court would resolve this dispute. According to the Law of Georgia "On Mediation", the risks of the illegal course of not only the mediation settlement but the mediation

[95] N. Uznadze, *Circumstances Excluding the Enforcement of Mediation Settlements under the Legislation of Georgia and the Member States of the European Union, Alternative Dispute Resolution, Yearbook 2020–2021*, Ivane Javakhishvili Tbilisi State University, p. 143.

process itself are ensured by the mediator, as he/she is granted authority to terminate the process at any time if he/she believes that further continuation of mediation would be unreasonable and unjustifiable.[96]

The possibility to enforce the mediation settlement act is already provided by the law, but this does not guarantee its efficiency. Of course, it is beneficial that Georgia is among the first nations to legislate for the enforcement of the mediation settlement act.

However, when discussing the principle of the rule of law, it is important to emphasise the availability of justice. In particular, despite the existing regulation, the enforceability of the mediation settlement act is often questioned in practice, which naturally makes the individual distrustful of this alternative mechanism of dispute resolution.

Of course, a person's faith in the legal system as a whole involves the idea of the rule of law. Even when we ask Georgian courts if there are any statistics in this area, they are unable to answer adequately and refuse to respond. Information on enforcement is not readily available. It is normal for people to hear about mediation frequently. However, if we examine the past ten years, it is evident that numerous grants have been given out to promote mediation. However, this is still insufficient to inform someone who is learning about mediation for the first time, so it is normal that there is less trust in this system. This lack of trust impacts the individual's right to access all available means of justice, which directly contradicts the idea of the rule of law.

6.6. Conclusions

Based on the presented reasoning, several important issues can be identified.

First of all, it should be noted that the Rule of Law principle plays an important role in Georgian Civil law. The mentioned principle is of great importance in the settlement of private legal disputes. In the presented paper, the issues of labour and investment dispute

[96] N. Uznadze, *Circumstances Excluding the Enforcement…*, *op. cit.*, p. 142.

settlement by arbitration were analysed in the context of the Rule of Law. Furthermore, an evaluation was conducted on the measures taken to safeguard the procedural rights of the parties in arbitration proceedings. The investigation process uncovered the possibility of some procedural rights violations in alternative dispute resolution methods founded in the rule of law. This underscores the significance of establishing and enforcing pertinent standards in this regard.

In addition, the research showed that the Georgian legal regulation of the settlement of labour disputes by arbitration may not be consistent with the principle of the Rule of Law. In particular, in this regard, the employee's access to justice is important, since often the use of the principle of public policy in arbitration regarding labour discrimination disputes significantly curtails the principle of the rule of law.

Furthermore, as it has transpired, Georgian legislation and judicial practice may also be incompatible with protecting the rights of foreign investors, which could ultimately result in investor rights violations and ambiguity. These matters are examined in the context of the Rule of Law, and the ways in which Georgian structure and court practices relate to this principle are summarised. Based on this analysis, it is suggested that the aforementioned approach be modified, and that laws be enacted that will guarantee the protection of investment disputes and avoid ambiguity. One of the most crucial facets of the rule of law notion is the principle of certainty, which should be protected in investment disputes.

As for mediation, as one of the important dispute resolution mechanisms, the Rule of Law principle, is also present in this alternative dispute resolution mechanism, which is mainly related to the recognition and enforcement of the settlement act reached as a result of mediation and, accordingly, to ensuring the rights of the parties. From this vantage point, the Georgian legislative space has been assessed, and specific issues have been found in relation to the Rule of Law principle. One major issue in this regard is awareness; specifically, a lack of knowledge about alternative dispute resolution methods is against the Rule of Law principle because it impedes the parties' ability to access the justice system.

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PART II

THE CONSTITUTIONAL AMENDMENT PROCESS

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Chapter 7. The Process of Constitutional Amendment in Romania

7.1. Introduction

Constitutionalism has come to be so celebrated that it can be included among the elite class of the notions that represent the fundamental landmarks of the contemporary scientific jargon. The notion is widely known, studied and employed. References to it can be found everywhere: in and out of the sphere of scientific inquiry, in the study of law and the political sciences, on a national and international level alike, in almost all the regions of the world. But its success is not purely a quantitative one. The notion is obviously esteemed and revered. Being closely connected with the notion of democracy, for the triumph of which constitutionalism is still considered a key factor, the notion is certainly surrounded by a positive halo, though maybe not as bright as in the past. Opinions of criticism and scepticism have been expressed on the grounds of well-known situations in which constitutionalism failed. Nevertheless, as a notion which actually reflects the general faith in the efficiency of constitutions, constitutionalism still enjoys a considerable measure of appreciation. There are too numerous instances, throughout history, in which the constitutional structure managed to properly support and maintain a democratic form of government.

There are two elements which are essential for an adequate understanding of this notion. The first and most important is the purpose it assigns for constitutions. Constitutionalism is in fact an emphasis on the role of constitutions, which are designed to be nothing less

than efficient instruments for the limitation of power in a society. In their capacity as fundamental juridical acts, constitutions must be documents invested with the function of not only founding and organising the power in a state, but also with the authority to limit it appropriately. Every constitution must be elevated to this superior level of efficiency imposed by constitutionalism. This is the inflexible aspect of constitutionalism. No change or compromise can intervene here. Therefore, constitutionalism is the concept that aims at limiting the power of the governing authority by means of a constitution.[1] This purpose or *telos* is achieved whenever the constitution in force succeeds at ensuring an efficient limitation of the state and its representatives. The principle of constitutionalism is trespassed insofar as a constitution fails to satisfy this *raison d'être*. It is not sufficient for a constitution to be only operational. It may organise political power without restraining it, establishing a system of unlimited and uncontrolled power. Even though it is not a dead letter, the constitution becomes in this case a simple instrument of promoting the interests of those who have the power, being irrelevant to that purpose which is specific to constitutionalism. In such cases, the constitution becomes either a decorative and deceiving document, or a docile one, totally submissive to the government.

The second aspect of constitutionalism is however more flexible and adaptable. It is the part destined for evolution and improvement. We refer to the specific requirements necessary to achieve the above-mentioned purpose. For a certain constitution will most probably not be efficient, in the sense previously mentioned, unless several exigencies are strictly observed. The promoters of constitutionalism tried throughout the time to formulate and to develop these exigencies, but the process is still open for improvement.[2]

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[1] G. Sartori, *Constitutionalism: A Preliminary Discussion*, "The American Political Science Review" 1962, Vol. 56, Issue 4, p. 855; A.W. Heringa, P. Kiiver, *Constitutions Compared. An Introduction to Comparative Constitutional Law*, Antwerpen, Oxford 2009, p. 5.

[2] For the meaning, purpose, exigencies and present challenges of constitutionalism, see: I. Brad, *The Efficiency of Constitutional Norms. Democracy and Constitutionalism*, [in:] E.M. Fodor, C. Buzdugan, P. Popovici (eds.), *Efficiency of Legal Norms*, Bucharest 2012, pp. 34–40; I. Brad, *Is Constitutionalism Obsolete?*,

The proponents of constitutionalism have tried from the beginning to identify those elements of constitutional engineering essential for the achieving of its purpose. Thus, in 1789, the French Declaration of the Rights of Man and of the Citizen clearly stated, in Article 16: "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all." Substantial efforts have been made to discover those conditions a constitution[3] must fulfil in order to reach the goal of government limitation. Their efforts have materialised in a number of exigencies, which have become reference points of the constitutionalist movement.

The perspective upon these exigencies has much evolved in the course of time. Different historical experiences, especially the negative ones, have led to their revision. Analysing the failures of the democratic constitutions in front of totalitarian movements, the scholars have tried to reformulate the exigencies of constitutionalism in order that the constitutions might remain useful instruments for the limitation of power and for sustaining democracy.

We can divide these exigencies into two main categories: formal and material. The first category refers to conditions which apply to the constitution, but which involve different aspects of it, exterior to the actual content of the document. The second category contains those conditions strictly related to the content itself, principles that should be inserted in the text of a constitution.[4]

[in:] N.C. Aniței (ed.), *National and European Context in Juridical Sciences*, Iași 2012, pp. 135–144.

[3] The efficiency of a constitution depends largely on the constitutional structure itself. Nevertheless, the influence of extraconstitutional factors upon the efficiency of a constitution should not be neglected. Even though they are less mentioned or recognized, we want to briefly acknowledge their existence and importance, arguing that a better understanding and control is vital in their case. See: B. Ackerman, *The Rise of World Constitutionalism*, "Yale Occasional Papers" 1996, Vol. 4, pp. 4–8: R. Albert, *The Cult of Constitutionalism*, "Florida State University Law Review" 2012, Vol. 39, No. 2, pp. 373–378; A. Sajó, *Limiting Government: An Introduction to Constitutionalism*, Budapest 1999, pp. 9–10.

[4] The historical experience has proved that the formal exigencies are not enough to give the constitution the desired efficiency in the absence of certain provisions in its content. In other words, it is not enough for a constitution to

There are three formal exigencies which constitutionalism promotes. Thus, in order that a constitution might be an efficient legal act for the limitation of state power it needs to be a written, supreme, and stable document. These are all well-known aspects of the general theory of the constitutions, every one of them involving numerous theoretical and practical considerations.

The first one, formulated even since the beginning of constitutionalism, imposes the written form of constitutions. The specific organisation of power, as well as its limitations, must be clearly defined in a written document. Everyone should be able to easily know and invoke the text of the fundamental act. In addition to that, the written form influences in a large measure the durability and even the prestige of a constitution. In a written form, the content of a specific constitutional provision can be more accurately preserved, for a longer period of time. And depending upon the quality of the formulation, the written constitutional text is more likely to develop that sense of sacredness, which is so important for the efficiency of a constitution. Therefore, only a written text, through its precision and clarity, can be an efficient weapon against the abusive manifestations of the state's power. On the contrary, the customary constitutions are too flexible and imprecise, being unable to prevent such manifestations.

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be only technically applicable. The implementation of the formal exigencies will surely realize that. It is imperative for a constitution to rise at a superior level of efficiency, the level imposed by constitutionalism, which is the limitation of power and the achievement of democracy. That objective cannot be attained without a thorough endeavour to organize and limit power through the principles and the provisions contained in the constitutional text itself. The separation of power, the rule of law and the protection of the human rights were considered the essential principles that a constitution must necessarily contain in order to generate and sustain a democratic regime. See: C. De Aranjo, *Sur le constitutionnalisme europeene*, "Revue de droit public" 2006, No. 2(6), pp. 1559–1560; J.-P. Feldman, *La séparation des pouvoirs et le constitutionnalisme. Mythes et réalités d'une doctrine et de ses critiques*, "Revue français de droit constitutionnel" 2010, Vol. 83, No. 3, pp. 483–496; C. Grewe, H. Ruiz Fabri, *Droits constitutionnels europeens*, Paris 1995, pp. 21–32; A.W. Heringa, P. Kiiver, *Constitutions Compared…*, *op. cit.*, p. 23.

Then, the constitution must be the supreme legal act of the normative edifice. There can be no person or institution, private or public, who can ignore or elude the provisions of the constitution in their activity, be it manifested in juridical forms or not. Otherwise, the constitution is at risk of becoming only a political act, a declaration of good intentions, and not a mandatory juridical document. That is why constitutionalism upholds that a constitution should not be merely an ornament, not even a splendid one, but a fully applicable document, invested with the highest juridical force.

In accordance with this position, all public institutions are called to enforce this document in all their activity. The courts of justice are especially bound to respect the constitution and to sanction any violation of its norms. Furthermore, for the purpose of protecting the superiority of constitutions, as legal documents, many constitutions designed a special safeguard of their efficiency and supremacy, namely a Constitutional Court. Independent and specialised, these institutions are endowed with an extensive authority to censor various unconstitutional manifestations. But their key attribution is to make sure that the second most important legal documents in a society, the laws, are in accordance with the constitution. When disagreements occur, the constitutional authority has the prerogative to suppress any laws, and often some other important legal documents, which contradict the constitutional provisions.

Finally, the fundamental act of a state should not be easily amended. Its provisions must enjoy longevity. Constitutionalism recommends that the constitution be rigid and not flexible. Their efficacy depends largely on their stability. Only after a longer period of application the constitutional norms become known and can generate that sentiment of attachment within society (public opinion and political actors), which is so important for establishing its authority. Attachment and respectability come in this area, as in other areas of life, mainly with age. But the rigidity of constitutions is designed especially as a precaution against ill-intentioned alterations of its content. The constitutional edifice must be protected against any sabotage from within, against any attempt to eliminate through revision those provisions that may hinder the abuse of power.

For this purpose of stability, constitutions include procedures of self-defence and self-preservation. The revision is usually allowed, but only through the observance of a difficult and complex procedure, which might involve strict conditions regarding the initiative, various consultative procedures, the activity and vote of the body (parliament or constituent assembly) designated to adopt the revision, and even the approval of a national referendum. Therefore, constitutional rigidity derives from the existence of such a complex procedure of revision. A constitution that can be easily modified through the common legislative procedure cannot impose its democratic provisions against any potential authoritarian tendencies. In addition, it is frequent for constitutions to impose certain limitations for their revision. Usually there are two types of limitations: disposition of the constitution that cannot be revised (for example, the democratic form of government, political pluralism, the integrity of the territory, etc.) or affected, in the sense of diminution (provisions related to human rights and liberties and their guarantees), and circumstances in which the constitutions cannot be revised (situations of crisis, conflict or urgency; in these periods the revision tends to be rash and nondemocratic). The purpose of all these constitutional measures is obvious: to ensure stability to the constitutions and especially to those provisions which are considered vital for the enforcement of democracy and power limitation.

This paper will focus on this specific aspect of constitutional engineering as it is reflected in the Romanian constitution.[5] A certain procedure is installed to regulate any attempts at revision. Our approach will hopefully be extensive, analysing and evaluating the constitutional amendment process from various perspectives. The first part is dedicated to the presentation of the juridical structure itself, its content, nuances, developments, challenges. Also, we will assess the implemented procedure from a practical standpoint, following the whole course of all its subsequent applications. In the

[5] The Romanian Constitution came into force on the 8 of December 1991, replacing the communist Constitution from 21 August 1965. It was modified only once in 2003, through the Law of revision No. 429/2003.

second part we will explore some alternative routes to achieve constitutional evolution.

7.2. A Restrictive Process

A constitution is very much like a temple, a sacred space that preserves the most precious values, principles, and rules of a nation. Therefore, it is only normal that any visit with revision intentions should be strictly restricted. Any modification in the constitutional thesaurus not only that has the potential to produce immense effects in the society, and therefore should be made wisely and competently, but also contains the inherent risk to derail that society from its democratic course.

But change is a normality. Transformations are inevitable. A society constantly evolves. Any public act must impose the most adequate regulation for an ever-changing reality. That is why the pressure for normative adaptability is immense. A constitution cannot stay unsensible or opposed to this tendency. It must be endowed with some measure of receptivity to outside evolution. Otherwise, it becomes obsolete, inadequate, basically a hindrance in the development of the society, and it will be, in one way or another, in a greater or lesser degree, adapted or trespassed.

This is one of the most important tensions of each constitutional structure: the balance that it is called to establish between stability and adaptability, between rigidity and flexibility.[6] And of course, the defining landmark of this balance is the specific way in which its intrinsic procedure of constitutional amendment is designed. The difficulty with which this procedure allows transformation is the major indicator of the type of constitution we are dealing with.

The purpose of this paper is to present and evaluate the Romanian constitutional solution on this matter. Naturally, we will begin with the presentation of the juridical regulation itself. The relevant

[6] See: Venice Commission (hereinafter: Venice Commission Report): Report on constitutional amendment adopted by the European Commission for Democracy through Law at its 81st Plenary Session, 11–12 December 2009, paragraph 8.

constitutional texts set the framework for such an analysis. But their concrete application is also relevant. Therefore, we intend to scrutinise how the procedure was observed in the various instances in which a constitutional amendment was attempted.

7.2.1. THE JURIDICAL REGULATION

The Romanian Constitution has 156 Articles, organised in eight main titles. One of these titles, title VII, is "The Revision of the Constitution", and it contains three articles, namely Articles 150–152, which form the main body of the provisions regulating the process of constitutional amendment. Several other articles have direct incidence upon this procedure: Article 11 paragraph 3, Article 63 paragraph 4, Article 73 paragraph 1, Article 115 paragraph 6, Article 146 paragraph 1 letters a), i)–j).

Even from the beginning, an obvious material distinction can be noticed between these provisions. Some of them refer to procedural aspects regarding the process of revision. Others address more substantial aspects, imposing various limitations on the capacity of revision itself. We will shape our study accordingly.

7.2.1.1. *The Procedure of Revision*

It is no surprise that the constitutional amendment process differs quite significantly from the common legislative procedure. Receptive to the exigencies of constitutionalism, inspired from the modern constitutional models, predominantly preoccupied with sustaining and strengthening a fragile new democracy, the original framers of the constitution permitted revision in far stricter terms than those imposed to the ordinary legislator. From the great variety of mechanisms available to hinder revision,[7] the constitution combines

[7] The two most widely used mechanisms in European constitutions are a qualified majority in parliament and time delays. Thus, the amendment process is usually kept within the parliamentary system. See: Venice Commission Report, paragraph 92.

several of them in an original manner, creating a unique constitutional solution. These elements gravitate around the two fundamental decisions that must occur in order to reach a constitutional amendment: the decision of the Parliament and the decision of the people expressed in a referendum.

7.2.1.1.1. Decision of the Parliament

There are systems in which the decision of revision cannot be made by the parliament in office. A new parliament must be formed to decide upon any constitutional amendment.[8] The current Romanian constitution did not embrace this logic. The ordinary legislator serves also as constitutional legislator. There are several aspects essential to this decision.

[8] This was in fact the case with the previous Romanian democratic constitutions, namely the Constitution from 1866 and the Constitution from 1923. Both of them implemented the same double legislature system: the parliament in office has the right to declare that certain provisions of the constitution shall be subject to revision, but then both assemblies are automatically dissolved, and the new elected parliament will decide upon the revision, in agreement with the king. The assemblies elected to revise the constitution have a regular constitutional duration and, apart from amending the constitution, they also function as ordinary legislative assemblies. This system presents an unusual difficulty, namely the inherent tendency for self-preservation of the parliament in office. In other words, a revision can take place only if the members of the parliament are willing to lose their mandate. Thereby, on this essential aspect, the solution of the present constitution represents a major deviation from the traditional one. See: G. Alexianu, *Curs de drept constituțional*, Bucharest 1930, pp. 341–365; V. Duculescu, G. Duculescu, *Revizuirea Constituției. Istoric. Drept comparat. Documente. Opinii*, Bucharest 2002, pp. 50–57; E. Focseneanu, *Istoria constituțională a României (1859–2003)*, Bucharest 2018, pp. 35–89; M. Enache, M. Safta, *Romania's constitutional arch 1866–2016. Benchmarks for the revision of the Constitution*, Romanian Constitutional Court Bulletin 2016, pp. 1–4, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ccr.ro/wp-content/uploads/2021/07/Studii_EN.pdf, [access: 08.07.2023].

A. The Initiative

Article 150 regulates three[9] possible avenues[10] to start an amendment procedure, every one of them regulating the amendment initiative in more restrictive terms than those imposed for the ordinary legislative procedure:

1. The President of Romania on the proposal of the Government. The point of difference is here the role given to the head of the state. In the case of all other laws, the Government is endowed with the right to legislative initiative. But here a joint competence is imposed. The two authorities are bound to collaborate. Neither of them can act without the other. Nevertheless, receiving the proposal from the government, the President has the complete freedom to decide if he initiates or not the procedure of revision. Furthermore, if he decides to exercise his right to start the amendment process, he has the complete liberty to modify the project transmitted to him by the Government. In other words, the President can appropriate the Government's proposal in its entirety, only partially, or he can freely add his own contribution.[11]

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[9] Both, 1866 and 1923, Constitutions stipulated only two possible forms of initiative: the initiative of the king or of any of the assemblies.

[10] The enumeration is limitative. There are no other possibilities to start the amendment process. The Constitutional Court has underlined this principle in Decision No. 35/1996, declaring as unconstitutional a certain provision that simply reiterated the constitutional text imposing amendment limitations as interdictions for the political parties. The Court noticed that these limitations are applicable only for those subjects having the constitutional right to initiate constitutional revision and the political parties are not mentioned among them. By directly imposing the constitutional limits of revision to the political parties, the above-mentioned provision contains the insidious presupposition that the political parties could in principle promote a constitutional amendment. That is why the Constitutional Court declared this provision as unconstitutional: the expansion of the list of persons that are able to promote constitutional amendment would be in itself a constitutional revision that took place bypassing the existing procedure.

[11] See: Decision No. 799/2011. In this case, the President has made some changes to the project sent to him by the Government. The Constitutional Court ascertained that this practice is constitutional. Any other interpretation would leave the President with only a formal role and would completely void his right to revision initiative. This right was given to him (by the constitution) considering his role and position in the political system, which allows him to know the

2. At least one quarter of the number of deputies or senators. As for the parliamentary initiative, it must gather quite a substantial support: a minimum of one fourth of the total number of either chamber. A single deputy or senator has instead the right to initiate the ordinary legislative process. Even though the constitutional condition is fulfilled if it is upheld by the prescribed number of the members of one chamber, it is a common practice that a parliamentary amendment proposal is accompanied by two separate lists of required supporters, one from the deputies and one from the senators. However, the two lists must be treated as completely separate and it is not allowed to take into account some signatures from one list to the total number of the supporters on the other list.[12] The two lists cannot intermingle.
3. 500,000 citizens with the right to vote. This popular initiative is the most complex one and raises many practical issues. There are two major conditions that the constitution imposes to this initiative. The first one is the actual number of required signatures, which is 500,000 (only 100,000 citizens with the right to vote are enough to initiate the legislative process for the other laws), which attests to the constitutional preoccupation for the existence of a real and consistent popular support in favour of the constitutional revision. The second one, mentioned in Article 150 paragraph 2, imposes a territorial dispersion of the supporters, with the intent of assuring a certain degree of national representativity: "The citizens who

evolution of society and its development prospects. Therefore, he must have the opportunity to materialize his observations through initiating a constitutional revision. Of course, this possibility appears when, by the proposal of the Government, an accord between the two representatives of the executive power is reached regarding the initiation of such a procedure.

[12] An interesting situation appeared in 2019, when an amendment proposal was signed by 131 deputies and 9 senators. In this case, the Constitutional Court considered that the right to initiate constitutional revision was correctly exercised because the number of the deputies exceeded one quarter of the total members of that chamber. As for the senators' signatures, they were obviously insufficient. Consequently, as a general principle, they cannot be taken into consideration and cannot be added to the number of deputies for the purpose of meeting the minimum number imposed by the constitution. See: Decision No. 465/2019, paragraph 8.

initiate the revision of the constitution must belong to at least half the number of the counties in the country, and in each of the respective counties or in the municipality of Bucharest, at least 20,000 signatures must be recorded in support of this initiative".

Law No. 189/1999 regulates the concrete modality in which the popular initiative is to be exercised: an initiative committee must be constituted; this committee will draft the amendment proposal and will represent the citizens who support this initiative after they give their signature; both the composition of the committee and the amendment proposal are published in the Official Gazette of Romania; from this moment on, the committee must collect signatures and register the proposal to the parliament within a period of six months.

It is important to underline that the amendment proposal must have the specific juridical form of a bill and cannot be only a declaration of intentions or a general proposal that certain constitutional aspects should be revised. That is why the proposal must be previously advised by the Legislative Council,[13] who oversees that the proposal complies with all the exigencies of normative technique.

B. The Decision of the Constitutional Court

Before the notification of Parliament with the amendment proposal, the Constitutional Court shall decide, *ex officio*, on initiatives to revise the constitution (Article 146 paragraph 1 letter a)). The involvement of the Court in this procedure is not purely formal, its decision being mandatory for the Parliament.[14] The Court must decide if the constitutional provisions regarding the revision are accurately observed. If the Court declares the initiative unconstitutional, the Parliament cannot adopt it. Likewise, the same interdiction applies if only some specific amendments within the initiative are considered to violate some limits of revision.

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[13] According to the Article 79 paragraph 1, the Legislative Council is an advisory expert body of Parliament, that advises draft normative acts for the purpose of a systematic unification and coordination of the whole body of laws.

[14] F.B. Vasilescu, *Constituționalitate și constituționalism*, Bucharest 1998, pp. 183–190.

According to the Law No. 47/1992 regarding the organisation and functioning of the Constitutional Court, it is the Court's obligation to give its ruling within 10 days, the Court deciding with a majority of two-thirds of its members. The decision of the Court is communicated to those who have initiated the amendment procedure. The proposal cannot be transmitted to the Parliament without the decision of the Court.

Over time, the Constitutional Court has developed a certain paradigm in evaluating the constitutionality of the revision initiatives. First, the Court has repeatedly stated that it is not within its competence to examine the opportunity of the amendment proposals,[15] this attribution belonging to the Parliament and to the citizens. Then, the Court verifies if the constitutional conditions imposed on the initiative itself are observed. This phase is normally a simple one and requires extensive verification only in the case of the citizens' proposal.[16] Finally, the Court proceeds at evaluating the constitutionality of the proposal itself in rapport with the limits of revision, verifying the extrinsic constitutional conditions (mentioned by the Article 152 paragraph 3 and Article 63 paragraph 4 – the normality of the circumstances in which the revision takes place), which were never in question, and the intrinsic constitutional conditions (Article 152 paragraphs 1 and 2 – the specific provisions that cannot be amended), which typically occupy the vast majority of the Court's considerations.

[15] Decision No. 580/2016, paragraph 30; Decision No. 222/2019, paragraph 17.

[16] The greatest challenge in this process is not the number of signatures, the territorial dispersion, or the other conditions imposed on the initiative committee and on its activity. Instead, it is the verification of the lists containing the citizen's support. More precisely, the Court considered that it exceeds its competence to verify the activity of the initiative committee's members, the modality in which the signatures were collected or the accuracy of the collected data. It pertains to the Court to control only the legal attestation of the signature lists. Usually the Court finds many irregularities, like the absence of any attestation, attestations made by other persons than those indicated by the law, photocopied lists of signatures, incomplete attestation formula. See: Decisions No. 580/2016, paragraphs 31–33; Decision No. 222/2019, paragraphs 18–20. The Court takes into considerations only the list/signatures that are legally and correctly attested. For example, in a 2016 citizens' proposal, 62,039 signatures were not legally attested.

Some amendments generate intense reaction from various groups and a fierce debate in society. Consequently, the Constitutional Court is bombarded, in this phase, with *amicus curiae* memorandums. This type of intervention in the Court's proceedings does not entitle its authors to any standing before the Court but has only the significance of expressing an opinion/position regarding the issue under consideration, as a support for the Court in the resolution of the case.[17]

It is worth noting that the Constitutional Court assumes a much bigger role in the analysis of the revision proposals. We would expect the Court only to state if the amendment proposals pertaining to a revision initiative are complying with the limits of revision or not. But the Court does much more than that. That is why two different dimensions can be frequently identified throughout a decision's considerations. One dimension is the one we have already mentioned, the obvious one, in which the Court makes an assessment from the constitutional limitations standpoint and declares as unconstitutional any part of the proposal that violates these limits. This part of the decision is mandatory, as stated before. But there is another dimension, a surprising one, in which the Court expresses its critical opinion on the proposal, but for other reasons. A careful reading of these considerations reveals two major points of criticism, one regarding drafting problems[18] and the other opportunity

[17] See: Decision No. 580/2016, paragraph 21.

[18] The spectrum of drafting deficiencies is broad, as a testimony to the rigorous standards imposed by the Court. The most common one is related to deficient, imprecise or improper wording: Decision No. 148/2003, paragraph II.B1. a) and paragraph II.C. a); Decision No. 799/2011, proposal related to Article 138; Decision No. 80/2014, paragraphs 25, 240, 300, 358, 382, 385, 407, 424; Decision No. 464/2019, paragraph 65. Others refer to: a lack of juridical logic (Decision No. 80/2014, paragraphs 27, 269), an increased level of detail (Decision No. 80/2014, paragraph 74); lack of correlation with other norms and redundancy (Decision No. 148/2003, paragraph II.C. a); the proposed solutions pertain rather to the legal than to the constitutional level (Decision No. 148/2003, paragraph II.C. d); Decision No. 80/2014, paragraph 194; Decision No. 464/2019, paragraph 24). Consequently, the Court advises various recommendations: rewording of phrases, replacing words, reformulations, abandon of intended modifications, insertion of new paragraphs. A paragraph from the Decision No. 80/2014 is revealing of the guiding position assumed by the Court: "the Court

questions.[19] As a result of the detected insufficiencies, the Court makes recommendations which are not mandatory for the initiators or the Parliament.

C. The Decision of the Parliament

This is an essential moment in the course of the amendment process. The Parliament, as the supreme representative body of the Romanian people and the sole legislative authority of the country (Article 61 paragraph 1), has the constitutional prerogative to decide the fate of the revision proposal. For this purpose, the Parliament will follow largely its common legislative procedure, with two major differences:

1. The qualified majority.
   According to Article 151 paragraph 1: "The draft or proposal of revision must be adopted by the Chamber of Deputies and the Senate, by a majority of at least two thirds of the members of each chamber". It is a widespread majority in similar European procedures, significantly stronger than the majority required in the Romanian constitutional system for the passing of other laws: a simple majority (the majority of the members present) in the case of the ordinary laws (Article 76 paragraph 2) and an absolute majority (the majority of the members of a chamber) in the case of the organic laws (Article 76 paragraph 1).[20]

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recommends to the constituent legislator […] not to operate with terms and notions that do not have a correspondent in the juridical reality, to use a concise and precise language and to establish rules with principle's value" (paragraph 277).

[19] Sometimes the Court goes as far as making recommendations based on the opportunity of a certain proposal, expressing reservations (Decision No. 799/2011, proposals referring to Article 90 and to Article 138) or encouraging a reconsideration or a completion of an existing constitutional provision (Decision No. 799/2011, proposals referring to Article 133 and to Article 146). This denotes a proactive, almost creative position that the Court assumes in its analysis.

[20] According to Article 73 paragraph 1, there are three classes of laws that the Parliament can adopt: constitutional, organic, and ordinary laws. The constitutional laws are those of revision. The organic laws are those who regulate some specific areas, concretely stipulated by the constitution.

2. The functional equality of the two chambers.
The Romanian bicameralism is obsessively equalitarian. There is an obvious constitutional preoccupation not to favour one of the chambers. As for the common legislative procedure, the constitution initially created a perfect equality between the chambers. No draft could have been adopted without its approval by each chamber. That was rarely the case, so the so-called "legislative commute" began, a process in which the draft was repeatedly sent between the chambers in the hope of reaching an agreement as to its final shape. This system was deemed deficient, especially due to its lack of celerity, and was replaced in 2003 with the purpose of speeding the legislative process. Surprisingly, the new system abandoned the functional equality between the chambers, one of them becoming a consultative one (the first notified chamber) and the other the decision-making one.[21] Therefore, the decision of the first chamber was not mandatory anymore, being only a possible landmark for the second chamber, whose decision was final. Nevertheless, the equalitarian obsession prevailed again, because each of the two chambers alternate in the lead role of decisional chamber. Thus, for some laws the Senate is the decisional chamber and the Chamber of Deputies the first notified chamber. For other laws the positions interchange. Furthermore, there is no obvious quantitative or qualitative difference between the two domains of laws governed separately by the decisional competence of each chamber. The equality between the chambers is thus restored. The system is ingenious: inequality for reasons of efficiency at the level of one law, but equality for reasons not very clear (ego? legitimacy? mutual control?) at the level of the general legislative activity.

The only situation in which the functional equality between the chambers is preserved remains the process of revision. In this area, the initial paradigm is still applicable. Each chamber must adopt separately, with the above-mentioned majority,

[21] The classic reflection/decisional chamber dichotomy. The Constitutional Court compared the two legislative systems for example in Decision No. 431/2017, paragraphs 25–32.

the amendment proposal, both having a decisional quality. The drastic consequence is that they both must completely agree on the final form of the revision. Such a requirement sets the premises for a procedural blockage due to the improbability of both chambers reaching the same result.[22] Of course, if the chambers adopt the proposal in the exact same form, the law of revision is considered adopted and immediately sent to the Constitutional Court to verify its constitutionality. But in the more likely event that they don't,[23] the constitution installs two additional mechanisms in order to solve the divergences between chambers.

The first one is the mediation procedure. This is a holdover of the old legislative philosophy, operating now only in the case of the constitutional amendment process. The reference to it, although brief (Article 151 paragraph 2: "If no agreement can be reached by a mediation procedure […]"), is nevertheless significant. It represents the first attempt to bring the chambers to a common denominator. The most relevant features of this procedure are the following:

[22] The parliamentary amendment process is not taking place simultaneously in the two chambers. Those who initiate the revision have the liberty to choose which chamber will they first notify with their draft. The Constitutional Court has declared as unconstitutional a provision from the Rules of the Senate which imposed the revision initiative to be firstly submitted to the Chamber of the Deputies and only after its adoption to be transmitted to the Senate. See: Decision No. 431/2017, paragraphs 32–34.

[23] The hypothesis is that both chambers adopted the law of revision, but in different versions. There is nevertheless a third variant: one of the chambers adopts the revision draft and the other rejects it. In this case there is no direct recourse to the mediation procedure. Even though there is no legal or constitutional provision for this situation, the Constitutional Court expressed its opinion on the matter, deducing a solution based on the common legislative procedure that operated before the 2003 constitutional amendment. Thus, the Court concluded that if the first notified chamber adopts the proposal, but the second chamber rejects it, the draft is resent to the first chamber for a new debate. If rejected here, the procedure of revision ends and goes no further. If adopted, the draft is sent again to the second chamber. The solution now given by this chamber will settle the fate of the proposal. If rejected, the procedure ends. If adopted in the same form as the first chamber, the proposal is considered adopted by the Parliament. If adopted in a different form, there will be a mediation procedure. See: Decision No. 431/2017, paragraph 35.

i. A mediation commission is constituted, composed of 14 members: 7 deputies and 7 senators. The commission establishes the rules of its activity and the deadline for its report. This report is essential, being a first agreement between the representatives of the two chambers. The decisions of the commission are adopted with the majority of the members present at the meeting. Its activity ceases with the submission of the final report or if the commission does not agree upon the report in the self-imposed time.
ii. The commission's report is debated in each chamber. There will be a vote only for the solutions proposed by the commission that are different from what the chamber has initially adopted. The majority required is the majority of two-thirds required for adoption of the law of revision in its final form.
iii. If the mediation commission does not reach an agreement, or if one of the chambers does not approve, totally or partially, the mediation commission's report, the mediation procedure was unsuccessful. However, the draft is not yet definitively dismissed. One last constitutional procedure remains to be attempted.

This second mechanism is the joint sitting of the two chambers: "If no agreement can be reached by a mediation procedure, the Chamber of Deputies and the Senate shall decide thereupon, in joint sitting, by the vote of at least three-quarters of the number of deputies and senators" (Article 151 paragraph 2). The debate and the decision of the entire Parliament, gathered in a joint session, regards practically only the provisions still in divergence between the chambers. There is a new, enhanced majority imposed on the Parliament to pass the law of revision: three-quarters from the total members of deputies and senators. It might be difficult at first to understand why the constitution requires this higher majority. The explanation lies in the significant difference between the number of the deputies and that of the senators.[24] If the two-thirds majority would have been preserved, it is obvious that the opinion

[24] For example, in the present legislative, there are 330 deputies and 135 senators. According to Article 5 of Law No. 208/2015 regarding the election of the

of the deputies would probably prevail against that of the senators. The three-quarters majority was thus installed to give value to the vote and to the position of the senators. The entire parliamentary amendment process is based, as we have seen, on the perfect equality between the two chambers and this conception is reflected even in this final phase of the procedure.

D. A New Decision of the Constitutional Court?

Up to this point, the first major decision regarding the amendment proposal is already taken: the Parliament either rejects or adopts the proposal. In the first case, the amendment process is over and the constitution remains unchanged. In the second case, the revision process continues, but is not yet complete. It still needs the second major decision, namely the vote of the people expressed in a referendum.

But until the referendum takes place, an interesting question arises regarding the possibility of a new involvement of the Constitutional Court. More precisely, it is debated whether the Court has the prerogative to verify the constitutionality of the revision law adopted by the Parliament. A straightforward answer has not been forthcoming.

At first, the possibility that the Court has such a prerogative was firmly excluded by the Constitutional Court itself.[25] The main argument was a textual one: neither the Constitution nor other laws stipulate an attribution of the Constitutional Court to adjudicate again on the constitutionality of the law of revision adopted by the Parliament. As we have seen, Article 146 letter a) delineates a role for the Constitutional Court only regarding the control of the revision initiatives. In addition, the Court appealed to a wider

Senate and the Chamber of Deputies, the representation rate is one deputy for 73,000 inhabitants and one senator for 168,000 inhabitants.

[25] Decision No. 356/2003; Decision No. 385/2003. On the 2003 amendment process, that eventually leaded to the first and only constitutional amendment of our present constitution, the Constitutional Court was notified twice, first by 69 deputies and then by 27 senators, with a request to ascertain the unconstitutionality of the revision law adopted by the Parliament. Through the two mentioned decisions the Court refused to assume such a prerogative.

constitutional principle: when the Romanian people, as an entity that has sovereignty, is called to decide by referendum on the law of revision, and since the Parliament already adopted that revision law, no other public authority can interpose their judgement.

Then, an apparently insignificant change introduced in the 2003 constitutional revision opened up the possibility for a completely new approach. Thus, in the article enumerating the attributions of the Constitutional Court, a final paragraph was inserted which stated that the Court can "carry out also other duties stipulated by the organic law of the Court" (Article 146 letter l) in the present). Law No. 47/1992, the organic law of the Court, was soon modified through Law No. 232/2004 as to expressly stipulate that the Constitutional Court must adjudicate on the law of revision adopted by the Parliament.[26] This reasoning has since been well-established[27] and was put into practice in the subsequent amendment procedures[28] (of course, in those cases in which the procedure reached this point).

Therefore, according to Article 23 of Law No. 47/1992, the Constitutional Court shall decide within five days, *ex officio*, on the law of revision adopted by the Parliament. The procedure is the same as the one imposed for the first decision regarding the revision initiatives. The Court examines two aspects: if its previous decision was observed and none of its unconstitutionality findings were ignored and are still preserved by the Parliament in the content of the adopted revision law; if the modifications and additions made through the parliamentary procedure to the initial proposal are compliant with the constitutional provisions and principals related

[26] The argument for establishing such a prerogative was in fact to make sure that the Parliament conforms with the first decision of the Court pronounced with regard to the constitutional revision initiative. In the absence of such a mechanism there is the danger of the Parliament circumventing the mandatory effects of the Constitutional Court's decision. The constitutional control realized by the Court would thus become completely devoid of efficiency and that was deemed as incompatible with the rule of law principle and the role of the Constitutional Court.

[27] See: Decision No. 539/2018 paragraphs 18–20.

[28] Even so, the Constitutional Court has repeatedly made the recommendation to expressly insert this prerogative in the constitutional text itself. See: Decision No. 799/2011, proposal referring to Article 146; Decision No. 80/2014, paragraphs 432–435.

to revision.[29] Either way, the decision of the Court is mandatory and the next stage of the law of revision depends on the Court's findings. If the limits of revision were observed, the law of revision is published in the Official Gazette of Romania together with the decision of the Constitutional Court. The preparation for the referendum then begins. But if the limits of revision were violated, the law of revision is again sent to the Parliament, which must resume the whole procedure in order to bring the law of revision in line with the decision of the Constitutional Court.[30]

7.2.1.2. *Approval by Referendum*

There is a direct correlation between the number of decisions and the number of actors involved in a course of an amendment process and the actual rigidity of a constitution.[31] The majority of the new democracies in Central and Eastern Europe have chosen the solution of a two-thirds majority and a certain time delay, but without other very strict obstacles, keeping the amendment process within the parliament's competence. This is considered a balanced, middle-of-the-road solution.[32] But the Romanian constitution imposes a second major decision besides that of the parliament, namely the decision of the people expressed in a mandatory national referendum. Therefore, there are not one, but two major decisions/actors involved in the process of revision: first the Parliament and then the entire nation. Moreover, since the decision in Parliament involves the separate, independent, and equally important decisions of both

[29] For more considerations about the nature of the two types of control exercised by the Constitutional Court in the amendment process, see: Decision No. 539/2018, paragraphs 21–36.

[30] See: I. Deleanu, *Instituții și proceduri constituționale*, Bucharest 2006, p. 440.

[31] There is a traditional view that considered the qualified majority in parliament as the single most important mechanism for determining the actual rigidity or flexibility of a given constitutional system. But in more recent studies, some authors have argued that in fact the two most important elements are the number of decisions and the number of actors involved in the revision process. See: Venice Commission Report, paragraphs 98–99.

[32] Venice Commission Report, paragraphs 66–67.

its chambers, as we have previously show, there are in fact three important actors. That is why the Romanian constitution can be considered as an excessively rigid one.[33]

The Venice Commission considers that the national parliament is the most appropriate arena for constitutional amendment, in line with the modern idea of democracy.[34] The direct involvement of the people in the revision process through a referendum has probably only one upside: it strengthens the legitimacy of the constitutional amendment. Regarding the appeal to a referendum in this procedure, the Venice Commission made the following important remarks:[35]

- It is equally legitimate either to include or not to include a popular referendum as part of the procedure.
- A referendum on constitutional amendment should not be held unless the constitution explicitly provides for this.
- The requirement that all constitutional amendments be submitted to referendum risks making the constitution excessively rigid. This is exactly the case in the Romanian constitution.
- The recourse to a referendum should not be used by the executive in order to circumvent parliamentary amendment procedures.

[33] The anterior Romanian democratic constitutions did not require a referendum for the constitutional revision. Both adopted the system of a time delay in the parliament, dissolution of the parliament and the election of new assemblies, and then a qualified majority of two-thirds for the adoption of the constitutional revision. In the 1866 Constitution the legislative power had the right to declare that certain specific provisions of the constitution must be revised. This declaration was read three times, each 15 days, and was received by both assemblies. After that the parliament was automatically dissolved and a new one was elected. In the 1923 Constitution the system was very similar, but the role of the first parliament was significantly greater before its dissolution: both its assemblies decided separately with an absolute majority upon the necessity of a revision; then a mixt commission was formed with the purpose of proposing the specific constitutional texts that were to be revised; the report of the commission was to be read twice in each assembly at a 15 days interval and then the entire parliament, in joint setting, with a majority of two-thirds, would have to definitively decide which specific articles will be subjected to revision.

[34] Venice Commission Report, paragraph 183.

[35] Ibidem, paragraphs 184–193.

- There is a strong risk, in particular in new democracies, that referendums on constitutional amendment are turned into plebiscites on the leadership of that country and that such referendums are used as a means to provide legitimacy to authoritarian tendencies.
- It is important that the relevant rules on referendum are sufficiently clear and precise.

According to the Article 151 paragraph 3: "The revision shall be final after the approval by a referendum held within 30 days of the date of passing the draft or proposal of revision." This text, together with the provisions of the Law No. 3/2000, set out the rules for the referendum:

- The referendum will take place in the last Sunday of the 30 days period mentioned in the Article 151 paragraph 3, calculated from the date when the Parliament adopted the law of revision.
- The Government has the obligation to immediately announce to the public through public media the text and the date of the national referendum.
- The citizens that participate to the referendum will answer with "yes" or "no" to the following question: "Do you agree with the law revising the Romanian constitution in the form approved by the Parliament?"
- The referendum is valid only if at least 30% of the people registered on the permanent electoral lists participate. There is the additional condition related to the precent of valid votes: at least 25% of those registered on the permanent electoral lists.
- The majority of valid votes will decide the fate of the law of revision. If against it, the law of revision is rejected, the procedure ends, and the constitution will remain unchanged. If for it, the process of revision is successfully completed, and the constitution will have a new form.

Finally, one last confirmation must be given by the Constitutional Court. According to Article 146 letter i), the Constitutional Court has the obligation "to guard the observance of the procedure for the organisation and holding of a referendum, and to confirm its returns". The Court will decide with a majority of two-thirds

of its nine members on the validity of the referendum. The Court establishes if the procedure for organising and conducting the referendum was observed and confirms its results. The decision of the Court is presented to the two chambers of the Parliament in joint session[36] before its publication in the Official Gazette of Romania.

7.2.2. THE LIMITS OF REVISION

Besides the procedural obstacles, modern constitutions impose restrictions even on the capacity of revision itself. That means that certain forms of amendment are simply not allowed. The rigidity of a constitution is thus significantly increased, making the amendment process even more difficult. The practice is a generalised one and typically refers to special limitations regarding the object, the time or the circumstances of revision. The Romanian constitution also employs this technique and establishes two types of amendment interdictions: one regarding the provisions that cannot be revised, the other regarding the circumstances that prevent revision.

7.2.2.1. *Provisions That Cannot Be Revised*

Even if their legitimacy and authority is sometimes questioned,[37] these kinds of provisions are a formidable instrument for affirming

[36] Articles 46–47 of the Law No. 47/1992.

[37] The fundamental objection is this: why has one generation a superior right to regulate than the following ones? Because the restrictions imposed by the constitution at one moment of history remain over time and bind the capacity of future generations. But the right of a human society to choose its own law and form of government is inalienable and imprescriptible. That is why provisions like that should be considered as lacking proper juridical value and force, being simple desires that can be observed or not by the next generations. The argument fails to recognize that these limitations are not randomly imposed, but they express the legitimate commitment of a nation to a set of core values that are considered as essential for that specific form of statal organization and identity. In our opinion, the question is rather to know if these values were truly formed, correctly identified, completely selected, and appropriately regulated in

and protecting the hard core of a constitution, that part of it that contains the non-negotiable principles. The Romanian constitution institutes several such prohibitions, but with different degrees of intensity.

A. Absolute prohibition

Article 152 paragraph 1 states that:

> *The provisions of this Constitution concerning the national, independent, unitary and indivisible character of the Romanian state, the republican form of government, the integrity of the territory, the independence of justice, political pluralism and official language shall not be subject to revision.*

This is the select number of provisions that are unamendable at any time and under any circumstance. Imposing their complete intangibility, the constitution assumes a great risk. This type of absolute rigidity confers a great protection to the provisions themselves but renders the constitution as a whole more vulnerable. Its refusal to accept any kind of development means that any desire for evolution is continually repressed. But the pressure for change can build up and become so strong that the end result will be the demise of the constitution itself. In other words, the constitution ties its own existence to these provisions. They are so important that the constitution is ready rather to cease to exist than to operate without them.

It is worth noting that these provisions can be divided in two categories. On one hand, the majority of them are related to several fundamental characteristics of the Romanian state: its national,

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the constitutional text. For the lasting debate in the Romanian doctrine related to this issue, see: C. Dissescu, *Dreptul constituțional*, Bucharest 1915, pp. 420–321; G. Alexianu, *Curs de drept constitutional*, *op. cit.*, pp. 341–345; C. Rarincescu, *Curs de drept constituțional*, Bucharest 1940, pp. 204–205; T. Drăganu, *Drept constituțional și instituții politice*, Bucharest 2000, Vol. 1, pp. 54–56; D.C. Dănișor, *Drept constitutional și instituții politice*, Bucharest 2007, pp. 387–388.

independent, unitary, and indivisible character,[38] the republican form of government, the integrity of its territory and the official language. The others, namely the independence of justice and the political pluralism, aim primarily at safeguarding democracy.

The interdiction being so categorically and emphatically formulated, the provisions themselves were never subject to amendment attempts. Even though this is the meaning of the constitutional text, the Constitutional Court has developed an interesting jurisprudence, extending the prohibition from the revision of the provisions themselves[39] to the prohibition of any kind of revision proposal which can affect, in any way, the values proclaimed by these provisions. As a consequence, the Court had declared as unconstitutional several proposals considered as incompatible with, interfering with, or affecting the values and principles expressed by these provisions. In our opinion, this is a major deviation from the actual content of the constitutional prohibition. We will succinctly present these proposals.

One of them is an increasing the number of members representing civil society in the Superior Council of Magistracy[40] from two to six, three designated by the Parliament and three by the President. This proposal was considered to have a negative influence on the judiciary and is a political interference in the justice system. The Court has thus declared that the proposal is unconstitutional because it has the effect of infringing upon the independence of justice:[41]

[38] A reference to paragraph 1 of the constitution: "Romania is a national state, sovereign and independent, unitary and indivisible" (Article 1 paragraph 1). Article 152 paragraph 1 reiterates all these fundamental features of the Romanian state, each of them hard-earned throughout its tumultuous history, except one: sovereignty. The explanation lies in the desire to make this particular trait of the state more flexible in the present context of European integration.

[39] Each such provision can be easily identified. We already mentioned the content of Article 1 paragraph 1. The republican form of government is regulated by Article 1 paragraph 2, the integrity of the territory by Article 3 paragraph 1, and so on.

[40] According to Article 133, the Superior Council of Magistracy is the guarantor of the independence of justice. The Council consists of 19 members: 14 magistrates, 2 representatives of the civil society, the Minister of Justice, the President of the High Court of Cassation and Justice, and the General Public Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice.

[41] Decision No. 799/2011, proposals referring to Article 133. The same solution was given in the Decision No. 80/2014, paragraphs 363–370, where the proposal

i. Introduction of a different territorial administrative organisation, with a different rationale from the one underlying the delimitation of the administrative territorial units expressly and restrictively provided for by the constitution. This proposal was considered as liable to infringe upon the unitary character of the state.[42]
ii. Establishing the possibility for legal representatives of national minorities to set up their own decision-making and executive bodies is detrimental to the unitary character of the Romanian state and thus in contradiction with the Article 152 paragraph 1.[43]
iii. The use of their distinctive symbols by the national minorities is detrimental to the national character of the Romanian state, thus violating the limits of revision provided by Article 152 paragraph 1.[44]
iv. The generalised obligation attributed to the decisions of the National Security Council may affect the independence of justice.[45] These decisions would receive a juridical force similar to laws and become mandatory for all public administrative authorities and public institutions.

B. Relative prohibition

According to Article 152 paragraph 2: "Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms or their guarantees." In this case the interdiction is not absolute. Suppression is here the key word.

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was to increase the number of civil society representatives only from two to four, the total members of the Council being thus 21.

[42] Decision No. 80/2014, paragraphs 29–36. More specifically, the proposal regulated the possibility of recognising traditional areas as administrative subdivisions of regions.

[43] Decision No. 80/2014, paragraphs 37–42.

[44] Decision No. 80/2014, paragraphs 48–51. The proposal was thus formulated: "national minorities may freely use, in public and private spaces, their own symbols representing their ethnic, cultural, linguistic and religious identity".

[45] Decision No. 80/2014, paragraphs 341–351. It was a proposal intendent to change the name and the attributions of the Supreme Council of National Defence.

The Constitutional Court has interpreted it as meaning not only elimination, but any form of restriction or diminishing.[46] Therefore, revisions are permitted, but only in an upward direction. In other words, a revision in this area can only increase the level of protection provided by the constitution for the citizens, both by extending the sphere of their fundamental rights and freedoms and by providing more effective guarantees of existing rights.[47] It was only normal to leave open the possibility for this vital part of the constitution to evolve and improve.

The jurisprudence of the Constitutional Court related to this limitation is abundant. The Court has here a large power of appreciation. The notion of restricting a fundamental right offers a lot of leeway. This was combined with the Court's profound attachment to the protection of the human rights and with its organic reticence in allowing constitutional amendment (and maybe sometimes with the Court's annoyance at poorly made proposals). The combination of these factors generated the preponderance of verdicts of unconstitutionality given by the Court on this ground to various amendment proposals. The arguments, connections, interpretations, conclusions, and the overall juridical gymnastics displayed by the Court in this area are impressive. We would like to present several such situations of unconstitutionality, differentiated in the two categories presented by the constitutional text itself: suppression of the fundamental rights and freedoms and suppression of their guarantees.

1. Suppression of citizens' fundamental rights and freedoms:
   - The decisions of the Superior Council of Magistracy Council cannot be challenged before the courts. Such a provision would have the effect of suppressing the fundamental right of free access to justice.[48]
   - Reducing the possibility of state intervention in the secrecy of correspondence only to the situation of criminal proceedings

[46] Decision No. 222/2019, paragraphs 25–47.

[47] Decision No. 80/2014, paragraphs 65, 75; Decision No. 464/2019, paragraphs 29, 73.

[48] Decision No. 148/2003, paragraph II. B1. b).

violates the limits of review. These severe limitations makes it impossible for the state to fulfil its positive obligations to defend fundamental rights and freedoms, for example to protect the physical and mental integrity of persons against the action or inaction of third parties.[49] The interesting conclusion of this particular solution is that an increase in the protection of one fundamental right could result in a suppression/reduction of the protection of another fundamental right.[50]

- The introduction of a time condition (residence in Romania for at least 6 months before the elections) for the persons who wish to be a candidate in the elections for the Parliament and the office of President of Romania represents a suppression of the right to be elected of the Romanian citizens who do not meet this condition. Moreover, this condition violates the limits of revision by suppressing the principle of universality of rights regulated by Article 15 paragraph 1.[51]
- The obligation of public and private persons to appear before parliamentary committees infringes the individual freedom enshrined in Article 23 of the Constitution.[52]

2. Suppression of the guarantees:
   - A recurrent proposal was to remove the presumption of lawful acquisition of wealth. The Court has repeatedly stated that this presumption is one of the constitutional guarantees of the right to property.[53]
   - Removal of inviolability as a form of parliamentary immunity. It has the direct effect of suppressing a guarantee which concerns both the mandate of the chambers (this does not concern though a fundamental right or freedom) and of each individual parliamentarian. Moreover, it has the effect

[49] Decision No. 80/2014, paragraphs 108–113.

[50] The same reasoning was used by the Court to rule that the absolutisation of property right prevents the legislature from protecting the competing rights and freedoms of other citizens. See: Decision No. 80/2014, paragraphs 143–148.

[51] Decision No. 80/2014, paragraphs 133–137.

[52] Decision No. 80/2014, paragraphs 201–208.

[53] Decision No. 85/1996; Decision No. 799/2011, proposal referring to Article 44.

of suppressing a guarantee of personal freedom and freedom of expression of the person occupying the public dignity of parliamentarian.[54]

- Introduction of the possibility to use illegally obtained evidence if it is in favour of the accused. The Court held that the lawful taking of evidence is a guarantee of the right to a fair trial and the proposal removes this guarantee.[55]
- The provision whereby parliamentarians who resign from the political party from which they were elected and join another party lose their mandate. This was considered to supress a guarantee of the fundamental rights and freedoms which is the representative mandate.[56]
- The indirect elimination of certain attributions of the Constitutional Court prevents the access to constitutional justice for the defence of constitutional values, rules, and principles. This means a suppression of a guarantee of these values, rules and principles, which also include the sphere of fundamental rights and freedoms.[57]
- The elimination of the state's power to grant amnesty and pardon for acts of corruption violates the principle of equality, which is a guarantee of fundamental rights and freedoms.[58] The Court has ruled that all the general principles that precede the catalogue of fundamental rights and freedoms are their guiding guarantees, and their violation is examined with priority. The violation of these general principles no longer makes it necessary to proceed to the second stage of analysis, as it is not necessary anymore to identify the fundamental right or freedom suppressed.

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[54] Decision No. 799/2011, proposal referring to Article 72.

[55] Decision No. 80/2014, paragraphs 83–91.

[56] Decision No. 80/2014, paragraphs 214–220. It is interesting how the Court asserts this guarantee and its suppression. It seems that the Court assumes great liberty in identifying guarantees, in connecting them with various rights and freedoms and in ascertaining their violation.

[57] Decision No. 80/2014, paragraphs 438–443.

[58] Decision no. 464/2019, paragraphs 27–56.

7.2.2.2. *Circumstances That Prevent Revision*

There are special moments in the political life of a nation that are not favourable for a constitutional revision. It is imperative that such an important endeavour to be done in a climate of normality, without the pressure of extraordinary events.[59] The tragic experience of some countries has shown that in these moments the constitutions are vulnerable to hasty and toxic amendments. There is obviously no debate regarding the legitimacy and efficiency of these restrictions. The Romanian constitution acknowledges this potential danger and prohibits any form of constitutional revision in the following circumstances:

1. Article 152 paragraph 2: "The Constitution shall not be revised during a state of siege or emergency, or in time of war."

   The state of siege and the state of emergency[60] concern crisis situations that require exceptional measures to be taken in cases determined by the appearance of serious threats to the defence of the country and national security, to constitutional democracy or to prevent, limit or remove the consequences of disasters. The measure can be of a political, military, economic, public order, or social nature.

   The President of Romania establishes, by decree, countersigned by the Prime Minister and published immediately in the Official Gazette of Romania, a state of siege or state of emergency in the whole country or in some administrative-territorial units and asks the Parliament to approve the adopted measure, at the latest 5 days after its adoption. A state of siege may be imposed for a maximum of 60 days and a state of emergency for a maximum of 30 days.

   During a state of siege or a state of emergency, the exercise of certain fundamental rights and freedoms may be restricted, only insofar as the situation so requires. Also prohibited during this period are:

[59] T. Drăganu, *Drept constituțional…*, *op. cit.*, pp. 56–57.
[60] Regulated by the Emergency Ordinance No. 1/1999.

- limitation of the right to life, except in cases where death is the result of lawful acts of war,
- torture and inhuman or degrading treatment or punishments,
- conviction for offences not provided for as such under national or international law,
- restriction of free access to justice.

War is a terrible reality that can involve the Romanian state. This unfortunate event has a juridical regulation as the "state of war".[61] It is the totality of extraordinary measures that may be instituted, mainly in the political, economic, social, administrative, diplomatic, legal and military fields, in order to exercise the inherent right of the state to individual or collective self-defence.

In the event of armed aggression directed against the country, the President of Romania shall take measures to repel the aggression and shall promptly bring them to the attention of Parliament in a message. Also, the President of Romania may declare, with the prior approval of Parliament, the partial or total mobilisation of the armed forces. Only in exceptional cases, the President's decision shall subsequently be submitted to Parliament for its approval within five days of its adoption.

Parliament declares, by resolution, in a joint sitting, partial or total mobilisation, demobilisation or exclusively a state of war. Parliament approves or rejects, before or after issuing, as the case may be, the decree of the President of Romania declaring partial or total mobilisation or demobilisation.

2. Article 63 paragraph 4: "The mandate of the Chambers is extended until the new Parliament is legally convened. During this period the Constitution cannot be revised, and no organic laws can be adopted, amended or repealed."

This is a transitional period, between two legislatures. The mandate of the old parliament has ended, and the new parliament has not yet begun its own.[62] In order to avoid a legislative

[61] Regulated by Article 65 paragraph 2, letters c)–e); Articles 92–93 of the Constitution and Law No. 355/2009.

[62] Usually, a significant period of time passes between these two moments. That is especially due to the fact that the elections for a new parliament are held

vacuum, the constitution has opted to prolong the mandate of the previous parliament, extending their activity beyond their 4-year mandate. But since this is only a transitory solution, there are justified concerns about the legitimacy and responsibility of the parliament temporarily retained in office. That is why Article 63 paragraph 4 seriously restricts its competence in this period, allowing it to 'touch' neither the constitution nor the organic laws.

7.2.3. THE PRACTICAL APPLICATION

The formal amendment rules outline an excessively rigid review procedure. The involvement of both chambers of the Parliament, the censorship of the Constitutional Court, the requirement of a referendum, the wide range of revision limits imposed determine the theoretical rigidity of the Romanian constitution.

But textual rigidity may not also be a practical rigidity. There are other various factors involved in determining the effective rigidity of a constitution, such as national constitutional tradition, the symbolic value of the constitutional text, national norms of constitutional interpretation, the concrete political context, the driving forces behind the revision intentions, the conservatism or reformism of the leading constitutional actors and, more generally speaking, the whole constitutional culture of a certain national context. Thereby, the general national constitutional culture and context significantly influence the way in which formal amendment provisions are applied.[63] This is why we thought it necessary to capture the concrete way in which the constitutional review procedure was carried out through its several attempts.

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after (but no later than 3 months) the expiry of the mandate or the dissolution of the former parliament (Article 63 paragraph 2). Another few days pass with the electoral process itself and also until the newly elected parliament legally convenes at the convocation of the President of Romania (but no later than 20 days after the elections according to Article 63 paragraph 3).

[63] All these considerations are affirmed in the Venice Commission Report, paragraph 98, pp. 118–121.

First attempt: 1996. Initiated by a group of 39 senators who proposed only one constitutional amendment regarding the right of private propriety, namely the replacement of the presumption of lawfully acquired wealth. The new text presumed that a person's wealth was unlawfully acquired until proven otherwise by its owner. The Constitutional Court ruled in Decision No. 85/1996 that this proposal is unconstitutional because it would result in the suppression of a guarantee of the right to property, thus violating the limits of review. The proposal was registered only in the Senate, but following the Court's decision the legislative process was stopped without further discussion, the proposal being considered closed.

Second attempt: 2000. Probably due to the phenomenon of widespread corruption that has profoundly marked the democratic evolution of Romania after 1989, the new proposal also concerned the constitutional regulation of property right. It was formulated by the citizens and intended to replace just one word in the constitutional text: the phrase "Private property shall be equally protected by the law" would become "The private property shall be equally guaranteed by the law." In the Decision No. 82/2000, the Constitutional Court decided that the initiative does not violate the limits of review.[64] The proposal was registered only in the Chamber of Deputies but it did not reach its agenda and therefore the procedure did not continue when the elections generated a new parliament.

Third attempt: 2003. The proposal was initiated by 233 deputies and 94 senators. It contained 61 amendment proposals having as main objectives: meeting the constitutional conditions for Romania's integration into the European Union and accession to the North Atlantic Treaty; extending institutional and constitutional guarantees of fundamental rights and freedoms; optimising the decision-making process of public authorities. The Constitutional Court issued Decision No. 148/2003 that found only two Articles

[64] The interesting fact was that the Court could not verify the signatures. The law on the exercise of legislative initiative by citizens was not in force at the time, so there were no rules for the signature gathering process. The Court ruled that the absence of a law in force at the time when the lists of supporters were drawn up, signed and certified cannot restrict the exercise by citizens of their constitutional right to initiate legislative proposals, including the revision of the constitution.

as unconstitutional but made many observations and recommendations to the Parliament. Both chambers of the Parliament debated and adopted the proposal, but with some differences. Fortunately, the mediation commission was able to reach an agreement and its final report was approved by both chambers separately. The constitutional referendum was held on 18–19 October 2003. The great challenge of this referendum was the quorum condition, which was very strict (50% + 1 of voters to turn out to vote). In order to fulfil this requirement, the referendum was held over two days. In the end, the attendance was 55.7%, the great majority of which voted in favour of approving the revision law (89.7%). The result was a major constitutional revision, the only one successfully accomplished so far. It was a rare moment of political and social cohesion,[65] generated especially by the perspective of Euro-Atlantic integration.

Fourth attempt: 2007. Initiated by the citizens with a sole article aimed at allowing marriage only between a man and a woman. The Constitutional Court decided (Decision No. 6/2007) that the citizens' initiative does not meet the formal condition of territorial dispersion (there were not the required 20,000 signatures in at least half the number of the counties in the country). The proposal was registered only in the Senate, but following the Court's decision the procedure was closed.

Fifth attempt: 2011. Initiated this time by the President of Romania on the proposal of the Government. It contained 61 amendment proposals with a wide range of constitutional implications, but with the central theme of transitioning to a unicameral parliament.[66] It was also intended to correct some of the shortcomings that had arisen over 20 years of applying constitutional provisions and to

[65] E.S. Tănăsescu, *1991–2023: The Revision of the Constitution – between the juridical exigencies and the political desires*, 23.02.2023, https://video.juridice.ro/categorii/1991-2023-revizuirea-constitutiei-intre-exigentele-dreptului-si-dezideratele-politicului/1991-2023-revizuirea-constitutiei-intre-exigentele-dreptului-si-dezideratele-politicului-23-februarie-2023/?wpvsopen=1 [access: 23.02.2023].

[66] The proposal was justified by the opinion expressed in this regard by the majority of citizens who participated in a consultative referendum organized by the President of Romania on 22 November 2009.

regulate solutions for institutional clarification that will lead to cooperation between public authorities and to eliminate potential blockages in relations between them. But its general direction was obviously towards the strengthening of the President's constitutional role. The Constitutional Court's Decision No. 799/2011 pronounced five amendment proposals as violating the limits of revision and also made many observations on the other proposals submitted. Naturally, this kind of initiative could not pass through the Parliament. It stayed for two years in the Chamber of Deputies who finally rejected it with an overwhelming majority, automatically ending the revision process without further debate in the Senate.

Sixth attempt: 2014. This was a massive revision attempt initiated by 236 deputies and 108 senators. It had 128 amendment proposals that profoundly affected every part of the constitution. As a general trend, a slight partiality toward the Parliament and against the President could be identified. The Constitutional Court was very critical of this proposal. In Decision No. 80/2014, 26 amendment proposals were declared unconstitutional and many other observations, insufficiencies, reformulations and eliminations were suggested to the Parliament. The proposal was registered only in the Senate but was left idle for a long time. Because it did not reach the agenda of the chamber, the procedure was officially closed once the new parliament was elected.

Seventh attempt: 2016. Again, a popular initiative, with large support (almost three million signatures in favour of it), intended to change the definition given to marriage by Article 48 paragraph 1, replacing the phrase "between spouses" with "between a man and a woman". The Court found a number of irregularities relating to the lists of supporters, but in the end concluded that the initiative fulfils all the conditions required by the constitution[67]

[67] Decision No. 580/2016. The great challenge for the Court was to determine whether the amendment proposed by the initiators of the revision of the constitution abolishes the right to marry, or a guarantee thereof. Its conclusion: 'by replacing the phrase "between spouses" with the phrase "between a man and a woman", the text merely clarifies the exercise of the fundamental right to marriage by expressly stating that it is concluded between partners of different biological sexes, which is, moreover, the very original meaning of the text'.

(Decision No. 580/2016). Both chambers adopted the proposal in the same form and consequently a national referendum took place on 6–7 October 2018. Even though 91.5% of the votes were for the revision, the referendum was not valid because the legal quorum for participation was not met (only 21%, the minimum requirement being 30%). Therefore, the constitution remained unchanged, but this attempt was the closest one to successful revision.

Eighth attempt: 2019. Again, an initiative of the citizens with the purpose of establishing integrity criteria for elected representatives of the people. The only amendment intended was to prohibit the right to be elected to those "who have been definitively sentenced to custodial sentences for offences committed with intent until a situation arises which removes the consequences of the conviction". The Constitutional Court declared the proposal as constitutional (Decision No. 222/2019), concluding after a long analysis that it does not entail any suppression or restriction of the right to be elected which would affect its substance. On 14 July 2020 the Chamber of Deputies adopted the proposal with a large majority and was then registered with the Senate. As of this writing, the draft proposal is still being examined by the Senate standing committees.

Ninth attempt: 2019. Registered with the Chamber of Deputies by 115 deputies, containing seven proposal amendments which aimed to implement the result of the consultative referendum initiated by the President of Romania on 26 May 2019. The referendum was validated (with a 41.28% participation) on two main issues: prohibition of amnesty and pardon for corruption criminal offences; prohibition of the adoption of emergency ordinances in the field of criminal offences, penalties and judicial organisation. The Constitutional Court declared three out of seven proposals as unconstitutional because they violated the limits of revision.[68] The draft never entered into parliamentary debate and the procedure was officially closed in 2021 when the elections generated a new parliament.

[68] Decision No. 464/2019. Very interesting are the considerations of the Court regarding the effects of a referendum that involves constitutional issues. Thus, such a consultative referendum, though validated, does not automatically initiate the process of revision (paragraph 5).

Tenth attempt: 2019. Registered with the Chamber of Deputies by 131 deputies and 9 senators with the same purpose as the previous one but supported by deputies and senators from another political sphere. The main political competitors felt compelled to follow up the results of the referendum on justice issues and entered into a race to amend the constitution, but each on its own terms. This particular initiative contained only four amendment proposals, one of which was declared by the Constitutional Court as unconstitutional (Decision No. 465/2019). Its course in the Parliament was exactly the same: it was left idle for a long period of time and then closed by the new Parliament.

The revisionist practice of the last 30 years fully confirms the ultra-rigid character of the Romanian constitution. Following the history of the various attempts at revision, it is not difficult to perceive the major themes that have concerned the society, the conduct and interests of the actors involved, the strength and origin of the pressures for change, but above all the high elevation to which the revision procedure has raised the constitutional text. An exceptional political and social mobilisation, driven by the most widely shared and appreciated desires for change, necessarily translated into inspired and appropriate legal formulas, is needed in order to amend the constitution.

7.3. A Necessary Evolution

In the first part of our study, we have focused mainly on the formal rules of amendment. We have concluded that formal rules truly matter. They are by far the determining factor in shaping the constitutional amendment process. That is why we have devoted most of our work to analysing these rules. But there are other alternatives to reach revision. And we are not referring to irregular or fraudulent channels, but to legitimate ones. They are widely recognised and accepted today,[69] and they complete the phenomenon of constitutional evolution. Especially in a system as rigid as the Romanian

[69] See: Venice Commission Report, paragraph 18, pp. 109–121.

one, such flexibility valves are essential. Of all the mechanisms of informal change, two stand out in their direct effects on the constitutional content.

7.3.1. THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT

According to Article 142 paragraph 1, the Constitutional Court[70] is the guarantor of the supremacy of the constitution. The Court has extensive powers and its decisions are generally binding. As a watchdog of the constitution, its main task is to ensure compliance by all other public authorities. For this purpose, the Court's constant activity is to explain, interpret and apply the constitutional norms. But sometimes the Court assumes such a freedom in this process that obviously exceeds the limits of a normal interpretative process and takes on a creative role. Here are some Court decisions that have undeniably "enriched" the constitutional text.

1. Decision No. 98/2008. The provision in question is Article 85 paragraph 1: "In the event of government reshuffle or vacancy of office, the President shall dismiss and appoint, on the proposal of the Prime Minister, some members of the Government." By Decision No. 98/2008, the Court examined an application for resolution of the legal conflict of a constitutional nature between the President of Romania and the Romanian Government, arising from the President's refusal to act on the Prime Minister's proposal for appointment of a member of the Government. The question in debate was the constitutional role of the President in this procedure, namely if he can refuse the proposal of the Prime Minister. The Court gave a completely surprising ruling: the President may refuse the proposal of the Prime Minister, but only once. The reasons for the President's refusal cannot be censured by the Prime Minister and

[70] The Court is composed of nine judges, that must have graduated law, have high professional competence and at least eighteen years of experience in juridical or academic activities. They are appointed for a term of office of nine years, three by the Chamber of Deputies, three by the Senate and three by the President of Romania.

the Prime Minister cannot reiterate the first proposal, being obliged to nominate another person for the post of minister. This solution is a clear departure from the content of the constitutional text. The arguments and connections used by the Court to reach this conclusion are not at all convincing. Moreover, the solution is monumental, since the Court claimed that this mechanism of just one possible refusal has constitutional value as a principle in the resolution of legal conflicts between two or more public authorities which have joint powers, and that this principle is of general application in similar cases.[71]

2. Decision No. 270/2008. Article 109 paragraph 2 refers to the criminal liability of government members and in the first part states, "only the Chamber of Deputies, the Senate and the President of Romania have the right to demand legal proceedings to be taken against members of the Government for acts committed in the exercise of their office". The Court decided that the constitutional text excludes both the cumulative jurisdiction of the claims of the three public authorities and the alternative jurisdiction between the three authorities. That is why the referral of a case to one of the three authorities for prosecution cannot be made either randomly or preferentially by the Public Prosecutor's Office – the Prosecutor's Office of the High Court of Cassation and Justice. Consequently, the Court established a division of competences that is not required by the constitutional text: the Public Prosecutor's Office of the High Court of Cassation and Justice must apply to one of the three authorities as follows:
   - Chamber of Deputies or Senate – for members of the Government or former members of the Government (Prime Minister, Minister of State, Minister, Minister Delegate, as the case may be) who, at the time of the referral, are also members of the Chamber of Deputies or Senate.

[71] We have criticized this solution for its unreasonable creativity and for the exceptional consequences that the Court generates without justification. See: I. Brad, *Discutii referitoare la colaborarea dintre autoritatile publice cu atributii conjuncte in adoptarea unei masuri prevazute de Constitutie, in lumina deciziei nr. 98/2008 – gresita – a Curtii Constitutionale*, "Dreptul" 2008, No. 11, pp. 158–174.

- The President of Romania – for members of the Government or former members of the Government (Prime Minister, Minister of State, Minister, Minister Delegate) who, at the time of the referral, are not members of Parliament or Senators.

3. Decision No. 80/2014. The Court has even made its creative contribution to the provisions relating to the constitutional amendment procedure. In the aforementioned decision, para. 55, the Court makes the following statement:

> *The principle of the rule of law is a prerequisite for respect for the values on the basis of which the express limits of the revision of the Constitution were established, which leads to the conclusion that it is implicitly incorporated into the normative content of Article 152 of the Constitution.*

The principle of the rule of law is stipulated in Article 1 paragraph 3 but is not expressly mentioned among the provisions declared non-amendable by Article 152 paragraph 1. Nevertheless, the Court declares that this principle is implicitly incorporated into the normative content of Article 152, thus substantially extending an important provision of the constitution.

4. Decision No. 464/2019. Starting from the Article 1 paragraph 3 which states that "Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values", the Court has elevated the concept of human dignity as the source of both fundamental rights and freedoms and the free development of the human personality. So, all the fundamental rights and freedoms enshrined in the constitution are an expression of human dignity. Even though Title II of the constitution does not include human dignity in the list of fundamental rights and freedoms, but of supreme values, however, the lack of qualification of human dignity as a fundamental right by the text of the constitution itself and its placement just outside Title II of the constitution – Fundamental Rights, Freedoms and Duties – does

not exclude its valuation as a limit of the revision of the constitution in the sense of Article 152 paragraph 2 of the constitution. By this reasoning the Court added human dignity among the fundamental rights that cannot be suppressed by a constitutional revision.[72]

7.3.2. THE "OPEN" PART OF THE CONSTITUTION

A second informal review mechanism is provided by the very text of the constitution. Thus, Article 20 states:

> *(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.*

This text regulates a unique supremacy of international law over constitutional provisions regarding the fundamental human rights: international regulations take precedence over constitutional provisions if those regulations are more beneficial for the protection of individual rights and freedoms.[73]

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[72] Therefore, the Court has arrogated to itself the right to shape the list of rights and freedoms provided for in the constitution. The Court held that Articles 21 to 52 of the constitution contain only an enumeration of fundamental rights and freedoms, without this meaning that fundamental rights and freedoms are limited to this catalogue. These are the rights and freedoms which are qualified as fundamental, i.e. those expressly named/nominated. Therefore, to the extent that a constitutional text contains a supreme value of a constitutional nature, which is in itself a guiding principle and/or a fundamental right/freedom, qualified as such by the Constitutional Court, the catalogue contained in Title II of the constitution is shaped accordingly. See: paragraphs 44–55 of the decision.

[73] I. Deleanu, *Instituții și proceduri constituționale*, *op. cit.*, pp. 458–462.

This opens the way for an evolution of this part of the constitution other than by following the typical revision procedure. Whenever a more favourable international law provision on human rights appears, the constitutional text itself will be ignored and the provision outside it will be applied. This is a welcome mechanism which gives a healthy flexibility to the constitution in this area, allowing a highly beneficial connection[74] of the constitution to the international level of human rights protection.

7.4. Conclusions

It is appropriate as a conclusion of this study to formulate some *de lege ferenda* proposals for the Polish legislator regarding the constitutional amendment process. But offering such suggestions for legislative improvements is a difficult task. Firstly, because it is extremely complex to transpose constitutional solutions from one national constitutional context to another. Secondly because Romania has an excessively rigid amendment system, its solutions going mainly in the direction of constitutional rigidity, which is not necessarily ideal. However, we dare to make the following recommendations:

1. Initiative of the citizens. Extending to the citizens the right of initiative is sensible and valuable. Imposing a minimum number of signatures prevents insignificant initiatives. It is true that there are some procedural difficulties in verifying the authenticity of the signatures, but the great advantage is that it provides a constructive way of expressing the serious concerns for constitutional improvement that preoccupy society. The structure of today's society, characterised by information, concern for the common good, willingness to mobilise, calls for such a platform.
2. Involvement of the Constitutional Tribunal. The experience of the attempts to revise the Romanian constitution have demonstrated the crucial role of the Constitutional Court. The Court's

[74] Fundamental rights should be continuously debated and developed. See: Venice Commission Report, paragraphs 114, 146–177.

view on compliance with the constitutional review procedure is a fundamental benchmark for the Parliament. As an independent body, ultra-specialised in constitutional matters, the Court provides an extremely valuable perspective on every detail of an amendment proposal, from their actual drafting to their various consequences and their complex constitutional intricacies. Throughout this work, we have extensively presented the jurisprudence of the Constitutional Court, clearly showing the substantial contribution that the Court has made to improving the quality of the amendment process.

3. The interdiction to diminish the fundamental rights and freedoms. An interdiction as that contained in the Article 152 paragraph 2 of the Romanian constitution ("no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms or their guarantees") is a useful mechanism to assure the vital protection of the entire constitutional bill of rights. We do not necessarily recommend the usage of the absolute prohibitions, but we advocate the relevance of this relative prohibition. By removing the possibility of diminishing the level of constitutional protection of fundamental rights, this provision cements the current elevated level of protection, while still preserving a healthy flexibility, allowing only improvements and an upward direction in the regulation of this essential part of the constitution.

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Chapter 8. The Role of Individual Actors in the Constitutional Revision Procedure

8.1. Introduction

The Constitution[1] is the fundamental legal act of a country, on which all other legal acts are based. As such, it constitutes the core of the legal system, enshrining the fundamental institutes and principles on which the functioning of the country is based. This paper attempts to shed light on various aspects of the Constitution of the Republic of Slovenia (henceforth: Slovenian Constitution) and that of the Republic of Poland (henceforth: Polish Constitution) in order to answer the following research questions:

1. What is the peculiarity of the procedure for adopting revisions to the Slovenian Constitution and how does the procedure differ qualitatively from the procedure for adopting 'ordinary' laws?
2. Is the rigidity of the Slovenian Constitution its universal characteristic or, taking into account the local tradition, does it not have to be an obligatory element?
3. What are the national solutions regarding the legitimacy process related to the adoption of revisions to the Slovenian Constitution?
4. To what extent is the manner of constitutional revision the result of native tradition, and to what extent does it adopt the universal pattern of the rigid constitution?
5. How is the Slovenian Constitution revised?

[1] The term "Constitution" is used to refer to the Constitution, as the supreme legal act of each country, in general and not to a specific national Constitution.

6. What role do the individual actors play in the process of revising the Slovenian Constitution?
7. Finally, based on the findings of the paper, it is attempted to make *de lege ferenda* proposals for the modification of the procedure for revising the Polish Constitution.

The main research methods on which this paper is based are the normative-dogmatic method, the axiological method, and the genealogical method. The normative-dogmatic method is used to describe the relevant facts (the constitutional revision procedure, the role of the various actors in the revision process, the practice of revising the Constitution, etc.) as they are (*de lege lata*). However, the paper goes beyond a purely descriptive approach by critically assessing the relevant institutions and phenomena. In this context, the axiological method is used in an attempt to determine the optimal state (*de lege ferenda*). Finally, the genealogical method is applied to analyse the genesis of the Slovenian and Polish Constitutions, as well as the relevant historical and political circumstances necessary for understanding their content and amendment practice, as well as the role of individual actors in the constitutional revision process. Several instrumental methods are also applied, namely the methods of gathering information and discarding irrelevant information, the methods of abstraction and classification, the methods of induction and deduction, and analytical and logical reasoning.

The present work is based on two types of sources, firstly on scientific literature and secondly on legal acts and other documents originating from the procedures for amending the Slovenian Constitution (e.g., minutes of meetings, official statistics). The analysis of the relevant literature serves to provide the theoretical framework necessary for understanding the paper, while the legal acts and other documents from practise serve to reveal the specifics of the Slovenian Constitution and the procedure for its revision.

The present work consists of six main parts. After the introduction, the first part introduces the reader to the different techniques that can be used to revise the Constitution and that have been developed by the global constitutional practice. Then, the structure of the Slovenian and the Polish Constitution and the rules applicable for their revision are presented. As regards the Slovenian

Constitution, both the rules established in the Constitution itself and those introduced by the Rules of Procedure of the National Assembly (hereinafter: Rules of Procedure)[2] and developed by the constitutional practice of the National Assembly of the Republic of Slovenia (hereinafter: National Assembly) are analysed. Finally, in this part of the paper, an empirical analysis of all amendments to the Slovenian Constitution, as well as unsuccessful proposals, is made, classifying them according to the proposing party, as well as according to the subject of the (proposed) amendment. In the second part of the paper, the differences between the procedures for adopting and amending the Slovenian Constitution and "ordinary" laws are presented.[3] In the third part of the paper, the concept of constitutional legitimacy is analysed. In this context, a brief theoretical background on various forms (classifications of constitutional legitimacy) is first presented, and then the above classification is applied to the Slovenian and the Polish Constitutions in order to find out what kind of constitutional legitimacy they are based on. The next part of the paper presents the role of different actors in the process of revising the Slovenian Constitution, namely the government, political parties and deputies, civil society and experts. The last part of the paper summarises its main findings and at the same time makes *de lege ferenda* proposals to the Polish legislator.

8.2. The Constitution of the Republic of Slovenia and the Procedure for Its Revision

8.2.1. TECHNIQUES FOR REVISING THE CONSTITUTION

Constitutional revision is possible by two different techniques, namely, by amending and by novelisation. In constitutional revision by amending, the original text is supplemented by changes, that is, by new text, while the original text remains untouched. In the

[2] Uradni list RS, št. 92/07 – uradno prečiščeno besedilo, 2007, 105/10, 80/13, 38/17, 46/20, 105/21 – odl. US in 111/21. For the English version, see: Rules of Procedure 2021, https://fotogalerija.dz-rs.si/datoteke/drugo/soj/razno/ [access: 30.04.2023].

[3] Taking into account the ordinary legislative procedure.

case of novelisation, on the other hand, the existing text of the Constitution is changed.[4] The novelisation of the Constitution can be done either by a constitutional act or by an 'ordinary' law. The Slovenian Constitution, like most other constitutions of European countries, is amended by novelisation. The Slovenian Constitution itself does not specify the act by which it is to be revised. Therefore, when the Slovenian Constitution was first revised in 1997, the National Assembly chose a constitutional act as the method for its revision. Five years later, in 2002, the Rules of Procedure codified that the Slovenian Constitution is to be revised by a constitutional act.[5] The legal force of the constitutional act is the same as that of the Slovenian Constitution.

In terms of the difficulty of revising them, Constitutions can be classified as either flexible or rigid. Flexible constitutions (such as the New Zealand Constitution) are revised according to the same procedure as "ordinary" laws. Therefore, although their content has a special place in the particular legal system, it is not additionally protected from revision. Rigid constitutions, on the other hand, are additionally protected from revision by a more rigorous, formalised, and usually longer revision procedure than that applicable to "ordinary" laws.[6] Most Constitutions, including the Slovenian and the Polish Constitution, are rigid constitutions. Moreover, some constitutions also contain a so-called perpetuity clause,[7] which absolutely prohibits the adoption of revisions to selected articles, i.e., it is not possible to revise certain constitutional provisions.[8] The Slovenian

[4] Novelisation is a technique widely used in European countries to revise the constitution.

[5] F. Grad, I. Kaučič, S. Zagorc, *Ustavno pravo*, Ljubljana 2016, pp. 112–113.

[6] F. Grad, I. Kaučič, S. Zagorc, *Ustavno pravo*, *op. cit*., pp. 91–92.

[7] The term "entrenchment clause" is also used sometimes.

[8] Article 79 paragraph 3 of the German Basic Law, the *Grundgesetz* (GG), for example, prohibits the amendment of several articles that were considered by the legislature to be particularly important constitutional guarantees, namely: the duty of state authority to protect human dignity; recognition of human rights; direct enforceability of fundamental rights; the republican form of government; the federal structure of Germany; the welfare state; popular sovereignty; the democratic character of the political system; rule of law and separation of powers. For more on the eternity clause, see: U.K. Preuss, *The Implications of*

and the Polish Constitutions do not contain an eternity clause, i.e. they can be revised in their entirety.

8.2.2. ON THE STRUCTURE OF THE SLOVENIAN CONSTITUTION

The Slovenian Constitution was adopted on 23 December 1991. It begins with the preamble, which is similar to the preambles of other European Constitutions.[9] The preamble is not part of the Slovenian Constitution, but clarifies the reasons for its adoption and the relevant historical context.[10] The normative part of the Slovenian Constitution consists of ten chapters, each of which lays down basic rules in thematically specific areas, namely: general provisions; human rights and fundamental freedoms; economic and social relations; organisation of the state (consisting of rules on the functioning of: the National Assembly, the National Council, the President of the Republic, the Government, the public administration, national defence, the judiciary, the prosecutor's office); self-government (with provisions on local self-government and other forms of self-government); public finances; constitutionality and legality; the Constitutional Court; procedures for amending the Constitution; transitional and final provisions.

The Slovenian Constitution is the basic law of the Republic of Slovenia. It was adopted on 23 December 1991, after the country's

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the Eternity Clauses: The German Experience, "Israel Law Review" 2011, Vol. 44, Issue 4, pp. 429–448; R. Weil, *On the Nexus of Eternity Clauses, Proportional Representation, and Banned Political Parties*, "Election Law Journal" 2017, Vol. 16, No. 2, pp. 237–246; L. Brajković, *The (Non-)Existence of Eternity Clauses in the Constitution of the Republic of Croatia*, "Zagreb Law Review" 2021, Vol. 10, No. 3, pp. 269–289.

[9] F. Grad, I. Kaučič, S. Zagorc, *Ustavno pravo*, *op. cit.*, pp. 96–97.

[10] The exact text of the preamble goes as follows: "Proceeding from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, and from fundamental human rights and freedoms, and the fundamental and permanent right of the Slovene nation to self-determination; and from the historical fact that in a centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood, the Assembly of the Republic of Slovenia hereby adopts."

declaration of independence from Yugoslavia, and has been the cornerstone of Slovenia's democratic system ever since. This Constitution reflects Slovenia's commitment to democracy, the rule of law and human rights. It provides for a parliamentary system of government, with a president as head of state and a prime minister as head of government. The National Assembly, composed of representatives elected by the people, exercises legislative power. One of the most notable features of the Slovenian Constitution is its strong emphasis on the protection of individual rights and freedoms. It guarantees a wide range of civil liberties, including freedom of speech, religion, assembly, and equality before the law. In addition, the Slovenian Constitution enshrines the importance of the social market economy, which aims to achieve a balance between economic development and social well-being. The Polish Constitution (also known as the 1997 Constitution or the Third Constitution (*III Rzeczpospolita*)) is the supreme law of the Republic of Poland and serves as the basis for its governance and legal framework. It was adopted on 2 April 1997, replacing the 1992 Constitution (also known as the Little Constitution), which was the last amended version of the Constitution of the People's Republic of Poland, the Communist Constitution of 1952. The 1997 Constitution marked a pivotal moment in Poland's history, as the country transitioned from a communist state to a democratic republic. The Polish Constitution is distinguished by its commitment to democracy, the rule of law, and the protection of individual rights and freedoms. It provides for a tripartite division of governmental power into executive, legislative, and judicial branches to ensure a system of checks and balances. One of the most important features of the Polish Constitution is its strong emphasis on human rights and civil liberties. It guarantees fundamental rights and freedoms such as freedom of speech, religion, assembly, and equality before the law. The Constitution also enshrines the principle of a social market economy, emphasising the importance of economic development and social justice.

8.2.3. REVISION RULES FOR THE SLOVENIAN CONSTITUTION

The basic rules governing the revision procedure of the Slovenian Constitution are laid down in the Slovenian Constitution itself.[11] However, they are very rudimentary and are further elaborated by the Rules of Procedure and the Referendum and Popular Initiative Act, as well as by parliamentary practice.[12]

8.2.3.1. *Revision Rules Set Forth by the Slovenian Constitution*

The Slovenian Constitution deals with the procedure for constitutional revision in Articles 168–171 of Chapter IX ("Procedure for Revising the Constitution").[13] According to them, the proposal to initiate the constitutional revision procedure may come from different actors, namely twenty deputies of the National Assembly, the Government of the Republic of Slovenia (henceforth: the Government), or at least 30,000 voters, with the National Assembly deciding on it by a two-thirds majority of the deputies present.[14, 15] The National Assembly adopts constitutional acts by a two-thirds

[11] Uradni list RS, št. 1991, 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121, 140, 143, 47/13 – UZ1 48, 47/13 – UZ90, 97, 99, 75/16 – UZ70a in 92/21 – UZ62a. For the English version, see: https://www.us-rs.si/media/constitution.pdf [access: 30.04.2023].

[12] Uradni list RS, št. 2007, 26/07 – uradno prečiščeno besedilo, 6/18 – odl. US in 52/20.

[13] The chapter on revising the Constitution is placed at the end of the Slovenian Constitution, after all chapters dealing with substantive issues and only before the chapter on "Transitional and Final Provisions" From a nomotechnical point of view, this makes sense, since the constitutional revision provision are not a substantive issue, but a procedural one.

[14] Constitution of the Republic of Slovenia (hereinafter: Slovenian Constitution), 1991, Article 168.

[15] Article 81 of the Rules of Procedure clarifies that a quorum of at least two-thirds of the deputies present must be met for the National Assembly to adopt a resolution by a two-thirds majority. This means that at least 40 votes (two-thirds of 90) must be cast in favour of a resolution.

majority of all deputies,[16, 17] however, the confirmation of constitutional acts adopted by the National Assembly may be subject to a referendum. The only party actively legitimised to demand such a referendum are at least thirty deputies. The constitutional revision in question is approved in a referendum if the majority of those voting have voted in favour of it, provided that the majority of all voters have participated in the referendum, i.e., a double majority is required, since both the majority of all voters must have participated in the referendum and the majority of them must have cast a vote to confirm the approval of the constitutional revision.[18] To date, no constitutional revision has been the subject to a referendum, and I believe it is unlikely that it ever will be. Constitutional revisions are adopted with a confirming vote of at least 60 of the 90 deputies, while the referendum can be demanded by at least 30 of the 90 deputies. It is practically inconceivable that the same MP would simultaneously confirm a constitutional revision and call for a referendum on the same issue. Therefore, the only situation in which a referendum on a constitutional revision would be conceivable is one in which exactly 60 deputies approve a constitutional amendment while the other 30 oppose it and then demand a referendum.[19] Once the constitutional amendment is adopted (and confirmed in a referendum, if that was the case), it enters into force when it is promulgated by the National Assembly.[20] Similarly, the rules for the revision of the Polish Constitution are set forth by the Constitution itself in Chapter XII ("Amending the Constitution"). Accordingly,

[16] Slovenian Constitution, 1991, Article 169.

[17] Since there are 90 deputies in the National Assembly, this means at least 60 deputies.

[18] Slovenian Constitution, 1991, Article 170.

[19] A referendum on a constitutional revision is a confirmation referendum, since the revision can only be adopted if it is confirmed in the referendum, while a legislative referendum is a rejection referendum, in which a "ordinary" law that has already been adopted by the National Assembly can be rejected (if the strict requirements of the Slovenian Constitution are met). Moreover, only the entire constitutional revision can be the subject of the referendum (and not, say, one of its parts), while a specific part of a "ordinary" law (such as an article or even a paragraph) can be the subject of a legislative referendum.

[20] Slovenian Constitution, 1991, Article 171.

the active legitimation to propose a bill to amend the Constitution can be submitted by either one fifth of the statutory number of deputies, the Senate, or the President of the Republic. Thus, neither the Government nor a certain number of voters can propose to amend the constitution, as is the case in Slovenia. However, this can be done by either the Senate or the President of the Republic, which is not the case in Slovenia (which also has a second house of the parliament, the National Council). For an amendment to the Polish Constitution to be passed, a statute must be adopted first by the Sejm and then by the Senate. It is different in Slovenia, where only the National Assembly, but not also the National Council, vote on the adoption of the constitutional act. Ahead, for a revision of the Polish Constitution, the bill must first be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of deputies, and then by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of senators. Thus, the required majority to adopt the bill in the Sejm is less strict than the required majority to adopt a constitutional act in the Slovenian National Assembly (two thirds of all deputies and not just two thirds of the deputies present with a quorum of at least half deputies present[21]). Ahead, if the bill to revise the Polish Constitution relates to the provisions of chapters: I ("The Republic"), II ("The Freedoms Rights and Obligations of Persons and Citizens") or XII ("Amending the Constitution"), there are several procedural steps which make the bill harder to pass. Firstly, the adoption of the bill must not take place sooner than 60 days after the first reading of the bill, which leaves ample room for discussion, and secondly, the Senate, one-fifth of the statutory number of deputies, or the President of the Republic can require that a confirmatory referendum takes place within 45 days from the adoption of the bill. Thus, for the revisions of provisions which are seen as especially important, a referendum can be demanded by a select group of actors, but a referendum is not necessary. This differs importantly from the possibilities to organise a referendum

[21] In Slovenia, such majority is required for the adoption of some legal acts, for example the Rules of Procedure of the National Assembly.

on the revision of the Slovenian Constitution, which can only be initiated by at least 30 deputies, as is the case for the revision of any article. Moreover, it is more likely that a referendum will be required to confirm a revision of the Polish Constitution than of the Slovenian Constitution, as it is likely that at least one fifth of the deputies will be against the revision of the Constitution. Lastly, while the revision of the Polish Constitution is promulgated by the President of the Republic, the revision of the Slovenian Constitution is promulgated by the National Assembly itself.

8.2.3.2. *Revision Rules Set Forth by the Rules of Procedure and by Parliamentary Practise*

The basic rules governing the procedure for revising the Slovenian Constitution are explained in more detail in Chapter IX ("Legal Acts and Procedures") of the Rules of Procedure.[22] Accordingly, the Slovenian Constitution may be amended by a constitutional act,[23] which consists of two parts (sections): Section I contains the text of the revision and Section II contains the provisions on its implementation.[24] The Rules of Procedure set for the required content of the constitutional act,[25] that must be satisfied for the act to be further processed.[26]

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[22] The legal nature of the Rules of Procedure is not entirely clear. They are neither an "ordinary" law, nor a bylaw, but occupy a sui generis position in the pyramid of legal acts. The Slovenian Constitutional Court found that the Rules of Procedure, at least in the part where they regulate the procedure for the adoption of legal acts in the National Assembly, have the hierarchical position of an "ordinary" law, although they are formally not a law. See: Decision of the Constitutional Court, 1996, US I-I-40/96, paragraph 3.

[23] Rules of Procedure of the National Assembly (hereinafter: Rules of Procedure), 2021, Article 172.

[24] Article 172.

[25] See: Article 172 paragraph 3, Article 173.

[26] If this is not the case, and if the proposing party refuses to supplement the act within 15 days of being requested to do so by the President of the National Assembly, the proposal shall be deemed not to have been submitted. See: Article 173 paragraph 5.

When all formal requirements are met, the proposal is forwarded to the Government, which may (but is not required to) issue an opinion if it is not the proposer.[27] The proposal is then forwarded (within 30 days of submission) to the Constitutional Committee,[28] where the proposing party presents the proposal for the constitutional act. Thereafter, representatives of parliamentary political parties in the Constitutional Committee present the opinions of their respective political parties. Although this is not provided for in the Slovenian Constitution or in the Rules of Procedure, at this stage, according to parliamentary practice, a group of experts (the Expert Committee) is appointed by the Constitutional Committee. The Expert Committee is composed of renowned experts on the topics of the constitutional act, with each parliamentary political party being able (but not obliged) to appoint one. The Expert Committee prepares a report on whether the revision procedure should be initiated. If so, the report also proposes the exact wording of the proposed constitutional act. The report is sent to the President of the Constitutional Committee, after which a meeting of the said Committee is held at which the position of the Expert Committee is presented, followed by a discussion between the members of the Committee and the invited parties on whether the revision procedure should be initiated. According to common parliamentary practise, the Chairman of the Constitutional Committee may invite experts and representatives of governmental and non-governmental institutions to this Committee session, who may present their views in a short speech of up to five minutes long. The meeting of the Constitutional Committee ends

[27] Article 173 paragraph 6.

[28] The Constitutional Committee is an ad hoc working body of the National Assembly. Unlike other working bodies of the National Assembly (committees and commissions), it is not a permanent working body but is formed only when a proposal for a constitutional act is submitted (within 30 days of its submission). The Constitutional Committee is formed by a decree issued by the Public Offices and Elections Commission of the National Assembly, taking into account the proportional distribution of seats according to the election results and other factors by means of a special mathematical formula. The Constitutional Committee is headed by a Chairman (President). The technical aspects of the Committee's work are managed by the Secretary of the Committee, an official of the National Assembly who must have passed the Slovenian State Law Examination.

with a vote on whether the Committee shall adopt the draft resolution to initiate the revision procedure by a two-thirds majority of the members present.[29] If the draft resolution does not receive the required support, the Chairman of the Constitutional Committee suspends the procedure for revising the Slovenian Constitution. However, the final decision on whether or not to initiate the revision procedure shall be taken at the plenary session of the National Assembly (after the proposal to initiate the procedure has already been approved by the Constitutional Committee) by a two-thirds majority of all deputies present. If the National Assembly does not adopt the resolution to initiate the revision procedure, the procedure is terminated and a proposal with similar content cannot be placed on the agenda of a session of the National Assembly in the same parliamentary term.[30]

It can be concluded that the proposal to initiate the revision procedure must be supported by both the Constitutional Committee and the plenary session of the National Assembly. Since the political structure of the Constitutional Committee is probably the same as the political structure of the plenary session of the National Assembly, it is extremely unlikely that a proposal supported by the Constitutional Committee will not also be supported by the plenary session of the National Assembly. If the Constitutional Committee decides to support the proposal to initiate the revision procedure, its President instructs the Expert Committee to prepare a working draft of the proposed constitutional act. The basis for the preparation of the draft is the proposal for the constitutional act submitted by the proposing party. Both the Expert Committee and the Constitutional Committee may retain the proposal in its original form or revise it. The revisions may range from minor nomotechnical issues to more important additions, changes, or deletions of parts of the text, and even introduce new substantive solutions. Therefore, it is possible that the working draft of the proposed revision may differ substantially from the original proposal of the proposing party. After the deadline for submitting the draft proposal, the Constitutional

[29] Rules of Procedure, 2021, Article 175.
[30] Article 175 paragraph 2, Article 177.

Committee hears the presentation of the proposal and the opinion of the proposing party on the draft proposal.[31] Prior to this, the Government, the National Council[32] and the invited members of the public also express their views, which is followed by a discussion among the members of the Constitutional Committee and the other parties present. The meeting ends with a vote on the proposed working draft(s) of the proposal to revise the Slovenian Constitution. Once the report of the Constitutional Committee is forwarded to the National Assembly, a general discussion takes place in the next plenary session, in a form similar to that in the Constitutional Committee. The discussion ends with a vote on whether to initiate the revision procedure or not. If the decision does not receive the support of at least two-thirds of the deputies present, the procedure is terminated.

The second stage of the revision procedure aims at the final drafting of the revision and the adoption of the constitutional act. It is important to note that with the end of the first phase of the procedure, the party that originally proposed the constitutional act loses the status of the proposing party and the Constitutional Committee is the proposing party from that moment on. The Expert Committee of the Constitutional Committee prepares a working draft of the constitutional act based on the opinion of the National Assembly on the proposed constitutional act, supplemented by a detailed justification of why the constitutional revision is necessary.[33] The Constitutional Committee then discusses the proposal prepared by the Expert Committee[34] and finally votes on each part of the proposed constitutional act by a required two-thirds

[31] Of course, this can only happen if the Constitutional Committee has already made a decision in favour of initiating the constitutional revision procedure.

[32] The Slovenian Parliament consists of two chambers, the lower chamber being the National Assembly and the upper chamber being the National Council. In general, the National Council has few powers, the most important being the ability to veto legislative acts, which in such a case must be passed a second time by the National Assembly.

[33] The Explanatory Note is a legally non-binding document that enables interested parties (the legislature, the Government, the interested public, etc.) to understand the constitutional act. Although it is not required by the Rules of Procedure, it is necessary according to common parliamentary practice.

[34] In addition to the members of the Expert Committee, the Government and the National Council also have the opportunity to express their opinions.

majority of all members of the Constitutional Committee.[35] Then the constitutional act (the individual articles and the entire draft) is discussed and voted on in the plenary session of the National Assembly, without the possibility of amending the proposed text.[36] The constitutional act is adopted by a majority of at least two-thirds of all deputies, i.e., 60. Finally, the adopted constitutional act must be promulgated no later than eight days after its adoption, unless at least 30 deputies request that the constitutional revision be submitted for confirmation to the voters in a referendum.[37] If this is the case and the constitutional act is confirmed in the referendum, it must be promulgated no later than eight days after the National Assembly receives the report on the results of the referendum.[38] An important peculiarity regarding the promulgation of the constitutional act is that it is promulgated by the plenary session of the National Assembly itself (through a decree) and not by the President of the Republic, as is the case with "ordinary" laws. This means that the same body that adopts the constitutional act also promulgates it.[39] The decree promulgating the constitutional act is adopted by a simple majority[40] (the majority of all deputies entitled to vote), which completes the constitutional revision procedure.

8.2.4. REVISIONS OF THE SLOVENIAN CONSTITUTION – AN EMPIRICAL ANALYSIS

Since its adoption in 1991, the Slovenian Constitution has been revised 11 times, a relatively small number compared to some Western European Constitutions, albeit considerably more than the

[35] If the Constitutional Committee is unable to pass a proposed constitutional act, it may either attempt to do so another time, or it may propose to the National Assembly that the constitutional amendment process be terminated.

[36] Rules of Procedure, 2021, Article 181.

[37] Article 182 paragraph 1.

[38] Article 182 paragraph 2.

[39] The situation is different in Poland, where the promulgation of the constitutional revisions is made by the President of the Republic. See: Constitution of the Republic of Poland, 1997, Article 235 paragraph 7.

[40] See: Rules of Procedure, 2021, Article 108 paragraph 3, Article 182.

Polish Constitution, which was revised only 2 times. The most recent revision was the introduction of the right to drinking water as a basic human right. The constitutional revisions adopted can be divided into three distinct groups, namely those made as a result of Slovenia's accession to the European Union,[41] the revision of (procedural) institutes inherited from the Constitution of the Socialist Republic of Slovenia that proved to be inadequate or inefficient,[42] and the addition of new fundamental rights in the Slovenian Constitution.[43]

[41] In other words, amendments whose reason was the acceptance by the Republic of Slovenia of obligations under international law, namely: the possibility of transferring the exercise of sovereign rights to international organisations and the possibility of joining a defence alliance that respects fundamental human rights and democratic principles (NATO) in Article 3a; the possibility of extraditing nationals to countries that are members of the European Union in Article 47; the possibility for third-country nationals to acquire ownership of real estate under conditions established by law (applies to nationals of EU member states); and the "golden fiscal rule" requiring a balanced budget in the medium term in Article 148, which was adopted to give constitutional status to the fiscal discipline rules of the European Union.

[42] These are: 1) the provision that voters have a decisive influence on the allocation of seats in the National Assembly to candidates in Article 80, which formed the basis for the revision of the Law on Elections to the National Assembly; 2) the restriction of the possibilities to reject a law on a referendum in Articles 90, 97 and 99, according to which it is not allowed to call a referendum on selected issues (such as: urgent measures, taxes and customs, the state budget, ratification of international treaties, and laws eliminating unconstitutionality) and the introduction of the requirement of a strict quorum for the referendum to reject a law; 3) the introduction of the possibility of delegating the exercise of public powers of state administration to legal entities and natural persons and the transferal of the execution of certain state functions to municipalities. In addition, the creation of regions as a second form of local self-government (alongside municipalities) was ordered by a constitutional revision, although the corresponding law has not yet been passed, thereby creating a permanent unconstitutionality present in the Slovenian legal order.

[43] These are: 1) the explicit prohibition of discrimination on the basis of disability in Article 14; 2) the introduction of the provision that the law shall include measures to promote equal opportunities for men and women in candidacy for state and local authorities in Article 43; 3) the introduction of the right to social security and the right to a pension in Article 50; 4) a provision allowing the free use of sign language and its promotion by public authorities in Article 62(a); and 5) the introduction of the right to drinking water in Article 72(a).

However, there were 43 proposals to revise the Slovenian Constitution, 30 of which were submitted by deputies, 12 by the Government, and only one by 30,000 voters.[44] In 1997, the latter proposed introducing the possibility for voters to revoke the mandate of a deputy, effectively ending his or her term of office. However, this proposal was rejected by the Constitutional Committee at its first session in 1997.[45] Of the 11 constitutional acts that successfully passed through the constitutional revision process, 7 were proposed by a group of at least 20 deputies and 4 by the government.[46] An analysis of the proposals for constitutional acts shows that several of them were aimed at revising the same article. For example, the Government proposed the revision of Article 68, which regulates the extradition of Slovenian citizens, three times (in 1995, 1997 and 2001), the revision of articles concerning the legislative referendum, the procedure for appointing government ministers,[47] and the amendment of the position and functions of judges.

[44] Several proposals were also submitted that did not meet the required criteria in terms of the number of proposing deputies or voters, but these are not the subject of this analysis. For more see: Z. Majer, *Analiza predlogov za spremembo Ustave Republike Slovenije v obdobju 1991–2011*, Ljubljana 2012.

[45] For more, see: C. Ribičič. *Politična odgovornost člana parlamenta*, "Zbornik referatov, V. Dnevi javnega prava" 1999, Portorož, pp. 320–323; Z. Majer, *Analiza predlogov za spremembo Ustave…*, *op. cit*., p. 101.

[46] I. Kaučič, *Kako se je spreminjala slovenska ustava (1991–2021)*, 15.12.2021, https://www.uradni-list.si/novice/pogled/kako-se-je-spreminjala-slovenska-ustava-1991-2021 [access: 03.05.2023].

[47] The Slovenian constitutional system has adopted the procedure for appointing Government Ministers introduced in the Constitution of the Socialist Republic of Slovenia in 1974. According to it, Government Ministers are not appointed by the Prime Minister after he is elected by the National Assembly (as is the case in most European countries). Rather, they must go through a hearing of the relevant working body of the National Assembly (the candidate Minister of Foreign Affairs of the Foreign Affairs Committee, the candidate Minister of Culture of the Culture Committee, etc.), at the end of which they must be confirmed by a majority vote. Consequently, they must also be confirmed by a vote of the plenary session of the National Assembly. This procedure is lengthy and inefficient, and has proven particularly problematic when a single Government Minister is to be appointed quickly (in case of termination of the function of the old one). However, the National Assembly has so far refused to forgo a relatively important instrument of political control. At the time of writing, another

Similarly, deputies attempted to revise several articles of the Slovenian Constitution multiple times, namely: the provisions on parliamentary immunity, which the deputies tried to revise (broaden) in 2001, 2005 and 2006, and on the regionalisation of the Republic of Slovenia, which they attempted to revise twice, once in 2005 and once in 2006.[48]

8.3. Passing a Constitutional Act and Passing a Law[49] – Qualitative and Quantitative Comparison

As mentioned above, the Slovenian Constitution is a rigid constitution, which means that the procedure for its revision is stricter and more complex than that for an "ordinary" law. First, the circle of actors who can propose the adoption of an "ordinary" law is much larger than the circle of actors who can propose the adoption of a constitutional act, as this can be done by each individual deputy (as opposed to 20 deputies who must propose the adoption of a constitutional act), the Government, and 5,000 voters (as opposed to 40,000 voters who must propose the adoption of a constitutional act).[50] Moreover, in the case of proposed "ordinary" laws the adoption procedure is much simpler that that required for the adoption of a constitutional act. The proposed law must go through three

attempt to change the procedure for appointing the Government and individual Government Ministers is underway. Given the current political structure of the National Assembly (a strong coalition favouring the change), there is a good chance that it will be successful.

[48] Z. Majer, *Analiza predlogov za spremembo Ustave…*, *op. cit.*, pp. 104–105.

[49] The legislative procedure examined here is the ordinary legislative procedure. There are two other legislative procedures, namely the abbreviated procedure and the emergency procedure, which allow for the law to be passed much quicker. The latter two procedures are intended for particularly justified cases (the abbreviated procedure for minor adjustments to existing laws and the emergency procedure for situations where public safety is at risk). However, political parties have hijacked the abbreviated procedure and the emergency procedure and use them extensively in cases where they are not justified to shorten the time needed to pass a law.

[50] Slovenian Constitution, 1991, Article 88.

readings, with the first reading being the mere forwarding of the proposal to the deputies, unless at least 10 deputies request a general debate.[51] The relevant working body is then designated by the President of the National Assembly. Thus, unlike the procedures for the adoption of a constitutional act, no special working body is formed; instead, the proposal is dealt with by the working body that has substantive jurisdiction over the subject of the proposed law.[52] The second reading then takes place entirely in the competent working body.[53] After the presentation of the position of the deputy groups, amendments may be introduced either by any deputy, a group of deputies, the working body, the Government if it is not the proposing party, and in special cases by the Finance Committee and the Commission for National Communities.[54, 55] After voting on each proposed amendment, a supplemented bill is prepared and sent to the plenary assembly of the National Assembly for the second part of the second reading. The plenary assembly of the National Assembly then debates only the amended articles. At this stage of the procedure, amendments to articles that have already been amended (but not to those that were not amended in the first part of the second reading before the relevant working body) may be amended, but only by a deputy group, at least 10 deputies, the Government, and the proposing party. It can be concluded from this that the circle of actors actively legitimised to introduce amendments is narrower than in the first stage of the second reading. Once all proposed amendments have been voted on, a revised version of the bill is prepared for the third reading.[56] Generally, no more

[51] Rules of Procedure, 2021, Article 122 paragraph 1.

[52] A bill on cultural heritage issues, for example, will be handled by the Commission on Culture.

[53] However, other working bodies, called "interested working bodies", may participate if the law is multidisciplinary.

[54] If the proposed law is to have an impact on the state budget or other financial resources, or if it affects the rights of national minorities. See: Rules of Procedure, 2021, Article 124.

[55] Article 129 paragraph 1.

[56] If less than 10% of the articles of the proposed act have been amended, the National Assembly may vote to proceed to the third reading immediately after the conclusion of the second reading, unless more than one-third of the deputies

amendments are proposed in the third reading, as the deputies are expected to pass the bill in its entirety.[57] However, amendments may still be proposed by the proposing party, the government, and groups of deputies, but not by other parties. The bill is finally put to a vote, and it is passed if it receives more votes in favour than against.

Unlike in the procedure for the adoption of a constitutional act, where there is no possibility of vetoing a constitutional act that has been adopted, the National Council may veto an 'ordinary' law after it has been adopted. However, this is only a procedural complication, since the National Assembly can override the veto if it adopts the law by a majority of all deputies. The situation is somewhat different if the coalition does not have a majority in the National Assembly (minority government), since in such a case a veto by the National Council can result in a law not being passed. However, it must be conceded that in such a situation the opposition can prevent the law from being passed by having all (or the required number) of its deputies appear for the third reading and reject it. It can be concluded from this that the National Council's ability to veto a law has little effect in practice, but rather represents a public expression of displeasure.

8.4. Constitutional Legitimacy

8.4.1. THE NOTION OF CONSTITUTIONAL LEGITIMACY

It is difficult to define when a constitution is legitimate. However, Barnett contends that it is legitimate when it creates a legal and legislative system that establishes rules that citizens are morally bound to follow.[58] Constitutional legitimacy is not a unified concept, i.e., there are different types of constitutional legitimacy.

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present objects. If no amendments have been adopted, the National Assembly votes on the adoption of the proposed act immediately.

[57] Since all interested stakeholders had ample opportunity to propose amendments in the preceding phases of the legislative process.

[58] R.E. Barnett, *Constitutional Legitimacy*, "Columbia Law Review" 2003, Vol. 103, No. 1, p. 116.

Schmitt distinguishes between dynastic and democratic legitimacy:[59] dynastic legitimacy is based on the power of monarchs to enforce the constitution, which is accepted by the people. This legitimacy is particularly relevant when considering the constitution-making process from a genealogical perspective, but less so in modern societies where the role of the monarch (or any other individual) is constrained by democratic institutions. Democratic legitimacy, on the other hand, is based on the concept of a democratic state in which all power emanates from the people, the state being the political emanation of the people. Therefore, a constitution is legitimate because it has been adopted by the people and for the people.

Below, Harel and Shinar distinguish between representative and reason-based legitimacy.[60] According to the representative legitimacy theory, a constitution is legitimate because it reflects the values and basic beliefs of a particular society, in other words, because it is a legal representation of that society.[61] The representative legitimacy theory is further divided into the conventionalist current and the naturalist current. Proponents of the first current claim that a constitution is legitimate because it reflects the will of the people, while adherents of the second current claim that a constitution is legitimate because it reflects the values of a nation.[62] The reason-based legitimacy school, on the other hand, argues that a constitution is legitimate not because it is an emanation of the will of the people, but because it implements solutions that are generally considered reasonable, logical, and just. Therefore, a constitution is worthy of the people's allegiance because it creates good institutions and establishes just norms.[63, 64]

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[59] C. Schmitt, *Constitutional Theory*, Durham 2008.

[60] A. Harel, A. Shinar, *Two Concepts of Constitutional Legitimacy*, "Global Constitutionalism" 2023, Vol. 12, Issue 1, pp. 80–105.

[61] A. Harel, A. Shinar, *Two Concepts…*, *op. cit.*, p. 85

[62] Ibid.

[63] Ibid, p. 94.

[64] Harel and Shinar further point out that reason-based legitimacy is particularly strongly present in regard to Constitutions that were not "organically" adopted by the people in the process of constitutionalisation, but rather "imposed" on them by an exogenous factor.

Below, Fallon distinguishes between legal, sociological, and moral legitimacy of a constitution.[65] According to the theory of legal legitimacy, a constitution, or for that matter any other legal act, is legitimate if it is adopted and/or amended according to the prescribed procedure. Sociological legitimacy refers to the ability of a set of rules to garner public support, i.e., a constitution is legitimate if people follow its rules for reasons other than fear of sanctions or hope of reward.[66] 'Sociological legitimacy is a variable, not a constant. Moreover, decisions and institutions that enjoy a high degree of legitimacy among some groups may tend to lose (sociological) legitimacy among others.'[67] Finally, moral legitimacy represents the moral justice of a constitution or its provisions. Therefore, even if a constitution enjoys broad public support and has been adopted and/or amended through a legally legitimate process, it may be morally illegitimate if it introduces solutions that are morally unjust.[68] The three types of legitimacy described above are independent of each other, so a constitution can be legally legitimate but sociologically and morally illegitimate, sociologically legitimate but legally and morally illegitimate, and so on. This means that there is no trade-off between the different types of legitimacy. Thus, the ideal that the body that adopts and/or amends the Constitution should strive for, is a constitution that is fully legally, sociologically, and morally legitimate.

Regarding the application of the theories of legal, moral and sociological legitimacy to the Slovenian and Polish Constitution, the following conclusions can be drawn.

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[65] R.H. Fallon, *Legitimacy and the Constitution*, "Harvard Law Review" 2005, Vol. 118, No. 6, pp. 1787–1853.

[66] R.H. Fallon, *Legitimacy…*, *op. cit.*, p. 1795.

[67] Ibid, p. 1796.

[68] Two major schools of moral legitimacy have developed, the idealist and the minimalist school. According to the idealist school, a constitution is morally legitimate if it contains provisions that are morally ideal, that is, the best. The minimalist school, on the other hand, argues that a constitution is morally legitimate once it exceeds the threshold of minimally necessary morality.

8.4.2. CONSTITUTIONAL LEGITIMACY IN THE SLOVENIAN AND POLISH LEGAL SYSTEMS

The process of democratic constitutionalisation in Slovenia began as early as 1989, when several amendments to the Constitution of the Socialist Republic of Slovenia were adopted that formally conflicted with the Federal Constitution of Yugoslavia.[69] These provided that the right of self-determination is an inalienable right of the Slovenian people, that the Assembly of the Socialist Republic of Slovenia is obliged to protect the constitutional position of the Republic in the event of unlawful interference by federal bodies, and that a state of emergency cannot be imposed on the territory of the Socialist Republic of Slovenia without the consent of the Assembly of the Socialist Republic of Slovenia.[70] Article 4 of the Act on the Referendum on the Sovereignty and Independence of the Republic of Slovenia,[71] which formed the legal basis for the independence referendum of 23 December 1990, stipulated that the Assembly of the Republic must adopt a constitution and take the necessary constitutional and other measures required for the independence of Slovenia. On the basis of this act, the Basic Constitutional Law on the Independence of the Republic of Slovenia[72] was adopted on 25 June 1991, granting the status of an independent state to the Republic of Slovenia, which thus ceased to be a federal unit of the Socialist Federal Republic of Yugoslavia. The status of an independent state thus obtained made it possible to adopt the Constitution on 23 December 1991. The Constitution was not adopted

[69] The Socialist Federal Republic of Yugoslavia was a federation in which each of the six socialist republics (Socialist Republic of Slovenia, the Socialist Republic of Bosnia and Herzegovina, the Socialist Republic of Croatia, the Socialist Republic of Macedonia, the Socialist Republic of Montenegro, and the Socialist Republic of Serbia) had a relatively high degree of autonomy under the 1974 Constitution. Ahead, the Socialist Republic of Serbia also included two autonomous regions, namely Kosovo and Vojvodina, that had some level of autonomy.

[70] F. Grad, I. Kaučič, S. Zagorc, *Ustavno pravo*, *op. cit.*, pp. 76–77.

[71] Zakon o plebiscitu o samostojnosti in neodvisnosti Republike Slovenije, 1990, Uradni list RS, št. 44/90.

[72] Temeljna ustavna listina o samostojnosti in neodvisnosti Republike Slovenije, 1991, Uradni list RS, št. 1/91-I in 19/91 – popr.

by a special constituent assembly, but by all three assemblies of the Assembly of the Republic in accordance with the procedure for amending the Constitution of the Socialist Republic of Slovenia.[73] The basic democratic postulates were an integral part of the new constitution. Therefore, the Slovenian Constitution has clear democratic legitimacy. As for the dichotomy between representative and reason-based legitimacy, I believe that the elements of reason-based legitimacy are much stronger than those of representative legitimacy. The Constitution contains provisions that can be found in many contemporary European constitutions. In this context, it is important to emphasise that the legislature avoided including politically polarising provisions in the Constitution in order to circumvent internal political tensions and to ensure broad support for the text, which was all the more important given the newly acquired independence and the latent threat of armed conflict even after the War of Independence. Although the Constitution breaks with the socialist political system, primarily through the wide range of fundamental rights it guarantees, it adopted some solutions from the Constitution of the Socialist Republic of Slovenia. However, these are mainly procedural aspects (such as the procedure for appointing the Government). However, elements of representative legitimacy can also be found, such as several socioeconomic rights, including the right to social security and the right to adequate housing.[74] It can be argued that these rights represent the values of Slovenian society, which was highly egalitarian at the time the Constitution was adopted.[75] Moreover, it can be concluded that it is both sociologically and morally legitimate, as the rules it lays down enjoy broad public

[73] According to the Constitution of the Socialist Republic of Yugoslavia, the Assembly of the Socialist Republic of Yugoslavia was composed of three Assemblies: the Assembly of Social and Political Interests, the Assembly of Municipalities and the Assembly of United Labour. The last Assembly of the Socialist Republic of Yugoslavia was elected in 1988 through plural elections and remained in office until the election of the first National Assembly under the rules of the Constitution of the Republic of Slovenia in 1992.

[74] It must be pointed out, however, that the right to reasonable accommodation is only a program norm without much practical value.

[75] Although is it very questionable if it still is.

support and are morally justified.[76] It is my opinion that the Polish Constitution is also democratically legitimate as it was conceived in the process of democratisation and societal shift from a communist to a democratic political regime. Moreover, the Polish Constitution is also morally, sociologically, and legally legitimate for the same reasons that apply to the Slovenian Constitution.

8.5. Analysis of the Role of Selected Actors in the Process of Revising the Constitution

After a detailed theoretical analysis of the constitutional amendment process, the following chapter examines the role of selected actors in this constitutional revision process, namely the Government, political parties, and experts.

8.5.1. GOVERNMENT

The Government is the supreme institution of the executive branch and at the same time a link between the National Assembly and the public administration.[77,78] The Government both implements the policies set forth in the legal acts adopted by the National Assembly and, as one of the bearers of legislative initiative,[79] proposes these legal acts for adoption. According to Article 4 of the Government of the Republic of Slovenia Act,[80] the Government is responsible for

[76] The Constitution of the Republic of Slovenia attaches great importance to the promotion and protection of fundamental rights, the acquisition of which is morally justified.

[77] G. Virant, *Pravna ureditev javne uprave*, Visoka upravna šola, Lubljana 1998, p. 48.

[78] Moreover, the Government is a collegial institution composed of the Prime Minister and Ministers with different portfolios. This allows it to act as a coordinator and mediator between the interests of the different departments.

[79] In the Slovenian legal system, laws can be proposed by the Government, by any deputy or by at least five thousand voters. See: Slovenian Constitution, Article 88.

[80] Zakon o Vladi Republike Slovenije, 2005, Uradni list RS, št. 24/05 – uradno prečiščeno besedilo, 109/08, 38/10 – ZUKN, 8/12, 21/13, 47/13 – ZDU-1G, 65/14, 55/17 in 163/22.

the policies it leads and for the positions it takes in all areas of state competence, for the execution of laws and other legal acts of the National Assembly, and for the work of the public administration *vis-à-vis* the National Assembly.[81] The National Assembly has several instruments with which it can hold the government accountable for its work, in particular the vote of no confidence.[82] In practice, however, this rarely occurs, as the Government is usually formed by the political parties that have a majority in the National Assembly.[83] Since most laws in Slovenia are passed by a simple majority (the majority of all deputies), it is unusual for a law proposed by the government not to be passed. However, the situation is different when a law must be passed with a stricter majority, as is the case when a constitutional act is passed.[84] In such cases, the National Assembly cannot, as a rule, be a 'voting machine' that merely confirms the Government's proposals, since a certain degree of support

[81] Since the Government is a collegial institution, its responsibility is also collegial, which means that every member of the Government is responsible (politically) for all positive and negative actions of the Government, even if he voted against it.

[82] According to Article 116 of the Slovenian Constitution, the National Assembly may, on the proposal of at least ten deputies, pass a vote of no confidence by a majority of all deputies (at least 46 deputies) if a new Prime Minister is elected at the same time.

[83] The Government led by Marjan Šarec, which was composed of four political parties (the Party of Marjan Šarec (LMŠ), the Social Democrats (SD), the Party of the Modern Center (SMC) and the Party of Alenka Bratušek (SAB)), held 38 seats in the National Assembly. However, they were supported by the Left Party, which was officially in the opposition. Due to various exogenous and endogenous factors, this Government collapsed in early 2020.

[84] A constitutional act must be passed by a two-thirds majority of all deputies (60 deputies). A two-thirds majority of all deputies is also required for the adoption of laws on the election of members of the National Assembly, the National Council and the President of the Republic, as well as laws on the ratification of international agreements by which the Republic of Slovenia transfers the exercise of its sovereign rights to international organisations. In addition, the Ombudsman is also elected by a two-thirds majority of all deputies. A two-thirds majority of all deputies present is required to revise the Act on Referenda and Popular Initiatives, the Act on Cooperation between the National Assembly and the Government in EU Affairs and the Rules of Procedure of the National Assembly. Finally, a majority of all deputies (46 deputies) is required to confirm laws vetoed by the National Council and to elect most of the functionaries.

from the opposition is also required (no Government to date had a constitutional majority). This is especially true due to the fact that the National Assembly is usually politically fragmented, with a large number of political parties represented, while the Government has only a weak majority.[85] It can be concluded from this that the role of the National Assembly in the process of revising the Slovenian Constitution cannot be that of a mere voting machine and that the Government cannot therefore impose its positions unilaterally.[86] Nevertheless, the Government plays an important role in the process of constitutional revision. As shown in the statistical data, 12 of the 43 proposals for constitutional acts were introduced by the Government, of which 4 were passed. Statistically, this means that one-third (33%) of Government proposals were adopted, compared to 23% of proposals submitted by groups of at least 20 deputies and 0% of proposals submitted by voters. This is not surprising, since the Government can rely on an accomplished and extensive apparatus (ministries) to prepare the proposal for the constitutional acts. Moreover, the Government has a special position in the constitutional revision procedure, as evidenced, among other things, by the fact that the President of the National Assembly is obliged to send the proposal to initiate the constitutional revision procedure to the Government if it is not the proposer, and that the Government has the right (but not the obligation) to submit an opinion[87] and the opportunity to express its opinion on the matter during the meetings

[85] The situation is somewhat different with the current Government led by Rober Golob, which has a stable majority of 53 votes in the National Assembly. However, this is an almost unprecedented position. Moreover, it is also not uncommon for political parties to change affiliation or fall apart, weakening the Government or driving it out of office altogether. This was especially the case in the eighth composition of the National Assembly (2018–2022), in which the Party of the Modern Centre (SMC) and the Pensioners' Party (DeSUS) both joined the third Janša Government in early 2020, although they were originally members of the Šarec Government. In addition, the Pensioners' Party fell apart, with some of its deputies supporting the third Janša government and some supporting the opposition.

[86] This would be different, of course, if the coalition had a qualified absolute majority in the National Assembly (a two-thirds majority of all deputies).

[87] Rules of Procedure, 2021, Article 173 paragraph 6.

of the Constitutional Committee. In Poland, the Government does not have any prerogatives in the constitutional revision procedure.

8.5.2. DEPUTY GROUPS, POLITICAL PARTIES, AND DEPUTIES

First, it should be noted that deputy groups, political parties, and deputies are different functional units. Deputy groups and deputies are usually the offshoots of political parties in the National Assembly and act according to the political guidelines of their respective political parties, although this is not necessarily the case.[88]

Political parties can be defined as political organisations composed of individuals with similar political beliefs who seek to gain or maintain political influence in order to fulfil their political program,[89] or as an organised group of individuals with similar political beliefs who join together for the purpose of participating in (usually parliamentary) elections.[90] In a pluralistic political system, political parties are the cornerstones of the democratic state, competing with each other to occupy positions of power.[91] Groups of deputies in the National Assembly are linked to political parties in that deputies elected on the same list of candidates, i.e., who are members of the same political party, may decide to form a deputy group. However, they are not obliged to do so. A deputy group must consist of at least three deputies. Each deputy can only be a member of one deputy group.[92] Deputy groups have a strong influence on the functioning of the National Assembly and its working bodies,

[88] A prime example of this is the disputes in the Pensioners' Party (DeSUS) during the term of the third Janša Government from 2020 to 2022, when the party itself was far more critical of the Government in which it participated than some of its deputies. This ultimately led to the weakening of the party, which was expelled from the National Assembly in the 2022 elections after having been a constant factor in parliamentary life since 1996.

[89] F. Grad, I. Kaučič, S. Zagorc, *Ustavno pravo*, *op. cit.*, p. 442.

[90] B. Constat, *Cours de politique constitutionnelle*, Bruxelles 1837, p. 202.

[91] J. Schumpeter, *Kapitalismus, Sozialismus und Demokratie*, Tübingen 1987, p. 427.

[92] See: Rules of Procedure, 2021, Articles 28–31.

since their heads[93] are members of the College of the President of the National Assembly, which decides on important procedural matters such as the convening of meetings and the agenda of each session. Deputy groups have special rights in the legislative procedure as well as in the procedure constitutional revision.[94] Deputies who do not belong to a deputy group may form their own deputy group consisting of independent deputies. This usually happens when at least three deputies leave the deputy group to which they originally belonged, usually due to political disagreements.

Each parliamentary party is represented on the Constitutional Committee and has the opportunity to nominate an expert to serve on the Expert Committee. The appointed expert need not be a member of the political party appointing him, and in most cases is not, but it is customary for him to share, at least to some extent, the political positions of the parliamentary party appointing him.[95]

The deputy groups may amend the proposal for the constitutional act prepared by the Expert Committee, but have no further formal role in the process of constitutional revision. However, as an outgrowth of a political party in the National Assembly, in practice they have a significant influence on the actions of individual deputies.

In discussing the influence of individual deputies and groups of deputies in the process of constitutional revision, it is first necessary to distinguish between the group of 20 deputies who have active legitimacy to propose a constitutional act, deputies who are members of the Constitutional Committee, and those who are not. First, the empirical analysis shows that 7 of the 11 constitutional acts passed by the National Assembly at the time of writing were introduced by groups of at least 20 deputies.

The deputies who are members of the Constitutional Committee participate in the discussion on the report prepared by the Expert Committee and then vote on whether the Constitutional Committee

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[93] Usually seasoned and senior politicians.

[94] F. Grad, I. Kaučič, S. Zagorc, *Ustavno pravo*, *op. cit.*, pp. 388–389.

[95] It would be highly unusual for a parliamentary party to appoint an expert who did not share its positions and was therefore likely to promote solutions other than those sought by that party.

will adopt the draft decision to initiate the constitutional revision procedure. It should be noted that the Constitutional Committee may either maintain the proposal in its current form or amend it. In advance, the Constitutional Committee discusses the draft constitutional act and prepares a report, which is forwarded to the plenary session of the National Assembly. After the later votes on the initiation of the second phase of the procedure for constitutional revision, the Constitutional Committee acquires the status of the proposing party. The Constitutional Committee discusses and votes on the final proposal of the Expert Committee with the required two-thirds majority of its members (since the Committee has 17 members, this means a majority of 12 members). This concludes the work of the Constitutional Committee.

Individual deputies who are not members of the Constitutional Committee participate in the constitutional revision procedure within the framework of discussions and votes in the plenary session of the National Assembly. The plenary session, by a two-thirds majority of all deputies present and a quorum of two-thirds of all deputies, makes the final decision on whether or not to initiate the constitutional revision procedure. In the second stage of the procedure, the plenary session of the National Assembly votes by a two-thirds majority of all deputies to adopt the constitutional act without being able to amend it.[96] Finally, the plenary session of the National Assembly also promulgates the constitutional act by a simple majority.

It can be concluded that the influence of individual deputies in the procedure for constitutional revision is far smaller than their role in the procedure for adopting "ordinary" laws, where they can propose amendments and even act as proposers. Nevertheless, deputies are the "dominus litis" of the constitutional revision procedure, with groups of deputies having active legitimacy to propose constitutional acts, and deputies ultimately deciding the fate of the proposed constitutional act. It is therefore not entirely baseless to claim that their role in the constitutional revision procedure is profound, much more so than that of the Government.

[96] In other words, he can either accept the proposed constitutional act in its entirety or reject it.

8.5.3. EXPERTS[97]

According to established parliamentary practice, each political party may appoint one expert to the Expert Committee, which is firmly integrated into the work of the Constitutional Committee. The Expert Committee first prepares a report on whether to initiate the proposed constitutional revision procedure and, if so, prepares the precise text of the constitutional act. If the Constitutional Committee decides to initiate the constitutional revision procedure, the Expert Committee is tasked with preparing a working draft of the constitutional act, with the original proposal as the basis for its preparation. The Expert Committee may decide to retain it or to make minor or even major amendments.[98] When the second stage of the procedure begins, the Expert Committee prepares a working draft of the constitutional act based on the position of the plenary session of the National Assembly.

The Expert Committee has no formal role in the constitutional revision process; its role is established by parliamentary practice. In practice, however, it is an essential element of the procedure, ensuring that the constitutional act is both substantively and nomotechnically sound and optimal.[99] An empirical analysis of past constitutional revision procedures shows that the Constitutional Committee usually follows the proposals of the Expert Committee. Moreover, it can be seen that the Expert Committee is a body in which different political interests can come together to find a solution that can receive broad support from the political parties and their deputies when it comes to a vote.

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[97] The term "experts" refers to the members of the Constitutional Committee's Expert Committee, but not to other experts who might be involved in the constitutional revision process, such as experts who serve as political consultants to political parties or nongovernmental organisations.

[98] The Expert Committee may even submit a working draft that has nothing in common with the original proposal, although this is only a hypothetical possibility, since the Expert Committee usually adheres closely to the original proposal.

[99] Which, as a purely political body, does not usually have the expertise and legal knowledge required to prepare the constitutional act.

8.6. Conclusions

In constitutional practice, two types of constitutional revision procedures have developed around the world, namely amending and novelisation. In the case of amending, the text of a constitution is supplemented by amendments, leaving the original text untouched, while in the case of novelisation, the existing text of a constitution is changed (novelised). The Slovenian Constitution, like most other constitutions, is revised in the process of novelisation.

Constitutions can be either rigid or flexible, with rigid constitutions requiring a higher hurdle (usually in the form of a lengthy procedure) to be crossed for their revision as compared to "ordinary" laws, and flexible constitutions being revisable in the same way as "ordinary" laws. Most constitutions, with some exceptions such as the Slovenian, Polish, and New Zealand constitutions, are rigid.

The Slovenian Constitution was adopted on 23 December 1991, and is the legal emanation of the Slovenian independence movement. The Slovenian Constitution was adopted according to the procedure established in the Constitution of the Socialist Republic of Slovenia, although new rules for its revision were introduced in it, which are contained in Chapter IX ("Laws and Procedures"). These were further elaborated in the Rules of Procedure. The Slovenian Constitution is revised by a constitutional act, and two bodies play a particularly important role in the revision process: the Constitutional Committee, an ad hoc working body, and the plenary session of the National Assembly. The circle of parties actively legitimised to propose constitutional acts is much narrower than for proposing "ordinary" laws, as only the Government, 20 deputies or 30,000 voters can propose its adoption. The constitutional revision process can be roughly divided into two phases, the first dedicated to deciding whether to initiate the constitutional revision procedure at all and, if so, preparing the constitutional act, and the second leading to the adoption of the final version of the constitutional act. After the adoption of the constitutional act by the plenary session of the National Assembly, at least 30 deputies may demand a referendum on the confirmation of the said act. Since the National Assembly has 90 deputies and the majority required to pass a constitutional

act is 60 deputies, it is unlikely that a constitutional act already passed by the National Assembly will receive the required opposition. However, if a referendum occurs, the constitutional act will only be confirmed if a double majority is reached, since both the majority of all voters must participate in the referendum and the majority of them must vote in favour of adopting the constitutional act. Once the constitutional act has been adopted by the National Assembly or confirmed by referendum, it is the responsibility of the plenary session of the National Assembly to promulgate the act within eight days.

Neither the Slovenian Constitution nor the Rules of Procedure contain provisions on the role and functioning of the Expert Committee of the Constitutional Committee, which was established by parliamentary practice. The members of the Expert Committee, appointed by the individual parliamentary political parties, play an informal but crucial role in the procedure for revising the Slovenian Constitution, as they are charged with examining the necessity of initiating the revision procedure from a technical point of view and preparing the text of the constitutional act.

The opinions and texts prepared by the Expert Committee are in no way binding, but in practice, the Constitutional Committee adheres closely to them.

Since its adoption in 1991, the Slovenian Constitution has been the subject of 11 revisions and 43 proposals for revisions. Of the 11 constitutional acts adopted, 4 were proposed by the Government and 7 by a group of at least 20 deputies. The procedure for adopting a constitutional act is far lengthier and more complex than that for adopting an "ordinary" law, which reflects the rigidity of the Slovenian Constitution. Moreover, the circle of actively legitimised parties that can propose a constitutional act is much more limited than in the case of proposing an "ordinary" law. The same also goes for the Polish Constitution.

The paper concludes that there are several different classifications of constitutional legitimacy. It is possible to distinguish between democratic and dynastic constitutional legitimacy, the first being the result of a democratic constitutionalisation process and the second being typical for a constitution introduced by an exogenous source.

Other possible classifications of constitutional legitimacy are representative legitimacy and reason-based legitimacy. According to the theory of representative legitimacy, the Constitution represents the values and fundamental beliefs of the nation, while reason-based legitimacy is based on the most optimal or just solutions that the Constitution contains. Finally, constitutional legitimacy can also be classified as legal, sociological, and/or moral, with legal legitimacy deriving from the (lawful) process of adopting the constitution, sociological legitimacy deriving from the free and willing acceptance of its rules by the people, and moral legitimacy deriving from the moral justice of its rules. It has been established that both the Slovenian and the Polish Constitutions enjoys democratic legitimacy, as they were the legal outcome of the democratisation process, and enjoy both representative and reason-based legitimacy, as they contain some provisions representing the basic values of the respective nations, while their majority enshrines fundamental democratic principles that are recognised as cornerstones of any democratic society. Moreover, both of the constitutions enjoy legal, sociological and moral legitimacy.

The study analysed the formal as well as the informal role of individual subjects involved in the process of constitutional revision. It was found that the Government plays an important role in this process, as it has active legitimacy for proposing constitutional acts and 4 of the 11 adopted constitutional acts were proposed by it. In addition, the Government has an extensive and well-trained administrative apparatus that allows for the preparation of expert positions and opinions in this procedure. It is important to note that the Government also has some unique procedural rights in the constitutional revision procedure. Parliamentary parties, political parties and deputies also have a high degree of influence on the constitutional revision procedure, with parliamentary parties being able to appoint the members of the Expert Committee and deputy groups having some unique procedural rights in the revision procedure. When analysing the influence of individual deputies, it is important to distinguish between those who are members of the Constitutional Committee and those who are not. The former have the ability to influence the work of the Constitutional Committee, which can lead

to a change in the wording of the constitutional act, while the latter can only vote on whether to initiate the constitutional revision procedure and on the final adoption of the constitutional act. In other words, they vote on the constitutional act but cannot influence its wording. At least 20 deputies are also among the parties actively legitimised to propose a constitutional act, and 30 deputies can call for a referendum on the said act. However, unlike in the ordinary legislative procedure, individual deputies cannot propose amendments to the constitutional act. The role of experts in the amendment procedure is informal but significant, as each political party appoints a member of the Constitutional Committee's Expert Committee. The Expert Committee prepares a report on the necessity of the amendment procedure and, above all, on the proposal for the final version of the constitutional act. As a rule, the Constitutional Committee closely follows the proposals of the Expert Committee.

Both the Slovenian and the Polish Constitution share multiple similarities. This is not surprising, as both were written in a similar historical and political moment, and both have fundamental rights and the safeguarding of a democratic regime at their heart. The actors which are included in the constitutional revision procedure and their role in this procedure in both constitutions differ somewhat. However, it cannot be stated that in this aspect one or another constitution is better or worse – they are just different. One possible institute which proved as very efficient in the Slovenian constitutional practice, however, is the Expert Group of the Constitutional Committee. A similar body could also be introduced to the Polish procedure for constitutional revision by parliamentary practice or even by a revision of the Polish Constitution itself.

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Chapter 9. The Rigidity of the Constitution and Its Relationship with the Legislative Process on Amendments of the Constitution

9.1. Introduction

Constitution of Slovak Republic is '30-years old'; it was novelised 26-times within this period, that means 0.86% novelisation on average for one year of the constitution's effectiveness. In comparison, the Constitution of the Czech Republic, which has the same age, because both of these states were establish at the same time, was novelised only 8 times, which means only 0.26 novelisation on average for one year of the constitution's effectiveness. Both of these constitutions are written, rigid, and have the lowest level of rigidity – both of them can be novelised by constitutional acts (amendments), which are approved by the qualified quorum. However, the Czech Republic has a bicameral parliament and the Slovak Republic has only a unicameral parliament. Naturally, these two different development tendencies of these two constitutions can stem from several reasons, e.g., the legal regulation of the legislative process of the constitutional amendments, the influence of European law, the political culture – constitutional amendments for political purposes, etc. Considering the situation in the Slovak Republic, the absence of a veto of the president of the Slovak Republic can be also the one of them, because the president can use the veto only in legislative processes, in which 'ordinary' acts are approved (to break the veto requires a quorum of 76 votes of all members of Parliament), but he cannot use the veto in cases of constitutional acts (amendments), which are approved by qualified quorum. Considering the legal

certainty and the stability of legal system, this state is not favourable, which fact the president of Slovak Republic has underlined. Therefore, one of the aims of this research is to identify the causes of this state and formulate the proposals that could contribute to changing this state and to increase of level of stability of the legal system.

However, this is only one of the issues addressed in this chapter. Indeed, it examines the chosen issue in a broader context, in particular the importance of rigidity for the legal system in relation to the causes of frequent constitutional amendments and the legal regulation of the legislative process for constitutional change (amendment). This chapter examines the causes of this phenomenon, the influence of European law and the need to harmonise European law with Slovak law on the frequency of amendments to the Constitution of the Slovak Republic No. 460/1992 Coll. (hereinafter referred to as 'the Constitution' or 'the Slovak Constitution'), whether this state of affairs is acceptable or not. The aim of this chapter is to formulate relevant proposals for solving this phenomenon, or to name specific measures that could contribute to increasing the degree of rigidity of the Slovak Constitution, including changes in the legislative process under which amendments to the Constitution are approved.

The following questions and scientific hypotheses have been formulated in the framework of the investigation of this issue:

1. Questions:
   - Does the level of rigidity of constitution determine the number of its amendments?
   - What legislative novels (changes) could contribute to the higher lever of the rigidity of the constitution and reach the lower number of amendments of constitution?
2. Hypotheses:
   - The level of the rigidity of the constitution is a significant but not the sole factor which influences the number of amendments of constitution and the stability of the legal system – the relevant ones are factors as well.
   - The rigid constitution with the lowest level of rigidity allows more frequent constitutional changes than the constitution with higher level of rigidity.

Several research methods were used to answer these questions and confirm these hypotheses in this chapter. Considering the research methods, within the basic research, especial use will be made of the method of expert analysis and the method of comparison. The method of expert analyse will include the scientific literature (monographs, article, proceedings) and the case law. The qualitative research will be focused on the obtaining of information by interviews with several experts on constitutional law and the legislative process.

Answering the questions raised and confirming the scientific hypotheses – using the scientific methods outlined above – is intended to contribute to the achievement of the aim of the investigation within this chapter. Starting from the assumption that the high number of amendments to the Slovak Constitution is largely due to the lowest possible level of rigidity of the Slovak Constitution and other relevant constitutional and social aspects, which are analysed in this chapter, the primary aim of the research in this chapter is to formulate relevant proposals to increase the level of rigidity of the Slovak Constitution, also from the procedural point of view, or from the point of view of the legislative process, within which amendments to the Constitution are approved. The other sub-objectives of the research correspond to this: to identify other constitutional and social causes of this phenomenon; to assess the impact of European law on this phenomenon, especially from the point of view of the need to harmonise Slovak law with European law; to identify problematic issues of the legal regulation of the legislative process for amending the Constitution at the governmental and parliamentary level.

9.2. Rigidity of the Constitution and Its Relevance for the Legal System

In general, the Constitution is the fundamental law of the state and, among other things (enshrining fundamental rights and freedoms, regulating the relations and degree of freedom of individuals and their relationship to the state and state authorities, the tripartite

division of powers and the establishment of a system of checks and balances, etc.), its role is to contribute to the stability of the legal system. Of course, the constitution – as with other legal provisions – is the result of the intellectual activity of man and the normative activity of the competent body (e.g., the people in the form of a referendum), but with the constitution and the legislative process, in which not only the constitution but also its amendments are approved, the question of the rigidity of the constitution, i.e., from a procedural, legislative point of view, also the conditions that must be met in order for the constitution, or its amendments, to be approved, is in principle at the forefront of the debate.

"The role of the constitution is to preserve the status quo; the rigidity of the constitution reinforces this preservative function."[1]

The question, of course, is to what extent the constitution should be rigid or, on the other hand, flexible, in order to preserve in an appropriate way the issues or rights, values or public interests that should be unchanging, such as the foundations of liberal democracy and the rule of law, the values of civil society, etc., but at the same time give room for changes that are required by the needs of civil society or the state. Káčer comments on this issue as follows:

> *It depends on whether we agree with the status quo that the constitution preserves. If so, we prefer more rigidity, if not, flexibility. The current constitution is a democratic order of fundamental rights and freedoms, so it should be highly rigid.*[2] *On the various mechanisms or instruments for increasing the degree of rigidity of the Constitution, see below – author's note.*

Martin Giertl also notes other aspects of the importance of the rigidity of the constitution when he argues:

> *Since there is historical, theoretical, practical, political and social agreement that the Constitution is the fundamental*

[1] Interview with Marek Káčer – the answer to Question No. 1.
[2] Interview with Marek Káčer – the answer to Question No. 2.

law of the state with the exception, for example, of such arrangements as it is the supreme legal norm which is the result of the development of society not only at a particular time but with a view to the future, i.e., stable and permanent, and should be the most responsible expression of the political will, the broad consensus of society, the will of the majority of the people and a mirror of its basic rules of functioning. At the same time, it should set the boundaries for the exercise of public authority and guarantee rights, in particular the rights and freedoms of the citizen. It follows from the above that the more modifications, changes or frequent interventions in the Constitution (but also, for example, in the Constitutional Laws), the more questionable, unstable and not sufficiently reflective of a lasting social agreement or consensus is the way in which public power is exercised in the state. Ultimately, it can lead to a disturbance in the balance between public power and the rights and freedoms of the citizen, thus undermining the stability of the legal system. The importance of the rigidity of the Constitution for constitutionalism is of the utmost importance because it primarily ensures stability not only for the relations in society (the state) regulated by the Constitution, but also for the position of public authorities and citizens and their relations with each other. At the same time, its rigidity is a guarantee of better building of long-term fair and balanced relations with other states and communities and of the stability of the legal system. (Note: the legal system and order of the Slovak Republic is unstable and the constant efforts to change the Constitution are a major interference with its stability).[3]

However, some experts also explicitly focus on the potential risks associated with the rigidity of the constitution, particularly in terms of its perception in the realm of "high rigidity" or "immutability". Trnkócy, for example, writes:

[3] Interview with Martin Giertl – the answer to Question No. 1.

> *On the issue of the rigidity of the constitution, we should focus on what we consider to be the rigidity of the constitution. If this is to be understood as the immutability of its provisions, we should then say what we want to be immutable or changeable only through a special legislative process. If I were to use comparison, I could draw on the Basic Law of Germany, where the provisions on the state system and on the guarantee of fundamental rights and freedoms are considered rigid. The legislators in Portugal and Spain have gone even further.*[4]

Another constitutional law expert, Jakub Neumann, argues that: "The rigidity of the Constitution is a double-edged weapon. On the one hand, it is 'celebrated' as a stabilising element of the constitutional system (protection of the constitution from frequent changes), on the other hand, it can preserve the constitutional system in a state that will not be satisfactory to citizens (most citizens want change, but because of the strict procedural conditions for changing the constitution, they cannot make it happen). At the same time, the high rigidity of the constitution may lead to the adoption of purely populist (i.e., not necessary, systemic and perhaps unpopular) changes".[5]

Nevertheless, Giertl argues that:

> *the Constitution should be as rigid as possible, so that the constitutional conditions and the basic relations in society regulated by it are as stable as possible. In the case of the Constitution of the Slovak Republic, it is the Constitution of a relatively new state (established on 01.01.1993), when the Constitution was adopted already on 01.09.1992. Since it was primarily created in connection with the division of the common federal state (ČSFR), the efforts to create and build a new state, based on the Constitution of the common state, but also on the Charter of Fundamental Rights and Freedoms and others, its creators and the then relevant*

[4] Interview with Slavomír Trnkócy – the answer to Question No. 1.
[5] Interview with Jakub Neumann – the answer to Question No. 1.

> *political representation (the National Council of the Slovak Republic and the political parties) were able to create and adopt a relatively stable and mostly accepted basic law of the state. It must be assumed in all historical, political and social contexts and processes that the Constitution will also be flexible in responding to changes (e.g., the accession of the Slovak Republic to the EU). However, such changes must always be the result of expertise and legitimacy, i.e., a broad consensus not only of the public authorities, but also of the citizens. Any rules of the game, which are frequently changed, cease to be understandable, acceptable to those involved and may ultimately lead to the impossibility of complying with them or to an attempt to circumvent them/ or to interpret and adapt them on purpose). (Note: "flexible does not mean: I have a constitutional majority so I will accept what I want", or I will try to enforce, e.g., basic cultural and ethical settings in society without a broad social consensus through the Constitution because I/we believe/are convinced of an immutable truth and we are threatened).*[6]

Neumann notes not only the legal but also the political dimension of the issue. He argues that:

> *In this case, the issue is not a legal one, but a political one. There is no ideal model of a rigid/flexible constitution, as there is no ideal society. A constitution should be as rigid or flexible as its framers wish it to be. In other words, the constitution is supposed to conform to the ideas of its makers/ society.*[7]

Trnkócy thinks likewise, saying that:

> *We should first say what we want it to be rigid or even immutable. It would also be inappropriate for the constitution, as*

[6] Interview with Martin Giertl – the answer to Question No. 2.
[7] Interview with Jakub Neumann – the answer to Question No. 2.

> *the basic law of the state, not to reflect fundamental changes in society. In my view, it is not appropriate for the constitution to be changed every election period just as a kind of monument to the legislative activity of a political party in parliament.*[8]

That means, there are different views on the optimal model of constitutional rigidity, Neumann even arguing that there is no ideal model of the relationship between a rigid and flexible constitution (since there is no ideal society, either). Regardless, however, the answers of the respondents clearly show the irreplaceable importance of the rigidity of the constitution in relation to the stability of the legal system. At the same time, however, it is also true that there is no such thing as a direct proportionality of the type "the higher the degree of rigidity of the constitution, the more stable the legal system". This would be an oversimplified view of the matter because, as Trnkócy argues, if we understand constitutional rigidity (too narrowly) as only the immutability of the constitution and the legal system, it could lead to undesirable social and legislative phenomena, which would consist in the fact that the constitution and the legal system might not be adaptable to the current social needs. In short, it could be said that the responses of the respondents indicate that they believe that the lowest level of rigidity in the constitution is not ideal as it allows for frequent changes to the constitution that do not reflect real and actual social needs but are explicitly promoted for political reasons by the ruling political parties. At the same time, however, it also follows that too high a degree of constitutional rigidity is not ideal – neither for society nor for the state. Indeed, the 'conservatism' of a legal system should not be confused with its stability; a stable legal system is built in such a way that it contains mechanisms (including of a constitutional nature) that give it 'strength', which lies not only in stability itself, but in legal certainty and predictability and other aspects, but also in such a way that it is open to change, which, however, is not merely expedient and political, but justified by societal needs.

[8] Interview with Slavomír Trnkócy – the answer to Question No. 2.

What is the situation in the Slovak Republic? Looking at the previous answers, it is clear that it is far from ideal. The Constitution of the Slovak Republic is rigid, but with the lowest possible degree of rigidity, because a qualified quorum of 90 votes is sufficient to change it – the Constitution can be changed by a constitutional law. Let us see how this lowest level of rigidity was assessed by the respondents.

Question No. 3: the Slovak Constitution has been amended 26 times during its thirty years of existence (until 26 September 2023, when I will finalise these questions – author's note), which means an average of 0.86 amendments per year. In your opinion, is the frequency of amendments to the Constitution a 'good' or 'bad' phenomenon in the legislative processes in the Slovak Republic?

This was followed by another question, namely Question No. 4, which concerned a comparison with the legislative development of the Czech constitution: for comparison, the Constitution of the Czech Republic has been amended only 8 times in the same period (from the establishment of the independent Czech Republic to 26 September 2023), which averages 0.26 amendments per year. What do you think is the reason for this difference?

Several respondents were very critical of the number of amendments to the Slovak Constitution. According to Matin Giertl:

> *It is certainly a bad and undesirable phenomenon, but it is a reality of the relationship of public authorities in particular to the Constitution (and thus to the stable unchanging rules of the game), and also to the rights and freedoms of citizens. A country which, even after more than 30 years, does not have a fully-fledged and consensually prepared binding basic strategic document – a short- and long-term vision for the development of the Slovak Republic and the public policies that follow it, including investment planning, tends to regulate the basic relations in society, including the Constitution, on an ad hoc basis. This tendency is especially true for representatives of political power elected for 4 years. By such repetitive actions, they undermine legal certainty and the stability of the legal system, including non-compliance with legislative processes. (Note: how many constitutional lawyers and*

> *experienced legislators do the political parties represented in the National Assembly have in their teams?).*[9] *Káčer likewise considers the number of amendments to the Constitution and its frequent changes to be a 'bad phenomenon'.*[10]

However, Neumann and Trnkócy also note some other connections. According to Neumann:

> *Pointing only to the high number of amendments to the constitution is a simplistic shortcut when criticizing the basic document. I consider it more appropriate to assess the substance of the individual amendments (did they necessary/purposefully requested by the professional community or unnecessary/unnecessary/populist?). From my point of view, it is also important to perceive whether the amendments affect the "value core" of the Constitution (enshrining the definition of marriage; limiting the powers of the Constitutional Court) or regulate (or rather correct) less important issues of an "operational" nature (how the President will be elected; when the term of office of the Ombudsman will end, etc.).*[11]

Trnkócy, on the other hand, says (partly in agreement with Neumann, partly differently):

> *In my opinion, the guiding figure is not the average, but it is necessary to note the analogies and also the content of the amendments. Certainly, the novel no. 90/2001 had its justification, but I do not see the point of constitutionally enshrining the protection of water, defining marriage, etc. So not only has the Constitution been amended frequently, but also unnecessarily.*[12]

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[9] Interview with Martin Giertl – the answer to Question No. 3.
[10] Interview with Marek Káčer – the answer to Question No. 3.
[11] Interview with Jakub Neumann – the answer to Question No. 3
[12] Interview with Slavomír Trnkócy – the answer to Question No. 3.

Regarding the comparison of the frequency of amendments to the Slovak and Czech constitutions, respondents held different opinions. Of course, the sheer number of amendments to both constitutions, which are, so to speak, 'equally old', may be influenced by several factors, or the approved amendments to both constitutions may be justified by several reasons. In addition, it should be remembered that the Slovak Republic has a unicameral parliamentary system, while the Czech Republic has a bicameral parliamentary system, but in formulating interview Question No. 4, I assumed that this is not the only or decisive factor why the two constitutions developed diametrically differently in terms of the dynamics of their development in the same period of time. Let us see what the respondents had to say about this.

Martin Giertl reflects on the possible reasons as follows:

> *I do not know why the Czech Republic has not had more frequent amendments to its Constitution (even so, together with us, it is the most frequently amended – among EU countries), I am not an expert on Czech constitutional realities, but I believe that it is due to several factors:*
> – *The Czech Constitution was probably drafted better.*
> – *The legislative process/adoption of laws amending the Constitution of the Czech Republic or adopting constitutional laws is only possible on the basis of the consent of both chambers of the legislative body (Chamber of Deputies, Senate) and at least a 3/5 majority in both chambers is required, which is a higher barrier than in a unicameral body (National Council of the Slovak Republic).*
> – *Respect before the Constitutional Court of the Czech Republic and its implementation practice is higher than in the Czech Republic.*
> – *The general professional and public debate on constitutionality is at a higher level in the Czech Republic.*
>
> *Note: "Finally the Czechs have not overtaken us in something".*[13]

[13] Interview with Martin Giertl – the answer to Question No. 4.

In addition to the bicameral parliament factor, Káčer also notes another connection when he says: "The Czech Republic has a bicameral parliament and a higher level of political and legal culture".[14] In similar fashion, in addition to the bicameral parliament, Trnkócy also formulates an answer and names the cause of this phenomenon, saying that "Probably in the legislators' greater respect for it".[15]

However, Jakub Neumann also notes other connections; he responded to Question No. 4 as follows:

> *I cannot comment on the reasons for this difference. At the same time, however, I would like to point out that despite the lower number of amendments, the Constitution of the Czech Republic is not subject to less controversy than the Constitution of the Slovak Republic (in layman's terms – it is not more perfect). Repeatedly criticised shortcomings (of the Czech Constitution) are, for example, the complicated regulation of the post-election formation of the government (Article 68(4)) or the lack of regulation for the holding of a national referendum. If the excessive rigidity of the constitution (to which the bicameral parliamentary system in the Czech Republic also contributes) prevents changes to these apparent shortcomings, then the low number of amendments would not necessarily be considered a positive indicator of the stability of the constitution, but rather a negative indicator of its 'ossification'.*[16]

The individual answers show that even a bicameral parliamentary system may not be a guarantee of the stability of the legal system and the optimal or ideal setting of the relationship between the flexibility and rigidity of the constitution. Although Neumann also draws attention to the risk of 'ossification' of the Czech constitution, in general it could be said that the respondents have named important factors that influence the stability of the legal system (and consequently also

[14] Interview with Marek Káčer – the answer to Question No. 4.
[15] Interview with Slavomír Trnkócy – the answer to Question No. 4.
[16] Interview with Jakub Neumann – the answer to Question No. 4.

the predictability of law and legal certainty) in relation to the situation in the Czech Republic, and these are 'a generally higher level of professional and public debate on the topic of constitutionality in the Czech Republic' (Giertl), 'a higher level of political and legal culture' (Káčer) or 'greater respect of legislators for the constitution' (Trnkócy). In my opinion, however, it is also worth considering whether the bicameral parliamentary system also contributes to a higher level of political and legal culture…

Regardless, the 'absence of a second chamber of parliament' in the Slovak Republic is not the only factor contributing to the lower degree of rigidity of the Slovak constitution. Another, equally important factor is the presidential veto. When passing 'ordinary' laws, which require a supermajority of MPs present at a parliamentary session (the parliament is quorate if a supermajority of all MPs is present), the President can use his veto power and the presidential veto can be overridden by the parliament by a supermajority of all MPs, i.e., more than 76. The problem is that the President has no such power when passing constitutional laws. The next question (Question No. 5) therefore concerned precisely the 'absence' of a presidential veto in the case of legislative processes concerning constitutional laws. It read as follows:

> *90 votes are required to approve a constitutional law amending the Constitution. However, in this case the President does not have the same veto power as in the approval of 'ordinary' laws. Does this 'handicap' of the President also contribute to a lower degree of rigidity in the Constitution? And what, in your opinion, would be the most appropriate mechanism to compensate for this 'handicap' for the Slovak Republic?*

This is a rather complicated constitutional question, which is not clearly answered in the expert public, or on which there are different opinions among constitutional law experts.

Giertl notes:

> *It is a question of the scope of the powers of the President of the Slovak Republic and whether we want to strengthen the*

> *system towards a presidential system, or whether it will be a combination, or whether we are satisfied with the current state of affairs. This is a serious constitutional question that requires, first of all, a proper high-level debate, including the practice of other systems, support across political parties and a broad consensus, including among the public. While I understand the dissatisfaction with this so-called 'handicap' of the President and the desire to empower the President, on the other hand, I believe that at this time and for at least the next term, the National Assembly and its members must be held fully accountable for their actions, including their legislative initiatives (including constitutional laws). While this is a gamble with the rigidity of the Constitution, the legislative practice in the last term of the current Parliament members in particular leads me to believe that it is appropriate to open up such a highly professional debate and patiently weigh the pros and cons. (Note: after the experience of our past presidents and the practice of the national council and our political culture, I do not think that the presidential system is appropriate for the SR at this time).*[17]

Neumann is clear on this controversy. His response shows that he not only recognises this as a problem, but also proposes a solution to it, as follows:

> *In general, when exercising the veto power, the President is working with a pair of factors that can impede the path of legislation to enactment. These are primarily (1) the need to pass the vetoed legislation by a strict majority of the House (76+), but equally important is (2) the time lag before the next vote (the ratio of political forces in support of the legislation being passed can change over time). Both factors could be adapted to the needs of a specific 'constitutional' veto, which could look as follows: (1) Parliament could only proceed to a vote on overriding a vetoed constitutional law*

[17] Interview with Martin Giertl – the answer to Question No. 5.

> *with a certain – well-defined – time lag (e.g., only 3 months after the veto is invoked). (2) If the quorum is tightened when passing an ordinary law, there is no reason not to apply the same procedure when vetoing a constitutional law. A reasonable tightening (from the original 3/5 – 90 MPs) to the 2/3 (100 MPs) threshold could be considered.*[18]

Trnkócy also does not consider this situation ideal and advocates or proposes other solutions. In his opinion:

> *The right of suspensive presidential veto has its importance, but a much more fundamental impact on procedural rigidity is the provision of Article 15 of the Swedish Constitution, where the same wording of an amendment has to be adopted twice. After the first adoption of the proposed amendment, a national parliamentary election must be held, and the new parliament must adopt it in the same wording(!) This is how the change of the constitution manifests itself in relation to political representation and also as a reflection on the change of society.*[19]

Káčer, on the other hand, does not consider the current president's 'handicap' consisting in the lack of the right to veto constitutional laws compared to 'ordinary' laws to be a 'handicap' of the president at all. While he advocates a greater degree of rigidity in the Constitution, he suggests other mechanisms, arguing:

> *The president's veto is of little use in this case because under the current arrangement it can be overridden by an absolute majority vote. I would strengthen the rigidity by making it compulsory to approve an amendment to the constitution by referendum.*[20]

[18] Interview with Jakub Neumann – the answer to Question No. 5.
[19] Interview with Slavomír Trnkócy – the answer to Question No. 5.
[20] Interview with Marek Káčer – the answer to Question No. 5.

The individual answers of the respondents show that basically all of them are aware of this phenomenon and evaluate it negatively as an undesirable, problematic phenomenon, and they also suggest solutions to this problematic phenomenon. For example, in the form of the introduction of the presidential constitutional veto, the re-voting on the same proposal for the amendment of the Constitution (constitutional law in the conditions of the Slovak Republic) or the need for a referendum to approve the amendment of the Constitution (to confirm the constitutional law approved by the Parliament, which would amend the Constitution).

9.3. Influence of European Law on Amendments to the Slovak Constitution

Of course, one of the important factors that influenced the amendments to the Slovak Constitution was the accession of the Slovak Republic to the European Union and the need to harmonise Slovak law, including constitutional law, with European law. However, in the course of the interview I also focused on the question of how important this factor was in terms of the number of amendments to the Slovak Constitution, or how many amendments to the Slovak Constitution were justified by the need to harmonise Slovak law with European law. Question No. 6 concerned this aspect and was worded as follows: "Did the accession of the Slovak Republic to the EU and the need to harmonise Slovak law have an impact on the number of amendments to the Constitution?"

Giertl clearly states in the affirmative, in his answer he says:

> *Certainly yes, and at the same time, in the sense of our integration in the legal environment as an EU member, it was a necessity, but at the same time it was also a matter of greater legal certainty. The question is whether these adjustments are properly implemented, as there is not primarily a society-wide consensus and many have not even been properly discussed professionally or publicly. (Note: our*

membership in the EU is a certain barrier against undue interference in the Slovak Constitution).[21]

This means that he not only names one of the reasons for the need to amend the Slovak constitution, but also – interestingly – the membership of the Slovak Republic is, in his opinion, important from the point of view of the stability of the constitutional or legal system.

It could be said that the other respondents answered the question in the same way. Káčer also answers unequivocally: "Yes. Immediately with the EU, two constitutional amendments were adopted – a major amendment to the 2001 constitution, then an amendment introducing the incompatibility of the office of a member of the National Assembly of the Slovak Republic with the office of a member of the European Parliament".[22] Equally, Neumann: "Yes. In 2001, probably the most significant/extensive amendment to the Constitution was adopted (Constitutional Act No. 90/2001), also referred to as the so-called 'Euronovel'. It can be said that it was a comprehensive preparation of the constitutional system of the Slovak Republic for the accession to the European Union, which was significantly reflected in the constitutional document (the establishment of the Judicial Council, the Public Defender of Rights, the extension of the powers of the Constitutional Court, a comprehensive modification of Article 7 concerning a number of international law issues)".[23] This amendment to the Constitution is also mentioned by Trnkócy when he replies, "If we were to take the preparation for membership and the membership of the Slovak Republic in the EU itself, it was sufficiently influenced by the amendment to the Constitution by Constitutional Act No. 90/2001".[24]

The answers of the respondents show that the influence of European law and the need to harmonise Slovak law with Slovak law also had an impact on the amendments to the Slovak constitution, respectively it also affected the Slovak constitution, but especially the

[21] Interview with Martin Giertl – the answer to Question No. 6.
[22] Interview with Marek Káčer – the answer on the Question No. 6.
[23] Interview with Jakub Neumann – the answer on the Question No. 6.
[24] Interview with Slavomír Trnkócy – the answer on the Question No. 6.

answers of Neumann and Trnkócy also show that this impact was not so significant from a quantitative point of view (since they both mention only one constitutional law, namely Constitutional Act No. 90/2001 Coll.; moreover, Trnkócy explicitly states that the influence of European law was not decisive for the other amendments), but rather from a qualitative point of view. I consider this aspect to be significant, above all, because the aforementioned amendment to the Constitution introduced some – one could say modern – institutes or mechanisms for Slovak civil society. Káčer and Neumann specifically name them – the incompatibility of the mandate of a member of the Slovak Parliament with the mandate in the European Parliament, the establishment of the Judicial Council, the establishment of the Public Defender of Rights, the extension of the powers of the Constitutional Court of the Slovak Republic). From this qualitative point of view, this was undoubtedly a significant amendment of the Slovak Constitution, which was influenced by European law, but at the same time, it should be added that from a quantitative point of view, this does not explain the number of amendments to the Slovak Constitution over the course of its approximately thirty years of existence. In other words, the reasons for the numerous amendments to the Slovak Constitution must be sought elsewhere than in the influence of European law on Slovak law and the need to harmonise the Slovak legal order with European law, which was justified by the accession of the Slovak Republic to the European Union.

9.4. The Legislative Process on Amendments of the Constitution

Another factor in this phenomenon may be the regulation of the legislative process under which both 'ordinary' laws and constitutional bills are passed. This legislative process or its regulation is diametrically opposed to that of government bills, i.e., government bills – whether they are 'ordinary' or constitutional bills – and bills that can be tabled in Parliament by its Members of Parliament (the parliamentary legislative process). Legislative processes that take place at governmental level, i.e., where the responsible institutions

(e.g., ministries) that submit bills, including their amendments, are subject to a rather complicated legal and methodological regime in which a number of impacts of the bill being submitted are assessed and which are subject to a rather complex procedural procedure, are quite differently 'set up' or much more strictly regulated than legislative processes that take place at the parliamentary level. These legislative processes are by no means subject to such strict regulation (whether statutory or methodological). Simply put, if Members of Parliament want to bring a bill to the floor of Parliament, they can do so without, for example, publishing preliminary information on the bill, assessing the impact of the eventually approved bill on the Slovak Republic's economy, family, society, etc. Let us look briefly at the difference between the legislative process at government level, where bills, including constitutional bills, are submitted by responsible institutions such as ministries, and the legislative process at parliamentary level, where bills are submitted by members of parliament for consideration by parliament.

The legislative process at the governmental level is primarily regulated by Act No. 400/2015 Coll. on the Legislative Drafting and the Collection of Laws of the Slovak Republic and on Amendments and Additions to Certain Acts (hereinafter referred to as the 'Legislative Drafting Act'). This Act regulates the basic rules for the creation of generally binding legal regulations (hereinafter referred to as 'legal regulation'), which are the Constitution of the Slovak Republic (hereinafter referred to as 'Constitution'), constitutional laws, and laws and regulations of the Government of the Slovak Republic (hereinafter referred to as 'Government Regulation'), decrees and measures of ministries and other central state administration bodies, other state administration bodies and the National Bank of Slovakia, and their promulgation in the Collection of Laws of the Slovak Republic (hereinafter referred to as 'Collection of Laws').[25]

In addition to the formal and substantive aspects of the draft legislation, such as the language of the legislation (paragraph 3), the content of the legislation (paragraph 4), the systematic division of the legislation (paragraph 5), the amendment of the legislation

[25] Paragraph 1(1) of Legislative Drafting Act, 2015.

(paragraph 6), and the details of the draft legislation (paragraph 7), the Act on Legislative Drafting also regulates a number of procedural procedures relating to the legislative process at the governmental level, such as preliminary information (paragraph 9),[26] public hearings (paragraph 9a), and the comment procedure (paragraph 10).

In addition to the law on lawmaking, which is, of course, material of a legislative or normative nature, the lawmaking or legislative process at the governmental level is also influenced by non-legislative material, which could be summarised as methodological. These are the following materials:

1. Legislative Rules of the Government of the Slovak Republic (hereinafter referred to as 'Government Legislative Rules'),
2. Uniform Methodology for Impact Assessment (hereinafter referred to as the 'Uniform Methodology'),
3. Guideline for the preparation and submission of materials to the Government of the Slovak Republic, and Methodological Instruction for the preparation and submission of materials to the Government of the Slovak Republic,
4. Methodological Instruction for the Preparation and Submission of Materials to the Government of the Slovak Republic,
5. Rules of Procedure of the Government of the Slovak Republic,
6. Rules for public participation in public policy-making.

As regards the 'absence' of stricter regulation of the legislative process at the parliamentary level, this stems primarily from Article 1(2) of the Law on Legislative Drafting, which provides parliamentarians with several exemptions from the rules that otherwise apply to the submitters of draft legislation in the legislative processes at the governmental level. Under this provision, Members of Parliament are not required, inter alia, to publish advance information

[26] The preliminary information is also an important tool for citizen participation, because according to Article 9 of the Law on the Drafting of Legislation, before starting the drafting of a draft legal regulation, in order to inform the public and public authorities, the submitter shall publish on the portal preliminary information on the draft legal regulation being drafted. In particular, in the preliminary information, the submitter shall briefly set out the main objectives and themes of the draft legislation under preparation, an assessment of the current state of play and the expected date for the start of the comment procedure.

or report on public participation in the drafting of legislation (see below).

Also, a problematic point in the analysis of the legislative process at the parliamentary level in comparison with the regulation of the legislative process at the governmental level is the absence of binding by the legislative rules of the government, which is implied by section 1(2) of the Legislative Drafting Act with reference to section 2(3) of the Legislative Drafting Act. The Government's legislative rules, although not legislative or normative in nature, are important methodological material which to a certain extent also performs the function of implementing material in relation to the Law on Legislation, as it, inter alia, specifies a number of provisions of the Law on Legislation. Members are bound by the legislative rules adopted by the National Council of the Slovak Republic.[27]

As regards the other three materials of a non-legislative but methodological nature, namely the Directive on the Preparation and Submission of Materials to the Government of the Slovak Republic and the Methodological Instruction on the Preparation and Submission of Materials to the Government of the Slovak Republic, and the Rules of Procedure of the Government of the Slovak Republic, it is clear from the nature of the matter that these materials cannot concern Members of Parliament. However, with regard to the Rules on Public Involvement in Public Policy Making, the absence of public involvement in the legislative process at parliamentary level – in the light of Article 1(2) of the Law on Legislative Drafting – could be viewed critically. This is because there is a significant discrepancy between the obligations of the responsible institution (the proposer of the bill) in the legislative process at government level, which must be fulfilled before the bill reaches parliament, and the freedom, so to speak, of members of parliament to introduce bills in the legislative process at parliamentary level – because in the legislative process at government level, the responsible institution must declare the level of public involvement in the preparation and drafting of legislation

[27] Paragraph 69 of Act No. 350/1996 on the Rules of Procedure of the National Council of the Slovak Republic (hereinafter referred to as the 'Rules of Procedure Act'), 1996.

(including the bill and the constitution) in accordance with the Rules for Public Involvement in Public Policymaking. Members of Parliament are under no such obligation at all when tabling bills and constitutional laws in the legislative process.

The legislative process at parliamentary level is regulated primarily by the Constitution and the Law on Rules of Procedure. Naturally, the Constitution does not regulate the detailed legal conditions of the legislative process at parliamentary level, but in fact 'only' grants the right of legislative initiative to Members of Parliament – either individually or through the committees of which they are members (Article 87(1)). As regards the regulation of the legislative process at parliamentary level under the Rules of Procedure Act, it is to a large extent looser than the corresponding regulation at governmental level. This is particularly evident from Articles 67 and 68 of the Rules of Procedure Act, which, although it imposes an obligation on MPs to submit an explanatory memorandum together with the text of a paragraph, specifying the content of the explanatory memorandum, does not impose an obligation on MPs to publish advance information on the draft law under preparation, including the draft constitutional law, or to allow the public to participate in the drafting of this legislation – which logically implies the absence of any provision on the obligation to publish a report on the public participation.

Question No. 7 in the interviews with the respondents was therefore also formulated with a focus on the absence of, so to speak, stricter regulation of the legislative process at parliamentary level compared to the regulation of the legislative process at government level. Its essence was to find out whether such absence also contributes to the low level of rigidity of the Slovak Constitution, as it naturally concerns not only 'ordinary' but also constitutional laws. Obviously, it goes without saying that the absence of stricter regulation of the legislative process at the parliamentary level creates room for politically motivated amendments to the Constitution, which may be proposed and possibly even adopted for explicitly political reasons and not based on actual social needs. This is a very complicated and sensitive issue, as Members of Parliament instinctively perceive any restrictions on the exercise of their functions as

an interference with the legislative power. The question was formulated as follows:

> *The legislative process at government level is primarily regulated by Act No 400/2015 on the creation of legislation and the Collection of Laws of the Slovak Republic and on amendments and additions to certain acts, but it is also influenced by documents of a non-legislative nature. On the other hand, the legislative process at parliamentary level is not so strictly regulated. Would it contribute to the rigidity of the constitution if proposals to amend the constitution could not be submitted by members of the National Council of the Slovak Republic?*

The respondents are also aware of this problem, as is evident from their answers.

Giertl responds as follows:

> *I am convinced that the legislative process at government and parliamentary level should be harmonised as much as possible, i.e., strictly regulated similarly at parliamentary level. Especially when it comes to, e.g., indirect hidden amendments of seemingly unrelated laws, the abuse of unjustified abbreviated procedures and the transparency of submitted legislative proposals do not speak for the quality of the submitted materials. (Note: after the last legislative practice of the National Council of the Slovak Republic, i.e., in the 2020–2023 electoral period, there has been such a massive circumvention and abuse of legislative rules, especially in the National Council of the Slovak Republic, that it is worth considering whether such MPs should have a legislative initiative at all, which of course in a representative democracy cannot be restricted, including proposals to amend the Constitution. Only if by changing, for example,*

> *to a bicameral body, or otherwise by changing the Constitution, which they will ultimately agree on themselves).*[28]

Káčer is also aware of this problem, but at the same time he points out the possible constitutional risks of limiting the legislative initiative of members of parliament in relation to the submission of constitutional bills that could amend the constitution. In its reply, it states the following:

Here we need to do research on how successful parliamentary amendments to the constitution have been. If great, banning parliamentary amendments would add to the rigidity of the constitution. The question is whether it would be too much of an encroachment on democratic legitimacy.[29]

Neumann is likewise critical of such a consideration, saying that:

> *In my view, it would not be the right move. Parliament/MPs have the highest degree of democratic legitimacy (the legitimacy of the government is only derived from the National Council). At the same time, the National Council is defined in the Constitution as the only (!) legislative and constitutional body (Article 72), and therefore the legislative and constitutional initiative of the deputies should be preserved. When submitting a draft constitutional law, I would consider an increase in the necessary number of submitters to be an adequate tightening. For example: a constitutional bill must be tabled by at least 1/5 of the Members of Parliament.*[30]

His proposal to increase the necessary number of sponsors of a constitutional bill (one-fifth of the Members of Parliament equals at least 30 Members of Parliament – author's note) is interesting.

Trnkócy is equally critical or negative about such a consideration, saying that: "In my opinion, such a limitation of parliament's activity would contradict logic and could lead to the creation of 'monuments

[28] Interview with Martin Giertl – the answer to Question No. 7.
[29] Interview with Marek Káčer – the answer to Question No. 7.
[30] Interview with Jakub Neumann – the answer to Question No. 7.

and memorials' by persons with constitutional power to propose changes to the Constitution."[31]

Respondents' answers to Question No. 7 show that they are very cautious and reticent in their assessment of such a move, and partly critical. And they look for an increase in the rigidity of the constitution in other means or mechanisms rather than limiting the legislative initiative of MPs in submitting constitutional bills, e.g., tightening the constitutional and legal regulation of the legislative process at the parliamentary level or increasing the necessary number of petitioners from among the MPs to submit a constitutional bill. This is a logical conclusion based on the views of respondents, who overwhelmingly see certain constitutional risks that such a move could pose.

9.5. *De Lege Ferenda* Proposals

The last Question, No. 8, was not so much a question as an invitation for respondents to express their views on what measures, mechanisms or procedural procedures they would suggest to make it possible to increase the degree of rigidity of the constitution in the legislative process in which the constitution is being amended. This means that at the end of the interview they were given space to express their own views or to formulate specific proposals from a *de lege ferenda* perspective.

Question No. 8 was as follows: what changes (mechanisms) would you suggest to enable the degree of rigidity of the constitution to be increased?

Martin Giertl gave a more extensive answer and named a number of factors that could contribute or help to achieve this goal. He answers:

> *Raising the legal awareness of society as a whole, stimulating expert discussions, adopting consensus decisions and proposals on the basis of expertise, information and the involvement of the widest possible range of stakeholders.*

[31] Interview with Slavomír Trnkócy – the answer to Question No. 7.

> *Independent expert monitoring of the legislative process by elected representatives, greater engagement on the subject by legal experts, academics and civil society in general, the decision-making practice of the Constitutional Court* […] *If we have no respect for the basic rules of the game, for the Constitution, we have no respect for our own state. This is where we need to start in the education system. And to begin with, it would be enough to modify the legislative rules for the submission and adoption of laws in the National Council of the Slovak Republic. (Note: also, thanks to projects such as this one and to the greater involvement of the academic community and the professional community in general, it is necessary to cultivate the relationship to law-making, to constitutionalism, to the Constitution of the Slovak Republic, and to contribute to its stability and durability. The results of these activities must first and foremost be a pressure and barrier for politicians. It is necessary to educate).*[32]

In the answer, Káčer refers to his answer to Question No. 5 ("I would strengthen the rigidity by introducing the obligation to approve the constitutional amendment in a referendum").

In his answer to this last question, Neumann makes three suggestions:

> *Three general suggestions (for discussion):*
> *(1) Enshrining the perpetuity clause (providing a guarantee of immutability by articles regulating key parts of the constitution: e.g., basic human rights).*
> *(2) Necessity to approve each constitutional amendment in a ratification referendum.*
> *(3) Enshrining the power of the president to veto constitutional laws (answer to Question No. 5).*[33]

[32] Interview with Martin Giertl – the answer to Question No. 8.
[33] Interview with Jakub Neumann – the answer to Question No. 8.

This means that he agrees with Káčer in his second proposal. Confirmation of the amendment of the constitution by a ratification referendum is, of course, a very interesting proposal, the introduction of such a mechanism (constitutional procedure) would undoubtedly mean a significant increase in the degree of rigidity of the constitution and would also mean a kind of 'prevention' against – so to speak – the abuse of constitutional amendments for political purposes.

Trnkócy interprets his answer – in a fashion similar to Giertl – somewhat more broadly and also names several social and professional factors:

> *In addition to the process of changes in the admission process, it would be appropriate and even necessary to change the view on the preparation of the legislative process by educated and experienced persons, involving law faculties and other social organisations that are to be affected by the change and lead a society-wide as well as professional discussion. Currently, something like this is absent.*[34]

Although Káčer and Neumann are more factual in their answers and focus primarily on the constitutional dimension of the issue, no less relevant are the answers of Giertl and Trnkócy, who in addition to the constitutional dimension and professional aspects, also see and name a certain extent of the examined issue to several social areas. Their opinions and proposals are therefore – I dare say – no less interesting and relevant, especially the emphasis on professional training for amending the constitution, conducting professional and social discussions during its preparation, the need for education, respect for the law and the constitution, etc. If their suggestions were translated into the legislative process for changing (amending) the constitution, it would certainly contribute to the 'improvement' of the legislative process itself, more elaborate and professionally justified proposals for amendments to the constitution, which would naturally lead to a reduction in the number of amendments to

[34] Interview with Slavomír Trnkócy – the answer to Question No. 8.

the constitution and to a certain extent would also prevent political abuse of constitutional amendments. Of course, the introduction of the presidential veto and the increase of the quorum for approving constitutional laws (Neumann) and especially the introduction of the ratification referendum (Káčer, Neumann) would also provide a significant insurance from this point of view and contribute to increasing the degree of rigidity. One can clearly agree with their proposals, but in the case of the proposal to increase the quorum required for the approval of constitutional laws or to introduce the presidential veto in the legislative process on draft constitutional laws, I believe that there is wider space for political possibility and the approval (enforcement) of such changes than when introducing ratification referendum, by which it would be necessary to confirm the approved draft of the constitutional law. Although, of course, purely from a constitutional, professional and substantive point of view, I clearly identify with their proposal, because it would be a significant element of rigidity in the legislative process to change the constitution. (If there was a ratification referendum in Slovakia, I dare to say that the Slovak constitution would certainly not have been amended 26 times during its existence. In other words, it is very difficult to imagine that in the approximately 30 years of existence of an independent state in Slovakia, after the division Czechoslovakia held 26 referendums, and only because of amendments to the constitution.) Perhaps a slightly more transitory proposal could consist in the fact that the already approved draft constitutional law would have to be voted on after a certain time interval, even in the newly formed parliament after the parliamentary elections, when the proposal in the same wording would have to be approved again.

9.6. Conclusions

The theme of the relationship of the rigidity of the constitution and the legislative process focused on the amendments of the constitution is very relevant and actual within the situation in Slovak Republic. According to the interviews, several respondents answered that the very low level of the rigidity of Slovak constitution is a problem

and they formulated several interesting proposals as to how to solve this problem (see "5. *De lege ferenda* proposals" – author).

Within the research, two research questions and two research hypotheses were formulated.

1. Questions:
   - Does the level of rigidity of constitution determine the number of its amendments?
   - What legislative novels (changes) could contribute to the higher lever of the rigidity of the constitution and reach the lower number of amendments of constitution?
2. Hypotheses:
   - The level of the rigidity of the constitution is significant, but not single factor, which influences the number of amendments of constitution and the stability of the legal system – the relevant ones are also other factors.
   - The rigid constitution with the lowest level of rigidity allows more frequent constitutional changes than the constitution with higher level of rigidity.

The questions could be answered – according to the answers of respondents – as follows: The lowest level of the rigidity of the Constitution is the problem, identified by the respondents within the interviews, is the reason the Constitution has been novelised so often. Concretely, the problem is that the actual legal state does not regulate 'constitutional barriers' that could contribute to the prevention of the frequent novelisation of the Constitution and of the abusing of the novelisation of the Constitution for political purposes. Therefore, the second research question was formulated within this research and the answer on this second question follows from the answers of the respondents, who formulated several proposals as to how to solve this problem. Perhaps the strongest measure, but at the same time the most politically improbable one, is the ratification referendum (see "5. *De lege ferenda* proposals" – author).

According to the answers of the respondents, the hypotheses could be qualified as confirmed, because the respondents identified several aspects or "lacks" of legislative process on amendments of the Constitution that also caused frequent novelisations of the Constitution. They identified (qualified) the actual legal state (constitutional

regulation) as problematic and formulated several proposals that could contribute to the attainment of a higher level of rigidity of the Constitution (see "5. *De lege ferenda* proposals" – author). That means that these proposed legal measurements for changing of the legislative process on amendments of the Constitution could contribute to reaching a higher level of the rigidity of the Constitution and prevent the frequent novelisation of the Constitution. Finally, that means that the main goal of this research was achieved.

Attachments

1. Interview with Jakub Neumann.
2. Interview with Martin Giertl.
3. Interview with Slavomír Trnkócy.
4. Interview with Marek Káčer.

ATTACHMENT NO. 1

Interview for the purpose of the scientific research project Comparative Research Platform 2023 – The nature of the legislative process adopted to amend the Constitution (in the light of European integration and constitutional identity)

Please indicate your title(s), name and surname:
JUDr Jakub Neumann, PhD.

Please indicate your profession/job title:
Assistant Professor at the Department of Theory of Law and Constitutional Law, University of Trnava.

For the purposes of the above project, please answer the following questions:

1. What is the importance of the rigidity of the Constitution for constitutionalism and stability of the legal system?

The rigidity of the constitution is a double-edged weapon. On the one hand, it is 'celebrated' as a stabilising element of the constitutional system (protecting the constitution from frequent changes), on the other hand, it can preserve the constitutional system in a state that will not be satisfactory to citizens (most citizens want change, but cannot make it because of the strict procedural conditions for changing the constitution). At the same time, the high rigidity of the constitution may lead to the adoption of purely populist (i.e., not necessary, systemic and perhaps unpopular) changes.

2. To what extent should the constitution be rigid or flexible?

   In this case, the question is not a legal one, but a political one. There is no ideal model of the rigid constitution – flexible constitution ratio, as there is no ideal society. A constitution is supposed to be as rigid or flexible as its framers wish it to be. In other words, the constitution is supposed to conform to the ideas of its makers/society.

3. The Constitution of the Slovak Republic has been amended 26 times during its thirty years of existence (until 26 September 2023, at the time of finalising these questions – author's note), which means an average of 0.86 amendments per year. In your opinion, is the frequency of amendments to the Constitution a 'good' or 'bad' phenomenon in the legislative processes in the Slovak Republic?

   Drawing attention only to the high number of amendments to the Constitution is a simplistic shortcut when criticising the basic document. I consider it more appropriate to assess the substance of individual amendments (were they necessary/useful/requested by the expert community or unnecessary/unnecessary/populist?). From my point of view, it is also important to perceive whether the amendments affect the 'value core' of the Constitution (enshrining the definition of marriage; limiting the powers of the Constitutional Court) or regulate (or rather correct) less important issues of an 'operational' nature (how the President will be elected; when the term of office of the Ombudsman will end, etc.).

4. In comparison, the Constitution of the Czech Republic has been amended only 8 times in the same period (from the establishment of the independent Czech Republic to 26 September 2023), which averages out to 0.26 amendments per year. What do you think is the reason for this difference?

   I cannot comment on the reasons for this difference. At the same time, I would like to point out that despite the lower number of amendments, the Constitution of the Czech Republic is not subject to less controversy than the Constitution of the Slovak Republic (in layman's terms – it is not more perfect). Repeatedly criticised shortcomings (of the Czech Constitution) are, for example, the complicated regulation of the post-election formation of the government (Article 68(4)) or the lack of regulation for the holding of a national referendum. If the excessive rigidity of the constitution (to which the bicameral parliamentary system in the Czech Republic also contributes) prevents changes to these apparent shortcomings, then the low number of amendments would not necessarily be considered a positive indicator of the stability of the constitution, but rather a negative indicator of its 'ossification'.

5. A constitutional law amending the Constitution requires 90 votes of the members of Parliament to be approved. However, in this case the President does not have a veto right as in the approval of 'ordinary' laws. Does this 'handicap' of the President also contribute to a lower degree of rigidity of the Constitution? And what, in your opinion, would be the most appropriate mechanism to compensate for this 'handicap' for the Slovak Republic?

   Generally speaking, when exercising the veto power, the President is working with a pair of factors that can slow down the path of a piece of legislation to its enactment. These are primarily (1) the need to pass the vetoed legislation with a strict majority of the House (76+), but equally important is (2) the time lag before the next vote (the ratio of political forces in support of the pending legislation can change over time). Both factors could be adapted to the needs of a specific 'constitutional' veto, which might look like the following:

1) The parliament could only proceed to a vote on overriding a vetoed constitutional law with a certain – well-defined – time lag (e.g., only 3 months after the veto has been exercised). The challenge for the parliament in this case would be to demonstrate a continued commitment to proceed with a constitutional change (removing the risk of ill-considered and quickly approved 'hurrah' ideas).
2) If the quorum is tightened when passing an ordinary law, there is no reason not to apply the same procedure when vetoing a constitutional law. A reasonable tightening (from the original three-fifths – 90 MPs) to the two-thirds threshold (100 MPs) could be considered.

6. Has the accession of the Slovak Republic to the EU and the need to harmonise Slovak law had an impact on the number of amendments to the Constitution?

   Yes. In 2001, probably the most significant/extensive amendment to the Constitution was adopted (Constitutional Act No. 90/2001 Coll.), also referred to as the so-called 'Euronovel'. It can be said that it was a comprehensive preparation of the constitutional system of the Slovak Republic for the accession to the European Union, which was significantly reflected in the constitutional document (the establishment of the Judicial Council, the Public Defender of Rights, the extension of the powers of the Constitutional Court, a comprehensive modification of Article 7 concerning a number of international law issues…).

7. The legislative process at the governmental level is primarily regulated by Act No. 400/2015 Coll. on the Creation of Legal Regulations and the Collection of Laws of the Slovak Republic and on Amendments and Supplements to Certain Acts, but it is also influenced by documents of a non-legislative (non-legislative) nature. On the other hand, the legislative process at parliamentary level is not so strictly regulated. Would it contribute to the rigidity of the constitution if proposals to amend the constitution could not be submitted by members of the National Assembly?

   In my opinion, this would not be the right step. Parliament/MPs have the highest degree of democratic legitimacy (the legitimacy of the government is only derived from the National

Council). At the same time, the National Council is defined in the Constitution as the only (!) legislative and constitutional body (Article 72), and therefore the legislative and constitutional initiative of the MPs should be preserved. When submitting a draft constitutional law, I would consider an increase in the necessary number of submitters to be an adequate tightening. For example: a constitutional bill must be tabled by at least one-fifth of the Members of Parliament.

8. What changes (mechanisms) would you suggest to enable the degree of rigidity of the constitution to be increased?
   Three general suggestions (for discussion):
   1) Anchoring the perpetuity clause (giving a guarantee of immutability to articles governing key parts of the constitution: e.g., fundamental human rights).
   2) The need to approve any constitutional amendment in a ratification referendum.
   3) Anchoring the President's power to veto even constitutional laws (answer to Question No. 5).

Thank you very much for your time and your willingness to cooperate. Please send the interview with your answers to me at deset.milos@gmail.com. If you have any questions, please also feel free to contact me by phone at 0918938574.

ATTACHMENT NO. 2

Interview for the purpose of the scientific research project Comparative Research Platform 2023 – The nature of the legislative process adopted to amend the Constitution (in the light of European integration and constitutional identity)

Please indicate your title(s), name and surname:
Mgr Martin Giertl.

Please indicate your profession/job title:
Lawyer, consultant of the SHR/UNHCR project and consultant of the National Digital Coalition project.

For the purposes of the above project, please answer the following questions:

1. What is the importance of the rigidity of the Constitution for constitutionalism and the stability of the legal system?

   Since there is historical, theoretical, practical, political and social agreement that the Constitution is the fundamental law of the land (except, for example, in the case of an arrangement such as that of the United Kingdom of Great Britain and Northern Ireland, where it is made up of several legal norms) and is the supreme legal norm which is the result of the development of society not only over time but with a view to the future, i.e., stable and permanent, it should be the most responsible expression of political will, of the broad consensus of the society, of the will of the majority of the people, and a mirror of its basic rules of functioning. At the same time, it should set the boundaries for the exercise of public authority and guarantee rights, in particular the rights and freedoms of the citizen.

   It follows from the above that the more modifications, changes or frequent interventions in the Constitution (but also, for example, in the Constitutional Laws), the more questionable, unstable and not sufficiently reflective of a lasting social agreement or consensus is the way in which public power is exercised in the state. Ultimately, it can lead to a disturbance in the balance between public power and the rights and freedoms of the citizen, thus undermining the stability of the legal system.

   The importance of the rigidity of the Constitution for constitutionalism is of the utmost importance because it primarily ensures stability not only for the relations in society (the State) regulated by the Constitution, but also for the position of public authorities and citizens and their relations with each other. At the same time, its rigidity is a guarantee of better building of long-term fair and balanced relations with other states and communities and of the stability of the legal system. (Note: the

legal system and order of the Slovak Republic is unstable and the constant attempts to amend the Constitution are a major interference with its stability).

2. To what extent should the constitution be rigid or flexible?

   The constitution should be as rigid as possible, so that the constitutional conditions and the basic relations in society regulated by it are as stable as possible. In the case of the Constitution of the Slovak Republic, it is the Constitution of a relatively new state (established on 1 January 1993), when the Constitution was adopted already on 1 September 1992. Since it was primarily created in connection with the division of the common federal state (CSFR), the efforts to create and build a new state, based on the Constitution of the common state, but also on the Charter of Fundamental Rights and Freedoms and others, its creators and the then relevant political representation (the National Assembly of the Slovak Republic and the political parties) were able to create and adopt a relatively stable and mostly accepted basic law of the state.

   It must be assumed in all historical, political and social contexts and processes that the Constitution will also be flexible in responding to changes (e.g., the accession of the Slovak Republic to the EU). However, such changes must always be the result of expertise and legitimacy, i.e., a broad consensus not only of the public authorities, but also of the citizens.

   Any rules of the game, which are frequently changed, cease to be understandable, acceptable to those involved and may ultimately lead to the impossibility of complying with them or to an attempt to circumvent them/or to interpret and adapt them on purpose).

   (Note: 'flexible' does not mean: "I have a constitutional majority so I will accept what I want, or I will try to enforce, e.g., basic cultural and ethical settings in society without a broad social consensus through the Constitution, because I/we are convinced of an immutable truth and we are threatened".)

3. The Constitution of the Slovak Republic has been amended 26 times during its thirty years of existence (until 26 September 2023, as these questions are being finalised – author), which means

an average of 0.86 amendments per year. In your opinion, is the frequency of amendments to the Constitution a 'good' or 'bad' phenomenon in the legislative processes in the Slovak Republic?

It is certainly a bad and undesirable phenomenon, but it is a reality of the relationship of public authorities in particular to the Constitution (and thus to the stable unchanging rules of the game), and also to the rights and freedoms of citizens. A country which, even after more than 30 years, does not have a fully-fledged and consensually prepared binding basic strategic document – a short- and long-term vision for the development of the Slovak Republic and the public policies that follow it, including investment planning – tends to regulate the basic relations in society, including the Constitution, on a permanent ad hoc basis. This tendency is especially true for representatives of political power elected for 4 years. By doing so repeatedly, they undermine legal certainty and the stability of the legal system, including non-compliance with legislative processes.

(Note: how many constitutional lawyers and experienced legislators do the political parties represented in the National Council of the Slovak Republic have in their teams?)

4. In comparison, the Constitution of the Czech Republic has been amended only 8 times in the same period (from the establishment of the independent Czech Republic to 26 September 2023), which averages out to 0.26 amendments per year. What do you think is the reason for this difference?

I don't know why the Czech Republic hasn't had more frequent amendments to the Constitution (even so, together with us, they are the most frequently amended among the EU countries), I am not an expert on Czech constitutional realities, but I believe it is due to several factors:

- the Constitution of the Czech Republic was probably drafted better,
- the legislative process/adoption of laws amending the Czech Constitution or adopting Constitutional laws is only possible with the consent of both chambers of the legislature

(Chamber of Deputies, Senate) and at least a three-fifths majority in both chambers is required, which is a higher barrier than in a unicameral body (National Council of the Slovak Republic),
- respect before the Constitutional Court of the Czech Republic and its implementation practice is higher than in the Czech Republic,
- the general professional and public debate on constitutionality is at a higher level in the Czech Republic,

(Note: "finally the Czechs have not overtaken us in something").

5. A constitutional law amending the Constitution requires 90 votes of the members of Parliament in order to be approved. However, in this case the President does not have a veto right as in the approval of 'ordinary' laws. Does this 'handicap' of the President also contribute to a lower degree of rigidity of the Constitution? And what, in your opinion, would be the most appropriate mechanism to compensate for this 'handicap' for the Slovak Republic?

   This is a question of the scope of the powers of the President of the Slovak Republic and whether we want to strengthen the system towards a presidential system, or whether it will be a combination, or whether we are satisfied with the current state of affairs. This is a serious constitutional question that requires, first of all, a proper high-level debate, including the practice of other systems, support across political parties and a broad consensus, including among the public.

   I understand the dissatisfaction with this so-called 'handicap' of the President of the Slovak Republic and the desire to strengthen the position of the President, but on the other hand, I think that at this time, and at least for the next term, the National Council of the Slovak Republic and its members must be held fully accountable for their actions, including their legislative initiatives (including constitutional laws). While this is a gamble with the rigidity of the Constitution, the legislative practice in the last term of the current National Council of the Slovak Republic members in particular leads me to believe that it is appropriate

to open up such a highly professional debate and patiently weigh the pros and cons.

(Note: after the experience of our previous presidents and the practice of the National Council of the Slovak Republic and our political culture, I think the presidential system is not appropriate for the Slovak Republic at this time).

6. Did the accession of the Slovak Republic to the EU and the need to harmonise Slovak law have an impact on the number of amendments to the Constitution?

   Certainly yes, and at the same time, in the sense of our integration in the legal environment as a member of the EU, it was a necessity, but at the same time it was also a matter of greater legal certainty. It is questionable whether these amendments are properly implemented, as there is not primarily a society-wide consensus and many of them have not even been properly discussed by experts or in public.

   (Note: our membership of the EU is a certain barrier against undue interference in the Slovak Constitution.)

7. The legislative process at the governmental level is primarily regulated by Act No. 400/2015 Coll. on the Creation of Legal Regulations and the Collection of Laws of the Slovak Republic and on Amendments and Supplements to Certain Acts, but it is also influenced by documents of a non-legislative nature. On the other hand, the legislative process at parliamentary level is not so strictly regulated. Would it contribute to the rigidity of the constitution if proposals to amend the constitution could not be submitted by members of the National Council of the Slovak Republic?

   I believe that the legislative process at the government and parliamentary levels should be harmonised as much as possible, i.e., strictly regulated similarly at the parliamentary level. Especially with regard to, e.g., indirect hidden amendments of seemingly unrelated laws, abuse of unjustified abbreviated

procedures and transparency of submitted legislative proposals do not speak for the quality of the submitted materials.

(Note: after the last legislative practice of the National Council of the Slovak Republic, i.e., in the 2020–2023 term, there has been such massive circumvention and abuse of legislative rules, especially in the National Council of the Slovak Republic, that it is worth considering whether such MPs should have legislative initiative at all, which of course cannot be curtailed in a representative democracy, including proposals to amend the Constitution. Unless by changing, e.g., to a bicameral body, or otherwise by changing the Constitution, which they will ultimately agree themselves.)

8. What changes (mechanisms) would you suggest to enable the degree of rigidity of the constitution to be increased?

Raising the legal consciousness of the whole society, stimulating expert discussions, taking consensus decisions and proposals based on expertise, information and involvement of the widest possible range of stakeholders. Independent expert monitoring of the legislative process by elected representatives, greater engagement on the subject by legal experts, academics and civil society in general, the decision-making practice of the Constitutional Court…

If we have no respect for the basic rules of the game, for the Constitution, we have no respect for our own state. This is where we need to start in the education system.

And to begin with, it would be enough to modify the legislative rules for submitting and passing laws in the National Council of the Slovak Republic.

(Note: also, thanks to projects like this and greater involvement of the academic community and the professional community in general, it is necessary to cultivate the relationship to lawmaking, to constitutionalism, to the Constitution of the Slovak Republic and to help its stability and durability. The results of

these activities must first and foremost be a pressure and a barrier for politicians. It is necessary to educate.)

Thank you very much for your time and your willingness to cooperate. Please send the interview with your answers to me at deset.milos@gmail.com. If you have any questions, please also feel free to contact me by phone at 0918938574.

ATTACHMENT NO. 3

Interview for the purpose of the scientific research project Comparative Research Platform 2023 – The nature of the legislative process adopted to amend the Constitution (in the light of European integration and constitutional identity)

Please indicate your title(s), name and surname:
Mgr Slavomír Trnkócy.

Please indicate your profession/job title:
Lawyer.

For the purpose of the above project, please answer the following questions:

1. What is the importance of the rigidity of the Constitution for constitutionalism and stability of the legal system?

   On the issue of the rigidity of the constitution, we should focus on what we consider to be the rigidity of the constitution. If it is to be understood as the immutability of its provisions, we should then say what we want to be immutable or can only be changed by a special legislative process. If I were to use comparison, I could draw on the Basic Law of Germany, where the provisions on the state system and on the guarantee of fundamental rights and freedoms are considered rigid. The legislators in Portugal and Spain have gone even further.

2. To what extent should the constitution be rigid or flexible?

   We should first say what we want to be rigid or even immutable. It would also be inappropriate for the constitution, as the basic law of the state, not to reflect fundamental changes in society. In my opinion, it is not appropriate for the constitution to be changed every election period just as a kind of monument to the legislative activity of one of the political parties in parliament.
3. The Constitution of the Slovak Republic has been amended 26 times during its thirty-year existence (until 26 September 2023, when I am finalising these questions – author's note), which means an average of 0.86 amendments per year. In your opinion, is the frequency of amendments to the Constitution a 'good' or 'bad' phenomenon in the legislative processes in the Slovak Republic?

   In my opinion, the average is not the guiding figure, but it is necessary to note the analogy and the content of the amendments. Certainly, the amendment of the Constitution Act No. 90/2001 had its justification, but I do not see the importance of constitutionally enshrining the protection of water, defining marriage, etc. So not only has the Constitution been amended frequently, but also unnecessarily.
4. In comparison, the Constitution of the Czech Republic has been amended only 8 times in the same period (from the establishment of the independent Czech Republic to 26 September 2023), which averages out to 0.26 amendments per year. What do you think is the reason for this difference?

   Probably in the greater respect of legislators for it.
5. A constitutional amendment bill requires 90 votes to pass. In this case, however, the President does not have veto power as in the approval of 'ordinary' laws. Does this 'handicap' of the President also contribute to a lower degree of rigidity of the Constitution? And what, in your opinion, would be the most appropriate mechanism to compensate for this 'handicap' for the Slovak Republic?

   The President's suspensory veto has its importance, but a much more fundamental influence on procedural rigidity is the provision in Article 15 of the Swedish Constitution where the same text of an amendment has to be adopted twice. After the first

adoption of the proposed amendment, a national parliamentary election must be held, and the new parliament must adopt it in the same wording (!). This is how constitutional change manifests itself in relation to political representation and also as a reflection on the change in society.

6. Did the accession of the Slovak Republic to the EU and the need to harmonise Slovak law have an impact on the number of amendments to the Constitution?

   If we should consider the preparation for the membership and the membership of the Slovak Republic in the EU itself, the amendment of the Constitution by Act No. 90/2001 Coll. had a sufficient impact on it. Indeed, no.

7. The legislative process at the governmental level is primarily regulated by Act No. 400/2015 Coll. on the creation of legal regulations and on the Collection of Laws of the Slovak Republic and on the amendment and supplementation of certain acts, but it is also influenced by documents of a non-legislative (non--legislative) nature. On the other hand, the legislative process at parliamentary level is not so strictly regulated. Would it contribute to the rigidity of the constitution if proposals to amend the constitution could not be submitted by members of the National Assembly?

   In my opinion, such a limitation of parliamentary activity would be contrary to logic and could lead to the creation of 'monuments and memorials' by persons with the constitutional power to propose amendments to the Constitution.

8. What changes (mechanisms) would you suggest to enable the degree of rigidity of the constitution to be increased?

   In addition to the process of changes in the adoption process, it would be advisable or even necessary to change the view of the preparation of the legislative process by educated and experienced persons, involving law faculties and other social organisations that are to be affected by the change, and conducting a society-wide as well as a professional discussion. At present, there is no such thing.

Thank you very much for your time and your willingness to cooperate. Please send me the interview with your answers to deset.milos@gmail.com. If you have any questions, please do not hesitate to contact me by phone at 0918938574.

ATTACHMENT NO. 4

Interview for the purpose of the scientific research project Comparative Research Platform 2023 – The nature of the legislative process adopted to amend the Constitution (in the light of European integration and constitutional identity)

Please indicate your title(s), name and surname:
Dr Mgr Marek Káčer, PhD.

Please indicate your profession/job title:
University teacher/independent researcher.

For the purposes of the above project, please answer the following questions:

1. What is the importance of the rigidity of the constitution for constitutionalism and the stability of the legal system?

   The role of the constitution is to preserve the status quo; the rigidity of the constitution reinforces this preservative function.
2. To what extent should a constitution be rigid or, conversely, flexible?

   This depends on whether we agree with the status quo that the constitution preserves. If so, we prefer more rigidity, if not, flexibility. The current constitution is a democratic order of fundamental rights and freedoms, so it should be highly rigid.
3. The Constitution of the Slovak Republic has been amended 26 times in its thirty years of existence (until 26 September 2023, when I am finalising these questions – author's note), which means an average of 0.86 amendments per year. In your opinion, is the frequency of amendments to the Constitution a 'good' or 'bad' phenomenon in the legislative processes in the Slovak Republic?

It is a bad phenomenon.

4. In comparison, the Constitution of the Czech Republic has been amended only 8 times in the same period (from the establishment of the independent Czech Republic to 26 September 2023), which averages out to 0.26 amendments per year. What do you think is the reason for this difference?

   The Czech Republic has a bicameral parliament and a higher level of political and legal culture.

5. A constitutional law amending the constitution requires 90 votes to pass. However, in this case the President does not have a veto right as in the approval of 'ordinary' laws. Does this 'handicap' of the President also contribute to a lower degree of rigidity of the Constitution? And what, in your opinion, would be the most appropriate mechanism to compensate for this 'handicap' for the Slovak Republic?

   The President's veto is of little significance in this case, because under the current arrangements it can be overridden by an absolute majority vote. I would strengthen the rigidity by introducing the obligation to approve an amendment to the constitution in a referendum.

6. Has the accession of the Slovak Republic to the EU and the need to harmonise Slovak law had an impact on the number of amendments to the Constitution?

   Yes. Immediately with the EU, two constitutional amendments were adopted – a major amendment to the Constitution in 2001, then an amendment introducing the incompatibility of the office of a Member of the Slovak Parliament with the office of a Member of the European Parliament.

7. The legislative process at the governmental level is primarily regulated by Act No. 400/2015, but it is also influenced by documents of a non-legislative nature. On the other hand, the legislative process at parliamentary level is not so strictly regulated. Would it contribute to the rigidity of the constitution if proposals to amend the constitution could not be submitted by members of the National Council of the Slovak Republic?

   Here one needs to do research on the success of parliamentary amendments to the constitution. If great, banning

parliamentary amendments would contribute to the rigidity of the constitution. The question is whether it would be too much of an encroachment on democratic legitimacy.

8. What changes (mechanisms) would you suggest to enable the degree of rigidity of the constitution to be increased? See Question No. 5 above.

Thank you very much for your time and your willingness to cooperate. Please send the interview with your answers to me at deset.milos@gmail.com. If you have any questions, please also feel free to contact me by phone at 0918938574.

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Interview with Jakub Neumann.

Interview with Marek Káčer.

Interview with Martin Giertl.

Interview with Slavomír Trnkócy.

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Methodological instructions for the preparation and submission of materials for the Slovak government's deliberations.

Rules for involving the public in the creation of public policies.

Rules of Procedure of the Slovak Government.

Uniform methodology for impact assessment.

PROFESSOR DR GEORGE GORADZE
Sulkhan-Saba Orbeliani University | DOI: 10.32041/9788367149754/10

Chapter 10. Constitutional Law-Making in Georgia: Reality and Prospects

10.1. Introduction

The Constitution is the most important political and legal document, one which plays an essential role in the life of any state.[1]

Democratisation and political crises are the main important factors leading to constitutional replacements in a democratic regime,[2] especially in new democracies in the former Soviet areas, which are often prone to political crisis.

Georgian constitutionalism is very young, despite the millennial history of the existence of Georgia.[3] Georgian constitutionalism originates from 1990s, if we are to exclude the independent constitutional law-making process of the Democratic Republic of Georgia, which was a light for Georgia that had been conquered by the Russian Tsarist Empire followed by the Soviet Empire. The current Constitution of Georgia was adopted in 1995. Ever since, several amendments were made to the Constitution, however, it has never been done as a result of public consensus at any stage of the

[1] D. Gegenava, *The First Constitution of Georgia: Between Myths and Reality*, "Journal of Constitutional Law" 2021, Special Edition, Vol. 1–2, p. 79.

[2] G.L. Negretto, *New Constitutions in Democratic Regimes*, [in:] G.L. Negretto (ed.), *Redrafting Constitutions in Democratic Regimes Theoretical and Comparative Perspectives*, Cambridge 2020, p. 6.

[3] A. Demetrashvili, *Paradigms of Constitutionalism in Georgia*, "Constitutional Law Review" 2010, No. 3, p. 84.

constitutional law-making process.[4] Several constitutional norms had signs of unconstitutional constitutional law, however, the Constitutional Court of Georgia was never courageous enough to properly tame a legislator's outrageous passions.

This research concerns the constitutional reforms of Georgia and its 'bright' and 'dark' sides as well as the constitutional law-making process in Georgia and the role of the Constitutional Court. Fulfilling the recommendations, which would rehabilitate the constitutional law-making process and would be positively reflected on Georgian constitutionalism, is given at the end of the research study.

Various research methods were used in the study process, the most significant being:

i. The historical analysis method, which enables the constitutional law-making process of Georgia to be studied and evaluated in chronological and historical terms.
ii. Data analysis of the sociological research, by which the results of some sociological research were analysed regarding society's attitude towards the constitutional reforms of 2017–2018, evaluated society's involvement in the implementation process of the reform.
iii. Normative analysis ensured the study of separate legal acts content.
iv. System analysis made it possible to study and evaluate separate norms in general law and order term.
v. Case study – will contribute to the assessment of the role of the Constitutional Court of Georgia on the path of establishment of European values.

Of course, the research could not avoid the comparative-legal research method, although it is presented in the research to a lesser extent, since the main emphasis is placed on constitutional law-making in Georgia and its specifics.

[4] D. Gegenava, *25 Years in the Search of Legitimacy: Constitution of Georgia in Action*, "Teka Komisji Prawniczej PAN Oddział w Lublinie" 2021, Vol. 14, No. 1, p. 121.

10.2. Historical Review of Georgian Constitutionalism

10.2.1. THE ORIGINS OF GEORGIAN CONSTITUTIONALISM

The first Georgian Constitution was adopted by the Constituent Assembly of the newly created Democratic Republic of Georgia[5] on 21 February 1921. This document unquestionably has been considered as one of the most advanced and perfect supreme legislative acts oriented on human rights since its adoption by the Georgian legislators at the beginning of 20th century.[6] This was one of the clear examples of a second-wave Constitution, which contains elements that were particularly progressive compared to the other Constitutions of that time, namely the German Weimar Constitution of 1919 and the Austrian Constitution of 1920.[7]

According to the Constitution, the Democratic Republic of Georgia was a clearly-expressed parliamentary republic with parliamentary supremacy.[8] In the Constitution, its democratic character was particularly emphasised, including some chapters referring to human rights.[9] For example, Article 19 of the Constitution of Georgia banned the death penalty.

The Constitution of Georgia provided equal voting rights for men and women, which was only introduced in Germany in 1918.[10] However, it should be noted, that the Constituent Assembly of the Republic of Georgia adopted a statute on elections (law) in 1918,

[5] Following 1917 Revolution and collapse of Russian Empire, Georgia obtained freedom on 26 May 1918 and declared its independence as 'Democratic Republic of Georgia'.

[6] G. Papuashvili, *The 1921 Constitution of the Democratic Republic of Georgia Looking Back After 90 Years*, [in:] *The 1921 Constitution of the Democratic Republic of Georgia*, Batumi 2012, p. 6.

[7] A. Rainer, *Contemporary Constitutionalism and the Anthropocentric Value Order – on the Modernity of the 1921 Constitution of Georgia*, "Journal of Constitutional Law" 2021, Special Edition, Vol. 1–2, pp. 45–46.

[8] D. Gegenava, *The First Constitution of Georgia…*, *op. cit.*, p. 85.

[9] Chapter XII "Education and Schools", Chapter III "Rights of Citizens", Chapter XIII "Social and Economic Rights", Chapter XIV "Rights of National Minorities".

[10] A. Rainer, *Contemporary Constitutionalism…*, *op. cit.*, p. 43.

which according to some scholars, was the most democratic law in the world at that time.[11] Everyone from the age of 20 was allowed to participate in elections,[12] which clarifies that women had electoral rights since 1918. Moreover, five women[13] were elected to the legislative body of Georgia in 1919; a year earlier, in 1918, a Muslim woman named Peri-Khan Sofieva was elected to one of the local representative bodies of Georgia in the first ever election of a Muslim woman worldwide.[14]

Chapter XIII "Social and Economic Rights" of the 2021 Constitution, which encompassed issues such as protecting the unemployed, social assistance for persons with disabilities, pension, labour rights, etc., should be discussed separately. The Constitution included such a large number of norms of social rights that it could be considered as its flaw.[15]

Unfortunately, in February–March 1921, Georgia was occupied by the occupying army of Soviet Russia and the legitimate Government emigrated,[16] terminating the logical development of Georgian Constitutionalism. In fact, during the Soviet occupation, Georgia

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[11] J. Stephen, *Formation of Democracy in Georgia: 1918–1921*, [in:] M. Erkomaishvili (ed.), *Collection: 'Remembering the Georgian Democratic Republic 100 Years On: A Model for Europe?'*, International Scientific Forum, Tbilisi 2018, p. 45.

[12] J. Stephen, *Formation of Democracy…*, *op. cit.*

[13] I. Khakhutaishvili, *Gender, Equality and Discrimination: Recent developments in Georgian Legislation and Case-Law of the Constitutional Court of Georgia*, 17th meeting of the Joint Council on Constitutional Justice Mini-Conference on 'Gender, Equality and Discrimination', Lausanne, 28 June 2018, European Commission for Democracy through Law, Strasbourg 2018, p. 2.

[14] See: S. Zviadadze, D. Jishkariani, *Identity Issues among Azerbaijani Population of Kvemo Kartli and Its Political and Social Dimensions*, Human Rights Education and Monitoring Center (EMC), https://socialjustice.org.ge/uploads/products/pdf/Qvemo-Qartli_merged-eng_1547217506.pdf [access: 17.10.2023]; W. Dunbar, *The World's First Democratically Elected Muslim Woman Was from Georgia*, 2018, https://eurasianet.org/the-worlds-first-democratically-elected-muslim-woman-was-from-georgia [access: 17.10.2023]; *What We Should Know about Azerbaijani Fellow Citizens*, Tolerance and Diversity Institute, https://tdi.ge/en/page/what-we-should-know-about-azerbaijani-fellow-citizens [access: 17.10.2023].

[15] D. Gegenava, *The First Constitution of Georgia…*, *op. cit.*, p. 82.

[16] D. Gegenava, G. Goradze (eds.), *Introduction to Georgian Constitutional Law*, 2nd Edition, Tbilisi 2021, pp. 48–49.

adopted the Constitution four times, in: 1922, 1927, 1937 and 1978 – however, they served as formal annex.[17]

10.2.2. THE CONSTITUTION OF GEORGIA OF 1995

10.2.2.1. *Adoption of the Constitution*

By the end of 1991–1992, the violent overthrow of the National Government of Georgia created a chaotic legal situation.[18] In November 1992, the Law on State Government was adopted, producing an absolutely unbalanced form of the state arrangement[19] that could not withstand any criticism.[20] Thus, it was necessary to create more a complete legal document, required by the state development and country's integration into the international commonwealth,[21] ensuring the society consolidation.

In 1993, the Parliament of Georgia approved the State Constitutional Commission with 118 members, among them lawyers, political scientists, economists, historians, etc.[22] The Constitutional Commission functioned for more than three years, and involved the assistance of foreign experts. The Venice Commission contributed to its functioning as well, since the debates of the Constitutional Commission took place not only in Georgia, but in other countries worldwide.[23] The functioning of the Constitutional Commission concentrated on creating a mixed model of governance, but this direction has changed in the Parliament, and a conceptually different

[17] D. Gegenava, G. Goradze (eds.), *Introduction…*, *op. cit*., pp. 50–51.

[18] See: D. Gegenava, B. Kantaria, L. Tsanava, T. Tevzadze, Z. Matcharadze, P. Javakhishvili, T. Erkvania, T. Papashvili, *Constitutional Law of Georgia 4th Edition*, Tbilisi 2016, pp. 54–56.

[19] Under this law the highest official was Head of State – Chairman of the Parliament having legislative and executive power. See: Law of the Republic of Georgia on State Government, Chapter III "Chairman of the Parliament – Head of State".

[20] V. Gonashvili, A. Demetrashvili, G. Kverenchkhiladze, V. Zhvania, *The Constitution of Georgia and Constitutional Reform of 2010*, Tbilisi 2010, pp. 10–11.

[21] See: D. Gegenava *et al*., *Constitutional Law of Georgia…*, *op. cit.*, p. 60.

[22] A. Demetrashvili, S. Demetrashvili, *Constitutional Law*, Tbilisi 2021, p. 48.

[23] A. Demetrashvili, G. Gogiashvili, *Constitutional Law*, Tbilisi 2016, pp. 76–77.

model similar to American Presidential model was rapidly adopted with a majority of votes.[24]

On 24 August 1995, the Parliament of Georgia adopted the Constitution of Georgia with 159 votes in favour and 8 against it.[25] The Constitution, which would have attained the function of consolidating the people, who were tired and divided by social and political problems, including civil war, became a focal point for an opposition that coalesced around the interests of one particular person, causing new controversy in the society.[26]

10.2.2.2. *Structure and Content of the Constitution*

Adopting the Constitution of Georgia was undoubtedly a significant occasion despite its flaws in the process of its drafting and adoption. Georgia adopted its second 'own' Constitution,[27] its political passport.[28] The main dignity of the Constitution of Georgia adopted on 24 August 1995, lies within its founding character, based on which democratic institutes were created.[29]

The Constitution of Georgia, in the scope of its structure and content, took into consideration the constitutional traditions of developed democratic states.[30] It consisted of a preamble, nine chapters, and 109 articles.

The preamble of the Constitution of Georgia, which in some respects is a curriculum introduction of the Constitution,[31] recognised six main objectives: establishing a democratic public order; economic freedom; establishing a social and legal state; ensuring universally recognised rights and freedoms; state independence and

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[24] O. Melkadze, *The Danger of Constitutional Georgianology?!*, Tbilisi 2005, p. 30.
[25] A. Demetrashvili, S. Demetrashvili, *Constitutional Law*, *op. cit.*, p. 51.
[26] D. Gegenava, G. Goradze (eds.), *Introduction…*, *op. cit.*, p. 54.
[27] A. Demetrashvili, *Paradigms…*, *op. cit.*, p. 92.
[28] O. Melkadze, *Conversations about Georgian Constitution*, Tbilisi 1996, p. 37.
[29] A. Demetrashvili, *Paradigms…*, *op. cit.*, p. 94.
[30] O. Melkadze, *Conversations…*, *op. cit.*, p. 42.
[31] See: D. Gegenava *et al.*, *Constitutional Law of Georgia…*, *op. cit.*, p. 20.

peaceful relations with other peoples. The constitutional norms are based on these objectives, which define the joint spirit of the Constitution.[32] According to the preamble, the Constitution of Georgia was based on the main principles of the Constitution of 2021. However, such provision is more symbolic than contextual.

The Constitution of Georgia was based on the idea of the People's sovereignty. Article 5 of the Constitution declared that the People are the source for state governance in Georgia, implementing their power through referendum, other forms of democracy, and their representatives. The same article also recognised the principle for separating governance, based on which the state governance should have been implemented.

Article 9 declared the Constitution of Georgia as a supreme legislative act, and determined the necessity of Georgian legislation compliance with principles and norms of universally recognised international law.

Chapter two of the Constitution fully refers to human rights and citizenship issues. For the first time in the history of Georgia, the Constitution of Georgia introduced the position of Public Defender, appointed by the Parliament of Georgia for a term of 5 years (Article 43).

A new institution in the state life of Georgia was the Constitutional Court, which consisted of 9 judges, 3 of which were appointed by the President of Georgia, the other 3 by the Supreme Court of Georgia and 3 were elected by the Parliament of Georgia (Article 88(2)). The recruitment procedure for the Constitutional Court remained the same despite several changes of the status and competence of the President of Georgia.

The Parliament of Georgia was unicameral, however, under the first chapter of the Constitution the bicameral Parliament should be established once after creating relevant conditions and local self-government bodies for the entire territory of Georgia. The Constitution did not define the term relevant conditions', however, according

[32] O. Melkadze, *Conversations…*, *op. cit.*, p. 43.

to the established opinion, it meant above all the restoration of the territorial integrity.[33]

The American Presidential model introduced by the Constitution of 1995 established a super-presidential executive with absolute power,[34] which assumed the possibility of a strong President to be involved with and control the legislative processes.[35]

Based on Article 69 of the Constitution of Georgia, the President of Georgia was declared as the Head of State and executive power of Georgia, who implemented the domestic and foreign policy of state, ensured the unity and integrity of the country and was the supreme representative in foreign relations. Therefore, the President was also the Supreme Commander-in-Chief of the Military Forces, who appointed the members of National Security Council, presided over its sessions, appointed military commanders, etc. (Article 73(4)).

The President appointed the ministers with the Parliament Approval (Article 73(1)(b)). The ministers formed the President's advisory body – the government, while in the structure of executive power there was a State Minister institution unknown to presidential republics. The State-Minister did not possess the competence of heading the governmental collegium, but was, in fact, responsible for its activities.[36]

The President does not possess the right of legislative initiative in the classical presidential model, as it is considered as a part of the legislative process due to a strict separation of power and should be the prerogative of the legislative body.[37] However, in the case of the United States of America, the president, who possesses the veto power, is eligible to participate in the legislative process by presenting recommendations and measures to Congress.[38] In contrast to this,

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[33] K. Kurashvili, K. Chokoraia, A. Buchukuri, *Dilemmas of Bicameralism*, Batumi 2011, pp. 60–64.

[34] D. Gegenava, G. Goradze, M. Jikia (eds.), *Constitutionalism, General Introduction*, Book II, Tbilisi 2021, p. 55.

[35] O. Melkadze, *The Danger…*, *op. cit.*, p. 16.

[36] A. Demetrashvili, *Paradigms…*, *op. cit.*, p. 94.

[37] D. Gegenava, G. Goradze, M. Jikia (eds.), *Constitutionalism…*, Book II, p. 32.

[38] I. Kldiashvili, *Separation of Powers, System of Checks and Balances in Light of American Constitutionalism*, "Constitutional Law Review" 2016, No. 9, p. 105.

along with strong executive power, the President of Georgia was not only eligible to initiate legislation but to request an extraordinary review from the Parliament, which the Parliament had to approve (Article 67). Moreover, the President had the power to initiate not only ordinary legislation but also constitutional legislation (Article 102(1)(a)). He could also call for a referendum on his own initiative (Article 74(1)).

The president possessed significant power regarding the judicial system. Through his deliberative body, the Council of Justice, he actually decided issues related to appointment, disciplinary proceedings and dismissal of the judges (except for Supreme Court members).[39]

Thus, the obvious disbalance between the branches of government were in favour of the President.

10.2.2.3. *Rules for Revising the Constitution*

The draft of the Constitution of Georgia of 1995 considered the adoption of the Constitution through referendum, but due to the complicated situation in Abkhazia and the region of Tskhinvali, as well as severe psycho-social situation caused by the civil war, this approach changed and the Parliament adopted the Constitution.[40]

When adopting the Constitution of 1995, the Georgian legislator chose a simple mechanism for revising the Constitution.[41]

Chapter VIII "Revision of the Constitution" focused on the revision of the Constitution, which consisted of only two articles.

Basic procedures were included in Article 102. Under this article, the President, more than half of the full composition of the Parliament and 200 thousand voters were eligible to submit the Constitutional draft law to the Parliament. The Parliament should have published the adopted draft law for public consideration; however,

[39] A. Demetrashvili, *Paradigms…*, *op. cit.*, p. 94.

[40] A. Demetrashvili, S. Demetrashvili, *Constitutional…*, *op. cit.*, p. 50.

[41] G. Luashvili, *The Mechanism for Revising the Constitution of Georgia and the Constitutional Reform of 2017*, "Journal of Constitutional Law" 2018, Vol. 2, p. 89.

the discussion of the draft law should have begun one month after its publication. The draft Constitutional law could be considered adopted if it was supported by at least two thirds of the full composition of the Parliament. The President of Georgia signed and published the adopted draft law.

The given article differentiated 'general and partial' revision; however, it was not defined on the legislative level, and from the legal point of view it blurred the line between these terms.[42]

Under Article 103, the process of revising the Constitution would be suspended during wartime or a state of or emergency.

10.2.3. CONSTITUTIONAL REFORMS OF GEORGIA

Constitutions as maps of power may be somewhat inaccurate. The realities of power may not be fully reflected in the Constitution.[43] "Constitutions need to develop over time to correct provisions that have proven to be inadequate or unworkable, to respond to new needs or changing public demands and to reflect evolving concepts of rights."[44] The Constitution, which does not correspond to the requirements of the society and existing political-legal situation, may not be able to fulfil its functions.[45]

On the one hand, constitutional amendments are essential, but the fact, that every constitutional amendment is a big challenge for new democracies due to an unstable political regime and an unfinished constitutional order, should be considered.[46] One constitutional amendment might be a 'Pandora's Box' and become

[42] T. Papashvili, D. Gegenava, *Georgian Model of Revising the Constitution – Shortcomings and Perspective of Normative Regulation*, Tbilisi 2015, pp. 29–30.

[43] M. Tushnet, *Constitution-Making: An Introduction*, "Texas Law Review" 2013, Vol. 91, Issue 7, p. 1984.

[44] M. Böckenförde, *Constitutional Amendment Procedures*, *International IDEA Constitution-Building Primer 10*, Stockholm 2017, p. 3.

[45] T. Papashvili, D. Gegenava, *Georgian Model of Revising the Constitution…*, *op. cit.*, p. 8.

[46] D. Gegenava, *Changing Constitutional Identity: Constitutional Reform and New Concept of Human Rights in Georgia*, "Bratislava Law Review" 2019, Vol. 3, No. 1, p. 112.

the source of permanent constitutional amendments, which could well prove ineffective in defining the authority of the Constitution or improving on it in the hoped-for manner.[47]

The year 1999 could be considered as a kind of breaking point for modern constitutionalism in Georgia after the first amendment to the Constitution of Georgia[48] was followed by the opening of 'Pandora's Box'. There have been up to forty amendments to the Constitution of Georgia throughout its existence,[49] and the reforms of 2004, 2010 and 2017–2018 reforms were the most significant. It needs be noted that no known data exists for the official sociological research that served as the basis of the constitutional amendments. The Constitutional Commission possessed no such information when it was working on the reforms.

According to the first constitutional amendment, the 5% threshold was increased to 7% for elections held by the parliamentary proportional electoral system.[50] The amendment was a purely political decision, being passed in a fast manner before the parliamentary elections.[51] It was a strategic measure carried out by the parliamentary parties to maintain their power,[52] as there were few months left before elections and relatively small parties would not be able to consolidate in blocks. So, the results were as follows: in the parliamentary elections held on 31 October 1999 only three large political alliance met the electoral threshold.[53]

Five constitutional amendments were made before the conceptual reform in 2004. The most significant ones are the constitutional amendments of 2000 and 2002, which referred to the territorial arrangement of Georgia. The issue related to territorial arrangement

[47] D. Gegenava, G. Goradze (eds.), *Introduction…*, *op. cit.*, p. 55.

[48] K. Godoladze, *Constitutional Changes in Georgia: Political and Legal Aspects*, "Constitutional Law Review" 2013, No. 6, p. 49.

[49] D. Gegenava, *25 Years…*, *op. cit.*, p. 123.

[50] See: Constitutional Law of Georgia "Amendments to the Constitution of Georgia", 20 July 1999.

[51] R. Albert (ed.), *The Architecture of Constitutional Amendments. History, Law, Politics*, Hart Publishing, Oxford 2023, p. 251.

[52] W. Gaul, *Adoption and Elaboration of the Constitution in Georgia*, Tbilisi 2002, p. 115.

[53] W. Gaul, *Adoption and Elaboration…*, *op. cit.*, p. 116.

was vague in the original edition of the Constitution. Because Georgian jurisdiction did not actually cover the particular territories of Georgia – Abkhazia and so-called South Ossetia – the legislators restrained themselves from specific definitions. Accordingly, the status of the autonomous units of Abkhazia and Adjara was unclear.[54] The constitutional amendments of 2000 and 2002 brought some clarity regarding the autonomous entities. The first amendment changed the legally incorrect term 'Autonomous Republic'[55] held over from the Soviet era and named it 'Autonomous Republic of Adjara'. Its status was determined by the separate constitutional law. Two years later, a similar amendment was passed regarding Abkhazia.

The constitutional law of 30 March 2001, which should have regulated the relations between the State of Georgia and the Georgian Orthodox Church through Constitutional Agreement, was also of high importance. The President of Georgia was granted with the authority to sign the law on behalf of the State of Georgia. The Constitutional Agreement was solemnly signed in October 2022.[56]

10.2.3.1. *Constitutional Reform of 2004*

In 2004, following the Rose Revolution, the new government, carried out another constitutional reform.[57] The draft of the constitutional amendments was not published for discussion until one month before the public consideration in the Parliament, as it was stipulated in the Constitution. The justified argument for the aforementioned was the draft law, based on the identical draft law of 2001, that was once rejected by the Parliament but was published at the time.[58] According to some opinions, these amendments were

[54] D. Gegenava, G. Goradze (eds.), *Introduction…*, *op. cit.*, p. 55.

[55] D. Gegenava (ed.), *Introduction to Constitutional Law*, Sulkhan-Saba Orbeliani University Press, Tbilisi 2021, pp. 241–242.

[56] D. Gegenava, *Legal Models of Church-State relations and Georgian Constitutional Agreement*, Tbilisi 2018, p. 106.

[57] G. Meladze, K. Godoladze, *Constitution for 'All' or for 'Chosen Few' – Problems of Constitution-Making in Georgia*, "Constitutional Law Review" 2015, No. 8, p. 27.

[58] K. Godoladze, *Constitutional Changes…*, *op. cit.*, p. 51.

made in violation of Article 102 of the Constitution of Georgia,[59] but some thinkers claim that the Government used in its favour (though unjustifiably)[60] the ambiguity that characterises the Constitution regarding the public consideration of the draft law. It should be also noted, that the constitutional amendment process was not transparent and available for review by general public Nevertheless, the draft was submitted to the Parliament and adopted in a very short time.[61]

The 2004 reform was extensive. More than half of the original 109 articles of the Constitution were reformulated.[62] The changes affected the form of the governance and the state moved from a presidential system to a semi-presidential model of governance.[63] The model of separation of powers was completely transformed, and accordingly, the state governmental system in Georgia was fundamentally altered.

The main result of these changes was a significant expansion of presidential powers, weakening of the parliament, and introduction of a new executive body – the government.[64]

A new Chapter, IV "Government of Georgia", was added to the Constitution. The Georgian Government was a collegial body, led by the Prime Minister. The function of the government was defined as ensuring the implementation of executive power, domestic and foreign policy of the country. The government was responsible to the President and the Parliament of Georgia (Article 78).

Despite the fact that the President of Georgia was only the head of state and was no longer formally designated as the head of executive branch, in reality, the President was the sole source of executive power.[65] The basis for this statement is provided by the analysis of separate provisions of the 2004 edition of the Constitution. In particular, according to Article 69 of the Constitution, the President directed and implemented the state's domestic and foreign policy,

[59] O. Melkadze, *The Danger…*, *op. cit.*, p. 31.
[60] T. Papashvili, D. Gegenava, *Georgian Model of Revising the Constitution…*, *op. cit.*, pp. 41–42.
[61] G. Meladze, K. Godoladze, *Constitution…*, *op. cit.*, p. 27.
[62] A. Demetrashvili, *Paradigms…*, *op. cit.*, p. 95.
[63] O. Melkadze, *The Danger…*, *op. cit.*, p. 32.
[64] K. Godoladze, *Constitutional Changes…*, *op. cit.*, p. 54.
[65] Ibidem, p. 56.

and was the highest representative of the state in foreign relations; the President was authorised to convene and lead government sessions regarding particularly a matter of state importance, and decisions made at these sessions were formalised through a presidential act (Article 78(4)). Since there was no definition of what constituted 'a matter of state importance' this remained within the President's discretion and allowed them to convene the government on any issue; the government could only submit draft laws concerning government structure and authority to Parliament after agreeing with the President (Article 78(5)); Despite the fact that from a formal perspective there existed a parliamentary vote of confidence in the government, if Parliament did not declare confidence in the government, the President could still appoint the Prime Minister, and in such case would dissolve Parliament,[66] which diminished Parliament as a body controlling the executive power; the President was authorised to suspend or annul acts of the government and executive institutions if they contradicted the Constitution of Georgia, international treaties and agreements, laws and presidential normative acts, and others.

Two important changes affected the judicial system: the jury trial system was introduced, and second, the Prosecutor's Office, which previously had an ambiguous status as a judicial authority institution, was completely removed from the constitution.

The changes did not affect the revision part of the Constitution and it remained in its old edition.

The Venice Commission expressed its remarks mostly regarding the expansion of the president's rights. The Commission noted that the president unjustifiably infringed on the parliamentary powers, the government and the court. The Commission recommended that the government of Georgia should refine the content of the draft of the Constitution,[67] however most of Commission's remarks were ignored.

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[66] Ibidem.

[67] Opinion on the Draft Amendments to the Constitution of Georgia adopted by the Venice Commission, No. 281/2004, CDL-AD (2004) 008, Strasbourg, 29 March 2004.

10.2.3.2. *Constitutional Reform of 2010*

Thirteen constitutional amendments were made from 2005 to 2010. Noteworthy among them was the amendment of 23 February 2005, which reduced the number of members of the Parliament from 235 to 150 and reflected the results of the 2003 referendum[68] on the same issue. The amendment determined that the Parliament would be composed of 100 members elected proportionally and 50 members elected with the majoritarian voting system. The amendment of 12 March 2008 changed the rule for elections to the Parliament, and ensured equality of numbers, with members of Parliament evenly divided between those elected by majoritarian vote and those elected through proportional voting. The amendment of 27 December 2005 deserves a separate discussion, as it reduced to 28 the minimum age for judges sitting on the General Court, a decision given absurd justification of a lack of lawyers.[69]

Expanded rights granted to the President by the reform of 2004 have become the subject of frequent criticism. The incompatibility of these rights in the existing constitutional system was obvious, which highlighted the necessity of the new constitutional reform.[70] Work on a reform began in 2009, when the State Constitutional Commission was established by the decree of the President.[71] The process was characterised by transparency, and everyone interested in this process could participate and contribute.[72] The Venice Commission lent its assistance to the Constitutional Commission.[73] However, the State Constitutional Commission had a low degree of

[68] A. Demetrashvili, *Referendum in Georgian Legislation and Practice*, [in:] D. Gegenava (ed.), *Collection: 'Giorgi Kverenchkhiladze 50'*, Sulkhan-Saba Orbeliani University Edition, Tbilisi 2022, p. 11.

[69] I. Putkaradze, *Judicial Power and Basic Rights in the New Edition of the Georgian Constitution*, "Constitutional Law Review" 2009, No. 1, p. 58.

[70] G. Meladze, K. Godoladze, *Constitution…*, *op. cit.*, 2015, p. 14.

[71] See: Order No. 388 of 8 June 2009 of the President of Georgia "On Required Activities for Forming Georgian State Constitution Commission".

[72] G. Meladze, K. Godoladze, *Constitution…*, *op. cit.*, p. 28.

[73] Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia adopted by the Venice Commission, No. 543/2009, CDL-AD (2010) 028, Strasbourg, 15–16 October 2010, p. 3.

legitimacy, because the opposition, with just a few exceptions, did not participate in the above-mentioned process.[74]

Most of the problems in the Georgian constitutionalism are related to the manner in which powers apportioned, in particular those of the head of state.[75] The constitutional reform of 2010 aimed at correcting misalignments in the horizontal system of division of powers,[76] which meant rolling back the increases in the authority of the President.

Following the amendments, the President could no longer execute domestic and foreign policy. He was distanced from the government. The role of the President in the process of forming a government was nominal, he was no longer entitled to appoint the members of the Government, moreover, the Government was accountable only to Parliament (Article 78). Even though the president's authority in foreign relations was limited,[77] as he was the head of state, responsibility for foreign relations remained with him. Specifically, Article 69(3) of the Constitution stated that the President of Georgia represents Georgia in foreign relations, while the Prime Minister and Ministers represent Georgia in foreign relations, but within their scope of competence (Article 78(4)). Later, this ambiguous provision regarding foreign relations became a subject of serious confrontation between the President and the Prime Minister in practice.[78]

The President was deprived of the right to legislative initiative and the right to call referendums on their own initiative. A new development was the President's distancing from the budgetary

[74] W. Babeck, S. Fish, Z. Reichenbecher, *Rewriting a Constitution: Georgia's Shift Towards Europe*, Nomos, Baden-Baden 2012, p. 62.

[75] G. Kverenchkhiladze, *Changes in Georgian Constitutionalism: Constitutional Construction of the President and the Government and Specificities of Their Interrelationship from the Perspective of 2010 Constitutional Reform*, "Constitutional Law Review" 2012, No. 5, pp. 185–200.

[76] A. Demetrashvili, *2009/2010 Constitutional Reform in Georgia*, Batumi 2012, p. 24.

[77] G. Kverenchkhiladze, *Changes in Georgian Constitutionalism…*, *op. cit.*, p. 161.

[78] See: T. Zurabashvili, *Explaining Intra-Executive Conflicts in Semi-Presidential Countries: The Case of Georgia*, "Constitutional Law Review" 2016, No. 9, p. 55.

process[79] and the introduction of the Prime Minister's countersignature institution, was an innovation which required the President's legal acts, which the President's legal acts required, except for certain exceptions (Article 73).

The changes affected the judicial system as well. The minimum age established for the judge of the General Court was once again defined as 30 years. The change ensured an appointment of a judge for life, with three-year probationary period (Article 86).

Chapter VII regarding local self-governance was added to the Constitution, which determined general provisions of local self-governance functions.

Under constitutional law, the significant part of the amendments should have entered into force following the Presidential elections of October 2013 upon his taking of the oath.[80]

Its desultory remarks notwithstanding, the Venice Commission positively evaluated the presented changes.[81]

10.2.3.3. *Rules for Revising the Constitution*

Considering the fact that revising procedure of the Constitution of Georgia was simple and placed the Constitution of Georgia on the list of 'flexible' Constitutions, ensured numerous amendments to it in the short period of time, the Constitutional Commission set a goal to change the procedure of revising the Constitution.[82] The above-mentioned resulted in two significant amendments.

First of all, the right to initiate constitutional law was taken away from the President. Therefore, the change also affected the rule for adoption of the draft constitutional law itself. If under Article 102 the Constitution stated that the constitutional law should be

[79] T. Zurabashvili, *Explaining Intra-Executive Conflicts…*, *op. cit.*, p. 161.

[80] Constitutional Law of Georgia "On Amendments and Additions to the Constitution of Georgia", Article 3(3), 15 October 2010.

[81] See: Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia adopted by the Venice Commission, No. 543/2009, CDL-AD (2010) 028, Strasbourg, 15–16 October 2010.

[82] V. Gonashvili *et al.*, *The Constitution of Georgia…*, *op. cit.*, pp. 70–71.

considered adopted if it was supported by at least two thirds of the full composition of the Parliament, then under the new amendment the draft law on revising the Constitution should be considered adopted if it was supported by at least two thirds of the full composition of the Parliament of Georgia in two consecutive sessions of the Parliament of Georgia within at least three months. The quorum determined by the constitutional law of 27 December 2011 soon was broadened and became three quarters.[83]

The Rules of Procedure of the Parliament of Georgia clarified the rules by which a constitution could be adopted in two consecutive sessions. In particular, under Article 176(8) of the Regulation, the Parliament would review and adopt the draft law on revising the Constitution of Georgia within three hearings. Therefore, the draft would be reviewed and adopted within the first and second hearings at the same session, however, within the third hearing it would be reviewed and adopted only after the Parliament's following session, in not less than three months after its adoption within the second hearing. The above-mentioned means that the previously existing general process (adopting the draft law within three hearings) was divided between two sessions. Accordingly, this was not a two-time adoption of the same draft law, but one-time adoption with a procedure extended over time and divided into two sessions.

Under Article 68 of the original edition of the Constitution of 1995, within five days the adopted draft constitutional law was submitted to the President of Georgia, who was obliged to sign and publish the law within 10 days, or return to the Parliament with motivated remarks. Whether the Parliament accepted the remarks of the President or not, the same number of votes – two thirds of the full membership was needed in order to adopt the draft constitutional law again. The above-mentioned meant that the higher quorum was not determined to override the Presidential veto, unlike other laws, however, a higher quorum of three-fifths of the full composition of the members of the Parliament was defined for other laws. The 2010 reform did not change the above-mentioned rule, however,

[83] Constitutional Law of Georgia of 27 December 2011 "On Amendments to the Constitution of Georgia", Article 1(5).

under the constitutional law of 2011, the minimum number of votes was increased from two-thirds to three-quarters for an override of the Presidential veto on the draft constitutional law, i.e., the same number of votes needed for the adoption of the constitutional law.[84]

10.2.3.4. *Constitutional Reform of 2017–2018*

The Georgian Parliament implemented the other constitutional reform in 2017–2018, resulting in technical as well as contextual changes of the Constitution,[85] creating a revamped Constitution.[86] However, it should be noted that, there were 8 more amendments to the Constitution of Georgia before 2010 and 2017 reforms, regarding the change of residency of the Parliament,[87] lowering the minimal age of the members of the Parliament to 21 years,[88] founding the city of Lazika,[89] etc.

10.2.3.4.1. Concept of Reform

The main goal of the reform of 2017 was to ensure full compliance of the Constitution with the fundamental principles of the constitutional law characteristic of a parliamentary republic.[90] Based on separate opinion, this reform ended the transition process to the

[84] Constitutional Law of Georgia of 27 December 2011 "On Amendments to the Constitution of Georgia", Article 1(4).

[85] G. Goradze, *Separation of Powers according to the New Amendments to the Constitution of Georgia – Problems and Prospects*, "Bratislava Law Review" 2019, Vol. 3, No. 1, p. 81.

[86] D. Gegenava, G. Goradze (eds.), *Introduction…*, *op. cit.*, p. 55.

[87] Constitutional Law of Georgia of 1 July 2011 "On Making Additions to the Constitution of Georgia".

[88] Constitutional Law of Georgia of 22 May 2012 "On Amendments to the Constitution of Georgia".

[89] Constitutional Law of Georgia of 29 June 2012 "On Amendments to the Constitution of Georgia".

[90] J. Khetsuriani, *Constitutional Reform in Georgia (2017) and Constitutional Court*, "Journal of Constitutional Law" 2018, No. 1, p. 28.

parliamentary model and eradicated the previously existing flaws in the Constitution.[91]

Powers related to executive power were completely taken away from the President due to the amendments. However, the function of foreign representation remained within the president, but only with the approval of the government. The Prime Minister became a representative in foreign relations, with authority to conclude international agreements.

Under Article 49(3) of the revised Constitution, the president is the Supreme Commander-in-Chief of the Military Forces, however, under Article 70(6) the defence forces act by the order of the Minister of Defence, and during a state of emergency or war by the order of the Prime Minister.

The procedure for electing the President of Georgia also changed. Instead of being elected by universal voting, the president will be elected by an electoral board of 300 delegates, composed of the members of the Parliament, autonomous units and members of the representative bodies of municipalities. However, the above-mentioned procedure for electing the president will enter into effect in 2024.

The procedure for electing the Parliament also changed: from 2024, the Parliament will be fully composed with 5% electoral threshold of the proportional system. Previously, the Parliament was composed of 77 members elected by proportional voting and 73 members elected by the majoritarian voting system, and the electoral threshold of proportional system would be 3%, which would ensure the governmental party to retain majority. The Venice Commission criticised this project more than once.[92] The Governmental Party had to compromise and change the procedure. In particular, under the amendment to the Constitution of 2020, the Parliament composed of 120 deputies elected by proportional

[91] J. Khetsuriani, *Constitutional Reform…*, *op. cit.*, p. 40.

[92] Opinion on the Draft Constitutional Amendments Adopted on 15 December 2017 at the Second Reading by the Parliament of Georgia, adopted by the Venice Commission at its 114th Plenary Session (Venice, 16–17 March 2018), Strasbourg, 19 March 2018, pp. 4–5.

voting and 30 deputies elected by the majoritarian voting system on the premise of a 1% electoral threshold.[93]

Unlike the classical model of the Parliamentary Republic, the Parliament of Georgia does not have any authority to make any changes in the draft law of budgeting without government approval.[94] The Venice Commission expressed its remarks regarding the above-mentioned,[95] however, the Government of Georgia did not consider any of them.

Article 78 of the Constitution is noteworthy, which states that every other constitutional body should take all measures within the scope of their competence to ensure the full integration of Georgia into the European Union and North Atlantic Treaty Organisation. This article was included in the chapter of transitional provision mainly due to the fact that the goal set by the norm was temporary and would expire once after integration into the European Union and NATO. This could be called a norm-principle, which provides the general orienteer of activities for constitutional bodies. It should be noted that the August–September 2017 visits to the European Union conducted by the President of Georgia in the frames of this norm, but without the governmental approval, became the basis for the impeachment procedure against him/her. The Constitutional Court qualified this act of the president as violation of the Constitution,[96] however, the judges did not share this opinion. One of the arguments in their dissenting opinion was that unwavering support of the Euro Integration process was universally declared

[93] Constitutional Law of Georgia of 29 June 2020 "On Amendments to the Constitution of Georgia Amendments to the Constitutional Law of Georgia", Article 2(1–2).

[94] Article 66 of the Constitution of Georgia.

[95] See: Opinion on the Draft Revised Constitution as Adopted by the Parliament of Georgia at the Second Reading on 23 June 2017, adopted by the Venice Commission at its 112th Plenary Session (Venice, 6–7 October 2017), 9 October 2017, p. 10; Opinion on the Draft Constitutional Amendments Adopted on 15 December 2017 at the Second Reading by the Parliament of Georgia, adopted by the Venice Commission at its 114th Plenary Session (Venice, 16–17 March 2018), Strasbourg, 19 March 2018, p. 8.

[96] Conclusion No. 3/1/1797 of 16 October 2023 of the Constitutional Court of Georgia on Violation of the Constitution by the President of Georgia.

by every governmental body, and was stated in Article 78 of the Constitution of Georgia.

Nevertheless, the President of Georgia would not even consider harming the foreign policy of the state due to his/her visits supporting Euro Integration.[97] Despite the Constitutional Court conclusion, the impeachment of the President was not carried out due to insufficient number of votes in the Parliament.

The constitutional law limited the rights of the Constitutional Court. In particular, under Article 60(6) the Constitutional Court was prohibited to recognise the norm regulating elections as unconstitutional within the respective election year, unless this norm was not adopted within a year before elections. Despite negative conclusion of the Venice Commission,[98] the norm was neither expelled nor qualitatively changed but according to the constitutional law of 2018 only the date of its adoption was changed and was edited as following: "A legal norm regulating elections shall not be recognised as unconstitutional by the Constitutional Court within the respective election year, unless this norm has been adopted within 15 months before the month of the respective elections."

There were other amendments to the Constitution of 2018, reflecting issues regarding undistributed votes in the parliamentary elections. In particular, according to the previous provision, all undistributed mandates in proportional elections would be received by the political party which won the elections. This provision was replaced by a rule that the undistributed mandates would be received consequently by political parties with better results.[99]

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[97] The Dissenting Opinion of the Members of the Constitutional Court of Georgia – Irine Imerlishvili, Giorgi Kverenchkhiladze and Teimuraz Tughushi Regarding the Conclusion No. 3/1/1797 of the Constitutional Court of Georgia, dated 16 October 2023.

[98] Opinion on the Draft Revised Constitution as Adopted by the Parliament of Georgia at the Second Reading on 23 June 2017, adopted by the Venice Commission at its 112th Plenary Session (Venice, 6–7 October 2017), 9 October 2017, p. 11.

[99] Article 37(6) of the Constitution of Georgia.

10.2.3.4.2. Technical Features of Law-Making

Under the 2017–2018 reform, the Constitution was revised, reduced and rearranged technically.[100] The number of articles was reduced. If article 109 was the last one in the Constitution, constitutional norms were included in just 78 articles in the new edition, which resulted a technical change of the previous articles. Moreover, the articles were titled.

In the end, the Constitution was amended in a way that only the date of adoption of the Constitution (1995) and the name of the President (Shevardnadze) who had already passed away by the time of the amendments, remained unchanged.[101] Therefore, it remains unclear why, given such comprehensive constitutional changes, it was not adopted as a new constitution.

The 2017 amendments to the Constitution of Georgia created a unique situation: the document functioned as a 'forward-looking' constitution, containing provisions that were specifically designed to take effect after the 2024 parliamentary elections. Notably, this constitutional text did not reflect the legal framework in place during the interim period, focusing instead on the future governance structure. For example, according to Article 37(2) of the Constitution, the Parliament of Georgia shall consist of 150 members elected through a proportional system, and pursuant to Article 37(6) the electoral threshold is set at 5%. In contrast, the Parliament of Georgia functioning during 2020–2024 consisted of 120 members elected through a proportional system with a 1% electoral threshold and 30 members elected through the majoritarian voting system. Furthermore, while Article 50(1) stipulates that the President shall be elected by the Electoral College for a five-year term, the President of Georgia serving during 2018–2024 was elected through direct universal suffrage for a six-year term. The Constitution contained no other provisions that would reflect this reality. Conventionally,

[100] D. Gegenava, *25 Years…*, *op. cit.*, p. 123.

[101] M. Nakashidze, *Georgia's Model of Constitutional Amendment Codification*, [in:] R. Albert (ed.), *The Architecture of Constitutional Amendments. History, Law, Politics*, Hart Publishing, Oxford 2023, p. 256.

such provisions should be incorporated within a chapter on transitional provisions; however, this chapter contains only a single article pertaining to membership in Euro-Atlantic structures.

The matter lies in the fact that the original version of the 2017 constitutional law contained three articles, of which the first article presented the entire new text of the Constitution. Article 2 of this law contained transitional provisions and Article 3 addressed the matter of this this law's entry into force.[102]

In 2018, the constitutional law of 2017 was amended to reflect certain observations made by the Venice Commission.[103] However, instead of amending specific provisions within the law, the entirety of Article 1 of the 2017 Constitutional Law was modified, thus effectively renewing the entire constitutional text.[104] Although the observations of the Venice Commission pertained to only a few provisions, the entire text of the Constitution was re-approved. Consequently, without a comparative analysis of the 2017 and 2018 texts, it is impossible to determine precisely what changes were made to the text of the constitution.[105]

Therefore, the text of the Constitution of Georgia alone is insufficient to comprehend the constitutional system of Georgia, as the constitutional law of 2017 encompasses specific provisions that are not reflected in the Constitution itself. It is also noteworthy that, unlike the content of the Constitution, no official English translation of the aforementioned law exists. Consequently, individuals interested in studying the Georgian Constitution would find it challenging to navigate Georgian constitutional legislation without the 'guidance' of a Georgian constitutional law expert. Due to this ambiguity, the Constitution of Georgia is sometimes categorised as belonging to the 'invisible model of the Constitution',[106] although 'shadow Constitution' would probably be more accurate.

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[102] See: Constitutional Law of Georgia of 13 October 2017 "On Amendments to the Constitution of Georgia".

[103] M. Nakashidze, *Georgia's Model…*, *op. cit*., p. 235.

[104] See: Constitutional Law of 23 March 2018 of Georgia "On Amendments to the Constitutional Law of Georgia".

[105] M. Nakashidze, *Georgia's Model…*, *op. cit*., p. 235.

[106] Ibidem.

10.3. Involvement of Society in the Process of Constitutional Reform

10.3.1. CONSTITUTIONAL COMMISSION

Constitutional law finds its origin with the people as the only legitimate source of power.[107] That is why constitutional legitimacy is an important criterion for evaluating the Constitution. The Constitution has practical and symbolic functions. Accordingly, it is not merely a theoretical construct but operates as a tangible instrument in the real world. It is highly relevant whether the Constitution inspires the faith and fidelity of citizens in order to function properly.[108] A fundamental challenge confronting constitutional architects resides in ensuring citizens' fidelity to the supreme law and cultivating constitutional identity among the populace. This essential aim is accomplished through the dual mechanisms of civic participation in the constitution-making process and the maintenance of procedural transparency.[109]

None of the constitutional reforms were supported by the electorate and, of course, were not legitimated by the people of Georgia. Unfortunately, this fact was ignored by the ruling parties that always believed that only they knew the real challenges of the Constitution and constitutional reality.[110] Since 1995, the Georgian constitutional order has afforded complete latitude to forces commanding a majority in the democratic process to define the constitutional framework according to their narrow interests.[111] Every incumbent

[107] D. Grimm, *The Achievement of Constitutionalism and Its Prospects in a Changed World*, [in:] P. Dobner, M. Loughlin (eds.), *The Twilight of Constitutionalism?*, Oxford 2010, p. 9.

[108] R. Albert, X. Contiades, A. Fotiadou (eds.), *The Foundations and Traditions of Constitutional Amendment*, Hart Publishing, Oxford 2017, p. 237.

[109] V. Menabde, *Revision of the Constitution – What Ensures the Legitimacy of the Supreme Law*, [in:] G. Nodia, D. Aphrasidze (eds.), *From Super Presidential to Parliamentary. Constitutional Amendments in Georgia*, Article Collections, Tbilisi 2013, pp. 117–118.

[110] D. Gegenava, *25 Years...*, *op. cit.*, p. 123.

[111] D. Zedelashvili, *Revision of the Constitution in Georgia: Passions of Majority and Constitutional Order*, [in:] G. Nodia, D. Aphrasidze (eds.), *From Super*

Government tries to take control over all branches of power as much as possible and attempts to fully control state issues.[112] In this regard, 2017–2018 reform was not an exception.

According to the legislation of Georgia, the creation of a constitutional commission is not mandatory for the implementation of constitutional changes, but such a commission was created before all constitutional reforms. This also happened in the case of the constitutional reform of 2017–2018.

State Constitutional Commission was established to work on a reform on 23 December 2016. Composition of the Commission was quite inclusive and combined representatives and experts of the administration, government, court, other constitutional entities, political parties and some public organisations, however the criteria for choosing the experts were ambiguous.[113] If we acknowledged that composition of the Commission was approved by the individual decision of the Chairman of the Parliament,[114] it would be easy to understand why the opinion of some independent experts coincided with the opinion of ruling party representatives, which did not leave the impression of being 'independent' at all.[115] The administration of the president refused to involve itself in the work of the Commission, as in its estimation the Commission lacked political trust, legitimacy, and democratic discussion of issues, and was not

Presidential to Parliamentary. Constitutional Amendments in Georgia, Article Collections, Tbilisi 2013, p. 170.

[112] D. Gegenava, *Retrospection of the Constitutional Reforms of Georgia: In Search of the Holy Grail*, "South Caucasus Law Journal" 2017, No. 8/2017, p. 239.

[113] Joint Assessment of the Work of the State Constitutional Commission of Georgia, Report to: the European Commission for Democracy through Law/ the Venice Commission the International Society for Fair Elections and Democracy (ISFED), Transparency International – Georgia, Georgian Young Lawyers' Association, and the Open Society Foundation – Georgia (OSGF), p. 3, https://www.transparency.ge/sites/default/files/georgian_csos_assessment_of_the_constitutional_commission_for_venice_commission.pdf [access: 17.10.2023].

[114] Resolution of the Parliament of Georgia of 15 December 2016 "On the Establishment of the State Constitutional Commission and the approval of the Statute of the State Constitutional Commission", Article 4.

[115] Joint Assessment of the Work of the State Constitutional Commission of Georgia…, *op. cit.*, p. 3.

oriented on reaching wide consensus.[116] Later, it convened its concluding session, the opposition parties left the Commission in protest, which resulted decrease of number of members from 73 to 60.[117]

The Constitutional Commission functioned in an unhealthy environment. Some members of the Commission, including its chairman, were sometimes aggressive and intolerant towards different or critical opinion, in particular, opposition parties and the civil sector. Representatives of the civil sector were addressed with insulting remarks by experts on the Commission; however, the chairman of the Commission did not respond adequately.

Such treatment had a negative effect on the working environment of the Commission. Therefore, the entire process was rushed and at all stages lacked clarity about balloting and about the decision-making process in general.[118] Unfortunately, this process proved once again the truth of the character of Georgian Constitutional Practice – namely, that in the main, the Constitutional Commission is established neither to solve problems nor to improve the Constitution based on consensus between various political groups, but for 'prestige', in order to project an image to the society and to the Parliament, but which in truth is a self-advancement project addressed to the narrow interests of specific powerful groups and individuals.[119]

10.4. Society's Attitude Towards Constitutional Reform

10.4.1. NATIONAL DEMOCRATIC INSTITUTE (NDI) RESEARCH

In June–July 2017, at the request of the American National Democratic Institute (NDI) the research study 'Public Attitudes in Georgia' was conducted. Within the research 2261 persons were

[116] President's Administration Boycotts Planned Constitutional Reform Commission, Civil Georgia, Tbilisi, 12 December 2016, http://civil.ge/eng/article.php?id=29687 [access: 17.10.2023].

[117] Joint Assessment of the Work of the State Constitutional Commission of Georgia…, *op. cit*., p. 4.

[118] Ibidem.

[119] D. Gegenava, *Retrospection of the Constitutional Reforms of Georgia…*, *op. cit.*, p. 239.

interviewed throughout Georgia, except for the occupied territories. The research's margin of error was +/– 2.2%. The questions were about the direction of the country, living conditions, issues related to national and local problems, state activity, foreign policy, current events, and reforms.[120]

Some questions of the research were about constitutional reforms as well.

To the question whether the respondents were aware of establishment of the Constitutional Commission last December and the adoption of the draft of the Constitution in April 2017, 60% of those interviewed answered in the negative; 8% did not know how to respond and only 32% of those interviewed were aware of the above-mentioned.[121]

The following questions were addressed to 32% who were already aware of the constitutional changes:

To the questions whether the respondents have enough information about the constitutional changes, 59% of interviewed responded that they were not sufficiently informed, 2% did not have any answer, and 39% considered themselves sufficiently informed.[122]

The following question regarded public meetings held by the members of the Parliament to discuss the proposed constitutional changes. The respondents should have answered whether they attended any of these meetings or not. 89% of the interviewed answered in the negative, 9% could not give any answer and only 2% answered in the affirmative. [123]

The last answer was the most meaningful. The respondents should have answered if the amendments to the Constitution fully reflected, partially reflected or did not reflect the citizen's opinions at all. The answers were as following: fully reflect – 6%, partially reflect – 47%, does not reflect at all – 32%, not aware of it – 15%.[124]

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[120] See: Public attitudes in Georgia Results of a June 2017 survey carried out for NDI by CRRC Georgia, https://www.ndi.org/sites/default/files/NDI%20poll_june%202017_ISSUES_ENG_VF.pdf [access: 17.10.2023].

[121] Public attitudes in Georgia…, *op. cit*., question 51.

[122] Ibidem, question 52.

[123] Ibidem, question 53.

[124] Ibidem, question 54.

The conducted research makes it clear that more the half of the population – 60% – is not aware of changes procedure regarding the supreme law of the country. It means that the Constitution is 'strange' to 60% of the population and once again underscores the formal nature of the Constitutional Commission. Inclusivity and transparency of the Commission should not even be mentioned as majority of the population is not even aware of Commission's functioning. That is why every Commission and especially the Parliament should take all measures to inform everyone about constitutional procedures as much as possible.

The second question highlights the formal nature of public meetings to discuss the amendments to the Constitution. The ones who were aware of current constitutional reform procedure were just 2% out of 32%, that is 0.64% out 100% of total respondents, which outlines formal nature and the futility of public meetings to discuss amendments to the Constitution.

Finally, regarding public perception of the constitutional amendments, the research reveals a strikingly low level of approval: only 6% of those aware of the changes (32% of total respondents), or just 1.92% of the total population surveyed (100%), believe that the Constitution fully reflects the public's views. As for partial reflections of population's opinion, even though its percentage indicator – 47% is much higher than others, still it is not encouraging data because of two factors: 1) again, this represents 47% of 32% of respondents, which is 15.04% in relation to the total 100% respondents. In other words, only 15.04% of the total respondents consider the draft constitution to be partially in accordance with the population's views; 2) some populist provisions were reflected in the Constitutional amendment. For example, one such provision was related to marriage. In particular, marriage was defined in it as 'a union of a woman and a man',[125] which automatically excluded homosexual marriage. Before the reform procedures, various political units actively discussed the banning same-sex marriage for populistic purposes over the years, however, pre-election manipulation of this issue was

[125] This norm is stated in Article 30(1) of the Constitution of Georgia.

a part of the pre-election agenda of the ruling party during the 2016 Parliamentary elections.[126]

The marriage issue became tied to the aspect of religious sacredness, which essentially outweighed all important social and other issues that typically become active during pre-election periods.[127] For this very reason, it is possible that those who considered the draft of the Constitution amendment partially aligned with the population's views, were referring to these sensitive issues that mattered to them. Even so, if we add 1.92% of the total respondents who consider the constitutional changes to be in accordance with citizens' views to this 15.04%, we would get approximately 17%. It means that only 17% of Georgian population considers the constitutional reform to be fully or partially aligned with citizens' views. Based on the aforementioned analysis, it is impossible to talk about public loyalty to the Constitution.

10.4.2. SOCIOLOGICAL RESEARCH OF THE CONSTITUTIONAL REFORM OF 2017–2018

The results of the above-mentioned research are confirmed by a research study published in the scientific journal "Orbeliani" in 2020, about the reform of 2017–2018. In this research, 2,235 adult respondents were interviewed by the researchers.[128]

According to the research study, 52% of those interviewed considered themselves either fully or partially uninformed about constitutional amendments, 32.7% stated that they were not well-informed and just 16% of the respondents believed that they were fully informed about constitutional amendments.

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[126] Joint Assessment of the Work of the State Constitutional Commission of Georgia…, *op. cit.*, p. 11.

[127] D. Gegenava, *Constitutionalization' of Marriage in Georgia*, "Orbeliani" 2020, Vol. 2, No. 3, p. 130.

[128] S. Metreveli, *Sociological Analysis of Constitution Reform of Georgia of 2017–2018*, "Orbeliani" 2020, No. 2, pp. 59–66.

It should be noted that 55% of the respondents stated that they had read about constitutional amendments, but did not participate in the process of discussion because they were not informed about it.

The rest of the questions were more profound and were mainly related to contextual issues to be implemented in the Constitution. For example:

- only 33% of respondents supported the parliamentary model, 35% supported the presidential model, and 27% supported the mixed model;
- 74% of the respondents disagreed with the parliamentary composition rule, which prohibited parties from forming blocks and established a 5% threshold in proportional elections;
- 50% of respondents supported the idea to directly elect the President, while 36% believed that the President should be elected by the Parliament.

On several issues, opinions were almost equally divided, including the matter of defining marriage in the Constitution. More than half of the respondents, 50.4%, believed that such a provision was essential, as it would enhance the strengthening of the tradition of marriage and exclude same-sex marriage. According to 49.6% of respondents, it was not necessary to include such transcript in the Constitution, as it already existed in Civil Code of Georgia.

It is worth noting that 53.5% supported adding a constitutional provision that banned the alienation of land to foreigners and foreign-created companies, justifying it with national interests. 46.5% believed that such prohibition would reduce investments and hinder the development of Georgia.

Generally, 40.6% evaluated the constitutional reform as a reinforcement of the power of ruling bodies, while 30% evaluated such changes as a step forward for improving democracy.[129]

[129] S. Metreveli, *Sociological Analysis…*, *op. cit.*, pp. 62–65.

10.4.3. SUMMARY

The mentioned research studies differ because they had different objectives. In the NDI research there were only 4 questions regarding constitutional amendments, while the second survey aimed at studying public attitudes toward the new constitutional draft. Unlike the NDI study, this second research conducted two focus groups alongside the quantitative research. Consequently, while there are differences in the data, the overall picture and trends remain similar.

Society was not sufficiently informed and involved in the constitutional reform process.

The research revealed citizens' conflicting views on the constitutional reform. For example, 74% negatively evaluated the proposed change to the parliamentary electoral system; only slightly more than one thirds (36%) of respondents agreed with the modification of the presidential electoral system, etc.

It is obvious that most of the population was not informed about the constitutional amendments of 2017–2018 and were sceptical. It is noteworthy that less than a third of interviewed considered the constitutional reform as a progressive step, which is not at all encouraging. Here comes a big unanswered question: how legitimate is the current Constitution of Georgia?

10.5. The Current Model of Revising the Constitution of Georgia

The formal amendment rules hold the key to making (or unmaking) the Constitution, and successfully deploying these rules confers legal authority on the change.[130] Its accurate regulation is very important for its functioning,[131] as the legitimacy of constitutional changes much depends on it. A balance should be struck when choosing

[130] R. Albert, B.E. Oder, *The Forms of Unamendability*, [in:] R. Albert, B.E. Oder (eds.), *An Unamendable Constitution? Unamendability in Constitutional Democracies*, Springer, 2018, p. 2.

[131] G. Luashvili, *The Mechanism for Revising the Constitution…*, *op. cit.*, p. 71.

the mechanism of revising the Constitution – on the one hand, the Constitution should be a rigid document, but on the other hand, should be flexible to allow for change.[132] Striking this balance is particularly important for the democracies emerging in post-Soviet countries, because the instability, lack of relevant political and legal traditions, and other features typical of former Soviet states, create major challenges to the creation as well as the amending of the constitution.[133]

The mechanism of revising the Constitution was substantially changed due to the constitutional reform of 2017. As a result, the mentioned procedure became more difficult, with the result that the Constitution of Georgia joined the list of rigid Constitutions.[134]

Chapter X refers to revising the Constitution – "Revision of the Constitution", including only one article – Article 77.

10.5.1. INITIATION OF THE CONSTITUTIONAL LEGISLATIVE PROCESS

First of all, it should be noted that provision regulating the revision of the Constitution, became terminologically more fixed and clearer. In particular, Article 77(1) explicitly establishes that "the Constitution shall be revised by a constitutional law". Prior to this provision, the Constitution contained no reference to a Constitutional Law, and only mentioned a "draft for constitutional revision"; however, in practice, constitutional revisions were invariably implemented through constitutional law.[135] Moreover, the Constitution no longer distinguishes between 'general and partial' forms of revision, which previously generated divergent interpretations and was the subject of

[132] V. Menabde, *Revision of the Constitution…*, *op. cit.*, p. 121.
[133] D. Gegenava, *Changing Constitutional Identity…*, *op. cit*., p. 112.
[134] S. Demetrashvili, V. Zhvania, *Constitutional Revision by a Plurality Vote and Legitimization of Constitutional Order*, "Iustitia Journal" 2023, No. 1(4), p. 77.
[135] M. Marinashvili, *The Rule of Revision of the Constitution According to the Current Constitution and Planned Amendments*, "Academic Digest" 2017, Special Edition: "Legal, Political and Economic Aspects of Revision of the Constitution of Georgia", p. 107.

academic criticism.[136] 'Revision' itself includes both implementing separate amendments to the Constitution and adopting a new one. Consequently, the currently existing provision should be unequivocally considered a positive development.

According to this article, the subjects authorised to initiate of the constitutional law remain unchanged. More than half of the total number of the Members of Parliament, and not less than 200 thousand voters have such authority. Within Georgian academic discourse, these constitutional law initiative subjects are positively assessed, and given the existing territorial-political circumstances, introducing amendments to this group or adding new subjects is considered unwarranted.[137]

The rule that obliges the Parliament to publish the draft constitutional law for nation-wide public discussions has not changed, and the Parliament can begin deliberations on the draft law one month after its publication. While the lack of a maximum time limit implies that public discussion may extend beyond month, Article 126(1) of the Rules of Procedure of the Parliament of Georgia establishes that "the committees determined by the Parliamentary Bureau shall consider the draft constitutional law no later than within 1 month after the expiry of the aforementioned time frame". As evident from this regulatory provision, the Parliament interprets the constitutional provision that "Parliament shall begin deliberations on the draft law 1 month after its publication" in a limited way, as exactly one month (30 days) and not as at least one month. Therefore, it would be appropriate to define the minimum and maximum terms of public discussion in the constitution, which would help eliminate existing legislative ambiguity and ensure greater public involvement in the discussion process.

The main purpose of public discussion is to hold debates to achieve consensus towards amendments, however these discussions

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[136] T. Papashvili, D. Gegenava, *Georgian Model of Revising the Constitution…*, *op. cit.*, pp. 29–33.

[137] See: G. Luashvili, *The Mechanism for Revising the Constitution…*, *op. cit.*, pp. 79–80; T. Papashvili, D. Gegenava, *Georgian Model of Revising the Constitution…*, *op. cit.*, pp. 33–36.

actually went beyond their initial goal and assumed a predominantly formal character in Georgia.[138]

Under Article 125 of the Rules of Procedure of the Parliament of Georgia, for the purpose of reviewing the draft Constitutional Law of Georgia, the Steering Commission on Public Considerations shall hold meetings in various administrative territorial units of Georgia, taking into account the principle of maximum awareness-raising and the engagement of the population. Therefore, in order to increase the awareness of the population, a schedule of meetings and brief information about the draft law should be published on the official webpage of the Parliament.

The analysis of the research discussed in the previous subsection highlighted the extreme lack of public awareness and the formal nature of the public discussions. Moreover, during the 2017 reform process, there were instances of delayed publication of pre-prepared public discussion schedules, mobilisation of governor political party activists and public sector employees, and attempts to steer discussions in a desired direction. These actions created the impression that the process was purely formal and its purpose was not to genuinely hear and consider public opinion.[139]

10.5.2. ADOPTION OF CONSTITUTIONAL LAW

Under Article 77(3) of the Constitution of Georgia:

> *A constitutional law shall be considered adopted if it is supported by at least two thirds of the total number of the Members of Parliament. The constitutional law shall be submitted to the President of Georgia for signature within 10 days following its approval, in one hearing, without amendments*

[138] D. Gegenava, *Retrospection of the Constitutional Reforms of Georgia…*, *op. cit.*, p. 242.

[139] 2018 Annual Report, Georgian Young Lawyers' Association, 2018, p. 10, https://gyla.ge/files/news/%E1%83%A4%E1%83%9D%E1%83%9C%E1%83%93%E1%83%98/Annual%20Report%202018.pdf [access: 17.10.2023].

by at least two thirds of the total number of the members of the next Parliament.

Accordingly, the Constitution of Georgia established a rule fashioned after the Scandinavian quasi-referenda model, which implies the involvement of elections in the process of constitutional revision.[140]

The Rules of Procedure of the Parliament of Georgia further specify this constitutional provision. Under Article 126, a draft constitutional law shall be considered and adopted by three hearings by the Parliament of one and the same convocation. The draft law adopted by this procedure is then presented to the Parliament of the next convocation by the Chairman of the Parliament, and is followed by debate. After the debates, the entire draft law is voted on in one hearing. In accordance with Article 119(1) of the Rules of Procedure of the Parliament, the law must be adopted without amendments by at least two-thirds of the total number of the MPs.

The adoption of a constitutional law by the next convocation of Parliament has a political significance, because the presentation of the draft law is followed by political debates, and the draft law must be adopted in one hearing. Under the conditions where the Constitution of Georgia does not allow holding a referendum on the adoption or cancellation of a law,[141] the existing model of revising the Constitution adds relevant strength to revision procedure which provides the constitutional revision process with appropriate stability and should be positively evaluated.[142]

The Constitution of Georgia establishes the adoption of the constitutional law through a simplified procedure. According to the Constitution two cases should be considered: 1) if the law is supported by at least three fourths of the total number of the Members of the Parliament, and 2) the constitutional law related to the restoration of territorial integrity shall be adopted by a majority of at least two thirds of the total number of the Members of the Parliament. In both

[140] G. Luashvili, *The Mechanism for Revising the Constitution…*, *op. cit.*, p. 84.
[141] Article 52(2) of the Constitution of Georgia.
[142] G. Luashvili, *The Mechanism for Revising the Constitution…*, *op. cit.*, pp. 85–86.

cases, it is no longer necessary to have them approved by the Parliament of the next convocation, and the draft law is submitted directly to the President for signature.

The logic of this simplified procedure is quite clear: in the first instance, a quorum of three-quarters is envisaged, which implies that such a number of votes achieves maximum consensus. However, given Georgia's electoral environment and historical experience, it is entirely possible for a single party to obtain the corresponding number of mandates in the Parliament. Consequently, adopting a constitutional law through such a simplified procedure undermines the 'quasi-referenda' model.[143]

The second instance is linked to Article 7(3) of the Constitution of Georgia, which states the necessity of adopting a constitutional law in the case of restoring territorial integrity of the country. In this case, the adoption of the constitutional law through a simplified procedure serves to ensure that after the complete restoration of the jurisdiction of Georgia over the entire territory of the country, the parliament of Georgia would be more flexible and able to adopt the relevant regulatory law relatively quickly, in order to determine the legal status and powers of the territories previously under occupation.

Under Article 126(5) of the Rules of Procedure of the Parliament of Georgia it is inadmissible to consider and adopt the draft Constitutional Law of Georgia through accelerated or simplified procedures. Undoubtedly, this prohibition does not apply to the exceptional cases of adopting a constitutional law through a simplified procedure as established by the Constitution, which were discussed above.

Article 46 of the Constitution of Georgia defines further procedures for draft law adopted by the Parliament. Under this article, after approval, the adopted draft constitutional law is submitted to the President for signature within 10 days. The president shall sign and promulgate the law or veto it or return it to Parliament with justified remarks within 2 weeks.

[143] Ibidem, p. 86.

If the President returns the law, Parliament will vote on the president's remarks. The adoption of the remarks requires the same number of votes as for the initial adoption of the type of law in question. If Parliament rejects the president's remarks, the initial version of the law will be put to a vote. A constitutional law will be considered adopted if it is supported by at least three-fourths of the total number of the MP.

The Constitutional law adopted based on the President's remarks will be submitted to the president within 5 days, and the law adopted with the original edition will be submitted to the president within 3 days. The President should sign such a law within 5 days, if the President does not sign this document, then the Chairman of the Parliament signs and publishes it within 5 days.

A law will enter into force on the 15th day after its promulgation in the official body unless a different deadline is established by the same law.

10.6. Impact of the Constitutional Court on Constitutional Law-Making Process

The only efficient instrument for assuring constitutional primacy is judicial control of the legislator. The more judicial review of legislation takes places in a legal system, the more the rule of law is achieved from an instrumental point of view.[144] The Constitutional Court is a hybrid state agency, which is created to exercise constitutional control over three branches of the government, to check and balance them.[145] The Constitutional Court is a natural opponent of the government, as it can wield influence over decisions made by the

[144] R. Arnold, *Constitutional Courts of Central and Eastern European Countries as a Dynamic Source of Modern Legal Ideas*, "Tulane European & Civil Law Forum" 2003, Vol. 18, p. 101.

[145] D. Gegenava, *Legal Nature of the Constitutional Court and Its Place in a Concept of Separation of Powers*, [in:] G. Kverenchkhiladze, D. Gegenava (eds.), *Modern Constitutional Law*, Book I, Tbilisi 2012, p. 99.

elected authority.[146] That is why it is often referred to as a political justice agency.[147] From this perspective, the Constitutional Court of Georgia is of great significance, which often appears at the centre of legal and political processes.[148]

The competence of the Constitutional Court is defined only by the Constitution.[149] Under Article 60(4)(a–c) and Article 5, the Constitutional Court Constitutional Court makes decision on the constitutionality of a normative act and has a power to recognise legal act or part of it as unconstitutional. However, here comes the question: Can the Constitutional Court review the constitutionality of a so-called 'unconstitutional constitutional law'?

Constitutional amendments may be held unconstitutional by courts for procedural reasons, – either because they fail to comply with relevant constitutional procedures, or for substantive reasons – when they are deemed inconsistent with certain 'basic' substantive constitutional principles.[150]

The constitutional law-making practice of Georgia knows both cases related to adoption of the constitutional law with procedural defects and such constitutional laws which violated fundamental principles of the Constitution. For example, as it was mentioned before, despite the Constitution's requirement, the draft of the constitutional amendments was not published for nation-wide public discussions one month before the deliberations in the Parliament, which was explained by the Government with an absurd reason.[151] Therefore, once after the constitutional amendments of 2017, the issue of introducing new amendments appeared in agenda immediately. Prior to second hearing of the draft constitutional law, the

[146] K. Eremadze, *Guards of Freedom in Search of Freedom, 20 Years of Constitutional Court in Georgia*, Tbilisi 2018, p. 15.

[147] D. Gegenava, *Legal Nature of the Constitutional Court…*, *op. cit.*, p. 99.

[148] D. Gegenava, *Constitutional Court of Georgia as Positive Legislator: Transformation and Modern Challenges*, "Polish-Georgian Law Review" 2017, No. 3, p. 87.

[149] J. Khetsuriani, *Constitutional Reform…*, *op. cit.*, p. 36.

[150] R. Dixon, *Transnational Constitutionalism and Unconstitutional Constitutional Amendments*, "Public Law Working Paper" 2011, No. 349, University of Chicago, p. 2.

[151] K. Godoladze, *Constitutional Changes…*, *op. cit.*, p. 51.

Ministry of Justice initiated the amendment to Article 18 of the draft law of the Constitution, so that it was not even raised at the stage public discussions. The above-mentioned amendment newly regulated the availability of public information. Despite the protest of oppositional parties and authoritative non-governmental organisations, the Parliament approved the draft law.[152]

In addition to the procedural defects in the adoption of the constitutional law, in some cases the draft constitutional law essentially contradicted constitutional principles, but it was adopted anyway, of which the constitutional amendment of 2020 is a clear example.

On 29 June 2020 the Parliament the parliament adopted a constitutional law entirely dedicated to the next parliamentary elections, which were planned to be held in October of the same year. This constitutional law did not amend the text of the Constitution itself. Instead, the changes affected the constitutional law of 19 October 2017, which implemented the constitutional reform. Specifically, Article 2(9) was removed from this law and Article 2^1 was added. This amendment abolished the electoral system set up for the parliamentary elections. In particular, if previously 77 members of the Parliament should have been elected with proportional and 73 members with majoritarian voting, according to the amendment, 120 members would be elected with proportional and 30 members with majoritarian voting. The 3% electoral threshold was decreased to 1%. It was a significant compromise for the governing party because the majoritarian voting system in Georgia has always benefited the ruling party.[153] As part of this compromise, the parliamentary majority determined the boundaries of the majoritarian electoral districts. In Article $2^1(4)$ of the constitutional law, the boundaries of 30 majoritarian electoral districts were determined in details, which is a classic example of manipulation with electoral boundaries.[154] The boundaries were determined in a way that some populated areas

[152] Constitutional Amendments were adopted by Third Hearing, https://civil.ge/ka/archives/220037 [access: 17.10.2023].

[153] G. Goradze, *Separation of Powers…*, *op. cit.*, p. 82.

[154] See: T. Tevzadze, T. Papashvili, *Signs of Manipulation of Electoral Boundaries in Georgian Electoral Law*, "Orbeliani" 2020, No. 2, p. 81–95.

where opposition parties were mainly concentrated, were artificially divided, moreover, some populated areas were also artificially added to some territorial units mostly populated with supporters of governmental parties, in order to concentrate them.[155] As a result, in the parliamentary elections of 2020, candidates nominated by the ruling party were elected as majority members of the Parliament throughout 30 majoritarian electoral districts.[156] In 2016, norms of organic law were appealed at the Constitutional Court of Georgia, which determined the boundaries of majoritarian electoral districts of the parliamentary elections, as well as authority of Central Election Commission, which within its decree, determined the boundaries of majoritarian electoral districts. Claimants accused the Government of creating a favorable electoral geography for the ruling political party through manipulation of electoral boundaries and demanded the unconstitutionality of the mentioned norms.[157] Even though the Court did not approve the claim, in its decision it determined criteria of electoral geography, necessity of revising the boundaries of majoritarian electoral districts, predictability and explicability of boundary changes, compatibility of basic principles of defining the electoral principles, and firmly defined statistical data of results of elections.[158] By determining the electoral boundaries through the constitutional law of 2020, the ruling party prevented the possibility of changing of changing its preferred electoral geography and the statutory normative act determining the mentioned could not be appealed at the Constitutional Court. The practice established by the Constitutional Court of Georgia allowed it. Regarding the constitutional control of unconstitutional constitutional amendments, the Constitutional Court of Georgia is characterized by an

[155] T. Tevzadze, T. Papashvili, *Signs of Manipulation of Electoral Boundaries…*, *op. cit.*, pp. 91–94.

[156] Parliamentary Elections of Georgia of 31 October 2020, Election Administration of Georgia, 2021, p. 11.

[157] T. Tevzadze, T. Papashvili, *Signs of Manipulation of Electoral Boundaries…*, *op. cit.*, p. 87.

[158] See: Decision N3/3/763 of 20 July 2016 of the Constitutional Court of Georgia on the case "Group of MPs (Davit Bakradze, Sergo Ratiani, Roland Akhalaia, Giorgi Baramidze and others. total 42 deputies) v. the Parliament of Georgia".

ultra-formalistic approach.[159] During the existence of the Constitutional Court of Georgia, a lawsuit where the subject of the claim was the constitutionality of a constitutional law was filed three times.

The first claim is dated 9 December 2009, which disputed the Constitutional Laws of Georgia of 6 February 2004 and of 27 December 2006 "On the Changes and Amendments to the Constitution of Georgia", motivated on the grounds that these laws were adopted in violation of the procedures established by the Constitution.[160] The second claim was filed with the Constitutional Court of Georgia on 24 February 2012, appealing the constitutional law of 27 December 2006, this time on substantive grounds rather than procedural provision violations. The claimant demanded the recognition of Articles 1(1)(c) and 1(2)(a) of the constitutional law as unconstitutional. The contested provisions extended the term of office for the Parliament of Georgia by 5 months and for the President of Georgia by 9 months.[161] Finally, on 5 January 2013, the constitutional law of 27 December 2006 was appealed once again. This time the claimants insisted on contextual contradictions of the mentioned law with the constitution, but with different basis than in the previous case.[162] The Constitutional Court briefly indicated that the Constitutional Law, as an integral and organic part of the Constitution, creates the constitutional-legal order and, from a substantive perspective, cannot be the object of assessment by the Constitutional Court.

In all three cases, the Court opted for a quite narrow, limited interpretation and developed its argumentation in some major directions: the essence and status of the constitutional law, the authority of the Constitutional Court and legal status of constitutional provisions

[159] A. Richard, M. Nakashidze, T. Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendments*, "Hastings Law Journal" 2019, Vol. 70, Issue 3, p. 648.

[160] Ruling N2/2/486 of 12 July 2010 of the Constitutional Court of Georgia on the case "Non-Entrepreneurial (Non-commercial) Legal Entity 'National League for Protection of the Constitution' v. the Parliament of Georgia."

[161] Ruling N1/3/523 of 24 October 2012 of the Constitutional Court of Georgia in the case "Citizen of Georgia Geronti Ashordia v. the Parliament of Georgia."

[162] Ruling N1/1/549 of 5 February 2013 of the Constitutional Court of Georgia in the case "Citizens of Georgia – Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze v. the Parliament of Georgia."

and their interrelation.[163] In the first case, the Constitutional Court briefly stated that the constitutional law, as an integral and organic part of the Constitution, itself creates the constitutional-legal order, and from a substantive perspective, cannot be the object of assessment by the Constitutional Court. That is why the claim is beyond the scope of the Constitutional Court's competence.[164] The actions taken by the Constitutional court about the following case were almost the same.[165] During the third case, the Constitutional Court mentioned the previous cases as examples, though discussed it in more details. According to the Court, the Constitution of Georgia neither points at provisions based on the principles of so-called 'eternal/unamendable' nor determines the formal hierarchy among constitutional norms throughout legal power. Different provisions of the Constitution may protect different values, though this does not cause their hierarchical subordination. According to the court, every provisions of the Constitution of Georgia has equal importance and, therefore, from a substantive perspective, it cannot be the subject of assessment by the Constitutional Court.[166] It is interesting to note the court's reasoning that the Constitutional Court does not exclude its authority to determine whether the procedure for adopting the constitutional law, as prescribed by the Constitution, was followed. However, it did not deliberate further on this matter, as the violation of a procedural norm was not the subject of dispute.[167]

Nevertheless, the Constitutional Court of Georgia did not have enough courage to discuss the constitutionality of the constitutional

[163] D. Gegenava, *Unconstitutional Constitutional Amendment: Three Judgments from the Practice of the Constitutional Court of Georgia*, "South Caucasus Law Journal" 2014, No. 5/2014, p. 401.

[164] Ruling N2/2/486 of 12 July 2010 of the Constitutional Court of Georgia on the case "Non-Entrepreneurial (Non-commercial) Legal Entity 'National League for Protection of the Constitution' v. the Parliament of Georgia."

[165] Ruling N1/3/523 of 24 October 2012 of the Constitutional Court of Georgia on the case "Citizen of Georgia Geronti Ashordia v. the Parliament of Georgia."

[166] Ruling N1/1/549 of 5 February 2013 of the Constitutional Court of Georgia on the case "Citizens of Georgia – Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze v. the Parliament of Georgia."

[167] Ibidem.

law and limited itself to a narrow-formal interpretation of the Constitution.

Rules for amending the constitution are indispensable for the functioning of constitutional democracy, yet they open the door to the demise of constitutional democracy itself, because political actors can abuse the Constitution with recourse to the constitution's own formal amendment rules.[168] Therefore, when there is suspicion of abuse of the Constitution and a new constitutional law violates any fundamental value established and protected by the Constitution, the Constitutional Court is even obligated to deliberate on the constitutionality of constitutional laws.

The argument of the Constitutional Court, that the Constitution neither outlines 'permanent' provisions nor settles any formal hierarchy among constitutional rules is extremely formalist. It is true that the Constitution of Georgia does not directly point to permanent provisions, though even in the absence of explicit unchangeability, certain constitutional principles are implicitly unchangeable.[169] The Rule of Law, separation of powers, democracy, popular sovereignty and other most general principles of constitutionalism are the backbone upon which the body of the Constitution is founded, and for the constitutional control of constitutional laws, the court must rely on these principles.

Worldwide there is a growing trend in constitutionalism to enforce this unchangeability by means of substantive judicial review of constitutional amendments.[170] The Constitutional Court of Georgia should also follow this trend.

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[168] R. Albert, B.E. Oder, *The Forms of Unamendability*, *op. cit.*, p. 2.

[169] Y. Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers*, Oxford 2017, p. 6.

[170] Y. Roznai, *Unconstitutional Constitutional Amendments*, *op. cit.*

10.7. Prospects for Constitutional Law-Making in Georgia

Based on the above, a number of shortcomings have been identified in the constitutional legislative law-making process of Georgia, the elimination of which requires a complex approach:

1. Constitutional low-making process should be refined and legally improved:
   - the period for nation-wide public discussions of a constitutional law draft, as provided by Article 77(2) of the Constitution, should become clearly defined and set at a maximum of three months, which will ensure greater public involvement of the society in the process;
   - the simplified procedure for adoption of a draft constitutional law, which, according to Article 77(4) of the Constitution, involves adopting a constitutional law within the framework of one parliamentary convocation in case of support by three-fourths of the parliament's full composition, should be abolished;
   - additional mechanisms for the dissemination of information should be added to the Regulation of the Parliament in order to ensure that society is properly informed about the constitutional legislative process; including the use of television, social media, and the traditional media;
   - the procedure for a comprehensive nation-wide public discussion of a draft constitutional law should be legally regulated and spelled in detail, so that it does not have a formal nature and ensures the possibility of freely expressing opinion by the population;
   - constitutional amendments should be based on society's opinion and common consensus; the drafting of the amendments should be preceded by sociological research or plebiscite.
2. Current practice should be changed in the terms of legislative techniques:
   - the constitutional law should serve to the amendment to the Constitution and do not cause duplication, therefore in a constitutional law there should not be separate additional rules and provisions that are not in the text of the constitution;

- transitional provisions should be reflected in the Constitution and not be separate from a Constitutional Law, as it is presented in the 2017 Constitutional Law;
- the constitutional amendments should be directly included in the content of the Constitution and not in previous constitutional law, by which the content of the Constitution was approved;
- practice of determining electoral districts through constitutional law should be abolished;
- when a separate Constitutional Law exists alongside the Constitution, it is necessary that this Constitutional Law be translated into the Abkhazian, as it is the second constitutional language in Georgia – moreover, the law should be also translated to English, as the Constitution (and the constitutional law accompanying it) should be accessible to everyone.

3. The Constitutional Court should be granted with the authority to constitutionally control the constitutional law:
   - the Constitutional Court should be able to examine the constitutionality of the constitutional law in terms of both procedure and context;
   - to avoid legal inconvenience, such control might be preventive, which means that the Constitutional Court should carry out control over the draft constitutional law. Preventive control over the draft constitutional law should be obligatory;
   - the limitation imposed on the Constitutional Court by Article 60(6) by regarding constitutional control over the regulating norm of the electoral legislation (that is, the Parliament may adopt an unconstitutional law a year and a half before the elections, and even if it is of an obvious anti-constitutional nature, the Parliament has no right to consider it), because it is unconstitutional in its essence.

Given amendments ensure growth of legitimacy degree of the Georgian Constitution and bring it closer to the standards of democratic states.

10.8. Conclusions

The constitution is the highest legislative act, the effectiveness of which is significantly if not decisive influenced by its legitimacy. The constitution has to take into account the demands and aspirations of the society. Otherwise, it cannot fulfil its functions.

Since the US Constitution, the constitutions of liberal states aspire to link the establishment of the state with conceptions of popular sovereignty.[171] The words of the preamble of the Constitution of Georgia ("We, the citizens of Georgia […] proclaim this Constitution […]") formally express the same idea. However, along with the existence of a constitutional principle, its enforcement is important.

Since the adoption of the Constitution of Georgia in 1995, about 40 amendments have been made to it. Three of them (in 2004, 2010 and 2017) were constitutional reforms that changed the system of government of the country. Along with these reforms, the procedure of making amendments to the constitution changed to some extent, and from this point of view, the Constitution of Georgia moved from a flexible constitution to a rigid constitution, in particular, a quasi-referendum model. According to Article 77 of the Constitution of Georgia, more than half of the members of Parliament, or no less than 200 thousand voters have the right to submit a draft of the constitutional law on constitutional amendments, which must be published for nation-wide public discussions. Parliament shall begin deliberations on the draft law one month after its publication. The support of at least two-thirds of the members of the parliament of two (current and next) convocations is necessary for the adoption of the draft law. The procedure for voting in the next convocation of the Parliament on a constitutional law adopted by the Parliament in 3 readings differs in that at this stage the draft law is adopted in only one reading.

There is also an exception to the rule governing the adoption of the draft constitutional law by parliament across two consecutive

[171] T. Horsley, *Constitutional Functions and Institutional Responsibility: A Functional Analysis of the UK Constitution*, "Legal Studies" 2022, Vol. 42, Issue 1, p. 102.

convocations. In particular, if the draft constitutional law is supported by at least three quarters of the full composition of the Parliament, it is no longer necessary to adopt it again by the Parliament of the next convocation. This exceptional rule is criticised in the Georgian scientific literature, because it renders the 'quasi-referendum' model meaningless.

Despite abovementioned numerous amendments and demands of the Constitution of Georgia, society has never been sufficiently informed and involved in the constitutional reform process in Georgia. Georgian legislators never tried to understand the real will of the Georgian people, or they completely ignored this will. This is clearly confirmed by two different surveys conducted regarding the recent constitutional reform. According to the survey results, the majority of the population was not informed about the constitutional changes of 2017–2018 and was sceptical about these changes, while less than a third of respondents considered the mentioned constitutional reform a progressive step. Thus, this reform took place with clear disregard for the principle of popular sovereignty.

The next challenge is the role of the Constitutional Court of Georgia in the constitutional law-making process. The Constitutional Court does not have the power and sufficient courage to influence this process and review the constitutionality of the law in question. The court has stated several times that the provisions challenged due to its unconstitutionality are already part of the Constitution of Georgia and the court has no power to discuss its constitutionality.

Along with the procedural and judicial problems, the content of the Constitution of Georgia also is problematic. Its text is not clear enough, it does not cover transitional provisions, and the constitutional law of 2017 includes such separate provisions, that are not included in the Constitution itself. Because of this lack of clarity, it is sometimes called 'invisible' or 'shadow' Constitution.

Based on the above, a complex approach in the following three directions is needed to overcome the existing gaps:

i. The Constitutional law-making process requires refinement and legal improvement.

ii. Current practice should be changed in terms of legislative techniques.
iii. The Constitutional Court should be granted with the authority to constitutionally control the constitutional law.

Taking into account the mentioned recommendations will contribute to the improvement of the Constitution of Georgia both from an editorial point of view, and to the improvement of constitutional law-making in it, and will ensure a high degree of legitimacy.

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Chapter 11. Amendments to the Constitution: Comparative Legal Aspects

11.1. Introduction

Amendments to the constitution are an important tool for ensuring compliance of legal norms with the needs of modern society. The necessity to modernise the constitution may occur due to various reasons, in particular: the need to adapt constitutional norms to changes in the political, economic and social spheres; correction of deficiencies in the previous version of the constitution, which prevent the effective functioning of the rule of law; ensuring compliance of constitutional norms with international standards and norms arising from international obligations; improvement of the mechanisms for ensuring the rights and freedoms of citizens, including changes aimed at strengthening the protection of human rights. In addition, amendments to the Constitution may be the result of the following processes: a change in the political regime or system of government, which requires revision of constitutional provisions to meet new political realities; expanding or limiting the power of state bodies in order to balance power and ensure a system of checks and balances; introduction of new mechanisms or procedures aimed at improving democratic institutions and citizen participation in the political process; adaptation of constitutional norms to new challenges in the global context, such as climate change, international conflicts, and other transnational problems.

The relevance of this topic is especially important in the context of European integration processes, as reforms in constitutional

systems can affect relations with the European Union. That is why, in the process of ensuring the stability and development of the country by establishing more effective management mechanisms and legal statehood, it is useful to research the experience of other countries. In particular, valuable experience in solving challenges related to constitutional reform can be provided by Ukraine and the Republic of Poland as two countries with similar historical and cultural roots. In turn, the differences in the constitutional systems of both countries and a comparative analysis of the process of amending their constitutions will allow to highlight the best practices and the most effective strategies for amending the constitutions in order to ensure stability and democracy, and may also be useful for other countries seeking to implement constitutional reforms.

The purpose of the research is a comparative analysis of the processes of amending the Constitution of Ukraine and the Constitution of the Republic of Poland in order to identify the common and distinctive legal aspects of these processes, as well as the formation of proposals for their improvement, taking into account the constitutional traditions, historical context and modern challenges.

This research is based on three hypotheses, which are as follows:

1. Observation of similar mechanisms for amending the Constitution of Ukraine and the Constitution of the Republic of Poland may indicate the importance of ensuring stability and progress in the legal development of both countries, in particular in the context of the establishment of democratic institutions and legal statehood.
2. An analysis of the practice of changes to the Constitution of Ukraine and the Constitution of the Republic of Poland can reveal similar aspects of consideration of human rights, the role of parliament and the independence of the judiciary in the formation of the constitutional system.
3. The identification of differences in the mechanisms of control over power and the provision of a system of checks and balances in the process of amending constitutions may reflect different approaches to ensuring the rule of law and the balance of power.

The article examines issues of amendments to the Constitution of Ukraine and the Constitution of the Republic of Poland based on

such comparative legal aspects as provisions on methods of introducing amendments to the constitutions, initiators of such changes, parliamentary procedures, referendum, restrictions on introducing amendments to constitutions and the role of constitutional courts in amending constitutions.

11.2. Materials and Methods

Because the focus of the research is a comparative analysis of the processes of amending the Constitution of Ukraine and the Constitution of the Republic of Poland in order to identify the common and distinctive legal aspects of these processes, as well as the formation of proposals for their improvement (taking into account the constitutional traditions, historical context and modern challenges), the author investigates them with the help of conceptual analysis.

The historical method is used for the analysis of provisions of the constitutions in their evolutionary development, a retrospective review of the constitutional process, tracing the genesis of problems that necessitate the introduction of changes to the constitutions.

The hermeneutic method is used to interpret the texts of scientific works related to the legal nature of amending the constitution, legal regulation of initiators and procedures for amending the Constitution of Ukraine and the Constitution of the Republic of Poland.

The systemic-structural method is used to consider the process of constitutional amendments as a complex and integral phenomenon, to identify its stages and the connections between them.

The comparative legal method is used to identify common and distinctive features of the institution of amending constitutions in certain states with the aim of forming favourable ways of its improvement.

The method of legal modelling is used to form optimal recommendations for the modernisation of Polish and Ukrainian constitutional processes in the context of modern challenges.

The research was carried out in three stages.

At the first stage of the research, with the help of special scientific methods (comparative analysis, analysis of expert positions),

information about historical aspects of the adoption of the Constitution of Ukraine and the Constitution of the Republic of Poland, legal character and methods of amending the constitutions is collected and processed.

At the second stage, the research of the initiators, procedures and practical experience of introducing amendments to the Constitution of Ukraine and the Constitution of the Republic of Poland is carried out.

At the third stage, proposals on improvement provisions on the process of amending the Constitution of Ukraine and the Constitution of the Republic of Poland are formed on the basis of the conducted research.

11.3. Results and Discussion

11.3.1. DOCTRINE AND APPROACHES TO DETERMINING THE LEGAL NATURE OF AMENDMENTS TO THE CONSTITUTION OF UKRAINE

It is obvious that the legitimacy of any constitution depends on the legitimacy of its adoption. This thesis gained special importance at the end of the XX–XXI centuries, when each new or updated constitution became a kind of repetition of the one known to everyone from the time of the work of Jean-Jacques Rousseau's *Du contrat social ou Principes du droit politique* (1762) of the social contract and marked the consensus between the people as the source of constituent power and the state, and was certainly approved by civil society and the international community. Current constitutions remain particularly demanding regarding the subject matter and procedures for making changes to them.[1]

After the adoption of the Declaration on State Sovereignty on 16 July 1990, two drafts of the basic law were considered in Ukraine,

[1] V.L. Fedorenko, *Approval of the main models and legitimate mechanisms of adoption of constitutions: world experience for Ukraine*, "Expert: Paradigms of Legal Sciences and Public Administration" 2021, No. 3(15), p. 120.

one of them was even submitted for national discussion, but neither was adopted. The Chairman of the Verkhovna Rada Oleksandr Moroz explained this situation as follows:

> *The first draft was actually blocked by the Verkhovna Rada not because it did not suit this Verkhovna Rada, but because it was written based on narrow, corporate interests, about which there is a sufficiently reasoned analysis, and therefore was rejected by the Verkhovna Rada. And the 1993 draft was not much different from the previous one, and that is why it was published with changes that did not change the essence.*

The issue of adopting a new basic law was not debatable for Ukrainian society. But discussions arose around the content of the new constitution.[2]

Researching the formation of Ukrainian constitutionalism, it should be noted that in September 1994, a new constitutional commission was created based on the principle of representation of the two branches of government. The President of Ukraine and the Chairman of the Verkhovna Rada were approved as co-chairs of the commission. However, the different positions of these subjects of the legislative process regarding the separation of power made it impossible to adopt a unified decision. In February 1995, the Constitutional Commission submitted the draft Constitution for consideration by the Parliament along with the comments of its members. Then there were three official readings. Again, the greatest controversy among deputies was caused by the rules on the separation of power between the branches of government, the problem of property, state symbols, and the status of the Republic of Crimea. Accordingly, without finding common solutions, the constitutional process was once again blocked. In the Verkhovna Rada, an unofficial deputy coordination commission was formed, which was headed by People's Deputy Mykhailo Syrota. At the beginning of May 1996, it was approved by the Verkhovna Rada as a temporary

[2] Y. Lukanov, *How was the Constitution of Ukraine adopted?*, 29.06.2023, https://www.istpravda.com.ua/reviews/2023/06/29/162851/ [access: 14.07.2023].

special deputy commission. Making titanic efforts, the Commission reconciled the vision of various parties, factions, directions in each disputed article of the Constitution.[3]

An important milestone in Ukrainian state formation was the adoption of the basic law of an independent state – the Constitution of Ukraine – at the fifth session of the Verkhovna Rada of Ukraine on 28 June 1996. The Constitution came into force almost five years after Ukraine declared its independence. More than 300 People's Deputies worked continuously to formulate the main provisions of the Constitution.[4]

The Constitution of Ukraine has specific features, with the help of which it is possible to distinguish it from other legal acts, to establish its legal essence, content and place in the legal system of Ukraine, to determine its role in the social and political life of the state.

Scientists M.V. Kovaliv, M.T. Havryltsiv and M.M. Blihar include the following among the main features of the Constitution of Ukraine:

i. The Constitution of Ukraine as the Basic Law is the main source of the national law of Ukraine, the core of the entire legal system, the legal basis of the current legislation.
ii. The Constitution of Ukraine is characterised by legal supremacy, which means its priority position in the system of national legislation of Ukraine, higher legal force above all other legal acts.
iii. An important legal feature of the Constitution of Ukraine is its stability, which is ensured by a special, complicated procedure for introducing changes and additions to it.
iv. The legal features of the Constitution of Ukraine can also include the direct effect of its norms, which according to Part 3 of Article 8 of the Constitution of Ukraine means the possibility of applying to the court for the protection

[3] L.S. Shachkovska, V.O. Tsymbal, *Problems of Ukrainian constitutionalism at the current stage of state development*, "Law and Public Administration" 2022, No. 2, p. 61.

[4] *The Constitution of Ukraine: historical milestones of creation*, 28.06.2022, https://nibu.kyiv.ua/exhibitions/575/ [access: 14.07.2023].

of the constitutional rights and freedoms of a person and a citizen directly on the basis of the Constitution of Ukraine.

v. The legal feature of the Constitution of Ukraine is a special legal protection, which aims to ensure compliance with constitutional provisions, protection against violations by both physical and legal entities, and various branches of state power.[5]

In turn, the researcher M.V. Savchyn notes that the following can be distinguished among the legal features of the constitution:

1. The constitutional nature of the constitution, which expresses the peculiarities of its adoption and the priority directions of law-making in the state.
2. Horizontal effect – the constitution is the main source of national law, the core of the national legal system, which forms the foundations of law-making activity, the main goals and objects of normative regulation.
3. The supremacy of the constitution is expressed in the highest legal force and direct effect of constitutional norms.
4. The stability of the constitution is understood primarily as a necessary condition for ensuring the constitutional regime of the functioning of public-power and civil institutions.
5. Special adoption procedure – amendments to the constitution are carried out in a different manner from the legislative procedure. This is manifested in a number of restrictions of a material and procedural-legal nature, as well as in the combination of the parliamentary and referendum procedure for the adoption of a new constitution, which can be adopted only with compliance with certain requirements different from the standards of the legislative procedure.[6]

The scientific position of the researcher O.O. Maidannyk is worth noting as he singles out the following features of the constitution: 1) the supremacy of the constitution, which is determined by its special place in the legal system, the absolute necessity for laws and by-laws to comply with constitutional prescriptions;

[5] M.V. Kovaliv, M.T. Gavryltsiv, M.M. Blihar, *Constitutional law of Ukraine*, Lviv 2014.

[6] M.V. Savchyn, *Constitutional law of Ukraine*, Kyiv 2009.

2) programmability – in addition to consolidating existing social relations, the constitution can determine the main goals of the development of the state and society, as well as ways to achieve these goals, that is, contain a program for the further development of the country, formulated in the most general terms; 3) normativeness, which characterises the constitution as a single legal document consisting of universally binding rules (norms) that determine the basis of the activities of state authorities, local self-government bodies, public associations, political parties, and the behaviour of citizens and other subjects; 4) constancy; 5) stability.[7] Thus, most researchers equally define the legal features of the Constitution of Ukraine, focusing on stability as a mandatory characteristic, which is especially important in the context of our research.

As a rule, stability is understood as the ability to maintain a certain state for a long time. In turn, the stability of the Constitution of Ukraine does not mean a complete rejection of changes, but implies a combination of long-term preservation of constitutional values and dynamism of social relations that correspond to modern state and public interests. A legal guarantee of the stability of the constitution is a special procedure for making changes to it.

In the science of constitutional law, constitutions are traditionally divided into flexible and rigid according to the method of making changes to them. Constitutions that are amended in the same manner as ordinary laws are considered flexible. Rigid constitutions are constitutions that are changed in a special, more complicated order, which differs from the order of making changes to ordinary laws.[8] Rigid constitutions are aimed at ensuring the stability of the state system, which, in turn, contributes to strengthening their authority and, accordingly, the stability of the constitutional system.[9]

The Constitution of Ukraine belongs to the category of rigid constitutions. Ensuring the rigidity of the Constitution of Ukraine is carried out by complicating the legislative process regarding draft

[7] O.O. Maidannyk, *Constitutional law of Ukraine*, Kyiv 2011.

[8] M.I. Kozyubra (ed.), *Constitutional law*, Kyiv 2021, p. 80.

[9] V.P. Kolisnyk, Y.G. Barabash (eds.), *Constitutional law of Ukraine*, Kharkiv 2008, p. 43.

laws on amendments (as opposed to the procedure for adopting ordinary laws), namely:

- establishing a differentiated approach to changing the constitutional text;
- limitation of the range of initiators of the right to submit draft laws on amendments to the Verkhovna Rada of Ukraine;
- the use of a qualified majority when adopting a law on amendments – decisions of the parliament are made on the basis of voting by a qualified majority of two-thirds votes from the constitutional composition of the parliament;
- introduction of repeated voting; the draft law on amendments (except for Sections I, III, XIII) after preliminary approval by the majority of the constitutional composition of the Verkhovna Rada of Ukraine is considered adopted, if at the next regular session of the Verkhovna Rada of Ukraine, at least two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine voted for it;
- establishment of the obligation to adopt amendments to the constitution by the newly elected parliament due to the fact that the powers of the parliament that initiated the need to amend the constitution are prematurely terminated;
- the presence of constitutional control, which is carried out by the Constitutional Court of Ukraine – the only specialised body of constitutional jurisdiction that ensures the supremacy of the Constitution;
- confirmation of the need to approve the draft law on amendments to Chapters I, III, XIII of the Constitution of Ukraine in an all-Ukrainian referendum.[10]

The process of introducing changes to the Constitution of Ukraine is characterised by complexity, which is manifested in the presence of a system of normative legal acts that regulate it. In general, the legal grounds for making changes to the Constitution of Ukraine are regulated by the norms of the Constitution of Ukraine,

[10] D.E. Kayla, D.V. Slyzhuk, *Amendments to the constitution: comparative legal principles*, "Scientific Bulletin of the Uzhhorod National University, Pravo Series" 2015, Vol. 1, Issue 35, Part II, p. 91.

the Law of Ukraine "On the Constitutional Court of Ukraine", the Law of Ukraine "On the All-Ukrainian Referendum" and the Law of Ukraine "On the Regulations of the Verkhovna Rada of Ukraine".

The Constitution of Ukraine is the basis for virtually all state processes in Ukraine, and therefore for making changes to it. In particular, it contains Chapter XIII, dedicated to the initiators of the amendments, which lays out the conditions for the adoption of the draft law on amendments, the issues on which amendments are prohibited, and the need for a decision of the Constitutional Court of Ukraine on the compliance of the draft law on amendments with the established constitutional requirements. Analysing the constitutional norms, it is worth emphasising the procedure for making changes, which differs depending on whether the issue belongs to a specific chapter of the Constitution of Ukraine. In particular, the Draft Law on Amendments to Chapter I "General Principles", Chapter III "Elections. Referendum" and Chapter XIII "Amendments to the Constitution of Ukraine" is submitted to the Verkhovna Rada of Ukraine by the President of Ukraine or by at least two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine and it is adopted by at least two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine, then it is approved by an all-Ukrainian referendum appointed by the President of Ukraine. Instead, the Draft Law on Amendments to the Constitution of Ukraine, except for Chapter I "General Principles", Chapter III "Elections. Referendum" and Chapter XIII "Amendments to the Constitution of Ukraine", previously approved by a majority of the constitutional composition of the Verkhovna Rada of Ukraine, is considered adopted if at the next regular session of the Verkhovna Rada of Ukraine, at least two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine voted for it.[11]

In this context, we agree with the position of judge of the Constitutional Court of Ukraine (retired) V. Shapoval, who in a separate

[11] Constitution of Ukraine dated 28 June1996 No. 254k/96-BP, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/conv#n4932 [access: 26.06.2023].

opinion in the case regarding the right of veto on the law on amendments to the Constitution of Ukraine noted the following:

> *The procedure for adoption (and approval) of laws on amendments to the Constitution of Ukraine is defined by its Chapter XIII, which has the appropriate name. This procedure is fundamentally different from the one established for laws, which indicates the different nature of laws on amendments to the Constitution of Ukraine and laws.*[12]

The Law of Ukraine "On the Regulations of the Verkhovna Rada of Ukraine" dated 10 February 2010 No. 1861-VI acts as another legislative act in the system of regulatory and legal support for the regulation of the process of introducing amendments to the Constitution of Ukraine. This Law contains a separate chapter devoted to consideration by the Verkhovna Rada of Ukraine of issues under special procedures, including consideration of draft laws on amendments to the Constitution of Ukraine. The law regulates in detail:

- initiators of submission to the Verkhovna Rada of draft laws on amendments to the Constitution of Ukraine, proposals, amendments to them and proposals for their consideration;
- procedure for submission to the Verkhovna Rada of draft laws on amendments to the Constitution of Ukraine, proposals and amendments thereto;
- withdrawal of draft laws on amendments to the Constitution of Ukraine, proposals, amendments to them;
- preparation for consideration of the issue of inclusion of the draft law on amendments to the Constitution of Ukraine to the agenda of the Verkhovna Rada session and the procedure for continuing work on it;
- consideration by the Verkhovna Rada of the issue of including the draft law on amendments to the Constitution of Ukraine to the agenda of the Verkhovna Rada session and the procedure for continuing work on it;

[12] M.V. Savchyn, *Constitutional…*, *op. cit.*

- preparation of the draft law on amendments to the Constitution of Ukraine before its preliminary approval or adoption by the Verkhovna Rada;
- appeal of the Verkhovna Rada to the Constitutional Court of Ukraine on the provision of a decision by the Constitutional Court of Ukraine regarding the compliance of the draft law on amendments to the Constitution of Ukraine with the requirements of Articles 157 and 158 of the Constitution of Ukraine;
- preliminary approval, adoption by the Verkhovna Rada of the draft law on amendments to the Constitution of Ukraine, which, according to the decision of the Constitutional Court of Ukraine, meets the requirements of Articles 157 and 158 of the Constitution of Ukraine;
- introduction and consideration in the main committee of proposals and amendments to the draft law on amendments to the Constitution of Ukraine;
- consideration by the Verkhovna Rada of proposals and amendments to the draft law on amendments to the Constitution of Ukraine.[13]

Given that one of the key subjects involved in the process of amending the Constitution of Ukraine is the Constitutional Court of Ukraine, important aspects of this process are established by the Law of Ukraine "On the Constitutional Court of Ukraine" dated 13 July 2017 No. 2136-VIII. The norms of this Law are important for this research, because in the context of amendments to the Constitution of Ukraine, they enshrine:

i. powers of the Constitutional Court of Ukraine,
ii. a list of issues for which a written request for a decision may be submitted,
iii. term of constitutional proceedings,
iv. a list of issues on which the Grand Chamber of the Constitutional Court of Ukraine provides a decision,

[13] Law of Ukraine "On the Regulations of the Verkhovna Rada of Ukraine" dated 10 February 2010 No. 1861-VI, https://zakon.rada.gov.ua/laws/show/1861-17/conv#n1078 [access: 28.06.2023].

v. requirements for the content of the decision of the Constitutional Court of Ukraine.[14]

Provisions on amendments to Chapters I, III, XIII of the Constitution of Ukraine were further developed in the Law of Ukraine "On the All-Ukrainian Referendum" of 26 January 2021 No. 1135-IX. It regulates the issue of the subject of the all-Ukrainian referendum, including the approval of the law on amendments to Chapters I, III, XIII of the Constitution of Ukraine, as well as the initiators of the appointment (proclamation) of the all-Ukrainian referendum. In addition, in accordance with Article 17 of this law, the appointment of an all-Ukrainian referendum on amendments to Chapters I, III, XIII of the Constitution of Ukraine is carried out by decree of the President of Ukraine.[15]

11.3.2. INITIATORS OF AND PROCEDURE FOR AMENDING THE CONSTITUTION OF UKRAINE

The actual problem of the theory and practice of the constitution remains the problem of defining the initiator and the procedure for its review, which on the one hand would allow the preservation of the effectiveness of the current constitution, and on the would ensure the legitimacy of changes to it, and would likewise guarantee the stability of the constitution. It is obvious that the achievement of such goals during the revision of the constitution can be carried out, first of all, by the subject of the constituent power, which has adopted a legitimate constitution. In particular, A. Esmen rationally distinguished between legislative and constituent power, based on the fact that "both are established by the same constitution, one

[14] Law of Ukraine "On the Constitutional Court of Ukraine" dated 13 July 2017 No. 2136-VIII, https://zakon.rada.gov.ua/laws/show/2136-19/conv#n435 [access: 30.06.2023].

[15] Law of Ukraine "On the All-Ukrainian Referendum" dated 26 January 2021 No. 1135-IX, https://zakon.rada.gov.ua/laws/show/1135-20/conv#n10 [access: 04.07.2023].

of which is competent to promise ordinary laws, the other – constitutional laws".[16]

The Constitutional Court of Ukraine noted in its Decision that the Constitution of Ukraine as the Basic Law of Ukraine is, by its legal nature, an act of the constituent power that belongs to the people. The Verkhovna Rada of Ukraine, as the only body of legislative power in Ukraine, performs not only the legislative function, which is a priority, but also other functions of the state, in particular the constitutional one. In contrast to the adoption of ordinary laws, when adopting the Constitution of Ukraine, the Verkhovna Rada of Ukraine acted not as a body of legislative power, but as a body of constituent power. Therefore, it is precisely as a body of the constituent power that it should make changes and thus create the foundations of the social and state system that the people choose for themselves.[17]

Pursuant to Clause 29 of the Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session (Venice, 11–12 December 2009), the reports of the initiative to introduce a constitutional amendment can be introduced in different ways, as a more common way – from below or as a political project – from above, spontaneously or as a planned process. All constitutions contain rules on the right of initiative to introduce constitutional amendments. In some countries the threshold is low, in others it is quite high. In many countries, there are two or more parallel ways to initiate the amendment procedure.[18]

The Constitution of Ukraine defines the range of entities that can initiate consideration of a draft law in the Verkhovna Rada of Ukraine. In order to ensure the stability of the Basic Law, the list of these initiators is clear and comprehensive. In accordance with Article 154

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[16] V.L. Fedorenko, *Amendments to the Constitution in Ukraine and abroad: concepts, models, subjects, procedures*, "Law and Society" 2021, Issue 5, p. 35.

[17] D.V. Yuzova, *The procedure for introducing amendments to the Constitution of Ukraine*, "Scientific Notes" 2006, Vol. 53, p. 39.

[18] Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session (Venice, 11–12 December 2009), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-rus [access: 05.07.2023].

of the Constitution of Ukraine, a draft law on amendments to the Constitution of Ukraine may be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine or at least one third of the People's Deputies of Ukraine from the constitutional composition of the Verkhovna Rada of Ukraine. At the same time, according to Part 1 of Article 156 of the Constitution of Ukraine, the draft law on amendments to Chapter I "General Principles", Chapter III "Elections. Referendum" and Chapter XIII "Amendments to the Constitution of Ukraine" shall be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine or by at least two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine.[19]

The fundamental provisions of the stages of the procedure for introducing amendments to the Constitution of Ukraine are also regulated by the basic law of the state. In particular, in accordance with Article 85 of the Constitution of Ukraine, the powers of the Verkhovna Rada of Ukraine include the introduction of amendments to the Constitution of Ukraine within the limits and procedure provided for by Chapter XIII of the Constitution of Ukraine. The clarity and certainty of this procedure is an integral component of the legitimacy of changes to the Constitution of Ukraine. In addition, it is the stable procedural order of making changes to it that ensures, to a certain extent, the stability of the legal content and the possibility of partial changes to individual provisions if necessary. In this way, the stability of social relations and the possibility of their further development on a democratic basis are ensured.

The procedure for amending the Constitution of Ukraine defined by the Basic Law of Ukraine is an independent parliamentary procedure, which excludes the possibility of applying other constitutional provisions when considering draft laws on amendments to the Constitution of Ukraine. Analysing the norms of Chapter XIII of the Constitution of Ukraine, we note that a differentiated approach to the selection of the procedure is provided depending on the type of issues that require changes. In particular, the draft

[19] Constitution of Ukraine dated 28 June 1996 No. 254k/96-BP, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/conv#n4932 [access: 06.07.2023].

law on amendments to the Constitution of Ukraine, except for Chapter I "General Principles", Chapter III "Elections. Referendum" and Chapter XIII "Amendments to the Constitution of Ukraine", previously approved by the majority of the constitutional composition of the Verkhovna Rada of Ukraine, is considered adopted if at the next regular session of the Verkhovna Rada of Ukraine, at least two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine voted for it. In this context, we will analyse in more detail the stages of the procedure for introducing amendments to the Constitution of Ukraine.

It should be noted that the research of the norms of the Laws of Ukraine "On the Regulations of the Verkhovna Rada of Ukraine" made it possible to divide the procedure of making changes into the following stages:

Stage 1 – submission to the Verkhovna Rada of draft laws on amendments to the Constitution of Ukraine.

In the event of the need for simultaneous comprehensive amendments to Chapter I "General Principles", Chapter III "Elections. Referendum", Chapter XIII "Amendments to the Constitution of Ukraine" or other chapters of the Constitution of Ukraine, the initiator of such amendments to the Constitution of Ukraine submits to the Verkhovna Rada simultaneously two separate bills (related bills). The submission to the Verkhovna Rada of a draft law on amendments to Chapters I, III, XIII of the Constitution of Ukraine is accompanied by a simultaneous submission of a draft law, which provides for the allocation of funds from the State Budget of Ukraine for the holding of an all-Ukrainian referendum on changes to the Constitution of Ukraine.

Stage 2 – preparation for consideration of the issue of inclusion of the draft law on amendments to the Constitution of Ukraine to the agenda of the session of the Verkhovna Rada.

The main committee and other committees, which were entrusted with the preparation for consideration of the issue of including

the draft law in the agenda of the session and the procedure for continuing work on it, prepare decisions in accordance with the subjects of their mandate:

- on whether the adoption of the amendments to the Constitution of Ukraine proposed in the draft law will not lead to a violation of Ukraine's international obligations;
- regarding the political, social, economic expediency (or necessity) of adopting such a draft law in general;
- about the presence or absence of such provisions in the draft law (or similar provisions), which in the previously provided conclusions and adopted decisions of the Constitutional Court of Ukraine were recognised as cancelling or limiting the rights and freedoms of a person and a citizen or aimed at eliminating independence or violating territorial integrity of Ukraine;
- other issues stipulated by the regulations of the Verkhovna Rada of Ukraine.

Stage 3 – consideration by the Verkhovna Rada of the issue of inclusion of the draft law on amendments to the Constitution of Ukraine to the agenda of the Verkhovna Rada session.

The Verkhovna Rada includes in the agenda of the session of the Verkhovna Rada a draft law on amendments to the Constitution of Ukraine in order to send it with an appeal of the Verkhovna Rada to the Constitutional Court of Ukraine to obtain the decision provided for in Article 159 of the Constitution of Ukraine, to pre-approve the draft law or adopt and send it to the President of Ukraine for submission to the all-Ukrainian referendum in the unchanged wording. The decision to include the draft law on amendments to the Constitution of Ukraine to the agenda of the session of the Verkhovna Rada is adopted by a majority of people's deputies from the constitutional composition of the Verkhovna Rada. If the draft law is included in the agenda of the session, the Verkhovna Rada may decide to create a temporary special commission as the main one to continue work on the draft law on amendments to the Constitution of Ukraine.

Stage 4 – preparation of the draft law on amendments to the Constitution of Ukraine for preliminary approval or adoption by the Verkhovna Rada.

Proposals and comments received during the national discussion of the draft law are summarised and preliminarily considered by the committees of the Verkhovna Rada tasked with drafting the draft law. Generalised materials of the committee are sent to the main committee, which finally processes them and reports on them to the Verkhovna Rada (during the discussion at the plenary session of the Verkhovna Rada on the adoption of a resolution on the appeal of the Verkhovna Rada to the Constitutional Court of Ukraine). If the resolution on the appeal of the Verkhovna Rada to the Constitutional Court of Ukraine is not adopted and the draft law is not excluded by voting from the agenda of the session, the Verkhovna Rada decides on the content and terms of further work on the draft law.

Stage 5 – appeal of the Verkhovna Rada to the Constitutional Court of Ukraine to issue a decision by the Constitutional Court of Ukraine on compliance of the draft law on amendments to the Constitution of Ukraine with the requirements of Articles 157 and 158 of the Constitution of Ukraine.

In this context, it is worth emphasising the provisions of the Decision of the Constitutional Court of Ukraine in the case of the constitutional submission of 252 People's Deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On Amendments to the Constitution of Ukraine" dated 8 December 2004 No. 2222-IV (the case of compliance with the procedure for introducing amendments to the Constitution of Ukraine) dated 30 September 2010 No. 20-рп/2010. In particular, in paragraph 3 of subsection 3.2 of clause 3 of the motivational part, it is noted that according to the Basic Law of Ukraine, the availability of the relevant decision of the Constitutional Court of Ukraine is a mandatory condition for consideration of the draft law on amendments to the Constitution of Ukraine at the plenary

session of the Verkhovna Rada of Ukraine. The implementation by the Constitutional Court of Ukraine of preliminary (preventive) control of compliance of such a draft law with the requirements established by Articles 157 and 158 of the Constitution of Ukraine, with all possible amendments made to it in the process of consideration at the plenary session of the Verkhovna Rada of Ukraine, is an integral stage of the constitutional procedure for introducing amendments to the Basic Law of Ukraine.[20]

Stage 6 – preliminary approval, adoption by the Verkhovna Rada of the draft law on amendments to the Constitution of Ukraine, which, according to the decision of the Constitutional Court of Ukraine, meets the requirements of Articles 157 and 158 of the Constitution of Ukraine.

After the discussion of the draft law on amendments to the Constitution of Ukraine, the question of its preliminary approval (Article 155 of the Constitution of Ukraine) or acceptance as a whole (Article 155, Part 1 of Article 156 of the Constitution of Ukraine) is put to the vote. A draft law that did not receive (according to Article 155 or, accordingly, the Part 1 of Article 156 of the Constitution of Ukraine) the required number of votes of people's deputies in support, is considered not pre-approved or not adopted, respectively.

If the draft law on amendments to the Constitution of Ukraine is not approved in advance, as provided for in Article 155 of the Constitution of Ukraine, the Verkhovna Rada may, by a majority vote of people's deputies from its constitutional composition, decide on the content and terms of further work on it. In such cases, there are two additional stages:

[20] Decision of the Constitutional Court of Ukraine in the case of the constitutional submission of 252 People's Deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On Amendments to the Constitution of Ukraine" dated 8 December 2004 No. 2222-IV (the case of compliance with the procedure for introducing amendments to the Constitution of Ukraine) dated 30 September 2010 No. 20-рп/2010, https://zakon.rada.gov.ua/laws/show/v020p710-10#Text [access: 10.07.2023].

Stage 7 – introduction and consideration in the main committee of proposals and amendments to the draft law on amendments to the Constitution of Ukraine.

If, in the decision of the Constitutional Court of Ukraine, the draft law on amendments to the Constitution of Ukraine as a whole or its separate provisions are recognised as not meeting the requirements of Articles 157 and 158 of the Constitution of Ukraine, as well as in the event that the decision of the Constitutional Court of Ukraine contains reservations to the provisions of such a draft law, The Verkhovna Rada decides the issue of further work on the draft law.

Stage 8 – consideration by the Verkhovna Rada of proposals and amendments to the draft law on amendments to the Constitution of Ukraine.

At the plenary session of the Verkhovna Rada, each proposal and amendment to the draft law on amendments to the Constitution of Ukraine is discussed in full. After the end of the voting on the adoption of proposals and amendments to the draft law, the Verkhovna Rada proceeds to consideration of the issue of adopting a resolution on the appeal of the Verkhovna Rada to the Constitutional Court of Ukraine on the provision by the Constitutional Court of Ukraine of a decision on the compliance of the amended version of the draft law on amendments to the Constitution of Ukraine with the requirements of Articles 157 and 158 of the Constitution of Ukraine.

If, as a result of consideration by the Verkhovna Rada of proposals and amendments to the draft law on amendments to the Constitution of Ukraine, the draft law is withdrawn from consideration, then the provisions of the Part 1 of Article 158 apply accordingly: the draft law on amendments to the Constitution of Ukraine, which was considered by the Verkhovna Rada of Ukraine, and the law is not was adopted, may be submitted to the Verkhovna Rada of Ukraine no earlier than one year from the date of adoption of the decision on this draft law. In addition, in accordance with the Part 2 of Article 156 of the Constitution of Ukraine, re-submission of the draft law on amendments to Chapters I, III and XIII of this

Constitution on the same issue is possible only before the next convocation of the Verkhovna Rada of Ukraine.

In contrast to the above, it should be emphasised that there is a more complicated procedure in case of amendments to other chapters of the Constitution of Ukraine. Therefore, the draft law on amendments to Chapter I "General Principles", Chapter III "Elections. Referendum" and Chapter XIII "Amendments to the Constitution of Ukraine" is submitted to the Verkhovna Rada of Ukraine by the President of Ukraine or by at least two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine and if it is adopted by at least two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine, then it is approved by an all-Ukrainian referendum appointed by the President of Ukraine. As explained by the Constitutional Court of Ukraine in the Decision in the case on the constitutional submission of the Supreme Court of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the provisions of the second sentence of the Part 7 of Article 43, the first sentence of the Part 1 of Article 54 of the Law of Ukraine "On pension provision of persons released from military service, and of some other persons" dated 20 December 2016 No. 7-рп/2016:

> *the special constitutional procedure for amending Chapter I "General Principles" of the Constitution of Ukraine is due to the specificity of the subject of its regulation – the basis of the constitutional order in Ukraine – in particular, the need to ensure national security and defence of Ukraine, the needs to protect the state sovereignty and territorial integrity of Ukraine as a sovereign and independent, democratic, social and legal state.*[21]

[21] Decision of the Constitutional Court of Ukraine in the case on the constitutional submission of the Supreme Court of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the provisions of the second sentence of the Part 7 of Article 43, the first sentence of the Part 1 of Article 54 of the Law of Ukraine "On pension provision of persons released from military service, and of some other persons" dated 20 December 2016 No. 7-рп/2016, https://zakon.rada.gov.ua/laws/show/v007p710-16#Text [access: 13.07.2023].

The legal aspects of the all-Ukrainian referendum are detailed in the Law of Ukraine No. 1135-IX "On the All-Ukrainian Referendum" dated 26 January 2021. Article 26 of the Law stipulates that the President of Ukraine, within five days after receiving from the Chairman of the Verkhovna Rada of Ukraine the law on amendments to Chapters I, III, XIII of the Constitution of Ukraine, issues a decree on the appointment of an all-Ukrainian referendum on amendments to the Constitution of Ukraine, indicating the date of its holding. The text of the law submitted for approval by the all-Ukrainian referendum on amendments to Chapters I, III, XIII of the Constitution of Ukraine has to be attached to the decree of the President of Ukraine. In accordance with Part 2 of Article 17 of this Law, the Decree of the President of Ukraine on the appointment of an all-Ukrainian referendum is published in official printed publications within three days from the moment of its signing. If a law of Ukraine providing for amendments to Chapters I, III, XIII of the Constitution of Ukraine is approved at the all-Ukrainian referendum, it shall enter into force ten days after its official promulgation, unless otherwise provided by the law itself, but not earlier than the day of its official publication.[22]

Separately, we note that the Constitution of Ukraine has established an exhaustive list of grounds for which it cannot be changed:

i. if the changes involve the cancellation or restriction of human and citizen rights and freedoms;
ii. if the changes are aimed at eliminating the independence or violating the territorial integrity of Ukraine;
iii. in conditions of war or state of emergency.

As a result of a detailed analysis of the procedure for amending the Constitution of Ukraine, it should be highlighted that by its legal nature, the normative act on amending the Constitution of Ukraine is not identical to any ordinary law adopted by the Verkhovna Rada of Ukraine in accordance with its powers, established in paragraph 3 Part 1 of Article 85 of the Constitution of Ukraine. The following

[22] Law of Ukraine "On the All-Ukrainian Referendum" dated 6 November 2012 No. 5475-VI, https://zakon.rada.gov.ua/laws/show/5475-17#Text [access: 17.07.2023].

main differences between normative legal acts on amendments to the Constitution of Ukraine and other laws can be distinguished:

1. The Constitution of Ukraine is one of the "rigid" acts, as it can be changed only in a special manner established by it. Regulatory acts on amendments to the Constitution of Ukraine are characterised by an independent constitutional procedure for their adoption, unlike other ordinary laws.
2. After the normative-legal act on amendments to the Constitution of Ukraine enters into force, its norms are integrated into the Constitution of Ukraine and become its component, acquiring the highest legal force. Norms of the ordinary law of Ukraine in the hierarchy of legal sources do not have the highest legal force, they are adopted on the basis of the Constitution of Ukraine and have to correspond to it.
3. The draft law on amendments to the Constitution of Ukraine may be considered by the Verkhovna Rada of Ukraine only if there is a decision of the Constitutional Court of Ukraine that the draft law meets the requirements of Articles 157 and 158 of the Constitution of Ukraine. That is, draft laws on amendments to the Constitution of Ukraine are subject to mandatory preliminary judicial constitutional control, which is carried out by a single body of constitutional jurisdiction. Regarding ordinary laws adopted by the Verkhovna Rada of Ukraine under the legislative procedure, the optional control is established, which is carried out by the Constitutional Court of Ukraine.
4. The Constitution of Ukraine has established an exhaustive list of grounds for which it cannot be changed. On the other hand, with regard to other laws, the Constitution of Ukraine does not provide for restrictions on making changes to them, but only provides a list of issues, the regulation of which can be determined or established exclusively by the laws of Ukraine (Article 92 of the Constitution of Ukraine).
5. Bills on amendments to the Constitution of Ukraine shall be adopted by a qualified majority, not less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine. At the same time, changes to Chapters I, III, XIII of the Constitution of Ukraine have to be approved by an all Ukrainian

> referendum after adoption. The draft law on amendments to other chapters of the Constitution of Ukraine, except for Chapters I, III, XIII, is subject to consideration at two sessions of the Verkhovna Rada of Ukraine. At one session of the parliament, it is preliminarily approved by the majority of votes of people's deputies of Ukraine from the constitutional composition of the Verkhovna Rada of Ukraine, and at the next session it is adopted by two-thirds of its constitutional composition. In contrast to this, the Verkhovna Rada of Ukraine adopts other ordinary laws, resolutions, acts, except for cases provided for by the Constitution of Ukraine, by a majority of its constitutional members (Article 91 of the Constitution of Ukraine), i.e., by at least 226 votes of People's Deputies of Ukraine.

In Ukraine, as in any democratic state, the Constitution of Ukraine is not devoid of shortcomings of both a technical-legal and a political-legal nature. However, most of these problems were not obvious during the development and adoption of this document, but appeared only during the direct application of the Constitution. Since then, the Constitution of Ukraine has actually been amended 8 times, in: 2004, 2010, 2011, 2013, 2014, 2016, 2019 (twice).[23]

The first amendments to the Constitution of Ukraine were made in accordance with the Law of Ukraine "On Amendments to the Constitution of Ukraine" No. 2222-IV dated 8 December 2004.[24] According to the provisions of this Law, Ukraine became a parliamentary-presidential republic. This meant that the powers of the president were limited, and those of the parliament and the government were significantly expanded. In particular, the Verkhovna Rada appointed the prime minister, the minister of defence, and the minister of foreign affairs at the request of the head of state, and at the request of the prime minister – other members of the government. But the president could submit a candidate for the position of the head of the

[23] *Green book of constitutional reform in Ukraine*, (n.d.), https://rpr.org.ua/wp-content/uploads/2021/12/Zelena-knyha.pdf [access: 19.07.2023].

[24] Law of Ukraine "On Amendments to the Constitution of Ukraine" dated 8 December 2004 No. 2222-IV, https://zakon.rada.gov.ua/laws/show/2222-15#Text [access: 21.07.2023].

government to the parliament only on the proposal of a coalition of parliamentary factions that constituted the constitutional majority.

In 2010, people's deputies of the pro-ruling party appealed to the Constitutional Court with a request to determine whether the changes made to the Constitution of Ukraine in 2004 were legal. By the decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of 252 People's Deputies of Ukraine regarding compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On Amendments to the Constitution of Ukraine" dated 8 December 2004 No. 2222-IV (case on compliance with the procedure for amending the Constitution of Ukraine) dated 30 September 2010 No. 20-рп/2010,[25] and also without a vote of the Parliament, the changes were recognised as inconsistent with the Basic Law. After that, Ukraine returned to the presidential-parliamentary form of government.

The next changes to the Constitution of Ukraine took place on 21 February 2014, when the Law of Ukraine "On the Restoration of Certain Provisions of the Constitution of Ukraine" No. 742-VII was approved.[26] In particular, the Verkhovna Rada voted to restore the 2004 version of the Constitution. The decision of the Constitutional Court, adopted in 2010, was declared illegal. Therefore, Ukraine again became a parliamentary-presidential republic, and the powers of the head of state decreased.

Subsequently, on 2 June 2016, the Verkhovna Rada made further amendments to the Constitution of Ukraine in accordance with the approved Law of Ukraine "On Amendments to the Constitution

[25] Decision of the Constitutional Court of Ukraine in the case of the constitutional submission of 252 People's Deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On Amendments to the Constitution of Ukraine" dated 8 December 2004 No. 2222-IV (the case of compliance with the procedure for introducing amendments to the Constitution of Ukraine) dated 30 September 2010 No. 20-рп/2010, https://zakon.rada.gov.ua/laws/show/v020p710-10#Text [access: 24.07.2023].

[26] Law of Ukraine "On Restoration of Certain Provisions of the Constitution of Ukraine" dated 21 February 2014 No. 742-VII, https://zakon.rada.gov.ua/laws/show/742-18#Text [access: 25.07.2023].

of Ukraine (Regarding Justice)" No. 1401-VIII.[27] They provided that the President appoints and dismisses the Prosecutor General with the consent of the Verkhovna Rada. In addition, according to the changes of 2016, the High Council of Justice was reorganised into the High Council of Justice. The number of council members increased to 21. At the same time, the Minister of Justice and the Prosecutor General were excluded from its composition. At the same time, the Supreme Council of Justice was given the right to suspend, transfer, dismiss judges and submit applications to the president for their appointment, as well as the right to consent to the detention and arrest of judges. In addition, the changes provided that the judge has to submit a declaration of family ties and a declaration of integrity (in addition to the declaration of income). The Constitution of Ukraine also enshrined the creation of the High Anti-Corruption Court, the High Court on Intellectual Property and local district courts.

Other important changes to the Constitution of Ukraine took place on 7 February 2019, in accordance with the provisions of the Law of Ukraine "On Amendments to the Constitution of Ukraine (regarding the strategic course of the state to acquire full membership of Ukraine in the European Union and in the North Atlantic Treaty Organisation)" No. 2680-VIII.[28] In particular, people's deputies made changes to the Constitution of Ukraine, which provided for the irreversibility of the state's strategic course towards full membership in the European Union and the North Atlantic Alliance. The preamble of the Constitution was supplemented with words about confirmation of the European identity of the Ukrainian people and the irreversibility of Ukraine's European and Euro-Atlantic course. In addition, the wording was added to Article 102 of the Constitution of Ukraine stating that the President of Ukraine is the guarantor

[27] Law of Ukraine "On Amendments to the Constitution of Ukraine (regarding Justice)" dated 2 June 2016 No. 1401-VIII, https://zakon.rada.gov.ua/laws/show/1401-19#Text [access: 26.07.2023].

[28] Law of Ukraine "On Amendments to the Constitution of Ukraine (regarding the State's Strategic Course for Ukraine's Full Membership in the European Union and the North Atlantic Treaty Organization)" dated 7 February 2019 No. 2680-VIII, https://zakon.rada.gov.ua/laws/show/2680-19#Text [access: 28.07.2023].

of the implementation of the state's strategic course towards full membership of Ukraine in the European Union and NATO.

On 3 September 2019, the Law of Ukraine "On Amendments to Article 80 of the Constitution of Ukraine (regarding the inviolability of people's deputies of Ukraine)" No. 27-IX was approved.[29] The law excludes from Article 80 of the Constitution the provision guaranteeing parliamentary immunity to parliamentarians as well as the impossibility of being prosecuted, detained or arrested without the consent of the Verkhovna Rada of Ukraine. At the same time, people's deputies of Ukraine are not legally responsible for the results of voting or statements in the parliament and its bodies, with the exception of liability for insult or slander.

11.3.3. LEGAL REGULATION OF INITIATORS AND PROCEDURE FOR AMENDING THE CONSTITUTION OF THE REPUBLIC OF POLAND

The past three or four decades have seen many difficulties related to constitutions and the constitutional process. The world order underwent significant changes during this time. The final collapse of the colonial system and the emergence of new states; the end of military regimes; the collapse of communism; increased efforts to end civil conflicts, especially in multinational states, all contributed to the creation of constitutions. The variety of situations in which they were developed shows that the main goals of their creation differ significantly: state building in those cases when a new state emerges; the strengthening of democracy when the military returns to the barracks or the regimes of authoritarian presidents are overthrown; liberalism and the creation of a market economy with the end of communism; peace and cooperation between communities after

[29] Law of Ukraine "On Amendments to Article 80 of the Constitution of Ukraine (regarding Inviolability of People's Deputies of Ukraine)" dated 3 September 2019 No. 27-IX, https://zakon.rada.gov.ua/laws/show/27-20#Text [access: 31.07.2023].

the end of internal conflicts. These goals determine the orientation of the constitution, and often the process by which it is created.[30]

In general, it should be noted that the foreign experience of approving changes to constitutions allows us to distinguish such procedures as:

1. approval of changes to the constitution by the legislative body of state power; this group, in turn, is divided into four subgroups:
   - approval of changes by an absolute majority of members of the legislative body,
   - approval of changes by a qualified majority of members of the legislative body of state power,
   - approval of changes by the legislative body of state power using the "double vote" procedure,
   - approval of changes by the legislative body of state power using the "complex double vote" procedure;
2. approval of changes to the constitution in a national vote (referendum);
3. approval of changes to the constitution by the constituent power body;
4. approval of changes to the constitution by the legislative bodies of the subjects of the federation in the federated states;
5. participation of the head of state in changing the constitution.[31]

In connection with the course chosen by Ukraine for European integration and the similar historical and cultural roots between Ukraine and the Republic of Poland, it seems appropriate to investigate the experience of the Republic of Poland in solving issues related to changes to the constitution. We are convinced that the obtained data on the similarities and differences of the legal regulation of amendments to the constitutions will contribute to the formation of proposals for improving the effectiveness of this process.

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[30] M. Brandt, J. Cottrell, Y. Ghai, A. Regan, *Development and reform of the constitution: choice of process*, Ukraine 2011, https://www.interpeace.org/wp-content/uploads/2015/07/2015_06_25_Constitution-Making_Handbook_Ukrainian.pdf [access: 04.08.2023].

[31] D.P. Taran, *Rigidity of the constitution as a condition for ensuring its protection*, "Scientific Bulletin of the Uzhhorod National University, Pravo Series" 2015, Vol. 1, Issue 35, Part I, p. 102.

It should be noted that free Poland adopted constitutions four times in its history, in: 1791, 1921, 1935 and 1997. The free state also twice adopted constitutional provisions that temporarily regulated the powers of the most important state bodies, the so-called 'small constitutions': in 1919 and 1992. Characterising the basic aspects of the four constitutions, here are the main ones:

1. The Constitution of 3 May 1791 was the first written constitution in Europe and the second in the world – the Constitution of the United States of America being the first. The Constitution was adopted by the Four-Year Sejm, which met under the confederation. It was in effect for a total of 14 months. Conceived as a fundamental step towards the restoration of the state, it was an attempt to modernise Poland's declining system and save its sovereignty.
2. In January 1919, elections were held to the legislative Sejm, the main task of which was the preparation and adoption of the Constitution. The Constitution was finally adopted by the legislative Sejm on 17 March 1921, and its sections contained the most important statements regarding the nature of the state and the sovereign power of the nation, the competences of state bodies within the framework of the tripartite division of legislative, executive and judicial power, civil duties and rights.
3. The new Constitution of 23 April 1935 was an expression of the desire to further strengthen the executive power and centralise key powers in the office of the President of the Republic of Poland. Adopted in the interwar period, it was the last constitution of independent Poland. Despite sharp criticism by the opposition of new political decisions and the adoption procedure, it created conditions for preserving the legality and legal and state continuity of the Republic of Poland after the cataclysm of the Nazi-Soviet aggression in 1939.[32]

Work on a new constitution began in 1989, on the threshold of political transformation, to replace as soon as possible the

[32] M. Korkuć, *Konstytucje polskie w ujęciu historycznym*, https://www.prezydent.pl/prezydent/piec-lat-prezydentury-andrzeja-dudy/referendum-konsultacyjne/konstytucje-polskie-w-ujeciu-historycznym [access: 09.08.2023].

Constitution of the Polish People's Republic of 1952, which was incompatible with the needs of a democratic state.[33] The Constitution of the Republic of Poland was adopted on 2 April 1997 by the National Assembly, i.e., the combined chambers of the Sejm and the Senate. It was then adopted in a constitutional referendum.

The referendum took place on 25 May 1997. The campaign's intensity did not convince voters to participate in large numbers: only 42.86% (i.e., 12, 137, 136) of eligible voters decided to cast a ballot. Thus, the constitution had to gather at least 6,068,569 affirmative votes. It received 6,396,641 supporting votes, or 52.7%. This was enough to have the constitution confirmed. On 15 July 1997, after having examined 433 challenges, the Supreme Court decided that the referendum had been valid, and on 16 July the president ceremonially signed the constitution. It was published in the Journal of Laws on the same day. According to Article 243, the constitution became effective three months later, on 17 October 1997. Thus, almost eight years after the Sejm and Senate had appointed the first constitutional committees, the constitution-writing process in Poland came to a successful conclusion.[34]

Practically from the very beginning of its operation, individual provisions became the subject of more or less lively discussions and comments by representatives of various political, social and scientific circles. They resulted in concrete proposals for changes to the Constitution formulated by politicians in draft laws submitted to the Sejm. At the same time, the still relevant question was raised whether it is necessary, and if so, in what direction and to what extent to change the Constitution and how to protect the Constitution from situational changes of a political nature. It seems that the most

[33] M. Kuczyński, *25. rocznica uchwalenia Konstytucji RP*, 22.04.2022, https://bip.brpo.gov.pl/pl/content/RPO-rocznica-uchwalenia-konstytucji-rp#:~:text=-Ustawa%20zasadnicza%20zosta%C5%82a%20uchwalona%20przez,w%20%C5%BCycie%203%20miesi%C4%85ce%20p%C3%B3%C5%BAniej. [access: 14.08.2023].

[34] L. Garlicki, A.Z. Garlicka, *Constitution Making, Peace Building, and National Reconciliation. The Experience of Poland*, [in:] L.E. Miller (ed.), *Framing the State in Times of Transition*, Washington 2012, https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter14_Framing.pdf [access: 16.08.2023].

responsible and politically neutral answer was given by constitutional scholars who believed that any changes to the Constitution should always be preceded by a deep political and legal reflection, making impossible the danger of instrumental changes to the law by the ad hoc political needs.[35]

The process of amending the Constitution of the Republic of Poland dated 2 April 1997 is regulated by Chapter XII "The Amendment of the Constitution", and is also supplemented by constitutional provisions regulating issues of the legislative process (Articles 119–122), regulations of the Sejm and the Senate of the Republic of Poland, and the Law of the Republic of Poland on Statewide referendum.

Analysing the provisions of the above normative legal acts within the framework of this research, the provisions on the methods of amending the constitutions, initiators of such changes, parliamentary procedures, referendum, restrictions on amending the constitutions and the role of constitutional courts in amending the constitutions are subject to a comparative analysis.

According to Part 1 of Article 235 of the Constitution of the Republic of Poland, the amendment of the constitution takes place in accordance with a special procedure. Thus, analysing the theoretical and legislative approaches to the methods of making changes to the Constitution of Ukraine and the Constitution of the Republic of Poland, it should be noted that both states provide for a strict way of making changes to the Basic Laws.

The right of legislative initiative to introduce a draft law on amendments to the Constitution of the Republic of Poland is granted to an exclusive circle of initiators. Such initiators are: at least one-fifth of the constitutional composition of the Sejm, the Senate or the President of the Republic of Poland. According to Part 1 of Article 96 of the Constitution of the Republic of Poland, the Sejm consists of 460 deputies, so a legislative initiative to amend the Constitution

[35] R. Stawicki, *Zmiany Konstytucji Rzeczypospolitej Polskiej w latach 1997–2011 w świetle projektów ustaw oraz uchwalonych nowelizacji*, Kancelaria Senatu, 2011, https://www.senat.gov.pl/gfx/senat/pl/senatopracowania/22/plik/ot-605.pdf [access: 05.09.2023].

requires the votes of at least 92 Sejm deputies. In accordance with Part 1 of Article 97 of the Constitution of the Republic of Poland, the Senate has 100 senators, so the right of legislative initiative to amend the constitution requires unanimity, i.e., the votes of one hundred senators. In accordance with Part 1 of Article 126, the President of the Republic of Poland is the highest representative of the Republic of Poland and the guarantor of the continuity of state power.

Amendments to the Constitution of the Republic of Poland are carried out by the adoption by the Sejm, and no later than 60 days later by the Senate of a law with the same wording (Part 2 of Article 235 of the Constitution of the Republic of Poland). It should be emphasised that the Senate's adoption of the law on amendments to the constitution requires a longer term. In accordance with Part 2 of Article 121 of the Constitution of the Republic of Poland, the Senate may, within 30 days from the date of submission of the bill, adopt the law without changes, adopt amendments or completely reject the law. If the Senate does not take a corresponding decision within 30 days from the date of submission of the bill, the bill has to be recognised as adopted in the wording approved by the Sejm.

As indicated in Part 3 of Article 235 of the Constitution of the Republic of Poland, the first reading of the draft law on amendments to the Constitution may take place no earlier than on the thirtieth day from the date of submission of the draft law to the Sejm. Such a period is quite sufficient for getting acquainted with the content of the draft amendments to the Constitution.

In accordance with Article 39 of the Regulations of the Sejm, the first reading at a Sejm meeting ends with the transfer of the bill to the committee, unless the Sejm rejects the bill in its entirety in connection with the submitted proposal.[36] The Sejm may appoint an Extraordinary Commission, which reflects the representation of parliamentary groups in the Sejm, to consider the bill on amendments

[36] Uchwała Sejmu Rzeczypospolitej Polskiej "Regulamin Sejmu Rzeczypospolitej Polskiej" z dnia 30 lipca 1992 r., M.P. z 1992 r. Nr 26, poz. 185, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WMP19920260185/U/M19920185Lj.pdf [access: 14.09.2023].

to the Constitution.[37] In addition, Article 86c of the Regulations of the Sejm establishes that the Committee, which considers the draft act on amendments to the Constitution, appoints a group of permanent experts, one-third of which is appointed by the representative of the initiator of the draft act on amendments to the Constitution.[38]

It should be noted that according to the provisions of Article 86f of the Regulations of the Sejm, an amendment to the draft act on amending the Constitution can be submitted in written form by a group of at least 5 deputies at a meeting of the Committee, which is considering the draft act on amending the Constitution. Proposals for amendments rejected by the Commission, after submission in written form and at the request of at least 5 applicants, are included in the report as minority proposals; the proposal of the minority has to include the consequences of this proposal for the text of the bill; applicants add justification to the statement of the minority, which has to indicate the need and purpose of the change and its expected legal and social consequences. Adoption of an amendment or proposal of a minority to a draft law on amendments to the Constitution is carried out by a majority of not less than two-thirds of the votes in the presence of no less than half of the legally determined number of deputies.

In accordance with the requirements of Article 86i of the Regulations of the Sejm, the second reading of the draft law on amendments to the Constitution can take place no earlier than on the fourteenth day after the report of the Committee considering the draft amendments to the Constitution is handed over to deputies.

The constitutional provisions also enshrine the right of the applicant to withdraw the draft act during the legislative procedure in the Sejm before the completion of the second reading of the bill.[39]

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[37] Ibid.

[38] Ibid.

[39] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz. U. z 2009 r. Nr 114, poz. 946, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970780483/U/D19970483Lj.pdf [access: 18.09.2023].

The third reading can take place immediately if the bill has not been re-referred to the committee for the second reading.[40]

It should be emphasised that Part 4 of Article 235 of the Constitution of the Republic of Poland stipulates that the Law on Amendments to the Constitution is adopted by the Sejm with a majority of at least two-thirds of the votes in the presence of at least half of the number of deputies determined by law, and by the Senate by an absolute majority of votes in the presence of at least half of the legally established number of senators.[41] That is, the minimum number of votes required for the adoption of the law on amendments to the constitution is the votes of 154 deputies of the Sejm and the votes of 26 senators. In this way, this requirement involves a combination of two conditions: the presence of an appropriate quorum and obtaining an appropriate majority of votes.

In addition, it is highlighted that amendments to the Constitution are introduced by an act adopted in the same version by the Sejm, and then within no longer than 60 days by the Senate.[42]

Further, Part 5 of Article 235 of the Constitution of the Republic of Poland stipulates that the adoption by the Sejm of the law on amendments to the provisions of Chapters I, II or XII of the Constitution may take place no earlier than on the sixtieth day after the first reading of the draft of this act. It is worth clarifying that Chapter I "Republic" establishes the general constitutional principles of the Republic of Poland, Chapter II "Freedoms, Rights and Responsibilities of a Person and a Citizen" respectively regulates the general principles and the corresponding catalogue of freedoms, rights and responsibilities of a person and a citizen, and Chapter XII "The amendment of the Constitution" includes the

[40] Uchwała Sejmu Rzeczypospolitej Polskiej "Regulamin Sejmu Rzeczypospolitej Polskiej" z dnia 30 lipca 1992 r., M.P. z 1992 r. Nr 26, poz. 185, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WMP19920260185/U/M19920185Lj.pdf [access: 22.09.2023].

[41] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz. U. z 2009 r. Nr 114, poz. 946, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970780483/U/D19970483Lj.pdf [access: 25.09.2023].

[42] P. Zyzański, *Jak się zmienia polską Konstytucję?*, 02.03.2018, https://konstytucyjny.pl/jak-sie-zmienia-polska-konstytucje/ [access: 27.09.2023].

analysed Article 235. The above-mentioned provision of Part 5 of Article 235 of the Constitution of the Republic of Poland is designed to guarantee the constancy of the norms of the constitution, which are of special importance for both the state and its citizens.

The requirements of Part 6 of Article 235 of the Constitution of the Republic of Poland provide for further initiation of the referendum procedure regarding such changes to the Constitution. In particular, the subjects of the legislative initiative to amend the constitution (at least one-fifth of the constitutional composition of the Sejm, the Senate or the President of the Republic of Poland) within 45 days after the Senate has adopted the act on amendments to Chapters I, II or XII of the Constitution may demand a conciliation referendum. With such a submission, the relevant subject of the legislative initiative turns to the Marshal of the Sejm, who orders an immediate referendum to be held within 60 days from the date of submission of the request.

It is important to note that the Speaker of the Sejm does not have the right to freely assess the grounds for such convening, according to the constitutional norms, in the case of an initiative to hold a referendum by an authorised subject, the speaker "immediately convenes" a referendum within 60 days from the date of submission of the application. It should also be noted that unlike the national referendum on issues of special interest to the state, the constitutional referendum is valid regardless of the turnout: amendments to the Constitution are considered adopted if the majority of voters voted "yes". This procedure is aimed at ensuring that the transformation of the content of the Basic Law depends on the will of citizens interested in the direction of legal changes, and is not blocked by the passivity of part of the electorate.[43]

Pursuant to Part 4 of Article 125 of the Constitution of the Republic of Poland, the validity of the national referendum and the referendum provided for in Part 6 of Article 235 is determined by the Supreme Court.

[43] L. Buchkowski, *National referendum in the Republic of Poland in the light of proposed amendments to the Law of March 14*, "Ukrainian Journal of Constitutional Law" 2003, No. 4, p. 72.

After completion of the procedural actions specified in Parts 4 and 6 of Article 235 of the Constitution of the Republic of Poland, the Marshal of the Sejm submits the adopted act to the President of the Republic of Poland for signature. The President of the Republic of Poland signs the act within 21 days from the moment of delivery and orders it to be published in the official publication – *Dziennik Ustaw Rzeczypospolitej Polskiej*.

Special attention deserves the provision of Part 6 of Article 228 of the Constitution of the Republic of Poland, which stipulates that during a state of emergency, the following cannot be changed: the Constitution, the rules of elections to the Sejm, the Senate and local self-government bodies, the Law on Elections of the President of the Republic of Poland and the Law on the State of Emergency. Polish constitutionalists consider this provision as an additional guarantee of the stability of the Constitution of the Republic of Poland.

It should be noted that the legislation of the Republic of Poland does not provide for the need to refer to the Constitutional Tribunal or to have its opinion regarding amendments to the Constitution. Proponents of this thesis point out, for example, that it is impossible to verify the conformity of the amended provisions of the constitution with the content of the current one, since it would be internally contradictory from the very beginning. A more liberal view allows for the possibility of checking the constitutionality of the act of amending the Constitution, but only in a technical aspect (compliance with procedural requirements, etc.), without interfering with the content of the legal act.[44]

An interesting position is presented by scientists Mateusz Klinowski and Rafał Smoleń, who note that the concept of unconstitutional change of the constitution, especially in the material (content) dimension, is a novelty in the field of constitutional and legal science in Poland, especially since at first glance it may seem internally contradictory. This stems from the conviction, previously shared by many authors, that the power of the people in shaping the content of the constitution is practically unlimited, as well as from the fact that the concept of unconstitutionality in Polish

[44] P. Zyzański, *Jak się zmienia…*, *op. cit*.

constitutional law has so far been understood mainly as the unconstitutionality of ordinary laws. However, the concept of unconstitutional amendment of the Constitution fits well with the current need for a correct understanding of political changes introduced by the ruling majority, which often only maintained the appearance of the rule of law through literal adherence to the accepted law-making procedure or by referring to the will of the people, that is, the principle of sovereignty, understood as the right to shape the state system. All this indicates that the doctrine of constitutional law functions and develops in accordance with current political practice.[45]

Analysing the application of provisions on amendments to the Constitution of the Republic of Poland in practice, we note that only two laws on amendments to the Constitution were adopted. In 2006, the Law on Amendments to the Constitution of the Republic of Poland was adopted, which changed the content of Article 55 regarding the possibility of extraditing a Polish citizen who committed a crime outside Poland to another country on the basis of a European arrest warrant. In particular, it was noted that the extradition of a Polish citizen is prohibited, except in cases where such an opportunity arises from an international treaty ratified by the Republic of Poland, or an act implementing an act of law established by an international organisation of which the Republic of Poland is a member, if the act, to which the extradition request applies:

1) is committed outside the territory of the Republic of Poland, and
2) constitutes a crime under the legislation of the Republic of Poland or would constitute a crime under the legislation of the Republic of Poland if it was committed on the territory of the Republic of Poland, both at the time of its commission and at the time of submitting the application.[46]

[45] M. Klinowski, R. Smoleń, *Postęp w nauce prawa konstytucyjnego. Ewolucja poglądów dotyczących (nie)konstytucyjności zmian konstytucji*, "Przegląd Konstytucyjny" 2022, No. 4, p. 50.

[46] Ustawa o zmianie Konstytucji Rzeczypospolitej Polskiej z dnia 8 września 2006 r., Dz. U. z 2006 r. Nr 200, poz. 1471, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20062001471/T/D20061471L.pdf [access: 09.10.2023].

The amendment was aimed at adapting Polish legislation to the provisions of the European Union.

The second amendment was introduced in 2009 and related to passive electoral right. In particular, the Law on Amendments to the Constitution of the Republic of Poland of 7 May 2009 introduced a new version of Article 99, according to which: a person convicted by a final sentence of imprisonment for an intentional crime prosecuted by public indictment cannot be elected to the Sejm or the Senate.[47]

Despite the fact that the Constitution has been amended only twice so far, there have been many proposals for the introduction of amendments. In the first decade of the Constitution, proposals for changes, motivated by political and ideological considerations, almost did not concern the issue of citizens' participation in the decision-making process. The first few proposals on this topic appeared in 2004 and 2005 in drafts of a new constitution prepared by the leading political parties. They mainly concerned the modification of existing forms of direct democracy. The first proposals for the introduction of broad changes in the regulation of institutions of direct democracy, including the introduction of new decisions in the Polish legal system, date back to 2010 and were included in the "Law and Justice" drafts. It is important to point out that none of the above-mentioned proposals received the form of a draft law on changes to the constitution, and none were submitted to the Sejm.[48]

[47] Ustawa o zmianie Konstytucji Rzeczypospolitej Polskiej z dnia 7 maja 2009 r., Dz. U. z 2009 r. Nr 114, poz. 946, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20091140946/T/D20090946L.pdf [access: 09.10.2023].

[48] M. Wiszowaty, *Propozycje zmian zwiększających wpływ obywateli na proces decyzyjny w państwie w projektach zmiany Konstytucji RP z 1997 r., wypowiedziach ekspertów oraz postulatach środowisk obywatelskich*, "Tygodnik Spraw Obywatelskich" 2021, Vol. 69, No. 17, https://instytutsprawobywatelskich.pl/konstytucja-dla-obywateli/ [access: 10.10.2023].

11.3.4. MODERNISATION OF THE PROVISIONS OF THE CONSTITUTION OF THE REPUBLIC OF POLAND AND THE CONSTITUTION OF UKRAINE

In general, the modernisation of the provisions of the Constitution can be an important step to ensure the stability, development and democratic functioning of the state. It helps to maintain citizens' confidence in the legal order and contributes to the strengthening of democratic institutions. Therefore, it is worth noting such positive aspects of modernisation as:

1. Adaptation to modern challenges: society is constantly changing, and constitutional norms must reflect modern requirements and challenges. Modernisation can ensure the relevance of the constitution and its compliance with the needs of modern society.
2. Strengthening the rule of law: modernisation of the provisions of the Constitution can contribute to strengthening the principles of the rule of law, ensuring greater protection of citizens' rights, independence of the court and equality before the law.
3. Integration with international standards: modernisation can contribute to greater coherence with international human rights standards and norms of international law, ensuring the conformity of constitutional provisions within the framework of the international legal order.
4. Increasing citizens' trust: changes aimed at strengthening democratic principles, human rights and equality before the law can contribute to increasing citizens' trust in the constitutional system and state institutions.
5. Improvement of the governance system: modernisation can contribute to more efficient and transparent governance, ensuring the greater accountability of power structures to citizens.

Taking into account the fact that the legislation of the Republic of Poland does not provide for the need to apply to the Constitutional Tribunal or to have the Tribunal's decision on amendments to the Constitution, it is considered appropriate to make changes to the list of restrictions for amendments to the Constitution of the Republic of Poland. In particular, Part 6 of Article 228 of the Constitution of the Republic of Poland establishes a list of legal acts that cannot be

amended during a state of emergency. However, the state of emergency is a concept that has a limited meaning (for example, it does not cover natural disasters, which very often serve as a justification for the state to suspend the exercise of human rights). In connection with the above, using the constitutional experience of Ukraine in this aspect, it is considered appropriate to enshrine the prohibition of restrictions that: provide for the cancellation or restriction of the rights and freedoms of a person and a citizen, of those that are aimed at eliminating the independence or at violating the territorial integrity of the Republic of Poland.

Secondly, Part 6 of Article 228 of the Constitution of the Republic of Poland establishes restrictions on amending the Constitution only during a state of emergency. According to Article 230 of the Constitution of the Republic of Poland, the duration of the state of emergency is limited to no more than 90 days. It can be extended only once with the consent of the Sejm and for a period of no more than 60 days. In connection with the above, we consider it expedient to improve the provisions of the Constitution of the Republic of Poland, enshrining the prohibition on making changes to the Constitution not only during a state of emergency, but also during a state of war.

The proposed changes seem to be an additional guarantee of the stability of the Constitution of the Republic of Poland for the following reasons:

i. The proposals are aimed at strengthening the protection of the rights and freedoms of citizens during crisis situations, such as a state of emergency or a state of war.
ii. Limiting constitutional amendments during states of emergency and a state of war can help prevent possible manipulation or abuse of power in times of crisis. This can ensure citizens' trust in the constitutional institutions of the state.
iii. The proposals can help prevent temporary or extreme changes in the constitutional order during crisis situations. This will contribute to maintaining stability, which is a key factor in ensuring the rule of law.
iv. The proposals are based on the principles of constitutional law, which aim to protect the rights and freedoms of citizens at any

time and under any circumstances. This helps ensure compliance of constitutional norms with international human rights standards.

As for amendments to the Constitution of Ukraine, it is important to note the comprehensive and clear regulation of the procedure for amending the Constitution in the Republic of Poland. This is confirmed by the fact that the Constitution of the Republic of Poland contains more specific procedural norms (including deadlines) that regulate the procedure for introducing amendments to the Basic Law, which are entirely absent in the Constitution of Ukraine; in particular, it: establishes a thirty-day period between the introduction of the initiative and the first reading in the parliament; enshrines the adoption of a law to amend the provisions of Chapters I, II, or XII of the Constitution not earlier than the sixtieth day after the first reading of this bill. Therefore, it seems appropriate to establish clear terms between:

1) introduction of the initiative and first reading in the parliament;
2) the first reading and adoption by the Verkhovna Rada of the draft law on amendments to the provisions of Chapters I, II or XII of the Constitution of Ukraine.

Commenting on the above proposals, it should be noted that a detailed establishment of the terms between certain stages of the procedure for amending the Constitution is important for the following reasons:

1. Clearly defined terms between specific stages of the procedure for amending the Constitution help to avoid legal uncertainty in the understanding of legal norms. This contributes to the maintenance of the stability of the legal order in the state, as well as increases public confidence in the legal system and power structures.
2. Clearly defined deadlines help to avoid delays or excessive acceleration of the process of introducing amendments and stimulate the effective work of the parliament in making decisions.
3. Clearly defined terms ensure the transparency of the process of introducing amendments to the Constitution and allow citizens to understand the course of the constitutional process.

11.4. Conclusions

One of the urgent issues is the resolution of the eternal dilemma about the inviolability and stability of the Constitution and at the same time about making changes to it in connection with the identified shortcomings or changes in socio-political relations.

The procedure for introducing amendments to the constitution is a type of law-making process, namely constitutional law-making. The practice of twenty-seven years of operation of the current Constitution of Ukraine and twenty-six years of operation of the current Constitution of the Republic of Poland provide rich material for understanding the positive and negative aspects associated with making changes to them.

Research of the problems of amendments to the Constitution of Ukraine and the Constitution of the Republic of Poland based on such comparative legal aspects as provisions on the methods of making amendments to the constitutions, initiators of such changes, parliamentary procedures, referendum, restrictions on making amendments to the constitutions and the role of constitutional courts in amending constitutions, allows us to make the following conclusions:

i. The Constitution of Ukraine and the Constitution of the Republic of Poland establish a rigid method of amending the constitutions; parliamentary procedures for amending the constitutions of Ukraine and Poland differ from the procedure for adopting ordinary laws.
ii. The Constitution of Ukraine and the Constitution of the Republic of Poland provide for the same subject composition of the initiators of amendments to the constitutions: the parliament and the head of state. However, the quantitative composition of the members of the parliaments of both states, who can initiate changes to the constitutions, is different.
iii. Ukraine and Poland provide for the possibility of making changes to the constitutions in a referendum. However, in Ukraine, a referendum on approving changes to some chapters of the Constitution is mandatory, and in Poland, a referendum on such changes to the Constitution is permissible.

iv. Both, Ukraine and Poland, at the constitutional level enshrine provisions regarding restrictions on amendments to the constitutions.
v. The role of constitutional courts in amending the constitutions is different in Ukraine and Poland. The draft law on amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine only if there is a decision of the Constitutional Court of Ukraine regarding the compliance of the draft law with the requirements of Articles 157 and 158 of this Constitution, while there are no provisions in the constitutional legislation of Poland regarding the exercise of control over amendments to the Constitution by the Constitutional Tribunal.

At the same time, the research of the issues of making amendments to the Constitution of Ukraine and the Constitution of the Republic of Poland testified to the existence of a number of aspects not sufficiently represented in the theoretical coverage, on the basis of which it becomes possible to justify relevant practical actions in the field of modernisation of the constitutions of these countries. Therefore, it is justified and proposed to make changes to:

1) the Constitution of the Republic of Poland, which would regulate:
   – enshrining the prohibition of restrictions that: involve the cancellation or limitation of the rights and freedoms of a person and a citizen, or if the restrictions are aimed at eliminating independence or violating the territorial integrity of the Republic of Poland,
   – enshrining the prohibition on making changes to the Constitution not only during a state of emergency, but also during a state of war;
2) the Constitution of Ukraine, which would refer to establishing clear terms between:
   – introduction of the initiative and first reading in the parliament,
   – the first reading and adoption by the Verkhovna Rada of the draft law on amendments to the provisions of Chapters I, II or XII of the Constitution of Ukraine.

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Chapter 12. Constitutional and EU Conformity of the Evolution of Legal Regulation in the Field of Monetary Law

12.1. Introduction

This paper examines the constitutional and EU conformity of the evolution of legal regulation in the field of monetary law. The author embarks on a comprehensive study examining the legal evolution of two critical entities in the Czech Republic: The Czech National Bank and the Czech Financial Arbitrator. These institutions hold a unique status as sui generis administrative bodies and public law entities. The primary aim of this research is twofold. The constitutional and EU conformity of these entities must be assessed not only in terms of their *de lege lata* status, but also in light of the evolution of legal regulation and relevant amendments. Furthermore, the identification of legal problems, evaluation of legislative processes and examination of the judicial review of administrative decisions are essential elements of this assessment.

The author sets forth the following research objectives:

– Constitutional conformity. The paper scrutinises the historical development of legal norms governing the Czech National Bank and the Czech Financial Arbitrator. It assesses their alignment with constitutional principles and important EU requirements. These two entities were chosen for the analysis because they have a special status among the administrative authorities and similar entities are regulated in some way in all EU member states, including Poland.

- Position as administrative bodies sui generis: The author examines the distinctive features that set these entities apart from other administrative authorities. Their sui generis status warrants thorough examination.
- Judicial review: In addition to considering the legislation and its amendments, the review of their decisions is also examined from the perspective of the correct fulfilment of the constitutional requirement for the control of the executive power by the power of the judiciary.

The following hypotheses will be tested in the paper:

HYPOTHESIS 1: the Czech National Bank fulfils the role of an administrative authority in specific proceedings, ensuring full compliance with constitutional rules.

HYPOTHESIS 2: the Czech Financial Arbitrator functions as an administrative body in full conformity with both constitutional and EU rules.

HYPOTHESIS 3: the judicial review of administrative decisions of the Czech Financial Arbitrator and the Czech National Bank is established as fully compatible with the constitutional and other legal requirements for the judicial review of executive entities.

The author's aim is to contribute valuable insights to the legal discourse surrounding these pivotal financial institutions through rigorous analysis.

12.2. Constitutional Law in the Czech Republic and Its Development

The basis for the examination and examples in the following parts of the text (see below) will be the Constitution of the Czech Republic approved on 16 December 1993 and published in the Collection of Laws under No. 1/1993 Sb. with effect from 1 January 1993

(hereinafter referred to as the Constitution),[1] which is a fundamental, but not the only source of Czech constitutional law. Within the continental legal system, the source of constitutional law are such legal regulations, treaties or rulings of the Constitutional Court,[2] which contain rules of conduct of subjects of constitutional law in legal relations that are subject to regulation by Czech constitutional law. What does it mean in particular? In its penultimate Article 112(1), the Constitution defines the notion of the constitutional order of the Czech Republic. The constitutional order consists of this Constitution, the Charter of Fundamental Rights and Freedoms,[3] constitutional laws adopted pursuant to this Constitution and constitutional laws of the National Assembly of the Czechoslovak Republic, the Federal Assembly of the Czechoslovak Socialist Republic and the Czech National Council regulating the state borders of the Czech Republic and constitutional laws of the Czech National Council adopted after 6 June 1992.[4]

In contrast to the continental tradition, the Constitution of the Czech Republic does not directly contain a catalogue of fundamental human rights, and it is through the aforementioned Article 112(1) that it makes the Charter of Fundamental Rights and Freedoms part of the constitutional order (sometimes also a more narrowly defined part of the constitutional order, referred to as the Constitution with a lower-case letter).[5] Although this Charter of Fundamental Rights

[1] Of course, not only the contemporary wording of the relevant articles of the Constitution will be examined, but also the current version as amended.

[2] However, only rulings under Article 87(1)(a) and (b) of the Constitution by which the Constitutional Court decides to repeal laws or individual provisions thereof if they are contrary to the constitutional order, or to repeal other legislation or individual provisions thereof if they are contrary to the constitutional order or the law.

[3] Resolution of the Presidium of the Czech National Council of 16 December 1992 No. 2/1993 Sb. on the promulgation of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic (hereinafter referred to as the Charter of Fundamental Rights and Freedoms).

[4] These are Constitutional Acts of the Czech National Council No. 4/1993 Sb. of 15 December 1992 on measures related to the dissolution of the Czech and Slovak Federative Republic and No. 29/1993 Sb. of 22 December 1992 on certain other measures related to the dissolution of the Czech and Slovak Federative Republic.

[5] See: J. Wintr, *Principy českého ústavního práva*, Plzeň 2023, p. 13.

and Freedoms is not formally designated as a constitutional law, it must be treated as a constitutional law. In fact, the Czech Republic has a "dual" constitution (the Constitution + the Charter of Fundamental Rights and Freedoms).[6] Constitutional laws adopted under the Constitution are not only the actual amendments to the Constitution and the Charter of Fundamental Rights and Freedoms, but also "separate" regulations that do not amend the Constitution, such as Constitutional Law No. 110/1998 Sb. on the Security of the Czech Republic. To a certain extent, laws may also be considered as sources of constitutional law, e.g., election laws or the rules of procedure of the Houses of the Parliament of the Czech Republic.

The current constitutional law represents a kind of starting point for all branches of the Czech legal system, regardless of their nature.[7] Filip[8] states that Czech constitutional law did not emerge "out of thin air" on 1 January 1993, when the Constitution of the Czech Republic came into force. According to Filip, modern constitutional law follows a line of development that began in our territory as early as the revolutionary year 1848[9] and, after difficulties in the 1850s and 1860s, started its journey towards the present-day rule of law in 1867.[10] In view of the complicated development, Filip speaks of the continuity and discontinuity of constitutional law at the same time. On the one hand, our current constitutional system is based on the draft of the 1811 General Civil Code (ABGB), since by way of the 1920 Constitutional Charter of the Czechoslovak Republic it inherited many elements not only from it but also from the

[6] See: J. Hřebejk, [in:] A. Gerloch, J. Hřebejk, V. Zoubek, *Ústavní systém České republiky*, Plzeň 2022, p. 65.

[7] Cf. J. Filip, *Ústavní právo České republiky (Základní pojmy a instituty. Ústavní základy ČR)*, Brno 2011, p. 39.

[8] J. Filip, *Ústavní právo České republiky…*, *op. cit.*, p. 22.

[9] The history of the development of Polish constitutional law has been discussed by some authors even since 1791, see: M. Dobrowolski, D. Lis-Staranowicz, *(Im)permance of Polish Constitutionalism: in Search of an Optimal Vision of the State*, [in:] L. Csink, L. Trócsányi, *Comparative Constitutionalism in Central Europe. Analysis on Certain Central and Eastern European Countries*, Miskolc–Budapest 2022, p. 89.

[10] On the constitutional development, see: A. Gerloch, J. Hřebejk, V. Zoubek, *Ústavní systém České republiky*, *op. cit*., pp. 11 ff.

Austro-Hungarian ABGB. Continuity can therefore be seen not in the simple description of legal norms, but in the starting points and inspiration of the essential elements.[11] On the other hand, the radical changes in, for example, electoral, assembly, association or petition law compared to the previous period from 1948 to 1989 should be seen as a manifestation of discontinuity[12] One of the first major revisionist steps was the adoption of Constitutional Law No. 135/1989 Sb., which eliminated the leading role of the Communist Party of Czechoslovakia, which had been normalised until then. The same period saw the beginnings of work on the new Polish Constitution, which culminated in 1997.[13]

12.3. The Constitution and Its Amendments

The Constitution in the Czech Republic, as explained above with regard to its relationship with the Charter of Fundamental Rights and Freedoms, is a polylegal constitution.[14]

The Constitution of the Czech Republic itself, as a written constitution,[15] consists of a preamble and eight chapters, which successively deal with the basic provisions (Articles 1 to 14), the legislative power (Articles 15 to 53), the executive power (Articles 54 to 80), the judicial power (Articles 81 to 96), the Supreme Audit Office (Article 97), the Czech National Bank (Article 98), the territorial

[11] See: J. Broz, J. Chmel, *Pohled za oponu: studie o vzniku Ústavy České republiky a o kontextu její interpretace*, Praha 2017, pp. 28 ff; A. Gerloch, *Dělba moci v ústavě Československé republiky (1920) a v ústavě České republiky (komparace)*, "Acta Universitatis Carolinae. Iuridica" 1999, No. 1–2, p. 167.

[12] On the different conception of formal and material discontinuity, see: F. Weyr, *Soustava čs. práva státního*, Praha 1924, p. 56.

[13] See: B. Banaszak, *The Republic of Poland*, [in:] L. Besselink, P. Bovend'Eert, H. Broeksteeg, R. De Lange, W. Voermans (eds.), *Constitutional Law of the EU Member States*, Deventer 2014, p. 1248.

[14] For more details, see: P. Rychetský, [in:] P. Rychetský, T. Langášek, T. Herc, P. Mlsna *et al.*, *Ústava České republiky. Ústavní zákon o bezpečnosti České republiky. Komentář*, Praha 2015, p. 94.

[15] See: D. Grimm, *Types of Constitutions*, [in:] M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, p. 105.

self-government (Articles 99 to 105) and the transitional and final provisions (Articles 106 to 113). For further analysis, examples will be taken from Title One (where the conditions for additions and amendments to the Czech Constitution are dealt with right at the beginning in Article 9, whereas in Poland this area is dealt with systematically only in the penultimate part of the Polish Constitution[16] in Article 235), from Title Two (where qualified majority is regulated in Article 39) and from Title Six, where, similarly to the Polish Constitution but more briefly,[17] the Central Bank is regulated.

The Charter of Fundamental Rights and Freedoms is divided into six chapters: general provisions (Articles 1 to 4), human rights and fundamental freedoms (Articles 5 to 23), the rights of national and ethnic minorities (Articles 24 and 25), economic, social and cultural rights (Articles 26 to 35), the right to judicial and other legal protection (Articles 36 to 40) and common provisions (Articles 41 to 44). Part Five will be relevant for further interpretation with regard to the issue of judicial review of decisions of administrative authorities, in particular Article 36, which establishes the right to seek redress.[18]

As far as the possibility of amendments is concerned, the Czech Constitution and the Charter of Fundamental Rights and Freedoms, like the Polish Constitution,[19] are among the rigid ones.[20] In order to amend the Constitution or any other constitutional law, according to Article 39(4) of the Constitution, with regard to the bicameral Parliament of the Czech Republic, the consent of a three-fifths majority of all deputies (i.e., at least 120 votes out of 200) and a three-fifths majority of the senators present is required (here Article 39(4) applies). Article 39(1) of the Constitution, according

[16] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997 No. 78, item 483.

[17] See: Article 227 of the Polish Constitution.

[18] For more details, see: J. Kmec, [in:] Z. Kühn, J. Kratochvíl, J. Kmec, D. Kosař *et al.*, *Listina základních práv a svobod. Velký Komentář*, Praha 2022, p. 1263.

[19] On the qualified procedure for amending the Polish Constitution, see: B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, p. 1119.

[20] On similar principles within theories of constitutional law, see: A. Jakab, *European Constitutional Language*, Cambridge 2016, p. 9; K. Tuori, *European Constitutionalism*, Cambridge 2015, p. 15.

to which each chamber of the Parliament is able to deliberate with at least one third of its members present; the Senate has 81 senators; at least 27 senators must be present, and of these a three-fifths majority is then applied).[21] Nevertheless, it is possible to find authors who talk about the lack of rigidity of the Constitution.[22]

The rigidity of the Constitution is already guaranteed by Article 9(1), according to which the Constitution may be amended or changed only by constitutional laws. Moreover, the following Section of this article set out further restrictions, namely that alteration of the essential elements of the democratic rule of law is not permissible and that the interpretation of legal norms cannot justify the removal or undermining of the foundations of the democratic state. According to Rychetský,[23] this is one of the most important provisions of the Constitution, which establishes the principle of its rigidity and at the same time expresses the immutability or inviolability of the essential elements of the democratic rule of law and the protection of its democratic foundations by the legislative, executive, and judicial powers. The material core of the Constitution, thus expressed, is granted a privileged status and, above all, special protection against possible attempts to change it by normative activity or to endanger it by other interventions of the state power. The content of this provision therefore requires a demanding interpretation not only in terms of the terms used (such as the Constitution, the essential elements of a democratic state governed by the rule of law or the foundations of a democratic state), but also in terms of their broader content.

[21] According to Article 235(4) of the Polish Constitution, a law amending the Polish Constitution shall be adopted by the Polish Sejm by a majority of at least two-thirds of the votes in the presence of at least half of the statutory number of deputies and by the Polish Senate by an absolute majority of votes in the presence of at least half of the statutory number of senators.

[22] J. Syllová, *Souvislosti a následky nedostatečné rigidity Ústavy ČR*, [in:] B. Dančák, V. Šimíček (eds.), *Aktuálnost změn Ústavy ČR*, Brno 1999, pp. 32 ff. The author mentions several reformation periods, starting with the zero period, which took place at the time of the constitution's creation, through the first reformation period from 1993 to 1996, which was critical of the Constitution and the constitutional order in general, to the next period.

[23] See: P. Rychetský, *op. cit*., p. 93.

Of particular note in the context of Article 9(1) of the Constitution is the choice of words and the distinction between "amendments" and "additions" to the Constitution by constitutional laws. According to Rychetský, an amendment to the Constitution undoubtedly means a change to the existing text of a part of the constitutional order by inserting a new text to replace the existing regulation. An amendment to the Constitution, on the other hand, implies the addition of a supplementary provision to the existing text. In addition to the prescribed procedure and form, both cases are subject to the limiting restriction in paragraph 2, which prohibits an amendment or addition to the Constitution from affecting the essential elements of a democratic state governed by the rule of law.

Due to the more complex procedure of adopting constitutional laws, amendments or additions to the Constitution are not frequent. The original text of the Constitution has been amended only nine times since its adoption, with the most significant changes occurring in the Constitution of the Czech Republic: No. 300/2000 Sb. (in connection with the Czech Republic's admission to NATO); No. 395/2001 Sb. (the so-called Euro Amendment to the Constitution enabling the Czech Republic's accession to the European Union); No. 319/2009 Sb. (addition of a new paragraph 2 to Article 35, allowing for another method of early dissolution of the Chamber of Deputies); No. 71/2012 Sb. (changing the method of election of the President to direct election). This went some way to redressing criticisms of the Constitution that had been voiced since the late 1990s. According to Filip,[24] after the first five to seven years, the Constitution proved its viability, but it had a number of shortcomings that required amending or supplementing the Constitution. Filip summarised the contemporary reservations about the Constitution into a series of points, including the absence of provisions for direct democracy at the time, the Constitution's lack of preparedness for

[24] See: J. Filip, *Ústava ČR po pěti letech – základní východiska*, [in:] V. Šimíček (ed.), *Ústava České republiky po pěti letech: sborník z conference*, Brno 1998; B. Dančák, V. Šimíček (eds.), *Aktuality of the Amendments to the Constitution of the Czech Republic*, Brno 1999, pp. 9, 15 ff.; J. Filip, *Obecné poznámky k aktuálnosti změn Ústavy ČR*, [in:] B. Dančák, V. Šimíček (eds.), *Aktuálnost změn Ústavy ČR*, Brno 1999, pp. 15 ff.

future EU accession and foreign relations in general at the turn of the millennium,[25] the unresolved issues of local government, the lack of implementation of the Constitution due to, for example, the absence of a civil service law or the establishment of the Supreme Administrative Court. However, the conclusions led to the fact that the Constitution at that time required discussion. Above all, it should have been a discussion conducted in professional forums. Only after a broader consensus had been reached should amendments be drafted, but only those that were really necessary. The quoted text was published at a time when amendments to the Constitution were on the agenda, whether or not they were actually adopted later (see below). Filip appealed for an answer to the question whether the proposed amendments to the Constitution are legitimate (inter alia, with reference to the mandate of the voters to implement them, i.e., to achieve the necessary level of political culture) and necessary (the necessity being determined by objective circumstances arising from changes in social conditions, e.g., the Czech Republic's accession to NATO). Filip does not stop at these two requirements, however, and adds that it is also necessary to ask whether the time is right for the proposed changes at the time of their submission, i.e., the chance of their general positive acceptance. Filip warned against the method of amending the Constitution in the form of reactions to specific actions of a specific person in specific situations, which is not only contrary to the required principles, but also inconsistent with the general interpretation of the issue of law.[26] Philip also recognised

[25] For more details, see: J. Malenovský, *Aktuálnost změn "mezinárodních článků" Ústavy*, [in:] B. Dančák, V. Šimíček (eds.), *Aktuálnost změn Ústavy ČR*, Brno 1999, pp. 56 ff.

[26] The validity of such a fear is best illustrated by the practical case of Pl. ÚS 27/09, in which: "the Constitutional Court concluded that a constitutional law adopted ad hoc, which does not change or supplement the constitutional order, but suspends and replaces it for one particular case with a unique procedure specific to such a single case, is neither a permissible supplement nor an amendment to the Constitution, but an impermissible disturbance or circumvention of the valid constitutional order. In this ruling, the Constitutional Court found the contested Constitution to be inconsistent with the Constitution. 159/2009 Sb. with the imperative of the immutability of the essential elements of a democratic state governed by the rule of law under Article 9(2), both in the impermissible

that the Constitution is a means of resolving conflicts, but it must also be a means of preventing future conflicts.[27]

Despite significant substantive and formal limitations, attempts to amend the Constitution and the Charter have not been, and are not now, as rare as one might assume on the basis of the above. However, in terms of actual amendments adopted, this is not a staggering number.[28] In fact, the Constitution itself has been directly amended nine times,[29] namely by Constitutional Acts: No. 347/1997 Sb.; No. 300/2000 Sb. (in connection with the Czech Republic's admission to NATO); No. 395/2001 Sb. (the so-called Euro Amendment to the Constitution enabling the Czech Republic's accession to the European Union); No. 448/2001 Sb., No. 515/2002 Sb., No. 319/2009 Coll., No. 71/2012 Sb. (change of the method of election of the President to direct election); No. 98/2013 Sb. and most recently No. 87/2024 Sb. by Constitutional Act amending certain matters relating to the elections to the Parliament of the Czech Republic, which will not come into force until 1 January 2026. The amendment by Constitutional Act No. 448/2001 Sb. affecting the Czech National Bank will be further examined. The Charter has been amended in

violation of the applicable constitutional order and in the use of a norm lacking one of the basic material features of a law, which is generality. The Constitutional Court also found a violation of the above-mentioned Section in the circumvention of one of the fundamental constitutional principles of the prohibition of retroactivity in conjunction with the principles of the protection of the legitimate trust of citizens in the law and the right to vote freely, i.e. – among other things – the right to vote with knowledge of the conditions of the formation of the democratic public authorities resulting from the elections, including knowledge of their term of office. If a one-off constitutional law shortened the electoral term of the Chamber of Deputies in a way that was not foreseen by the Constitution at the time of the elections, and if, outside the framework of the procedure prescribed by the Constitution, a completely different procedure was laid down for this single case, the Constitutional Court concluded that there had been a violation of the constitutional prohibition of retroactive legal norms. The Constitutional Court would consider such a procedure to be constitutionally permissible only in an exceptional situation justified by public interest, such as circumstances of a state of war or natural disaster". See: P. Rychetský, *op. cit*., p. 104.

[27] J. Filip, *Obecné poznámky k aktuálnosti změn Ústavy ČR*, *op. cit*., pp. 25 ff.

[28] Even the Polish Constitution has not escaped amendments, see, e.g.: Journal of Laws of 2001 No. 28, item 319.

[29] Polish Constitution only twice.

this way only twice, namely by Constitutional Acts No. 162/1998 Sb. and No. 295/2021 Sb., the latter being an addition to Article 6 of the Constitution by the express provision of the right to defend one's own life or the life of another person, even with a weapon, under conditions laid down by law.

According to Rychetský,[30] in view of the poly legal nature of the constitutional order in the Czech Republic, the adoption of a separate constitutional law that extends the constitutional order and for which the same limits apply as for direct constitutional amendment must also be considered an indirect amendment to the Constitution or an addition to the Constitution. Article 9(1) of the Constitution provides only for the reservation of a constitutional law in relation to constitutional amendments. However, it no longer includes the power to make constitutional laws, which is part of Parliament's legislative power under Article 15(1), and therefore, according to Rychetsky, their content cannot be limited to direct amendments to the Constitution. Given that the Constitution and other constitutional laws have the same legal force, any constitutional law may have the effect of amending or supplementing the Constitution or another constitutional law even indirectly, by acting as *lex specialis* in relation to them. In this respect, reference may be made, for example, to Constitutional Act No. 110/1998 Sb. on the Security of the Czech Republic, which in its Article 8 provides for special rules of the legislative process during a state of national emergency or a state of war and in Article 10 for the possibility of extending the electoral period. In some cases, according to Rychetský, the Constitution explicitly provides for such legislative constitutional steps. As an example, Rychetský cites the constitutional law on the referendum under Article 2(2) of the Constitution (implemented in practice as Constitutional Act No. 515/2002 Sb. of 14 November 2002 on the referendum on the accession of the Czech Republic to the European Union and on the amendment of Constitutional Act No. 1/1993 Sb., the Constitution of the Czech Republic, as amended).

However, the Constitution of the Czech Republic in Article 9, as indicated above, contains a regulation of the content limits of

[30] See: P. Rychetský, *op. cit*., p. 97.

constitutional laws. How is this achieved by the Constitution? By the fact that the Constitution itself defines its immutable parts. Such provisions, according to Rychetsky, are often referred to as the clause of immutability or eternity and are given a supra-constitutional character by parts of legal theory.[31] Their purpose is to protect the material core of the constitution, i.e., the fundamental principles that form the essence of a particular constitution. Similar provisions can be found in a number of constitutions of democratic states, where, however, the principle of immutability and inviolability is usually linked to explicit enumerated parts of the constitution or defined constitutional principles.[32] The inadmissibility of changing the substantive core of the Constitution is determined only in legal terms, not in factual terms. The inadmissibility of an amendment to the substantive core of the Constitution cannot guarantee that such an amendment will not occur in fact; the content of such inadmissibility is that any amendment cannot be given validity within the existing constitutional system. In the conditions of a democratic state governed by the rule of law, such a change would (or could) lead to a denial of the fundamental principles on which the legal order is based and which the Czech Constitution mentions in its preamble. To admit otherwise would in effect mean a threat to the existence or preservation of the rule of law and could ultimately

[31] Ibidem, p. 98.

[32] As an example, Rychetský cites: "the Basic Law of the Federal Republic of Germany, which provides in Article 79(3) that an amendment to this Basic Law which concerns the division of the federation into countries in the course of legislation or the principles set out in Articles 1 and 20 is inadmissible. Article 1 postulates human dignity as a fundamental value, and Article 20 lists the fundamental constitutional values (the principles of a democratic and social state, the sovereignty of the people, the separation of powers, the binding of State power by law and the right of resistance). Similarly, the constitutions of France (Article 89) and Italy (Article 139) contain an explicit prohibition on changing the republican form of government, while the constitutions of Greece (Article 110) and Portugal (Article 288) contain a relatively very detailed list of constitutional clauses to which they attribute a perpetual, inviolable and immutable character. These include the form of government, fundamental human rights and freedoms, the basic principles of the democratic organisation and exercise of State power, the principles of local government and, in the case of Portugal, the inviolability of the institution of the protection of constitutionality (the constitutional judiciary)."

lead to the abolition of the Constitution. Thus, far from being understood as merely declaratory (without immediate effect and enforceability), Article 9(2) of the Constitution cannot be understood as a constitutional instruction (command) binding all public authorities to protect the material core of the Constitution. This command also applies to the power of the Parliament of the Czech Republic to enact constitutional laws. In fact, it is not possible to change the essential elements of a democratic state governed by the rule of law even if all the formal and procedural requirements for the adoption of a constitutional law are observed. The duty to ensure that such a consequence does not occur lies primarily with Parliament itself, which should identify and judge as unacceptable a draft constitutional law that contravenes the material core of the Constitution. If such a "defective" constitutional law is nevertheless adopted, its review by the Constitutional Court is an ultima ratio. In the context of review before the Czech Constitutional Court, the protection of the substantive core can be achieved in two ways. The first is by way of a binding interpretation of this constitutional law, which will prevent its violation. If the first way is not possible, the second option is to repeal such a law. Both cases can be encountered in the Czech constitutional judiciary.[33]

12.4. Constitutional Conformity of the Czech National Bank's Position

12.4.1. LEGAL REGULATION OF THE CENTRAL BANK AND ITS CHANGES

The Czech National Bank is enshrined in Article 98 of the Constitution. In contrast to Poland, where the Constitution contains

[33] See the Constitutional Court rulings cited by Rychetsky Pl. ÚS 36/01 and Pl. ÚS 27/09. It is worth recalling here that Pavel Rychetský was President of the Constitutional Court of the Czech Republic from August 2003 until August 2023 and is one of the greatest personalities of Czech constitutional law.

relatively detailed provisions in Article 227,[34] the Czech legislator limited itself to a rather subtle expression in Article 98 of the Czech Constitution. Nevertheless, this did not prevent the amendment of the Constitution (see below).

The current version of Title Six of the Constitution,[35] which contains a single article, reads as follows:

> *Article 98:*
> *(1) The Czech National Bank is the central bank of the state. The main objective of its activities is to safeguard price*

[34] Article 227. The National Bank of Poland:
(1) The National Bank of Poland is the central bank of the state. It has the exclusive right to issue money and to determine and implement monetary policy. The National Bank of Poland is responsible for the value of Polish money.
(2) The bodies of the National Bank of Poland are: the President of the National Bank of Poland, the Monetary Policy Council and the Management Board of the National Bank of Poland.
(3) The President of the National Bank of Poland is appointed by the Sejm on the proposal of the President of the Republic for a term of 6 years.
(4) The President of the National Bank of Poland may not belong to a political party, a trade union or conduct public activities incompatible with the dignity of his office.
(5) The Monetary Policy Council consists of the President of the National Bank of Poland as Chairman and persons distinguished by their knowledge in the field of finance, appointed for 6 years in equal numbers by the President of the Republic, the Sejm and the Senate.
(6) The Monetary Policy Council establishes the assumptions of the monetary policy annually and submits them to the Sejm for information at the same time as the Council of Ministers submits the draft budget law. The Monetary Policy Council shall, within 5 months of the end of the fiscal year, submit to the Sejm a report on the implementation of the monetary policy assumptions.
(7) The organisation and principles of operation of the National Bank of Poland, as well as the detailed principles for the appointment and dismissal of its bodies, shall be determined by an Act.

[35] Thus, as amended by Constitutional Act No. 448/2001 Sb. of 27 November 2001 amending Constitutional Act No. 1/1993 Sb., the Constitution of the Czech Republic, as amended by Constitutional Act No. 347/1997 Sb., Constitutional Act No. 300/2000 Sb. and Constitutional Act No. 395/2001 Sb.

stability; its activities may be interfered with only on the basis of law.

(2) The status, powers and other details shall be determined by law.

While the Polish Constitution specifies the position and role of the central bank in the state, regulates its institutions in relative detail and only in other details refers to a special law,[36] the Czech Constitution is more concise and entrusts much more to ordinary (not constitutional) law. For example, the Czech Constitution does not even list the bodies of the Czech National Bank, leaving their number, names and rules on how the members of these bodies are appointed to the law.[37] Nevertheless, in the case of Article 98 of the Constitution of the Czech Republic, this is an important provision whose importance has been demonstrated in practice, particularly in relation to the independence of the central bank from the government, which can be inferred from the first paragraph (see below).

> *The Czech National Bank, together with the Supreme Audit Office (which is also regulated in a separate chapter of the Constitution under Article 97), are among the only two specialised institutions enshrined in the Constitution that are endowed with audit powers. The constitution of such bodies after the establishment of the independent Czech Republic fits into the broader global phenomenon of delegation of powers to expert authorities. According to some authors, this even establishes a fourth power alongside the traditional state powers (legislative, executive and judicial), upsetting the usual understanding of control and separation of powers.*[38]

[36] Act of 29 August 1997 on the National Bank of Poland, Journal of Laws of 2022, item 2025.

[37] Act No. 21/1993 Sb. on the Czech National Bank, as amended.

[38] F. Vibert, *Rise of the unelected*, Cambridge 2007, p. 55.

While the existence of a central bank on our territory is not new, its path to anchorage in the basic regulations of the state has been more complicated. The first central bank to operate in the territory of the now independent Czech Republic was the Privileged Austrian National Bank (Privilegierte Österreichische National-Zettel-Bank), established in Vienna by an imperial patent of 1816. The reason for the establishment of a largely independent bank was the desire to stabilise the currency even then,[39] which was in the throes of government monetary reforms necessitated by Austria's costly participation in the Napoleonic Wars. After the changes in state law in 1867, the Privileged Austrian National Bank was replaced by the Austro-Hungarian Bank, established by a law of 1878. However, it was still not and could not be a Czechoslovak bank, as the Czechoslovak state had to wait several years after the establishment of the Republic on 28 October 1918 for its own central bank,[40] although the formal establishment of the National Bank of Czechoslovakia was already foreseen by Act No. 347/1920 Sb.[41] In the meantime, the monetary separation from the Austro-Hungarian Empire and other urgent tasks were dealt with by the Banking Committee of the Ministry of Finance. Although it was then finally the central bank of Czechoslovakia, it was enshrined only by law, which stipulated that the Bank Board consisted of a governor, appointed for five years by the president on the proposal of the government, and 9 to 11 other members, most of whom were elected by the general meeting, since the bank, as a joint-stock company, was two-thirds of it in private hands, and the other members of the Board were appointed by the president.

[39] J. Blažek, *Rozpočtová nerovnováha v ekonomické teorii (Pár poznámek k rozpočtové odpovědnosti)*, [in:] V. Šimíček (ed.), *Finanční ústava*, Brno 2013, p. 18.

[40] When, due to the lack of time, the so-called provisional constitution was adopted first in the form of Act No. 37/1918 Sb. of 13 November 1918 on the Provisional Constitution and the National Assembly and only a year and a half later in the form of Act No. 121/1920 Sb. of 29 February 1920, which established the constitutional charter of the Czechoslovak Republic.

[41] The National Bank of Czechoslovakia had to be renamed the National Bank for Bohemia and Moravia between 1939 and 1945 due to the circumstances associated with the Second World War and the Protectorate, but after the end of the war it reverted to its original name.

However, the road to the constitutional anchoring of the central bank in Czechoslovakia in the post-war period was far from over. Even the 1948 Constitution[42] did not include the central bank (or any mention of it), even though a whole (rather extensive) Chapter Eight of the then Constitution was devoted to economic management and a unified economic plan. The independence of the central bank from the government was out of the question. The Bank's shares were gradually nationalised and those members of the Board who had hitherto been appointed by the General Assembly were reappointed by the Government. This was one of the many steps towards the forthcoming transition of Czechoslovakia to a planned economy. In 1950, the National Bank of Czechoslovakia ceased its previous activities altogether and was replaced by the State Bank of Czechoslovakia.[43] In doing so, the State Bank of Czechoslovakia had already lost its independence altogether, having fulfilled the dual role of an issuing and commercial bank. It was now headed not by a governor but by a general director who was personally responsible to the Minister of Finance. The Minister of Finance also appointed and dismissed the Director-General of the Bank.

Even the subsequent 1960 Constitution[44] did not regulate the Central Bank (now the State Bank of Czechoslovakia) in any way, although the definition of the social order in Title One of this Constitution briefly mentions a planned socialist economy. From 1965[45] onwards, with the new law on the State Bank of Czechoslovakia, the appointment and dismissal of the General Director was transferred directly to the government. The independence of the central bank was thus *de facto* and *de jure* destroyed and the bank was already completely subordinated to the state.

For the first time, the State Bank of Czechoslovakia received the attention it deserved at the level of constitutional law after the

[42] In this case, it was already Constitutional Act No. 150/1948 Sb. of 9 May 1948, the Constitution of the Czechoslovak Republic.

[43] See: Act No. 31/1950 Sb. of 9 March 1950 on the State Bank of Czechoslovakia.

[44] Constitutional Act No. 100/1960 Sb. of 11 July 1960, Constitution of the Czechoslovak Socialist Republic.

[45] See: Act No. 117/1965 Sb. of 10 November 1965 on the State Bank of Czechoslovakia.

federalisation of Czechoslovakia in 1968. It was still not mentioned directly in the Constitution as such, but "only" in Constitutional Law No. 143/1968 of 27 October 1968 on the Czechoslovak Federation. This constitutional law mentioned the State Bank of Czechoslovakia in two places, in Article 14[46] and in Article 42.[47] However, this constitutional law did not refer to the State Bank of Czechoslovakia

[46] Article 14:
(1) The Czechoslovak currency shall be regulated by the Federal Assembly by law.
(2) Issuing activity and its control shall be vested in the monetary banking system, which shall consist of the Federal Bank as the supreme monetary authority and the national banks of the two republics; these banks shall be legal persons.
(3) The management of the Federal Bank shall be vested in a collective body headed by the Governor; this body shall consist of an equal number of citizens of the Czech Socialist Republic and the Slovak Socialist Republic.
(4) The competence of the Czechoslovak Socialist Republic includes:
(a) issue Czechoslovak banknotes,
(b) to establish the monetary, foreign exchange and credit policy approach,
(c) establish the principles and scope of the issue and monitor compliance with them,
(d) to determine the instruments for the implementation of a single monetary, foreign exchange and credit policy,
(e) determine the extent of foreign exchange reserves and determine the manner of their management,
(f) to determine the framework of foreign exchange operations and to determine the exchange rate of the Czechoslovak currency.
(5) The status of the banks referred to in Section 2, their relations and activities shall be regulated by an Act of the Federal Assembly.

[47] Article 42:
(1) In the case where the prohibition of majoritisation applies under this Constitutional Act, deputies elected in the Czech Socialist Republic and deputies elected in the Slovak Socialist Republic shall vote separately in the House of Peoples. A resolution shall be adopted if a majority of all deputies elected in the Czech Socialist Republic and a majority of all deputies elected in the Slovak Socialist Republic vote in favour of it, unless this Constitutional Law requires a qualified majority (Article 41).
(2) The prohibition of majoritisation applies to the approval of:
[…]
(i) draft laws regulating the Czechoslovak currency, the status of the Federal Issue Bank and the national issue banks of the two republics, their relations and activities, and draft laws on the matters referred to in Article 14(4).

by its full name, but referred to it as a federal bank or a federal bank of issue. The new Act on the State Bank of Czechoslovakia was then based on the above-mentioned constitutional law as the third law with the same name. According to Section 8 of this Act, the Bank carried out its activities through its head office in Prague, the main institute for the Czech Socialist Republic in Prague, the main institute for the Slovak Socialist Republic in Bratislava,[48] branches or other organisational units. The Bank was newly managed by a chairman, whose appointment was returned to the President of the Republic (however, the appointment was made on the proposal of the Prime Minister). This law, with one minor amendment, lasted until 1989, when it was replaced by the fourth law on the State Bank of Czechoslovakia[49] shortly before the Velvet Revolution. The bank remains headed by a chairman, but now appointed by the president on the proposal of the government (not just its chairman).

Social changes and the transition to democracy were reflected in the position of the central bank in 1992 in Constitutional Act No. 556/1990 Sb. of 12 December 1990 amending Constitutional Act No. 143/1968 Sb. on the Czechoslovak Federation. Among other substantive changes, Article 14 was amended, Section 2 of which, after amendment, read:

> *The central bank in the Czech and Slovak Federative Republic shall be the State Bank of Czechoslovakia, which shall establish and apply a uniform monetary policy. The State Bank of Czechoslovakia shall include the Central Office of the State Bank of Czechoslovakia for the Czech Republic and the Central Office of the State Bank of Czechoslovakia for the Slovak Republic. The State Bank of Czechoslovakia shall be governed by a Bank Board consisting of the Governor, two Vice-Governors, one of whom shall be a citizen of the Czech Republic and the other a citizen of the Slovak*

[48] Until then, the Bratislava regional institute became the second (formally equivalent) main institute of the bank next to the Praha one.

[49] Act No. 130/1989 Sb. of 15 November 1989 on the State Bank of Czechoslovakia.

> *Republic, and an equal number of representatives of the headquarters of the State Bank of Czechoslovakia for the Czech Republic and for the Slovak Republic. If the Governor is a citizen of the Czech Republic, the next Governor shall be a citizen of the Slovak Republic and vice versa.*

A new third Section was added, according to which:

> *the status and legal relations of the State Bank of Czechoslovakia and its organs and its relationship to other banks shall be determined by an Act of the Federal Assembly. The status and legal relations of other banks and savings banks shall be determined by an Act of the Federal Assembly.*

Thus, after more than sixty years[50] the management of the Central Bank returned to the hands of the Bank Board as a collective body headed by the Governor. The bank also gradually regained its lost independence from the state or the government

The amendment to the constitutional law was followed by another, this time the last one, the Act on the State Bank of Czechoslovakia[51] No. 22/1992 Sb. of 20 December 1991 on the State Bank of Czechoslovakia, which had a very lonely life indeed. The law came into force on 20 January 1992 and was only effective from 1 February 1992 to 31 December 1992. As of 1 January, Czechoslovakia was divided into two separate states, and this necessitated a change in the central banking system. In the Czech Republic the Czech National Bank (CNB) became the successor of the State Bank of Czechoslovakia and in Slovakia the National Bank of Slovakia (NBS).[52] The existing Constitution, issued in 1993 as the very first regulation of the new

[50] The National Bank of Czechoslovakia was modelled on the so called "first republican" National Bank of Czechoslovakia (est. 1920).

[51] Act No. 22/1992 Sb. of 20 December 1991 on the State Bank of Czechoslovakia.

[52] The transfer of rights and obligations from the State Bank of Czechoslovakia to the Czech National Bank was confirmed by Resolution III. ÚS 183/97. See also: Ľ. Majerčík, [in:] P. Rychetský, T. Langášek, T. Herc, P. Mlsna *et al.*, *Ústava České republiky. Ústavní zákon o bezpečnosti České republiky. Komentář*, Praha 2015, p. 1036.

state, and the Act No. 6/1993 Sb. on the Czech National Bank, which is still in force today, with a number of amendments, came into force.

12.4.2. THE IMPORTANCE OF THE CONSTITUTIONAL ANCHORING OF THE CENTRAL BANK IN THE CONSTITUTION ON THE EXAMPLE OF THE RULING OF THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC

In the context of the discussion of the constitutional anchoring of the central bank, the definition of the position of the Czech National Bank in the area of monetary and price policy cannot be omitted, especially from the perspective of constitutional principles or the constitutionality of the measures taken. The basic framework for the functioning of the Czech National Bank is enshrined in Title Six of the Constitution, and the Constitution empowers the Czech National Bank Act to set out further details.

As mentioned above, Article 98 of the Constitution, which regulates the Czech National Bank, has been amended in the past. In its current form, it sets price stability as the main (but not the only) objective of the central bank. Until the end of 2001, the original version of Article 98 of the Constitution formulated the main objective of the CNB as currency stability. Why was it changed?

The Constitution of the Czech Republic, as amended in 1992, stipulated the Czech National Bank's main objective in Article 98 to ensure monetary stability. This objective was (and in fact had to be) amended as part of the accession negotiations to the European Communities. The European System of Central Banks, on the basis of Article 105 of the Treaty establishing the European Communities, established the obligation to take care of price stability. A constitutionally compliant amendment to the Constitution itself and to Section 2 of the Czech National Bank Act was therefore submitted to the Czech legislators.[53] However, the legislative process was somewhat stalled. While the amendments to the Czech National

[53] PS 1998-2002 tisk 541.

Bank Act were adopted by the Chamber of Deputies,[54] no changes to the Constitution were made. This, however, created an unconstitutional situation where the objective defined in the Constitution did not coincide with the objective defined in the Act, and the wording in the Constitution was, according to the Constitutional Court of the Czech Republic, broader than the Act.[55] The situation that arose alarmed many experts and politicians and led the then President of the Republic, Václav Havel, to file a motion to repeal the incriminated provisions of the Czech National Bank Act. Far from being the main target of the Czech National Bank, other interventions were also concerned, bringing actual or potential threats or even limitations to the independence of the central bank. The Constitutional Court in its ruling Pl. ÚS 59/2000 (subsequently published in the Collection of Laws under No. 278/2001) stated that:

> *the constitutional content of the central bank's position can be deduced directly from the Constitution of the Czech Republic itself. The legislator, empowered to regulate the details, cannot go beyond this constitutional content. There is no dispute that the activities of the Czech National Bank may be interfered with by law, but that law must not contradict the content of the Bank's main objective.*

In the reasons for the ruling, the Constitutional Court further explained the position of the CNB within the separation of powers in the state and the need to protect its independent status as a constitutional principle. The unitary result was achieved only after the intervention of the Constitutional Court, which annulled the problematic provisions, including the restrictive first sentence of Section 2 of the CNB Act. The originally intended result of changing the main objective was finally achieved by correctly and successfully restating first the Constitution and then Section 2 of the Czech National Bank Act to its present form. Thus, Article 98 of the Constitution,

[54] See also: Ľ. Majerčík, *op. cit*., p. 1041.
[55] Pl. ÚS 59/2000.

together with Section 2 of the Czech National Bank Act, imposes a *de lege lata* obligation on the central bank to ensure price stability.

The following overview[56] illustrates the challenges faced by legislators in achieving their objective, as well as the impact of time and change, including the Czech Republic's membership in the European Union.[57]

The evolution of the language employed in Section 2 of Act No. 21/1992 Sb. on the Czech National Bank:

1. Paragraph 2, as amended until 31 December 2000 (until Amendment No. 442/2000 Sb.):

   The main objective of the Czech National Bank is to ensure the stability of the Czech currency. *To this end, the Czech National Bank:*

   (a) determines monetary policy;

   (b) issue banknotes and coins;

   (c) manage the circulation of money, payment and settlement of banks and ensure their smoothness and economy;

   (d) supervise the conduct of banking activities and ensure the safe functioning and efficient development of the banking system in the Czech Republic;

   (e) carry out other activities under this Act and under special laws.

2. Paragraph 2, sections 1 and 2, letter a) as amended until 3 August 2001 (until amendment No. 278/2001 Sb.[58]):

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[56] This is not a list of all amendments to Section 2 of the Czech National Bank Act, which contains several paragraphs that have been amended. However, these amendments are not directly related to the main focus of this text.

[57] On monetary law in the European context, see also: P. Mrkývka, *Finanční právo v evropském kontextu*, [in:] *Pocta prof. JUDr. Milanu Bakešovi, DrSc., k 70. narozeninám*, Kolektiv, Praha 2009, p. 275.

[58] Constitutional Court ruling published as No. 90/22 Sb. NU 249 and No. 278/2001 Sb.:

On behalf of the Czech Republic: On 20 June 2001, the Constitutional Court ruled in plenary session on the President of the Republic's motion to repeal Act No. 6/1993 Sb. on the Czech National Bank, as amended by Acts No. 60/1993 Sb., No. 15/1998 Sb. and No. 442/2000 Sb., in Section 1(3) in the words 'and by special legislation 1)', Section 2(1), first sentence, Section 2(2)(e) in the words 'and by special legislation 1)', Section 5(2)(b) in the words 'for activities carried out in the

(1) **The main objective of the Czech National Bank is to ensure price stability.** *Insofar as its main objective is not affected, the Czech National Bank shall support the general economic policy of the Government leading to sustainable economic growth. The Czech National Bank shall act in accordance with the principle of an open market economy.*

(2) In accordance with its main objective, the Czech National Bank: (a) determine monetary policy […].

3. Paragraph 2, sections 1 and 2, letter a) as amended until 30 April 2002 (until amendment No. 127/2002 Sb.):

(1) **Insofar as its main objective is not affected, the Czech National Bank shall support the general economic policy of the Government leading to sustainable economic growth.** *The Czech National Bank shall act in accordance with the principle of an open market economy.*

(2) In accordance with its main objective, the Czech National Bank: (a) determine monetary policy […].

4. Paragraph 2(1) and (2)(a) as amended until 16 August 2013 (until Amendment No. 227/2013 Sb.):

(1) **The main objective of the Czech National Bank's activities is to ensure price stability.** *Insofar as its main objective is not affected, the Czech National Bank shall support the general economic policy of the Government leading to sustainable economic growth. The Czech National Bank shall act in accordance with the principle of an open market economy.*

(2) In accordance with its main objective, the Czech National Bank: (a) determine monetary policy […].

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course of securing the main objective' and in the words 'raws up a draft operating and investment budget', Section 6(3), Section 35(a) and Section 47(1) to (4),

like this:

The provisions of Section 2(1), first sentence, Section 5(2)(b), in the words 'for the activities carried out in securing the main objective' and in the words 'and draws up the draft operating and investment budget', Section 6(3), Section 35(a) and Section 47(2) to (4) of Act No. 6/1993 Sb. on the Czech National Bank, as amended by Act No. 442/2000 Sb., are hereby repealed as of the date of publication of this award in the Collection of Laws. The remainder of the application is dismissed.

5. Paragraph 2, sections 1 and 2, letter a) as amended until 31 July 2021 (until amendment No. 219/2021 Sb.):
   (1) **The main objective of the Czech National Bank's activities is to ensure price stability.** *The Czech National Bank also takes care of financial stability and the safe functioning of the financial system in the Czech Republic. Insofar as its main objective is not affected, the Czech National Bank shall support the general economic policy of the Government leading to sustainable economic growth and the general economic policies in the European Union with a view to contributing to the achievement of the objectives of the European Union. The Czech National Bank shall act in accordance with the principle of an open market economy.*
   (2) The Czech National Bank shall perform the following tasks: (a) determine monetary policy […].
6. Paragraph 2(1) and (2)(a) as amended *de lege lata*:
   (1) **The main objective of the Czech National Bank's activities is to ensure price stability.** *The Czech National Bank also takes care of financial stability and the safe functioning of the financial system in the Czech Republic. Insofar as its main objective is not affected, the Czech National Bank shall support the general economic policy of the Government leading to sustainable economic growth and the general economic policies in the European Union with a view to contributing to the achievement of the objectives of the European Union. The Czech National Bank shall act in accordance with the principle of an open market economy.*
   (2) The Czech National Bank shall perform the following tasks: (a) determine and implement monetary policy […].

The amendment to the Czech National Bank Act under discussion, part of which was annulled by the Constitutional Court, contained more problematic provisions.[59] One of the limitations on the independence of the central bank was that the Board was

[59] See also: M. Karfíková, *Centrální banka a její zakotvení v právním řádu České republiky*, [in:] J. Kudrna (ed.), *Ústava v kontextu společenských změn. (K 30. výročí jejího přijetí)*, Praha 2022, p. 267.

to be entitled to approve independently only part of the budget, namely only the budget for activities carried out in pursuit of the main objective of the Czech National Bank. This restriction was added to the provisions of Section 5(2)(b) and Section 47(1) of the Czech National Bank Act. The Bank Board, as the governing body of the central bank, originally approved the entire budget of the Czech National Bank. However, after the amendment, in the case of the operating and investment budget, the Bank Board was only to be authorised to draw up the draft budget. The amendment thus removed from the Bank Board the power to decide on one part of the budget, while entrusting this power to the Chamber of Deputies. This could have significantly jeopardised the fulfilment of the central bank's main objective as defined in the Constitution. There is no precise line between the two budgets, since the operating and investment budgets also include the financing of a number of important activities of the CNB that are essential to the realisation of the main objective, such as the preparation of monetary analyses, the issue of banknotes and coins, transactions with banks and cash management. Such a restriction would be contrary to the requirement of the independence of the CNB in pursuing its objective, which is also expressed by the inclusion of the CNB in a separate title of the Constitution outside the legislative and executive branches. The Constitution therefore made the Czech National Bank a special executive body sui generis with a precisely defined sphere of competence. Intervention by other bodies would render the Bank unable to properly fulfil this objective. Under Article 98 of the Constitution, although further details may be laid down by law and the central bank's activities may be interfered with, this is not in such a way as to negate the position of the Czech National Bank. This attempt to limit the independence of the central bank in favour of the legislature was removed by the Constitutional Court.

Another clash concerned the unconstitutional limitation of the President's powers to appoint the Governor, Deputy Governors and other members of the Board in favour of the Government. Under the proposed version of Section 6(3) of the Czech National Bank Act, the Governor, Vice-Governors and other members of the Bank Board were to be nominated by the Government. Thus, the President would

continue to appoint the Governor and all other members of the Bank Board, but would not be able to decide on the candidates himself. The President's role would be reduced to that of a mere endorser of the candidates proposed by the government, on which he would have only a veto. The Constitutional Court found such a state of affairs to be in breach of Article 62(k) of the Constitution, which entrusted the power to appoint all members of the Bank Board exclusively to the independent competence of the President of the Republic.

There was also a conflict with Article 98 of the Constitution in the case of the announcement of the exchange rate of the Czech currency against foreign currencies.[60] The sovereignty of the central bank should have been fundamentally limited by the government. The Czech National Bank was now allowed to announce the exchange rate regime of the Czech currency against foreign currencies after agreement with the Government. According to the President, who himself initiated the proceedings before the Constitutional Court, in the event of a difference of opinion with the government, the Bank would be forced to change its position on the stability of the currency. According to the President, this could be seen as an attempt by the government to gain the ability to interfere in the independence of the Czech National Bank and thus in its monetary policy. The statutory obligation to find a compromise between the Bank and the government could even lead to greater pass-through of compromise monetary policy measures in the medium term, and thus to a threat to price stability. Agreements between the government and the central bank are often difficult and time-consuming to reach, not only from the Czech perspective, but also from the perspective of other (not only European) countries, which may significantly jeopardise the correct timing of monetary policy measures. In practice, the political, economic and monetary objectives of the government's fiscal policy and the central bank's monetary policy diverge.

In its above-quoted ruling, the Constitutional Court stated that the constitutional expansion of the number of "pillars of state power"

[60] See also: P. Mrkývka, *Propedeutika finančního práva I. Obecná část*, Brno 2015, p. 109; D. Šramková, *Měnové právo*, [in:] P. Hrubá Smržová, P. Mrkývka *et al.*, *Finanční a daňové právo*, Plzeň 2020, p. 143.

is natural. Therefore, according to the Constitutional Court, counter-arguments based on comparisons with older "classical" constitutions, which did not mention an independent bank simply because economic theory at the time had not yet sufficiently described the danger of monetary manipulation by the executive, do not hold water. The expansion and change in the understanding of the need for and appropriateness of central banking regulation by constitutional provisions has continued with economic and technological developments.[61] The Constitutional Court has taken the position that the regulation of the status of the central bank of the state in the Czech Constitution is based on the conclusions of modern constitutional law at the end of the 20th century, when the need to regulate the status of the central (central) bank was gradually reflected in the constitutions.[62] The constitutional theory inspired by economic theory manifested itself in the fact that more and more constitutions regulated the position of the central bank and its functions. As examples, the Constitutional Court in its ruling directly mentions Article 227 of the Constitution of Poland and Article 56(1) of the Constitution of the Slovak Republic.[63]

12.5. Financial Arbitrator

So far, the Czech National Bank has been referred to as a sui generis public corporation that carries monetary policy on its shoulders.[64] However, central banks nowadays usually play a dual role, acting as administrative bodies alongside "classical central banking". This

[61] Not only some norms of constitutional law are related to the type of economy applied, but also the subject of regulation of financial law. For more details, see: P. Mrkývka, *Finanční právo v evropském kontextu*, *op. cit.*, p. 272.

[62] Regulation was evident not only in the constitutions of federative states, where it was linked to the vertical division of powers between the federation and its member states, but also in unitary states.

[63] According to the Czech Constitutional Court, where this has not been explicitly enshrined in the constitution, case law reaches these conclusions.

[64] On the nature of the Czech National Bank in this context, see: J. Barák, *§ 1. Komentář*, [in:] L. Rýdl, J. Barák, L. Saňa, P. Výborný, *Zákon o České národní bance. Komentář*, Praha 2014, p. 6.

second role is in the field of financial market supervision, which usually includes, among others, the supervision of banks, insurance companies, and securities traders. The Czech National Bank is no exception in this respect. As a supervisory authority, the Czech National Bank acts in relation to financial market entities, which can impose fines, remedial measures or withdraw licences in the event of deficiencies. However, it cannot resolve a specific problem of a client (e.g., a consumer) with a bank or other financial institution.[65] This role is entrusted to another body – the Financial Arbitrator.

An extrajudicial body for the settlement of selected payment disputes was required to be established (or its existence otherwise ensured[66]) by every Member State in the European Union to ensure one of the fundamental freedoms of free movement of capital.[67] In some EU countries, a single such body has gradually established itself in the financial market area, in others several bodies or organisations for the out-of-court settlement of disputes, which may be of a public or private nature.[68] These bodies cooperate with each other, both at EU and global level, as this is not a purely EU specific issue.

[65] See also: T. Rýdl, *§ 44. § 44a. Komentář*, [in:] L. Rýdl, J. Barák, L. Saňa, P. Výborný, *Zákon o České národní bance. Komentář*, Praha 2014, pp. 148 et seq.

[66] From the outset, the Czech Republic took the route of establishing a special administrative authority and adopted a new law to implement the Directive. In contrast, the Slovak Republic initially decided to use the already existing permanent arbitration court and therefore adopted only a subtle amendment in scope, which allowed the use of arbitration in certain cases by law, i.e. without the requirement of a prior arbitration agreement.

[67] Today, this area is already more comprehensively addressed at the EU level, however, at the time of the accession of the Czech Republic and Poland to the (then) European Communities, the requirement to establish an out-of-court dispute resolution body was enshrined in particular in Article 10 of Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border transfers. (This Directive has subsequently been replaced by Directive 2007/64/EC of the European Parliament and of the Council on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, and successively by Regulations – first 2560/2001/EC, then 924/2009/EC and currently 2021/1230/EU.) See also: P. Scholz, *Zákon o finančním arbitrovi. Komentář*, Praha 2009, p. 6.

[68] See: D. Šramková, *The financial ombudsman. (Finansu ombudsmenas)*, [in:] *Viešoji politika ir administravimas (Public Policy and Administration)*, "Vilnius: MRU and KUT" 2006, No. 15, pp. 92 ff.

Within the European Union, this is the FIN-NET financial dispute resolution network,[69] and at global level it is the INFO Network (which stands for the International Network of Financial Services Ombudsman Schemes).[70] For the Czech Republic, only the Financial Arbitrator[71] is a member of these networks. For Poland, there are three members in total, namely *Rzecznik Finansowy*,[72] the closest to the Czech arbitrator in some way, *Bankowy Arbitraż Konsumencki*[73] and *Sąd Polubowny przy Komisji Nadzoru Finansowego*.[74]

Initially, the Czech Financial Arbitrator was only authorised to arbitrate disputes between payment service providers and payment

[69] Further information on the FIN-NET can be found on the official FIN-NET website, accessible via the following link: https://finance.ec.europa.eu/consumer-finance-and-payments/retail-financial-services/financial-dispute-resolution-network-fin-net_cs [access: 24.10.2023].

[70] For further details on the INFO Network, please refer to the official website of the International Network of Financial Services Ombudsman Schemes, which can be accessed at: https://networkfso.org/About-us.php [access: 24.10.2023].

[71] The authority is a public entity established by law. Its proceedings are not charged, but both parties to the dispute bear their own costs. The decision is binding on both the financial institution and its client, the consumer. For further details on the Czech Financial Arbitrator, please refer to Act No. 229/2002 on the Financial Arbitrator, which is available on the official website at: https://finarbitr.cz/ [access: 24.10.2023].

[72] The Polish Financial Ombudsman is a public authority established by law. Its procedure is not charged, but its recommendations are not fully legally binding on the parties. For further information on the Polish Financial Ombudsman, please refer to the Act of 5 August 2015 on the processing of complaints by financial market entities, the Financial Ombudsman and the Financial Education Fund, which can be accessed via the official website at: https://rf.gov.pl/ [access: 24.10.2023].

[73] The Polish Association of Banks (ZBP) oversees the operation of this private voluntary body. The procedure is fee-based, and the decision is binding only on the financial institution (bank). For further information on *Bankowy Arbitraż Konsumencki*, please refer to the official website, which can be accessed at: https://zbp.pl/dla-klientow/arbiter-bankowy [access: 24.10.2023].

[74] The authority is a public entity established by law and the procedure is subject to a fee. The decision is binding on both the financial institution and its client, the consumer. For further information on the Court of Arbitration at the Polish Financial Supervision Authority, please refer to Article 18(1) of the Act of 21 July 2006 on the supervision of the financial market, which is available on the official website at: https://www.knf.gov.pl/dla_rynku/sad_polubowny_przy_KNF [access: 24.10.2023].

service users in the provision of payment services (or between electronic money issuers and electronic money holders in the issuance and redemption of electronic money). However, the Financial Arbitrator could only arbitrate under the condition that the Czech court would otherwise have jurisdiction to decide the dispute, and that the arbitration agreement did not exclude the arbitrator's jurisdiction (these conditions still apply today). According to the law, the arbitrator primarily seeks to resolve the dispute amicably, and therefore proceeds to arbitration only after the parties to the dispute fail to reach an agreement (amicable settlement).

The fundamental problem, which had a constitutional overlap, lay in the period from the establishment of the Financial Arbitrator on 1 January 2003 until 30 June 2011 (when the amending Act No. 180/2011 Sb. came into force) in the material and financial provision of the functioning of the Financial Arbitrator. According to the law, the activities of the financial arbitrator were to be financed by the Czech National Bank. Specifically, the Czech National Bank provided (to a justified extent) administrative support for the performance of the arbitrator's activities at its own expense, including reimbursement of expenses related to the activities of persons entrusted under the Act on the Financial Arbitrator. The salary and other specified benefits of the arbitrator and his representative were also at the expense of the Czech National Bank. The salary and other allowances of the arbitrator and his representative could not be influenced by the Czech National Bank itself, since these amounts were set by the Chamber of Deputies pursuant to Section 4(5) of the Financial Arbitrator Act.[75] Thus, the Czech National Bank had to spend funds from its budget which were not related to its main objective or to its sub-objectives. This state of affairs was unacceptable not only from the point of view of the central bank, but also from the point of view of the European Central Bank and, above all, the European Commission. The budget of the Czech National Bank is outside the state budget, and therefore the costs of the central bank are not part of the expenditure side of the state, and hence public budgets. The European Commission rightly argued

[75] The Chamber of Deputies also elected the arbitrator and his deputy.

that allowing such an unprecedented (not only in Czech conditions) way of financing the Financial Arbitrator would open an imaginary "Pandora's box" in the form of a way of artificially reducing the deficit of public budgets. Nevertheless, it took more than eight years for the correction to take place. As of mid-2011, the sentence on financing by the Czech National Bank was deleted from the law and the arbitrator (and his subsequently appointed office) were included in the budget chapter of the Ministry of Finance.[76] Under the new rules set out in the amended Section 4 of the Financial Arbitrator Act, the arbitrator and his deputy are no longer elected by the Chamber of Deputies, but both are appointed by the Government of the Czech Republic on the proposal of the Minister of Finance. The above amendments have corrected a partial contradiction with Article 98 of the Constitution. However, the Act on the Financial Arbitrator has already been amended fourteen times and the scope of its powers has gradually expanded considerably. The Financial Arbitrator is now empowered to adjudicate disputes in a number of areas, and payment does not always play a dominant role among them.[77] In particular, disputes between consumers and:

1. by a payment service provider when offering and providing payment services,
2. the issuer of electronic money when issuing and redeeming electronic money,
3. by a creditor or intermediary when offering, granting or arranging a consumer credit or other credit, loan or similar financial service,
4. the person managing or administering the collective investment fund,

[76] This change effectively meant a significant pay cut for the Financial Arbitrator and his deputy.

[77] Since 2013, disputes arising from consumer credit agreements have become the most frequently settled type of case. For more details, see: L. Vacek, *Zákon o spotřebitelském úvěru: komentář*, Praha 2015, pp. 78 et seq. On the contemporary position of the consumer in general, see: D. Šramková, *Ochrana spotřebitele v rámci činnosti finančního arbitra*, [in:] J. Fiala, J. Hurdík, M. Selucká, *Současné aktuální otázky spotřebitelského práva: Sborník příspěvků z konference konané na PrF MU dne 18.1.2008*, Brno 2008, pp. 10 ff.

5. by an insurer or insurance intermediary in the distribution of life insurance or in the exercise of rights and performance of obligations under life insurance,
6. by a person carrying on an exchange business when carrying on an exchange business,
7. by a building society or intermediary when offering, providing or arranging building savings,
8. a person providing investment services in the provision of investment services,
9. by a person who maintains an account other than a payment account, when maintaining that account,
10. the recipient of a lump sum deposit when receiving or returning that deposit,
11. by a pension company or intermediary when offering, providing or arranging supplementary pension insurance with a state contribution,
12. a pension company or intermediary when offering, providing or arranging supplementary pension savings,
13. by a person providing or distributing a pan-European personal pension product when providing or distributing a pan-European personal pension product,
14. a person providing a currency exchange service which is offered to the payer via an ATM or at the point of sale of goods or services before the payment transaction is initiated, when providing that currency exchange service,
15. the provider of a long-term investment product when providing that product.[78]

As the number of disputes that an arbitrator handles increases, so does the number of his decisions. If a party disagrees with the award of the Financial Arbitrator, it may file a proper appeal. This appeal (objections) is again decided by the Financial Arbitrator in the framework of self-mediation. Exhaustion of the ordinary remedy then opens the way for judicial review. As the Financial Arbitrator is an executive authority,[79] this judicial review is guaranteed

[78] See: Section 1(1) of the Financial Arbitrator Act.
[79] Similar to the Czech National Bank in the case of financial market supervision.

directly by the Constitution. However, a decision on the merits by the Financial Arbitrator differs fundamentally from a decision by the Central Bank in that it is a private law decision. Therefore, the administrative justice procedure does not apply, but the action must be brought under Part 5 of the Code of Civil Procedure[80] before a civil (district) court. If, on the other hand, the Financial Arbitrator issues a decision of a procedural nature (typically an award imposing a fine on an institution for failure to comply with a deadline for providing cooperation), this is already a decision of a superior authority against a subordinate body and the Administrative Procedure Code applies (again, after exhaustion of the ordinary remedies), i.e., the administrative court route.[81] However, in the case of the Financial Arbitrator, the courts had to deal with a third case. In regulating the financial arbitrator, the legislator did not sufficiently address the specificities inherent in the legal norms in question. This has led to a situation which, paradoxically, instead of a quick and relatively inexpensive resolution of the dispute, could lead to lengthy litigation. What was (and *de lege lata* still is) at stake?

If the financial arbitrator, in his/her decision on the merits, satisfies the consumer (or decides at least partially in favour of the consumer), it also means that the institution must have violated the law in some way. In such a case, the financial arbitrator's decision will consist of two parts. In the first part, the matter in dispute (i.e., the private law dispute) will be decided on the merits. In the second part of the operative part of the same decision, the arbitrator will impose a monetary sanction on the institution for a violation of a relevant law (which will be an overriding decision in nature).[82] However, the Law on the Financial Arbitrator no longer provides any

[80] See: paragraphs 244 et seq. of Act No. 99/1993 Sb., Code of Civil Procedure.

[81] See: Sections 65 et seq. of Act No. 150/2002 Sb., Administrative Procedure Code.

[82] According to Section 17a of the Act: *In an award granting, even in part, the claimant's claim, the arbitrator shall also impose a penalty on the institution in the amount of 10% of the amount the institution is obliged to pay to the claimant under the award, but not less than CZK 15,000. It shall also order payment of CZK 15,000 in cases where the amount in dispute is not a sum of money. The penalty shall be a revenue of the State budget.*

guidance on how to exercise judicial review of the executive in such a case without leading to absurd situations (inconsistent conclusions of the courts when the two types of proceedings coincide, or unacceptable delays when the administrative court is waiting for a final decision of the general court). The Supreme Administrative Court of the Czech Republic had to find a solution to this complex issue in 2007,[83] as failure to provide proper judicial protection would be contrary to the Constitution.

After much consideration, the Supreme Administrative Court reached the following decision:

1. Judicial review of the decision-making activity of the Financial Arbitrator in matters of merits (i.e., matters falling within the scope of his competence as defined in Section 1(1) of the Financial Arbitrator Act) falls under the regime of Part Five of the Code of Civil Procedure. The decision on the sanction under Section 17a of the Financial Arbitrator Act is subject to judicial review under Part Five of the Code of Civil Procedure in the context of judicial review of the decision-making activities of the Financial Arbitrator in matters falling within his jurisdiction as defined in Section 1(1) of the Act. The Court of First Instance has therefore decided, albeit practically but unexpectedly, that even the part of the decision on the penalty, which falls within the scope of administrative justice, will be dealt with as an accessory part together with the decision on the merits in a single judicial review before the ordinary courts.
2. The decision on the orderly fine pursuant to Section 23 of the Financial Arbitrator Act may be challenged by an action pursuant to Section 65 et seq. of the Administrative Procedure Code. Therefore, the action shall be brought before the administrative court, which in the Czech Republic shall be the competent regional court.

Although the first and last sentences of the quoted judgment of the Supreme Administrative Court are understandable and indisputable, many jurists wondered about the solution chosen in the middle

[83] Judgment of the Supreme Administrative Court of 19 April 2007, 2 Afs 176/2006-96.

point. However, the author must honestly say that although this is a controversial solution from the point of view of the Czech legal system, any other decision of the court would probably lead to even greater problems and could mean a major undesirable interference with the rights of the parties.

12.6. Conclusions

The paper presented here began by explaining how constitutional law developed and functioned.

On the basis of a general interpretation, the Czech reality in relation to the central bank and the out-of-court consumer dispute settlement body in the financial market was presented. Examples of constitutional problems related to the Czech National Bank and the Financial Arbitrator were used to illustrate the problems that may arise in practice.

A partial comparative analysis with Poland was made: The author looks at the broader European context and considers similar bodies or institutions in other EU member states, mostly including Poland. The comparative findings improve the understanding of the role of the institutions and their legal framework.

Conclusions on the hypotheses:

HYPOTHESIS 1: the legal regulation of the Czech National Bank was for some time in conflict with the Czech Constitution. However, the analysed problem has been eliminated, so that currently the Act on the Czech National Bank is already in conformity with the Constitution. The hypothesis has been confirmed *de lege lata*.

HYPOTHESIS 2: the legal regulation of the Czech Financial Arbitrator has been in conflict with the Czech Constitution for more than 8 years. However, the analysed problem has already been eliminated. Therefore, the Financial Arbitrator Act is currently in full compliance with the Constitution. The requirements of EU law and the

European Commission are properly implemented. The hypothesis has been confirmed *de lege lata*.

HYPOTHESIS 3: judicial review of administrative decisions of the Czech National Bank is established as fully compatible with the requirements for judicial review of such an executive body. However, judicial review of administrative decisions of the Financial Arbitrator is not adequately regulated at the legislative level. In its jurisprudence, the Supreme Administrative Court has found a solution for the practical application of its jurisprudence. Although this is the best possible solution under the given circumstances, the administrative and general judicial limits are still not fully respected. Unfortunately, therefore, the anomalous situation persists and a fully correct legislative solution is not currently on the agenda. The hypothesis has only been partially confirmed.

What recommendations can be drawn from the above?

A proper discussion should take place before any proposal is submitted to both Czech and Polish legislators.

This does not only mean the standard procedure of external and internal comments that is part of the normal legislative procedure for the government's legislative proposals.

The requirement for sufficient discussion is significantly increased in the case of constitutional or other constitutional amendments. History shows the importance of sufficient discussion not only across the political spectrum of elected representatives in a country's parliament, but also (and especially) expert discussion among professionals, academics, judges, representatives of the executive and other practitioners, depending on the area affected by the legislative change. Such discussion needs time and space. Practical examples show that haste in the preparatory phase can and often does lead to problems in the subsequent legislative process, jeopardising the adoption of the legislation in question and, if it is finally adopted, increasing the risk of a constitutional challenge. Even if the Constitutional Court does not subsequently find the legislation to be unconstitutional on the basis of a constitutional complaint, the risk of such legislation being repealed or further amended in the future

increases when the composition of each chamber of Parliament changes after the next elections. The problem is compounded by the number of amendments to the law, making the situation even more complex. The instability of the legal system does not allow for the proper application of the rules and the appropriate methodology to be determined by the addressees of the legal norms, let alone for the judiciary to be given a chance to rule on any disputed issues. The author recognises that the requirement for proper discussion and broad consensus among experts and politicians across the political spectrum may not always be possible (given, inter alia, current developments in the world and our region and the commitments of Member States to the European Union).

However, this should be an unassailable standard in the case of the Constitution and any other constitutional legislation.

Every effort should also be made to allow sufficient room for expert debate in the case of key legislation closely related to the constitution.

If this mechanism fails or cannot be applied, and if the Constitutional Court subsequently finds that there has indeed been an unconstitutional situation, its decisions should be respected by the executive and the legislature, and efforts should be made to remedy the specific problem and not to repeat the error.

A clear definition of the position of individual executive authorities, most often in the form of administrative authorities, may be another recommendation for both Czech and Polish legislators. It is not enough to define only the role, basic function (main objective) and specific powers of a given authority. It is also important to place it correctly in the existing system of administrative bodies or other significant entities and to solve the issue of financing its operation. There is an increased risk of negative consequences if this procedure is not followed, especially when harmonising the national legal order with EU law. If the legislator focuses narrowly and exclusively on the issue currently being dealt with in one part of the legal order and does not pay attention to the broader context, it is easier to make a systemic mistake or to create an unintentionally complicated situation from which it will be difficult to find standard solutions.

The constitution provides (as is now the norm) that judicial review of the executive must be available as part of the balance of powers in the state. In practice, this means that the decision of an administrative authority must be reviewable by a court (usually after exhausting the proper remedies). Administrative courts are often set up for this purpose, as in the Czech Republic and Poland. Thus, in addition to the system of ordinary courts, there are administrative tribunals to which recourse may be had by way of an action. It is judicial review or the conditions and specifics of judicial review by general and administrative courts that the legislator should also take into account. Similarly, the desire to meet the deadline for the harmonisation of the Czech or Polish legal system with EU law should not mean compromising the quality of the preparation and implementation of the legislative process. The opposite approach disproportionately increases the risk that the legislator will act quickly at the expense of quality. Tasks that are solved in time, but not properly, are in fact only seemingly solved. Not only do they mean more work for the legislator and more amendments to legislation, but they also lead to instability and, in extreme cases, may even lead to the activation of sanction mechanisms at EU level.

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PART III

EFFICIENCY OF THE JUSTICE SYSTEM

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Chapter 13. Assessing the Efficiency of the Judiciary: Comprehensive Research

13.1. Introduction

Judicial efficiency holds enormous importance as it serves crucial roles in society, extending beyond upholding social values to directly influencing a country's economic performance. It represents one of the fundamental pillars underpinning society's trust in the judiciary. The judicial system, for numerous reasons, stands as a vital institution within society. It serves as a guardian of formal rights and acts as a dispenser of justice in the eyes of citizens. Furthermore, it assumes a pivotal role in collaboration with the legislature and the executive, working collectively to yield socially and economically beneficial outcomes. Notably, a well-functioning judiciary contributes significantly to the development of financial markets. It actively participates in fostering sustainable growth and maintaining a robust economy by efficiently upholding private property rights and providing potential investors with credible signals regarding the reliability of the economic framework. It is only when the judiciary operates accountably within the bounds of the law that the exchange of goods through contracts makes sense.

The judicial system is a multifaceted and intricate entity, with its effectiveness determined by various factors, including efficiency, fairness, and the quality of rulings. Among these factors, judicial efficiency plays a crucial role in ensuring the smooth operation of

markets. Specifically, the length of trials serves as a key indicator of judicial efficiency and is closely linked to economic activities.[1]

From a business perspective, the certainty of judicial decisions and the accessibility of judicial services are equally vital considerations. Trial length intersects with these two aspects of the judiciary because protracted trials limit access to judicial services due to court capacity constraints and jeopardise the certainty of judicial decisions, in line with the well-known legal maxim, "justice delayed is justice denied".

The primary aim of this research is to identify and define the key indicators that will play a pivotal role in shaping the methodology for assessing judicial efficiency. To achieve this objective, a multifaceted approach is adopted. The research commences by seeking to discern these key performance indicators through qualitative research methods, involving a comprehensive analysis of the judicial landscape in Georgia. This qualitative research is then complemented by desk research, which entails an extensive review of existing studies and prior research conducted in the field of judicial efficiency assessment. Subsequently, a quantitative data analysis is carried out using publicly available statistical information for first-instance courts in Georgia from 2018 to 2020. This statistical data is analysed in conjunction with the two main indicators used by the CEPEJ, namely Clearance Rate and Disposition Time, with the primary goal of critically evaluating whether these indicators alone are sufficient or if additional information is required for a comprehensive assessment of judicial efficiency.

Following this extensive investigation, the research aims to formulate the principal performance indicators. These indicators are designed not only to facilitate the quantification of judicial efficiency within individual countries but also to enable meaningful cross-country comparisons. The ultimate objective of this research is to develop a comprehensive judicial efficiency evaluation tool that can be applied not only in the assessment of judicial efficiency

[1] G. Palumbo *et al.*, *The Economics of Civil Justice: New Cross-country Data and Empirics*, "OECD Economics Department Working Papers" 2013, No. 1060, http://dx.doi.org/10.1787/5k41w04ds6kf-en [access: 14.09.2023].

within a single country but also to facilitate meaningful comparisons between different countries.

13.2. Methodology

For the research on assessing the efficiency of the judiciary, a qualitative research methodology was employed. The data collection took place in Georgia during the period of June to July 2023 and involved conducting in-depth interviews with a total of 20 court managers and 30 practicing lawyers specialising in civil, criminal, and administrative law. The primary objective of these interviews was to elucidate the key performance indicators as perceived by these legal professionals and to gain insights into their definitions of judicial efficiency.

The qualitative research approach allowed for a nuanced exploration of the subject matter, drawing from the perspectives of individuals directly involved in the legal system. The participants were selected to provide diverse points of view, ensuring a comprehensive understanding of the topic. The interviews were conducted using open-ended questions to encourage participants to express their opinions and insights freely. These interviews served as the foundation for identifying the crucial dimensions of judicial efficiency and the associated performance indicators.

To further enrich the qualitative findings and ensure they are in line with broader industry standards, desk research is conducted in Chapter 13.3. This component involves an exhaustive examination of existing studies, research papers, and publications related to judicial efficiency assessment. It delves into the collective knowledge gathered by the academic and research community over the years. This comprehensive literature review serves to validate and contextualise the qualitative data, grounding it in the broader context of judicial efficiency assessment.

To add a quantitative dimension to the research, publicly available statistical information is harnessed in Chapter 13.4. This data comprises a wide range of numerical figures and factual records, offering insights into the performance of first-instance courts in Georgia over

a specific timeframe, from 2018 to 2020. Quantitative data analysis entails the systematic examination, interpretation, and visualisation of this statistical information. It allows for the identification of trends, patterns, and numerical relationships within the data.

By blending qualitative insights, literature review findings, and quantitative data analysis, the research methodology forms a well-rounded and holistic approach. This triangulation of research methods ensures that the findings are robust, credible, and supported by multiple sources of evidence. It allows for a comprehensive understanding of the complex subject matter of judicial efficiency and bolsters the reliability and validity of the study's outcomes.

Findings: the interviews with court managers and practicing lawyers yielded several noteworthy findings regarding the assessment of judicial efficiency:

i. Definition of efficiency: participants generally concurred that efficiency in the context of the judiciary refers to the accomplishment of desired outcomes using minimal resources. Efficiency can be categorised into two dimensions: technical efficiency, which emphasises the optimal utilisation of available resources, and allocative efficiency, which emphasises the allocation of resources to areas of the highest societal value.
ii. Factors influencing efficiency: speedy justice was unanimously identified as a paramount factor contributing to efficiency. Additionally, a subset of interviewed managers and lawyers emphasised that trust in the justice system is intrinsically linked to efficiency.
iii. Performance indicators: participants identified a range of performance indicators, reflecting the multifaceted nature of judicial efficiency. These indicators have been categorised for clarity:
    a) case management efficiency:
        – Clearance Rate,
        – Disposition Time,
        – number of incoming cases per judge,
        – number of resolved cases per judge,
        – number of pending cases per judge,

- total number of pending cases at the beginning and end of the reporting period,
- age of pending cases,
- age of resolved cases;

b) backlog management:
- number of backlog cases at the beginning and end of the reporting period,
- number of received backlog cases in the reporting period,
- number of pending cases that became backlog in the reporting period,
- number of backlog cases resolved during the reporting period,
- average duration of pending cases,
- average duration of resolved cases,
- average number of hearings per case/average number of postponed hearings per case;

c) resource allocation:
- number of judges,
- number of non-judge court staff per judge.

These findings serve as a foundational framework for assessing judicial efficiency within the context of the legal system. They offer valuable insights into the perspectives of court managers and practicing lawyers, illuminating key dimensions and performance indicators that can guide future research and policy initiatives aimed at enhancing the efficiency of the judiciary.

13.2.1. DEFINING INDICATORS

As seen in the previous chapter, the interviews primarily identified key performance indicators that professionals believe might be a solution for assessing the efficiency of the judicial system. While some of these indicators are quite obvious, there are others that need further definition. In doing so, the CEPEJ guidelines on judicial

statistics (GOJUST)[2] shall be used, as they provide definitions for some of the key performance indicators mentioned above. Additionally, CEPEJ's newly adopted Backlog Reduction Tool[3] shall serve as a point of reference in achieving the desired goal of defining these indicators.

13.2.1.1. *Clearance Rate*

The Clearance Rate (CR) is one of the most commonly used indicators for monitoring the flow of court cases. The Clearance Rate percentage is calculated by dividing the number of resolved cases by the number of incoming cases and then multiplying the result by 100:

$$\text{Clearance Rate (\%)} = \frac{\text{resolved cases in a period}}{\text{incoming cases in a period}} \times 100.$$

A Clearance Rate that equals 100% indicates the ability of the court or a judicial system to resolve cases received within the given period of time. A Clearance Rate above 100% indicates the ability of the system to resolve more cases than received, thus reducing any potentially existing backlog. Finally, if received cases are not resolved within the reporting period, the Clearance Rate will fall below 100%. When the Clearance Rate drops below 100%, the number of unresolved cases at the end of a reporting period (backlog) will rise.

The CEPEJ developed the Time Management Checklist, titled the "Checklist of indicators for the analysis of lengths of proceedings in the justice system," [4] as a tool for internal use by its stakeholders.

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[2] See: The European Commission for the Efficiency of Justice (hereinafter: CEPEJ): Guidelines on judicial statistics (GOJUST), https://rm.coe.int/1680747678 [access: 10.10.2023].

[3] See: CEPEJ: Backlog Reduction Tool, Document adopted at the 40th plenary meeting of the CEPEJ (Strasbourg, 15–16 June 2023), https://www.coe.int/en/web/cepej/home [access: 10.10.2023].

[4] The CEPEJ: Time Management Checklist – Checklist of indicators for the analysis of the lengths of proceedings in the justice system and the other relevant documents by the CEPEJ, https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-time-managemen/168074767d [access: 10.10.2023].

Its purpose is to help justice systems collect appropriate information and analyse relevant aspects of the duration of judicial proceedings in order to reduce undue delays, ensure the effectiveness of proceedings, and provide necessary transparency and foreseeability to users of the justice system.

13.2.1.2. *Calculated Disposition Time and Case Turnover Ratio*

The Disposition Time provides further insight into how the judicial system manages its flow of cases. Generally, the Case Turnover Ratio and Disposition Time compare the number of resolved cases during a reporting period to the number of unresolved cases at the end of that period. These ratios measure how frequently the judicial system (or a court) processes received cases, indicating how long it takes for a specific type of case to be resolved.

The relationship between the number of resolved cases during a reporting period and the number of unresolved cases at the end of the period can be expressed in two ways. The first method calculates the number of times during the year (or other reporting period) that the average case types are resolved or turned over. The Case Turnover Ratio is calculated as follows:

$$\text{Case Turnover Ratio} = \frac{\text{number of resolved cases in a period}}{\text{number of unresolved cases at the end of period}}.$$

The second method calculates the number of days that cases remain outstanding or unresolved in court. This is also known as "the Disposition Time (DT)" and is calculated by taking the Case Turnover Ratio and dividing the result into the 365 days in a year, as follows:

$$\text{Calculated Disposition Time} = \frac{365}{\text{Case Turnover Ratio}}.$$

The additional effort required to convert a Case Turnover Ratio into days is justified by the simpler understanding of what this relationship entails. For example, an increase in the judicial Disposition Time from 60 days to 75 days is much easier to comprehend than

a decline in the Case Turnover Ratio from 6.0 to 7.5. Converting to days also facilitates comparing a judicial system's turnover with the projected overall length of proceedings or established standards for the duration of proceedings.

Of course, this ratio does not provide a clear estimate of the average time needed to process each case. For instance, if the ratio indicates that two cases will be disposed of within 600 days, one case might be resolved on the 30th day, and the second on the 600th day. The ratio fails to indicate the mix, concentration, or validity of the cases. Case-level data are needed to review these details and conduct a comprehensive analysis. In the meantime, this formula offers a valuable practical approach. A shorter version of the calculated Disposition Time formula is also available:

$$\text{Calculated Disposition Time} = \frac{\text{number of unresolved cases at the end of period}}{\text{number of resolved cases in a period}} \times 365.$$

Caseload

Total number of pending cases at a given time (e.g., 1 January 2017) plus the incoming cases in a given period (e.g., from 1 January 2017 to 30 June 2023). It serves as an indicator of the total number of cases that a court or a judge is required to resolve.

Number of resolved cases during the reporting period

A resolved case refers to a case that was adjudicated or resolved in the court concerned, either through a decision rendered by the court or through any other procedural step that brought the case to a conclusion (e.g., discontinuance of the case or a settlement) within a defined period of time. The termination date of a case will generally be the date of the: i) signing or issuing of the decision/judgment; ii) approval by the court of a settlement; and iii) formal discontinuance.

Total number of pending cases at the end of the reporting period

Similar to the total number of pending cases at the beginning of the reporting period, this refers to cases that remain unresolved by the court concerned at a specific point in time (e.g., 31 December).

Backlog

Backlog should be understood as pending cases at the court concerned that have not been resolved within an established timeframe. A timeframe is an established period of time, as defined by laws, regulations, court procedures, or agreements among the courts and parties, within which cases are expected to be resolved. Each judiciary has its own timeframes, which typically vary for different case types. For example, in Georgia on Civil Cases the maximum timeframe for the haring a case has been set at 5 months, the backlog consists of the number of pending civil cases that have exceeded the 5-month threshold.

There are several other KPIs which are dealing specifically with the backlog cases:

1. Number of backlog cases at the beginning of the reporting period: a backlog case refers to a case which has not been resolved within an established timeframe at the beginning of the reporting period.
2. Number of received backlog cases in the reporting period: an incoming case that has been previously pending longer than the established timeframe (e.g., in some other court or instance) before being received by the court concerned.
3. Number of pending cases that became backlog in the reporting period: pending cases whose duration exceeded the established timeframe during the reporting period.
4. Number of backlog cases resolved during the reporting period: resolved backlog case refers to a case which has been resolved after the established timeframe during the reporting period.
5. Number of backlog cases at the end of the reporting period: this represents cases unresolved within an established timeframe at the end of the reporting period.

Another important aspect covered by the CEPEJ KPIs is the duration of the proceedings, by using the following indicators:

13.2.1.3. *Average Duration of Pending Cases*

The duration of a pending case (in days) is the period from the date of filing of the initial act until the date when the report is generated. The average is obtained by adding the duration of all pending cases (in days) divided by the number of pending cases. The figures on the average duration of pending cases are generated for a specific date, not for a reporting period. To effectively analyse court performance, it is advisable to compare the values for different dates, allowing for tracking and comparison of data. By doing so, it becomes possible to identify trends and determine whether the average duration of pending cases is increasing (indicating a decline in court performance) or decreasing (indicating an improvement in court performance).

Average duration of resolved cases: the duration of a resolved case (in days) is the period from the date of filing of a case until the date of resolution. The average is obtained by adding the duration of all resolved cases in days, divided by the number of resolved cases.

13.2.2. SUMMARY

The conducted interviews played a pivotal role in identifying several key performance indicators, as perceived by legal professionals, that can serve as effective tools for assessing the efficiency of court systems. These findings shed light on what is considered essential in gauging the performance of courts. To streamline these indicators for analytical purposes, they were systematically categorised and subsequently compared to the primary indicators employed by the European Commission for efficiency assessments of its member states.

While this comparative analysis provided valuable insights, certain indicators required further clarification. Consequently, this paper endeavoured to elucidate their definitions in alignment with the standards set forth by the European Commission for the

Efficiency of Justice (CEPEJ). The rationale behind selecting CEPEJ as a reference point lies in its methodology, which has garnered consensus among all member states. Consequently, aligning the identified indicators with CEPEJ's framework was a logical and systematic approach.

The identification of these key performance indicators marks the initial step in the process of evaluating judicial efficiency. However, to create a comprehensive model for assessing judicial performance, additional criteria must also be identified. In light of this, the forthcoming chapter aims to conduct a comprehensive literature review of existing research in this domain, beyond the purview of CEPEJ, with the objective of supplementing the indicators already identified. This endeavour seeks to culminate in the development of a robust judicial performance assessment tool that can be effectively utilised across diverse jurisdictions.

13.3. Measures of Judicial Efficiency: Literature Review

Several recent studies have delved into the intricate matter of evaluating the factors influencing the "production of justice", with a specific emphasis on judicial efficiency. This issue presents a multifaceted challenge as it encompasses both quantitative and qualitative dimensions.

The quantitative aspect aligns with conventional production theory, revolving around optimising the quantity of output (in this context, judicial decisions) relative to the resources invested. On the other hand, the qualitative dimension examines how these outputs are generated and whether unintended consequences, such as prolonged waiting times, come into play. The time required to resolve disputes can significantly impact the uncertainty and, subsequently, the reliability of a judicial system.

A number of studies have inclined towards the latter perspective, concentrating on identifying the causes of delays in rendering decisions, which are often regarded as a rough indicator of overall judicial efficiency. In this context, judicial efficiency is viewed as the system's

capacity to effectively meet the demand for justice.[5] To better understand the dynamics of production technology within the context of the judicial system, various studies have delved into the connection between judges' productivity and their educational qualifications. This factor appears to play a crucial role in elucidating the speed at which judges arrive at decisions[6] (Landes, Lessig, & Solimine, 1998; Ramseyer, 2012).

These studies have sought to explore how judges' educational backgrounds influence their decision-making processes. Educational qualifications are a key area of focus as they are believed to have a significant impact on the efficiency and effectiveness of judges in rendering decisions. The research conducted by mentioned authors contributes to a deeper understanding of the intricate relationship between educational backgrounds and the speed of judicial decision-making. By shedding light on this connection, these studies offer valuable insights into the factors that shape the production technology within the judicial system.

In their 2012 study, Dimitrova-Grajzl and colleagues examined the productivity of First-Instance Courts in Slovenia.[7] Their research focused on the influence of the number of judges and the current caseload on the judicial production process. They discovered that the number of judges lost its statistical significance, while the caseload

[5] See: W.H. Binford *et al.*, *Seeking best practices among intermediate courts of appeal: A nascent journey*, "Journal of Appellate Practice & Process" 2007, Vol. 9, pp. 37–119; J.N.G. Cauthen, B. Latzer, *Why so long? Explaining processing time in capital appeals*, "Justice System Journal" 2008, Vol. 29, pp. 298–312; S.A. Lindquist, *Bureaucratization and balkanization: The origins and effects of decision-making norms in the federal appellate courts*, "University of Richmond Law Review" 2007, Vol. 41, pp. 659–706.

[6] See: S.J. Choi, M Gulati, E.A. Posner, *What do federal district judges want? An analysis of publications, citations, and reversals*, "Coase-Sandor Working Paper Series in Law and Economics" 2010, pp. 23–26; W.M. Landes, L. Lessig, M.E. Solimine, *Judicial influence: A citation analysis of federal courts of appeals judges,* "Journal of Legal Studies" 1998, Vol. 27, No 2, pp. 271–332; J.M. Ramseyer, *Talent matters: Judicial productivity and speed in Japan*, "International Review of Law and Economics" 2012, Vol. 32, pp. 38–48.

[7] See: V. Dimitrova-Grajzl, P. Grajzl, J. Sustersic, K. Zajc, *Court output, judicial staffing, and the demand for court services: Evidence from Slovenian courts of first--instance*, "International Review of Law and Economics" 2012, Vol. 32, pp. 19–29.

continued to significantly affect productivity. A similar conclusion was reached by Beenstock and Haitovsky in 2004 when they investigated Israeli courts. Their findings suggested that increasing the number of judges did not efficiently improve productivity. Their research also revealed a correlation between the workload pressure on judges and their productivity, indicating that an increase in the number of judges led to a reduction in the number of completed cases. Additionally, it highlights the importance of considering various factors, including workload management and case processing efficiency, when evaluating and enhancing the performance of the judiciary.[8]

To enhance the measurement of productive efficiency, the Data Envelopment Analysis (DEA) approach has gained popularity. DEA is a mathematical and statistical method used for assessing the relative efficiency or performance of multiple decision-making units (DMUs) or entities that convert inputs into outputs. DEA allows for the comparison of similar production units, such as courts, and the calculation of relative technical efficiency scores.[9] DEA has the advantage of being a versatile method that can accommodate multiple inputs and outputs, making it useful for complex, real-world problems where efficiency evaluation is required. Therefore, it is considered as a method that offers a robust measure of the productive efficiency of individual courts.

Previous studies on the judiciary have employed DEA, utilising both single-stage and two-stage models. Lewin *et al.* were pioneers in 1982, using DEA to assess the efficiency of criminal courts and judicial districts in North Carolina. They considered various outputs, including the number of judgments and cases pending for less than 90 days, along with inputs such as caseload, the number of district attorneys and staff, days of court sessions, the number of misdemeanours within the caseload, and the size of the white population. Their analysis identified inefficient judicial districts and

[8] See: M. Beenstock, Y. Haitovsky, *Does the appointment of judges increase the output of the judiciary?*, "International Review of Law and Economics" 2004, Vol. 24, pp. 351–369.

[9] G. Falavigna *et al.*, *Judicial productivity, delay and efficiency: A Directional Distance Function (DDF) approach*, "European Journal of Operational Research" 2015, Vol. 240, Issue 2, pp. 592–601.

comparison groups of efficient and comparable districts, with the aim of proposing corrective policies to enhance the performance of inefficient DMUs.[10]

Kittelsen and Førsund conducted a comprehensive study in 1992 that centred on the evaluation of Norwegian district courts. Their research delved into various aspects of the functioning and efficiency of these courts, aiming to provide a thorough analysis of their performance and the factors influencing it.

The primary focus of their study was on understanding how the number of judges and staff within these district courts impacted their overall performance. They considered this factor as an input into the judicial process, with a specific emphasis on its relationship with the number of cases completed, which served as the output measure. This approach allowed them to assess whether an increase in the number of judges and staff positively or negatively affected the courts' productivity. To provide a more detailed and comprehensive assessment, Kittelsen and Førsund also considered the classification of cases handled by the district courts, distinguishing between civil and criminal matters. By categorising cases in this manner, they could better understand how the nature of the cases influenced the courts' performance. One of the key findings of their research was the concept of "economies of scale" within the Norwegian judicial system. They suggested that the inefficiencies observed were linked to the size of these courts, implying that there might be an optimal size at which the courts could operate most efficiently.[11]

Chaparro and Jimenez conducted an assessment of the technical efficiency of administrative sections within the Spanish Courts in 1996. They utilised the labour force as an input and the number of completed cases as an output. Notably, they differentiated between cases concluding with a judgment and those resolved through other means, like settlements or suit withdrawals.[12]

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[10] A.L. Lewin, R.C. Morey, T.C. Cook, *Evaluating the administrative efficiency of courts*, "Omega" 1982, Vol. 10, pp. 401–411.

[11] S.A.C. Kittelsen, F.R. Førsund, *Efficiency analysis of Norwegian district courts*, "The Journal of Productivity Analysis" 1992, Vol. 3, pp. 277–306.

[12] F. Pedraja-Chaparro, J. Salinas-Jimenez, *An assessment of the efficiency of Spanish courts using DEA*, "Applied Economics" 1996, Vol. 28, Issue 11, pp. 1391–1403.

Shifting our focus to Italy, Marselli and Vannini embarked on an analysis of the national Districts of the Court of Appeal in 2004. Their approach incorporated inputs such as judges' workload and the total number of cases, categorised into pending and incoming. Meanwhile, the output was determined by the number of cases completed. To investigate inefficiency, they introduced environmental variables in the second stage of their study.[13]

Schneider delved into German courts in 2005, employing a two-stage analysis. In this context, the output was represented by the number of cases managed, while the inputs encompassed the number of judges and their caseloads. In the second stage, the author explored the relationship between the courts' productivity and the careers of the judges.[14]

In a more recent study by Yeung and Azevedo, the DEA technique was applied to evaluate the efficiency of Brazilian courts. They considered the number of judges and staff as inputs and the number of judgments for both first and second instances as outputs.[15] Similarly, Deyneli investigated the relationship between judicial efficiency and judges' salaries at the European level. In the first stage, the author used the number of judges and staff as input, with the number of resolved cases as output. In the subsequent stage, variables such as judges' salaries, their training, and the number of courts were introduced as regressors.[16]

Yet another methodology that was used to with the aim to assess judicial efficiency is Directional Distance Function (DDF). In their work, Falavigna and her colleagues used the DDF to assess

[13] R. Marselli, M. Vannini, *L'Efficienza Tecnica dei Distretti di Corte di Appello Italiani: Aspetti Metodologici, Benchmarking e Arretrato Smaltibile*, "CRENOS Working Paper" 2004, No. 9, pp. 17–23.

[14] M.R. Schneider, *Judicial career incentives and court performance: An empirical study of the German labour courts of appeal*, "European Journal of Law and Economics" 2005, Vol. 20, No. 2, pp. 127–144.

[15] L.L. Yeung, P.F. Azevedo, *Measuring efficiency of Brazilian courts with data envelopment analysis (DEA)*, "IMA Journal of Management Mathematics" 2011, Vol. 22, pp. 343–356.

[16] F. Deyneli, *Analysis of relationship between efficiency of justice services and salaries of judges with two-stage DEA method*, "European Journal of Law and Economics" 2012, Vol. 34, No. 3, pp. 477–493.

judicial efficiency, specifically in Italian tax courts. They compared the results obtained from DDF with those from a standard Data Envelopment Analysis model, while also applying the bootstrap procedure for more robust estimates. The study found that standard DEA models, which focus on maximising outputs while keeping inputs equal, might not adequately account for externalities, such as judicial delay. According to the authors, judicial delay results in social costs, impacts the certainty of justice, and increases private and public expenditures on legal enforcement. It can also affect the demand for justice and the overall reliability of the judiciary.[17] The empirical evidence showed that in the context of the justice system, achieving the goal of 'the sooner, the better' in resolving cases is desirable but not always feasible. While reducing judgment times is important, it does not always produce the expected results. The pursuit of technical efficiency while minimising externalities requires a nuanced approach at each step of the dispute resolution process.

13.3.1. SUMMARY

A literature analysis has revealed a plethora of research endeavours aimed at assessing judicial efficiency from various perspectives. The purpose of this type of analysis was to ascertain whether the indicators identified through qualitative research presented in the preceding section and those elucidated in the literature review are congruent. Additionally, this analysis sought to categorise these indicators in a manner that enhances their clarity and identifiability.

Drawing from the insights gleaned from the literature review, the primary indicators for assessing judicial efficiency, as expounded in the text, can be categorised as follows:

1. Quantity of judicial decisions: this quantitative indicator evaluates the output in terms of the quantity of judicial decisions delivered relative to the resources invested.

[17] G. Falavigna *et al.*, *Judicial productivity, delay and efficiency: A Directional Distance Function (DDF) approach*, "European Journal of Operational Research" 2015, Vol. 240, Issue 2, pp. 592–601.

2. Educational qualifications of judges: the education and qualifications of judges are crucial factors influencing the speed at which judges arrive at decisions. This relates to their productivity and efficiency.
3. Judicial delay: the time required to resolve disputes and the causes of delays in rendering decisions serve as a qualitative indicator of judicial efficiency. Delays are often regarded as a rough indicator of overall judicial efficiency and can significantly impact the reliability of the judicial system.
4. Number of judges: the number of judges within a judicial system can also be an important indicator of efficiency, as seen in numerous studies. It's essential to understand how the number of judges affects productivity.
5. Caseload: the caseload, specifically the current caseload, is another key indicator, as it significantly affects the efficiency of the judicial production process.
6. Case processing time: the time of case processing, workload management, and the capacity to complete cases is crucial to the overall performance of the judiciary. This involves the effectiveness of various processes within the judicial system.
7. Externalities and judicial delay or backlog: externalities, such as judicial delay, which impact social costs, certainty of justice, and private and public expenditures on legal enforcement, are important factors that affect judicial efficiency.

These indicators are commonly used in various studies to assess and understand the dynamics of production technology within judicial systems and their efficiency. It is also evident that researchers often focus on understanding the relationship between these indicators and their impact on the effectiveness and performance of the judiciary.

Now, in comparing these categories with those identified in the previous chapter, it becomes evident that they largely align, and in some cases, their interpretations can be harmonised. However, a crucial question persists: which of these indicators should be employed in the construction of a comprehensive efficiency evaluation model? In the chapters that follow, the paper will delve deeper into the

process of selecting and refining these indicators to create a holistic and practical efficiency evaluation model for judicial systems.

13.4. Comparative Evaluation of Judicial Efficiency Indicators: Enhancing the Assessment Methodology

The preceding sections have presented a comprehensive analysis of various indicators used to assess judicial efficiency. Among the key indicators identified, Clearance Rate, time for case resolution (or Disposition Time), the number of judges and court staff, and the management of case backlogs stand out as pivotal factors. These indicators are instrumental in evaluating the performance and effectiveness of court systems in different jurisdictions.

It is worth noting that these indicators bear a striking resemblance to the methodology employed by the European Commission for the Efficiency of Justice (CEPEJ) when assessing judicial efficiency in its member states. CEPEJ's approach, based on a consensus among its member states, has been widely recognised and accepted as a robust framework for evaluating judicial performance.

To put this methodology into practice, this paper endeavours to amalgamate the identified indicators and apply them to assess the efficiency of the first instance courts in Georgia. Data spanning the years 2018 to 2020 will be used to conduct this evaluation. The central objective is to determine whether these indicators are sufficiently comprehensive to create a holistic tool for assessing judicial efficiency, or if additional components are necessary to refine and enhance this assessment.

This comparative approach, drawing parallels between indicators used internationally and those identified in previous sections, will shed light on the effectiveness of CEPEJ's methodology and its applicability to the Georgian judicial system. The findings will provide valuable insights into whether the existing indicators suffice or if they need to be augmented to create a more nuanced and all-encompassing tool for evaluating judicial efficiency.

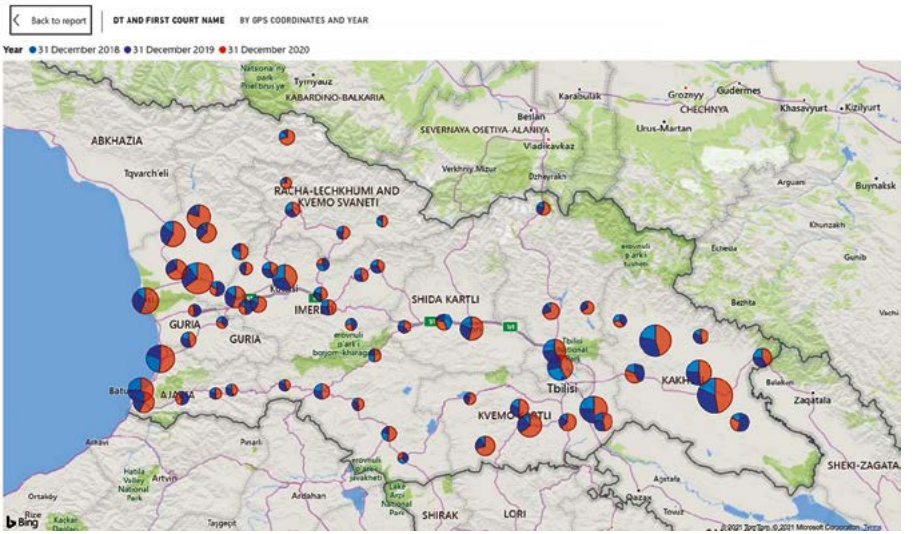
13.4.1. APPLIED MODULE AND INDICATORS

Based on the data collected for the three periods from 2018 to 2020, a prototype of a court management system can be developed to effectively demonstrate the efficiency of Georgian first-instance courts (excluding magistrate courts). To achieve this, we will utilise traditional key performance indicators of court performance, such as the Clearance Rate and Disposition Time, making meaningful comparisons and highlighting specific areas that require managerial attention.

In addition to these traditional indicators, we will consider other crucial metrics. These include the number of judges and the quantity of cases resolved by each judge at the end of the reporting period. We will also examine the number of pending cases per judge. By incorporating these indicators, we aim to provide a comprehensive overview of the efficiency of Georgian first-instance courts during the specified timeframe.

To achieve our goal, we have analysed four main types of cases: civil, commercial, and litigious cases, criminal cases, administrative cases, and administrative offense cases. We have calculated the numerical data for all first-instance courts in Georgia using the appropriate formulas for Clearance Rate and Disposition Time. The results are presented below – in Figure 1 and Table 1. Figure 1 shows Disposition Time for three following periods according to geographic location.

Figure 1. *Heat map of Georgian first-instance courts*



Source: Supreme Court of Georgia, https://old.supremecourt.ge/statistics/ [access: 15.10.2023].

Table 1. *Clearance Rate (%) and Disposition Time (number of days) figures for three different periods*

Court	2018		2019		2020	
	CR	DT	CR	DT	CR	DT
Tbilisi City Court	94	232	102	204	93	309
Ozurgeti	96	55	92	89	94	122
Kutaisi City Court	94	209	99	223	96	307
Samtredia	89	91	87	164	78	312
Zestafoni	96	59	95	92	94	128
Sachkhere	102	43	96	67	98	77
Telavi	96	230	88	346	91	481
Gurjaani	91	182	91	216	84	364
Sighnaghi	86	227	70	418	78	312
Mtskheta	95	171	90	214	94	270
Ambrolauri	96	44	100	44	91	94
Tsageri	101	68	97	84	96	105

Court	2018		2019		2020	
	CR	DT	CR	DT	CR	DT
Poti	101	102	77	240	76	450
Senaki	105	120	81	249	55	682
Zugdidi	95	103	78	220	64	439
Akhaltsikhe	96	69	99	81	90	142
Akhalkalaki	99	67	99	58	84	138
Gori	101	152	94	184	76	413
Khashuri	101	37	94	64	103	65
Rustavi	92	202	97	231	84	411
Bolnisi	107	78	83	170	67	442
Tetritskaro	97	77	89	127	87	209
Batumi	100	188	92	232	87	332
Khelvachauri	92	98	92	131	75	308
Sokhumi[18]	99	35	92	63	71	260
Gali-Gulripshi[19]	70	257	111	93	98	191

Source: Supreme Court of Georgia, https://old.supremecourt.ge/statistics/ [access: 15.10.2023].

Table 1 displays the Clearance Rate and Disposition Time of Georgian first-instance courts over three distinct periods. The Clearance Rate percentage is determined by dividing the number of incoming cases by the number of resolved cases and multiplying the result by 100. The analysis of the Clearance Rate is straightforward: if the percentage for this indicator is below 100%, it indicates that the courts cannot resolve as many cases as they receive. Conversely, if the Clearance Rate exceeds 100%, it means that the courts not only managed to resolve all the cases received during a particular period but also cleared some cases from the backlog.

[18] The Sokhumi Regional Court is responsible for hearing cases from the occupied Sokhumi region and is currently situated within the premises of the Tbilisi City Court.

[19] The Gali-Gulripshi Regional Court is responsible for hearing cases from the occupied Gali-Gulripshi and Ochamchire Tkvarcheli regions. Currently, it is situated within the premises of the Zugdidi Regional Court.

On the other hand, Disposition Time, as discussed in the second chapter of this paper, signifies the number of days required to complete cases and is calculated using the following formula: 365 divided by the result of dividing the number of resolved cases by the number of unresolved cases.

Table 2. *Number of judges in three different periods*

Court	**2018**	**2019**	**2020**
Tbilisi City Court	109	106	120
Ozurgeti	3	1	2
Kutaisi City Court	6	4	6
Samtredia	3	3	3
Zestafoni	3	1	2
Sachkhere	1	1	1
Telavi	5	3	5
Gurjaani	4	3	1
Sighnaghi	2	2	2
Mtskheta	2	2	4
Ambrolauri	1	1	1
Tsageri	0	1	0
Poti	1	2	2
Senaki	1	1	1
Zugdidi	3	4	4
Akhaltsikhe	3	1	4
Akhalkalaki	2	1	2
Gori	9	6	8
Khashuri	4	3	4
Rustavi	8	8	10
Bolnisi	5	3	5
Tetritskaro	2	2	2
Batumi	12	11	9
Khelvachauri	1	0	1
Sokhumi	2	1	1

Court	2018	2019	2020
Gali-Gulripshi	0	0	0
Sum	192	171	200

Source: Own development.

Table 2 presents the data on the number of judges in Georgian first-instance courts. It is noticeable that in 2020, the number of judges was higher than in the two preceding periods. If the number of judges is directly linked to Disposition Time (DT), we might expect DT to be higher for this period. The average DT for 2020 is calculated at 293 days, indicating that, on average, Georgian courts require 293 days to finalise a case. It's important to note that this is a simplified calculation, and it's likely that DT for criminal cases differs from that of civil cases.

In 2020, the total number of finalised cases across all courts was 82,893. Examining the correlation between the number of judges and the average DT for 2020, we find that there were 8 judges on average. This suggests that, on average, an individual judge took approximately 38 days to finalise a case in 2020.

In 2019, the total number of finalised cases was 110,664, and in 2018, it was 110,012. The average DT for these periods was 165 days in 2019 and 123 days in 2018, respectively. In 2019, the average number of judges was 6.5, while in 2018, it was 7. Following this trend, we can conclude that in 2019, an individual judge was finalising a case in approximately 25 days, and in 2018, it took around 17 days.

Interestingly, despite having the highest number of judges in 2020 compared to the other two periods, judges were finalising cases more slowly. This raises the question of whether there is a strong correlation between Disposition Time and the number of judges.

13.4.2. ASSESSMENT

In the preceding section, we endeavoured to assess the efficiency of Georgian courts in line with the methodology applied by the CEPEJ during its evaluation of member states. To achieve this, we employed

CEPEJ's two classic indicators, Clearance Rate and Disposition Time, along with some additional indicators commonly used by CEPEJ, such as the number of judges, types of cases, caseload, and backlogs.

It is important to analyse whether relying primarily on Clearance Rate and Disposition Time for assessing court efficiency is sufficient, or if additional indicators are necessary for a more comprehensive evaluation. Clearance Rate has consistently been a key indicator in judicial efficiency research. It is logical to prioritise the ability of courts to finalise cases within a specific period, but this indicator, when used in isolation, offers an incomplete view of judicial efficiency. Firstly, Clearance Rate places significant emphasis on the quantity of cases resolved, potentially prioritising the speedy processing of cases at the expense of ensuring effective justice. This emphasis on quantity can lead to rushed decisions and may result in important case details being overlooked.

Secondly, judges might feel pressured to expedite case resolution to meet Clearance Rate targets, which could lead to burnout and increased stress among judicial personnel. Such pressure can significantly impact the overall well-being of the judiciary and might encourage judges to prioritise quantity over quality. Consequently, the quality of justice may be compromised. Furthermore, Clearance Rate may not be an ideal tool for backlog management, as it could incentivise courts to artificially inflate their Clearance Rates by addressing older cases in the backlog while leaving newer cases unaddressed. This could result in an imbalance in case management.

Even when used in conjunction with Disposition Time, which measures the time taken for case hearings, these indicators alone may not be sufficient for a comprehensive assessment of judicial efficiency. Disposition Time has its limitations as well, particularly in its lack of differentiation between complex and straightforward cases. It does not distinguish between cases of varying complexity, potentially leading courts to focus on quick resolution at the expense of more intricate cases that require more time and attention. Moreover, Disposition Time might not accurately reflect the actual time required to process a case. Courts may clear backlogs of older cases, resulting in lower Disposition Times, while new cases may still experience delays that are not adequately represented by the

metric. Disposition Time (DT) also does not account for specific judge days or working days. Sometimes judges are on training, on leave, or on sick leave, and DT does not incorporate these variables when assessing the time.

As demonstrated in Tables 2 and 3, Disposition Time alone does not explain the potential correlation between the number of judges and the time required for case finalisation. For instance, in 2020, when there was the highest number of judges in Georgian first-instance courts, Disposition Time was the lowest when compared to 2018 and 2019. This discrepancy might be attributed to the impact of the COVID-19 pandemic, which disrupted court proceedings for an extended period. Unfortunately, such external factors are not considered when calculating Disposition Time, leading to a potentially skewed representation of court efficiency.

Given these limitations, it is advisable to use Clearance Rate and Disposition Time in conjunction with other indicators and metrics when assessing judicial efficiency. A holistic approach should consider various aspects, including case complexity, caseload management, delay control, and qualitative assessments of case management. This approach can offer a more accurate and comprehensive evaluation of a court's efficiency.

The emphasis on quantitative indicators, such as Clearance Rate and Disposition Time, by organisations like CEPEJ and within the research discussed in this paper is undoubtedly important in assessing judicial efficiency. These quantitative metrics provide a structured and objective way to measure certain aspects of court performance. They allow for comparisons across different jurisdictions and over time, offering valuable insights into how efficiently courts process cases and manage their caseloads. However, a sole reliance on quantitative indicators has its limitations. While they provide a numerical snapshot of court performance, they may not capture the full complexity of the judicial system.

To enhance the effectiveness and relevance of assessing judicial efficiency, it is essential to strike a balance between quantitative and qualitative assessments. Continually refining the evaluation process by incorporating qualitative indicators and considering the intricacies of case management can lead to a more holistic and

accurate evaluation. This balanced approach allows for a comprehensive understanding of how well a judicial system is functioning and where improvements can be made to ensure justice is not only delivered promptly but also effectively and fairly.

13.5. Identifying Relevant Indicators for the Efficiency Assessment

The preceding chapter's conclusion underscored the insufficiency of relying solely on quantitative indicators for the comprehensive evaluation of judicial efficiency. It became evident that incorporating additional factors, including qualitative considerations, is essential for a more nuanced assessment. This chapter embarks on the task of identifying the relevant indicators necessary for the development of a comprehensive tool for assessing judicial efficiency. Such a tool should strike a balance between quantitative and qualitative indicators to provide a holistic evaluation.

To begin this task, we will draw from the analysis presented in previous chapters. These foundational insights will guide us in identifying and incorporating the requisite indicators, ensuring a robust and multifaceted approach to judicial efficiency assessment. In doing so, we aim to refine the existing evaluation methodologies, enhancing their effectiveness in capturing the intricacies of court performance.

For this reason, the paper identifies six efficiency directions, incorporating relevant indicators, through which all court processes can be assessed, thereby providing a clearer picture of the efficiency of the courts.

13.5.1. EFFICIENCY DIRECTION 1 – CASE MANAGEMENT

From the literature review and insights gained from the CEPEJ's work, it is evident that the primary indicators for evaluating judicial efficiency universally revolve around two core performance indicators: Clearance Rate and Disposition Time. These indicators are

fundamental in assessing a court's ability to manage incoming cases and their timely resolution, thus dealing with backlogs. However, it is also clear that to comprehensively evaluate a court's performance, additional indicators are necessary to provide a more holistic picture.

Efficiency evaluations should focus on the court's capacity to handle pending cases and effectively manage backlogs. Therefore, it is essential to introduce various indicators that specifically address these aspects. Additionally, analysing the age of case dispositions and the time required for different case stages can help identify areas of potential delay and inefficiency within the judicial process. The age of backlog cases is another critical indicator that sheds light on a court's ability to prioritise and efficiently address long-standing cases.

To summarise, the following core performance indicators are crucial for evaluating court efficiency:

1. Clearance Rate percentage is a fundamental indicator that assesses the court's ability to manage its caseload. It is calculated by dividing the number of cases resolved during a specific period by the number of incoming cases during the same period, multiplied by 100. This indicator reflects the court's efficiency in addressing incoming cases promptly. A high Clearance Rate indicates that the court is handling cases efficiently and preventing the accumulation of backlogs. However, it's essential to note that a very high Clearance Rate can sometimes indicate that decisions were rushed at the expense of the quality of the delivered justice.
2. Disposition Time measures the time it takes for a court to resolve cases. It is calculated by dividing the total number of exact working days of judges by the number of resolved cases in a specific period. This indicator offers insights into the court's efficiency in processing cases. While a low Disposition Time suggests swift case resolution, it does not differentiate between the complexity of cases. For instance, some complex cases may require more time for a fair and just resolution. It's important to consider the balance between speed and quality in Disposition Time assessment.
3. Number of backlogs examines the backlog of pending cases at the court's disposal. Backlogs are cases that have not been resolved within a predefined timeframe. Evaluating the number of backlogs at the beginning and end of the evaluation period

provides information about the court's capacity to manage its caseload effectively and prevent undue delays in case resolution.

4. Age of backlogs is to gain a deeper understanding of the backlog situation, it is essential to categorise backlogs by their age. The age of backlogs can be classified into four categories: those pending for over 6 months, those between 6 and 12 months old, those between 12 and 24 months old, and those pending for over 24 months. This breakdown helps identify the severity of backlog issues and the court' prioritisation of different age groups of cases.
5. Time for case stages: judicial proceedings consist of various stages, each with its own time requirements. To evaluate efficiency comprehensively, it is crucial to analyse the time taken at each stage of the judicial process. This data can then be grouped and used to calculate average time spent on different case stages. This approach aids in assessing the efficiency of case progression and may highlight areas where delays are most likely to occur.
6. Number of judges: the total count of judges in an individual court provides context for understanding the court's capacity to handle its caseload. A higher number of judges may suggest greater resources, but it's essential to consider whether these judges are effectively utilised to maintain efficiency.
7. Number of cases disposed per judge: this indicator measures the caseload handled by individual judges. It is calculated by determining the number and percentage of cases disposed of by each Judicial Officer within a year. It helps assess the productivity of individual judges and whether their caseload is manageable.

Following the collection of this information, a comprehensive evaluation of court performance is necessary. The evaluation should employ a rating system on a scale from 1 to 100, with 100 indicating the highest performance. The result should be presented as a percentage to provide a clear and quantifiable measure of efficiency.

13.5.2. EFFICIENCY DIRECTION 2 – PROCEDURES AT THE COURT

The utilisation of quantitative criteria to evaluate the court's performance and its case management processes is undeniably significant.

However, a comprehensive understanding of the court's efficiency cannot be attained solely through this quantitative lens. Thus, an assessment of court procedures is considered the second critical dimension of court efficiency.

Assessing court procedures is of paramount importance due to the profound impact that these processes wield over the functioning of the justice system and the dispensation of justice itself. Several pivotal aspects underpin the rationale for this assessment. Foremost among these is the structured framework of case management powers, statutes, rules, procedures, and practice directions, which collectively serve as the cornerstone of the court's operational framework. Regular reviews of these procedural elements are imperative to ensure their continued relevance, compliance with legal standards, and alignment with evolving legal requirements. The evaluation of these components enables the court to adapt to changing circumstances, maintaining the integrity of the justice system.

An equally indispensable dimension of this assessment pertains to the knowledge and adherence of judges and court staff to the case management framework. Their comprehension and adherence to these procedures not only ensure the consistent application of the law but also contribute significantly to the transparency and fairness of the legal process.

Efficiency is a hallmark of a well-functioning court system, and efficient case handling crucially hinges on the expeditious screening of cases. The evaluation of cases within 24 hours of filing is instrumental in assessing compliance with filing requirements and identifying case characteristics. This process serves as a fundamental cornerstone for the timely delivery of justice and helps mitigate unnecessary delays in case resolution.

Differential case management constitutes a key facet of court procedures, involving the development of policies that prioritise specific case types, such as those involving children or victims of family violence. This prioritisation ensures the judicious allocation of resources to cases where they are most warranted, thus promoting the fair and expeditious resolution of these matters. Practical tools, such as the application of colour coding to files and documents for differentiated cases, enhance the identification and management of

cases based on their specific characteristics, further enhancing the operational efficiency of the court.

Acknowledging that the majority of disputes do not culminate in trials, courts must encourage parties to explore alternative dispute resolution (ADR) options. ADR methods, such as mediation and judicial settlement conferencing, offer parties the opportunity to resolve their disputes outside the courtroom. This proactive approach not only alleviates the burden on the court but also fosters more cost-effective and expeditious dispute resolution, to the benefit of all parties involved.

In conclusion, the assessment of court procedures is a multifaceted endeavour, bearing profound implications for the legal system. It is integral to the preservation of legal standards, the facilitation of efficient case management, and the provision of fair and timely justice. Furthermore, the promotion of alternative dispute resolution options significantly contributes to the overall effectiveness and accessibility of the justice system.

13.5.3. EFFICIENCY DIRECTION 3 – CASELOAD MANAGEMENT

Caseload management is critically important in the operation of courts. It ensures the timely delivery of justice, prevents case backlogs, and promotes fairness and consistency. Efficient management optimises resource allocation, reduces delays and costs, and fosters public trust in the legal system. It also allows for specialised expertise in handling cases, enhancing the overall effectiveness and integrity of the judiciary. Therefore, its thorough assessment is important for court management to properly control the processes at the court.

Assessing caseload serves as a linchpin for ensuring the smooth functioning of the court and the effective delivery of justice. Caseload management encompasses various critical facets that collectively contribute to the efficient and equitable handling of legal matters. A primary element of caseload management involves categorising the caseload into different segments, such as an "active pending list" and an "inactive pending list". Additionally, enforcement and bench warrant cases are separated from these lists. These categorisations

help prioritise cases, enabling the court to allocate resources appropriately and address cases in a timely and organised manner.

Equity in the distribution of cases is a crucial component of caseload management. Cases can be allocated to judges using a random allocation system to reduce any bias or perception of favouritism. Specialised expertise in various areas of law plays a pivotal role in this context. Cases can be allocated to judges who possess recognised expertise in specific legal domains. This ensures that complex cases are entrusted to judges with the requisite knowledge and experience, thus promoting more informed decisions and efficient case resolution. An equitable distribution of cases among judge dockets is essential to prevent judges from becoming overwhelmed by excessive workloads. Regularly equalising the number of cases assigned to individual judges helps maintain fairness and prevents the accumulation of excessive cases in specific dockets. The existence of comprehensive guidance for case flow management is fundamental. A manual of instructions detailing case management procedures should be available to all staff and judges, and its contents should be well-understood and consistently implemented.

Additionally, the continual oversight of enforcement proceedings is essential to guarantee the effective execution of court orders and decisions, thereby upholding the integrity of the legal process.

13.5.4. EFFICIENCY DIRECTION 4 – TIMEFRAME MANAGEMENT

Assessing time management within the judicial system is of significant importance due to its profound implications for the effective functioning of courts and the delivery of justice. Given its considerable significance, it is logical to conduct a separate assessment. This assessment encompasses various critical facets that collectively contribute to a well-organised and efficient legal process.

Efficiency in registry services and adherence to benchmark times for service are crucial elements in ensuring that legal proceedings progress smoothly. Efficient registry services help maintain the timely progression of cases, preventing unnecessary delays that could undermine the pursuit of justice.

A key aspect of time management involves the constant awareness of judicial and administrative leaders regarding the size and nature of the pending caseload. This awareness is pivotal in identifying potential bottlenecks and inefficiencies that could lead to delays. It also provides insight into the specific nature and extent of such delays. Furthermore, leaders' ability to recognise the stages at which cases experience delays, as well as the number of cases affected, is fundamental. This knowledge allows for targeted interventions and corrective actions to mitigate delay and prevent the accumulation of backlogs. Proactive leadership is essential in ensuring that delay does not become a pervasive issue. Leaders should be prepared to take active backlog reduction measures as soon as any backlog is detected, preventing the accumulation of unresolved cases that could lead to prolonged litigation.

Another critical element of time management is the absence of delay in the writing and delivery of reserve judgments. Timely judgment delivery is essential for upholding the principles of justice and ensuring that parties involved in legal proceedings receive closure and clarity within a reasonable timeframe. Likewise, there should be no delay in the disposition of cases. Delays in case resolution can result in a variety of adverse consequences, including prolonged legal disputes, increased costs, and diminished public trust in the legal system. Thus, timely case disposition is a hallmark of efficient time management within the courts.

In conclusion, assessing time management within the court system is integral to maintaining the integrity of the judicial process. Efficient time management ensures that cases progress in a timely and organised manner, prevents unnecessary delays, and promotes the fair and equitable delivery of justice. It also serves to enhance public trust in the legal system by upholding the principles of fairness, transparency, and efficiency.

13.5.5. EFFICIENCY DIRECTION 5 – JUDICIAL MANAGEMENT

Assessing judicial management within the court system is of profound importance due to its far-reaching implications for the

administration of justice and the effective operation of the legal process. This assessment encompasses various critical components that collectively contribute to the fair and timely resolution of legal matters.

A fundamental aspect of judicial management is ensuring that court users understand that the court maintains control over the pace of litigation. This knowledge is vital to maintaining a balanced and fair legal process and helps prevent undue pressure or delay on the part of litigants and legal representatives.

Continuous supervision by judges is another key element of effective judicial management. The presence of few cases without a future listing date indicates that cases are actively monitored and advanced toward resolution, reducing the risk of unnecessary delays and ensuring that the legal process moves forward efficiently. Additionally, published guidelines regarding recusal and conflicts of interest are integral to maintaining transparency and integrity within the judicial system. These guidelines provide a structured framework for addressing situations where judicial impartiality may be compromised, ensuring that justice is dispensed without bias.

Another critical component is the organisation of case management conferences and the establishment of timetables. These activities are essential to ensuring that cases are thoroughly and promptly prepared, preventing last-minute rushes and contributing to a well-structured and efficient legal process. Meticulous preparation of trials is pivotal, with careful consideration given to factors such as the structure, length, and presentation of testimony. Additionally, addressing the special needs of witnesses and victims ensures that trials proceed smoothly and without unnecessary delays. The presence of an agreed and published adjournment policy, when consistently adhered to, promotes consistency and predictability in case scheduling. This, in turn, reduces the likelihood of trials being adjourned on the day of commencement, minimising disruptions to the legal process.

Judicial readiness is fundamental to judicial management. Trials should not be adjourned due to a lack of readiness or available resources within the court. This reliability is critical in upholding the principles of fairness and efficiency in the delivery of justice.

Monitoring trial dates and vacation rates for important events is also essential to prevent scheduling conflicts that could lead to trial delays. This proactive approach ensures that cases progress according to established timetables, reducing the risk of unnecessary postponements.

The capacity to use videoconferencing is a valuable resource that enhances accessibility and convenience for all parties involved. This capability reduces the need for physical presence in the courtroom, thereby contributing to efficiency and adaptability in the legal process.

In summary, the assessment of judicial management is indispensable for upholding the principles of fairness, transparency, and efficiency in the legal system. It ensures that cases are actively monitored, prepared diligently, and proceed according to established timetables, ultimately contributing to the timely and equitable delivery of justice.

13.5.6. EFFICIENCY DIRECTION 6 – INVOLVEMENT OF NON-JUDGE STAFF

The involvement of non-judicial staff is important in ensuring the smooth and effective operation of the court system. Their multifaceted roles and responsibilities encompass critical elements that collectively underpin the integrity and efficiency of the legal process.

First and foremost, the confidence of court staff in their roles and their commitment to delivering exceptional service, both internally and externally, are central to upholding the core principles of the legal process. This confidence and dedication create an environment of trust and reliability, essential for the administration of justice. Furthermore, the production of accurate performance reports on a quarterly basis is not merely an administrative task but a crucial responsibility. These reports serve as a vital tool for evaluating and enhancing the overall performance and efficiency of the court. They provide insights into areas that require improvement, ultimately contributing to the court's ongoing development.

Registry personnel hold a pivotal position in the initial screening of filings, ensuring compliance and completeness. This role acts as a safeguard against the entry of incomplete or inappropriate documents, guaranteeing that only valid and relevant materials enter the legal process. Their diligence minimises disruptions and maintains the integrity of case records. Besides, the competence and meticulous record-keeping of court personnel, including the Case Tracking System, are indispensable. These elements form the bedrock of transparent and efficient case management, enabling the court to operate with precision and ensuring that justice is administered in a timely and orderly manner while fostering trust in the judicial system.

Innovation and improvement are perpetual processes within the court system, and the active participation of court personnel is integral. Their involvement in innovation and improvement plans and processes fuels the ongoing enhancement of court operations, ensuring that the legal system remains dynamic and responsive. Additionally, ensuring accessibility for individuals living with disabilities is a priority that requires a well-established protocol. This commitment to inclusivity is a testament to the court's dedication to providing equitable access to justice for all, regardless of their specific needs.

For the above reasons, providing relevant training and education opportunities to court personnel is a cornerstone of continuous improvement. Their development and expanding knowledge base contribute significantly to the overall efficiency and effectiveness of the court, ultimately benefiting the entire legal process. Finally, proper performance evaluation, recognising and rewarding efficient performance, is a means of fostering a culture of motivation and dedication among court personnel. Their commitment to excellence should be acknowledged and celebrated, creating a work environment that thrives on a sense of purpose and achievement.

13.5.7. INSTRUCTIONS FOR EVALUATION

In the opening section of this chapter, we underscore the presence of a comprehensive effectiveness evaluation system consisting of six distinct efficiency directions. It is crucial to emphasise that each of these directions necessitates separate evaluation to derive a comprehensive final efficiency score. This final score serves as a valuable indicator of the overall efficiency of the courts and the judiciary. Efficiency Direction 1, as stated, does not require a specific elaboration for assessment, as its assessment criteria are already detailed in Chapter 4.1. However, for Efficiency Directions 2 through 6, the assessment process demands a more individualised approach.

To facilitate the measurement of these dimensions, a Likert scale questionnaire is to be utilised. This questionnaire features responses that range from 1 (indicating "strongly disagree") to 5 (indicating "strongly agree"). It is essential to note that the questionnaire is intended for completion by all judges, the court president, and the court manager.

For each efficiency direction, except Direction 1, a pertinent questionnaire must be developed. Within each questionnaire, each question will be assigned a score ranging from 1 to 5. The cumulative maximum score for each direction can be determined based on the number of questions it comprises. For example, if Efficiency Direction 3 includes 10 questions, the maximum attainable score for this specific component would be 50.

The final score for each component is calculated using the following formula:

$$\text{final score (\%)} = (\text{total score}) / (\text{maximum score}) \times 100.$$

For instance, if Efficiency Direction 3 consists of 10 questions and the total score achieved is 35, the resulting efficiency score for Direction 3 shall be calculated as follows:

$$35 / 50 \times 100 = 70\%.$$

This indicates that, for this particular component, the efficiency score is 70%. Similarly, the efficiency scores for all other directions must be calculated using this formula, and an overall rating for each direction can be determined.

The final efficiency score for the court system is calculated by adding the scores of all six directions and calculating their average, providing an encompassing assessment of the court's overall efficiency.

Table 3. *The final efficiency score for the court system*

Efficiency direction	**Assessment results (%)**
Case management	50
Procedures at the court	60
Caseload management	70
Timeframe management	50
Judicial management	80
Involvement of non-judge staff	60
Overall rating	62

Source: Own develpoment.

This methodical and systematic approach to assessment and scoring serves as a robust framework for evaluating court efficiency comprehensively, consistently, and rigorously. It also offers a quantitative basis for making comparisons and identifying areas for enhancement, ensuring that the evaluation process adheres to academic standards and is grounded in a well-defined methodology.

13.5.8. SUMMARY

This chapter introduces a comprehensive effectiveness evaluation system consisting of six distinct efficiency directions, each of which plays a pivotal role in the assessment of the overall efficiency of the courts and the judiciary. The significance of conducting separate evaluations for each of these directions is underscored, recognising

the interconnection between these directions and the topics explored in previous chapters.

The inclusion of these additional directions is a response to the overarching goal of creating a comprehensive efficiency evaluation system. It is also driven by the insights gleaned from the findings of previous chapters, highlighting that assessing court performance solely through core performance indicators is insufficient in providing a complete picture of court efficiency. Consequently, this chapter introduces additional areas of assessment related to procedures at court, caseload management, timeframe management, and the involvement of non-judicial staff. Evaluating these areas is essential in offering a holistic evaluation of court efficiency.

The chapter offers explicit guidance on what should be included within each efficiency direction, providing a structured framework for assessment. Simultaneously, it grants evaluators the flexibility to define questionnaires for each section independently, recognising that different jurisdictions may have unique requirements and priorities. This adaptability allows for the customisation of the evaluation process while maintaining the system's effectiveness.

It is important to acknowledge that certain jurisdictions may necessitate the addition or removal of specific efficiency areas, and this flexibility is a strength of the system, as it can be tailored to suit individual circumstances. The crux of this system lies in the guidance provided for calculating efficiency, serving as a valuable starting point for evaluators as they embark on the assessment process. In summary, this chapter lays the foundation for a robust and adaptable system that enhances the evaluation of court efficiency by integrating various efficiency directions and providing a structured yet flexible approach to assessment.

13.6. Conclusions

The impetus of this paper was to develop a comprehensive judicial efficiency evaluation tool that could be applied not only in the assessment of judicial efficiency within a single country but also to facilitate meaningful comparisons between different countries.

To lay the groundwork for a comprehensive efficiency evaluation tool, the initial section of this study was dedicated to the identification of key performance indicators that hold paramount importance in assessing the efficiency of court systems. These indicators were meticulously culled from in-depth interviews with legal professionals, ensuring that they are firmly rooted in the practical experiences and real-world insights of those immersed in the legal field. One of the noteworthy elements of this process was the systematic categorisation of these performance indicators. This categorisation was not merely an exercise in organisation; it formed the basis for a structured and coherent framework, facilitating their methodical assessment. An essential aspect that warrants emphasis is the validation of these indicators through a comparative analysis. They were diligently cross-referenced with the indicators utilised by the European Commission for the Efficiency of Justice (CEPEJ) in their assessments. This step of validation serves to underscore the indicators' relevance, aligning them with internationally recognised standards. Among the indicators, two central components take precedence in CEPEJ's methodology and are of particular significance: Clearance Rate, and Disposition Time. Clearance Rate, in the context of judicial efficiency, refers to the measure of the court's ability to resolve and close cases within a specific timeframe. This quantitative indicator assesses how effectively courts manage their caseload by emphasising the quantity of cases resolved relative to the resources invested. Disposition Time, on the other hand, quantifies the duration taken to conclude legal proceedings. This indicator evaluates the speed at which judicial decisions are reached and case hearings are conducted. However, it is important to note that Disposition Time, as a quantitative metric, does not differentiate between complex and straightforward cases, potentially leading to an overemphasis on swift resolutions. The comparative analysis against CEPEJ's framework bolstered the indicators' credibility and compatibility with international benchmarks, laying a strong foundation for the subsequent development of a comprehensive efficiency evaluation tool.

The second chapter delved into a literature analysis of existing research on assessing judicial efficiency. The goal was to further

validate and categorise these indicators and gain insights from a broader perspective. The primary indicators discussed in this chapter covered a wide range of aspects, including the quantity of judicial decisions, educational qualifications of judges, judicial delay, number of judges, caseload, case processing time, and externalities and judicial delay. The chapter highlighted the significance of finding a balance between quantitative and qualitative indicators for a comprehensive evaluation. It was a recognition that assessing judicial efficiency wasn't just about numbers; it was about understanding the complexities of the judicial system and its impact on justice delivery.

The following chapter took a practical approach by applying the European Commission's classic indicators, Clearance Rate and Disposition Time, to assess the efficiency of Georgian courts. The focus was on whether relying solely on these quantitative indicators was sufficient or if additional metrics were needed for a more comprehensive evaluation. The chapter pointed out the limitations of these indicators, particularly in their inability to account for case complexity, delays caused by external factors, and the nuances of case management. It advocated for a holistic approach that included qualitative assessments and a more nuanced understanding of court efficiency.

In the concluding chapter, a significant milestone was achieved with the introduction of a comprehensive effectiveness evaluation system. This system was meticulously designed to encompass six distinct efficiency directions, each of which played a pivotal role in the assessment of overall court efficiency. These efficiency directions spanned various critical areas, encompassing not only the core functioning of the court but also procedural, managerial, and personnel-related aspects. One of the notable attributes of this system is its adaptability. It was thoughtfully structured to cater to the specific needs and nuances of different jurisdictions. This is a fundamental recognition of the fact that no two legal systems or court environments are identical, and a one-size-fits-all approach to evaluation would be inadequate. By allowing for customisation and tailoring, the system ensures its relevance and effectiveness in a diverse range of contexts. To provide further clarity and guidance for the evaluators, the chapter offered structured recommendations on what should be included within each efficiency direction. These

guidelines serve as valuable reference points, facilitating a systematic and well-informed approach to evaluation. Simultaneously, the flexibility granted to evaluators to customise questionnaires ensures that the assessment process is in tune with the unique circumstances and priorities of each jurisdiction. This adaptability is a core strength of the system, as it recognises that local and regional variations may necessitate adjustments to the assessment process. The system is not rigid but rather dynamic and responsive to the ever-evolving landscape of the legal field. In essence, this concluding chapter played a pivotal role in shaping a robust and adaptable system for court efficiency evaluation. By integrating various efficiency directions, it provides a comprehensive view of court operations, ensuring that assessments are holistic and aligned with the unique needs of individual contexts. This adaptability and structure ensure that the system serves as a valuable tool for enhancing the evaluation of court efficiency across diverse jurisdictions.

In conclusion, this article's journey took us from the identification of key performance indicators through a literature analysis, practical application, and the introduction of a comprehensive evaluation system. The overarching theme was the need for a balanced approach to assessing judicial efficiency. It recognised that numbers alone could not capture the full complexity of the judicial system, and a combination of quantitative and qualitative indicators was essential for a comprehensive understanding. This approach ultimately sought to improve the delivery of justice, ensuring it was not only efficient but also effective and fair.

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Chapter 14. Challenging an Administrative Act Before the Administrative Litigation Courts in Romania and the Preliminary Procedure That Has to Be Completed Before the Court Proceedings

14.1. Introduction

The main form of activity of the public administration authorities is represented by the administrative act. In this matter in Romania, in recent years, although the doctrine has evolved only to a small extent, and the legislation is relatively limited, the jurisprudence of the administrative litigation courts has had an accentuated dynamic.[1]

As for the provisions introduced by the Administrative Code[2] related to the matter of the administrative act, they refer to the clarification of some aspects, as well as the definition of some frequently used terms, such as quorum and majority, also containing references to the administrative acts adopted or issued by the central and local public administration authorities, not omitting those concerning civil servants. Nevertheless, the adoption of a Code of Administrative Procedure, which includes the systematisation of the main specific aspects of administrative acts, is long awaited in Romania, both by theorists and by practitioners of administrative law.

The adoption of a Code of Administrative Procedure is rightly considered as a solution to the problem created by the multitude

[1] D. Apostol Tofan, *Drept administrativ*, Bucharest 2020, p. 1.

[2] Emergency Ordinance of the Government No. 57/2019, Official Gazette 2019, No. 555.

of laws or Government Ordinances that refer to the administrative act, a problem referred mainly by the judges from the administrative litigation sections of the courts in Romania, who have to solve a very large number of cases of this type, and who manage with difficulty to discern the outline of the applicable legislation. Regarding the normative acts related to this aspect, we are talking about: Law No. 52/2003 on decision-making transparency in public administration,[3] Law No. 544/2001 on regarding free access to public interest,[4] the Government's Ordinance (G.O.) No. 27/2002 on the regulation of petition resolution activity,[5] the Government's Emergency Ordinance (G.E.O.) No. 27/2003 on regarding the tacit approval procedure,[6] and Law No. 24/2000 on legislative technical norms for the elaboration of normative acts.[7]

The notion of administrative act is used in Article 52 paragraph (1) of the Romanian Constitution, which provides that:

> *the person injured in his right or in a legitimate interest, by a public authority, through an administrative act or by the failure to resolve a claim within the legal term, is entitled to obtain the recognition of the claimed right or legitimate interest, the annulment of the act and the reparation of the damage.*

Currently, the main regulation of the administrative act is contained in Law No. 554/2004 on the administrative litigation.[8]

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[3] Law No. 52/2003 on decision-making transparency in public administration, Official Gazette 2013, No. 749.

[4] Law No. 544/2001 on regarding free access to public interest, Official Gazette 2001, No. 663.

[5] Government's Ordinance (G.O.) No. 27/2002 on the regulation of petition resolution activity, Official Gazette 2002, No. 84.

[6] Government's Emergency Ordinance (G.E.O.) No. 27/2003 on regarding the tacit approval procedure, Official Gazette 2003, No. 291.

[7] Law No. 24/2000 on legislative technical norms for the elaboration of normative acts, Official Gazette 2010, No. 260.

[8] Law No. 554/2004 on the administrative litigation, Official Gazette 2004, No. 1.154.

14.2. Definition of the Administrative Act

Article 2 paragraph (1) letter c) of the Law No. 554/2004 defines the administrative act as:

> *the unilateral act of an individual or normative character issued by a public authority, under public power, in order to organise the execution of the law or the concrete execution of the law (n.n. to enforce and to ensure the enforcement of the law), which gives rise to, modifies or extinguishes legal relations legal.*

Also, Article 2 paragraph (1) letter c[1]) points out the fact that the contracts concluded by public authorities whose object is the valuation of public property, the execution of works of public interest, the provision of public services, public acquisitions have the same legal effects as the administrative acts; by special laws, other categories of administrative contracts may be provided. As we can easily see, the legislator does not provide a definition of the notion of administrative contract, but limits himself to enumerating four categories of administrative contracts, with the mention that other special laws may also provide for other administrative contracts.

Also, the fact of not responding to the applicant within the legal term, as well as the unjustified refusal to resolve a request, have the same legal effects as the unilateral administrative acts in accordance with the provisions of Article 2 paragraph (2) of Law No. 554/2004.

Therefore, the notion of the administrative act is used in Romanian legislation, being also taken over in the doctrine, where it has been given a multitude of definitions.

The most complex administrative law treaty of the post-December Romanian doctrine[9] defines the administrative act as:

> *the main legal form of the activity of the public administration bodies, which consists of a unilateral and express manifestation of the will to give rise to, modify or*

[9] A. Iorgovan, *Tratat de drept administrativ*, Bucharest 2005, p. 25.

> *extinguish rights and obligations, in the realisation of public power, under the main control of legality of the courts.*

In another opinion,[10] more synthetic this time, the administrative act is defined as "a unilateral and express manifestation of will of a public authority, mainly of a public administration authority, in order to produce legal effects, in the basis of public power".

Another definition[11] shows that the administrative act represents:

> *the main legal form of activity of the public administration, which consists of an express, unilateral manifestation of will and subject to a regime of public power, as well as the control of legality of the courts, which emanates from administrative authorities or from private persons authorised by them, through which correlative rights and obligations are born, modified or extinguished.*

The recent doctrine[12] shows that the doctrinal definition of the administrative act should be reconsidered, by identifying a broad and a narrow meaning of the notion of administrative act. Thus, it is shown that, in a broad sense, the administrative act represents:

> *a unilateral manifestation of will or an agreement of will, belonging mainly to a public administration authority – in which a party is always a public authority – either to give rise to, modify or extinguish rights and obligations, either to satisfy a general interest, to provide a public service, to carry out a public work or to value a public asset, in the exercise of public power, under legality control of the courts.*

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[10] R.N. Petrescu, *Drept administrativ*, Bucharest 2009, p. 307.

[11] V. Vedinaș (ed.), *Drept administrativ. Ediția a XIII-a, revăzută și adăugită*, Bucharest 2022, p. 360.

[12] D. Apostol Tofan, *Drept administrativ*, *op. cit*., pp. 11–12.

Referring to comparative law, in France,[13] for example, the doctrine defines the unilateral administrative act in a narrow sense, as the act issued by the administration, as a manifestation of its participation in the normative function of the state, being exempt from this category administration contracts, preparatory acts (opinions, recommendations, proposals, etc.) or documents regarding legal relations under private law (such as, for example, the administration's decisions regarding the management of the private domain of public persons).

All these definitions prove that the doctrine is found in a continuous process of adaptation to the legal reality of the concept of an administrative act. Given the existence of this diversity of administrative act definitions, in the specialised literature there is no unanimous opinion regarding the number, name and content of the features of administrative acts, but only certain common elements are highlighted. Their role is to delimit the administrative acts from the other legal acts of the public administration authorities and to clarify which are those administrative acts that can be challenged in administrative litigation.

14.3. Features of the Administrative Act

14.3.1. THE ADMINISTRATIVE ACT IS THE MAIN LEGAL FORM OF THE ACTIVITY OF PUBLIC ADMINISTRATION AUTHORITIES

The activity of the central and local public administration authorities materialises, in the largest part, through administrative acts. Administrative acts can be issued or adopted both by central public administration authorities and by local public administration authorities. The current system of public administration organisation in Romania is characterised by the fact that local public authorities are not subordinated to the central ones, being an expression of the principle of decentralisation, which is a principle specific to the rule

[13] M. Lombard, G. Dumont, J. Sirinelli, [in:] E.L. Cătană (ed.), *Drept administrativ. Ediția 2*, Bucharest 2021, p. 270.

of law. Thus, local problems will be solved by authorities that are elected by local communities, and that will function autonomously, without hierarchical subordination to the central authorities.

These authorities at the level of administrative-territorial units are classified into deliberative authorities: local councils and county councils, respective executive authorities: mayors and presidents of county councils. As an important terminological delimitation, deliberative authorities adopt administrative acts and executive authorities issue administrative acts.

14.3.2. THE ADMINISTRATIVE ACT REPRESENTS A UNILATERAL LEGAL WILL

Referring to the narrow meaning of the notion of administrative act, the unilateral character represents that quality of the administrative act, according to which its issuance does not depend on the participation or consent of the subjects of law to whom it is intended or with respect to which it generates rights or obligations.[14] Being an externalisation of the internal will of a public administration authority, it cannot be conceived that an administrative act contains a request, a finding, an opinion or the expression of a feeling.[15] As essential characteristics, the legal will must be expressed expressly and unequivocally in bringing about a change in the existing legal reality at the time of its occurrence.

Regarding this feature of the administrative act, we can identify several issues that may arise in practice:

1. Does the adoption of an administrative act involving the participation of several natural persons or several public authorities exclude its unilateral character?

[14] I. Santai, *Drept administrativ și știința administrației, Vol. 2, ediție parțial revizuită*, Sibiu 2011, p. 63.

[15] R. Ionescu, *Curs de drept administrativ*, Bucharest 1970, [in:] V. Vedinaș (ed.), *Drept administrativ. Ediția a XIII-a, revăzută și adăugită*, Bucharest 2022, p. 361.

The answer is negative, since the adoption of an administrative act with the participation of several natural persons, who practically meet in a collegial body (for example, the Government, the county council, the local council) implies the result of the vote of these persons, following the meeting of the quorum and of the majority required by law. The quorum represents, according to Article 5 letter ț) Adm. Code, the minimum number of members provided by law for a valid meeting of a collegial body. The majority represents the number of votes required to be expressed by the members of a collegial body for the adoption of an administrative act, established under the conditions of the law (Article 5 letter bb) Adm. Code).

Finally, we are not discussing about a multitude of legal wills, but only one. As it is clearly expressed in the specialised literature, 'the act is unilateral not because it is the work of a single person or a single body, but because it expresses a single legal will'.[16] The conclusion is that the number of people participating in the adoption of the administrative act does not influence its unilateral nature. The same situation applies if two or more public administrative authorities participate in the adoption of the administrative act, for example, or an administrative structure and a non-state structure. In this case, too, a single legal will be achieved, regardless of whether it is about joint decisions of public administration authorities at the same level, at different hierarchical levels, as well as whether non-state structures are involved.

2. Does the issuance of an administrative act upon prior request influence the unilateral character of the act?

In this situation, two hypotheses must be considered, namely: when the prior request is addressed by the issuing body to the higher hierarchical body and when the prior request belongs to another legal subject, respectively the beneficiary of the administrative act. In the first hypothesis, the conditions related to the procedure for issuing the administrative act will be taken

[16] Al. Negoiță, *Drept administrativ*, Bucharest 1996, [in:] V. Vedinaș (ed.), *Drept administrativ. Ediția a XIII-a, revăzută și adăugită*, Bucharest 2022, p. 362.

into account, in the sense of requesting a prior agreement or an approval of the higher hierarchical body. In the second case, in practice there are many situations in which documents are issued only at the request of the interested legal entity (for example, permits or authorisations), and the prior request has the value of a condition that is the basis for issuing the respective document. In both cases, there is only one manifestation of legal will, coming from the issuing administrative authority, so the act retains its unilateral character, because the manifestation of legal will is unilateral.

14.3.3. THE ADMINISTRATIVE ACT IS ISSUED ONLY IN THE EXERCISE OF PUBLIC POWER

The will of the public authority is manifested through the administrative act, in the capacity of the authority of the public administration as the bearer of public power. The regime of public power is defined in the content of Article 5 letter j) of the Adm. Code as being the set of prerogatives and constraints provided by law in order to exercise the powers of public administration authorities and institutions and which give them the possibility to impose themselves with binding legal force in their relations with natural or legal persons, for the defence of the public interest. Two essential characteristics result from this feature of the administrative act, namely: the binding nature of administrative acts and their *ex officio* execution, without the need to fulfil other formalities. The obligation of administrative acts must be viewed from three perspectives, namely, the administrative act is mandatory: for the legal subjects to whom it is addressed, for the issuing authority, and for the administrative authority hierarchically superior to the issuing one.

14.3.4. THE ADMINISTRATIVE ACT PRODUCES LEGAL EFFECTS, GIVING RISE TO, MODIFYING OR EXTINGUISHING CORRELATIVE RIGHTS AND OBLIGATIONS

According to the doctrine,[17] the administrative act is a category of legal acts, a notion by which we understand those manifestations of will made in order to produce legal effects, the realisation of which is guaranteed by the coercive force of the state, under the conditions provided by the legal norms in force. By issuing/adopting an administrative act, legal relations of administrative law are created, modified or extinguished, consisting of those legal relations between public authorities and natural or legal persons.

14.3.5. THE LEGAL REGIME OF THE ADMINISTRATIVE ACT IS GOVERNED BY THE ADMINISTRATIVE LITIGATION LAW

This feature is a fundamental one to differentiate the administrative act from other acts of authority that may emanate from public authorities.

Both the provisions of Article 52, as well as those of Article 126 paragraph (6) of the Romanian Constitution enshrines this principle, according to which the administrative act is subject to the control of legality exercised by the administrative litigation courts, there being, however, some exceptions. Law No. 554/2004 develops the principle stated above.

What is important to emphasise is the fact that a qualification of a legal act as an administrative act does not depend only on the name given to it, but on the meeting of all the previously analysed conditions. For example, although most of the documents issued by the President of Romania are called decrees, however, analysing the activity and administrative jurisprudence, we will notice that the President can also issue decisions,[18] which are not mentioned

[17] T. Drăganu, *Actele de drept administrativ*, Bucharest 1959, p. 8.

[18] According to the Regulation on organization and operation of the Presidential Administration.

in the content of Article 100 of the Romanian Constitution, which stipulates that the President of Romania issues decrees that are published in the Official Gazette of Romania. We find the same situation in the case of the Government of Romania, which can also adopt memoranda, which, although they are not mentioned in Article 108 of the Constitution (this referring exclusively to decisions and ordinances), however, they meet the features of an administrative act.

14.4. Validity Conditions of the Administrative Acts

In this regard, we refer to the legality of administrative acts. The legality of administrative acts was defined[19] as expressing the obligation to comply with the constitutional provisions, the laws adopted by the Parliament, all normative acts having a superior legal force.

In any rule of law, the requirement of legality is a defining and fundamental dimension of it. According to the provisions of the Constitution, Romania is a state of law, democratic and social. The rule of law is defined[20] as a state which, organised on the basis of the principle of the separation of state powers, in the application of which the judiciary acquires real independence, and aiming through its legislation to promote the rights and freedoms inherent in human nature, ensures the strict observance of the regulations by its organs, in all their activity.

The legality of the administrative act is imperative to be respected, implying the obligation of the legislative power to ensure the fulfilment of the quality standards of the law, as well as a guarantee of the principle of legality, imposed by the jurisprudence of the European Court of Human Rights. We have in mind the judgments rendered in the cases of: *Rotaru v. Romania*[21] (paragraph 52),

[19] A. Iorgovan, *Tratat de drept administrative*, *op. cit*., p. 43.

[20] T. Drăganu, *Introducere în teoria și practica statului de drept*, Cluj-Napoca 1992, p. 10.

[21] ECHR, *Rotaru v. Romania case*, Decision of 4 May 2000, Official Gazette 2001, No. 19.

Sissanis v. Romania[22] (paragraph 66) and *Dragotoniu and Militaru-Pidhorni v. Romania*[23] (paragraph 34). These decisions are also invoked by the Constitutional Court of Romania[24] in its jurisprudence regarding the precision with regard to the statement of the legal norm, which claims that the citizen "should be able to foresee, to a reasonable extent, in relation to the circumstances of the case, the consequences that could result from a certain deed", sometimes also requesting for specialist advice.

The content of the principle of legality is composed of three essential requirements:[25] legality is the limit of administrative action; legality is the foundation of administrative action, and legality represents the administration's obligation to act in the effective sense of compliance with the law.

Compliance with the principle of legality in the activity of the public administration authorities is a complex issue, because the discretionary power of the state bodies also intervenes here, respectively the authorities' right of appreciation. This right has been defined as the margin of freedom left to the discretion of the authorities, which implies that in order to achieve the goal provided by the legislator, the public authority can resort to any means of action among several possible ways to follow within the limits of its competence.

In the Romanian doctrine, there are extensive discussions regarding the connection between legality and opportunity. Thus, it is appreciated that the opportunity of an administrative act[26] derives from the capacity that the authority that issues/adopts the act has, in the sense of choosing, among several possible solutions, the one that best corresponds to the public interest that must be satisfied. From this point of view, opportunity is an element of legality

[22] ECHR, *Sissanis v. Romania case*, Decision of 25 January 2007, Official Gazette 2008, No. 784.

[23] ECHR, *Dragotoniu and Militaru-Pidhorni v. Romania case*, Decision of 24 August 2007, Official Gazette 2010, No. 420.

[24] Decision No. 624/2016 of the Constitutional Court of Romania, Official Gazette 2016, No. 937.

[25] D. Apostol Tofan, *Drept administrativ*, *op. cit*., p. 21.

[26] V. Vedinas, *Drept administrativ…*, *op. cit*., p. 367.

and not a condition of its own. Looking from this perspective, it can be appreciated that the administrative litigation judge who has been charged with verifying the legality of an administrative act has the competence to rule both on issues related to legality and on those related to opportunity. Contrary to this opinion,[27] the judicial practice shows us that the administrative litigation courts are not competent to rule on the appropriateness of issuing/adopting an administrative act, this control falling entirely to the administrative authorities.

The principle of legality must be seen in close correlation with two other principles, namely equality in the content of the law, as well as equality before the law. The first of these means that the legal rules must not contain a different treatment in the situation of two identical cases, and the second refers to the fact that the administrative authorities must not treat two different cases identically and *vice versa*.

Also, with reference to the validity conditions, we can refer, on the other hand, to the form that the administrative acts must have, namely the written form. Also, there is the obligation to comply with the legal procedures for issuing/adopting administrative acts, as well as the obligation to publish them.

14.5. Legal Effects of Administrative Acts

The legal effects of the administrative act are viewed from two perspectives: the moment from which they begin to occur, and their extent and termination.

Regarding the moment from which administrative acts produce legal effects, for the issuing body, they produce effects from the moment of their issuance/adoption. For the other legal subjects, the normative acts produce legal effects from the date of their

[27] E.M. Fodor, *Controlul judecătoresc asupra puterii discreționare a administrației publice*, [in:] *Reformele administrative și judiciare în perspectiva integrării europene, Secțiunea pentru Științe juridice și administrative*, "Caietul Științific" 2006, No. 8, p. 643.

publication, and the individual ones, from the date of their communication. Normative administrative acts are those that contain general and impersonal rules, as are the laws, unlike individual administrative acts that are addressed to certain natural or legal persons.

Administrative acts produce effects until they are withdrawn from force, an operation that can be carried out either by the issuing body, or by the hierarchically superior authority or by the courts. Referring to the intervention of the courts, we will discuss the annulment of the administrative act.

Regarding the practice of the courts in Romania, the following were considered administrative acts, considering the definition set out in Article 2 paragraph (1) letter c) of Law No. 554/2004:

1. *A decision of the local council ordering the termination of a rental contract, the court noting in this case the fact that the mentioned decision is issued by an authority of the local public administration, as the institution of the local council appears qualified in Article 23 of the Local Public Administration Law No. 215/2001. At the same time, the decision of the local council* [...] *by which the termination of the rental contract was approved* [...] *constitutes an act issued under the regime of public power, the issuing body having the quality of a subject specially vested with public power attributions. The act is given in order to execute the Law, more specifically in order to execute the duties of administration of the public and private domain of the commune, duties conferred by the legislator on the local councils by Article 36 paragraph (2) letter c) of Law No. 215/2001.* [...] *under the conditions in which the legislation specific to administrative law does not qualify a local council decision, given in the exercise of the powers provided by Article 36 paragraph (2) letter c) of Law No. 215/2001, as being an administrative act or, on the contrary, a civil legal act, as it refers to the public property or the private property of the administrative-territorial unit, the conclusion that*

is imposed is that the one called to verify the legality of the respective decision is only the court of administrative litigation.[28]

2. *A provision for the collection of a motor vehicle concluded by an investigating agent from the Traffic Police, by which the collection of the registered motor vehicle was ordered, noting that the owner or the legal holder of the motor vehicle violated the provisions of Article 142 letter n) of Government Decision No. 1391/2006, since the traffic ticket (minutes/record) of the contravention have not been completed in order for the provisions of Article 32 paragraph (2) of Government Ordinance No. 2/2001 regarding the legal regime of contraventions.*[29]
3. *A decision issued by a local public authority, namely the Decision No. 32/2022, of the local Council of an administrative-territorial unit, having as its object the concession of the surface of 694 square meters of a land.*[30] *The Court considered that the contested act was issued by a public authority in the exercise of the powers conferred on it by the legislation in the field of organisation of public and private administration services. At the same time, the termination of the contract was approved for reasons of public utility, and not as a result of the culpable non-compliance of the obligations assumed by one of the*

[28] In the present case, the plaintiff did not request the execution of the rental contract, which is, indeed, the nature of a civil legal act, but the annulment of the administrative act by which the public authority agreed to end this contract and, thus, to exercise its the powers conferred by the legislator on local councils by Article 36 paragraph (2) letter c) of the Local Public Administration Law No. 215/2001, invoking the illegality of the council decision, Court of Appeal Timișoara, II civil section, Decision No. 1481 of 19 September 2012, summarized in the Romanian "Pandectele Magazine" 2013, No. 9.

[29] Oradea Court of Appel, Decision No. 10/2014, [in:] E. Marin (ed.), *Legea contenciosului administrativ nr. 554/2004. Comentariu pe articole*, Bucharest 2020, p. 34.

[30] https://sintact.ro/#/jurisprudence/553879855/1/sentinta-nr-rj-23-eee-3298-2023-din-15-mai-2023-curtea-de-apel-bacau-conflict-de-competenta-civil?keyword=act%20administrativ&cm=SREST, [access: 08.06.2023].

> *parties through the concession contract or the inability to fulfil them, therefore the present litigation is not one born from the execution of the contract. The initiative of the public authority to unilaterally denounce the concession contract is, in this case, based on the right of public power of the contracting public authority.*

On the other hand, the following were not considered administrative acts:[31] a control report drawn up by the Health Insurance Company for medical service providers; a record of reception upon completion of construction works; a control report concluded by the customs authorities and which was the basis for drawing up a contravention report; a decision of the plenary session of the Supreme Council of Magistracy regarding the organisation of the competition for the promotion of judges and prosecutors in execution positions.

14.6. The Institution of Administrative Litigation

In a state of law, the control over the activity of the public administration is a fundamental element, its role consisting, generically, in preventing errors, in removing them when they have intervened, to ensure the constant and permanent improvement of the activity of the administrative authorities, so that they correspond as best as possible to social needs. The object of control in the public administration is represented by the actions or inactions of the authorities, as well as of its officials, regarding the way in which they fulfilled their legal duties. Three types of control are distinguished: parliamentary control, administrative control and judicial control (administrative litigation).

[31] E. Marin, *Legea contenciosului administrative…*, *op. cit.*, pp. 37–39.

According to Article 2 letter f) of Law No. 554/2004, by administrative litigation is meant:

> *the settlement activity by the competent administrative litigation courts according to the organic law of disputes in which at least one of the parties is a public authority, and the conflict was born either from issuing or concluding, as the case may be, of an administrative act, within the meaning of this law, either from the failure to resolve it within the legal term or from the unjustified refusal to resolve a request related to a right or a legitimate interest.*

This legal definition should not be viewed in a singular way, but in conjunction with other provisions of Law No. 554/2004.

According to Article 1 paragraph (1) of Law No. 554/2004:

> *any person who considers himself injured in a right or in a legitimate interest, by a public authority, by an administrative act or by the non-resolution of a request within the legal term, may address the competent administrative court, for the annulment of the act, the recognition of the claimed right or legitimate interest and the reparation of the damage caused to him. The legitimate interest can be both private and public.*

Under the title Object of the judicial action, Article 8 paragraph (1) of Law No. 554/2004 provides that:

> *the person injured in a right recognised by law or in a legitimate interest by a unilateral administrative act, dissatisfied with the response received to the prior complaint or who did not receive any response within the term provided for in Article 2 paragraph (1) letter h), can notify the competent administrative court, to request the annulment of the act in whole or in part, the reparation of the damage caused and, possibly, reparations for moral damages. It is also possible to address the administrative litigation court the one who*

> *considers himself injured in a right or his legitimate interest by the failure to resolve within the term or by the unjustified refusal to resolve a request, as well as by the refusal to carry out a certain necessary administrative operation for exercising or protecting the right or legitimate interest. The reasons cited in the application for annulment of the act are not limited to those cited in the prior complaint.*

Therefore, the essence of administrative litigation is either the existence of an administrative act, the annulment or suspension of which is to be claimed, or the non-resolution, by a public authority, within the legal term, of a request or the unjustified refusal to resolve it, manifestations or omissions of the public authority through which the subject who can notify the administrative litigation court is considered injured in a legitimate right or interest.

Also, according to Article 18 paragraph (1) of Law No. 554/2004:

> *the court, resolving the request referred to in Article 8 paragraph (1), may, as the case may be, annul, in whole or in part, the administrative act, oblige the public authority to issue an administrative act, issue another document or perform a certain administrative operation.*

The administrative litigation court is a specialised court, and the legal norms that establish its competence are to be strictly interpreted.

The court has full competence to identify and apply the incidental legal norms, in relation to the procedural framework established by the parties and the reasons invoked in the action.

14.7. The Organisation of the Judicial System in Romania Regarding Administrative Litigation

Article 2 paragraph (1) letter g) of Law No. 554/2004 of administrative litigation expressly regulates the administrative litigation courts as: the Administrative and Fiscal Litigation Section of the High Court

of Cassation and Justice, the administrative and fiscal litigation sections of the appeal courts and the administrative-fiscal tribunals.

According to the provisions of Article 30 of Law No. 554/2004, until the establishment of administrative-fiscal tribunals, disputes are settled by the administrative litigation sections of the tribunals.

14.8. Conditions of Action in Administrative Litigation

14.8.1. THE CONDITION THAT THE CHALLENGED ACT IS AN ADMINISTRATIVE ACT

In addition to what has already been shown, it should be highlighted that the action in administrative litigation can have as its object both typical and atypical administrative acts, which are the unjustified refusal to resolve a request related to a right or a legitimate interest (express refusal), respectively, the fact of not responding to the applicant within the legal term (tacit refusal).

Appreciating unjustified refusal and administrative silence as atypical administrative acts does not remove the legal nature of administrative acts that have the same legal effects as the unilateral administrative acts, a fact that results from the definition given to them by Article 2 paragraph (2) of Law No. 554/2004. This fact indicates, in other words, the equality of legal treatment that the legislator considered to give to the actual administrative act and to the assimilated ones, a fact recognised, moreover, both in Romanian doctrine and in administrative litigation jurisprudence.

The notion of unjustified refusal is seen in correlation with that of excess of power, when the administrative authorities have a right of appreciation, that is, they can, in accordance with the legal provisions, adopt a solution from several possible ones,[32] but this vision must take into consideration the fact that issuing an administrative act based on the idea of the right of appreciation, but in violation

[32] O. Puie, *Tratat teoretic și practic de contencios administrativ*, Vol. 2, Bucharest 2016, p. 26.

of the fundamental rights and freedoms of the citizen, represents an excess of power.[33]

Excess of power is defined in Article 2 paragraph (1) letter n) of Law No. 554/2004, as representing the exercise of the discretion of the public authorities by violating the limits of competence provided by law or by violating the rights and freedoms of citizens. So, the excess of power has a double dimension. At the level of the European Union, the principle of avoiding the abuse of law in administrative conduct is enshrined, and there is a European Code of Good Administrative Behaviour,[34] which, although it is not an instrument with binding legal force, however, some elements coincide with the fundamental right to good administration, which is guaranteed by Article 41 of the Charter of Fundamental Rights of the European Union, which has the same legal value as treaties.

The assessment of excess power is also closely related to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, where the right to the resolution of a case within a reasonable time, regardless of its nature, is enshrined, as well as a guarantee of a fair trial, in an optimal and predictable term. Article 21 paragraph (3) of the Romanian Constitution enshrines the right to a fair trial and the resolution of cases within a reasonable time.

As for the unjustified refusal, only the administrative court will be able to decide whether the legal conditions are met with regard to this situation.

An interesting case is the non-execution of the administrative act issued as a result of the favourable resolution of the request or, as the case may be, of the prior complaint, which must be analysed by reference to the concept of a reasonable term provided for in European law. The Romanian Constitution provides for the concept of a reasonable term only with regard to the settlement of disputes, and not with regard to the obligation of the authorities to comply with the requests addressed by citizens in the framework of the administrative procedures prior to the referral to the administrative

[33] E.L. Cătană (ed.), *Drept administrative*, *op. cit*., p. 333.
[34] www.ombudsman.europa.eu [access: 24.07.2023].

litigation court. In this case, we appreciate that the proposal of *de lege ferenda*[35] is fully justified in the sense that such a legislative consecration should be included in the future Administrative Procedure Code of Romania.

In another train of thoughts, the contracts that have as their object: the valuation of public property assets (for example, the contract for the concession of a public asset), the execution of works of public interest (for example, the public-private partnership contract for the concession of works), the provision of public services, public procurement, and other categories of administrative contracts, have the same legal effects as those of the administrative acts. Referring to the first three categories stated above category, interpreting per *a contrario*, it results from the fact that those contracts concluded by public authorities whose object is to value private property assets, as well as those concluded for the management and capitalisation of the private property of the state or administrative-territorial units will be under the jurisdiction of common law courts, being considered private law contracts.

14.8.2. THE CONDITION THAT THE CHALLENGED ACT HARMS A RIGHT OR A LEGITIMATE INTEREST

We mention the fact that an express consecration of the criterion of violation of a legitimate interest appeared in our country with the revision of the Constitution that took place in 2003. Law No. 554/2004 took over the constitutional provisions, so that in Article 1 paragraph (1) it is expressly provided that "any person who considers himself injured in a right or in a legitimate interest can address the competent administrative court".

The injured right is defined in Article 2 paragraph (1) letter o) of Law No. 554/2004 as any right provided by the Constitution, the law or another normative act, which is affected by an administrative act.

The notion of legitimate interest was enshrined in the Constitution of 1991, in the framework of Article 21 paragraph (1), which

[35] E.L. Cătană (ed.), *Drept administrative*, *op. cit*., p. 335.

remained unchanged following the revision of 2003, with the following content: "Any person can turn to the justice system for the defence of his rights, freedoms and legitimate interests." The element of novelty brought by the revision of the Constitution is given by the fact that this concept of legitimate interest also falls within the scope of administrative litigation, within the framework of Article 52 paragraph (1) of the Constitution, which provides that:

> *the person injured in a right or in a legitimate interest, by a public authority, through an administrative act or by the non-resolution of a request within the legal term, is entitled to obtain the recognition of the claimed right or legitimate interest, the annulment of the act and the reparation of the damage.*

The administrative litigation law defines, in the framework of Article 2 paragraph (1) letter p) private legitimate interest as the possibility to claim a certain conduct, in consideration of the realisation of a future and foreseeable subjective right, foreshadowed; and within Article 2 paragraph (1) letter r) the legitimate public interest, which is the interest aimed at the legal order and constitutional democracy, guaranteeing the rights, freedoms and fundamental duties of citizens, satisfying community needs, realising the competence of public authorities.

From the regulation of these two definitions also arise the two types of administrative litigation, respectively the subjective administrative litigation, based on the subjective right or legitimate interest, respectively the objective administrative litigation, based either on the special procedural legitimisation of some public law subjects (the Public Ministry, the Prefect, the National Agency of Civil Servants), or on the legitimate public interest.[36]

Therefore, in the case of subjective litigation, the judge will have to establish the existence of a right or a legitimate interest of the plaintiff, namely the fact that that right or legitimate interest was harmed by the public administration authorities, while in the case

[36] Ibidem, p. 347.

of objective litigation the judge will not also investigate the violation of the subjective rights of the plaintiff, but only the compliance of the administrative act with the law.

Regarding the invocation of the legitimate public interest through administrative litigation, Article 8 paragraph (1^1) of Law No. 554/2004, provides that:

> *natural persons and legal entities under private law can formulate claims by which they invoke the defence of a legitimate public interest only in the subsidiary, to the extent that the harm to the legitimate public interest logically follows from the violation of the subjective right or the legitimate private interest.*

Specific to the possibility of invoking the legitimate public interest by the associations, as interested social bodies, the High Court of Cassation and Justice, the panel for resolving the appeal in the interest of the law, ruled through Decision No. 8/2020,[37] regarding this subject, as follows:

> *In the interpretation and uniform application of the provisions of Article 1 paragraph (1), Article 2 paragraph (1) letters a), r) and s) and Article 8 paragraphs (11) and (12) of the Administrative Litigation Law No. 554/2004, with subsequent amendments and additions, establishes that: in order to exercise legality control over administrative acts at the request of associations, as interested social bodies, the invocation of legitimate public interest must be subsidiary to the invocation of a legitimate private interest, the latter arising from the direct link between the administrative act subject to legality control and the purpose directly and the objectives of the association, according to the statute.*

[37] Decision No. 8/2020 of the High Court of Cassation and Justice, Official Gazette 2020, No. 580.

The social bodies concerned are defined in Article 2 paragraph (1) letter s) of Law No. 554/2004 as "non-governmental structures, unions, associations, foundations and the like, whose object of activity is the protection of the rights of different categories of citizens or, as the case may be, the proper functioning of public administrative services".

Article 8 paragraph (1^1) of Law No. 554/2004 regulates, as shown in the specialised literature,[38] the actions in objective administrative litigation with a subsidiary character, since an injury to the public interest arising from the violation of some legitimate private rights and interests must be proven. The shortcomings of drafting the legal text in this form have been pointed out by the doctrinaires and we also highlight that we cannot imagine a main action based on the subjective right, and the subsidiary one on the injury to the public interest or a situation in which the injury to the public interest would arise from the injury subjective law.[39] Regarding the social bodies concerned, as shown in the contents of Decision No. 8/2020 of the High Court of Cassation and Justice,[40] in the hypothesis in which the social body chooses to formulate an action in administrative litigation invoking an injury to a legitimate public interest, it is found that we are still in the realm of a subjective litigation, in which it is necessary to invoke the injury to the private legitimate interest of the plaintiff social body, in other words, it is necessary for that social body to be "interested", i.e., to have written in its statute, as its main purpose, the defence of the public interest, respecting the principle of the specialty of the respective association's capacity for use.

As the Constitutional Court of Romania also ruled, by Decision No. 66 of 15 January 2009,[41] regarding the exception of unconstitutionality of the provisions of Article 8 paragraph (1^1) of Law No. 554/2004, which states that:

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[38] E. Marin, *Legea contenciosului administrative…*, *op. cit.*, p. 246.

[39] D.C. Dragoș, *Legea contenciosului administrativ. Comentarii și explicații*, Bucharest 2005, p. 248.

[40] Decision No. 8/2020 of the High Court of Cassation and Justice, https://www.iccj.ro/2020/03/02/decizia-nr-8-din-2-martie-2020/ [access: 23.08.2023].

[41] Decision No. 66 of 15 January 2009 of the Constitutional Court of Romania, Official Gazette 2009, No. 135.

> *natural persons and legal entities under private law cannot directly invoke the 'legitimate public interest' for the annulment of an administrative act, but only in the subsidiary, through some separate claims, to the extent that the harm to the legitimate public interest arises from the violation of a subjective right or a private legitimate interest. Therefore, through the action brought, the natural persons and legal persons under private law must first prove that there has been a violation of their private legitimate right or interest, after which they must also support the request in support of the harm to the public interest, arising from the administrative act attacked. By adopting the criticised text, the legislator sought to 'paralyse' the so-called 'popular actions' filed by some natural persons or legal persons under private law who, having no arguments to prove an injury to a legitimate private right or interest of their own, resort to the actions based exclusively on the grounds of harming the public interest.*

However, in judicial practice, in many cases, the courts do not analyse the subsidiary character of actions based on Article 8 paragraph (1^1) of Law No. 554/2004, and by *de lege ferenda*,[42] it was proposed that the legal text provide for the possibility that actions in objective administrative litigation, based on the public interest, can be exercised by natural or legal persons under private law who can justify an interest in the annulment of the act.

In judicial practice,[43] it has been shown that there is no legitimate interest injured in the case of a political formation that claims the election of two vice-presidents of a county council, under the conditions that they had been proposed and elected according to the law, and the representative of the plaintiff political formation had expressly stated that he had no proposal.

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[42] D.C. Dragoș, *Legea contenciosului administrative…*, *op. cit.*, p. 248.

[43] G. Bogasiu, *Legea contenciosului administrativ. Comentată și adnotată, ed. a 4-a, revăzută și adăugită*, Bucharest 2018, p. 41.

14.8.3. THE CONDITION THAT THE ACT EMANATE FROM A PUBLIC AUTHORITY

The notion of public authority is defined in Article 2 paragraph (1) letter b) of Law No. 554/2004 of administrative litigation, as:

> *any state body or administrative-territorial units that act, under public authority, to satisfy a legitimate public interest; are assimilated to public authorities, for the purposes of this law, legal entities under private law that, according to the law, have obtained public utility status or are authorised to provide a public service, under the regime of public power.*

Therefore, several conditions must be met for an entity to be considered a public authority:

i. to be a state body or of administrative-territorial units,
ii. this body to act under the regime of public power, and
iii. to act to satisfy a legitimate public interest.

The notion is also defined in Article 5 letter k) of the Adm. Code, as "a state body or of the administrative-territorial unit that acts under the regime of public power to satisfy a public interest". There is a notable difference between the two legal definitions, in the sense that the Adm. Code no longer provides for the legitimate character of the public interest, although, obviously, this character must exist, it being inconceivable to satisfy an interest that is not based on the principles of law.

14.8.4. CONDITION OF FULFILMENT OF THE PRELIMINARY PROCEDURE

The prior complaint is defined in Article 2 paragraph (1) letter j) of Law No. 554/2004, as "the request by which the issuing public authority or the hierarchically superior one, as the case may be, is requested to re-examine an administrative act of an individual or normative character, in the sense of its revocation or modification".

A reference to this complaint also exists in the content of Article 7 paragraph (1) of Law No. 554/2004, in the sense that:

> *before addressing the competent administrative court, the person who considers himself injured in a right or in a legitimate interest by an individual administrative act addressed to him must request the issuing public authority or the hierarchically superior authority, if it exists, within 30 days from the date of communication of the act, its revocation, in whole or in Article. For well-grounded reasons, the injured person, addressee of the act, can file a preliminary complaint, in the case of unilateral administrative acts, and beyond the term provided for in paragraph (1), but no later than 6 months from the date of issuance of the act.*

This last term is one of prescription, according to the provisions of Article 7 paragraph (3) of Law No. 554/2004, but the law does not provide the legal nature of the 30-day term, a fact that should be reviewed by *de lege ferenda*, because opinions are divided regarding it, some authors considering it a term of recommendation with consequences legal, others see it as a limitation period or time-limit.[44]

Article 7 paragraph (1^1) provides that "in the case of the normative administrative act, the preliminary complaint can be formulated at any time".

According to these legal texts, the prior complaint is mandatory, which makes us wonder if it is compatible with the principle of free and unrestricted access to justice, as well as with the principle of equality.

Article 16 paragraph (1) of the Romanian Constitution provides that "citizens are equal before the law and public authorities, without privileges and without discrimination". This provision should not be interpreted in the sense in which it would support and guarantee an equality of treatment between citizens and public authorities. Thus, referring to the provisions of Article 126 paragraph (2) of the Romanian Constitution, according to which "the jurisdiction

[44] E. Marin, *Legea contenciosului administrative…*, *op. cit.*, pp. 198–200.

of the courts and the court procedure are provided only by law", the obligation to go through the preliminary procedure, regulated as a procedural condition in order to exercise the right to file an action in administrative litigation, does not violate the principle of equality.

Regarding the second principle, provided by Article 21 of the Constitution, according to which "any person can turn to justice for the defence of his rights, freedoms and legitimate interests" and "no law can limit the exercise of this right", this principle is respected, too. In this sense, the Constitutional Court of Romania ruled, through Decision No. 1 of 8 February 1994,[45] stating that:

> *the establishment of an administrative-jurisdictional procedure is not contrary to the principle provided by Article 21 of the Constitution, regarding free access to justice, how long the decision of the administrative body of jurisdiction can be challenged before a court.*

This position of the Constitutional Court has been constantly maintained,[46] showing that the prior complaint does not represent a limitation of the right of citizens to address the justice system and cannot be considered a delay in the resolution of cases, being a way of re-examining the administrative act of to the issuing body or the higher hierarchical body.

On the other hand, from the perspective of the European Court of Human Rights, in *Weissman and others v. Romania*[47] it was shown that the right to a tribunal guaranteed by Article 6 paragraph (1) of the Convention is not an absolute one, but it bears certain limitations, the state having at its disposal the choice of means in this sense.

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[45] Decision No. 1 of 8 February 1994 of the Constitutional Court of Romania, Official Gazette 1994, No. 69.

[46] Decision of the Constitutional Court No. 184/2007, Official Gazette 2007, No. 237; Decision of the Constitutional Court No. 488/2008, Official Gazette 2008, No. 378; Decision of the Constitutional Court No. 670/2005, Official Gazette 2006, No. 77; Decision of the Constitutional Court No. 1188/2007, Official Gazette 2008, No. 62.

[47] ECHR, *Weissman and others v. Romania case*, Decision of 24 May 2006, Official Gazette 2007, No. 588, paragraph 34.

According to the legal texts shown above, the mandatory and imperative nature of the prior complaint follows, there are two propositions: either to address the public authority issuing the administrative act, or to address the hierarchically superior authority, if it exists. In doctrine,[48] the two propositions are called graceful administrative appeal (when the complaint is addressed to the authority issuing the act), respectively hierarchical administrative appeal (the complaint addressed to the hierarchically superior authority).

We can also observe the contradiction of the legislator, who in Article 7 paragraph (1) of Law No. 554/2004 no longer refers to the possibility of requesting, through the prior complaint, the modification of the challenged act, as it follows from the legal definition, only the possibility of requesting revocation being maintained, a fact that should be remedied by *de lege ferenda*.

There are also some exceptions, cases when the prior complaint is not mandatory, in accordance with the provisions of Article 7 paragraph (5) in conjunction with Article 2 paragraph (2) and Article 4 of Law No. 554/2004, for example, the situation in which the subjects of the action in administrative litigation are: the prefect, the People's Advocate, the Public Ministry, the National Agency of Civil Servants or when an assimilated administrative act is considered, respectively the unjustified refusal to resolve a request or the fact of not responding to the requester within the term prescribed by law. Another particular case of non-application of the prior procedure is the one provided by Decision No. 22/2020[49] of the High Court of Cassation and Justice of Romania, which established that:

> *in public office disputes aimed at obliging the employer to pay ungranted salary rights, as well as when the employer has not issued an administrative act or the said act has not been communicated to the civil servant, he can directly address the administrative litigation court, without the need*

[48] O.M. Cilibiu, *Justiția administrativă și contenciosul administrativ fiscal*, Bucharest 2010, pp. 87 ff.

[49] High Court of Cassation and Justice, the panel for resolving appeals in the interest of the law, Decision No. 22/2020, Official Gazette 2020, No. 1208.

to have requested the employer to grant the same rights before the court was notified.

In the case of administrative contracts, the prior complaint is mandatory, being necessary to be filed within 6 months from the date of conclusion of the contract or from the date when the plaintiff became aware of the cause of annulment, but no later than one year from the conclusion of the contract, according to the provisions of Article 7 paragraph (6) of Law No. 554/2004.

14.8.5. THE CONDITION OF FILING THE ACTION WITHIN A CERTAIN PERIOD

This condition is regulated in Article 11 paragraph (1) of Law No. 554/2004, as follows:

Applications requesting the annulment of an individual administrative act, an administrative contract, the recognition of the claimed right and the reparation of the damage caused can be submitted within 6 months from:

a) the date of communication of the response to the prior complaint;

b) the date of communication of the unjustified refusal to settle the request;

c) the expiry date of the deadline for settling the prior complaint, respectively the expiry date of the legal deadline for settling the request;

d) the expiration date of the term provided for in Article 2 paragraph (1) letter h), calculated from the communication of the administrative act issued in the favourable settlement of the request or, as the case may be, of the prior complaint;

d1) the date of becoming aware of the content of the document, if the prior complaint is no longer mandatory.

The discussion is only about individual administrative acts, because normative ones can be challenged at any time.

At the same time:

> *for a valid reason, in the case of the individual administrative act, the request can be submitted even after the deadline provided for in paragraph (1), but no later than one year from the date of communication of the act, the date of taking cognisance of it, the date of filing the request.*

In this case, the legislator also specifies the fact that the 6-month term is one of prescription, and the 1-year term is one of time limit/forfeiture, which remains at the discretion of the court. On the other hand, the fundamental reasons are not defined by the law, a fact that should be remedied by *de lege ferenda*.

Regarding the way of calculating the terms, the provisions of Articles 181–183 of the Code of Civil Procedure, which stipulates that the term that is counted in days, weeks, months or years is fulfilled at midnight on the last days in which the procedural act can be fulfilled. Regarding the sending of documents to the court by email, initially, by Decision No. 34/2017[50] of the High Court of Cassation and Justice it was established that:

> *in the interpretation and application of the provisions of Article 182 and Article 183 of the Code of Civil Procedure, the procedural document sent by fax or e-mail, on the last day of the term which is counted in days, after the time at which the activity ceases at the court, is not considered to have been submitted within the term,*

and then, by Decision No. 45/2020[51] of the High Court of Cassation and Justice it was shown that:

[50] High Court of Cassation and Justice, the panel for resolving some legal issues, Decision No. 34/2017, Official Gazette 2017, No. 803.

[51] High Court of Cassation and Justice, the panel for resolving some legal issues, Decision No. 45/2020, Official Gazette 2020, No. 961.

> *in the interpretation and application of the provisions of Article 182 and Article 183 paragraphs (1) and (3) of the Civil Procedure Code, amended by Law No. 310/2018 on the amendment and completion of Law No. 134/2010 on the Code of Civil Procedure, as well as for the modification and completion of other normative acts, the procedural acts sent by fax or e-mail, on the last day of the procedural term which is counted in days, after the time when the activity ceases at the court, is considered to be submitted within the deadline.*

The preliminary complaint is a petition that, in accordance with the provisions of Article 2 of Government Ordinance No. 27/2002, can be formulated both in writing and by e-mail, the procedure being fulfilled also if this last means of communication is used. In the doctrine of our country,[52] it has been shown, however, that e-mail is used, the petitioner must ensure that his message has reached its destination, possibly by requesting a confirmation, and the sent message must be saved in the output file.

14.9. Procedural Aspects

14.9.1. THE SUBJECTS THAT CAN BE ADDRESSED TO THE COURT

According to Article 8 paragraph (1) of Law No. 554/2004:

> *the person injured in a right recognised by law or in a legitimate interest by a unilateral administrative act, dissatisfied with the response received to the prior complaint or who did not receive any response within the term provided for in Article 2 paragraph (1) letter h), can notify the competent administrative court, to request the annulment of the act in whole or in part, the reparation of the damage caused and, possibly, reparations for moral damages. It is also possible*

[52] D.C. Dragoș, *Legea contenciosului administrative…*, footnote, p. 224.

> *to address the administrative litigation court for those who consider themselves injured in a right or legitimate interest by the failure to resolve within the term or by the unjustified refusal to resolve a request, as well as by the refusal to carry out a certain necessary administrative operation for exercising or protecting the right or legitimate interest. The reasons cited in the application for annulment of the act are not limited to those cited in the prior complaint.*

So, first of all, with regard to the subjects that can be referred to the administrative-contentious court, we refer to the injured person, a notion that is defined in the content of Article 2 paragraph (1) letter a) of Law No. 554/2004, as:

> *any person entitled to a right or a legitimate interest, harmed by a public authority through an administrative act or by not resolving a request within the legal term; for the purposes of this law, the injured person and the group of natural persons, without legal personality, the holder of subjective rights or legitimate private interests, as well as the social bodies that invoke the injury by the contested administrative act of either a legitimate public interest or the rights and the legitimate interests of certain natural persons.*

As a result, natural and legal persons who can be directly harmed by means of an administrative act are considered. Also, third parties, indirectly harmed by an individual administrative act addressed to another person, can file an action in administrative litigation.

With regard to the objective administrative litigation, with the aim of protecting public interests, the following are subjects of referral to the court: the People's Advocate, the Public Ministry, the prefect and the National Agency of Civil Servants, as well as the issuing authority of the administrative act.

The People's Advocate/Ombudsman, an institution provided for by the Romanian Constitution, can refer the administrative litigation court under the terms of Law No. 554/2004, for the defence of a natural person and only if the petitioner appropriates the action

formulated at the first court term, under the penalty of cancellation of the request. The reasons for filing the action are represented by the illegality of the administrative act or the administrative authority's refusal to perform its legal duties. On the other hand, given that the People's Advocate is an autonomous public authority, in accordance with the provisions of Article 2 paragraph (1) of Law No. 35/1997, so its activity may be subject to action in administrative litigation.

The role of the Public Ministry is to represent the general interests of society and to defend the rule of law, as well as the rights and freedoms of citizens. The Public Ministry can only challenge individual unilateral administrative acts issued with excess of power and only if there is a prior agreement of the injured person. The Public Ministry has the right to refer the administrative litigation court also if it considers that the issuance of a normative administrative act has harmed a legitimate public interest; in this case the exclusive territorial jurisdiction of the court at the seat of the public authority issuing the act is regulated.

The Prefect and the National Agency of Public Servants have, in the Romanian legal system, the right of administrative guardianship. This right of control of the prefect, the institution of administrative tutelage, finds its foundation in the Constitution, respectively in the framework of Article 123 paragraph (5) of the fundamental law, which states that "the Prefect can challenge, before the administrative litigation court, an act of the county council, of the local council or of the mayor, if he considers the act illegal. The contested act is suspended by law". By *de lege ferenda*, the acts issued by the president of the county council should be included in the list of administrative acts that can be challenged by the prefect.

By Decision No. 11/2015,[53] the High Court of Cassation and Justice ruled in the sense that:

> *in the interpretation of the provisions of Article 3 of the Administrative Litigation Law No. 554/2004, with subsequent amendments and additions, combined with the*

[53] The High Court of Cassation and Justice (the panel for resolving some legal issues) ruled by Decision No. 11 of 11 May 2015, Official Gazette 2015, No. 501.

> *provisions of Article 63 paragraph (5) letter e) and Article 115 paragraph (2) of the Local Public Administration Law No. 215/2001, republished, with subsequent amendments and additions, and of Article 19 paragraph (1) letter a) and letter e) of Law No. 340/2004 regarding the prefect and the institution of the prefect, republished, with subsequent amendments and additions, and of Article 123 paragraph (5) of the Constitution, the prefect is granted the right to challenge before the administrative court the administrative acts issued by the local public administration authorities, within the meaning of the provisions of Article 2 paragraph (1) letter c) of the Administrative Litigation Law No. 554/2004, with subsequent amendments and additions.*

A consequence highlighted in the doctrine,[54] which derives from this decision, is that only administrative acts that:

> *were issued, adopted or concluded by the local and county public administration authorities can be subject to administrative guardianship control, so this control does not cover administrative acts that have the same legal effects as the unilateral administrative act (unjustified refusal to resolve a request and failure to resolve a request within the legal term).*

Regarding the category of administrative contracts, it should be emphasised that they are not "issued", but are "concluded", so they are not limited to the acts provided for in Article 3 of Law No. 554/2004. As a result, we rally to the doctrinal opinion[55] that claims that the prefect cannot formulate an action to request the annulment of an administrative contract. Due to the same considerations, neither

[54] O. Puie, *Controlul de tutelă administrativă exercitat de către prefect și acțiunea în contencios administrativ exercitată de către prefect în contextul Constituției revizuite, al Legii contenciosului administrativ nr. 554/2004 și al Codului administrativ aprobat prin O.U.G. nr. 57/2019*, p. 8, www.sintact.ro [access: 11.09.2023].

[55] E. Marin, *Legea contenciosului administrative…*, *op. cit.*, pp. 55–59.

the unjustified refusal nor the silence of the administration can be attacked by the prefect.

The role of the administrative litigation court in determining whether an act brought before the court is an administrative one that meets the conditions shown above is defining, the Constitutional Court of Romania showing, in the content of Decision No. 1353[56] of 10 December 2008, the fact that "the assessment of the nature of an administrative act or not of an act issued or adopted by local public authorities belongs to the court referred to the settlement of the dispute", and in a subsequent decision, namely Decision No. 482 of 12 April 2011, the Court:

> *assessed that it belongs to the court of law to analyse whether the scope of administrative guardianship control includes other documents than administrative documents issued by local public administration authorities, such as, for example, documents issued within civil, contractual or labour legal relations, such an analysis representing a matter of interpretation and application of the law.*

Regarding the National Agency of Civil Servants, in accordance with the provisions of Article 403 of the Adm. Code, it can notify the competent administrative litigation court, under the terms of the administrative litigation law, which means, in our opinion, the fact that the Agency has the competence to exercise guardianship control both with regard to typical administrative acts in the field of public office and civil servants, as well as regarding the refusal of the public administration authorities to apply the legislation concerning the public office.

The issuing authority of the administrative act, as a possible subject of referral to the administrative court, may, according to Article 1 paragraph (6) sentence I of Law No. 554/2004:

[56] Decision of the Constitutional Court of Romania, Official Gazette 2008, No. 884.

> *to ask the court to annul it, in the situation where the act can no longer be revoked because it entered the civil circuit and produced legal effects. If the action is accepted, the court, if it was notified through the summons, also decides on the validity of the legal acts concluded on the basis of the illegal administrative act, as well as on the legal effects produced by them. The action can be brought within one year from the date of issuance of the act.*

The temporal limitation of the possibility of bringing the action is in full accordance with the principle of legal security, which also materialises in the impossibility of revoking administrative acts that entered the civil circuit and produced legal effects.

14.9.2. COMPETENCE OF THE ADMINISTRATIVE LITIGATION COURTS

With regard to material competence, on the merits of the case, according to Article 10 paragraph (1) of Law No. 554/2004, disputes regarding administrative acts issued or concluded by local and county public authorities, as well as those regarding taxes and duties, contributions, customs debts, as well as their accessories of up to RON 3,000,000 are settled in the merits of the case by of administrative-fiscal tribunals, and those regarding administrative acts issued or concluded by central public authorities, as well as those regarding taxes, contributions, customs debts, as well as their accessories of more than RON 3,000,000 are settled in the merits by the administrative and fiscal litigation sections of the appeal courts, unless otherwise provided by a special organic law. According to Article 10 paragraph (2), the appeal against the sentences pronounced by the administrative-fiscal courts is judged by the administrative and fiscal litigation sections of the appeal courts, and the appeal against the sentences pronounced by the administrative and fiscal litigation sections of the appeal courts is judged by the Administrative Litigation Section and fiscal of the High Court of Cassation and Justice, if a special organic law does not provide otherwise.

Regarding the territorial competence, according to Article 10 paragraph (3):

> *the plaintiff, a natural or legal person under private law, applies exclusively to the court at his domicile or headquarters. The plaintiff public authority, public institution or similar to them addresses exclusively the court at the domicile or headquarters of the defendant.*

Thus, taking into account the quality of the party in the process, an exclusive territorial competence is regulated.

14.9.3. CONTENT OF THE REQUEST, JUDGMENT ON THE MERITS AND SOLUTIONS OF THE ADMINISTRATIVE COURT

The referral to the administrative litigation court will take place after completing the preliminary procedure, within the express terms of the law and by the subjects already shown previously.

The action in administrative litigation must include, obligatorily, all the elements provided by the Code of Civil Procedure in Romania, containing, among others: the indication of the court to which it is addressed, the name, surname, domicile or residence of the parties, or as the case may be, the name and their headquarters, the object, the amount of the claim, the reasons for the claim, as well as the signature.

In the case of challenging a typical administrative act or an administrative contract, the claimant must attach its copy to the requests. In the case of unjustified refusal or administrative silence, the response of the public authority regarding the refusal to resolve the request will be attached, respectively the copy of the request registered with the public authority.

Regarding the object of the request, the general rule is that it is possible to request the annulment of the act, the recognition of the claimed right or the legitimate interest (public or private) and the reparation of the damage, as expressly stated in Article 1 paragraph (1)

of Law No. 554/2004. Article 8 paragraph (1) of the same law details these aspects, regulating that:

> *the person injured in a right recognised by law or in a legitimate interest by a unilateral administrative act, dissatisfied with the response received to the prior complaint or who did not receive any response in the term provided for in Article 2 paragraph (1) letter h), can notify the competent administrative court, to request the annulment of the act in whole or in part, the reparation of the damage caused and, possibly, reparations for moral damages. It is also possible to address the administrative litigation court for those who consider themselves injured in a right or legitimate interest by the failure to resolve within the term or by the unjustified refusal to resolve a request, as well as by the refusal to carry out a certain necessary administrative operation for exercising or protecting the right or legitimate interest. The reasons cited in the application for annulment of the act are not limited to those cited in the prior complaint.*

As we can see, within Article 8 paragraph (1) sentence I, the object of the action is expressly provided, while in the case of assimilated administrative acts or the refusal to carry out certain administrative operations necessary for the exercise or protection of the right or legitimate interest, the object is no longer expressly regulated, a fact that creates an unjustified differentiation of legal treatment that should be corrected by *de lege ferenda*.

Action types:

i. actions in the total or partial annulment of the administrative act;
ii. actions to annul the act, accompanied by the request for material or moral compensation;
iii. actions in forcing the issuance of an administrative act or other document;
iv. actions to compel the issuance of the document along with the request for material or moral compensation;

v. actions in obliging the authority to carry out a certain administrative operation.

In accordance with the provisions of Article 17 paragraph (1) of Law No. 554/2004, the requests will be heard in open session, and in the first instance the panel will be composed of a single judge.

The solutions that the court can give are closely related to the object of the request, the court can admit, in whole or in part, the action or reject it.

14.9.4. ASPECTS REGARDING DIGITALISATION

Regarding the topic of digitisation, recently, in our country, things have started to evolve in a positive direction. Especially with the COVID-19 pandemic, when the physical presence in all courts was much limited for the public, both citizens and lawyers began to make full use of the electronic means of communication available in our country. Thus, although there are no special rules regarding administrative litigation, it is possible to send documents to the court by email, including regarding the request for summons. This is registered and given a certain date by applying the entry stamp, according to the provisions of Article 199 of the Civil Procedure Code.

The application is scanned and the ECRIS program assigns it a unique file number, which is randomly assigned by a mathematical algorithm. Thus, a true random distribution is ensured.

ECRIS is an application used at the court level for the electronic management of files, being a unique management system at the national level. Therefore, each court in our country has its own database that contains information about files. Part of the existing data in the ECRIS application is published on the court portal, with a specific page: portal.just.ro, where the solutions are published briefly, and can be consulted by the public. The decisions of the courts can be found in their entirety in the ECRIS application. The parties in the files who want to access the scanned documents from a certain file can request this by means of a request, and based on an authentication based on the email address and a unique code, they will be able to access the so-called electronic file of the case.

The studies highlight the fact that we could do better in the digitisation chapter. Thus, in the latest DESI report, published by the European Commission, Romania ranks last in digitisation.[57]

14.10. Conclusions

The institution of administrative litigation is fundamental in any rule of law, being a tool by which citizens can defend themselves against possible abuses by the public administration. The importance of these institutions also results from the fact that they have constitutional foundations, Article 52 of the Constitution representing the article that mainly provides for this topic, enshrining the right of persons injured by a public authority in Romania through an administrative act or by not resolving a request within the legal term, to obtain the annulment of the act and reparation of the damage caused.

We appreciate that this work is of significant importance, because administrative justice plays a very important role in the protection of the rights and freedoms of citizens. As we found in the contents of the works, in our country there are a lot of administrative acts issued or adopted by the public administration authorities, administrative acts that bear various names and which are in a very large number of special laws, in addition to the provisions of the Administrative Code and those of Law No. 554/2004 of the administrative litigation. This is why, in practice, it is very difficult for either judges or citizens to determine whether a certain act meets the cumulative conditions to be considered an administrative act. That's why we chose to show, in detail, what are the specific features of an administrative act, taking into account some controversial issues that have been identified both in judicial practice and in the doctrine of our country. Determining an act as an administrative act is essential for the possibility of challenging that act before the administrative litigation courts.

[57] https://digital-strategy.ec.europa.eu/ro/policies/desi [access: 28.09.2023].

The institution of administrative litigation in our country has undergone changes over time, with some provisions being introduced and others being repealed or undergoing changes. This fact once again proves the importance of the institution, also from the point of view of the legislator, who sought to find appropriate regulatory solutions in relation to the historical period and the development and European integration of the country. However, unfortunately, we still do not have a Code of Administrative Procedure, which takes over the provisions regarding the challenge of an administrative act. Although Law No. 554/2004 has been amended several times, however, currently, some shortcomings can still be identified, to which I have made express reference in the content of this work and on which we have tried to make proposals *de lege ferenda*, to improve the texts laws that still contain inaccuracies or inconsistencies. We have presented, along with absolutely necessary theoretical elements, a multitude of solutions from the practice of administrative litigation courts in our country, as well as solutions given by the Constitutional Court of Romania. As we stated previously, the role of the courts in evaluating the act that is subject to their attention, through the lens of the elements that were shown in the content of this work, is very important. First of all, being notified with a request, the administrative litigation court will verify the fulfilment of the features of the act that is subject to its attention, to determine if it is an administrative act and thus the request will be able to be judged by the specialised panels. The reform regarding the challenge of an administrative act before the administrative litigation courts would include, first of all, the adoption of a Code of administrative procedure, which would unite the provisions relating, first of all, to the elements related to the cataloguing of that act as an administrative one. Currently, in our country, the task of a judge in determining whether an act is administrative appears to be quite difficult, as there are a multitude of names found in many special laws.

Last, but not least, the ECRIS system is a critical system for the proper functioning of the justice system in Romania. The good functioning and efficiency of this information system will directly influence the good functioning and efficiency of the justice system, on which the good functioning of Romanian society depends. Thus,

the ECRIS implementation project is vital for Romanian society as a whole, and the success of this project is an essential step in the digital transformation of Romania and the transition to digital state administration and relations between the state and citizens.

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Chapter 15. Judicial Discretion, Hard Cases and Administrative Justice in Georgia

15.1. Introduction

Administrative law and justice are essential elements of every legal system. They determine the scope of functions and institutions within the state structure, preventing the establishment of autocratic governance.[1] The fundamentals of administrative proceedings appeared several centuries ago; however, they were less focused on the protection of human rights.[2] Human rights are the cornerstone of contemporary administrative justice, especially since administrative authorities enjoy substantial discretion. In such cases, questions concerning the balance, proportionality, and efficiency of private and public interests naturally come to the forefront.

In the exercise of discretionary authority, the relationship between parliament and government is an important consideration.[3] This is completely natural and logical, since the greatest part of legal principles are formed within the framework of the executive power, primarily through the acts of government authorities. Teubner believes that employing subordinate normative acts to address specific issues and challenges can be helpful in managing

[1] See: J. Madison, *The Federalist N10*, [in:] A. Hamilton, J. Madison, J. Jay, *The Federalist Papers*, I. Shapiro (ed.), New Haven–London 2009, pp. 47–53.

[2] P. Craig, *UK, EU and Global Administrative Law*, Foundations and Challenges, Cambridge University Press, Cambridge 2015, p. 42.

[3] See: I. Loveland, *Constitutional Law, Administrative Law and Human Rights, A Critical Introduction*, 6th Edition, Oxford 2012, p. 54.

a postmodern, complex society. However, this approach requires granting significant authority to the executive responsible for these regulations, making them the sole authentic interpreters.[4]

When granting discretionary authority, a customary procedure involves establishing the comprehensive framework and guidelines that govern the operations of the administrative authorities.[5] The problem with administrative discretion arises when an administrative body's specific action clashes with the value-based and political systems that determine its authority.[6] The use of discretion necessitates considerably more attention and prudence on the part of the executive, and irrational actions or unjustifiable decisions can quite costly for the state.[7] Administrative bodies are expected to make rational and reasonable decisions.[8]

Georgian administrative law, like German law, regards discretionary authority as an exceptional and special regime of the relationship between the executive and legislative authorities.[9] Furthermore, it is important for government entities to exercise discretion not only in the execution of laws but also in the pursuit of justice, particularly in situations where the court must assess the exercise of discretionary authority by administrative bodies and its legal implications during administrative proceedings. In such circumstances, there exists a constant fear that the court may exceed its discretion and infringe on the executive branch's function beyond what is necessary. The judiciary of any state is confronted with such a challenge, and each legal system has its own established prevention approach and methods.

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[4] See: C. Harlow, R. Rawlings, *Law and Administration*, 3rd Edition, Cambridge 2009, p. 195.

[5] A. Caroll, *Constitutional and Administrative Law*, 9th Edition, Edinburgh 2017, p. 354.

[6] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, 3rd Edition, Boca Raton, FL, 2010, p. 31.

[7] P. Cane, *Administrative Law*, 5th Edition, Oxford 2011, p. 140.

[8] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit.*, p. 67.

[9] See: ქეთევან გიორგიშვილი, შეცდომა დისკრეციული უფლებამოსილების განხორციელებაში, ჟურნ, "ადმინისტრაციული სამართალი", N1, 2013, გიორგიშვილი, p. 21.

The Georgian model of administrative justice is strongly inspired by legal traditions prevalent in continental Europe. However, administrative proceedings are conducted within the competence of general courts without the involvement of specialised administrative courts. Due to the significance of the public interest, the court possesses distinct and rather exceptional powers in resolving administrative disputes, thus distinguishing it from other legal proceedings. This is a very broad and often unconventional form of discretion that allows for decisions that are not only legally sound but also justified. Nonetheless, increasing decision-making freedom comes with inherent danger. These difficulties are exacerbated when addressing hard cases, where judges must push the limits of legal interpretation, employ unconventional methods and legal principles, and refrain from confining themselves to conventional solutions in order to ensure a fair outcome and the genuine pursuit of justice. Maintaining a proper balance between judicial self-restraint and judicial activism is important, and this can be achieved through established operational principles and mechanisms. These mechanisms facilitate the court to identify hard cases within administrative justice, opt for and employ fair and rational approaches to resolve them, all while upholding the integrity of judicial discretion and respecting the separation of powers, ensuring that the judiciary does not infringe on the authority of other branches of government.

15.2. The Georgian System of Administrative Justice and Judicial Discretion

15.2.1. ADMINISTRATIVE PROCEEDINGS

15.2.1.1. *Administrative Proceedings as Prerequisite for Administrative Justice*

The Georgian Constitution underwent amendments from 2017 to 2018, affecting both its essence and structural aspects. The second chapter of the Georgian Constitution, which is devoted to upholding fundamental freedoms for all people, was also impacted by these

changes.[10] The first paragraph of Article 18 of the Constitution of Georgia affirms the right to a fair administrative proceeding. According to this article, every individual has the right to fair hearing of his or her case by an administrative authority within a reasonable time frame. The fundamental right to fair administrative proceedings applies to public authorities in general and is binding upon all three branches.[11] The primary purpose is to protect a private person from unjustified actions taken by government during administrative decision-making process.[12] This right is significantly important from the perspectives of administrative law, as the majority of actions occur prior to execution of the power, at the stage of administrative proceedings. Administrative law regulates the functions of public administration agencies and the matters of power and authority as well as establishes the normative basis for public administration.[13] The becomes more realistic when we imagine that a significant portion of the law-making process takes place not within the legislative body but rather within the structural units of executive branch. At the practical level, a number of subordinate laws are adopted, and these laws constitute a substantial part of the legal framework.[14] The majority of subordinate acts, especially individual acts, are adopted through administrative proceedings.

The General Administrative Code of Georgia, Article 2 (1. "K") defines administrative proceedings as the action of an administrative body that aims to create, issue, and execute an administrative legal act, the resolution of an administrative complaint, as well as the preparation, conclusion, or cancellation of an administrative contract. In fact, any administrative decision is made through

[10] See: D. Gegenava, *Changing Constitutional Identity: Constitutional Reform and New Concept of Human Rights in Georgia*, "Bratislava Law Review" 2019, No. 1, pp. 112–119.

[11] პაატა ტურავა, სამართლიანი ადმინისტრაციული წარმოება როგორც ძირითადი კონსტიტუციური უფლება და მისი ინსტიტუციური გარანტია, წიგნში: ადამიანის უფლებათა დაცვა: კანონმდებლობა და პრაქტიკა, კონსტანტინე კორკელიას რედაქტორობით, თბილისი, 2018. ტურავა, p. 248.

[12] Ibidem, p. 249.

[13] P. Cane, *Administrative Law*, *op. cit*., p. 12.

[14] C. Harlow, R. Rawlings, *Law and Administration*, *op. cit*., p. 193.

administrative proceedings. This process is one of the most important stages of public administration; it determines the nature of public administration as a whole and encourages the fairness of the procedure. The outcome of this process should be consistent with the core principles of administrative law (legality, equality before the law, impartiality, transparency, etc.).[15]

Administrative proceedings are of special importance in the realm of administrative justice because Georgian law establishes a direct link between all mechanisms dedicated to human rights protection; moreover, it determines their interrelation in a mandatory manner. Article 2(5) of the Administrative Procedural Code of Georgia stipulates that one of the mandatory conditions for the admissibility of a lawsuit is a one-off opportunity to submit an administrative complaint in connection with a particular case. Georgian law mandates that any individual seeking to defend their rights in court is required to accomplish this by using the means available under the General Administrative Code within the framework of administrative proceedings. Therefore, the legal mechanism in the process of administrative proceedings is of special importance, especially since the proceedings are conducted by a public entity that has both authority and power. For this reason, a private person needs higher guarantees of protection.

15.2.1.2. *The Georgian System of Administrative Justice*

There are many different administrative systems around the globe; these systems vary in terms of administrative proceedings as well as in terms of the essence, form, and type of justice. Yet, administrative systems still faces similar challenges, such as evaluating evidence, norms, and discretion.[16] Administrative law, regardless of its system or structure, ensures that public entities are held accountable for the

[15] პაატა ტურავა, *op. cit.*, p. 248.

[16] P. Craig, *Judicial Review of Questions of Law: A Comparative Perspective*, [in:] S. Rose-Ackerman, P.L. Lindseth, B. Emerson, E. Elgar (eds.), *Comparative Administrative Law*, 2nd Edition, Cheltenham–Northampton 2017, p. 389.

exercise of their functions, including discretionary powers.[17] This is primarily guaranteed by administrative justice, which aims to protect the rights of private individuals from arbitrary bureaucracy,[18] safeguard fundamental human rights,[19] and, most importantly, establish the appropriate legal standard through judicial control and uniform court practice. This also ensures the protection of human rights in a systematic and preventive manner.[20]

Article 2 of the Georgian Administrative Procedural Code establishes the list of cases that are subject to administrative justice; for instance, disputes concerning administrative contracts or matters relating to compliance of administrative acts with Georgian law, the declaration of an act as null and void, and disputes concerning an administrative agency's obligation to compensate damages, fall under the jurisdiction of an administrative court. Moreover, in addition to these traditional examples, there are special proceedings and their assessment through administrative procedures is governed by law; for instance, administrative offences are also administrative disputes. According to Article 1(2) of Georgia's Administrative Procedural Code, provisions of the Civil Procedure Code of Georgia shall apply to administrative legal proceedings, unless they contradict the Administrative Procedural Code. This is due to the fact that civil and administrative proceedings are very similar, especially in formal or technical aspects; nonetheless, they differ significantly in assessing public interest, the role of a judge, self-initiative, and in the decision-making format. Within this specific context, the Administrative Procedure Code applies exclusively and, in other circumstances, it is the Civil Procedure Code.

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[17] P. Cane, *Administrative Law*, *op. cit*., pp. 12–13.

[18] J. Alder, *Constitutional and Administrative Law*, 10th Edition, Palgrave, London 2015, p. 391.

[19] თამარ ღვამიჩავა, პირის უფლება სამართლიან სასამართლოზე, ადმინისტრაციული სამართალწარმოების თავისებურებები, "შედარებითი სამართლის ქართულ-გერმანული ჟურნალი", N12, 2022, ღვამიჩავა, p. 37.

[20] შოთა გეწაძე, საქართველოს საერთო სასამართლოების პრაქტიკა საჯარო შრომითსამართლებრივ დავებზე, "სამართლის ჟურნალი", N1, 2020, p. 365.

In Georgia, protection of rights is guaranteed through administrative proceedings with a three-tiered judicial system.[21] There are no specialised courts in country, only a system of general courts. The administrative collegium or chambers within the respective court system are authorised to resolve administrative disputes. Those administrative disputes that are designated for first-instance court hearings are examined by the district and city courts. If courts are not situated in certain territories but a dispute falls under the jurisdiction of a district court, the magistrate court that operates with limited jurisdiction should hear the administrative dispute. As defined by Article 6 of the Administrative Procedural Code of Georgia, some disputes that are considered for a first-instance court hearing fall under their jurisdiction (other disputes are resolved by the respective district court). The second instance is the appellate court, and in Georgia, only two appellate courts exist, one located in Tbilisi and the other in Kutaisi. While in certain disputes, the decision taken by the appellate court is final, in some other cases, under the procedure determined by Georgian law, the decisions of appellate courts can be challenged in the Supreme Court's chamber for administrative matters.

15.2.1.3. *Administrative Procedure, Judicial Discretion and Principle of Inquisition*

Administrative proceedings are based on principles of civil proceedings, it shares the idea of adversarial proceedings and disposition; however, at the same time, it establishes guiding ideas exclusively for administrative justice. The principles of administrative justice allow for flexibility so that they can be efficiently in different circumstances, considering the complexity, specificity, and depth of the dispute.[22] The judge is obliged to hear all important arguments presented by

[21] მაია კოპალეიშვილი, ნუგზარ სხირტლაძე, ეკატერინე ქარდავა, პაატა ტურავა, ადმინისტრაციული საპროცესო სამართლის სახელმძღვანელო, GIZ, თბილისი, 2008, p. 398.

[22] J. Alder, *Constitutional and Administrative Law*, *op. cit.*, p. 381.

all parties, examine their rationality and purpose, and subsequently make a reasonable decision.[23] Despite the fact that, administrative proceedings are completely based on the equality and adversary of the parties, Article 4 of Georgia's Administrative Procedure Code grants the judge the exclusive authority at own initiative to make a decision on providing the supplementary information or a piece of evidence. The inquisitorial principle of proceedings, on the one hand, empowers the court to actively intervene in the process of administrative justice with the motive to protect the public interest. On the other hand, this enables the judge to ensure that no important factual circumstances or evidence that could impact a fair settlement of the dispute are neglected.[24] The Georgian court actively employs self-initiative in the pursuit of obtaining evidence and engaging in evidentiary proceedings,[25] with the aim of protecting the public interest and upholding the rights and freedoms of private individuals participating in the proceedings. Indeed, no objective criterion or standard is employed by the court to determine when it invokes the discretion provided by the principle of inquisition under Article 4 of the Administrative Procedure Code. This is completely left to the court's discretion, and it often leads to an unpredictable and unexpected outcome of justice. For this reason, even though the court has significant authority in the administrative process, this power is not limited and, when reviewing discretion, it functions within the specific boundaries. This is primarily attributed to the principles of separation of power.[26] When the court exercise judicial

[23] J. Massot, *The Powers and Duties of the French Administrative Law Judge*, [in:] S. Rose-Ackerman, P.L. Lindseth, B. Emerson, E. Elgar (eds.), *Comparative Administrative Law*, 2nd Edition, Cheltenham–Northampton 2017, p. 440.

[24] See: მაია კოპალეიშვილი, ნუგზარ სხირტლაძე, ეკატერინე ქარდავა, პაატა ტურავა, ადმინისტრაციული საპროცესო სამართლის სახელმძღვანელო, GIZ, თბილისი, 2008, p. 27.

[25] See: Ruling N3/3677-17 of Tbilisi City Court, 14 December 2017; Ruling N3/1514-19 of Tbilisi City Court, 19 June 2019; Ruling N3/3606-19 of Tbilisi City Court, 5 February 2020; Ruling N3/2266-20 Tbilisi City Court, 24 June 2020; Ruling N3/5335-21 of Tbilisi City Court, 2 May 2022; Ruling N4/2965-22 of Tbilisi City Court, 29 May 2022.

[26] ქეთევან გიორგიშვილი, შეცდომა დისკრეციული უფლებამოსილების განხორციელებაში, ჟურნ, "ადმინისტრაციული სამართალი", N1, 2013, 20.

discretion, it is necessary that it refrain from assuming the role of any of the parties involved in the administrative dispute, and it should also avoid unreasonably encroaching upon the competence of the administrative body. Moreover, it is important that the individual understand that the court will not undertake their duties and that the burden of proof will not shift to the court.

15.2.2. ADMINISTRATIVE DISCRETION AND JUDICIAL DISCRETION: MARGINS OF ACTIVITY

15.2.2.1. *Discretion of Administrative Body*

In the context of administrative decision, the principle of the protection of legitimate expectations not only protects the rights of citizens but also serves as the foundational element for maintaining legal certainty; therefore, it ensures the well-functioning of the constitutional legal order.[27] That being said, modern administrative justice focuses on human rights (not only domestically, but across the civilised world);[28] thus, it differs from the old model, which was primarily concerned with legal issues involving state matters.[29] Legal acts and rules alone do not form the foundation of any successful government; any government is founded on discretion in both administrative and judicial processes. Administrative bodies are essential not only for the survival of a legal and democratic state but also for the effective functioning of a legal and transparent bureaucracy.[30] They often find themselves tasked with making decisions regarding how, where, and in what context the law will

[27] V. De Falco, *Administrative Action and Procedures in Comparative Law*, The Hague 2018, p. 196.

[28] P. Craig, *Judicial Review of Questions of Law…*, *op. cit*., p. 42.

[29] K.C. Davis, *Discretionary Justice: A Preliminary Inquiry*, Baton Rouge 1969, p. 17.

[30] See: Ruling ნბს-1250-1194(კ-09) of the Administrative Law Chamber of Supreme Court of Georgia, 2 September 2010.

be enforced.[31] This is entirely logical because, when the administrative body is operating, it should consider not just the legal aspects, but also take into account financial, technical, technological, and social aspects. All resources are exhaustible, and in such instances, appropriate strategies and methodologies must be developed.[32]

Discretion, in its broadest sense, is the ability and authority to make choices.[33] The administrative body with discretionary power possesses considerable freedom to determine its actions and the practical application of that power.[34] The exercise of discretionary power is based on the presumption that the administrative body will operate within the limits established by the law and make rational, reasonable, well-founded decision regarding a specific issue.[35] In exercising its authority, an administrative body usually interprets a particular legal norm, collects relevant factual information and uses its discretion to apply the legal norm correctly in relation to relevant factual circumstances.[36]

When the legislation strictly defines the framework, establishes special order, it leaves no room for discretion, unlike the so-called "soft law", which establishes general approaches and defines policies in a specific manner. In such case, for instance, the potential for discretion increases thereby, granting the administrative body substantially more freedom of action.[37] Furthermore, in circumstances where the executive is not given explicit discretionary power and the legislation governing the scope of its action is very abstract and vague, it still acts with discretion.[38] In order to ensure administrative effectiveness, it is important to interpret any norm with

[31] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit*., p. 32.
[32] R. Wacks, *Philosophy of Law, A Very Short Introduction*, 2nd Edition, Oxford 2014, p. 28.
[33] P. Cane, *Administrative Law*, *op. cit*., p. 143.
[34] Ibid, p. 155.
[35] I. Loveland, *Constitutional Law, Administrative Law and Human Rights…*, *op. cit*., pp. 458–459.
[36] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit*., p. 63.
[37] See: P. Cane, *Administrative Law*, *op. cit*., p. 153.
[38] Ibid, 18.

the outmost flexibility when exercising public authority within the administrative body.[39]

When exercising discretion, the administrative authority must not only follow the law but also consider other practical considerations.[40] This is because the law, in certain situations, empowers the decision-maker to determine the exact order and adapt the specific course of action and legal norms that would apply in each situation. Based on the court's explanation, the administrative body is expected to determine the purpose of exercising such authority, accurately evaluate the circumstances, and then make an optimal decision.[41]

Numerous matters can be governed by a specific regulation or law, yet discretion remains preferable in many cases.[42] It gives an opportunity to make decisions while considering individual circumstances, which can result in a more fair and efficient approach.

Legislation sets strict boundaries and limitation to administrative discretion.[43] In line with the interpretations of Georgia's Supreme Court, discretionary authority exists and can be reviewed by the court, when administrative body is provided the scope of freedom and is authorised to choose among several alternative decisions. The exercise of discretion is prohibited when the action of the administrative body is limited, and it is obliged to comply with the law.[44] Moreover, the boundaries within which the administrative body can take action are limited by the lawful and legitimate expectations of the public as well as the predictability of the law, as these define the scope of administrative authority.[45] Interfering with the exercise of discretion is forbidden since it might limit not only the discretionary authority but also an administrative body's

[39] A. Caroll, *Constitutional and Administrative Law*, *op. cit*., p. 351.

[40] N. Parpworth, N. Padfield, *Constitutional and Administrative Law*, 7th Edition, Oxford 2012, p. 286.

[41] Decision Nბს-567-557(კ-12) of the Administrative Law Chamber of Supreme Court of Georgia, 26 March 2013.

[42] K.C. Davis, *Discretionary Justice…*, *op. cit*., p. 17.

[43] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit*., p. 34.

[44] See: Decision Nბს-739-714(კ-10) of the Administrative Law Chamber of Supreme Court of Georgia, 21 October 2010.

[45] P. Cane, *Administrative Law*, *op. cit*., p. 155.

flexibility to act and bear responsibility. Ultimately it will compromise the effectiveness of the decision-making process.[46]

While the administrative body may exercise its discretion through rational arguments, there is still the possibility that decision-makers will limit their own authority out of fear of making the wrong choice, thus artificially fettering their discretion.[47] The fundamental problem with discretionary authority is that it is often misused;[48] in certain circumstances, it is incorrectly applied or even avoided entirely. Discretion, which involves making broad legislative choices, can often become a whim of an administrative body.[49]

According to Dicey, one of the requirements of the rule of law is to prohibit the legislative authority from granting broad discretion to the executive.[50] This is logical, because the more authority given to the government, the greater the chance that the executive will limit individual liberties and significantly restrict people's freedom through delegated laws. Legality is a mandatory condition for the use of discretion; the administrative body must act within the limits of legality and decide accordingly.[51] Discretion should not be interpreted in such a way that the administrative body can disregard the requirement of objectivity and make arbitrary decisions.[52]

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[46] Decision Nბს-1110-1062(კ-07) of the Administrative Law Chamber of Supreme Court of Georgia, 8 May 2008.

[47] N. Parpworth, N. Padfield, *Constitutional and Administrative Law*, *op. cit.*, p. 287.

[48] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit.*, p. 32.

[49] Ibid, p. 33.

[50] I. Loveland, *Constitutional Law, Administrative Law and Human Rights…*, *op. cit.*, p. 54.

[51] Ruling Nბს-605-574(კ-09) of the Administrative Law Chamber of Supreme Court of Georgia, 23 December 2009.

[52] Decision Nბს-166-160(კ-09) of the Administrative Law Chamber of Supreme Court of Georgia, 30 July 2009.

15.2.2.2. *Judicial Discretion to Evaluate the Discretion of an Administrative Organ*

In continental European law (the civil law system), the process of assessment and evaluation, as well as the limitations imposed upon discretion, derive from the practice of the Counsei d'Etat.[53] Later, the practice was developed by French and German law family states. Considering the nature of discretion, this is entirely understandable. Discretion leaves the citizen in the hands of the administrative body, and a person has no choice but to rely on it, especially if the latter is not required to explain and justify their own actions.[54] The legislation should establish rules on administrative discretion,[55] the flexible standards necessary for the exercise of discretion, and applicable procedural rules that will place the administrative body within certain frameworks.[56] However, this is not sufficient because general regulations often establish red lines and frameworks, and acting within these frameworks entirely depends on the will of the administrative body. For this reason, discretionary authority must be controlled; otherwise, it may turn into "absolute" power.[57] In general, public entities, along with discretionary power, are primarily tasked with enacting subordinate laws, thereby, at a practical level, creating legal order.[58] They act with considerable discretion during the adoption of these laws; therefore, determining the scope of discretion and judicial control are extremely important. The purpose of judicial control is to ensure the legality of the actions of administrative entities;[59] moreover, to determine whether the

[53] V. De Falco, *Administrative Action and Procedures in Comparative Law*, *op. cit.*, pp. 171–172.
[54] P. Cane, *Administrative Law*, *op. cit.*, p. 140.
[55] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit.*, p. 34.
[56] P. Cane, *Administrative Law*, *op. cit.*, p. 172.
[57] Ibid, p. 171.
[58] Ibid, p. 18.
[59] J. Alder, *Constitutional and Administrative Law*, *op. cit.*, p. 381.

decision-making adheres to both legal requirements and the basic standards of rationality and fairness.[60]

The Court must review the decisions and acts of the "street level bureaucracy" that frequently encounters legal challenges.[61] It is essential to emphasise that the court's exercise of discretion is dependent on evaluating the administrative body's discretion as well as the actual application and characteristics of the legal framework used by the executive branch.[62] The court must consider not only the reasonableness and validity of the decision taken by the administrative body but also the degree of direct relationship between this decision and the legislative framework, along with how closely it aligns with the objectives outlined in the legislation.[63]

German jurisprudence has effectively developed the standard of the reasonableness and proportionality in evaluating discretion in administrative justice.[64] Later, the states belonging to German law family implemented it in their domestic administrative law. Decisions of the administrative body, including subordinate laws, are not always adopted on a rational basis.[65] It imposes a significant challenge on the administrative court, which is tasked with assessing the legality and reasonableness of these decisions. The administrative court's principal goal in determining reasonableness is to protect the status quo rather than to discover the objective truth; it must ensure that the administrative body exercised public authority in good faith, assessed all relevant facts and circumstances, and applied discretion when necessary.[66]

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[60] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit.*, p. 62.

[61] C. Harlow, R. Rawlings, *Law and Administration*, *op. cit.*, p. 201.

[62] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit.*, p. 63.

[63] P. Cane, *Administrative Law*, *op. cit.*, p. 156.

[64] V. De Falco, *Administrative Action and Procedures in Comparative Law*, *op. cit.*, p. 173

[65] C. Harlow, R. Rawlings, *Law and Administration*, *op. cit.*, p. 193.

[66] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit.*, p. 65.

The text of the law as well as any legal act in general follows a binary approach of "all or nothing"[67] or by adopting the specific rule to the particular circumstances,[68] when discretion provides increased flexibility and the opportunity to assess the circumstances and take appropriate action. This is the reason why many important matters are delegated to the executive discretion, so that it can make adequate, appropriate decisions, issue administrative acts, etc. Furthermore, any reference to the word "reasonable" in the legislation obviously indicates the discretion of the administrative body, because in a specific context, the interpreter decides the matter of reasonableness.[69]

After reasonableness, the court assess how and to what extend the administrative authority exercised its discretion.[70] Indeed, discretion while allowing freedom of choice, is not synonymous with uncertainty, it is bound by "belt of restrictions" and always depends on appropriate circumstances.[71] Discretion implies freedom of choice and action, but in its exercise the best possible decision must be made.[72] There is always the chance that the court will violate discretionary boundaries while considering an administrative body's discretion and reasonableness. Thus, the judge should be vigilant when entering the functional realm of governmental branches.[73] This is important because their interference not only violates the authority of the executive and legislative branches, but it also establishes a dangerous precedent that threatens the fundamental idea of the separation of powers within the state. However, it should be noted that the court's discretion in evaluating the activities of the administrative body should not be excessively restricted. Freedom

[67] R. Dworkin, *Taking Rights Seriously*, Cambridge 1978, p. 24.
[68] J. Raz, *Legal Principles and Limits of Law*, "Yale University Law Journal" 1972, Vol. 81, No. 5, p. 823.
[69] P. Leyland, G. Anthony, *Textbook on Administrative Law*, 7th Edition, Oxford 2013, p. 320.
[70] T. Endicott, *Administrative Law*, 2nd Edition, Oxford 2011 p. 235.
[71] R. Dworkin, *Taking…*, *op. cit.*, p. 31.
[72] T. Endicott, *Administrative Law*, *op. cit.*, p. 241.
[73] N. Parpworth, N. Padfield, *Constitutional and Administrative Law*, *op. cit.*, p. 409.

of action by the judiciary and judges is vital to the effectiveness and efficiency of the rule of law. For this reason, regardless of challenges and risks involved, the judiciary should not refuse to exercise its authority.[74] The primary guiding principle for law enforcement should be prioritising the public good and protecting the rights of individuals. These are the fundamental societal goals that must be justified before exercising judicial discretion or engaging in any potentially harmful activity.

15.2.3. PRINCIPLES AND MARGINS OF USING JUDICIAL DISCRETION

15.2.3.1. *Public Interest and Proportionality*

Discretion, on the one hand, implies freedom of choice; however, at the same time it also entails the obligation of the decision-maker to act responsibly and avoid arbitrariness.[75] In administrative justice, the basis for the broad discretion granted to a judge is the public interest, which it is entrusted to protect, regardless of the extent to which this interest is maintained by the administrative body itself. Furthermore, the actions of public authorities frequently contradict public interests.[76] As a result, the judge has the authority to act on his own initiative. At the stage of administrative proceedings, along with the public interest, the judge must assess whether the interests of a private person should be subject to special protection.[77] Thus, the same approach should be maintained in judicial administrative proceedings. In this case, the court's discretion entails evaluating the interplay between public and private interests, with an emphasis on determining the specific public interest at stake to ensure

[74] Ibid, p. 410.
[75] T. Endicott, *Administrative Law*, *op. cit.*, p. 234.
[76] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit.*, p. 32.
[77] Ruling Nბს-36-36(კ-08) of the Administrative Law Chamber of Supreme Court of Georgia, 6 November 2008.

optimal protection of private interests.[78] The court must assess the proportionality of public and private interests,[79] which necessitates impartiality and neutral decision-making.[80]

A judge must also assess the extent to which acts or the actions of an administrative body are proportionate to their legitimate public aim within the realm of judicial discretion.[81] The proportionality test has been applied throughout the world to resolve different disputes, both nationally and internationally.[82] This holds significant importance, especially within Europe, including both the national and pan-European context (for instance, in the practice of the European Court of Human Rights).[83] The aforementioned principle was reinforced and reflected in the institutional order and legal acts of the European Union.[84] The proportionality test was developed by the German Federal Constitutional Court and has since achieved significant acceptance within the constitutional control organs but also in the field of administrative law.[85] In the context of German constitutionalism, the principles of legality, certainty, and legal expectation were regarded as equally significant, both in terms of ideology and content.[86] Although proportionality is common in administrative law and is recognised by almost all administrative justice systems, its application varies from state to state and has individual characteristics.[87]

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[78] T. Endicott, *Administrative Law*, *op. cit.*, p. 234.

[79] P. Cane, *Administrative Law*, *op. cit.*, p. 153.

[80] V. De Falco, *Administrative Action and Procedures in Comparative Law*, *op. cit.*, p. 182.

[81] P. Leyland, G. Anthony, *Textbook on Administrative Law*, *op. cit.*, p. 325.

[82] J. Mathews, *Proportionality Review in Administrative Law*, [in:] S. Rose-Ackerman, L. Peter, P.L. Lindseth, B. Emerson, E. Elgar (eds.), *Comparative Administrative Law*, 2nd Edition, Publishing, Cheltenham–Northampton 2017, p. 405.

[83] P. Leyland, G. Anthony, *Textbook on Administrative Law*, *op. cit.*, p. 325.

[84] V. De Falco, *Administrative Action and Procedures in Comparative Law*, *op. cit.*, p. 173.

[85] J. Mathews, *Proportionality Review in Administrative Law*, *op. cit.*, p. 408.

[86] V. De Falco, *Administrative Action and Procedures in Comparative Law*, *op. cit.*, p. 196.

[87] J. Mathews, *Proportionality Review in Administrative Law*, *op. cit.*, p. 405.

Judicial discretion should preferably be grounded in the evaluation of an administrative body's action, which is primarily guided by the proportionality test. This approach seeks to examine not just the legality of administrative decisions but also their rationality, necessity, reasonableness, and proportionality stricto sensu.[88] In administrative law, the concept of proportionality is so fundamental that it is associated with the principles of equality, good faith, and justifiable expectations.[89] Proportionality governed by the administrative court's discretion and is used to assess the exercise of power by both the public authority and the court.

15.2.3.2. *Parties at Administrative Procedure, Judicial Discretion and Self Initiative*

For judicial administrative proceedings, an individual must demonstrate that the activity of an administrative body (act or action) has caused direct or immediate harm or poses a considerable and genuine risk of inflicting such harm in the future.[90] At the initial stage, the burden of proof initially lies with the plaintiff; however, given the nature of the administrative body's action, the burden also falls upon them. Additionally, allocating the burden of proof to the parties, judicial activism is important for the resolution of the case. In administrative judicial proceedings, it is a rule for the court to assess the legality, reasonableness/appropriateness and whether formal procedures were observed by the administrative body.[91] The majority of rules related to the activities of an administrative body are general, leaving room for judicial interpretations, since it is the Court that is responsible for interpreting these provisions and establishing the scope and manner of their implementation.[92]

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[88] Ibid, pp. 407, 412–413.

[89] V. De Falco, *Administrative Action and Procedures in Comparative Law*, *op. cit.*, p. 190.

[90] W.F. Funk, R.H. Seamon, *Administrative Law*, 5th Edition, New York 2016, p. 214.

[91] J. Alder, *Constitutional and Administrative Law*, *op. cit.*, p. 384.

[92] C. Harlow, R. Rawlings, *Law and Administration*, *op. cit.*, p. 205.

Within the realm of its discretion, the court also examines the evidence in the administrative disputes and, based on it, decides whether the public body's decision was reasonable and appropriate.[93] When assessing the actions of administrative authority, the court must consider various factors, all while it must maintain a reasonable margin between the control of legality, control, and the freedom of executive's actions,[94] since excessive interference in the sphere of discretionary power can lead to serious consequences.

In administrative justice, as well as in justice in general, the judicial assessment consistently relies on what is known as 'normative moral standard'.[95] This standard, in addition to written law, includes a critical component necessary not only for legal but also fair conflict resolution. When evaluating the discretionary decision of an administrative body, it is accurate to claim that the court's scope of supervision is limited.[96] However, the court's duty is to carefully assess and analyse the evidence and fully examine the case before making the decision. The plaintiff's lack of experience should not hinder the court from delivering a fair decision. If necessary, the court is obliged to assist the plaintiff in forming or amending an accurate legal claim.[97] The administrative court bears huge responsibility, since it must ensure that lack of knowledge of legislative norm or law does not result in violation of rights.[98]

An administrative body cannot hide behind the idea of discretion and justify any decision because, in such circumstances, the arbitrariness of the executive's actions will keep the individual in

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[93] P. Leyland, G. Anthony, *Textbook on Administrative Law*, *op. cit*., p. 317.

[94] J. Alder, *Constitutional and Administrative Law*, *op. cit*., p. 386.

[95] J. Jowell, *The Legal Control of Administrative Discretion*, "Public Law" 1973, Vol. 18, p. 201.

[96] პაატა ტურავა, ანა ფირცხალაშვილი, ეკატერინე ქარდავა, ადმინისტრაციული წარმოება საჯარო სამსახურში, GIZ, თბილისი, 2020, p. 145.

[97] Ruling Nბს-203-200(კ-11) of the Administrative Law Chamber of Supreme Court of Georgia, 15 September 2011.

[98] მაია კოპალეიშვილი, პაატა ტურავა, ირმა ხარშილაძე, ანა ლორია, თამარ გვარამაძე, თამარ ღვამიჩავა, ადმინისტრაციული საპროცესო სამართლის სახელმძღვანელო, "იურისტების სამყარო", თბილისი, 2018, pp. 25–26.

a state of vulnerability.[99] In such a situation, the court should review the use of discretionary authority and, when required, research the factors pertaining to the case on its own initiative. A judge's competence may not necessarily surpass when evaluating the action of an administrative body; however, a judge may objectively assess the actions of an administrative body and control how correctly an administrative body acted and how accurately it applied the law or discretion.[100]

From the submission of the administrative claim to the final decision, the judge's active involvement and, in some situations, self-initiative are crucial.[101] The court's active engagement in the process of gathering and evaluating evidence, as well as in the process of administrative justice in general, is always risky, although in some circumstances it is necessary. According to the Supreme Court of Georgia, the necessity of self-initiative in certain situations stems from the prevailing legal culture within the country and the motivation to protect the rights of individuals.[102] If necessary, the administrative court is authorised to instruct another territorial court to obtain and examine evidence, based on the goals of administrative justice.[103]

The enhanced involvement of the court and the potential for self-initiative should not be seen as removing an administrative authority's burden of proof;[104] judicial activism serves its own purposes and should not be used to justify an administrative body's inaction.

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[99] See: პაატა ტურავა, ნათია წკეპლაძე, ზოგადი ადმინისტრაციული სამართლის სახელმძღვანელო, გამომცემლობა, "სეზანი", თბილისი, 2010, pp. 241–249.

[100] T. Endicott, *Administrative Law*, *op. cit.*, p. 319.

[101] კოპალეიშვილი, სხირტლაძე, ქარდავა, ტურავა, *op. cit.*, p. 28.

[102] Ruling ნბს-303-299(კ-14) of the Administrative Law Chamber of Supreme Court of Georgia, 2 December 2014.

[103] Ruling ნბს-435-430(კ-12) of the Administrative Law Chamber of Supreme Court of Georgia, 26 February 2013.

[104] Ruling ნბს-1247-1191(2კ-09) of the Administrative Law Chamber of Supreme Court of Georgia, 25 May 2010.

Evaluating whether a judge has exceeded or remained within their authority frequently relies on the judge's individual perspectives and subjective elements.[105]

15.2.3.3. *Rationality and Reasonableness*

To achieve objectives determined by discretion, a discretionary decision must be made after evaluating the evidence and considering the factual circumstances.[106] When a court assesses the importance of numerous reasons and the underlying condition that led to an administrative body's decision, it is crucial to comprehend both the legal framework and the previous factual background.[107] The mechanism and measure of discretion is rationality.[108] For this reason, the administrative court should consider not only the legislation but also the recommendatory guidelines and policy papers that specify the features and scope of action that are appropriate in the context of a particular administrative authority.[109] According to the court's explanation, the administrative body is obliged to base every decision on reliable, objective, and adequate circumstances.[110]

Legislation frequently establishes a broad standard and provides the executive branch with guidance on the extent of its authority, often using terms like "reasonable suspicion", "excessive force", "within reasonable time",[111] which is very good due to practical needs and allows the administrative body the opportunity to act freely, effectively. However, at the same time, in many cases, the realisation

[105] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit*., p. 63.
[106] P. Cane, *Administrative Law*, *op. cit*., p. 174.
[107] J. Alder, *Constitutional and Administrative Law*, *op. cit*., p. 391.
[108] V. De Falco, *Administrative Action and Procedures in Comparative Law*, *op. cit*., p. 171.
[109] See: J. Alder, *Constitutional and Administrative Law*, *op. cit*., p. 391.
[110] Ruling Nბს-847(2ვ-18) of the Administrative Law Chamber of Supreme Court of Georgia, 17 January 2019.
[111] C. Harlow, R. Rawlings, *Law and Administration*, *op. cit*., p. 193.

of human rights also depends on it, which, in turn, is related to many delicate issues and problems.

In assessing reasonableness, the court relies heavily on discretion because it is very difficult to have an objective and general standard of reasonableness.[112] As a result of the exercise of the court's discretion, the scope of the court's action increases, which may result in the judiciary infringing on the power of other branches of government and encouraging the arbitrariness of the judges.

15.3. Hard Cases and Administrative Justice

15.3.1. CONCEPT OF HARD CASES

The historical path of the development of law is interesting and extremely important not only from a factual but from an analytical standpoint. Anthropological development demonstrates the transformation of legal thinking, indicating the emergence of new horizons of development, research, and assimilation. Criteria for hard and extraordinary cases have evolved throughout time. Obviously, this process acquired special momentum during the invention and promotion of the philosophy of law. Then it accelerated to hypersonic speed and reached unprecedented heights.

Fair justice is a constant concern for mankind. States that have a problem in this regard should strive to build it, while established democracies should seek to constantly develop it because fair justice is not a one-time goal. It requires continuous improvement, understanding of current problems, and therefore identification of appropriate solutions because the system will never be flawless; it is built and run by people, which, of course, implies an increased probability of mistakes.

In the practice of justice, there are extraordinary cases; in legal practice as well, the majority of cases are self-contained and individual, this is what distinguishes law school case-study examples from actual-life situations. People's imagination is limitless; therefore, the

[112] P. Leyland, G. Anthony, *Textbook on Administrative Law*, *op. cit.*, p. 320.

content of legal cases with their participation is likewise limitless. A small number of them cause lawyers a special headache because it is practically impossible to qualify and solve them using standard legal techniques; instead, something unique, legal, and fair is required. This process, however, should not shake the existing legal order and confuse peoples' understanding of justice.

Such legal cases can exist both at the stage of administrative proceedings and court proceedings. For more than two centuries, a great number of lawyers and legal philosophers have been researching this problem in depth.[113] They are known by different names, have different authors, and, of course, have diverse solutions.[114] In the 19th century, the impossible cases in legal realism were subject to a special regime of moral dilemmas. Within this framework, the judge should not refrain from law-making and should create applicable law as needed,[115] while adhering to the standards of Holmesian judicial self-restraint[116] and foregoing practical politics.

The evolution and development of the general concept of Hard cases are associated with Justice Douglas, who placed particular emphasis on the so-called 'penumbras' within the legislation and the margin of the judge's discretion in the interpretation of legal norms.[117] This was followed by Hart's open texture and the development of the idea.[118] For Hart, the open textures refer to gaps within the normative framework, representing the voids in the system of legal norms that require a comprehensive and substantive definition

[113] See: M. Doherty (ed.), *Jurisprudence: The Philosophy of Law*, 2nd Edition, Old Bailey Press, London 2001, pp. 3–8.

[114] B.H. Bix, *Jurisprudence: Theory and Context*, 5th Edition, Durham 2009, p. 82.

[115] J.W. Harris, *Legal Philosophies*, 2nd Edition, Oxford 2004, pp. 99–103; B.H. Bix, *Jurisprudence…*, *op. cit.*, pp. 48–52; S.P. Sinha, *Jurisprudence: Legal Philosophy*, West Publishing, St. Paul, Minn., 1993, online, pp. 255–266.

[116] See: R.A. Posner, *The Meaning of Judicial Self-Restraint*, "Indiana Law Journal" 1983, Vol. 59, No. 1, pp. 1–24.

[117] See: I. Cheishvili, *The Meaning of 'Penumbra' in Law and Its Content Evolution before Hart*, "Legal Methods" 2018, Vol. 1, No. 2, pp. 26–28.

[118] See: H.L.A. Hart, *Positivism and the Separation of Law and Morals*, "Harvard Law Review" 1958, Vol. 71, No. 4, pp. 593–629.

and application.[119] It was Hart who emphasised the subject of using penumbral norms and determined the substantive phases and logical steps that the judge should follow while interpreting the norms, assessing their meaning, and incorporating them into the facts.

The formation and development of the modern concept of hard cases can be attributed to the titan of modern jurisprudence, Ronald Dworkin. He introduced the contemporary concept of the "hard case" and provided the mechanism of assessment and resolution.[120] Hard cases, according to Dworkin, are situations that require clarification of applicable norms, a 'reading' of the law and the reliance on principles. It extends beyond seeking for hidden answers and it involves the implementation of principles in practice.[121] Situations deriving from both Anglo-American and continental European realities might be integrated into the modern concept of hard cases. Irrespective of the language used for similar cases across various systems, the general approach to handling these cases remains the same. They fall under the common concept of hard cases, requiring a courageous and non-conventional lawyer.

15.3.2. ELEMENTS OF HARD CASES

Several important elements of hard cases may be observed in order for lawyers in Georgia to be able to embrace the Dworkinian paradigm. In these elements, unconventional cases from both legal systems will be incorporated. The case can be considered as hard case when:

1. The normative framework fails to regulate or consider viable solutions to the situation at hand. In contemporary times, legislation establishes the fundamental principles and framework of measures to address specific issues. Nonetheless, despite the

[119] B.H. Bix, *Jurisprudence…*, *op. cit.*, p. 153.

[120] See: R. Dworkin, *Hard Cases*, "Harvard Law Review" 1975, Vol. 88, No. 6, pp. 1057–1109.

[121] See: R. Dworkin, *Law as Interpretation*, "Texas Law Review" 1982, Vol. 60, No. 3, pp. 527–550.

particularity of legal relationships, the dynamism of law, and the rapid pace of development in the modern world, new legal institutions (especially considering recent advances in artificial intelligence, surrogacy, and science) will always raise questions that require an answer, here and now. Furthermore, the absence of normative regulations will undeniably lead to problems not only now but in the future as well. Special attention is essential not only for addressing cases that fall beyond the scope of existing norms but also for preventing such cases from occurring.

2. The issue requires the general principles of law to be invoked and the case to be qualified in this manner – when specific regulations are insufficient to resolve a case, the court must refer to general principles of the law. Additionally, given the complexity of the issue, it is necessary to invoke the fundamental guiding ideas of the law. The principles have binding force since they are explicitly or implicitly established by value standard of the law. They are employed by court to arrive at fair, case-specific, and adequate decisions by acting within the bounds of positive law and applying advanced legal techniques.
3. The judge is required to use law or the analogy of law[122] – the mentioned case is well-known and prevalent in continental European law but within certain limitations. Public law excludes the use of law and analogies of law, particularly in criminal law, drawing from the concept of safeguarding human rights. In certain instances, notwithstanding any legislative restrictions, the court must use an analogy to settle a public law dispute fairly and with the intention of preserving the public interest and fundamental human rights.
4. A fair decision and a solution explicitly formulated in the legislation are incompatible and thus, the plaintiff employs the *contra legem* interpretation.[123] While it may pose a risk, it can sometimes be necessary. It is not possible for the general regulations

[122] See: Georgian Organic Law on "Normative Acts", Article 5; Civil Procedure Code of Georgia, Article 7; Criminal Procedure Code of Georgia, Article 2(3).
[123] See: G. Khubua, *Interpretation Contra Legem*, "Legal Methods" 2018, Vol. 1, No. 2, pp. 1–20.

of law to be ideal in all circumstances. The universalism claim is due to the influence of every legal standard in the majority of cases. While a legal matter can be distinct and at times unique due to people's creativity, enforcing a general norm upon them is not only challenging but also unfair. In such a scenario, the court uses the *contra legem* definition and attempts to rebuild the norm's objective goal – the legislator's will. Attaching the content to a norm that is drastically different from its explicit text is obviously not a pleasant experience. The judge should approach this process with a primary focus on defending human rights by considering the details of the case, and his or her interpretations must aspire to a positive outcome.

5. The disputed matter possesses an uncommon or unique nature; therefore, the judge at own discretion not only employs a purposive interpretation but also establishes a new legal order – the judge becomes a lawmaker,[124] which is an unpleasant scenario for European law, particularly in light of the concept of the separation of powers. A judge is always seen as the creator of justice rather than the norm, thus, making a decision is also lawmaking in broader sense. Nevertheless, it is outside the scope of the court's legal authority to establish a precise legal order. In this situation, the judge is required to act in the public interest and in compliance with the protection of human rights. The judge's purposive interpretation of the norm could impact the actual scope of the legal provision and thus, place significantly larger importance on it. Even within the European legal system, written law has relevance and importance, but ultimately what is considered to be law is at the discretion of court.

15.3.3. HARD CASES V. COMPLEX CASES

In legal proceeding, certain cases are challenging in terms of legal qualification, necessitating a solid legal knowledge, comprehensive examination of the problem, and specific expertise. The procedural

[124] See: B.H. Bix, *A Dictionary of Legal Theory*, Oxford 2004, pp. 3–5.

laws of all states accommodate similar disputes. Those disputes falling within the category of complex cases are predominantly associated with purely legal difficulties, specifically difficulties related to legal assessment and resolution of the case.[125] Although this complexity is well manifested in its multi-level nature, it should be addressed with proper legal instruments within the framework of existing positive law. In order to arrive at a decision, complex cases are often discussed within the collegium, where diverse viewpoints are shared and reconciled.

A Complex case is different from Hard case. For instance, hard cases are less related to the myriad of factual circumstances or the issue of legal assessment. In such cases, the issues at the centre are the delicacy of the matter and the gap between a just solution rooted in legal grounds and a fair outcome. In hard cases, to ensure justice, the judge must improvise and take an unusual decision by applying the general principles of law and legal techniques. At first glance, this might appear contradictory to the system of separation of powers and the conventional standard of law and order. Additionally, it's worth emphasising that while in hard cases, judges can decide individually, in complex cases, considering the difficulty of legal qualification, the dispute is typically decided through collective decision-making.

15.3.4. DWORKIN, HARD CASES, AND PRINCIPLES OF DISPUTE RESOLUTION

The court recognises various significant methods for addressing the complexities of hard cases, and the cumulative application of these methods leads to a dispute settlement. Each of these elements has a special purpose and plays an important role in achieving the final objective. They imply both the capability of the court and the methodology used. And at the heart of it all lies the Dworkinian understanding of law. For Dworkin, the entire the legal system is composed

[125] Civil Procedure Code of Georgia, Article 26(1)(ა-ბ).

of a set of norms, and the law is interpretation in and of itself.[126] Therefore, while interpreting the rules of conduct, whose essence is exposable, they must be made evident. It is the process of interpretation that is the Dworkinian way to solve a hard case, because the law, at its essence, is nothing but interpretation.[127] As a result, neither the legal positivism concept[128] nor the principles of natural law are compatible with his opinions; rather, they represent an alternative perspective in which morality and justice play an important role in the process of establishing the law.

Dworkin needs not only a judge to address a hard case, but rather a unique, an unconventional, non-traditional thinker, a judicial philosopher – Hercules.[129] This is a non-existent yet highly capable, individual who possesses the power to address challenging situations and find a solution. To free oneself from the restrictions of positive law and present the content of true law, making evident what is hidden and often unknown. It is the Judge Hercules who is empowered to interpret law, who needs to find the information concealed within the legal provision, lurking beneath the surface though subtext and context to understand the explicit, "true" essence of the legal norm. Certainly, there are no cases that remain unresolved or cases that cannot be justly resolved. Even when you assume that no applicable legal norm will be found, the problem lies not in the law and its imperfections or incomprehensiveness, but in the lawyer. The lawyer who cannot see beyond the layers of law cannot as well identify solutions because these solutions exclusively require the application of appropriate methods and the capability of shedding light on these intricacies. Since the law has the answer to everything, it is necessary to have a proper approach and the skills that Judge Hercules is equipped with.

When handling a hard case, it is essential to distinguish between the principles and political considerations of the litigation process.[130]

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126 See: R. Dworkin, *Law as Interpretation*, *op. cit*., pp. 527–550.
127 R. Wacks, *Philosophy of Law…*, *op. cit*., pp. 49–63.
128 Ibid, p. 57.
129 R. Dworkin, *Hard…*, *op. cit*., p. 1083.
130 R. Wacks, *Philosophy of Law…*, *op. cit*., pp. 50–60.

Dworkin found pragmatic purpose in distinguishing between principles and political arguments. The political arguments are useless in law, and a lawyer cannot rely on them. Furthermore, the argument of politics cannot be weighed against the law because political decisions are made on a political basis, and it is not a court matter. On the contrary, the principles define the essence of the law, whether explicitly or implicitly expressed in the form of guiding ideas. The argument of principles is the primary weapon Judge Hercules should rely on. When necessary, he should take on a hard case, a dispute falling within the realm of the principle, and decide it by applying the precisely correct principle.[131] But if the principle is not explicitly and clearly expressed in the norm, the judge's primary goal is to extract it from the content of the norms. This defines how to apply the authentic interpretation and how Judge Hercules' unconventional nature should be handled.

15.3.5. JUDICIAL DISCRETION AND THE RESOLUTION OF HARD CASES IN ADMINISTRATIVE JUSTICE

15.3.5.1. *Purposive Interpretation*

Despite differences in legal system, courts often take a conservative approach to establishing and interpreting norms to be applied in a dispute. They frequently lean towards an initial preference for a literal reading of the law.[132] The use of this interpretation method is both logical and desirable because it ensures the predictability of the norm and the law. However, in hard cases, the problem arises when a strict literal interpretation usually assumes a very limited and potentially unfair outcome qua outcome. To reconstruct the genuine will of the legislator, the judge must refuse grammatical interpretation of the legal provision and attempt to determine the well-thought-out goal embedded in the provision. Teleological interpretation, also known as purposive interpretation, is a common

[131] See: R. Dworkin, *Hard…*, *op. cit*.
[132] See: C. Harlow, R. Rawlings, *Law and Administration*, *op. cit*., p. 212.

approach,[133] particularly in administrative justice. A judge is required to evaluate both the public interest taken separately and the importance of balancing public and private interests in the protection of a person's basic rights. In administrative proceedings, the Georgian court frequently tries to discern the purpose of specific norms beyond their literal definition by using purposive interpretation with the aim of reaching a fair and legally justifiable, reasonable conclusion.

15.3.5.1.1. Maternity Leave for Men

The right to take leave for reasons related to pregnancy, childbirth, and child-rearing is recognised by the legislation of most developed nations, and in the contemporary world, it is regarded a fundamental right. The former Georgian law 'On Public Service' gave a very general definition of childcare leave. In one case, a male public official applied for child-rearing leave at his workplace, but instead of it, the governing body proposed an alternative leave, stating that the law only references "pregnancy" and "childbirth" in relation to women. Consequently, "childcare" was viewed as a direct continuation of this reasoning, preventing men from being recognised as rightful beneficiaries. Both the district and appellate courts dismissed the literal interpretation, asserting that all parents have the right to parental leave and only rational limitations can be imposed (if both parents are public servants and wish to take leave simultaneously). Beyond such specific cases, limitations, particularly those rooted in gender, are unjustified.

Revisions to Georgia's "On Public Service" law, along with judicial precedents, now ensure that both parents can benefit from childcare leave. The outcome of the court's ruling might appear simple and rational; in fact, this was only achieved through court proceedings because the administrative authority could not take a bold stance and provide an objective interpretation of the law. Regrettably, public institutions fail to make brave and fair decisions

[133] See: A. Barak, *The Purposive Interpretation in Law*, translated by S. Bashi, New Haven 2005, pp. 85–97.

from a human rights standpoint. The administrative court correctly assessed the situation and prioritised fundamental human rights and legal principles. In this context, the narrow interpretation of the regulation is baseless and unjustified.[134]

15.3.5.1.2. Recognition of Homelessness

Three individuals who applied for recognition as homeless were denied by an order issued by the health and social services department of Tbilisi City Municipality. These individuals requested the annulment of the order and to be given the primary reason for it that had resulted in the commission's negative decision. The administrative entity argued that the evidence presented in the case was sufficient for their conclusion. Yet, neither the district nor the appellate court shared this position. As per the court's interpretation, Part 5 of Article 53 of Georgia's General Administrative Code mandates that the administrative entity should not anchor its decision on any circumstances, facts, evidence, or arguments that were not examined and assessed during the administrative proceedings. The administrative entity had a duty to meticulously examine all details and evidence pertaining to recognition as a homeless person (this duty derives from Article 96 of the Code, with the corresponding provision under Article 97), and the decision should have been made only after the comprehensive assessment. Upon reviewing the evidence presented in the case, the court concluded that some of the evidence necessitated a deeper and more comprehensive assessment by the administrative body to make a new decision.[135]

[134] See: Decision N3ბ/435-16 of Tbilisi Appellate Court, 5 May 2016; Decision N3/4193-14 of Tbilisi City Court, 24 February 2015.

[135] Ruling N3ბ/2708-21 of Tbilisi Appellate Court, 1 April 2022. Also see: Decision N3/453-20 of Tbilisi City Court, 7 October 2021.

15.3.5.1.3. Dismissal of Public-Sector Employees

15.3.5.1.3.1. *Legal Assessment of Resignation*

In Georgian legal practice, disputes related to written resignations are widespread.[136] In such disputes, it is very important to determine the sincerity and thoughtfulness of the resignation letter; therefore, the burden of proof also rests in large part on the public entity. The Georgian Supreme Court directly associated similar cases with the rule of law principle, explaining that an unpredictable work environment, immature public service policy, the dynamics of employee resignation decisions, and other related issues impede the efficient implementation of public administration and the practical functioning of the rule of law. It is true that a personal statement is an expression of will; yet, given the country's current financial or legal situation, formally considering the legal norm imposed by legislation is insufficient. The public entity is required to investigate all the circumstances carefully and diligently and, to the greatest extent possible, all factors that led to the public servant to reach this conclusion. Otherwise, there is always a possibility that the employee was forced into writing the personal statement, either directly or indirectly. Courts were required to consider not only formal requirements of a personal statement but the applicant's freedom of choice, its validity, and compliance with the good faith standard.[137]

The Supreme Court of Georgia raised the standard for the protection of rights and imposed an obligation on administrative entities to ensure that the personal statement on dismissal is a voluntary decision. In addition, all facts and evidence in this respect must be examined. Furthermore, before deciding, the public authority must ensure that every employee's working environment complies with the rule of law and effective public administration principles. This was achieved by court's ability to employ broader teleological

[136] შოთა გეწაძე, საქართველოს საერთო სასამართლოების პრაქტიკა საჯარო შრომითსამართლებრივ დავებზე, "სამართლის ჟურნალი", N1, 2020, p. 371.

[137] Decision Nბს-463-451(კ-13) of the Administrative Law Chamber of Supreme Court of Georgia, 18 February 2014.

interpretations: the court was not limited by the strict boundaries of legal positivism; it stemmed from the real aims of public service regulatory laws rather than their formal provisions.

15.3.5.1.3.2. *Overcoming Established Practices in Favour of a Person*

In the context of covert recordings, Georgian courts established a practice according to which, as a rule, such evidence is considered inadmissible. They are allowed only in exceptional and narrowly defined circumstances, such as when the need to protect the recording outweighs the right to privacy and represents the sole means of safeguarding an individual's legal rights.[138] In one case, the plaintiff covertly taped recordings alleging that there was a pre-existing agreement between a supervisor and an individual to submit an application five days before reaching retirement age, with the promise of being hired. As a result, the individual was no longer eligible for the compensation they were entitled to. The Tbilisi Court of Appeal rejected the Ministry's position and the secret record, which was regarded as proof of the communication and deemed admissible since it considered a person's social security to be a sufficient justification owing to the significance of the freedom to labour. Furthermore, according to the court's assessment, the application for dismissal made five days before attaining retirement age is unconvincing, raising many issues about whether the individual truly receives an essential social entitlement. The court's interpretation of the evidence-related law and case law led to the admission of this evidence, and thus, the free will be expressed by an individual was deemed invalid.[139]

The court exercised its own discretion, adhering to principles of administrative justice rather than being restricted by formal procedures and preexisting court practices. It adopted a comprehensive approach that balanced various rights against one another, ultimately resulting in a decision that was not only legal but also fair.

[138] Ruling Nას-1155-1101-2014 of the Civil Law Chamber of Supreme Court of Georgia, 4 May 2015.

[139] Decision N3ბ/1797-18 of Tbilisi Appellate Court, 21 September 2018.

15.3.5.1.3.3. *Reorganisation Evaluation and Equivalent Position*

Dealing with legal challenges relating to reorganisation is a complex issue since it is commonly used as a legal defence for dismissing a public employee. Following traditional litigation, the court would be unable to examine the reorganisation cases effectively. As a result, according to the Georgia's Supreme Court, the administrative court should therefore make a significant effort to review changes made to the personnel list, identify the positions that are abolished and those that will be added in the future, as well as to determine whether there have been significant changes in the number of staff positions and so forth. In the event that structural units are eliminated, the court examines their duties in light of newly created and existing structural units. The dismissal of the public servant is unlawful, per the court's established procedure, if the court determines that the reorganisation is illusory and that the structural unit or job position has not been eliminated or diminished.[140]

The court does not strictly adhere to the formal provisions of the legislation; it assumes a broader role, exercising its own discretion by examining, interpreting, and assessing not only the legal norms but also the factual circumstances surrounding the reorganisation, the conditions that existed prior to the reorganisation, and the circumstance's that have developed since it. The court does not strictly abide by the formal provisions of the legislation. Without such judicial activism and the effective use of judicial discretion, the rule of law would be difficult to guarantee.

15.3.5.1.3.4. *Back Pay and Purposive Interpretation*

It is crucial to determine compensation and lost back pay in cases when a public employee has been unfairly terminated. While ordinary cases are simple, complexity arises when the official wage changes, particularly when the income increases during the dismissal period. In such cases, when the legislation fails to provide

[140] See: Ruling Nბს-449-442(კ-15) of the Administrative Law Chamber of Supreme Court of Georgia, 8 December 2015; Decision N No3ბ/1556-17 of Tbilisi Appellate Court, 21 September 2017.

a straightforward solution regarding the course of action the court should pursue, the existing legal lacuna has been addressed by judicial practice. The Georgia Supreme Court ruled that an employee's wrongful termination caused them to lose income they would have otherwise received; furthermore, the court also stated that awarding back pay aimed to restore the rights that an individual had prior to their unlawful dismissal. Accordingly, the amount of compensation was determined based on the employee's average salary received prior to the dismissal and the employee will be entitled to an increased salary only after his reemployment.[141]

In one of the cases, an employee who was dismissed from public service was granted a monetary compensation equivalent to two months' salary; nevertheless, the day after the dismissal order was issued, the individual was reappointed to another position within same administrative body. The Georgian Law "On Public Service", which imposes a requirement for compensation, was defined by the Supreme Court of Georgia using a purposive interpretation technique; however, what holds significance is determining the aim of the legal provision. According to the court's opinion, this is a specific manifestation of the state's support of unemployed public servants. Since the person was appointed to another position and kept working for the same administrative body, there was no need to grant the employee compensation.[142]

The court's objective extends beyond merely creating a favourable environment for the individuals; it must strike a reasonable balance between private and public interests. In doing so, the court should protect the basic human rights while also refraining from interfering with public interest as they are related to the stability of legal order and legal security. In this specific case, the court's rationale was linked to compensation arising from forcible, unlawful dismissal and the sum was determined by considering reasonable circumstances and the passage of time.

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[141] Ruling ნბს-1512(კს-18) of the Administrative Chamber of Supreme Court of Georgia, 5 February 2019.

[142] Decision ნბს-453-453(კ-18) of the Administrative Chamber of Supreme Court of Georgia, 4 October 2018.

15.3.5.1.4. Own Personal Data Disclosure

A literal interpretation of legal norms and regulations may lead to substantive and procedural ambiguity. At its core, the legal system aims to simplify the lives of people, not *vice versa*. A person, through a representative, had requested information about his biological parents, and his request was refused. The government entity claimed that, as per the order from the Justice Minister, obtaining such information requires the appropriate representative who possesses the necessary authority. When the guardianship and care authority, the investigating body, or the court order it, copies of civil status documents such birth or adoption certificates are issued. The person challenged the denial of his information request by filing an administrative appeal in the City Court. The court examined the personal data issue raised by the applicant and noted that right to know one's origins is part of the right to free personal development and any limitation placed on it must have rational justification. In this case, there is no adequate and reasonable basis to prevent an adult from accessing their own birth information. While the law does not explicitly allow for the release of information about one's origins upon personal request in adoption cases, a mere procedural rule should not hinder the fulfilment of fundamental rights.[143]

The court requires both competence and courage to embody the role of Judge Hercules, ensuring that restrained justice is unbound and formal rules instead of limiting rights of people, contribute toward their full realisation.

15.3.5.1.5. Compensation for Material and Moral Damages in Administrative Law

Compensation for damages is one of the most debated and complex issues in administrative justice. While a relatively consistent approach has been established for compensating pecuniary damages, and the amount of damage is determined based on measurable and realistic criteria, the issue concerning moral damages is considerably

[143] Decision N3/4514-16 of Tbilisi City Court, 16 December 2016.

complex. The complexity is particularly true in context of German law, which ultimately links moral damages with pecuniary damages.

Until 2019, administrative justice followed a consistent practice in which moral damages were compensated only in exceptional circumstances, and even then, only to a limited extend. To change the court's long-standing practice, obtaining court's judgment on the dispute against Georgia and its subsequent interpretation was vital. The case concerned a wrong diagnosis which was followed by wrong surgical operation, after which the plaintiff's son died. The material damage was compensated, but the plaintiff was denied compensation for moral damages since Georgian law did not include provisions for awarding compensation to family members. Considering the European Court's ruling,[144] the Administrative Chamber of Georgia's Supreme Court ruled that the exclusion of compensation for moral damage is a breach of human rights and reconsidered the case for further examination. The court changed its practice; the moral suffering experienced by the parent following the loss of a young child, accompanied by persistent negative emotions and stressful circumstances, has become a prerequisite for granting compensation for moral damages. Furthermore, to change the consistent practice, the court employed systematic interpretation of the norm, incorporating the European Convention as an integral part of Georgia's legislation, and considering the European Court's decision as a defining aspect of its authentic meaning.[145]

In the realm of administrative proceedings, numerous significant cases involving the evaluation of compensation for both financial and emotional harm were examined within the scope of an acquittal verdict. Georgian legislation provides compensation for damages caused by administrative bodies, and as a preventative measure, the legislation provides compensation for rehabilitated individuals, including compensation for damages resulting from wrong

[144] Sarishvili-Bolkvadze v. Georgia, [ECtHR], App. No. 58240/08, 19 October 2018.

[145] Decision Nბს-327-309(კ-07) of the Administrative Law Chamber of Supreme Court of Georgia, 16 May 2019.

conviction, criminal prosecution, and unlawful detention.[146] Drawing from multiple legal lawsuits, the court examined the possibility of granting compensation for moral damages and noted that facing criminal prosecution, along with wrong conviction and detention, can be an extremely stressful experience. This has an impact on a person and hence, when a verdict of not guilty is delivered, a person has the right to seek compensation for moral damages.[147]

Over time, the conditions were established to facilitate the allocation of compensation in administrative proceedings, and this is indeed a positive development. It should be emphasised, however, that the court did not propose a rational formula for the compensation of moral damages or a measurable and logical mechanism for calculating the amount of the damage. Unlike the calculation of pecuniary damages, moral damages are considerably more challenging, yet there are several verified procedures in comparative legal practice that may be applied. For this reason, the court's determination that moral damages lack a tangible equivalent is inherently accurate.[148] However, within the realm of law, the concept of damages and monetary compensation aims at restitution to the greatest extent possible while acknowledging the difficulty of achieving a complete restoration to the initial state. According to Georgia's Supreme Court, evaluating health using financial criteria is not viable. The purpose of compensation is to offer relief from pain and distressing feelings resulting from moral damage, to promote positive emotions, aiding those facing challenges in achieving spiritual balance, and to encourage social interaction, this defines a satisfactory function to addressing for moral (non-material) damages through compensation.[149] Gradually, Administrative justice will be compelled to employ such comparative methods.

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[146] Civil Code of Georgia, 1997, Art. 1005(3).

[147] See: Decision N3/4258-23 of Tbilisi City Court, 13 July 2023; Decision N3/2143-23 of Tbilisi City Court, 29 June 2023.

[148] See: Decision N3/4258-23 of Tbilisi City Court, 13 July 2023, par. 6.3.

[149] Decision Nბს-972-936(კ-08) of the Administrative Law Chamber of Supreme Court of Georgia, 8 April 2009.

15.3.5.1.6. Professional Email and Public Information

The organisation submitted a request to the Ministry of Justice inquiring about copies of letters sent and received from the official e-mail of the Minister of Justice and other authorised representatives related to urgent state procurements. However, the request was refused. Although the lower courts did not fulfil the request, the Court of Cassation deemed the inquiry for information to be justifiable and instructed the Ministry of Justice to provide the relevant materials to the organisation. The Supreme Court disagreed with the Court of Appeals' perspective, which narrowly viewed the legislation and regarded email communication as informal; therefore, it could not be a fact of legal significance, especially since the letter was sent by e-mail it contained no information or document of an official nature. The court of cassation considered the information sent by official email to be an "official document" governed by subsection "m" of the first part of Article 2 of the Administrative Code of Georgia. Indeed, more attention was given to the information related to state procurement, which was deemed urgent and was not related to state or other secrets. The significant public interest involved should have dictated that especial care be taken to preserve such information, given its relationship to urgent state procurement not involving state or other secrets, and that it be maintained as a public record and made readily accessible to the general public. In recognition of this fact, the Ministry was obligated to make it available to any interested person.[150]

The ruling was groundbreaking. While the Ministry of Justice voiced its opposition,[151] the Supreme Court set a significant precedent. By exercising its discretion, the court correctly interpreted the norm and acted to promote the accessibility of public information.

[150] Decision Nბს-286-284(კ-17) of the Administrative Law Chamber of Supreme Court of Georgia, 14 September 2017

[151] See: გიორგი გრიგალაშვილი, სამსახურებრივი ელექტრონული ფოსტა და საჯარო ინფორმაცია, წიგნში: რთული შემთხვევები სასამართლო პრაქტიკაში, ტ. II, დიმიტრი გეგენავას რედაქტორობით, თბილისი, სულხან-საბა ორბელიანის უნივერსიტეტის გამომცემლობა, 2022, pp. 31–44.

The decision played an essential role in the process of strengthening transparent and open public administration.

15.3.5.1.7. Recognition of Property Rights to Parcels of Land

In Georgia, the registration of land parcels remains significant because of Georgia's having been part of the former Soviet Union and the number of successful and unsuccessful land reforms. According to the Georgian Law "On Recognition of Property Rights of the Parcels of Land Possessed (Used) by Natural Persons and Legal Entities under Private Law", certain conditions must be met, and upon their fulfilment, an individual can apply to obtain ownership rights to a state-owned land plot. An important point to emphasise here is that, under the provisions of this law, the ownership of state-owned land plots can only be established if an individual arbitrarily occupied the land before the law came into effect. The aforementioned law outlines the evidence required to be submitted to the appropriate commission within the Tbilisi City Assembly to decide on the acquisition of ownership rights. The ownership registration application was rejected due to the fact that the house had been built on the land plot by the previous owner without a proper authorisation, the land surrounding the house was in the ownership of the state, and the land itself was subject to joint ownership between the state and the current owner, who was applying for registration of rights to the entire property. Accordingly, the land plot was not solely owned by the state; the commission's decision to refuse recognition of the plot's ownership was based on a strict, literal interpretation of the law. Considering the court's assessment, the ownership recognition process should not be impeded by succession, as the conditions remain same, and it is confirmed that the successor and previous owner have had continuous possession of the land over the years. The court provided insights into the objectives of Georgia Law "On Recognition of Property Rights of the Parcels of Land Possessed (Used) by Natural Persons and Legal Entities under Private Law" and stated that the legislator supported private initiatives and encouraged both natural persons and private legal entities to make use of the available land recourses. The adoption

of the law was necessitated by the fact that the arbitrary seizure of state-owned plots of land threatened the efficient utilisation of the land fund and the development of the state strategic plan for the land market and land possession. Hence, the court decided in favour of a private person and instructed the commission to register the ownership right to the land plot.[152]

15.3.5.2. *Contra Legem Interpretation*

No rules can be considered entirely comprehensive and universal;[153] they generally apply to most cases; however, there are exceptions where the rule requires clarification, interpretation, or alternative adjustment. Nonetheless, in a particular case, it is important to establish an exception through legislation or judicial activism when a judge can adopt a non-conventional approach and deviate from the applicable law. When the interpretation provided by the provision is essentially restrictive and the judge relies upon principles of law and a positive understanding of fundamental rights, the judge can invoke the *contra legem* definition, namely the judge may assign a different, seemingly contradictory meaning to the provision for a singular purpose, one that is distinct from the content explicitly mentioned in the norm. While there are risks inherent in this approach, when used in a balanced way, it can fairly address a complex administrative justice matter.

15.3.5.2.1. A Five-Word Name

A married couple applied to the Tbilisi Civil Registry Service, operating under the LEPL Public Service Development Agency, to obtain their child's birth certificate. They wanted to give the child a name that was composed of five words. With reference to Georgian law, particularly the first paragraph of Article 68 of the law "On Civil Acts", which sets forth the criteria for rejecting a name change

[152] See: Ruling N3ბ/434-23 of Tbilisi Appellate Court, 11 May 2023.
[153] C. Harlow, R. Rawlings, *Law and Administration*, *op. cit*., p. 209.

request, including the prohibition of having more than two words in the name, the parents filed an administrative appeal with the court against the agency's final decision, requesting the registration of a five-word name for a child.[154]

The court was faced with an interesting dilemma: on the one hand, the explicit language of legislation, which requires a literal interpretation and does not permit a broad legal hermeneutic interpretation, and on the other hand, the legitimate interest and right of parents to name their child the name they choose. The court raised several noteworthy arguments, and the subsequent discussions ultimately led the court to a legally justified and fair decision within the framework of administrative proceedings. The court emphasised the right to a name as a fundamental human right, affirmed by the constitution, and vital for personal self-identification and personal development. Furthermore, the court invoked the principle of proportionality and examined the relationship between the legitimate public goal and the means employed by public authorities to impose restrictions. The court built its decision on the goal of the legal norm; specifically, in a particular case, it deemed the agency's refusal to register the five-word name as unlawful. The legal provision was interpreted in accordance with its purpose and logical content, thereby granting the parents the ability to officially name their children the name they desired to give it. In its ruling, the court employed a *contra legem* interpretation by defining a specific provision of the law in a manner contrary to its explicit meaning. While it did not violate the legislation, it deemed the greater interest, the basic right, to be superior. A rational and fair judgment was taken because there was no objective and real public interest of the state that outweighed the interests of private persons, namely the basic right to the name. It is true that the definition of *contra legem* contains an inherent danger because the implicit content of it is not entirely dependent on the will of the judge. However, it is entirely possible to strike a balance between legal security and justice, ensuring the best outcome by considering the relative importance

[154] Decision N3/3312-14 of Tbilisi City Court, 30 March 2015.

of private and public interests and implementing the true purpose of administrative proceedings.

15.3.5.2.2. The Birth Registration of Siblings Born Through Surrogacy

Judges must have special skills when handling disputes concerning matters that are not fully addressed by the law. Surrogacy is a noteworthy illustration of how unconventional legal regimes may evolve, making it hard to predict future developments and preventing the legal system from performing preventive functions. In one case, the couple chose to employ in vitro fertilisation to implant embryos produced by their own genetic material into the bodies of two women surrogates. The two pregnancies were planned, with one woman having one child and the other woman having two. Despite their utmost efforts, one of the surrogate women unexpectedly gave birth 10 days earlier than planned. Obviously, the parents wanted to indicate the same calendar day as the date of birth for their children; however, the administrative body refused to comply, citing the provisions of Articles 21–23 of Georgian Law "On Civil Acts", which stipulated that the date of a child's birth shall be the one recorded on the certificate issued by a medical intuition. The court examined the issue of children born on different days, with a particular emphasis on their fundamental rights including the right to live in a healthy environment. Furthermore, the court evaluated the core principles of state interests with regard to a specific registration date. The children were of the same age, born to the same parents; therefore, they were twins who grew up in different women's bodies. Indicating the same age was essential for their development, peaceful, stable life, and healthy life environment (otherwise, there will always be a potential threat of external interference and exposure of their personal story). The court ruled in favour of the plaintiff and mandated that the state modify the pertinent law to reflect the same birth date.[155]

Regarding the matter under consideration, the court applied the *contra legem* interpretation, disregarded the formal objections

[155] Decision N3/1914-14 of Tbilisi City Court, 2 June 2015.

of the legal provisions in favour of children's rights, and acknowledged that the children's right to a healthy environment, including unrestricted personal development, and their full membership in society represent a greater value. To address challenging cases in administrative justice, the judge should not be afraid to take small risks; instead, the judge should devote all efforts to determining a fair and effective solution for both parties. For this specific objective, it is deemed acceptable to interpret the meaning of the law beyond what is explicitly stated in the norm, as the primary goal of the law is to guarantee the freedom and peaceful coexistence of individuals rather than imposing artificial obstacles on their lives.

15.3.5.3. *Lawmaker Judge*

The authority of a judge is restricted by the law, and ultimately, they are incapable of acting straightforwardly as a lawmaker. Nonetheless, in certain instances, considering the unique circumstances of a case, the court may engage in the law-making process. In the narrow interpretation of this concept, the principle of separation of powers is obviously being violated, but practical justice often requires non-standard approaches and alternative means of resolving disputes. Although it is true that judges of administrative justice are equipped with sufficient authority, they occasionally employ certain mechanisms to bridge the gap between the law and the practice of administrative organs.

15.3.5.3.1. The Ruling on the Development of Social Policy

In one of the cases, the dispute revolved around the healthcare program approved by the Ministry of Labour, Health, and Social Protection for internally displaced persons (IDPs) living in Georgia's occupied territories. This program did not allocate funds for dental services for children with disabilities, even in cases where such services were necessary to relieve extreme pain. This issue has sparked controversy as families of persons with disabilities lack the funds to cover expenses for anaesthesia, and in order to save

money, families are forced to postpone medical treatment until multiple teeth are damaged, at which point they seek treatment for all damaged teeth simultaneously or else are unable to afford treatment at all. The court considered the judge's petition to apply interim measures drawing upon international human rights acts and domestic legislation while also examining the state's positive obligations and the implementation of the government's health and social care policies in the context of persons with disabilities, including children. The court explained that "according to the legislation of Georgia, the government has a duty to approve reasonable state programs related to medical services tailored to the needs of children with disabilities".[156]

The court exercised its authority, applied judicial activism, and accurately evaluated both the seriousness of the matter and the necessity of an interim measure. It is undeniable that the court opted for a risky decision, and it might be stated that the court slightly encroached upon the executive authority; however, the court brought the fundamental human rights to the fore and regarded them as having equal weight with the public authorities' broad discretion.

15.3.5.3.2. Administrative Jurisdiction

The question of jurisdiction is one of the most serious problems in European administrative law. The jurisdiction of civil or administrative courts are competitive and the resolution of disputed is hindered by the fact that the appellate or supreme courts may ultimately conclude that the dispute was heard by the wrong collegium. This will unquestionably result in a re-evaluation of the case with all the procedural nuances and lengthy periods. In one of the cases, a person filed a lawsuit with an administrative claim against the Ministry of Justice and requested to be unblocked from the Ministry's official Facebook page. The administrative chamber of the Tbilisi City Court forwarded the matter to the civil chamber of the court because it

[156] Interim Ruling N4416218-21 of Tbilisi City Court, 9 March 2021.

believed the dispute to be of a private legal nature and unrelated to administrative law.[157]

Eventually, the Supreme Court of Georgia reached the conclusion that, despite the case's focus on freedom of expression, usually handled through civil proceedings, the central issue in this case involves the Ministry's obligation to take action and "unblock". Additionally, since the public body is involved in so-called administrative justice, resolving the case in an administrative manner automatically provides a higher legal status for the plaintiff because it is regarded as a "strong side", and the court is concerned with protecting an individual's rights.

15.4. Conclusions

In administrative justice, the number of hard cases is significant, and the exercise of the judge's discretionary power is well established. It is worth noting that the exercise of discretion has decisive importance in the settlement of hard cases. Identifying and addressing hard cases within the realm of administrative proceedings is a serious challenge because the entire process is devoted to determining the appropriate legal mechanisms, using adequate methods to interpret the norm, conducting a proper assessment of the action, and solving the case in this manner. Ultimately, this will contribute toward a rational, legal, and fair dispute resolution. That being said, it is vital to emphasise that justice should never be regarded as a cliched or obsolete concept because administrative justice has an effective and practical importance.

Judiciary discretion is necessary for dispute settlement, but it simultaneously entails certain risks that are related to both the proper functioning of the separation of powers and the maintenance of the limitations of judicial self-restraint. Discretion has both advantages and disadvantages. For instance, the distinct advantage of discretion is flexibility, since it enables anyone with discretionary

[157] Ruling Nბს-568(გ-19) of the Administrative Law Chamber of Supreme Court of Georgia, 4 June 2019.

authority to consider all aspects of the case.[158] However, its negative aspects can be demonstrated in situations where, for instance, the motivation is partially hidden; access to all those circumstances that led to it are limited; and increased danger of injustice and the abuse of power.[159] Irrespective of how precisely the law governs the scope of exercise of discretionary authority and all matters related to it, the final decision will be influenced by the court's internal convictions and assessment.[160] However, it does not mean that discretion should not be regulated by law. As the Court and Administrative body play a crucial role in administrative justice, it is important to clearly define their authority and the scope of it. This tends to improve the predictability in decision-making and minimise the reliance on human discretion, as it will ensure more consistent final outcomes. It is true that a clear and well-established legislative framework reduces the chances to abuse the discretionary power.[161] There is no simple, universal, or "magical" formula for defining the scope of judicial discretion.[162] The elimination of discretion is impossible; however, it is possible to regulate such authority in the manner to minimise the negative effects and aspects.[163] Therefore, it is recommended that the material and procedural legislation explicitly establishes:

1. Circumstances when discretion should be used and the scope of the action.
2. Binding principles of discretion (protection of fundamental human rights, proportionality of public and private interests, proportionality, usefulness, effectiveness).
3. To adequately examine the legal implication of discretionary authority, it is important to establish practical criteria. These factors should be subjected to a comprehensive preliminary

[158] P. Cane, *Administrative Law*, *op. cit*., p. 140.
[159] C. Harlow, R. Rawlings, *Law and Administration*, *op. cit*., p. 209.
[160] J. Alder, *Constitutional and Administrative Law*, *op. cit*., pp. 390–391.
[161] P. Cane, *Administrative Law*, *op. cit*., p. 141.
[162] N. Parpworth, N. Padfield, *Constitutional and Administrative Law*, *op. cit*., p. 409.
[163] D.H. Rosenbloom, R. O'Leary, J. Chanin, *Public Administrative Law*, *op. cit*., p. 34.

reasoning, which empowers the individual with discretion to predict potential legal consequences and decide accordingly.

4. When assessing the discretionary authority of an administrative body, the judge should respect the autonomy and executive discretion of such entities. Moreover, the judge should respect the boundaries of its operational sphere and the use of self-initiative when the public interest is at stake, and furthermore, uphold the principle of separation of powers.

In administrative law, the main purpose of discretion should be the protection of public interests and the principle of proportionality between public and private persons. In both scenarios, it is necessary to establish measurable and predictable criteria to assist the judge in making an informed decision. This approach guarantees the judge to determine the scope of their own action as well as the scope of legal evolution and self-initiative. Furthermore, this helps the judge to respect and not violate the adversarial and disposition principles. Additionally, this assists the judge in respecting and not violating the adversarial and disposition standards. Furthermore, it ensures that private individuals are not left alone when opposing the government and that bad judgments made by public authorities do not harm the public interest. It is preferable that the law define the criteria and all-important characteristics of legal disputes falling under its jurisdiction. The court has authority to integrate aspects of an inquisitorial process into the adversarial process based on public interest and with reference to it. Public interests should not be understood unilaterally, considering only the general interests of the state. The court should refrain from intervening as a corrector of administrative mistakes. In the context of the separation of powers and the deterrence and balance system, the court should be viewed as a controller and evaluator, a place where private individuals will protect their rights and, in the event of a violation of their rights, restore them.

As a result, the legal norm should take specific perspectives and guiding concepts into account:

i. The public interest should be cumulatively connected to protection of human rights, and not in isolation from the interest of private individuals.

ii. It is necessary to have a legal definition of public interest so that the court can rely on it. Furthermore, it is important to have a more concrete formulation of the general principle of proportionality, since the aforementioned is one of main principle of decision-making in administrative justice, especially in addressing the hard cases.

When assessing the proportionality of public and private interests: 1) measurable criteria should be defined to determine, on the one hand, public interests, and on the other hand, private interests; 2) it is necessary to develop appropriate legal formulations based on the categories of disputes in order to use the proportionality in relations to public-private interests. When employing judicial discretion in administrative justice, special emphasis should be placed on the general principle of proportionality, which doesn't include a narrow interpretation of the proportionality of public-private interests. Considering that the administrative law focuses on human rights protection, it is crucial to employ all necessary mechanisms within the administrative process. The proportionality test is a well-established and well-tested technique at both the national and international levels that establishes the preservation of human rights and their limitations only as necessary in a democratic society. As a result, its inclusion will improve the predictability and measurability of the legal outcomes of administrative justice.

It is important to identify a hard case in administrative justice since its resolution considerably enhances judicial discretion. For this purpose, the judge must assess:

1. To what extent there is legislation applicable to the dispute.
2. How fair is the mechanism proposed by law in decision-making process.
3. To what extent the *contra legem* definition is permissible and how it can be used to justify the decision.
4. Is there a risk of excessive judicial activism when employing the objective interpretation of the norm?

In exercising judicial discretion, the court must attempt to strike a balance between judicial activism and self-restraint, especially in circumstances where there a risk of transitioning from legal issues into the realm of policymaking. The court should not refrain from

judicial activism in administrative proceedings; the crucial issue is to build its decisions on rational and, most importantly, legal considerations. It can broaden the boundaries of interpretations as necessary to create a more precise arrangement within the existing legal framework. However, since it cannot fall under the authority of other branches of government, it will not violate the system of checks and balances.

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Chapter 16. The Obsession over Efficiency of Justice Systems: On Realities, Perceptions, Deterrence and the Bliss of Ignorance[1]

16.1. Introduction

The paper at hand analyses the causes and consequences of our growing obsession over (measuring and upgrading) the efficiency of justice systems, with a special focus on criminal justice. In order to achieve this, the phenomenon of the efficiency-obsession, as detected in the domain of the 'justice business', needs to be traced back to its actual disciplinary origins that have little (if anything) to do with legal sciences and its daily practice. Thus, at the very onset of the discourse it is justified, probably even far overdue, to deal with fundamental questions on the matter: why do we even care about whether and how efficient our justice systems are? Moreover, what exactly do we expect to gain in terms of knowledge, insight and understanding of justice systems by measuring their (presumable or perceivable) efficiency? To what extent is it even possible to measure any given justice system's efficiency? How should we

[1] The research for this paper has been funded by the Institute of Justice in Warszawa (*Instytut Wymiaru Sprawiedliwości*) within the framework of the scientific and research project Comparative Research Platform 2023 and its Efficiency of the Justice System research team. The author expresses her gratitude to the Institute and in particular its Director Dr. hab. Marcin Wielec for enabling and supporting the research at hand, while acknowledging the indispensable value of the research team's fruitful discussions throughout the six scientific seminars successfully coordinated monthly by Dr. hab. Jarosław Szymanek, under the excellent overall project coordination of Dr. Zbigniew Więckowski.

deal with the elements of space, time and culture when it comes to the (comparative) interpretation of such efficiency measurements? Finally, are there perhaps more meaningful solutions to upgrading our justice systems than trying to increase Clearance Rates and/or decrease Disposition Times, the two most prominent indicators currently used to assess the efficiency of the judiciary?

In order to meaningfully tackle these and many alike research questions, in a first step throughout the second heading of this paper we shall define the key terms 'efficiency' and 'justice' in relation to the phrase 'efficiency of justice'. This will be done against the backdrop of the efficiency-concept's disciplinary economic origins and by approaching the judiciary as a type of market-driven organisation which is in the business of the administration of law – a justice business. Here we focus on the 'managerialisation' of the 'justice business', understood as a:

> *process that changed the organisational practices of justice towards the quest for higher efficiency, to be obtained through the optimisation of human and material means and the use of private-sector management tools and practices, such as the user/client approach to service processes, a market-driven control of costs and the measurement of performance to assess actions by result.*[2]

This booming 'managerialisation' of the 'justice business', which is clearly not a kind of market-driven private enterprise, but evidently a fully monopolised state power, has led to a growing influx in more or less meaningful attempts to measure and index the

[2] Cit. B. Cappellina, *Legitimising EU Governance through Performance Assessment Instruments – European Indicators for a Judicial Administration Policy*, "International Review of Public Policy" 2020, Vol. 2, No. 2, p. 145, with reference to: C. Hood, *A public management for all seasons?*, "Public Administration" 1991, Vol. 69, Issue 1, pp. 3–19, DOI: 10.1111/j.1467-9299.1991.tb00779.x; C. Vigour, *Professions in Policy and Knowledge Transfer: Adaptations of Lean Management, and Jurisdictional Conflict in a Reform of the French Public Service*, "International Journal of Sociology" 2015, Vol. 45, pp. 112–132, DOI: 10.1080/00207659.2015.1061855.

judiciary's performance in order to evaluate and upgrade its efficiency. The ultimate justification for this efficiency-obsession is to produce the 'justice-product' with little or no waste of resources, based on the firm belief that 'court and public prosecution services efficiency remain one of the key pillars for upholding the rule of law and a determining factor of a fair trial as defined by Article 6 of the European Convention on Human Rights.'[3] The question however arises whether we are indeed merely decreasing the per-unit costs of justice, or in fact committing consumer fraud by simply continuing to label the product as justice, while actually selling a different product that in terms of its quality may no longer be considered justice?

Throughout the third heading of the paper at hand we will discuss the current state of art in measuring performance and assessing efficiency of the judiciary. There is a generally accepted notion of the countries of our region having a less efficient justice system than most other (esp. western) European countries. Now, this assumption might be investigated by determining the level of efficiency of the justice systems in each of the project team countries, as well as in relation to other European countries. However, on a conceptual level, this issue must as a starting point clearly determine what level of efficiency should be assessed as efficient (baseline), as compared to non- or less efficient and whether levels of efficiency are a category outside of any social (and therefore cultural, normative, historical, economic, etc.) context, or an inevitable part of it. Depending on this conceptual perspective the matter in question may be approached as either an abstract and mathematical measure of certain indicators (e.g., justice system budget per capita, number of judges or prosecutors *per capita*, Case Clearance Rates), or rather as a probable reflection of the broader social context, taking into account government efficiency in general, as well as cultural particularities that relate to work efficiency in more general terms (e.g., extremely long summer breaks including July and August during which not

[3] Cit. European judicial systems – CEPEJ Evaluation Report – 2022 Evaluation cycle (2020 data), Part 1. Tables, graphs and analyses, Council of Europe, Strasbourg 2022, p. 125, https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279 [access: 22.05.2023].

only the Croatian justice system, but work efficiency in general becomes extremely low in all areas except for tourism). As we shall see, none of these issues have been settled in a meaningful conceptual nor a methodologically sound manner throughout the current state of art in measuring performance and assessing efficiency of the judiciary. Therefore another, yet closely related and utmost important question arises here: what could be plausible alternative (less obvious) goals of the booming efficiency-obsession and diverse measurement initiatives such as, for example, the infamous global *Rule of Law Index*, or the *EU Justice Scoreboard* and the *European Commission for the Efficiency of Justice*[4] *Evaluations*? The proclaimed purpose of such measurement initiatives is to provide objective and empirical data for an evidence-based policy aimed at improving judiciaries' performances. Yet, at the very least as an unintended side-effect, we see that 'the "quiet power of indicators" operates to drive change in public policy'.[5] In a sense, such indicators are being used as instruments of soft law that nevertheless still produce hard and durable effects very much alike those typically enforced through hard law instruments,[6] thereby efficiently bypassing the division of powers and legitimate national authorities' competences in the realm of the judiciary.

Based on the foregoing critical investigation into the state of art in the judiciary's performance and efficiency measurement and in view of its less obvious purposes and effects, in the paper's forth heading we investigate a set of arguments that should help pave the way towards developing more meaningful and thus fully legitimate alternatives to the current efficiency-dogma imposed on judicial systems by way of performance indicators. Here we look at the negative consequences of increased judicial efficiency, especially at how a decreased per-unit cost of criminal adjudication in times of rising penal populism acts as an accelerator for criminalisation, in turn

[4] Hereinafter: CEPEJ.

[5] Cit. B. Cappellina, *Legitimising EU Governance…*, *op. cit.*, p. 142, with reference to: S.E. Merry, K.E. Davis, B. Kingsbury (eds.), *The Quiet Power of Indicators*, Cambridge 2015, on the term 'quiet power of indicators.'

[6] B. Cappellina, *Legitimising EU Governance…*, *op. cit.*, p. 142.

generating more crime, thus putting even more efficiency-pressure on the judiciary. Now, in view of Popitz's thesis about the 'preventative effect of ignorance' acting as a norm-stabiliser, so to say the 'bright side' of the dark figure of crime, there is indeed good reason to question whether we should indeed pursue the goal of a fully efficient justice system? In this regard it is of utmost importance to look at empirical findings that strongly indicate that the deterrent effects of criminal law are extremely limited, and are (if at all) to be found in the realm of perceptions, rather than realities. Therefore, it will be argued that an efficient criminal justice system, when it comes to fulfilling its deterrent function, needs to be as concerned with its public perception, as it should be with its actual performance. Because at the end of the day the addressees of the norms are most likely to be deterred by their perception of the criminal justice system's efficiency, rather than by actual performance indicators and measurements of reality.

With the paper's fifth and final heading a first attempt is made to sketch new ideas and a set of exemplary practical solutions as an alternative to the efficiency-obsession and booming 'managerialisation' of the 'justice business.' These are both future-oriented proposals for the Polish legislator, as they are suggestions for using the presented findings in legal theory and practice. Clearly, none of the ideas and proposals will solve any of the grand mysteries of legal sciences or its daily practice, nor provide full-fledged answers to any of the posed questions about the efficiency of justice systems. However, if they manage to raise at least some good new questions, while providing food for thought on innovative ideas about potential solutions, then the goal of the research and the paper at hand will have been reached.

16.2. Key Terms Explained in View of the Efficiency--Obsession in the 'Justice Business'

Throughout this introductory section, first the key terms shall be defined and put in context. This will be done against the backdrop of a briefly sketched reference to efficiency as a management concept,

in order to pave the way for a much-needed discussion about the concept's highly questionable transposition into the domain of legal sciences and its daily practice, in particular its dubious application within the 'justice business'. Second, we look at some key trends in measuring efficiency of justice systems in order to detect both purpose and consequences of this growing obsession. Already at this point it must be stressed that the said measurement obsession in the judiciary needs to be understood within the context of a much broader global measurement-frenzy which has meanwhile infected most (if not all) domains of modern society. The two main questions that arise here are on the one hand the measurability of abstract social constructs (such as justice) and on the other hand the expected benefits such measurements might provide us with (such as measures to produce justice more efficiently). This now brings us back to the introduction's first task – defining the key terms of the following discussions: efficiency and justice.

The word 'efficiency' captures the quality or degree of being efficient, whereby 'efficient' means to be 'productive of desired effects', 'especially capable of producing desired results with little or no waste'.[7] Now, when applying the term 'efficiency' with direct reference to 'justice systems', then obviously there is some kind of underlying economic tone to it. A tone that clearly signals an approach towards justice systems or the judiciary as a type of business – the 'justice business.' At the core of the 'justice business' (or system) lies the production of justice, whereby 'justice' is understood as 'the administration of law', or as 'the maintenance or administration of what is just especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments'.[8] Essentially this means that a 'justice business' would qualify as efficient if it were capable of producing the administration of law with little or no waste of resources. Clearly, although well defined, we still have no clue what exactly this means, nor how to make an objective and methodologically sound measure of said efficiency.

[7] Cit. *Merriam-Webster Dictionary*, 'Efficient', https://www.merriam-webster.com/dictionary/efficient [access: 11.06.2023].

[8] Cit. *Merriam-Webster Dictionary*, 'Justice', https://www.merriam-webster.com/dictionary/justice [access: 11.06.2023].

Most of all because the product itself (justice) is an abstract social construct which puts it at the very centre of social sciences, where of all the disciplines, economics has probably 'had the most success in adopting measurement theories, primarily because many economic variables (like price and quantity) can be measured easily and objectively'.[9] This well explains the strong overarching economic sound to the phrase 'efficiency of justice systems', making a brief reference to efficiency as a management concept, a mandatory next step in any critical analysis aimed at rethinking why and how we measure justice (systems), in an attempt to come up with new ideas and impulses for legal sciences and its daily practice.

The idea that making each individual process (more) efficient will result in an (more) efficient organisation overall still lies at the very core of most our ideas about efficiency ('process efficiency').[10] In the context of justice systems this might play out as, for example, reducing time and resources needed for criminal adjudication which, as a rule, should be the end result of a lengthy and costly trial process, by simply introducing 'plea bargaining'. Now, if the measures applied for assessing the degree of a (justice) organisation's efficiency are 'Clearance Rates' and/or 'Disposition Times', there is no doubt that such kind of efficiency-measure (like plea bargaining) will add up and eventually result in a more efficient (justice) organisation overall. Similarly, increasing for example the number of cases resolved by 'friendly settlements' before the European Court of Human Rights,[11] by introducing a compulsory 12-week non-contentious phase to its procedure, will undoubtedly make it more efficient in terms of reducing its workload by striking out such cases of its list, provided that one measures its efficiency as a decrease in backlog of cases.[12] Both examples, plea bargaining and friendly

[9] Cit. *Encyclopedia Britannica*, 'Measurement', 2023, https://www.britannica.com/technology/measurement [access: 11.06.2023].

[10] M. Witzel, *A Short History of Efficiency*, "Business Strategy Review" 2002, Vol. 13, No. 4, p. 38, https://doi.org/10.1111/1467-8616.00232 [access: 10.06.2023].

[11] Hereinafter: ECtHR.

[12] See in more detail about human rights concerns regarding settlements before the ECtHR in: V. Fikfak, *Against settlement before the European Court of Human Rights*, "International Journal of Constitutional Law" 2022, Vol. 20, Issue 3, pp. 942–975, https://doi.org/10.1093/icon/moac087 [access: 10.06.2023].

settlement, as efficiency-increasing procedures, perfectly fit into the concept of 'process efficiency' as a management concept that has been transposed from economics to the legal sciences and its daily practice. There are countless further examples clearly demonstrating how said management concept is being applied in the 'justice business', with a clear tendency of even further expansion. Nevertheless, little do we know about the quality of justice such efficiency-enhancing procedures produce, let alone if the product of such 'justice businesses' in fact is still the same?[13] One would assume that the burden of proof falls on those proposing and introducing such efficiency-enhancing procedures to show that the quality of justice will remain the same. However, empirical research documents that this is not the case, and even in the aftermath of already having introduced these efficiency-enhancing procedures, we have no evidence that the increase in efficiency does not come at the cost of the quality of the product, which at the end of the day might perhaps not even be the same product at all? With this notion we have already moved away from the causes of our obsession with efficiency in the judiciary and entered the analysis of its consequences, a topic that will be discussed in much more detail further down the road in the paper's forth heading.

At this point it suffices to conclude that (process) efficiency is essentially an economic management concept that works well in the setting of business organisations, while the measurement of efficiency works well for many economic variables (such as price and quantity), as these can be measured easily and objectively. In the next, second heading of this paper, we shall explore whether and how efficiency and performance can be measured in the judiciary and what the current state of art looks like. Before we do so, we

[13] See, for example, a recent review of the research on plea bargaining that shows (among many other important findings) that to date there is still a huge lack regarding the practice and impacts of plea bargaining, despite plea bargaining meanwhile having become the rule, whereas criminal trials are the exception in the United States of America: R. Subramanian, L. Digard, M. Washington II, S. Sorage, *In the Shadows: A Review of the Research on Plea Bargaining*, New York 2020, https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf [access: 10.06.2023].

take a quick look at some key trends in measuring (efficiency of) justice systems in order to demonstrate the scope of this growing obsession. Besides the infamous *Rule of Law Index*,[14] or the *Fragile State Index* (formerly known as the *Failed State Index*)[15] and many more alike,[16] well-fitting within the ongoing much broader 'global indexing and ranking frenzy' across vast areas of modern society,[17] there are methodologically much more sound attempts to measure the efficiency and quality of European justice systems, such as for example the *EU Justice Scoreboard* or the *CEPEJ Evaluations*. Both will be discussed in more detail in the next heading, but for the time being it is to be pointed out that there is a steadily growing volume in diverse indexing, indicatoring and measuring initiatives targeting abstract normative constructs,[18] whereby it remains largely unclear

[14] See the webpage of the World Justice Project's Rule of Law Index: https://worldjusticeproject.org/rule-of-law-index/ [access: 03.06.2023].

[15] See the webpage of the Fund for Peace's Fragile States Index: https://fragilestatesindex.org/ [access: 03.06.2023].

[16] See, for example: *Global Slavery Index*, https://www.walkfree.org/global-slavery-index/ [access 03.06.2023]; *Global Organized Crime Index*, https://ocindex.net/ [access: 03.06.2023]; *Global Terrorism Index*, https://www.visionofhumanity.org/maps/global-terrorism-index/#/ [access 03.06.2023]; *Corruption Perception Index*, https://www.transparency.org/en/cpi/2022 [access 03.06.2023]. Initiatives to create a: *Global Femicide Index* (S. Walklate, K. Fitz-Gibbon, J. McCulloch, J.M. Maher, *Towards a Global Femicide Index: Counting the Costs*, Abingdon, New York 2020), or the *World Press Freedom Index* (https://rsf.org/en/index [access: 03.06.2023]), to name but a few.

[17] In more detail on our meanwhile "hyper-numeric world preoccupied with quantification", see: P. Andreas, K.M. Greenhill (eds.), *Sex, Drugs, and Body Counts: The Politics of Numbers in Global Crime and Conflict*, Ithaca, New York 2010.

[18] Davis, Kingsbury and Merry point out that: "With the turn to evidence-based governance, reliance on statistical data along with its synthesis into the kinds of scales, ranks, and composite indexes we refer to as indicators has become essential for policy formation and political decision making. The use of indicators in governance has expanded from economic and sector-specific quantitative data to measurement of almost every phenomenon. […] Indicators are both a form of knowledge and a technology for governance. Like other forms of knowledge, indicators influence governance when they form the basis for political decision making, public awareness, and the terms in which problems are conceptualized and solutions imagined. Conversely, the kinds of information embodied in indicators, the forms in which they are produced and disseminated, and how they function as knowledge are all influenced by governance practices. The

to what extent this is meaningful or even possible. Why then such obsession with indexing and indicators?

Well, the appeal of indicators and indexes as well as measurements is their ability to boil down complex social phenomena and normative constructs to easily comprehendible numerical values which lend themselves to powerful visualisations and comparisons across space and time through rankings, thus they appear to be objective, scientific, transparent and reflecting accountability.[19] Nevertheless, the expected benefits such measurement-obsessions might provide us with are essentially nonprovable, making the whole endeavour rather obscure. There is steadily growing:

> *concern about the way indicators present themselves as more effective and reliable and valid than is truly warranted.* […] *indicators strive to appear objective and neutral and they need to maintain that appearance to be credible. But they are in essence political creatures. Social and political processes determine their creation, use, and effects on policies and publics.*[20]

Finally, there is also a large grey area in which the measurement of justice systems' performance and efficiency is conflated with the measurements of laypersons', professionals' and experts' perceptions about justice systems' performance and efficiency. This becomes most obvious when taking, for example, a look at the *Rule of Law*

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production of indicators is itself a political process, shaped by the power to categorize, count, analyze, and promote a system of knowledge that has effects beyond the producers. In these respect indicators are comparable to law." Cit. K.E. Davis, B. Kingsbury, S.E. Merry, *Introduction: The Local-Global Life of Indicators: Law, Power, and Resistance*, [in:] S.E. Merry, K.E. Davis, B. Kingsbury (eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law, Cambridge Studies in Law and Society*, Cambridge 2015, pp. 1–2, https://doi.org/10.1017/CBO9781139871532.001 [access: 03.06.2023].

[19] See: D. Nelken, *Conclusion: Contesting Global Indicators*, [in:] S.E. Merry, K.E. Davis, B. Kingsbury (eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law, Cambridge Studies in Law and Society*, Cambridge 2015, p. 321, https://doi.org/10.1017/CBO9781139871532.011 [access: 03.06.2023].

[20] Cit. D. Nelken, *Conclusion…*, *op. cit.*, p. 318.

Index's methodology or at certain indicators of the *EU Justice Scoreboard* such as the perceived judicial independence and effectiveness of investment protection. With such conflation of realities and perceptions, the challenge of accurately measuring performance and assessing efficiency in the judiciary becomes even more complex and less sound, as we shall discuss in the following heading.

16.3. State of the Art in Measuring Performance and Assessing Efficiency in the Judiciary

Continuing with the just-described challenge of conflating measurements of justice systems' performance and efficiency with the measurements of laypersons', professionals' and experts' perceptions about justice systems' performance and efficiency, we shall have a look at 2 examples. The first one is from the *Rule of Law Index* that essentially is a perception/opinion survey, comparable to the *Eurobarometer Rule of Law Survey*,[21] and not at all a measurement that targets actual indicators of any given judiciary's performance or efficiency in reality. The second example is sourced from the *EU Justice Scoreboard* and it shall demonstrate not only the conflation of measuring realities and perceptions within the same initiative, but also show that the two – reality and perception – (more often than not) are two rather distant types of assessment.

[21] See in full detail: https://europa.eu/eurobarometer/surveys/detail/2235 [access: 05.06.2023].

Table 1. *Examples of variables used to construct the WJP Rule of Law Index 2023**

GPP3	In your opinion, most judges decide cases according to: (a) What the government tells them to do; (b) What powerful private interests tell them to do; (c) What the law says. [Single answer]
GPP 4	Assume that a government officer makes a decision that is clearly illegal and unfair, and people complain against this decision before the judges. In practice, how likely is that the judges are able to stop the illegal decision? [Very Likely (1), Likely (.667), Unlikely (.333), Very Unlikely (0)]
GPP7	If a police chief is found taking money from a criminal organisation, such as a drug cartel or an arms smuggler, how likely is this officer to be sent to jail? [Very Likely (1), Likely (.667), Unlikely (.333), Very Unlikely (0)]
GPP55	Imagine that the local police detain two persons equally suspected of committing a crime. In your opinion, which of the following characteristics would place one of them at a disadvantage? The suspect is: A homosexual. [Yes (0), No (1)]
QRQ178	Based on your experience with common criminal cases (such as armed robbery) during the last year, approximately what percentage (%) of the suspects: Were in fact presumed innocent by the judge during trial until all evidence has been presented? [100% (1), 75% (0.8), 50% (0.6), 25% (0.4), 5% (0.2), 0% (0)]
QRQ179	Based on your experience with common criminal cases (such as armed robbery) during the last year, approximately what percentage (%) of the suspects: Were in fact presumed innocent during the criminal investigation? [100% (1), 75% (0.8), 50% (0.6), 25% (0.4), 5% (0.2), 0% (0)]
QRQ202	On a scale of 1 to 10 (with 10 being a very serious problem, and 1 being not a serious problem), please tell us how significant are the following problems faced by the criminal defense system in the city where you live: Lack of adequate training/education of state-provided or pro-bono defense attorneys. [10 Point Scale: Serious Problem (0) – Not a Serious Problem (1)]
QRQ204	Please assume that someone in this neighborhood has a dispute with another resident over an unpaid debt. How likely is it that one or both parties resort to violence in the process of settling the dispute (for example, to intimidate one of the parties, or to ask for a payment of the unpaid debt)? [Very Likely (0), Likely (.333), Unlikely (.667), Very Unlikely (1)]

* GPP – General Population Poll; QRQ – Qualified Respondents' Questionnaire, only Criminal Law.

Source: *World Justice Project Rule of Law Index 2023, Variable Map*, https://worldjusticeproject.org/rule-of-law-index/downloads/ROLIndex2023_Table_of_Variables.pdf [access: 05.06.2023].

Table 1 provides us with exemplary 8 variables (out of a total of more than 500 variables) used to construct the *Rule of Law Index*.[22] The first 4 variables are part of the General Population Poll (GPP) and, as the name already suggests, are questions asked to laypersons, whereas the next 4 variables are part of the Qualified Respondents' Questionnaire (QRQ) to be completed by legal practitioners and experts, in the example here, relating only to criminal law. Now, the interested legal scholar, when reading through both sets of variables, the one addressing laypersons (GPP) as well as the one addressing legal practitioners and experts (QRQ), might quickly realise that in all likelihood neither of the two groups of survey participants in fact can essentially answer any of the posed questions. In a nutshell, the laypersons will have to rely on the accuracy and validity of the sources of the information based on which they build their opinion on. This will most likely be (social) media and the press, which most certainly do not representatively report about criminal justice practices, but commonly focus on negative and newsworthy incidents. In this sense one can expect that respondents' opinions are merely a reflection of the public discourse about (more or less closely) related topics to those covered with the variables. Now, the legal practitioners and experts in criminal law, expected to provide their assessments to the second set of the presented 4 variables, and to which the author of this paper presumes to belong to, will most definitely be in no position to accurately answer any of the posed questions, at least not without some sort of prior analysis and thorough investigation into the matter at stake.

Considering that the *Rule of Law Index* is very broadly used not only throughout media and public policy, but also in social sciences (particularly legal sciences), it seems justified to use this

[22] In the Rule of Law Index's methodology, it is stated that: "The country scores and rankings presented in this report are built from more than 500 variables drawn from the assessments of over 149,000 households and 3,400 legal practitioners and experts in 142 countries and jurisdictions, making it the most accurate portrayal of the factors that contribute to shaping the rule of law in a country or jurisdiction." Cit. *World Justice Project Rule of Law Index 2023 Methodology*, p. 183, https://worldjusticeproject.org/rule-of-law-index/downloads/Index-Methodology-2023.pdf [access: 05.06.2023].

opportunity to caution the interested reader about what the index is in fact composed of and what degree of accuracy may be reasonably expected from it. Thus, since the *World Justice Project* – a new EU funded project – intends 'to generate and disseminate people-centred indicators to assess justice, governance, and the rule of law in the EU at the subnational level', with these indicators aiming to 'provide an overview of how government institutions perform based on the experiences and perceptions of people living in different regions of the EU when they interact with authorities from different levels',[23] European legal scholars and practitioners might want to take a much closer and more critical look at the *Rule of Law Index*.[24]

Finally, those of us legal scholars involved in empirical data collection and analysis know that there is no such thing as a 'flawless'

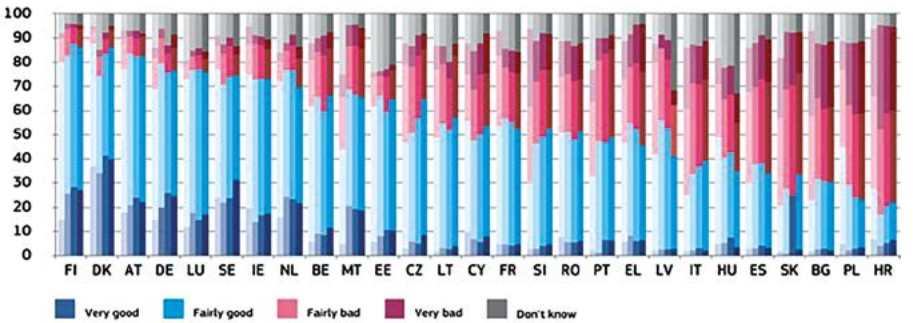
[23] Cit. World Justice Project webpage on "The World Justice Project is starting a new and multi-year project to produce people-centered indicators to assess justice, governance, and the rule of law in the European Union at the subnational level", https://worldjusticeproject.org/our-work/research-and-data/european-union-subnational-justice-governance-and-rule-law-indicators [access: 05.06.2023].

[24] Besides taking a deep dive into the methodology itself, especially by reading through the 500 variables the index is composed of (including as variables several other indexes and surveys, such as the: *Open Data Index*, *Political Terror Scale*, *Gallup World Poll*, *UNODC Homicide Statistics*, *Uppsala Conflict Data Program*, *Center for Systemic Peace*) as well as how exactly this has been done, the interested reader is advised to consult for example: T. Ginsburg, *Pitfalls of Measuring the Rule of Law*, "Hague Journal on the Rule of Law" 2011, Vol. 3, Issue 2, pp. 269–280, https://doi.org/10.1017/S187640451120006X [access: 05.06.2023]; S.E. Skaaning, *Measuring the Rule of Law*, "Political Research Quarterly" 2010, Vol. 63, Issue 2, pp. 449–460, http://www.jstor.org/stable/20721503 [access: 05.06.2023]; A. Jakab, L. Kirchmair, *How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way*, "German Law Journal" 2021, Vol. 22, Issue 6, https://doi.org/10.1017/glj.2021.46 [access: 05.06.2023]; R. Urueña, *Indicators and the Law: A Case Study of the Rule of Law Index*, [in:] S.E. Merry, K.E. Davis, B. Kingsbury (eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law, Cambridge Studies in Law and Society*, Cambridge 2015, https://doi.org/10.1017/CBO9781139871532.003 [access: 05.06.2023]; A. Jakab, V.O. Lorincz, *International Indices as Models for the Rule of Law Scoreboard of the European Union: Methodological Issues*, "Max Planck Institute for Comparative Public Law & International Law Research Paper" 2017, No. 2017-21, http://dx.doi.org/10.2139/ssrn.3032501 [access: 05.06.2023].

empirical research undertaking. This standard accordingly applies to all indexing, ranking and measuring attempts referred to within this paper. Nevertheless, when discussing scientific empirical research, especially the academic publishing of its findings, the scientific community has established strict criteria and (peer) review procedures that ensure critical and objective contesting of any research concept, its methodology, the research instruments, data analysis and findings/conclusions. This is however missing in the case of so called 'grey literature' and 'grey research' stemming from the non-academic/non-scientific sector, or from diverse governmental/public agencies. Within this lack of possibility to contest these actors' research concepts, methodologies, instruments, data (analysis) and findings prior to publication lies the challenge itself, and as a consequence we end up (potentially) relying on 'research findings' and 'research methodologies' or 'research data' which – at least according to the common scientific publishing standards – perhaps might have never seen the light of day. Thus, such critical discussions are not only serving the purpose of gatekeeping, but are essentially intended to increase the quality of the scientific work in question.

Now, on to our next example, illustrated in way of Figures 1 and 2. Both are sourced from the *2023 EU Justice Scoreboard*. Within the discourse at hand, the aim is to show how easily data *on* and *about* judicial performance are conflated with each other, even within the same evaluation effort. The distinction might appear subtle on first thought and come down to distinguishing between the two words 'on' and 'about'. Yet, the factual difference is huge, as in the case of Figure 1 we look at data 'about' the judiciary in terms of its perceived performance (e.g., independence) as assessed by laypersons (comparable to the *Rule of Law Index*'s household survey), whereas in case of Figure 2 we are presented with hard facts 'on' the realities of justice systems across Europe (e.g., number of judges in ratio to population). Regardless of what we intend to do with both data sets and how they might be meaningfully applied in any analysis of judiciaries' performance, it is of utmost importance not to conflate the two with each other and to be aware of their underlying specific (and vastly different) data sources and methodologies.

Figure 1. *2023 EU Justice Scoreboard (%) – How the general public perceives the independence of courts and judges**



* Member States are ordered first by the percentage of respondents who stated that the independence of courts and judges is very good or fairly good (total good); if some Member States have the same percentage of total good, then they are ordered by the percentage of respondents who stated that the independence of courts and judges is fairly bad or very bad (total bad); if some Member States have the same percentage of total good and total bad, then they are ordered by the percentage of respondents who stated that the independence of courts and judges is very good; if some Member States have the same percentage of total good, total bad and of very good, then they are ordered by the percentage of respondents who stated that the independence of courts and judges is very bad.

Source: Eurobarometer: 2016, 2021 and 2022 (light colours), 2023 (dark colours).[25]

The core challenge with barometers, just as with indexes, assessments and estimates, just as with victimisation surveys or risk calculations in general, is that there is only a limited possibility to evaluate or test their accuracy. This does not imply that the data and findings they produce are incorrect, but merely points out the fact that they too suffer from limitations and shortcomings, which eventually make all assumptions and predictions based on their findings (more or less) speculative. In that sense they ought best to be used as one of many sources of information *about* the rule of law

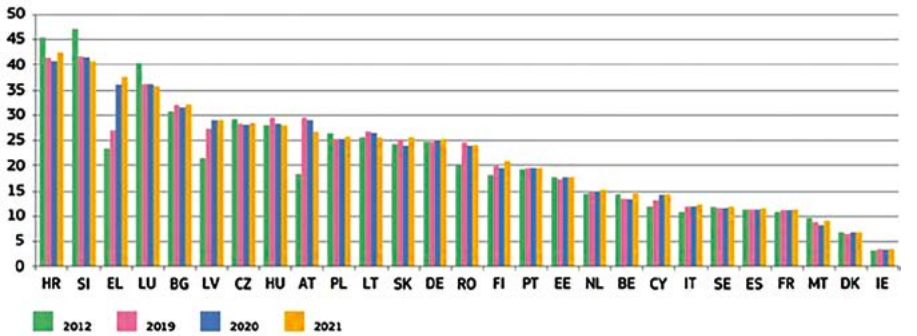
[25] Source of figure and text: *The 2023 EU Justice Scoreboard*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2023) 309 final, Publications Office of the European Union, Luxembourg 2023, p. 41, https://commission.europa.eu/system/files/2023-06/Justice%20Scoreboard%202023_0.pdf [access: 02.08.2023].

(perception), not as hard facts and figures that accurately capture the real scope of rule of law (reality). Such measurement initiatives' obvious advantage lies in their inherent ability to advocate for social change by addressing and mobilising a much broader audience than traditional scientific and academic research undertakings ever could hope for. Although this does not resolve any of the methodological challenges they face, it marks a territory for prospective collaborations and synergies of efforts among civil society actors, (inter) national organisations and the academic community. A first necessary and far overdue precondition to truly advancing the state of art in empirical performance research on the judiciary would therefore be to start off a broad and frank discussion between actors engaged in collecting facts and data *on* justice systems (realities), and those producing estimates and assessments *about* justice systems (realities). Otherwise, we will all remain in our comfortable own silos, trapped 'in an echo chamber of like-minded and right-thinking souls who provide each other little incentive or encouragement to really interrogate how we are thinking and working'.[26, 27]

[26] Cit. A.T. Gallagher, *What's Wrong with the Global Slavery Index?*, "Anti--Trafficking Review" 2017, Issue 8, https://antitraffickingreview.org/index.php/atrjournal/article/view/228/216 [access: 11.06.2023], s.p.

[27] See in more detail with focus on the *Global Slavery Index*: D. Derenčinović, A. Getoš Kalac, *Trafficking in Human Beings: Focus on European Human Rights Standards and the State of Art in Empirical Research*, [in:] T. Karlović, E. Ivičević Karas (eds.), *Legatum pro Anima – Zbornik radova u* čast *Marku Petraku*, Zagreb 2024, pp. 1043–1068.

Figure 2. *2023 EU Justice Scoreboard – Number of judges, 2012, 2019–2021* (per 100,000 inhabitants)*



* This category consists of judges working full-time, in accordance with the CEPEJ methodology. It does not include the Rechtspfleger/court clerks that exist in some Member States. AT: data on administrative justice have been part of the data since 2016. EL: since 2016, data on the number of professional judges include all the ranks for criminal and civil justice as well as administrative judges. IT: Regional audit commissions, local tax commissions and military courts are not taken into consideration. Administrative justice has been taken into account since 2018.

Source: Council of Europe's European Commission for the Efficiency of Justice (CEPEJ).[28]

Clearly, it would be inappropriate to completely disregard what has been thus far accomplished in the area of measuring the performance and assessing the efficiency of judicial systems. In this regard the two key measures, as quite uniformly applied throughout the field, have been developed and clearly defined: For one, there is the Clearance Rate (CR), which:

> *is the ratio obtained by dividing the number of resolved cases by the number of incoming cases in a given period, expressed as a percentage. It demonstrates how the court*

[28] Source of figure and text: *The 2023 EU Justice Scoreboard*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2023) 309 final, Publications Office of the European Union, Luxembourg 2023, p. 30, https://commission.europa.eu/system/files/2023-06/Justice%20Scoreboard%202023_0.pdf [access: 02.08.2023].

> *or the judicial system is coping with the in-flow of cases and allows comparison between systems regardless of their differences and individual characteristics.*[29]

Thus, there is the Disposition Time (DT), which:

> *is the calculated time necessary for a pending case to be resolved, considering the current pace of work. It is reached by dividing the number of pending cases at the end of a particular period by the number of resolved cases within that period, multiplied by 365. More pending than resolved cases will lead to a DT higher than 365 days (one year) and vice versa.*[30]

Now, obviously it is possible to come up with a measure of efficiency of the justice system, especially if we approach it as the 'justice business' and focus primarily on 'process efficiency'. Even if we were to subscribe to this, what matters most is the measuring of all those indicators we consider to be accelerators or decelerators of a justice system's performance.

There are clearly multiple and complexly interconnected factors that either accelerate or rather decelerate, sometimes even work both ways, the efficiency of the justice system. Factors on the macro level such as budget, quality of the normative framework, culture of legal settlement of conflicts, overall government efficiency, etc., clearly have a key impact on the justice system in terms of case load and complexity on the one hand and capacity to handle inflow of cases on the other hand. On the mezzo level of different organizational units (courts, prosecutorial offices, ministries, local government, etc.) geography, population density, unequal distribution of budgets, lack of administrative and technical support, etc. play an as much important role as management types and skills of lead actors

[29] Cit. European judicial systems – CEPEJ Evaluation Report – 2022 Evaluation cycle (2020 data), Part 1. Tables, graphs and analyses, Council of Europe, Strasbourg 2022, p. 125, https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279 [access 22.05.2023].

[30] Ibidem.

or professional culture and work climate, IT support or even office space and venues in general. Finally, on the micro level factors such as age and gender, quality of education and lifelong learning and training opportunities are equally important as are remuneration, advancement opportunities, motivation and, last but not least, corruptibility and misconducts of all types. Now, all these factors are then embedded into an interwoven net of normative frameworks which to a great extent (but not ultimately) determine the efficiency of the justice system. This also demonstrates that purely normative causation of inefficiency of justice systems is highly unlikely – a sensible normative framework is not the solution to a more efficient justice system, but merely one of its basic preconditions.

Eventually our quest for efficiency within the justice system builds upon the conviction or presumption that, given the right data input and provided with the right mathematical formulas, the 'managerialisation' of the 'justice business,' should on a daily basis look something like this:

> *Sometime in the not too distance future, we envisioned then, court executives and other stakeholders, will get all the critical information about their court's performance on their computers instantly. For court managers, the homepage of their court's website would display a window highlighting performance information summarized by a single number, the CPI [note: Court Performance Index], accompanied by a green or red triangle with another number indicating whether the CPI is up or down from the previous day and by how many points. (Think of the way the Dow Jones Industrial Average is shown on CNBC and CNN.)*
>
> *If a quick morning check of the court's CPI by the court manager or chief judge, for instance, reveals a green, upward pointing triangle and an increase since the previous day, all would be well. The court manager or chief judge could relax and get a cup of coffee. On the other hand, the cup of coffee may need to wait if the morning check discloses a red downward-pointing triangle and a significant downturn in*

the CPI. By drilling down through several screens of progressively more detailed and less aggregated performance data, beginning with a display of four to ten core court performance measures that constitute the components of the CPI (think, again, of the Dow and its component company stock values), court managers and judges would be able to pinpoint the court, division, case type or resources needing attention.

The court manager may click the CPI icon to show a more detailed screen displaying a 'balanced scorecard' of the four to ten performance measures that contribute to the CPI (e.g., adaptations of the National Center for State Courts' CourTools or Appellate CourTools). Each of the performance measures on this screen are displayed in the same simple way as the CPI, i.e., a single score for the measure, a smaller number indicating a change in the measure, if any, and a triangle indicating a downturn or upturn in the measure.

The manager might discover, for example, that the early results of one measure – for example, an online survey of court employee engagement posted the morning of the previous day – is largely responsible for dragging down the court's CPI. From the 'real time' data displayed on the screen the court manager learns that 37 percent of the court employees already had responded to the survey within 24 hours of their posting on the website.

A few more clicks by the court manager produces screens revealing important additional information about this measure including trends over time; the alignment of the measures with the court's management processes such as strategic planning, budgeting, quality improvement, and employee evaluation; related measures; and best practices in the performance area gauged by the measures. Further, a note on the screen showing trends of the measures over time may indicate that the response rate to previous administrations

> *of the surveys was higher than 90 percent of all the court's employees and that, in the past, the early returns tended to be the most negative. The court manager decides not to jump to conclusions but to mobilise the management team in the event that the survey results do not improve as more of the court employees complete the online questionnaires.*
>
> *In a few minutes of the morning, the court manager will have viewed the performance 'dashboard' and determined the days 'score' and what needs to be done. In this example, the court manager decides simply to alert and to mobilise the court's management team in case the measure that caused the CPI downturn does not show improvement in the days ahead.*[31]

The issue at stake here is not whether or not such a scenario appears more or less probable to eventually play out like this in courts. The question rather concerns a very basic yet utmost important insight into assessing performance and increasing efficiency, as the provided example illustrates: the efficiency-obsession and its measurement become a 'beast of its own'. We see that behind the red triangle (the drop of the CPI, seen as an alerting decrease in the court's performance) in fact lies the CPI itself, or to be more exact the *online survey of court employee engagement*, being one of the indicators measured and used to compose the CPI. Perhaps it is only an interesting coincidence that the scenario plays out exactly like this and that the very cause of the alerting decrease in the court's performance turns out to be the CPI itself, nevertheless it clearly illustrates some of the hidden dangers inherent to such approaches, namely that by constructing and obsession over indexing and measurement we might be (artificially and counterproductively) creating additional challenges that eat up resources which might have

[31] Cit. I. Keilitz, *A Justice Index: The Quest for the Holy Grail of Court Performance Measurement*, Made2Measure, 08.09.2010, https://made2measure.blogspot.com/2010/09/justice-index-quest-for-holy-grail-of.html?m=1 [access: 28.07.2023], s.p.

been utilised more efficiently, e.g., by the court manager or chief judge having his/her morning coffee with the heads of sections and discussing detected challenges as well as their solutions.

On a final note, we ought to briefly consider another (less apparent) danger inherent to assessing performance and measuring efficiency. This is the question of the lacking legitimacy and competences of the executive branch (as well as civil society) to factually intervene in the 'justice business' via 'efficiency-increasing' soft law or 'naming and shaming' or 'ranking' or 'best practices', etc., thereby clearly bypassing and surpassing necessary hard law competences (which they do not have). Capellina in this regard conducted a highly informative rather recent analysis about the legitimising of EU governance through performance assessment instruments and provided valuable insights into how the CEPEJ indicators are (being used as) much more than a simple data basis for informed policy creation. She concludes that:

> *the paper proves that the quantification of social reality produced by indicators has effects that go beyond the expectations and the control of the actors that shaped them. The example of the side effects produced by the CEPEJ report, both in national reforms and through the nurturing of a powerful competitor in the field of evaluation and governance of European judicial systems, illustrates these contrasted dynamics. This last example illustrates that the potential of indicators is relevant in three main aspects: providing a sufficiently loose framework to solve vertical and horizontal cooperation problems at the international level; determining policy goals through the selection of areas of measurement and evaluation, and providing proof to influence local and national policy-makers over reforms either through lesson-drawing, persuasion or conditionality.*[32]

Clearly, either explicitly or implicitly, all indexing, measuring, assessing and ranking of judicial performance and efficiency, is

[32] Cit. B. Cappellina, *Legitimising EU Governance…*, *op. cit.*, p. 154.

being conducted and obsessed over with the purpose of inducing change, arguably a positive one. However, what is frequently disregarded is that already the conceptualisation and the disciplinary approach towards the issue at stake, let alone the decision on which indicators and in what way to focus, pretty much predetermine where one looks for solutions. With this we open up the next heading's main topic – case studies demonstrating consequences of the 'managerialisation' of the 'justice business' which might provide us with the argumentative basis for exploring alternative approaches to looking at and understanding efficiency of justice systems.

16.4. Case Studies on Consequences of the 'Managerialisation' of the 'Justice Business'

Alternative dispute resolution[33] methods, in particular 'mediation'[34], is believed to be a meaningful way of settling legal disputes outside the courtroom, or better to say, without the courts and judges having to 'produce justice', but rather relaying on 'alternative production of justice'. In that sense ADR might best be described as a kind of 'generic or hybrid justice' when compared to the 'authorised justice' as traditionally produced by courts and judges in courtrooms. Whether or not such 'generic or hybrid justice' in terms of its essential quality is still the same as 'authorised justice' is not relevant for the discussion at hand, although at least on a conceptual level it needs to be underlined that any 'opt-out mediation model' in its very essence is no longer a proper type of truly 'voluntary' mediation.[35] Thus, on a methodological note it is rather challenging to imagine

[33] Hereinafter: ADR.

[34] See, for example, the outputs of the CEPEJ Working Group on mediation (CEPEJ-GT-MED): https://www.coe.int/en/web/cepej/cepej-work/mediation [access: 28.07.2023], in particular CEPEJ's European Handbook for Mediation Lawmaking (European Handbook for Mediation Lawmaking. As adopted at the 32th plenary meeting of the CEPEJ, Strasbourg, 13–14 June 2019, https://rm.coe.int/cepej-2019-9-en-handbook/1680951928 [access: 28.07.2023]).

[35] See in more detail about the effects of 'opt-in' vs. 'opt-out' mediation models: G. De Palo, *A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs to Be More… Directive*, Briefing requested by the JURI committee,

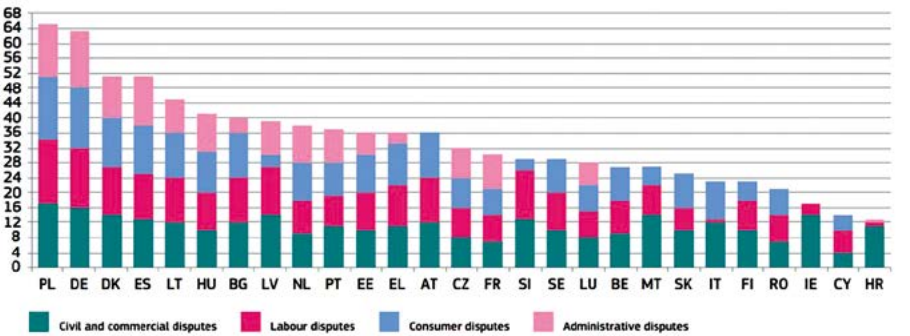
the empirical research design that could provide for a solid proof that ADR produces the same type and quality of justice as the one produced traditionally by courts and judges in courtrooms.[36] What is however relevant for the analysis at hand is the question whether an increase in the application of ADR methods does in fact lead to an increase in justice systems' performance and efficiency. Well, at least from the standpoint of how the *2023 EU Justice Scoreboard* perceives the 'quality of justice' within the framework of assessing judiciaries' performance, there is believed to be a clear link between increased application of ADR, quality of justice and overall effectiveness of national justice systems.[37] Therefore the *2023 EU Justice Scoreboard* monitors and compares states' efforts to promote the voluntary use of alternative dispute resolution (ADR) as an indicator of justice systems' accessibility, as illustrated in Figure 3.

November 2018, https://www.mondoadr.it/wp-content/uploads/Briefing-Note-GDP-EU-Parliament.pdf [access: 24.07.2023].

[36] Such an empirical analysis would in fact need to be either experimental (*in vitro*) or observational (*in vitro*), ideally a combination of both, and based on a randomised assignment of cases to either ADR methods on the one hand and traditional dispute resolution by courts/judges on the other hand. Now, by doing so the question of voluntarity regarding ADR methods would automatically arise, whereas without prior randomisation any empirical study struggles with the impact of 'opt-in' and 'opt-out' effects of ADR methods as compared to traditional dispute resolution methods where such impacts are irrelevant.

[37] The *2023 EU Justice Scoreboard* claims to provide: "data on the established three key elements of effective national justice systems: efficiency, quality, and independence" (cit. *The 2023 EU Justice Scoreboard*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2023) 309 final, Publications Office of the European Union, Luxembourg 2023, https://commission.europa.eu/system/files/2023-06/Justice%20Scoreboard%202023_0.pdf [access 02.08.2023], Foreword), thereby evidently building upon the conceptual belief that ADR, as a quality indicator, feeds into the key elements of effective national justice systems in a positive manner.

Figure 3. *2023 EU Justice Scoreboard – Promotion of and incentives for using ADR methods, 2022**



* Maximum possible: 68 points. Aggregated indicators based on the following indicators: 1) website providing information on ADR; 2) media publicity campaigns; 3) brochures for the general public; 4) provision by the court of specific information sessions on ADR upon request; 5) court ADR/mediation coordinator; 6) publication of evaluations on the use of ADR; 7) publication of statistics on the use of ADR; 8) partial or full coverage by legal aid of costs ADR incurred; 9) full or partial refund of court fees, including stamp duties, if ADR is successful; 10) no requirement for a lawyer for ADR procedures; 11) judge can act as a mediator; 12) agreement reached by the parties becomes enforceable by the court; 13) possibility to initiate proceedings/file a claim and submit documentary evidence online; 14) parties can be informed of the initiation and different steps of procedures electronically; 15) possibility of online payment of applicable fees; 16) use of technology (artificial intelligence applications, chat bots) to facilitate the submission and resolution of disputes; and 17) other means. For each of these 17 indicators, one point was awarded for each area of law. IE: administrative cases fall into the category of civil and commercial cases. EL: ADR exists in public procurement procedures before administrative courts of appeal. ES: ADR is mandatory in labour law cases. PT: for civil/commercial disputes, court fees are refunded only in the case of justices for peace. SK: the Slovak legal order does not support the use of ADR for administrative purposes. FI: consumer and labour disputes are also considered to be civil cases. SE: judges have procedural discretion on ADR. Seeking an amicable dispute settlement is a mandatory task for the judge unless it is inappropriate due to the nature of the case.

Source: European Commission.[38]

[38] Source of figure and text: *The 2023 EU Justice Scoreboard*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2023) 309 final, Publications Office of the European Union, Luxembourg 2023, p. 24, https://commission.europa.eu/system/files/2023-06/Justice%20Scoreboard%202023_0.pdf [access: 02.08.2023].

Clearly, there is a kind of basic logic in assuming that broad availability of ADR methods might make justice systems more accessible to its users/consumers, but is there any sound empirical proof for this assumption? Furthermore, even if there were such proof, can such accessibility be actually measured indirectly, by collecting data about justice systems' promoting and incentivising the use of ADR methods? Now, obviously this can be done, but it remains doubtful (at best) whether this is in fact altogether meaningful, or rather in itself serves the purpose of promoting and incentivising the use of ADR methods across EU member states' justice systems.

Throughout the past few decades, most democratic societies have witnessed an increasing mismatch between cases and adjudication resources, since our modern way of life has 'generated more crime, more civil injuries, and more contract disputes; trial processes grew more professionalized, formal, and elaborate as contemporary notions of fairness and due process evolved'.[39] This leads to an ever-growing trend in fast-tracked, out-of-court or alternative dispute resolution mechanisms, tackling the delays and backlogs of cases created by the said mismatch of cases and adjudication resources. In this regard Brown notes:

> *The reasons that judges, policymakers, scholars, and others experience pressure for greater adjudicative efficiency is not the focus here. The starting point is that the perceived need for greater efficiency is widespread and longstanding; as the primary diagnosis of adjudication's modern predicament, it has driven the relentless trend to resolve each case more quickly and cheaply. The pressure for efficiency has deeply reshaped adjudication practice, driving innovation of non-trial practices in order to match caseloads to court capacity.*[40]

[39] Cit. D.K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, "Virginia Law Review" 2014, Vol. 100, No. 1, p. 184, http://www.jstor.org/stable/24362653 [access: 02.08.2023].

[40] D.K. Brown, *The Perverse Effects…*, *op. cit.*, p. 185.

Brown points out that in criminal adjudication the state 'can switch from a costlier process for reaching judgments, such as trials, to a cheaper one, such as settlement' and that this 'kind of substitution is commonly described in criminal adjudication as improved efficiency. In blunt terms, it describes the production of more criminal court judgments at a lower per-unit cost, and therein lies the complication.'[41] Brown continues by arguing that:

> *[t]his sort of efficiency gain – a decrease in the cost of the service – can be expected, on the premise of an ordinary demand function, to trigger more demand. Cheaper adjudication can lead to even more cases entering the criminal court system. That response is a widely recognized and routine effect of efficiency improvements in all sorts of contexts, but it is little discussed in criminal adjudication. In many settings this effect is not only unproblematic but welcome; it may be the goal of improving efficiency. In other contexts, however, increased demand as a result of increased efficiency is undesirable, even yielding perverse results.*[42]

Essentially, what Brown shows very skilfully is that the parameters dictating the perceived need for increased efficiency of the criminal justice system are far from naturally given circumstances, but rather discretionary decisions by legislatures, police, prosecutors, and ultimately, to some degree, public opinion, which are all impacted by the increase of adjudicative efficiency that acts as an incentive for (even further) criminalisation and increase in caseload.[43] According to Brown:

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[41] Ibidem, p. 186.

[42] Ibidem.

[43] "Once one recognizes this flexibility in criminalization and enforcement policy, it is easy to see that the connection between criminal offending and caseloads is far from straightforward. That recognition makes the link between caseloads and adjudicative efficiency more problematic as well. Legislatures, police, and prosecutors (and ultimately, to some degree, public opinion) exercise a lot of discretion in determining caseloads; the number of prosecutions is not simply a direct function of the rates of criminal offending in the world outside

Broadly speaking, as greater efficiency reduces the overall cost of criminal law enforcement, it makes it less costly for legislatures to create new offenses, and more tempting to choose criminal enforcement over other public policy strategies to address social problems or regulatory agendas. Adding new offenses to criminal codes is cheap, but funding their enforcement is not. Yet more efficient adjudication reduces the effective level of 'per unit', or per-offense, spending on prosecutors, courts, and defenders. That amounts to an incentive for legislatures to expand the types of conduct or social harms that they criminalize; it incrementally makes criminal law enforcement more appealing as a policy response to social problems.[44]

Adjudication's efficiency contributes to excessive enforcement and punishment policies. This sounds heretical in an age that valorizes efficiency and is skeptical of both public expenditure and public sector inefficiency. Yet high costs – or, the same thing, resource limits – are uncontroversial means to force better spending choices in many contexts […].[45]

Recognizing that an efficiency improvement is distinct from efficiency's effects reminds us that there is no ex-ante reason to assume that lower adjudication costs necessarily lead to better criminal justice policy outcomes, or that higher costs are inevitably linked to worse ones. Those judgments are difficult, and they are at bottom political. But it can improve

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the court room. The discretion to change the number of crimes by legislating crime definitions, uncovering more with greater policing investments, or addressing some violations with policies other than criminal prosecution – all of this opens the possibility for policymakers to make these decisions in response to changes in the *price of adjudication*, which changes with gains in efficiency." Cit. D.K. Brown, *The Perverse Effects…*, *op. cit.*, p. 199.

[44] Ibidem, pp. 200–201.

[45] Ibidem, p. 222.

> *political decision-making* […] *to acknowledge that the price of goods with negative externalities can be too low.*[46]

Therefore, a state's increase in criminalisation – both in terms of broadened scope of criminal behaviours as well as increased sentencing ranges – must be adequately reflected in the state's proportional increase in resources allocated to the adjudication of the increased caseload. Put differently, a sensible alternative approach to increasing efficiency of justice systems would be decriminalisation in the realm of criminal adjudication and deregulation when looking at the broad area of all judicial dealings. Otherwise, the 'holy grail' of maximal adjudication efficiency might eventually turn out to be a curse rather than a blessing (case in point: the mass-incarcerations in the US), whereby the obsession over judicial performance assessment and justice systems' efficiency measuring could easily prove to be its tool, rather than merely an objective or scientific attempt to provide a basis for evidence-based (criminal) policy creation.

Although the presented case study and its conclusions relate to the realm of criminal justice, there are obvious parallels to most other areas of judicial adjudication. Here, as well, the ambivalent relationship between the judiciary and the judicial administration in light of efficiency pressures and how these pressures impact judicial independence, has been the subject of critical scholarly attention.[47] Even the CEPEJ itself, for example, concludes that '[i]n the majority of the states and entities, prosecutors improved the share of resolved cases over received ones. Presumably, the decreasing influx of cases, explained mainly by the COVID-19 pandemic measures, facilitated these results',[48] thereby clearly indicating that 'efficiency' of the judiciary might in fact come down to the simple (unintended) result of a global health pandemics, due to which we witnessed a decrease

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[46] Ibidem, p. 223.

[47] H. Schulze-Fielitz, C. Schütz (eds.), *Justiz und Justizverwaltung zwischen Ökonomisierungsdruck und Unabhängigkeit*, Berlin 2002.

[48] Cit. European judicial systems – CEPEJ Evaluation Report – 2022 Evaluation cycle (2020 data), Part 1. Tables, graphs and analyses, Council of Europe, Strasbourg 2022, p. 161, https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279 [access: 22.05.2023].

in crime worldwide.[49] If such coincidental (and tragic) events are 'measured into judicial efficiency', then indeed on the one hand the question arises as to what we are actually measuring, whereas on the other hand it seems legit to propose decriminalisation and deregulation as a means to decrease case-income while increasing adjudication outcome and therefore improving efficiency without engaging in a 'price dumping' of the 'justice-product' itself.

The last part of the present analysis investigates two important aspects of the 'judicial efficiency' debate which have been largely neglected thus far. One aspect relates to what Popitz has coined as the 'Preventative Effect of Ignorance' (German: "*Präventivwirkung des Nichtwissens*"),[50] whereas the other aspect deals with the *prominence of impressions and perceptions over facts and realities*, considering how this mismatch between appearances and realities might be explored more vigorously in creating a positive and efficient image of judiciaries, thereby boosting the deterrent effect of adjudication and law in more general terms.

Popitz's thesis about the 'Preventative Effect of Ignorance' dating back to 1968 is broadly known throughout the German-speaking legal scholarship, but has largely remained unnoticed elsewhere. Essentially, his thesis demonstrates that there is an utmost bright side to the dark figure (of crime or norm-transgression). He argues that the 'bliss of ignorance', the circumstance that we do not know about all the actual transgressions of norms, but only the small fraction that gets detected, processed and adjudicated, has a norm-stabilising effect in the sense that it upholds our (faulty) belief in the norm, which otherwise would not be the norm anymore.[51] Thus,

[49] See, for example: A.E. Nivette, R. Zahnow, R. Aguilar *et al.*, *A global analysis of the impact of COVID-19 stay-at-home restrictions on crime*, "Nature Human Behaviour" 2021, Vol. 5, https://doi.org/10.1038/s41562-021-01139-z [access: 22.05.2023].

[50] H. Popitz, *Über die Präventivwirkung des Nichtwissens (1968), Mit einer Einführung von Fritz Sack und Hubert Treiber*, Berlin 2002.

[51] "If the norm is no longer or too rarely sanctioned, it loses its teeth – if it has to bite constantly, its teeth become dull. […] But it is not only the sanction that loses its weight when the neighbor to the right and left is punished. It thus also becomes obvious – and indeed in a conceivably unambiguous way – that the neighbour also does not comply with the standard. However, this demonstration

not only the norm would no longer be the norm if we were to know the actual incidence of its transgression, but also the punishment for norm-transgressions would no longer have the deterrent effect of punishment, if all norm-transgressions were to be punished.[52] Popitz's thesis has meanwhile been put to experimental testing, and the first empirical findings indicate that there is good reason to belief that full transparency of norm-transgressions is highly likely to cause norm-transgression in itself.[53] Put differently, if we know (or assume to know) that most people transgress a certain norm, then we are much more inclined to behave in such a norm-transgressing way ourselves. This now clearly is not intended to provide for a monocausal explanation of the cause of all norm-transgression. It rather highlights in the context of the analysis at hand and related to the judicial-efficiency-obsession, that there might very well be far-reaching negative side-effects of fully efficient justice systems, that are not being accounted for. In that sense one would be wise to consider which degree of judicial efficiency might still be in line with providing for a certain amount of 'blissful ignorance' that is needed to uphold the (perception of the) norm as the norm, and thereby society as such.

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of the extent of the non-applicability of the provision will have an impact on the willingness to conform, as will the weight loss of the sanction. If too many are pilloried, not only does the pillory lose its horror, but also the violation of norms loses its exceptional character and thus the character of an act in which something is 'broken' and broken." Cit. H. Popitz, *Über die Präventivwirkung…*, *op. cit.*, pp. 19–20.

[52] "Punishment can only maintain its social effectiveness as long as the majority does not 'get what it deserves'. The preventive effect of the penalty also only remains in place as long as the general prevention of the number of unreported cases is maintained. The splendor and misery of punishment are based on 'the wonderful, beautiful care of nature,' to which we owe the fact that 'they do not know' – or at least very little." Cit. H. Popitz, *Über die Präventivwirkung…*, *op. cit.*, p. 23.

[53] Besides the well-known series of sociological and criminological experiments conducted by Solomon Asch, Stanley Milgram and Philip Zimbardo, the interested reader is advised to consult: A. Diekmann, W. Przepiorka, H. Rauhut, *Die Präventivwirkung des Nichtwissens im Experiment*, "Zeitschrift für Soziologie" 2011, Vol. 40, No. 1, https://doi.org/10.5167/uzh-95632 [access: 22.05.2023], who specifically tested for Popitz's thesis.

We see that appearance matters, rather frequently even over substance. This is true for many aspects of daily life, but obviously even more when it comes to the efficiency assessment of judicial systems. Otherwise, neither the *Rule of Law Index*, nor numerous 'perception-indicators' applied throughout the *EU Justice Scoreboard* or the *CEPEJ evaluations*, would be of any relevance whatsoever for the assessment of judicial efficiency. Now, in view of this, it appears more than just legitimate to focus our attention on empirical findings about the deterrent effect of law and its adjudication, which indicate that appearance indeed might matter much more than substance. Research suggests that there is a rather limited deterrent effect of (criminal) law and punishment (at best), which essentially comes down to prospective lawbreakers conducting a cost-benefit assessment, whereby they do not factor-in the actually proscribed sentences, even less the actual sentencing practices, but rather relay on the *perceived* probability of their detection, prosecution and punishment.[54] In other words, a deterrent effect of the judiciary may most likely be expected with regards to *how efficient the judiciary is being perceived by potential lawbreakers*, not with regards to how efficient the judiciary in fact really is. So, the goal should be to investigate more vividly (e.g., through the *Rule of Law Index* or the *Justice Scoreboard* or the *Eurobarometer*) what creates and impacts citizens' perceptions about the efficiency of justice systems.

Where do citizens mainly source the information about the judiciary from? What type of information are they most likely to pick up and which one to disregard? How firm are such perceptions and impressions about the judiciary, and which would be promising avenues to change them? These are just as important questions for the usage of perception-indicators for the measurement of actual efficiency, as they are important for facilitating a more efficient appearance of the judiciary. Presumably most (if not all) information on which citizens base their perceptions of the justice

[54] See in particular: H. Hirtenlehner, *Die unklare Beziehung von Normakzeptanz und Sanktionsrisikobeurteilung. Gerechtigkeitsglaube oder moralfestigende Normverdeutlichung?*, "Zeitschrift für Rechtssoziologie" 2022, Vol. 42, Issue 2, https://doi.org/10.1515/zfrs-2022-0206 [access: 22.05.2023].

systems are sourced from the press and (social) media. Now, these are well-known for reporting extremely selectively about the judiciary with a clear focus on 'newsworthiness'. This mainly coincides with scandals and negatively framed news about the performance of the judiciary – it is difficult to imagine a news piece about a swift and efficient prosecution leading up to a conviction imposing an adequate punishment (in the assessment of the author). What on earth would be 'newsworthy' about this? Undoubtably there are countless cases of police, prosecutors, and judges working efficiently and in high quality, but who has ever read about such cases in the press or the (social) media? Here there is a window of opportunity where the judiciary has been far too inactive and out of touch with contemporary realities. It is no longer enough for the 'justice business,' to produce its 'justice-product' and do so efficiently – it has to engage in marketing and PR and image-boosting.

Clearly, it is not being suggested that judiciaries ought to start off an untruthful propaganda campaign, aimed at mass deception and disinformation of its citizens. Rather, we ought to consider more accurately and much more attractively informing citizens about the actual efficiency of judicial systems. That might range from active communication strategies, professional public relations staff, open and proactive engagement or even dialogue with the press and media, and go all the way to visually appealing interactive court websites with cool dashboards (like the ones so successfully utilized by the *Rule of Law Index* and many indexes alike) and social media outreach. Such actively improved perception of the judiciary's efficiency might be a valuable goal in itself, as it serves both transparency as well as open data principles, while it would quite likely (as an intended side-effect) boost the deterrent effects of perceived detection, prosecution and adjudication, potentially decreasing norm transgressions and thus lowering the incoming caseload.

To sum up, the presented case studies, although mainly referring to the realm of criminal justice, provide us with valuable insights and fresh ideas about more meaningful approaches towards justice systems and the assessment or improvement of their performance. We see that in many ways the challenges justice systems are being faced with nowadays, in particular the growing mismatch between

incoming caseload and outgoing adjudication, are generated by discretionary decisions of legislatures, police, prosecutors, and ultimately the public themselves, rather than they are some naturally given circumstances outside the reach of our influence. We also have established that ultimately it might very likely be a rather bad idea to aim for a 100% efficient justice system that would detect, process and adjudicate each and every transgression of the law. Clearly, that is (for now) a utopian goal anyway, but even if it were to be achievable, there are good reasons not to work efficiently towards that goal, as this would likely undermine the very stability of norms within societies, by vividly displaying that the norms are in fact not norms of behaviour (anymore), but rather exceptions to the actual norms of human behaviour. In that sense absolute transparency of norm transgressing behaviour and its fully efficient adjudication should not and cannot be the goal, not only because of its likely dangerous side-effects destabilising the very norms themselves, but also due to the necessity of safeguarding a minimum of freedom, even if this implies a certain degree of (freedom for) norm-transgression and (freedom from) transgression-adjudication. Rather we should aim for drastically changing and updating the manner in which citizens are being informed by justice systems about their performance and efficiency. This would not only serve the principles of transparency and open data, but (as an intended side-effect) also boost the judiciary's appearance and its increased perception as efficient amongst its citizens, thereby quite likely increasing the expected deterrent effects of judicial adjudication. With this we already enter the realm of the fifth and final heading recommending actionable proposals and providing new impulses for legal sciences.

16.5. Conclusions

Prior research indicates that the efficiency of justice systems can be significantly improved by shortening the length of proceedings, proper enforcement of court decisions, strengthening transparency, improving the quality of training of judges, improving gender balance in the senior judiciary, introducing digitalisation, to name but

a few. Empirical research from cognitive sciences (e.g., the field of the psychology of human decision-making) thus demonstrates that not only the effectiveness, but also the quality and thus fairness of decision-making throughout the whole justice system might very well be under a much-underestimated influence of very simple and inherently human needs, such as more frequent breaks or levels of blood sugar.[55] Contemplating about the research that has been conducted previously and published in 2023 within the framework of the Polish-Hungarian Research Platform project organised by the Institute of Justice in Warszawa,[56] the aim of this analysis has been to make a valuable contribution to the ongoing discourse about justice systems' efficiency, while clearly opening up the very concept of the 'justice business' and its stampeding 'managerialisation' to critical reflections with the ultimate goal of initiating new ideas and

[55] See in more detail: S. Danziger, J. Levav, L. Avnaim-Pesso, *Extraneous factors in judicial decisions*, "Proceedings of the National Academy of Sciences of the United States of America" 2011, Vol. 108, No. 17, https://doi.org/10.1073/pnas.1018033108 [access: 22.05.2023]; J.C. Bublitz, *What Is Wrong with Hungry Judges? A Case Study of Legal Implications of Cognitive Science*, [in:] A. Waltermann, D. Roef, J. Hage, M. Jelicic (eds.), *Law, Science, Rationality*, "Maastricht Law Series" 2019, Vol. 14; C.M. Barnes, J. Schaubroeck, M. Huth, S. Ghumman, *Lack of sleep and unethical conduct*, "Organizational Behavior and Human Decision Processes" 2011, Vol. 115, Issue 2, https://doi.org/10.1016/j.obhdp.2011.01.009 [access: 22.05.2023].

[56] For more details and the valuable findings from the previous studies conducted through the Research Platform project about the efficiency of justice systems, including the efficiency, duration and complexity of cases dealt with in courts, as well as the human factor, see: E. Veress, *Effectiveness of (Civil) Justice, the Human Factor and Supreme Courts: Debates and Implications*, [in:] A. Mezglewski (ed.), *Efficiency of the Judiciary*, Warszawa 2023; A. Mezglewski, *Effectiveness of the human factor in justice in the light of research on the application of law*, [in:] A. Mezglewski (ed.), *Efficiency of the Judiciary*, Warszawa 2023; E. Varadi-Csema, *Efficiency of Criminal Justice – a Prevention-focused Approach*, [in:] *Efficiency of the Judiciary*, A. Mezglewski (ed.), Warszawa 2023; M. Rau, *The impact of the human factor on the effectiveness of criminal proceedings. A socio-psychological perspective*, [in:] A. Mezglewski (ed.), *Efficiency of the Judiciary*, Warszawa 2023; A. Tunia, *Effectiveness of the human factor in justice in the light of dogmatic studies*, [in:] A. Mezglewski (ed.), *Efficiency of the Judiciary*, Warszawa 2023; K. Zombory, *The right to an effective remedy: a key element for ensuring the effectiveness of the ECHR human rights system – the example of Poland and Hungary*, [in:] A. Mezglewski (ed.), *Efficiency of the Judiciary*, Warszawa 2023.

solutions as well as question, thereby also boosting constructive further discussions. Due to the complex nature of the research questions at hands, its likewise theoretical as well as practical perspective, a transdisciplinary research approach is imperative, and as such the potential answers and solutions need to be framed. Obviously, it is not a question of 'whether', but a question of 'how' the efficiency of justice systems can best be improved, whereby actionable measures have to be designed in such a manner that they realistically fit into the Polish social, cultural and normative context, without causing an imbalance between efficiency and quality or causing dangerous and unintended side-effects. Thus, when considering and finetuning any of the following proposals, it will be of particular importance to simultaneously design a set of truly measurable indicators for each proposed action that should at a later point be used for sound evaluations and policy-recalibrations, in line with the leitmotiv of an evidence-based policy.

On a conceptual level there needs to be a well-informed and clear decision about the willingness and legitimacy of implementing hidden hard-law effects through the application of seemingly only soft-law tools, such as promoted by the *EU Justice Scoreboard*. On a broader level it should be transparently and critically discussed how much power diverse performance-assessing and efficiency--measuring indexes, indicators and other measuring initiatives targeting our national justice systems should be granted, especially without an existing legal framework or practical setup that would foresee internal and external scientific quality assurance of such measuring initiatives. Within the aforementioned deliberations it should not be taken for granted that the judiciary is a 'justice business,' nor that justice is a 'product/service' that can be provided more efficiently by simply 'outsourcing' some of it to ADR methods, thereby generically decreasing the case volume, while still 'selling' all of it as justice (of the same quality).

On a methodological and very practical level, attention must be paid to the details of diverse measuring initiatives in order to ensure that one distinguishes between measuring hard facts as compared to presumed perceptions about judicial efficiency. Otherwise, the two get conflated with far-reaching consequences stemming from the

mismatch between appearance and substance of justice systems' performance. Further research is clearly needed to determine the source of information citizens utilise in creating their perceptions and assessments of the judiciary. This would not only inform us about the (lack of) soundness of using perception-indicators as measures of efficiency or quality of justice, but likewise enable the creating of professional communication strategies towards the public and the press and (social) media, aimed at transparently providing for hard facts on which perceptions of the judiciary should be built on.

On the policy level that determines the need for criminalisation and regulation, it needs to be recognised that 100% efficiency of the judiciary is neither achievable nor even desirable, as this would undermine the very stability of norms in any given society. The 'bliss of ignorance' in terms of not truly knowing how often the norms in our society are transgressed has an utmost stabilising effect on our system of norms and the very values they protect. Thus, by boosting efficiency of the judiciary, we engage in a sort of 'price dumping' that makes it attractive to consider criminalisation and regulation over other (potentially much more meaningful) ways to define and settle conflicting interests within society. There are solid grounds for recommending decriminalisation and deregulation as a much more meaningful approach to increasing judicial efficiency. At the very least the legislator should be obliged to secure additional resources to the judiciary that are proportionate to any increase in criminalisation and regulation and the consequentially increasing caseload – anything else would in itself aid to the judiciary's decease in efficiency – by fault and discretionary decision of the legislature, not the judiciary.

To conclude with – adjudication is not, and it should not be, cheap! Perhaps one of the most impactful ways of maintaining and upgrading judicial systems' high quality is to ensure that it never gets cheap, while considering that we will produce justice most efficiently by decriminalisation and deregulation, essentially by (re) focusing on those core values and fundamental interests that truly need judicial adjudication.

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Chapter 17. Digitalisation of Criminal Trials and Procedures in Romania

17.1. Introduction

Fact: The physical world is no longer the only arena of human activity.

Information and Communication Technologies (ICT), the virtual environment and cyberspace offer us a new, non-spatial arena in which we can carry out many, if not all, of the activities we carry out in the physical world. The availability of this new conceptual vector for human activity has various consequences for criminal law, and as these experiences become more integrated in our everyday life, we have to determine their impact and adapt to this new "reality".

The digitalisation of justice in Romania is a process that has been going on for a while, but has been accelerated since the 2020s due to objective conditions related to how to respond to the challenges specific to the COVID-19 pandemic.

The system of electronic record keeping and management of court activity, called ECRIS, was implemented in the 2010s in Romania, starting with the courts in the capital of the country, Bucharest. Subsequently, this filing system was extended nationwide, with various adaptations to the system. Currently, the ECRIS system manages the files before the courts and has 2 sections, one public for informing the public and the other for informing and carrying out the activity of the courts mainly, but also of the prosecutor's offices. This system does not include the investigation phase (prosecution), except by reference to certain elements, due to the non-public nature of this phase.

This system was the first form of effective digitalisation of justice in Romania. It was on the one hand irreversible and, on the other, ultimately plenitudinous. Despite the difficulties of this system, it is fully functional and is used throughout the country, both by courts and prosecutor's offices, and finally, by defenders, lawyers, legal advisers, and litigants. But the real accelerator of the digitisation process was neither what was the pressures from the European Union within the European Cooperation and Verification Mechanism for Justice,[1] nor were the funds allocated for digitisation, but it was necessary to adapt and adapt the Romanian justice system to the conditions generated by the COVID-19 pandemic.

In fact, lawyers reacted quite quickly in terms of adapting to the new conditions. With the intervention of restrictions, the legal framework appeared – a normative act adopted by the Romanian Government, which allowed judicial proceedings to be conducted by video conference, in this case the provisions of Article 42 paragraph (3) of Annex 1 of Decree No. 195/2020, according to which in the processes provided for in paragraph (1), where possible, the courts shall order the necessary arrangements for conducting the hearing by videoconference.

In fact, adapting to new conditions was a necessity, given that the old working paradigm was no longer valid. From another perspective, the implementation of digital technologies can also be justified by cost-effectiveness, first of all, especially since in much research and in many articles the terms "industrial justice" and "justice industry" appear more and more often. We believe that in this context we must look at this area of human activity also through the prism of its efficiency. And in fact, this is what it all boils down to, because the efficiency of justice means the success of justice, on all levels.

For example, as long as justice is ineffective in terms of the length of proceedings, then it can be characterised as such, even if fair

[1] This surveillance mechanism established by Decision of European Commission of 13 December 2006 (2006/928/EC) was repealed by Decision of European Commission of 15 September 2023. For details, please see: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en [access: 10.12.2023].

solutions are pronounced, but with great delay. The general public views this delay as a deficiency of justice. Efficiency is not reduced to just the quality of solutions, and we believe that the speed with which the solutions are pronounced must also be taken into account, for material reasons, as well as social or more precisely, psychosocial considerations.

And yet, in our approach, we must mention an obstacle to the normalisation of judicial procedures, given that the High Court of Cassation and Justice, for a while, did not allow certain documents, especially summons and procedural documents, to be transmitted also under the handwritten signature, but only in the form of electronic signature, as regulated by law. Specifically, starting from the idea that:

> *basically, the valid electronic (digital) signature provides the court with a guarantee that the message or digital document is created by the person who signed it, and the content of the message or the digital document has not been modified*

the[2] court considered that "In the absence of the party's signature, such an application, deprived of one of the necessary and essential

[2] Although an objective circumstance was invoked, held by the court as such, "in the written notes filed in the file, the appellant-appellant informed the court that he could not transmit a signed copy to the appeal application because he did not have a scanner. With reference to this clarification of the appellant-applicant, it is noted that if a party intends to submit applications electronically to the court, the existence of the signatory's scanned signature is not sufficient, given the special provisions provided by Law No. 455/2001, normative act establishing the legal regime of electronic signatures and documents in electronic form, as well as the conditions for providing electronic signature certification services. Electronic signature is data in electronic form that are attached or logically associated with other data in electronic form and that serve as a method of identification. In such cases as in the case before the court, where applications are addressed to courts in electronic format, the digital signature connects the electronic identity of the signatory with the digital document, and cannot be copied from one digital document to another, which gives the document authenticity (certifies that the document belongs to the signatory person, and the author of the document cannot decline responsibility for the content of the document with a valid electronic signature). Therefore, in order to comply

elements to ensure a minimum procedural discipline, cannot determine a legal vesting of the court".[3]

This decision was welcomed by the specialised industry – speaking of the justice industry:

> *We welcome the decision of the supreme court that we believe will encourage legal practitioners to switch to the use of digital means of signing and communicating documents in the act of justice. Thus, courts will also have to adapt to the electronic management of justice, to fast and efficient communication with its actors.*[4]

But the evolution of social conditions made this decision obsolete from the first year of its issuance, meaning that many of the courts took into account even the documents that were scanned and sent with the content, and implicitly the signature, scanned to the courts. Moreover, some courts have shown an even greater openness to electronic means, in the sense that they allowed documents sent to courts to be received and taken into account, even if they were not signed even with the scanned signature, given that they were sent from the email address of the procedural subject. In the latter case, it was requested, when the party was present at the hearing, to sign or confirm, as the case may be, the document, at which point the respective courts considered that the requirements related to this procedural discipline were met.

Therefore, we notice, on the one hand, a very wide range regarding the interpretation of legal provisions and, respectively, the obligation of electronic signature, as enshrined in Law No. 455 of 2001 and,

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with the orders of the court, the appellant-plaintiff had the possibility, either to send by e-mail the application for appeal, an e-mail with a valid electronic signature attached, under the conditions of the aforementioned special law, or to send by post a copy of the application made, bearing his handwritten signature." See: http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=148960 [access: 10.12.2023].

[3] Ibid.

[4] HCCJ admits equivalence between electronic and handwritten signature in documents submitted to courts – certSIGN [access: 10.12.2023].

on the other hand, a certain senseless conservatism that imposed and applied by the High Court of Justice. This is due in no small part to the fact that forensics specialists in Romania lack sufficient expertise in the science of handwriting analysis to enable them to pronounce upon the authenticity or otherwise of signatures and handwritten documents, and to determine what is and is not fraudulent. Although this issue was the subject of intense discussion in the specialised events I personally attended in Mesagne, Italy, in Cluj Napoca, and in Bucharest and Oradea, there has to date been no agreement with respect to forensic expertise of handwriting based on the non-original (copy) documents provided by one party.[5] On the other hand, it is well known and accepted that technical IT expertise can establish the origin of an email and therefore in almost all situations determine who is the sender of the message.

Returning to the new circumstances on the occasion of the extension of the effects of the COVID-19 pandemic, which generated a reaction from the government, by adopting Emergency Ordinance No. 195 of 2020 establishing a series of measures for justice, we highlight those that aim to make justice more efficient through the use of digital means: Article 42 paragraph (3):

> *In the processes provided for in paragraph. Subject to paragraph 1, courts shall, where possible, arrange for the hearing to be conducted by videoconference and serve procedural documents by fax, electronic mail or other means ensuring transmission of the text of the document and confirmation of its receipt.*

[5] The last event was 'Convegno: Dalla carta di Mesagne (2016) ai protocolli della perizia grafica', organised in Mesagne (BR), Italy, 2–3 of September 2023, https://www.sullarottadelsole.it/workshop-e-convegni/101-convegno-dalla-carta-di-mesagne-2016-ai-protocolli-della-perizia-grafica.html [access: 10.12.2023].

In the criminal investigation phase, Article 43 paragraph (3):

> *In the trials provided for in paragraph (1) Where possible, the courts shall order the necessary arrangements for the hearing to be conducted by videoconference and shall serve procedural documents by fax, electronic mail or other means ensuring transmission of the text of the document and confirmation of receipt and paragraph. (6) Persons deprived of their liberty shall be heard by videoconference at the place of detention or in premises suitable from a sanitary point of view, without the consent of the person deprived of his liberty being required.*

In accordance with Article 47 of the same normative act, the right of detainees to online conversations was further enshrined, regardless of the disciplinary situation and the situation of contact with the family.

17.2. Clarification of Concepts

17.2.1. TELEMATIC JUSTICE

Telematic justice has been defined as:

> *a contemporary construct that is based on a technological architecture that allows remote (online) execution of operations such as archiving documents, sending communications and notifications, consulting the status of proceedings using the online register, consulting files and jurisprudence, and even conducting remote judicial processes and procedures through online means of communication, operations which previously could only be carried out by physically visiting the premises of the judicial authorities concerned.*[6]

[6] L.M. Stănilă, *Justiție telematică vs Justiție informatică. Amintiri despre viitor*, "Universul Juridic Journal" 2020, No. 4, April, p. 94.

Telematics justice uses the means of distance communication and transmission, and as these are currently mostly digital, then we can say that telematics justice can only be implemented through the widespread use of information technology.

It has been stated that telematics justice is not confused with digitised justice, but due to the high degree of digitisation of the means of communication, we believe that these two concepts will end up overlapping at some point.[7]

17.2.2. INFORMATION TECHNOLOGY IN JUSTICE

This concept implies the use of information technology in the very realisation of the act of justice. Thus, from this perspective we have electronic tools that help legal documentation through legislation programs and platforms such as: Lege5, Sintact, Legis, and many others. They have evolved from a simple database of normative acts to real working platforms that have as functionalities: legislative information – current state of normative acts, their amendments, decisions of the Constitutional Court and of the High Court of Cassation and Justice, information on judicial practice, and user information on normative acts adopted at European Union level. At the same time, these platforms also contain models of acts, adaptable to concrete, practical situations, respectively opinions of specialised doctrine.

Relatively recently, such platforms have been developed that offer the possibility to search for relevant legal information with the help of AI.[8]

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[7] Ibid.

[8] "New AI-powered functionality provides legal professionals a complete overview of case-law solutions and the possibility of exact sorting of results for each head of claim identified in the relevant court decisions. The artificial intelligence algorithm identifies the legal terms sought, provides recommendations, automatically selects words or phrases frequently found in court decisions and presents relevant information about the limit of amounts/sentences handed down in decisions relevant to the search (including the possibility of sorting them), the route of the case – including within the HCCJ – and a relevant statistical basis for legal documentation." See: https://info.wolterskluwer.ro/inteligenta-artificiala/ [access: 10.12.2023].

In that context, we must also recall an impasse which has been generated by the change in the way in which the publicity of court decisions has been ensured by changing the system and the platform which directly provided that somewhat raw information (www.rejust.ro), a circumstance which gave rise to difficulties in interconnecting legislative platforms to the database of court decisions, offered through the Superior Council of Magistracy of Romania.[9]

The website of the High Court of Justice and Cassation includes also a very important digital library that contains the decisions ruled by the High Court of Justice and Cassation, as well as the jurisprudence bulletin of the Courts of Appeal.[10]

Another component of electronic justice are those technical models based on some form of advanced software or even artificial intelligence – which assist in decision-making. They analyse important categories of data and suggest a solution based on their interpretations. In Romania these systems are not officially implemented on a large scale, perhaps due to the current lack of databases.[11] To our knowledge, an application that assesses the risk of

[9] The Case Law Portal is an application designed and developed by the Superior Council of Magistracy to allow citizens and judicial practitioners easier access to judgments handed down by national courts. This improves knowledge of judicial practice in certain areas, while ensuring greater transparency inside and outside the system, as well as improving access to justice by raising awareness, awareness of citizens' rights and developing legal culture. See: https://www.rejust.ro/info/despre [access: 10.12.2023].

[10] https://www.iccj.ro/ [access: 10.12.2023].

[11] "One of the applications of IT justice is the use of IT tools for criminal risk assessment (e.g., COMPAS – *Correctional Offender Management Profiling for Alternative Sanctions*; IORNS – *Inventory of Offender Risk, Needs, and Strengths*; OST – *Offender Screening Tool*; STRONG – *Static Risk and Offender Needs Guide*) recidivism or violent behaviour in order to provide logistical support to the judge who must decide on preventive measures, individualisation of sentence, individualisation of execution of sentence or conditional release in the case of defendants/convicted persons." In this regard, for please see: L. Stănilă, *Artificial Intelligence and the Criminal Justice System – Criminal Risk Assessment Tools*, "Business Criminal Law Review" 2019, No. 3, pp. 130–157; C.D. Miheș, *Interacțiunea om-calculator. Implicații juridice*, "Oradea Faculty of Law Journal" 2018, No. 1, pp. 159–163.

convicted persons is used by the Probation Service which operates attached to each Court.

17.2.3. DIGITALISATION OF JUSTICE

Digitised justice is the future, whether we like it or not – and we must prepare for the plenary influence of information technology in justice.

Digitalised justice includes elements of both telematic justice and e-justice. We still have a little time until the implementation of the robot judge. On the other hand, it may be that, in justice, robot actors are not so desirable, because we will lose the human factor that is specific to the act of justice However, until we will have robot actors in the justice administration it is important to implement the available digital tools as efficiently as possible.

Currently, version 4 of the ECRIS platform operates in Romania, but it needs to be updated and improved. In fact, those responsible in the field declare the same thing: "The complete digitisation of the justice system in Romania is coming. Through the ECRIS 5 software application, physical files will be removed, and the electronic file will be widely implemented", Justice Minister Alina Gorghiu announced.[12]

All the above components, which sometimes can overlap or complement each other, when taken together determine the concept of e-justice. This concept is considered to actually include electronic justice, which includes both easy and fast access to legal information as well as the rapid transmission of documents and procedures, meaning both telematic and informatics justice, digitisation being the common element,[13] but also the tools that allow the very development of the act of justice.[14]

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[12] https://newsweek.ro/justitie/urmeaza-digitalizarea-completa [access: 10.12.2023].

[13] L.M. Stănilă, *Artificial Intelligence…*, *op. cit.*, p. 98

[14] In our view, the concept of e-justice should not be restricted to content now designed by the European Union, https://e-justice.europa.eu/home?plang=-ro&action=home [access: 10.12.2023]. We see it as an evolving concept, which

Basically, e-justice represents a version of the future of justice, in which the digital, virtual or electronic component will hold an increasing share in the preparation, realisation and completion of the act of justice.

17.3. From Digitalised Justice to E-Justice. A Look at the Current State of Digitalisation of Criminal Justice in Romania

17.3.1. DIGITALISATION OF JUSTICE ADMINISTRATION

The intervention of circumstances related to the COVID-19 pandemic has also been a real catalyst in terms of the large-scale transition to the system that is called the "electronic file".[15] In our country there were operating at the level of appeal courts 4 different systems of electronic record of files, and it seems, unfortunately, that these 4 different systems are still in operation. It is not about ECRIS record files, but about so-called internal management, which we will return to in an action section later.

Regarding virtual proceedings and the conduct of judicial activities in the virtual courtroom, we would like to highlight what happened in April 2020, because it was a strong move towards digitalisation.

Thus, on 3 April 2020, at 11:30, the first virtual process in Romania took place, even if it was carried out experimentally. Basically, it was a simulated trial, simulating certain procedures in court, and all the proceedings were carried out through the Zoom application,

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will include all areas of activity in justice, in a broad sense. We do not believe that prosecution can be removed from this concept, just as we do not believe that it should refer only to issues relating to the trial phase.

[15] A. Prună, *Sala de judecată virtuală (eCourtroom) – o instanță a viitorului sau o cerință a prezentului?*, https://www.juridice.ro/676609/sala-de-judecata-virtuala-ecourtroom-o-instanta-a-viitorului-sau-o-cerinta-a-prezentului.html [access: 10.12.2023]; V. Marchuson, *Dreptul digital: spre o nouă paradigmă socio-juridică*, https://www.juridice.ro/500753/dreptul-digital-spre-o-noua-paradigma-socio-juridica.html [access: 10.12.2023].

each of the participants connecting from different locations and working together for debates and decisions on the case. Given that none of them were present in the courtroom, it was basically an experiment of the virtual or electronic courtroom and showed that it was possible to achieve this. On the other hand, it also showed what are the challenges of using information technology. In this sense, in the digitalisation of the act of justice it is obvious that there are not only positive things, just as they are not only negative things. But both must be acknowledged. The problems must be solved so that the use of information technology generates as much efficiency of justice as possible.[16]

As stated by the organisers and initiators of this project, it has set several objectives, among are which: the priority given to the health of the participants in the act of justice, in those times when the risk reported to health was on the first place; the second thing is the underlining, the advantages of using information technology, especially in the emergency period, and consequently how a case can be solved in this way. In this regard, it was pointed out that this way of conducting a trial can prevent the postponement of the case without the need to move parties from different cities; the issue of observing the solemnity of the court hearing and effective communication between the court, lawyer and parties was raised, as was the principle of publicity of the court hearing, it being broadcast live during its duration, and the aspect related to the technical equipment, which was relatively minimal – a terminal connected to the internet, source video camera and licensed applications for videoconferencing, in our case Zoom – was also highlighted.[17]

However, we note that the simulated procedure through Zoom was likely to identify several problems, especially those related to ensuring the security of conversations and the ensuring of the confidentiality of the client-lawyer relationship, an essential aspect in light of Article 6 ECHR (the right to a fair trial). But these things

[16] S. Stănilă, *Tehnologia informației și comunicațiilor în procesul judiciar*, https://www.universuljuridic.ro/tehnologia-informatiei-si-comunicatiilor-in-procesul-judiciar/ [access: 10.12.2023]. (Basement organization.)

[17] S. Stănilă, *Tehnologia informației…*, *op. cit.*

will be able to be solved in the future. The important thing was the message that the court hearing was, and can be, conducted in this way as well.[18]

Furthermore, the majority of these methods, such as audio-video examinations, supervised deliveries, and undercover agents, can be used in the field of cooperation in criminal matters within the EU.[19]

In fact, the way judicial activities are carried out through information technology has been the subject of quite widespread concerns in Romania, such that legal professionals address them in the specialised literature.[20]

17.3.2. DEMATERIALISATION OF THE CRIMINAL PROCEDURE

In the Code of Criminal Procedure there are some precise regulations that allow the use of means of distance communication or allow the use of information technology in the performance of justice. We will try to review all these provisions to have a concrete picture of the digitalisation of criminal procedure.

17.3.2.1. *Conduct of Criminal Prosecution or Other Investigative Acts*

Thus, Article 106 of the Code of Criminal Procedure lays down special rules on the hearing of persons, with paragraphs (2) and (3) laying down certain conditions for hearing the person detained at the place of detention by videoconference. It was established that, exceptionally, the person detained at the place of detention may be

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[18] Ibid.

[19] M. Pătrăuș, *Cooperarea judiciară internațională* în *materie penală*, Universul Juridic Publishing House, Bucharest 2021, pp. 387–431.

[20] L.C. Alexe, *Let's go to ECRIS! Acte de procedură – tradiție versus modernitate. Diluarea noțiunii "sală de judecată" sau un nou concept*, https://www.juridice.ro/686215/lets-go-to-ecris-acte-de-proceduratraditie-versus-modernitate-diluarea-notiunii-sala-de-judecata-sau-un-nou-concept.html [access: 10.12.2023]; A. Prună, *Sala de judecată virtuală…*, *op. cit*.

heard by videoconference, if the judicial body considers that this does not prejudice the proper conduct of the trial or the rights and interests of the parties in this situation. If the person interviewed is in one of the situations where legal aid is mandatory, the hearing may take place only in the presence of the lawyer at the place of detention.

We believe that these provisions could provide certain guarantees in light of compliance with Article 6 ECHR, but legal aid must be provided effectively and confidentially.

Another provision that can be considered part of the telematic justice mechanism is that relating to witness protection and, specifically, we refer here to the situation of threatened witnesses. And in this regard, Article 126 of the Code of Criminal Procedure lists the protection measures ordered during the criminal investigation and among them was the one which, in concrete terms, entitles the threatened witness to be heard by means of remote audio-visual transmission with distorted voice and image. This measure is subsidiary in the sense that it is ordered when other measures, such as surveillance or guarding of the residence of the witness, providing accompaniment, offering personal protection, or protection of identification data, are not sufficient. Basically, it is a measure designed to guarantee, in the end, the safety of the witness and the credibility of his statements, thus ensuring a fair trial.

Similarly, at the trial stage, Article 127 paragraph (2) of the Code of Criminal Procedure provides for the protective measures ordered during the trial. And at this stage, we have a similar provision in section 127(d) of the Code of Criminal Procedure, where the witness may also be heard by means of transmission, at a distance with distorted voice and image. Finally, also regarding the situation of the protected witness, it is important to emphasise that these measures mentioned above can be implemented by means of remote audio-video transmission, without the witness being physically present in the place where the judicial body is located. In particular, to ensure the right to a fair trial, during this procedure the main subjects of the proceedings, the parties and lawyers may put questions to the witness, and the court – obviously – may reject questions that would lead to the identification of witnesses. This provision is also necessary to ensure the contradictoriality principle, regarding the

administration of witness evidence, as a fundamental principle of criminal procedure in Romania.[21]

Another situation in which ICT means can be used in criminal proceedings is that of appeals against decisions ordering preventive measures during criminal prosecution. The appeal shall be settled in the presence of the defendant, except in situations expressly specified in Article 204 of the Code of Criminal Procedure, because the last sentence of Article 204 paragraph (7) also provides that the defendant deprived of liberty shall be deemed to be present who, with his consent and in the presence of defence counsel chosen or *ex officio*, and, where appropriate, of the interpreter, if he does not speak the Romanian language, participates in the resolution of the appeal by videoconference at the place of detention. Here, too, legal aid must be granted to the defendant by a lawyer chosen or appointed *ex officio*.

The situation is identical in the situation provided by Article 235 paragraph (3) of the Code of Criminal Procedure, procedure for prolongation of preventive arrest during criminal investigation – hearing of the accused may be done with his/her consent and in the presence of a defence counsel chosen or appointed *ex officio* and, where appropriate, of an interpreter, also by videoconference, at the place of detention.

Article 364 of the Code of Criminal Procedure, the participation of the defendant in the trial is mandatory because, as a rule, the defendant must be present at the trial. Also, bringing the detained defendant to trial is mandatory. However, pursuant to Article 364 paragraph (1) of the Code of Criminal Procedure, the defendant deprived of liberty shall also be deemed to be present who, with his/her consent and in the presence of the defence counsel chosen or appointed *ex officio* and, where appropriate, also of the interpreter, participates in the trial by videoconference at the place of detention. Further, according to Article 364 paragraph (4) of the Code of Criminal Procedure, if the defendant in custody has requested to be tried in absentia, the court may order, upon request or *ex*

[21] M. Udroiu, *Sinteze de procedură penală, Partea generală*, Vol. 11, C.H. Beck Publishing House, Bucharest 2021, pp. 337–350.

officio, that he/she may make conclusions during the hearings and be given the floor by videoconference, in the presence of his/her chosen defence counsel or counsel appointed *ex officio*.

Another case is that provided by Article 597 of the Code of Criminal Procedure, "procedure at the executing court" which is intended to resolve regulated situations that are given to the jurisdiction of the executing court, where paragraph (2)[1] provides that:

> *The convict in detention or interned in an educational centre may participate in the trial in order to resolve the situations covered by this title also by videoconference, at the place of detention, with his consent and in the presence of defence counsel chosen or appointed ex officio and, where appropriate, also of the interpreter.*

We note that in all these situations, there are specific guarantees to ensure the right to defence, a fundamental component of the right to a fair trial. The practical challenge is to effectively exercise this right of defence.

Special methods of surveillance or research: also, part of the criminal process is special methods of surveillance or investigation. Regarding the conditions for resorting to this special method, the Code of Criminal Procedure lists among the crimes to investigate special methods and "falsification of electronic payment instruments, in the case of crimes committed through information systems or means of electronic communication". Special attention has therefore been paid to these crimes involving the use of ICT elements.

Special methods of surveillance or investigation are listed in Article 138 of the Code of Criminal Procedure and include the following: Interception of communications or any type of distance communication, access to a computer system, video, audio or photographic surveillance; tracking or tracing by technical means; obtaining data on a person's financial transactions; detaining, handing over or searching postal items; use of undercover investigators or collaborators; authorised participation in certain activities, supervised delivery and, last but not least, obtaining traffic and location data, processed

by providers of public networks, electronic communications or providers of publicly available electronic communications services.

As can be seen from this list, many of these methods are carried out either directly with the help of information technology, or they themselves involve the use of information technology alone to be carried out. Moreover, the law, hereinafter in paragraph (2), defines, what it means: the notion of interception of communications;[22] access to an information system means in paragraph (3);[23] 'computer system' in paragraph (4);[24] 'computer data' and what and represents means.[25] It specifies what the tracking and tracing activity means, enshrining the idea that it is carried out by technical means.[26] As regards the search of postal items and the obtaining of data concerning a person's financial transactions, it is clear from the definition set out in paragraphs (8) and (9)[27] that these special investigative measures can and are usually carried out using information technology.

[22] Article 138 paragraph (2) of the Code of Criminal Procedure: "Interception of communications or of any type of communication means interception, access, monitoring, collection or recording of communications made by telephone, computer system or any other means of communication."

[23] Article 138 paragraph (3) of the Code of Criminal Procedure: "Access to an information system means entering a computer system or means of storing computer data either directly or remotely, by means of specialised software or by means of a network, in order to identify evidence."

[24] Article 138 paragraph (4) of the Code of Criminal Procedure: "Information system means any device or set of devices interconnected or functionally related, one or more of which ensures automatic data processing by means of software."

[25] Article 138 paragraph (5) of the Code of Criminal Procedure: "Computer data shall mean any representation of facts, information or concepts in a form suitable for processing in an information system, including software capable of inducing a function to be performed by an information system."

[26] Article 138 paragraph (6) of the Code of Criminal Procedure: "Tracking or tracing by technical means the use of devices to determine the location of the person or object to which they are attached."

[27] Article 138 paragraph (8), (9) of the Code of Criminal Procedure: "(8). Searching postal items means checking, by physical or technical means, letters, other postal items or objects transmitted by any other means. (9). Obtaining data on a person's financial transactions shall mean operations ensuring knowledge of the content of financial transactions and other transactions carried out or to be carried out through a credit institution or other financial entity, as well as obtaining from a credit institution or other financial entity documents or information in its possession relating to transactions or transactions of a person."

Last but not least, it is important to specify that, technical surveillance, within the meaning of the criminal procedure law, means the use of one of the methods provided for in Article 138 of the Code of Criminal Procedure paragraph (1) letters a) through and including d), which include interception of communications, access to a computer system, video-audio or photographic surveillance, and location or tracking by technical means. As a result, we can say that even in this area of special methods of surveillance and research there is an important impact of information technology, because they could not be achieved and put into practice without the help of these new forms of technology.

As regards the execution of the technical surveillance mandate, the prosecutor shall carry out the technical surveillance or may order it to be carried out by the criminal investigation body or by specialised police officers who directly use appropriate technical systems and procedures to ensure the integrity and confidentiality of the collected data and information. Providers of public electronic communications networks or providers of publicly available electronic communications services or of any type of communication are obliged to collaborate with the prosecutor, criminal investigation bodies or specialised police officers, within the limits of their competence, to enforce the technical surveillance mandate.[28]

Authorised persons carrying out technical surveillance activities, transmitting such data or receiving such data under this law have the possibility to ensure the electronic signature of data resulting from technical surveillance activities, using an extended electronic signature based on a qualified certificate issued by an accredited certification service provider.[29]

[28] Article 142 of the Criminal Procedure Code.

[29] Article 142[1] of the Code of Criminal Procedure. In fact, this is also possible in other situations. For example: "Article 170: Handing over objects, documents, or computer data – Natural or legal persons, including providers of public electronic communications networks or providers of publicly available electronic communications services, have the possibility to ensure the signature of the requested data, using an extended electronic signature based on a qualified certificate issued by an accredited certification service provider."

The preservation of computer data[30] consists in the immediate preservation of certain computer data, including traffic data which have been stored by means of an information system and which are in the possession or under the control of a provider of public electronic communications networks or a provider of publicly available electronic communications services, where there is a danger of their loss or alteration.

As regards the recording of technical surveillance activities,[31] it is also established who is responsible for data integrity. This accountability mechanism is also activated in any of the above situations.

From our point of view, the above enshrines de jure the use of videoconferencing as a way of conducting criminal prosecution or judicial investigation.[32]

The measures can be taken by the prosecutor, during the criminal investigation, even as a matter of urgency, then they are subject to analysis by the court.[33]

17.3.2.2. *Service of Procedural Documents*

The concept of telematic justice includes not only conducting research through modern means of communication, but also communicating criminal procedure documents using these methods. Thus, we have identified in the new Code of Criminal Procedure a series of provisions that allow the utilization of information

[30] Article 154 of the Code of Criminal Procedure.

[31] Article 143 of the Code of Criminal Procedure: "(21). Any authorized person who makes copies of a computer data storage medium containing the result of technical surveillance activities has the possibility to verify the integrity of the data included in the original medium and, after making the copy, to sign the data included therein, using an extended electronic signature based on a qualified certificate issued by an accredited certification service provider and which allows the authorised person to be identified unambiguously, thereby assuming responsibility for the integrity of the data."

[32] S. Stănilă, *Tehnologia informației…*, *op. cit*., https://www.universuljuridic.ro/tehnologia-informatiei-si-comunicatiilor-in-procesul-judiciar/ [access: 10.12.2023].

[33] M. Udroiu, *Sinteze de procedură penală…*, *op. cit*., pp. 337–350.

technology in serving procedural documents. Among the rights of the aggrieved person enshrined in Article 81 of the Code of Criminal Procedure, is the right to be informed, within a reasonable time, about the stage of criminal investigation, at his/her express request, provided that he/she indicates an address on Romanian territory, an e-mail address or electronic messenger, to which this information is to be communicated.

Article 230 paragraph (4)[1] of the Code of Criminal Procedure allows the transmission of the arrest warrant to the police authorities also by electronic mail or by any means capable of producing a written document under conditions that allow the receiving authorities to establish its authenticity. The situation is similar regarding the hypothesis regulated by Article 231 of the Code of Criminal Procedure – execution of preventive arrest warrant issued in the absence of the defendant.

Summons – most of the time the initial act of court proceedings can also be done by electronic mail or any other electronic messaging system, with the consent of the person summoned.[34] If the suspect or defendant lives abroad during the first trial term, the suspect or defendant will be notified by summons that he has the obligation to indicate an address on Romanian territory, an e-mail address or electronic messenger, where all communications regarding the trial are to be made. If he does not comply, communications will be made by registered letter, the receipt for delivery to the Romanian post of the letter, in which will be mentioned the documents to be sent, taking the place of proof of completion of the procedure (Article 259 paragraph (9) of the Code of Criminal Procedure).

According to Article 262 of the Code of Criminal Procedure, whenever a report is concluded during the delivery, display or electronic transmission of a summons, it shall accordingly include the mentions provided by law.[35] Where summons is issued by electronic

[34] In this regard, we recall the provisions of Article 257 paragraph (5), Article 259 paragraphs (9) and (13) and Article 262 paragraph (2) of the Code of Criminal Procedure.

[35] Thus, the mandatory mentions are to include the date of delivery of the summons, the name, surname, capacity and signature of the person serving the

mail or any other electronic messaging system, proof of transmission shall be attached to the minutes, if possible. The situation is identical in (the old and new) Civil Procedure.[36]

In the case of service of other procedural documents, Article 264 of the Code of Criminal Procedure offers the possibility of communicating them by any means other than the classical ones, provided that this means is available at the place of detention.

17.3.2.3. *Influence of ICT in the Enforcement of Sanctions or Preventive Measures*

New technologies also influence the way in which those ordered by the prosecutor or by the court are carried out.

Thus, as regards the content of the judicial review, a measure during which the defendant must comply with the following obligations – one of those obligations that can be imposed is "to wear an electronic surveillance device at all times".[37]

Similarly, if house arrest has been ordered,[38] the judge of rights and freedoms, the preliminary chamber judge or the court may order the defendant to wear an electronic surveillance device at all times during house arrest.

In relation to the reasons for which preventive arrest may be ordered – the most serious preventive measure, among the conditions and cases of application of preventive arrest measure is also the commission of an act classified as a crime committed through computer systems or electronic communication means or another offense for which the law provides for imprisonment of 5 years or more.[39]

As regards the sanctions applied to legal persons, the enforcement of the complementary penalty of prohibiting the legal person

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summons, the certification by him of the identity and signature of the person to whom the summons was served, as well as showing its quality.

[36] F. Morozan, *Drept procesual civil*, Vol. 1, University of Oradea Publishing House, 2014, pp. 273–274.

[37] Article 215 letter c) of the Code of Criminal Procedure.

[38] Article 121 paragraph (3) of the Code of Criminal Procedure.

[39] Article 223 of the Code of the Criminal Procedure.

from participating in public procurement procedures implies that a copy of the operative part of the decision imposing on the legal person the penalty of prohibition to participate in public procurement procedures shall be communicated, on the date of becoming final, to the administrator of the electronic public[40] procurement system, thereby giving substance to the conviction against the legal person.

Another situation of incidence of information technology in the conduct of criminal justice is Article 556, where paragraph (2)[1], provides that the execution warrants or the order prohibiting leaving the country may also be transmitted to the competent bodies by fax, electronic mail or any means capable of producing a written document under conditions enabling the receiving authorities to establish its authenticity. All these electronic ways of communication are meant to increase the efficiency of justice, because this correspondence is much faster than classical forms of correspondence, which involve the physical transmission of documents from one authority to another.

At the same time, it was shown that: Article 29 of Law No. 254/2013 on the execution of custodial sentences and measures ordered by judicial bodies during criminal proceedings; Article 7 paragraph (2); Article 37, Article 38 of the Regulation (EU) implementing Law No. 254/2013 on the execution of custodial sentences and measures ordered by judicial bodies during criminal proceedings regulates hearings by videoconference, while Articles 134 and 135 of the Regulation regulate the right of persons deprived of liberty to online communications.[41]

17.4. Dematerialisation of the Criminal Offence

The influence of information technology is also manifested at the level of Substantial/Material Criminal Law. ICT offers new ways of committing crimes, or even induces the need for new criminalisation.

[40] Article 501 of the Code of Criminal Procedure.

[41] S. Stănilă, *Tehnologia informației*..., *op. cit*., https://www.universuljuridic.ro/tehnologia-informatiei-si-comunicatiilor-in-procesul-judiciar/ [access: 10.12.2023].

Therefore, in the following we will point out some such influences, which practically generate a dematerialisation of the crime, whether it is a cybercrime proper or another crime, but which is committed with the help of information technology.

One issue that has been discussed quite widely in the literature has been whether the crime of computer fraud is a form of e-deception.[42] The question was settled by the solution given in an appeal in the interest of the law by the HCCJ, by Decision No. 37/2021:[43]

> *Establishes that the publication of fictitious online ads that resulted in damage, without this activity intervening on the computer system or on the computer data processed by it, realises the conditions of typicality of the crime of deception, provided by Article 244 of the Criminal Code.*

It was also noted in the above-mentioned decision that:

> *In addition, by comparing the two incrimination texts, we find that the crime of computer fraud includes other ways of committing the act that do not lend themselves to the imprint of the crime of deception, thus ensuring additional protection of social values of patrimonial nature, relevant being the ways of committing the act by restricting access to computer data or preventing in any mode of operation of a computer system.*

Thus, previously, by decisions of this case, the act (computer fraud) was considered only an electronic version of deception: "The crime of computer fraud is a variant of the crime of deception

[42] C.D. Miheș, *Computer fraud. Observations. Delimitations*, "Journal of Criminal Law" 2022, No. 1; N. Neagu, *Frauds committed through computer systems and electronic means of payment – special variants of the crime of fraud?*, "Romanian Journal of Business Criminal Law" 2019, No. 3; G. Zlati, *Treaty of Cybercrime*, Solomon Publishing House, Bucharest 2020, pp. 454 et seq.; C.D. Miheș, *Misrepresentation and computer fraud*, "Büntetőjogi Szemle" 2021/különszám, Budapest 2021.

[43] https://www.iccj.ro/2021/07/19/decizia-nr-37-din-7-iunie-2021/ [access: 10.12.2023].

committed in the virtual space, the second being the general rule and the first mentioned constituting the special norm" – HCCJ Criminal Section, Decision No. 2106/2013 and HCCJ[44] Criminal Section Decision No. 85/RC/2020.[45]

In essence, summarising the above points of view, if computer fraud is committed on a computer system, the deception is committed through a computer system, and the criterion of intervention on the computer system (a criterion viewed objectively) is the essence of the crime of computer fraud, along with the other conditions of typicality.

Starting from the incriminating text differences, several criteria for delimiting deception from computer fraud have been highlighted in the doctrine,[46] but perhaps the most important of these is the criterion of manipulation of the computer system or computer data, which, from our point of view, this conduct generates material benefit and produces damage in the case of computer fraud. On the other hand, we must not forget that in the case of deception we have a favourable behaviour on the part of the victim, but this behaviour can also be found in the case of computer fraud in another form – in fact, the victim does not protect his computer system properly.[47]

Theft, a classic crime, with a classic object, acquires new valences when we talk about the theft of virtual currency. The theft of virtual currency was classified, in accordance with the legal framework existing at that time, in the category of acts incriminated under Article 149 of the Criminal Code – Computer fraud.[48] However, the Romanian legislator considered it necessary to amend this article and introduce virtual currency in the enumeration in Article 250 of the Criminal Code, along with 'monetary value' when talking

[44] https://www.scj.ro/cms/o/publicmedia/getincludedfile?id=23491 [access: 10.12.2023].

[45] https://www.universuljuridic.ro/infractiunea-de-frauda-informatica-recurs-respins-ca-inadmisibil-ncpp-ncp/ [access: 10.12.2023].

[46] G. Zlati, *Treaty of Cybercrime*, *op. cit.*, pp. 458–461.

[47] C.D. Miheș, *Misrepresentation and computer fraud*, *op. cit.*

[48] This act was rightly classified as computer fraud – in this sense, G. Zlati, *Treaty of Cybercrime*, *op. cit.*, pp. 340–344.

about transfer of funds.[49] As stated earlier, we consider that the new form of Article 250 of the Criminal Code criminalizes virtual currency theft, which can be achieved only through a fraudulent financial operation.[50]

Perhaps the most important issue in matters regarding cyberspace is the establishment of identity and certainty about the identity of the "interlocutor". Virtual identity is a fact of our society. From this perspective, in Romania, we do not have a specific incrimination for virtual identity theft.

To make up for this insufficiency, the High Court of Cassation and Justice, by decision No. 4/2021[51] ruled that:

> *the act of opening and using an account on a social network open to the public, using as username the name of another person and entering real personal data that allow his identification, meets two of the essential requirements of the crime of computer forgery provided in Article 325 of the Criminal Code*[52]*, i.e. that the act of entering computer data is carried out without right and that the act of entering computer data results in data inappropriate to the truth.*

[49] In addition, Law No. 207 of 2021 complements Article 180 of the Criminal Code – Non-cash means of payment with: "(4). *Virtual currency* means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily linked to a legally established currency and does not have the legal status of currency or money, but is accepted by natural or legal persons as a medium of exchange and can be transferred, stored and traded electronically."

[50] C.D. Miheș, *Misrepresentation and computer fraud*, *op. cit.*

[51] https://www.iccj.ro/2021/01/25/decizia-nr-4-din-25-ianuarie-2021/ [access: 10.12.2023].

[52] Article 325. Computer forgery: "The act of introducing, modifying or deleting, without right, computer data or restricting, without right, access to such data, resulting in data inappropriate to the truth, in order to be used to produce a legal consequence, constitutes an offense and is punishable by imprisonment from one to 5 years."

Basically, this translation to the crime of computer forgery is just a solution to the problem, because we believe that we should have a text dedicated to criminalising identity theft.

17.5. Conclusions

Looking at the legal framework presented above, following the interviews and discussions with actors of the judicial system, taking into consideration the provisions of ECHR, especially in respect of Article 6 – the right to a fair trial – we synthetise our conclusions and our proposal as follows:

Key findings of ICT implications and the digitalisation of the administration of justice are positive impacts on efficiency and transparency through digitalisation; improved case management and evidence administration; Identified challenges, including cybersecurity risks and potential legal gaps; Demonstrated success through case studies and examples.

What should we do in the future? Our suggestions for the answers to this question are:

1. A strong call to action for continued trustworthy digitalisation efforts.
2. Strengthen legal frameworks to support and regulate digitalisation in criminal trials, i.e., to remove the demand to use an electronic signature in case of filling a preliminary complaint; mandatory introduction by law of electronic file.
3. Improve the legal frameworks to criminalise and update the provision when necessary due to the dematerialisation of Substantive Criminal Law, i.e. to criminalise 'identity theft' in the electronic/virtual environment.
4. Invest in cybersecurity measures to address potential threats and ensure data integrity.
5. Promote ongoing training for legal professionals to adapt to digital tools and technologies.
6. Encourage collaboration between the government, legal institutions, and technology experts.

7. Prioritise the integration of emerging technologies for further advancements.

By emphasising these points, the call to action aims to guide future efforts toward a more robust, secure, and effective digitalised criminal trial system in Romania, and in Europe, of course.

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Chapter 18. Party's Motion to Submit a Question for a Preliminary Ruling to the CJEU Through the Lens of the Right to a Reasoned Decision and the Right to a Fair Trial Under the European Convention of Human Rights and the Charter of Fundamental Rights

18.1. Introduction

Today, in the "age of reasons",[1] reason-giving and (public) justification of decisions adopted by governments, courts and other public authorities is considered as highly desirable, if not even a commonsense requirement.[2] In reality, it is closely connected with other values, such as efficiency, sincerity, guidance, legitimacy, and democracy, as well as with past legal and constitutional experience.[3]

The preliminary reference procedure under Article 267 TFEU was developed as one of the first collaborations between an international court and national courts.[4] In one sentence, it is a non-contentious procedure aimed at ensuring the unity of interpretation of European

[1] M. Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, "Washington and Lee Law Review" 2015, Vol. 72, pp. 483–484.

[2] M. Cohen, *When Judges Have Reasons Not to Give Reasons…*, *op. cit.*, p. 485.

[3] M. Shapiro, *The Giving Reasons Requirement*, "University of Chicago Legal Forum" 1992, Issue 1, Article 8, p. 179, http://chicagounbound.uchicago.edu/uclf/vol1992/iss1/8 [access: 25.09.2023].

[4] M. Broberg, N. Fenger, *Variations in Member States' Preliminary References to the Court of Justice – Are Structural Factors (Part of) the Explanation?*, "European Law Journal" 2013, Vol. 19, No. 4, p. 2.

Union (EU) law.[5] Legal scholarship often describes the procedure as the "jewel in the crown" and the "most fundamental element in the constitutional architecture" of the EU legal order.[6] It sets up a dialogue between the Court of Justice of the European Union (the CJEU or the Court of Justice) and the courts of the Member States, its objective being uniform interpretation of EU law and promotion of "its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".[7]

The effectiveness of the preliminary reference procedure depends on national courts exercising their ability to refer a question to the CJEU. As such they are an "important guarantors of the effectiveness of EU law and the rights of individuals",[8] their referencing representing "the very essence of the EU system of judicial protection" and enabling "effective cooperation to be established […] between the national courts and the Court of Justice".[9]

As it is well known, national courts and tribunals have the power or obligation to refer a matter to the CJEU if they consider that a case pending before them raises questions involving interpretation of the provisions of EU law or consideration of their validity, necessitating a decision on their part.[10] While Article 267(2) TFEU determines the possibility of any national court to request the clarification from the CJEU, paragraph 3 of the same Article institutes the obligation to start the preliminary reference procedure: the latter exists

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[5] R.K. Magyarosi, *Preliminary Ruling of the Court of Justice of European Union and its Legal Effects*, 2022, p. 30, https://old.upm.ro/facultati_departamente/ea/RePEc/curentul_juridic/rcj22/recjurid223_2F.pdf [access: 03.10.2023].

[6] P. Craig, G. de Búrca, *EU Law. Text, Cases and Materials*, Oxford University Press, Oxford 2015, p. 464; J.H.H. Weiler, *The European Court, National Courts and References for Preliminary Rulings – The Paradox of Success: A Revisionist View of Article 177 EEC*, [in:] H.G. Schermers *et al.* (eds.), *Article 177 EEC: Experiences and Problems*, Elsevier Science Publishers, 1987, p. 366.

[7] Opinion of the Court 2/13 (Accession of the European Union to the ECHR) [2014] EU:C:2014:2454, paragraph 176.

[8] Case C-224/01. *Gerhard Köbler v. Republik Österreich* [2003] EU:C:2003:513, paragraphs 35–36.

[9] Case C-300/99 P. *Area Cova & Ors v. Council* [2001] EU:C:2001:71, paragraph 54.

[10] See, to that effect: Opinion of the Court 1/09 (Agreement creating a Unified Patent Litigation System) [2011] ECLI:EU:C:2011:123, paragraph 68.

(i) when the question refers to the interpretation or validity of EU law,[11] the answer to which it is necessary to give a judgment, and (ii) when the deciding court is the court against whose decision no judicial remedy under national law exists. In practice the obligation (unless CILFIT exceptions apply)[12] will therefore generally apply to the highest courts in Member States – usually a supreme or constitutional court or in some cases also to courts of lower instance if they issue a final decision.

Individuals have no possibility to individually request the CJEU for preliminary reference. Additionally, there are also no remedies under EU law provided for individuals to "force" the national court to obtain a preliminary ruling from the CJEU if the national court has refused to make such reference. The "compensation" available to individuals when they consider that the national court has acted contrary to the obligation provided in Article 267(3) TFEU is an institute of financial liability of a Member State for judicial acts as established by the CJEU in *Köbler*[13] and confirmed in *Traghetti del Mediterraneo*[14], *Commission v. Italy*[15] and in the *Ferreira da Silva* ruling.[16] Another alternative possibility is a complaint before the European Court of Human Rights (ECtHR) alleging the violation of Article 6 of the European Convention on Human Rights (ECHR) caused by national court's refusal to refer to the CJEU. This consequently means that national courts of each Member States have

[11] The procedure covers the entire body of EU law, i.e. interpretation of the Treaties, including the Charter of Fundamental Rights, validity of acts of a broader range of EU institutions, secondary EU law and international agreements concluded by the EU, with the exception of the Common Foreign and Security Policy as determined in Article 275 TFEU.

[12] CILFIT criteria refer to situations in which national courts are exempted from the duty to refer. The framework was presented by the CJEU in CILFIT judgment of 1982 and are in more detail considered below. Case C-283/81. *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] EU:C:1982:335, paragraphs 14–20.

[13] Case C-224/01. *Köbler*.

[14] Case C-173/03. *Traghetti del Mediterraneo SpA v. Repubblica italiana* [2006] ECLI:EU:C:2006:391.

[15] Case C-379/10. *Commission v. Italy* [2011] ECLI:EU:C:2011:775.

[16] Case C-160/14. *João Filipe Ferreira da Silva e Brito and Others v. Estado português* [2015] ECLI:EU:C:2015:565.

a crucial role in the full application of EU law in all Member States and the judicial protection of individuals' rights under EU law.[17]

This paper considers the obligation to start the preliminary reference procedure from the perspective of party's application to submit a question for a preliminary ruling to the CJEU. In more details, we consider situations of dismissal of party's motion to submit a question for a preliminary ruling through the lens of Article 6 (Right to a Fair Trail) of the EHCR and Article 47 (Right to Effective Remedy and Right to a Fair Trail) of the Charter of Fundamental Rights of the European Union (the Charter). Although case law of the CJEU and ECtHR seem to uniformly suggest reasoned decision when a national court of last instance dismisses party's application for a preliminary ruling the issue is not yet completely clear. This is the case especially in situations where national provisions of Member States expressly provide for the court to dismiss the application only by reference to the inexistence of the conditions allowing the appeal. The Republic of Slovenia is one example of such national provisions. The latter recently led to the Supreme Court of the Republic of Slovenia turning to the CJEU for clarification: by reference made on 7 April 2023 (case *Kubera*[18]) the Supreme Court requested answers to the following questions:

> *whether the requirements of EU law preclude Slovenian legislation which, in the decision granting leave to bring an appeal on a point of law (revision), does not require an independent assessment of whether the Supreme Court is under an obligation to refer one or more questions to the Court of Justice for a preliminary ruling at the request of one of the parties.*

If the answer is affirmative and the Supreme Court is required to carry out such assessment of the party's request, the Supreme

[17] Opinion 1/09, *supra note* 10, paragraphs 66–68 and 83–86.

[18] Case C-144/23. *Kubera, trgovanje s hrano in pijačo, d.o.o. v. Republika Slovenija* [2024] ECLI:EU:C:2024:7140.

Court, recalling the decision in *Consorzio Italian Management* and the case law of the ECtHR, further asked the CJEU:

> *whether Article 47 of the Charter must be interpreted, as regards the requirement to state the reasons for judicial decisions, as meaning that an order refusing an application for leave to bring an appeal on a point of law (revision) under the Civil Procedure Act constitutes a "judicial decision" which must contain the reasons why the party's request that a reference for a preliminary ruling be made to the ECJ must not (or should not) be granted.*[19]

In November 2023 (when research for this paper was concluded) the opinion of the Advocate General and the answer of the CJEU was yet to be issued.[20]

Taking this background into account, this paper is structured as follows. After the Introduction, Part Two considers the Slovenian legislative framework and case law of the Supreme Court of the Republic of Slovenia in regard to reasoned decision (or better: lack of it) when party's request for preliminary ruling is a part of application for leave to bring an appeal on the point of law (extraordinary legal remedy). Express national procedural provisions enable dismissal of such application without stating reasons even when such application includes a request for the national court to turn to the CJEU for clarification. This seems to be in contradiction with standing point of the CJEU on the matter discussed in Part Three as well as with case law of the ECtHR discussed in Part Four. In Part Five we aim to show that the giving reasons requirement is not only a requirement of Article 6 of the ECHR or Article 47 of the Charter, but is part of a broader legislative context. The main argument of the paper is that Article 6 of ECHR and Article 47 of Charter as well as the principles

[19] Case C-144/23. *Kubera*. Document available at: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=274721&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3853747 [access: 03.10.2023].

[20] After submission of the paper and before publshing (November 2023–November 2024) the CJEU adopted a decision in the case *Kubera* (judgment of 15 October 2024, ECLI:EU:C:2024.7140).

of good governance, good administration, and rule of law (especially avoidance of arbitrary power and objective and transparent justice system as two elements from the rule of law checklist), demand national court to always give reason for dismissal of party's application to request a question for preliminary ruling. This applies also to situations when a motion for preliminary reference is included in an application which the court may, in accordance with national provisions, dismiss only by reference to the inexistence of the conditions allowing the appeal. This seems especially important in administrative law, where parties often do not have the same level-playing field (state against an individual). In this sense we provide suggestions for Polish and other legislators and courts of Member States when refusal of party's request for preliminary ruling together with the obligation of the national court to refer a question for preliminary ruling is concerned (Part Six). Part Seven briefly summarises the main findings of the paper.

18.2. Party's Motion to Submit a Question for a Preliminary Ruling Before the Court of Last Instance and the Slovenian Normative Framework

18.2.1. THE APPEAL ON A POINT OF LAW AS AN EXTRAORDINARY LEGAL REMEDY UNDER SLOVENIAN LAW

In accordance with Slovenian procedural law[21] and the obligation to refer a question for preliminary ruling embodied in Article 267 TFEU, the Supreme Court of the Republic of Slovenia (the Supreme Court) as the court against whose decision there is no judicial remedy under national law will generally be bound to turn to the CJEU for preliminary reference when faced with doubts on interpretation or validity of EU law. At the same time, the Supreme Court has jurisdiction to decide on appeal on a point of law (revision

[21] The Civil Procedure Act (in Slovenian language: "Zakon o pravdnem postopku"), Official Gazette No. št. 73/07 – official consolidated text with subsequent changes and amendments.

procedure, "revizija" in the Slovenian language) as one of extraordinary legal remedies under Slovenian law. Appeals on a point of law concern the consideration of infringements of the substantive law and procedural rules applied by the lower court. In accordance with Article 367a of the Civil Procedure Act the Supreme Court permits an appeal on a point of law if the decision is expected to determine a point of law which is important for ensuring legal certainty, uniform application of law or further development of law through case-law.[22] The assessment is whether the case is, by reason of its objective importance, such as to require an assessment of the substance of the points of law by the Supreme Court. It is the wider public interest that matters, and not only the party's interest in a case being judged.[23] The question for preliminary reference under the TFEU and appeal on a point of law under Slovenian law, which in accordance with the Civil Procedure Act applies also in administrative disputes (in accordance with Article 22 of the Administrative Dispute Act) thus have similar aim: their main objective is, on the basis of legal precedent, to unify the jurisprudence and ensure appropriate interpretation of law.[24]

Appeal on a point of law is permitted on the basis of party's application for leave to bring an appeal on a point of law (Article 367a(2) of the Civil Procedure Act) satisfying formal criteria determined in Article 367b(4) of the Civil Procedure Act.[25] If the application for

[22] In this regard the revision shall be admitted in particular: 1) if it is a point of law in respect of which the decision of the court of second instance deviates from the case-law of the Supreme Court; 2) if it is a point of law in respect of which the case-law of the Supreme Court does not yet exists or if the case law of higher courts is not uniform; 3) if it is a point of law in respect of which the case law of the Supreme Court is not uniform (Article 367a paragraph 1 of the Civil Procedure Act).

[23] Supreme Court, Request for a preliminary ruling No. X DoR 380/2022-6 of 7 March 2023, paragraph 7.

[24] Ibidem, paragraph 9.

[25] In this regard a party shall, in the motion for admission of a revision, state in detail and in concrete terms the point of law in dispute and the legal rule allegedly violated, the circumstances showing its significance, and a brief statement of grounds why this point of law was resolved unlawfully by the court of second instance; the alleged violations of the proceedings must be described in detail and in concrete terms and similarly the party must also demonstrate the existence of

leave to bring an appeal on a point of law is dismissed, party's application is dismissed only by general reference to the non-existence of the conditions referred to in Article 367 of the Civil Procedure Act. Hence, in accordance with express national provisions the Supreme Court in these situations needs not to state reasons for its decision; it is sufficient to point out in general terms that conditions determined in law are not satisfied (Article 367c(2) of the Civil Procedure Act).

The approach of the Supreme Court is equal if the application for leave to bring an appeal on a point of law applies to national or EU law: in both cases, for permission to bring an appeal on a point of law, objective criteria stemming from Article 367 of the Civil Procedure Act have to be given. If the Supreme Court considers they are not, the application is dismissed without concrete justification.

18.2.2. PARTY'S APPLICATION TO SUBMIT A QUESTION FOR A PRELIMINARY REFERENCE AS A PART OF AN APPLICATION FOR LEAVE TO BRING AN APPEAL ON A POINT OF LAW

In practice applicants often combine an application for leave to bring an appeal on a point of law and an application to submit a question for a preliminary reference to the CJEU (both motions in one application). This does not however change the decision of the Supreme Court: existence of a motion to submit a question for a preliminary reference in an application for leave to bring an appeal on a point of law does not automatically mean that an appeal on a point of law will be permitted. The application is still assessed in the light of criteria from the Civil Procedure Act.[26] Hence, in deciding whether to grant leave to bring an appeal on a point of law, the Supreme Court will assess the relevance of points of law deriving from EU law in the same way as those deriving from national law, whereas it

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the Supreme Court's case-law from which the decision allegedly deviates or the inconsistency of the case-law. If the party filing a motion for a revision refers to the Supreme Court's case-law, he or she shall indicate the reference numbers of the cases and submit copies of court decisions that it refers to if they have not been made public.

[26] Supreme Court, Request for a preliminary ruling, *supra note* 21, paragraph 27.

is irrelevant, for the purposes of that assessment, whether the party has also requested that a reference for a preliminary reference be made to the CJEU.[27]

If party's application including a motion to submit a question to the CJEU is granted, the issue whether a preliminary reference shall be made or not will be considered when deciding the substance of the case. The situation is however different if party's application is dismissed: as already explained, in accordance with national procedural rules and Supreme Court's case law, such dismissal will not represent a reasoned decision. There will be no difference in the reasoning of the Supreme Court if party's application includes a request for preliminary reference or not: the decision of the Supreme Court non-granting the appeal on the point of law will only point out in general terms that conditions determined in law are not satisfied. Practical effect of such rule is that party applying for the "last chance" legal remedy will never obtain a reasoned decision why her motion to submit a question for a preliminary reference was not granted. How is such situation compatible with CJEU's reasoning in *Consorzio Italian Management* where the CJEU renewed its position in regard to Article 267 TFEU and obligation of national courts to give reasoned opinion in cases where party's motion for preliminary reference is not granted? We discuss position of the CJEU in this regard in following paragraphs.

18.2.3. AN INTERVENTION: INCOMPATIBILITY OF THE SUPREME COURT'S CASE LAW WITH THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA

Before proceeding along the reasoning of the CJEU in *Consorzio Italian Management* it is worth mentioning that opinion of the Constitutional Court of the Republic of Slovenia (the Constitutional Court) in this regard is different from above-described practice of the Supreme Court. Namely, in its recent Decision No. 1133/18-25 from 31 March 2022 the Constitutional Court bound the Supreme

[27] Ibidem, paragraph 11.

Court to a different obligation when party's application for leave to bring an appeal on point of law includes a request to submit a question for a preliminary reference. In its Decision the Constitutional Court differentiated between two situations: (i) an application for leave to bring an appeal on a point of law without party's request to submit a question to the CJEU and (ii) an application for leave to bring an appeal on a point of law including such request. While under express provision of Article 367 of the Civil Procedure Act the first application may be dismissed without stating reasons, the situation is different in regard to the second: recalling the provision of Article 47 of the Charter, CJEU's case law in this regard and Article 22 of the Constitution of the Republic of Slovenia the Constitutional Court held that the right to a reasoned judicial opinion includes the obligation of courts to explain why the national court did not refer a question for preliminary reference. Consequently, in such cases national courts shall always adopt a position as to the request for a preliminary reference with sufficient clarity and shall, in doing so, provide a reasoning also in situations where national procedural regulation determines that a court may only substantiate its decision by referring to the fact that the conditions for considering the case are not fulfilled (so-called summary reasoning).[28] Hence, in the opinion of the Constitutional Court, the order dismissing the application to leave to bring an appeal on a point of law including a motion for preliminary reference shall contain a reasoning as to why party's motion for a preliminary ruling was not granted. The opposite would represent a violation of the right to the equal protection of rights from Article 22 of the Constitution in conjunction with the right to judicial protection determined in Article 23(1) of the Constitution of the Republic of Slovenia.[29] In other words, the Constitutional Court is thus of the opinion that national procedural rules as far as they concern obligation to state reasons when a question for preliminary reference is concerned are not compatible

[28] The Constitutional Court stressed the importance of giving reasons when party's motion to refer to the CJEU is dismissed also in several other decisions, such as decisions: No. Up-797/14 (12 March 2015), No. Up-384/15 (18 July 2016) or No. Up-561/15 (16 November 2017).

[29] Paragraphs 13–18.

with EU law. With reference to Article 47 of the Charter the Constitutional Court stressed that the Supreme Court shall, if it does not permit an appeal on a point of law, give reasons why the matter was not referred to the CJEU. The decision shall provide reasons whether the question referring to the EU is not relevant for solution of the dispute, whether the interpretation of the EU law is already given in CJEU's case law or, when there is not such case law, the interpretation of the EU law is so obvious that it does not leave any reasonable doubt (CILFIT criteria). Hence, in these situations the Supreme Court may still give reasons for its decision not to permit the bringing of an appeal on a point of law by referring only to a failure to meet the requirements laid down in Article 367a of the Civil Procedure Act, however it shall always provide reasoned decision to the party's request to refer a question.[30] Although such position is more coherent with the reasoning of the CJEU in *Consorzio Italian Management* described below, at the time of writing this paper[31] there is no evidence in case law that the Supreme Court has followed the instructions of the Constitutional Court. It has however, turned to the CJEU for clarification in this regard (question for preliminary reference described previously, case C-144/23. *Kubera*).

18.3. The Decision Not to Refer and Obligation to State Reasons in the Jurisprudence of the CJEU

18.3.1. THE STANDARDS FOR THE DUTY TO REFER UNDER ARTICLE 267(3) TFEU ESTABLISHED IN *CONSORZIO ITALIAN MANAGEMENT*

In *Consorzio Italian Management*,[32] where the question was referred to by the Italian Consiglio di Stato in a dispute concerning public procurements of services, the CJEU was once again asked to interpret

[30] Paragraphs 30–31.

[31] The database was last checked on 6 October 2023.

[32] Case C-561/19. *Consorzio Italian Management and Catania Multiservizi SpA v. Rete Ferroviaria Italiana SpA* [2021] ECLI:EU:C:2021:799.

Article 267(3) TFEU and its duty to refer. Beyond substantive questions in the matter of public procurement that are not relevant for discussion in this paper, the CJEU (inter alia), restated its previous interpretation of Article 267(3) TFEU and then established the mandatory content of national court's decision not to refer a question for preliminary reference.

In the wording of the CJEU, Article 267 TFEU read in the light of Article 47(2) of the Charter determining the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law demands from the national court of last instance, considering it is relieved of its obligation to make a reference to the CJEU due to existence of CILFIT criteria, to always adopt the statement of reasons for its decision. Such statement of reasons shall show either that the question of the EU law raised is irrelevant for the resolution of the dispute, or that the interpretation of the EU law provision concerned is based on the Court's case law or, in the absence of such case law, that the interpretation of EU law was obvious to the national court of last instance as to leave no scope for any reasonable doubt.[33]

Hence, on the basis of combined reading of Article 267 TFEU and Article 47 of the Charter the CJEU introduced a major novelty for the national courts, i.e., the duty to state reasons when a national court of last instance decides not to refer questions on interpretation of EU law to the CJEU. In order to establish that they can escape their duty to refer, national courts of last instance must now fulfil another duty: the duty to explain why and how they decided to not share the case with the CJEU.[34] Consequently, following this line of reasoning, national courts of last instance shall not be sanctioned for

[33] Paragraph 51.

[34] F.X. Millet, *CILFIT Still Fits*, "European Constitutional Law Review" 2022, Vol. 18, p. 19. In this regard legal scholars are of the opinion that *Consorzio Italian Management* paves the ground for a necessary redirection in terms of remedies when it comes to the sanctioning of violations of Article 267(3) TFEU: Member State's liability now appears more suitable than infringement proceedings to enforce the duty to refer.

non-compliance with the duty to refer itself but for non-compliance with the duty to state reasons.[35]

Although the CJEU is silent on the matter, legal academia agrees that in establishing the duty to state reasons the CJEU actually embraced the approach of the ECtHR.[36] Namely, the ECtHR has already dealt with the issue of reasoned response to party's request to refer a question for preliminary reference to the CJEU, its approach now being mostly copy & pasted by the CJEU. We consider the principles arising from ECtHR's case law immediately below.

18.4. Article 6 of the ECHR and the Right to a Reasoned Response to a Request for a Preliminary Ruling

18.4.1. DUTY TO REFER AND ECTHR

In the last decade, several applicants initiated proceedings before the ECtHR alleging that the refusal of the national court of last instance to seek a preliminary ruling from the CJEU upon their application violated their rights under Article 6 of the ECHR. The most frequent allegation was that the national court did not comply with a duty to provide reasons when it dismissed their request for a referral without indicating which of the CILFIT grounds was applicable and providing explanation for such applicability.

Despite regularly emphasising that the ECHR does not guarantee, as such, the right to have a case referred by a domestic court to the CJEU for a preliminary ruling,[37] the refusal to grant a referral – even

[35] F.X. Millet, *CILFIT Still Fits*, *op. cit*.

[36] Ibidem, p. 18.

[37] *Baydar v. the Netherlands*, Application No. 55385/14, 24 April 2017, paragraph 39. The ECtHR regularly emphasizes that the review of the soundness of the interpretation of EU law by the national courts is a matter falling outside the Strasbourg Court's jurisdiction (see, to this effect: case *Somorjai v. Hungary*, Application No. 60934/13, 28 August 2018, paragraph 54).

if the court is not ruling on the last instance[38] – may, when the refusal proves to have been arbitrary, infringe the fairness of proceedings and thus be contrary to Article 6 of the ECHR.[39] In the wording of the ECtHR, such arbitrariness arises where the applicable rules allow no exception to the granting of a referral or where the refusal is based on reasons other than those provided for by the rules, or where the refusal was not duly reasoned.[40]

18.4.2. ECTHR PRINCIPLES IN REGARD TO THE OBLIGATION TO REFER UNDER ARTICLE 267(3) TFEU

As a result, the ECtHR set forth principles determining national court's obligation to refer a question for a preliminary ruling. The principles were established in *Vergauwen and Others v. Belgium*[41] and restated in subsequent case law:

> *(i) Article 6(1) requires the domestic courts to give reasons, in the light of the applicable law, for any decision refusing to refer a question for a preliminary ruling.*
> *(ii) When the ECtHR hears a complaint alleging a violation of Article 6(1) on this basis, its task consists in ensuring that the impugned refusal has been duly accompanied by such reasoning.*
> *(iii) Whilst this verification has to be made thoroughly, it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law.*

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[38] *Predil Anstalt S.A. v. Italy*, Application No. 31993/96, 8 June 1999, and case *Herma v. Germany*, Application No. 54193/07, 8 December 2009.

[39] The first case in which the ECtHR found violation of Article 6 due to absence to state reason for the decision not to refer to the CJEU was in case *Dhahbi v. Italy*, Application No. 17120/09, 8 April 2014, paragraphs 32–34.

[40] *Baydar v. the Netherlands*, *supra note* 35, paragraph 39.

[41] *Vergauwen and Others v. Belgium*, Application No. 4832/04, 10 April 2012, paragraphs 89–90. For subsequent case law see case law cited below.

> *(iv) In the specific context of Article 267(3) TFEU, this means that national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of EU law, are required to give reasons for such refusal in the light of the (CLIFIT) exceptions provided for by the case law of the CJEU, meaning that they must indicate the reasons why they have found that the question is irrelevant, that the EU law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.*[42]

Consequently, when court's decision of last instance will make no reference to the applicant's request for a preliminary ruling (including situations in which request being simply disregarded or ignored), will not explain why it considered the question irrelevant or relating to a provision which was clear or already been interpreted by the CJEU, Article 6(1) of the ECHR could be violated.

The court's obligation to state reasons was emphasised also in *Baydar v. the Netherlands* and *Sanofi Pasteur v. France.*[43] Whereas in the first case the applicant claimed a violation of Article 6, because the Supreme Court dismissed appeal in cassation, including the request for a referral to the CJEU, using a summary reasoning based on section 81 of the Judiciary (Organisation) Act,[44] in *Sanofi Pasteur v. France* the French Court of Cassation rejected applicant's request for preliminary ruling without giving any reasons at all.[45] In both

[42] *Dhahbi v. Italy*, *supra note* 37, paragraph 31.

[43] *Sanofi Pasteur v. France*, Application No. 25137/16, 13 February 2020.

[44] The national judgement included the following explanation: "[…] Based on section 81(1) of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*), this requires no further reasoning as the grievances do not give rise to the need for a determination of legal issues in the interests of legal uniformity or legal development", *Baydar v. the Netherlands*, *supra note* 35, paragraph 15.

[45] The Court of Cassation rejected applicant's appeal: "without any need arising to request a preliminary ruling from the Court of Justice of the European Union." *Sanofi Pasteur v. France*, *supra note* 41, paragraph 73.

cases the ECtHR reiterated that Article 6 of the ECHR requires the national courts to give reasons for any decision refusing to refer a request for a preliminary ruling, especially where the applicable law allows for such a refusal only on an exceptional basis. It repeated that in this regard the ground for the refusal shall be made in the light of the exceptions provided for in the case law of the CJEU (CILFIT exceptions).[46] In *Sanofi Pasteur v. France* the breach of Article 6(1) was given, whereas in *Baydar v. Netherlands* it was not.[47]

The assessment whether national court acted in accordance with obligation stemming from Article 6 of the ECHR is an case-by-case assessment: in each individual case an assessment shall always be made in the light of the circumstances of individual case and the domestic proceedings as a whole.[48] In more details, the obligation to state reasons does not demand a detailed answer to every argument; rather it depends from the nature of the decision and taking in regard, among others, "the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments".[49] Such reasoning is in accordance with ECtHR general point of view

[46] *Sanofi Pasteur v. France*, *supra note* 41, paragraph 69.

[47] In *Baydar v. the Netherlands* (*supra note* 35) the ECtHR, after considering all circumstances of the case, concluded that violation of Article 6 was not given, because: "[…] the summary reasoning contained in such a judgment implies an acknowledgment that a referral to the CJEU could not lead to a different outcome in the case", that's why domestic court was not obliged to refer a question about the interpretation of EU law (paragraphs 48–49). In *Sanofi Pasteur v. France* the ECtHR found a breach of Article 6 of the ECHR because the "judgment does not state the reasons for considering that the issues raised were not wort referring to the CJEU" and because "the circumstances of the present case would have required, in particular, an explicit justification of the decision not to refer to the CJEU the requests for a preliminary ruling submitted by the applicant company". Paragraphs 77–78.

[48] *Sanofi Pasteur v. France*, *supra note* 41, paragraph 68; *Baydar v. the Netherlands*, *supra note* 35, paragraph 40; *Krikorian v. France* (dec.), Application No. 6459/07, 26 November 2013, paragraph 99; *Harisch v. Germany*, Application No. 50053/16, 11 April 2019, paragraph 42; *Repcevirág Szövetkezet v. Hungary*, Application No. 70750/14, 30 April 2019, paragraph 59.

[49] *Baydar v. the Netherlands*, *supra note* 35, paragraph 39.

that the rule of law and the avoidance of arbitrary power are two of the principles underlying the ECHR;[50] on this ground the right to a reasoned decision in a judicial sphere protects the individual from arbitrariness by demonstrating to the parties that they have been heard[51] and fosters public confidence in an objective and transparent justice system, "one of the foundations of a democratic society".[52]

An obligation of the domestic court to state reasons in the light of CILFIT criteria is however not absolute. The ECtHR has accepted a summary reasoning where the appeal on the merits itself raised no fundamentally important legal issues or had no prospects of success.[53] The same applies where the appeal on points of law was declared inadmissible for failing to comply with the conditions of admissibility.[54] In such cases, the replies to the questions envisaged, whatever they might be, would have no impact on the outcome of the case.[55] The Court also accepts that, *in concreto*, the reasons for the rejection of the request for a preliminary ruling under the CILFIT criteria can be deduced from the reasoning of the remainder of the decision given by the court in question[56] or from reasons considered implicit in the decision rejecting the request.[57] Furthermore, in *Stichting Mothers of Srebrenica and others v. the Netherlands*[58] the Court found that the summary reasoning used by the Supreme Court to refuse a request for a preliminary ruling was sufficient, pointing out that it followed already from a conclusion reached in

[50] Ibidem, paragraph 39.

[51] *Ullens de Schooten and Rezabek,* Application No. 3989/07 and 38353/07, 20 September 2011, paragraphs 54–59.

[52] *Taxquet v. Belgium*, Application No. 926/05, 16 November 2010, paragraph 90.

[53] See, in particular: *Baydar v. the Netherlands*, *supra note* 35, paragraphs 42, 46 and 48.

[54] See: *Astikos Kai Paratheristikos Oikodomikos Synetairismos Axiomatikon and Karagiorgos v. Greece* (dec.), Application No. 29382/16 and 489/17, 9 May 2017, paragraph 47.

[55] Ibidem.

[56] *Krikorian v. France*, *supra note* 46, paragraphs 97–99; *Harisch v. Germany*, *supra note* 46, paragraphs 37–42; *Ogieriakhi v. Ireland* (dec.), Application No. 57551/17, 30 April 2019, paragraph 62.

[57] *Repcevirág Szövetkezet v. Hungary*, *supra note* 46, paragraphs 57–58.

[58] *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), Application No. 65542/12, 11 June 2013.

another part of the Supreme Court's judgment that a request to the CJEU for a preliminary ruling was redundant.[59]

Quite recently the ECtHR applied above-described line of reasoning also to Slovenian case. Namely, in *Rutar and Rutar Marketing v. Slovenia*[60] the applicant submitted that District Court of Nova Gorica dismissed their request for preliminary ruling, and subsequently their judicial protection, only with a couple of sentences and without actual justification. This allegedly instituted a violation of Article 6 of the ECHR. In its judgment delivered on 22 December 2022 the ECtHR, after summarising the principles concerning refusals by domestic courts to refer a preliminary question to the CJEU, agreed with the applicant in this regard. It held that that applicant's request for a preliminary ruling was clearly formulated, supported by argument, and was not prima facie redundant. On the contrary, however, the reasons given in the judgment at issue shed no light on the ground relied upon by the Slovenian court to dismiss the applicants' request to seek a preliminary ruling and left open the possibility that the request was simply disregarded. Failure to address in any way applicant's request to seek a preliminary ruling and any other of their legal arguments were, in the wording of the ECtHR, sufficient to determine that there has been a violation of Article 6(1) of the ECHR.[61]

18.5. Obligation to State Reasons as an Obligation for Administrative and Judicial Decision Making

The above analysis of case law of the CJEU and ECtHR offers a conclusion that the national court dismissing party's motion for preliminary reference, irrespective of national procedural provisions, shall always show either that the question of EU law raised is irrelevant for the resolution of the dispute, or that the interpretation of the EU

[59] Paragraph 173.

[60] *Rutar and Rutar Marketing v. Slovenia*, Application No. 21164/20, 15 December 2022.

[61] Paragraphs 58–64.

law provision concerned is based on the Court's case law or, in the absence of such case law, that the interpretation of EU law was obvious to the national court of last instance as to leave no scope for any reasonable doubt (thus, justification within CILFIT criteria). Such reasoning corresponds to the obligation to state reasons in general (for any administrative or judicial decision) as provided in Article 6 of the ECHR and Article 47 of the Charter, as well as with fundamental concepts of EU legal system, especially with the right to good administration, good governance, and rule of law. We consider these in subsequent paragraphs.

18.5.1. OBLIGATION TO STATE REASONS UNDER ARTICLE 47 OF THE CHARTER

The right to an effective remedy and to a fair trial embodied in three paragraphs of Article 47 of the Charter comprises various elements, in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented.[62] After the CJEU explicitly recognised the principle of effective judicial protection as a general principle of EU law stemming from the constitutional traditions common to the Member States in the 1980s,[63] it emphasised in *Heylens and others* that the principle of effective judicial protection required national authorities to give reasons for their decisions so that the persons concerned are able to defend their rights under the best possible circumstances.[64] Following such line of reasoning, the CJEU later developed a number of sub-rights and sub-principles stemming

[62] S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights, A Commentary*, Second Edition, Hart Publishing, 2021, p. 1251.

[63] Case C-222/84. *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] EU:C:1986: 206, paragraph 18.

[64] Case C-222/86. *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others* [1987] EU:C:1987:442, paragraph 15.

from general principle of effective judicial protection,[65] whereas after Lisbon the CJEU equates the principle of effective judicial protection with Article 47 by arguing that the general principle of judicial protection "is now reaffirmed by Article 47 of the Charter".[66] The provision is closely linked with Article 19(1) of the TEU entrusting the judicial review in the EU legal order to the CJEU and to national courts. Although the content of Article 47 was directly inspired by Article 6 and Article 13 of the ECHR, it derives from the Explanations of the Charter[67] that the protection under Article 47 is wider. Also, AG Wathelet, for example, in his opinion in *Berlioz Investment Fund*[68] stressed that Article 47 of the Charter has a wider scope *ratione materiae*. It applies where:

> [*the*] *rights and freedoms guaranteed by the law of the Union are violated (whether or not they are set out in the Charter), whereas Article 13 of the ECHR requires a violation of* "[*the*] *rights and freedoms as set forth in the* [*ECHR*]".[69]

In addition, Article 6(1) of the ECHR limits the right to a fair trial to the determination of civil rights and obligations or of any criminal charge. No such restriction is to be found under Article 47(2).[70] It also follows from the Court's jurisprudence that Article 47 is sufficient in itself and does not need to be made more specific by

[65] Some of them found their way into the wording of Article 47, whereas others guide remain influential by guiding interpretation of Article 47. S. Peers *et al.*, *The EU Charter of Fundamental Rights…*, *op. cit.*, *supra note* 60, p. 1256.

[66] Case C-64/16. *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117, paragraph 35.

[67] See: Explanations relating to the Charter, Oficial Journal of the European Union C 303, 14.12.2007, pp. 17–35.

[68] Case C-682/15. *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes* [2017] EU:C:2017:2, paragraph 37.

[69] Ibidem.

[70] Ibidem, paragraph 61 and subsequent. Also, AG Saugmandsgaard Øe shared the same opinion in Case C-64/16. *Associação Sindical dos Juízes Portugueses proti Tribunal de Contas* [2017] ECLI:EU:C:2017:395, paragraph 71.

provisions of EU or national law to confer on individuals a right which they may rely on as such.[71]

While the paragraph 1 of Article 47 provides a right to an effective remedy before a tribunal for everyone whose rights and freedoms under EU law are violated, the paragraph 2 guarantees a right to a fair and public hearing by an independent and impartial tribunal and a possibility to be advised, defended, and represented. The paragraph 3 refers to legal aid.[72] The paragraph relevant for the topic of this chapter is thus embodied in paragraph 2. We consider its scope and content below.

A quick glance at the wording of the Article shows that the right to an effective judicial remedy is ensured by a number of procedural rights. Six of the elements are stemming from the first sentence of Article 47(2). These are: (i) fair trial, (ii) public hearing, (iii) independent tribunal, (iv) impartial tribunal, (v) tribunal that was previously established by law and (vi) adjudication within a reasonable period. To these, seventh element is attached: the right to be advised, defended, and represented.[73]

What is relevant for the discussion in this paper is that the right to a fair hearing (inter alia) requires a court to give reasons for its judgment. While this characteristic is linked to a right to a public hearing and the principle of open justice, a main feature is that the court shall address all essential issues raised, albeit a detailed answer to every argument is not required. The assessment is made individually, depending on the nature of the decision and must be examined, in:

> *the light of the proceedings taken as a whole and all the relevant circumstances, taking account of the procedural guarantees surrounding that decision, in order to ascertain*

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[71] See, to this effect, for example: Joined cases C-924/19 PPU and C-925/19 PPU. *Országos Idegenrendés Főigazgatós Dél-alföldi Regionális Igazgatóság* [2020] ECLI:EU:C:2020:367, paragraph 140; Case C-233/19. *B. v. Centre publique d'action sociale de Liège* [2020] ECLI:EU:C:2020:757, paragraph 55.

[72] *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes*, *supra note* 66, paragraph 61.

[73] S. Peers *et al.*, *The EU Charter of Fundamental Rights…*, *op. cit.*, *supra note* 60, p. 1251.

> *whether the latter ensure that the persons concerned have the possibility to bring an appropriate and effective appeal against the decision.*[74]

The reasons for a decision shall be "sufficiently specific and concrete"[75] to enable the applicant to understand the decision of the court and decide whether to appeal.

A procedural obligation to reason issued public acts is also a constituent part of the right to effective judicial review from Article 47(1) of the Charter. An effective judicial remedy shall permit a review of the legality of the decision at issue as regards matters of both fact and law in the light of EU law.[76] For a review to be effective on national or EU level the right to an effective judicial remedy requires a statement of reasons in order to enable the persons or entities concerned to "exercise their right to bring an action",[77] to "decide, with full knowledge of the relevant facts, whether it is worth appealing to the courts"[78] and to enable the person concerned "to defend his rights under the best possible circumstances".[79] In this regard, the CJEU has held that "if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based".[80] In this regard it derives from the case law that the reasoning must be clear either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to

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[74] Case C-619/10. *Trade Agency Ltd v. Seramico Investments Ltd.* [2012] ECLI:EU:C:2012:531, paragraph 60.

[75] Case C-230/18. *PI v. Landespolizeidirektion Tirol* [2019] ECLI:EU:C:2019:383, paragraph 79.

[76] Case C-430/10. *Hristo Gaydarov v. Director na Glavna direktsia "Ohranitelna politsia" pri Ministerstvo na vatreshnite raboti* [2011] ECLI:EU:C:2011:749, paragraph 41.

[77] Case T-15/11. *Sina Bank v. Council* [2012] ECLI:EU:T:2012:61, paragraph 57.

[78] Joined cases C-372/09 and C-373/09. *Josep Peñarroja Fa* [2011] ECLI:EU:C:2011:156, paragraph 63.

[79] *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others*, *supra note* 62, paragraph 15.

[80] Ibidem, paragraph 17.

require the authority concerned to provide that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question.[81]

18.5.2. REASONED DECISIONS AND THE SCOPE OF ARTICLE 6 OF THE ECHR

The right to a reasoned decision is also an integral part of the right to a fair trail from Article 6 of the ECHR, one of essential safeguards for protection of democracy and the rule of law in the EU.[82] Beside guaranteeing procedural rights ensuring accurate and fair judgement, the right also includes the right to understand the reasons of the court's decision. In this regard and linked to the proper administration of justice, court's decisions shall adequately state the reasons on which they are based,[83] protecting an individual from arbitrariness. Additionally, the justification of the judicial decisions serves the realisation of the legal interest of the party to the proceedings, ensures transparency of the judiciary as well as increases public trust towards state institutions. The existence of a justification prevents the right to appeal against the decision to become ineffective and demonstrates that the parties have been heard, which in turn contributes to a more willing acceptance of the decision.[84] What is

[81] Case C-300/11. *ZZ v. Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:363, paragraph 53. Whilst with reference to Kadi finding that: "it may prove necessary, both in administrative proceedings and in judicial proceedings, not to disclose certain information to the person concerned, in particular in the light of overriding considerations connected with State security".

[82] C. Rozakis, *The right to a fair trial in civil cases*, "Judicial Studies Institute Journal" 2006, Vol. 4, Issue 2, p. 96.

[83] *Hirvisaari v. Finland*, Application No. 49684/99, 12 December 2000, paragraph 30.

[84] M. Dymitruk, *The Right to a Fair Trail in Automated Civil Proceedings*, "Masaryk University Journal of Law and Technology" 2019, Vol. 13, Issue 1, p. 39.

more, the right justifies the activities of an authority and makes public scrutiny of the administration of justice possible.[85]

As already mentioned above, the right to a reasoned decision entails that all decisions of the national courts adequately state reasons on which they are based; although a detailed answer to every argument is not required, the judgment shall reply expressly to submissions decisive for the outcome of the proceedings.[86] The extent of reasons will always depend on the nature of the decision and is assessed individually in the light of the circumstances of the case. To allow for acceptable degree of variation, the ECtHR takes into consideration "the diversity of the submissions that an applicant may bring before the court and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments".[87]

The requirement of the reasons depends also on the level of jurisdiction: while lower domestic courts must indicate sufficiently clearly the grounds which they base their decision, so that the parties can appeal effectively, the manner of application of Article 6 of the ECHR to appellate courts depends on the entirety of the proceeding and the role of the appellate court therein. Confirming the reasons of the lower court, if will suffice for the appellate court to only endorse the reasons for the lower court's decision or without further explanation simply apply a specific legal provision to dismiss an appeal on points of law as having no prospects of success. Contrarily, when providing reasons different from those of the lower court, the appellate court shall address the essential issues submitted to it. On the other hand, the standard is lower when rejecting the application for leave for appeal: the notion of fair procedure will be satisfied even if the appellate court simply applies a specific legal provision to dismiss an appeal as having no prospects of success, without further explanation.

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[85] *Hadjianastassiou v. Greece*, Application No. 12945/87, 16 December 1992, paragraph 33.

[86] *Ruiz Torija v. Spain*, Application No. 18390/91, 9 December 1994, paragraph 25.

[87] *Pronina v. Ukraine*, Application No. 63566/00, 18 July 2006, paragraph 23.

Summarily, the general rule under Article 6 of the ECHR is that domestic courts shall reason their judgments adequately to ensure proper administration of justice, while the extent of their reasoning depends on various circumstances, from substance of the case to characteristics of judicial legal system and level of jurisdiction.[88]

18.5.3. THE RIGHT TO GOOD ADMINISTRATION: AN ADDITIONAL VIEW

Careful consideration of the reasons for adoption of the decision could be considered also as a part of the right to good administration embodied in Article 41 of the Charter. The right to good administration is a procedural fundamental right based on the existence of the EU as subject to the rule of law[89] and codifying the general principle developed in the case law of the CJEU.[90] With the objective to compensate the disproportion between position of the parties in administrative proceedings (individuals as weaker parties v administrative authority exercising administrative power), the right underscores an individual citizen's entitlements to have their matters handled impartially, equitably, and in a reasonable timeframe by the EU: the duty of care, the right to be heard, the right of access to files, and the right to reasoned decisions.[91] Albeit directly referring to EU public administration and not to national level decision-making, it is established case law that as a general

[88] L.R. Glas, *Translating the Convention's Fairness Standards to the European Court of Human Right: An Exploration with a Case Study on Legal Aid and the Right to a Reasoned Judgment*, "European Journal of Legal Studies" 2018, Vol. 10, p. 76.

[89] S. Peers *et al.*, *The EU Charter of Fundamental Rights…*, *op. cit.*, *supra note* 60, p. 1125.

[90] Case C-249/13. *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques* [2014] EU:C:2014:2431, paragraphs 30–36; Case C-358/16. *UBS Europe SE and Alain Hondequin and Others v. DV and Others* [2018] EU:C:2018:715, paragraphs 28 and others.

[91] T. Lock, *Article 41 CFR Right to good administration*, [in:] M. Kellerbauer, M. Klamert, J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, Oxford 2019, pp. 2205–2206.

principle of EU law the concept of good administration binds also the Member States when they act in the scope of EU law.[92] The right to good administration is thus directly applicable also within national law.[93]

While also depending on the circumstances of the case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure or other parties to whom it is of direct and individual concern may have in obtaining explanations,[94] the right to good administration requires:

> *the statement of reasons to be appropriate to the act at issue and shall disclose in clear and unequivocal fashion the reasoning followed by the institution* […] *in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review.*[95]

While delivering information which enable individuals to defend their rights and interests, the statement or reasons serves also as a self-control mechanism of administration, because formulating the reasons "forces" the deciding authority to verify the motives on which their decision is based.[96] The right to good administration or more precisely, the obligation to give reasons as an element of the right to good administration will thus be infringed in the case of qualitatively (when it will not refer to all important reasons which were grounds for decision) or quantitively (when it does not clearly

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[92] Case *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, *supra note* 88, paragraphs 30–36; Case C-358/16. *UBS Europe SE and Alain Hondequin and Others v. DV and Others*, *supra note* 88, paragraphs 28 and others.

[93] C. Titirișcâ *et al.*, *The Right to Good Administration. A Special View on the Administration's Obligation to Provide Reasons for Its Decisions*, [in:] *Conferinta Internationala de Administratie si Management Public*, Editura ASE, 2020, p. 122.

[94] S. Peers *et al.*, *The EU Charter of Fundamental Rights…*, *op. cit.*, *supra note* 60, p. 1263.

[95] Case C-367/95 P. *Commission v. Sytraval and Brink's France* [1998] ECLI:EU:C:1998:154, paragraph 63 and subsequent case law.

[96] K. Stoye, *Die Entwicklung des europäischen Verwaltungsrechts durch das Gericht erster Instanz*, Freiburg 2004, p. 53.

and completely consider facts and law on which the decision is based) insufficient statement of reasons, which could consequently lead to the annulment of the administrative decision.[97]

18.5.4. CLEAR AND TRANSPARENT DECISION UNDER THE RULE OF LAW AND GOOD GOVERNANCE

As it is well known, compliance with the rule of law is a prerequisite for protection of fundamental values listed in Article 2 TEU and a prerequisite for upholding all rights and obligations deriving from the EU Treaties.[98] Despite different views as to its substance, the principle has, as a concept of universal validity,[99] "progressively become a dominant organisational model of modern constitutional law and international organisations [...] to regulate the exercise of public powers".[100] Legal scholarship generally agree that the core elements of rule of law are: 1) legality, including a transparent, accountable and democratic process for enacting law; 2) legal certainty; 3) prohibition of arbitrariness; 4) access to justice before independent and impartial courts, including judicial review of administrative acts; 5) respect for human rights; and 6) non-discrimination and equality before the law.[101] While the main components of the rule of law shall always be given, their implementation will differ from one country to another depending on judicial, historical, political, social or geographical contexts.[102]

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[97] K. Milecka, *The Right to Good Administration in the Light of Article 41 of the Charter of Fundamental Rights of the European Union*, [in:] I. Barković Bojanić, M. Lulić (eds.), *Contemporary Legal and Economic*, Third Edition, Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek, 2011, p. 54.

[98] Joined Cases C-402/05 P and C-415/05 P. *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECLI:EU:C:2008:461.

[99] Venice Commission, Rule of Law Checklist, 2016, Study No. 711/2013, p. 5.

[100] 2014 New Framework to Strengthen the Rule of Law, European Commission, pp. 3–4.

[101] Venice Commission, Rule of Law Checklist, *op. cit.*, *supra note* 97, p. 7.

[102] Ibidem, p. 9.

Careful examination of factual and legal aspects of the case and justification of the decision enables the authority to act fairly and transparently, prevents arbitrariness, ensures transparency, and makes judicial review effective. The role of the reasons as a safeguard against arbitrariness and a substantial check upon abuse of administrative power is fairly obvious: if the authority shall publicly articulate the reasoning process upon which a decision is based, it will determine the matter more carefully than if it would not be obliged to explain their decision. Giving reasons thus ensures that the authority has applied its mind to the case and that the reasons that compelled the authority to take decisions in question are relevant to the contents and scope of authority's power, as well as enable judicial review and annulment if the reasons would be irrelevant, incorrect, or non-existent.[103] Additionally, a well-considered, clear, and transparent decision minimises the possibility of unequal treatment of parties, breach of human rights, corruption, and inefficiency, which are all elements of the rule of law.[104] Further, the requirement of giving reasons makes authority less prone to errors and subject them to broader scrutiny which consequently ensures transparency in decision making. The latter is 'a hallmark of any good administrative body and a trait cherished by a democratic country',[105] as well as one of the principles of good governance.[106]

To this last note, it must be mentioned that – together with the rule of law and democracy – good governance is one of the three pillars of the modern state.[107] In this regard, Addink, providing explanation of the concept stresses that the rule of law includes the legal base of government actions and the need for protection of fundamental rights. Democracy concerns transparency and

[103] S.A. de Smith, *Judicial Review of Administrative Action*, Second Edition, Oxford University Press, Oxford 1995, p. 457.
[104] H. Addink, *Good governance: Concept and context*, Oxford University Press, Oxford 2019, p. 112.
[105] M.N. Ali, *Reasoned Decisions as a Check upon the Arbitrary Use of Discretionary Powers by the Administrative Authorities – A Comparative Study*, "Cihan University-Erbil Scientific Journal" 2018, Vol. 2, No. 1, p. 151.
[106] See: H. Addink, *Good governance…*, *op. cit.*, *supra note* 102.
[107] Ibidem, pp. 3–4.

participation of citizens and gives depth to the rule of law, while good governance is about further development of the rule of law and democracy, accountability, and efficiency of the government.[108]

Six basic elements have been defined as a hard core of good governance: properness, transparency, participation, effectiveness, accountability, and economic, social, and cultural human rights. Although detailed discussion of each of these elements is outside the scope of this paper, we have already showed that adopting reasoned decisions causes the decision to be clear and transparent, thus satisfying the principle of transparency as one element of good governance principle. Well-thought decision making is also in accordance with the principle of properness. Namely, the latter includes the requirement of formal carefulness (hearing as a part of natural justice), the prohibition of the abuse of power, nationality, proportionality, legal certainty, legal expectations, equality, and reasoning. Adequate, sufficient, and well-founded reasons correspond to principle of reasoning in the legal context, which requires the (administrative) decisions to include reasons in relation to the relevant facts, the interests involved, and the rules applicable (substantive dimension of the principle of reasoning).[109] Additionally, decisions where the authority performed adequate research of all relevant fact necessary for the adoption of a decision, gave interested parties procedural opportunities to give the deciding authority additional information on their concerns and interests and where authority identified adequately the relevant facts and interests concerning a decision, corresponds also to the (sub-)principle of carefulness. The latter is often described as the requirement of careful preparation of (administrative) decisions, i.e. collection and appropriate consideration of all necessary information necessary for the adoption of a decision.[110]

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[108] He recognises that all three principles also party overlap. Ibidem, p. 4.

[109] In its formal dimension the principle of reasoning requires existence of recognisable reasons or motives given by the administration, See: H. Addink, *Good governance…*, *op. cit.*, *supra note* 102, p. 111.

[110] Ibidem.

Hence, from this – more general – perspective, it may thus be concluded that a requirement to state reasons is not only requirement necessary under Article 6 of the ECHR and Article 47 of the Charter; its scope is more extensive: the duty to state reasons is a constituent part of the good administration, good governance, and the rule of law, all cornerstones of national as well as EU legal systems. It is a rule of legislative, administrative, and judicial decision making; exceptions to this general rule must be interpreted strictly and in the light of a substantive framework and settled case-law presented so far.

18.6. Good Practices and Effective Solutions – Some Implications *De Lege Ferenda*

The importance of equal treatment according to law and equal access to the justice system are nowadays widely recognised and praised by legal scholars, national constitutions of Member States, and the general public. These seem especially important in administrative procedures, where parties generally do not have an equal standing: when private and public interests collide, an individual has to face the state as his "opponent" in an administrative procedure, the latter generally having more knowledge (individuals are often not familiar with the law) and especially far more resources than an ordinary individual. To minimise negative consequences of such situations and to ensure the equality of arms between parties, regulation of administrative procedure focuses on ensuring the same procedural rights to all parties, unless distinctions are based on law and are justified on objective and reasonable grounds.[111] The request to turn to the CJEU for interpretation or validity of EU law is one of the situations in which equality of arms and equality in general shall be ensured.

[111] The principle was developed in ECtHR practice. See: ECtHR's Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trail (civil limb), https://www.echr.coe.int/documents/d/echr/guide_art_6_eng [access: 04.10.2023], pp. 90–92.

In essence, national judges have an exclusive competence to assess whether a question of EU law is relevant and necessary to resolve the dispute between parties in the main proceedings. In this regard national courts may either make their own motion (when the parties have not invoked the issue related to the EU law) or follow the suggestion of one or both parties to refer to the CJEU. And the other way around: because national courts have exclusive competence, they are not, when parties do submit a motion for preliminary reference, obliged to turn to the CJEU. They may decide not to refer. However, in this case (and under precondition that party's submission was appropriately substantiated) the analysis of the case law of the CJEU and ECtHR provided in this paper has shown that national courts of last instance shall adopt a sufficiently clear position – give reasons and explain – why they decided not to ask the CJEU for a preliminary ruling. Additionally, the justification of the court's decision not to refer not only corresponds to the requirements prescribed for all decision-making by Article 6 of the ECHR and Article 47 of the Charter but is also in accordance with general principles and values guaranteed at EU and national levels, i.e., with the rule of law, good administration, transparency, and good governance.

Although the above-described position seems clear in the case law of both Courts, not all national courts, especially when national procedural provisions enable them to dismiss national remedy without explanation or simply by reference to the non-existence of conditions provided in law, follow such practice. The Supreme Court of the Republic of Slovenia, despite the different opinion of the Constitutional Court of the Republic of Slovenia, is one such example – until they obtain the CJEU's answer to their preliminary reference, that is.

Against the substantive framework presented in this paper, the practice of dismissal of party's motion for preliminary reference without adequate reasons for such decision presents a practice that should be avoided. To satisfy the giving reasons requirement, avoid arbitrariness, ensure transparency and equality of arms in administrative procedures, and ensure the effectiveness of the preliminary procedure of Article 267 TFEU, we propose to the Polish judiciary

(as well as judiciary of all Member States) to always provide adequate justification for dismissal of party's motion to refer to the CJEU. Giving reasons requirement shall, in our opinion, be respected even when such motion is included in a submission or legal remedy for which national law prescribes dismissal without explanation or solely with reference to the non-existence of the criteria established by law (summary proceedings). Alternatively, beside establishing settled case law in this regard, the same result could be achieved also through legislation: in this manner the amendment or establishment of national rules governing administrative and civil procedures determining mandatory statement of reasons when party's request for preliminary reference before the court of last instance is dismissed would be necessary.

Such obligation imposed on national courts (either through settled case law or by law) would not represent too much of a burden to national judges and would therefore not influence their effectiveness (in a sense of additional workload). Namely, in the specific context of Article 267(3) TFEU, the ECtHR and CJEU established that the reasoning shall be bound only to justification in the scope of the CILFIT criteria. As already mentioned in this paper, the CILFIT criteria demand from national courts do indicate why the national court has found that the question is irrelevant, that the EU law provision in question has already been interpreted by the CJEU (*acte eclaire*), or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte eclaire*). Because national courts shall, in any case, determine all factual circumstances of the case and then determine (EU) legal rules applicable to the case, justification in this scope should not, in our opinion, be too difficult or too time-consuming. Admittedly, however, the CILFIT criteria are not without problems. Several legal scholars as well as the AG has pointed to inoperability of the criteria, showed that the doctrine is being applied inconsistently by the CJEU, and called for the revision of the CILFIT test.[112] Although another full-length paper would be

[112] See for example: E. Gambaro, I. Bellini, *Preliminary Ruling and Court of Last Instance: Do the EU's 'CILFIT' Criteria Need to Be Revisited?*, May 2021, GTLaw, www.gtlaw.com [access: 04.10.2023]; Case *Consorzio Italian Management and Catania Multiservizi SpA v. Rete Ferroviaria Italiana SpA*, ECLI:EU:C:2021:291,

needed for a detailed analysis of the (in)appropriateness of CILFIT criteria, at the time of writing this paper the CILFIT criteria are still valid criteria, as was confirmed by the CJEU in the case *Consorzio Italian Management*.

For the purpose of guidance for the Polish courts as well as courts of other Member States, the current standing point of the CJEU in regard to criteria may be briefly summarised in the following way: a) the national court does not need to make a reference where the answer to the question of EU law can in no way affect the outcome of the case, whatever that answer may be (criteria of irrelevance); b) no reference need to be made if the question is materially identical to one already subject to a preliminary ruling in a similar case or where established case law of the CJEU has resolved the legal issue (irrespective of the proceedings and even if the issues in dispute are not strictly identical, *acte eclaire*). If national courts have trouble understanding the scope of previous CJEU ruling, they must nonetheless make a reference. The reference shall also be made if they consider it appropriate to do so;[113] c) no reference need to be made where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte eclaire*). In this regard, the national court of last resort must be convinced that the matter is equally obvious to its counterparts in other Member States and must consider the characteristic feature of EU law, the particular difficulties to which its interpretation gives rise to, and the risk of divergences in judicial decisions within the EU. The national court must also bear in mind the divergences in various language versions, as well as the fact that EU law has its own terminology and concepts that may not correspond to the scope and nature of similar national institutes. EU law provision must be thus placed in the context of EU law as a whole. On the other hand, the fact that it is possible to interpret EU law in different ways is not sufficient to create a reasonable doubt as to interpretation where those different ways are not deemed sufficiently plausible. Where a national court is

Opinion of AG Bobek [2021], *supra note* 30. AG suggested a different test. Paragraphs 134 and subsequent. The CJEU upheld the CILFIT test and did not follow the opinion of AG Bobek.

[113] Paragraphs 37–38.

aware of diverging lines of case law either within the state or across national courts in a number of states, it has to be particularly vigilant as to whether there is reasonable doubt as to interpretation and have regard to the objective of uniform interpretation. Only having had regard to all these caveats can a national court conclude that there is no reasonable doubt to be had as to the correct interpretation.[114]

In line with the CJEU reasoning, the reasoning of the ECtHR, as well as the broader legal context shown in this paper, we argue, as already mentioned, that the obligation to state reasons for non-referral applies also when national procedural rules provide otherwise: even in cases where national procedural rules – as this is the case in the Republic of Slovenia – provide for summary reasoning when dismissal of submission or legal remedy is concerned, such dismissal shall nonetheless, to comply with the Charter and ECHR as well as with EU law in general, provide for sufficient and appropriate explanation why the national court considered that it is relieved from the duty to refer (CILFIT exceptions). Different interpretation is contrary with the requirements of EU law and shall be considered as inappropriate. National procedural rules enabling the absence of reasons in matters related to the preliminary reference procedure shall, in our opinion, in these cases not be applied or shall be interpreted in accordance with requirements stemming from EU law.

Overall, such practice or national procedural rules would, beside guaranteeing well-considered decisions of national courts and appropriate application of the preliminary-ruling procedure provided in Article 267 TFEU (the motion of individual for referral could not be simply disregarded or arbitrary dismissed), lead to consistency, full effect, autonomy, and the particular nature of the EU law established by the Treaties,[115] and would thus have positive consequences on EU legal system as whole.

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[114] I. Maher, *The CILFIT Criteria Clarified and Extended for National Courts of Last Resort Under Art. 267 TFEU*, "European Papers" 2022, Insight of 26 May 2022, Vol. 7, No. 1, European Forum, pp. 265–274.

[115] Case *Consorzio Italian Management*, *supra note* 30, paragraph 27. See also: Case C-284/16. *Slowakische Republik v. Achmea BV* [2018] EU:C:2018:158, paragraph 37 and case-law cited therein.

18.7. Conclusions

This paper examines the obligation to state reasons when party's motion for initiation of preliminary reference procedure before the CJEU is dismissed. After presenting the case law of the Supreme Court of the Republic of Slovenia and Slovenian procedural rules in regard to the appeal on a point of law, the paper analyses the case law of the ECtHR and the CJEU and shows that the case law of both courts and Slovenian case law differ: while the latter does not provide reasons when dismissing party's motion included in a submission for which national procedural rules enable dismissal without giving reasons, the first firmly holds a position that dismissal of party's request for preliminary reference shall be reasoned in order to prevent possible arbitrary decision-making; acting in another way would, following the line of reasoning of both courts, lead to the violation of Article 6 of the ECHR and Article 47 of the Charter. The paper then positioned the giving reasons requirement in broader context of EU law and in Part 6 provided some *de lege ferenda* propositions and best practices for the Polish legislator and judiciary.

In conclusion, we assert that the right to a reasoned decision is of outmost importance at the national and EU level.[116] Consequently, the authority adopting the decision shall, taking into account the information and statements of the parties, carefully and impartially examine all the relevant elements of the case under consideration and reason its decision in detail, whereby the extent of the obligation to state reasons may vary according to the nature of the decision and must be examined, in the light of the proceedings taken as a whole and all the relevant circumstances, taking account of the procedural guarantees surrounding that decision, in order to ascertain whether the latter ensure that the persons concerned have the possibility to bring an appropriate and effective appeal against that decision.[117]

[116] S. Peers *et al.*, *The EU Charter of Fundamental Rights…*, *op. cit.*, *supra note* 60, pp. 1367–1368.

[117] Case C619/10. *Trade Agency Ltd v. Seramico Investments Ltd.* [2012] ECLI:EU:C:2012:531, paragraph 55.

This applies also in situations where parties request the national court of last instance to initiate preliminary reference procedure, which is the "keystone of the judicial system established by the Treaties" and which sets up a dialogue between the CJEU and the court of the Member States, the later entrusted to ensure the full application of EU law and to ensure effective judicial protection of the rights of individuals under that law, and the first equipped with exclusive jurisdiction to give the definite interpretation of EU law.[118] The adequacy of reasoning in the procedure in which the question of EU law arises is crucial, because absence or inadequacy of such reasoning may disregard or deny the conditions determined in EU law under which the question must be referred to the CJEU for a preliminary ruling. Failure to submit a question to the CJEU may therefore result in a court that is not competent to answer questions of EU law deciding on them, or even not ruling on aspects of the application of EU law. The reasoning of the court, which refers to aspects of EU law, including the dismissal of the party's proposal to submit the question to the Court, must therefore be such that it allows to test whether the conditions of the duty to submit from Article 267(3) TFEU have been considered in a manner that is consistent with these conditions. National courts shall thus provide appropriate statement of reasons (CILFIT exceptions) when they decide not to call upon the CJEU to interpret the law applicable in an individual case, even in situations where national procedural rules suggest otherwise. Acting in this way will guarantee full effectiveness of the giving reasons requirement as established by EU law and ECHR.[119]

[118] See, to that effect: Case C-741/19. *République de Moldavie v. Komstroy LLC* [2021] EU:C:2021:655, paragraph 45.

[119] In its judgment in Kubera adopted on 14 October 2024 the CJEU agreed with arguments established in this paper by stating that: "1. the third paragraph of Article 267 TFEU must be interpreted as precluding a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law from deciding – in proceedings relating to the examination of an application for leave to appeal on a point of law the outcome of which depends on the significance of the legal issue raised by one of the parties to the dispute with respect to legal certainty, the uniform application of the law or its development – to refuse such an application for leave without having assessed whether it was obliged to submit to the Court of Justice for a preliminary ruling a question concerning the interpretation or validity of a provision of EU law raised in

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support of that application. 2. Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law must set out, in its decision refusing an application for leave to appeal on a point of law containing a request that a question concerning the interpretation or validity of a provision of EU law be referred to the Court of Justice for a preliminary ruling, the reasons why that reference was not made, namely that that question is irrelevant for the resolution of the dispute or that the provision of EU law in question has already been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt."

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Chapter 19. Digitalisation of Judicial Proceedings in Administrative Matters as a Means of Ensuring the Right to a Fair Trial

19.1. Introduction

Every right can be effectively enjoyed only if persons have the opportunity to claim it and to protect it through legal means. This is an important element in upholding the rule of law.[1] Article 6 of the European Convention of Human Rights (ECHR) provides guarantees for protection of Right to a fair trial, stating that "everyone is entitled to a fair and public hearing within reasonable time". Similarly, Charter of Fundamental Rights of the European Union provides "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before

[1] The meaning of the right to access justice can be narrowly interpreted as the possibility for individuals to bring claims before a court and have a court adjudicate them. In a broader sense, it contains: "the right of an individual not only to enter a court of law, but [also] to have his or her case heard and adjudicated in accordance with substantive standards of fairness and justice". See: F. Francioni (ed.), *Access to Justice as a Human Right*, Oxford University Press, Oxford 2007, p. 6; J. Kirsiene, D. Amilevicius, D. Stankeviciute, *Digital Transformation of Legal Services and Access to Justice: Challenges and Possibilities*, "Baltic Journal of Law and Politics" 2022, Vol. 15, No. 1, p. 150. See also: J. Bass, W.A. Bogart, F.H. Zemans (eds.), *Access to Justice for a New Century – The Way Forward*, Law Society of Upper Canada, Toronto 2005.

a tribunal".[2] The European Court of Human Rights interpreted the right to a fair trial from Article 6 of the ECHR and developed categories that are an integral part of the content of the concept of fair trial, which are not explicitly stated in the text of the ECHR itself. The elements of the right to a fair trial are the fairness of the trial, the right to a public hearing and a trial within a reasonable time, the hearing of the case by a court established by law, the independence and impartiality of the court, the right to access the court, the principle of equality of arms, the right to be present at the trial and the right to an oral hearing, the right to a lawyer, etc.[3]

In administrative court proceedings, in contrast to other court proceedings (such as criminal and civil court proceedings), an administrative proceeding before an administrative authority mandatory precedes court protection. Thus, the administrative procedure and the administrative dispute form a complementary unity in which citizens protect their rights and interests, and they must be seen together when assessing the respect of the right to a fair trial. In Croatia this includes 4 levels of proceedings (two levels of administrative procedure and 2 levels of administrative judicial protection) in which the citizens exercise their rights and interests, often resulting from lengthy proceedings. But could the digitalisation of Administrative Justice proceedings be a tool to improve the respect of the fair trial in administrative matters? What could be the impact of digitalisation on better respect for the right to a fair trial?

The legislative framework for the digitalisation of the Administrative Justice System should be adapted to the new circumstances triggered by the digitalisation of court proceedings, taking care to ensure the protection of the impartiality, efficiency and transparency of the judicial system, which ensures fair and efficient administrative disputes as well as the respect for individual rights. The key

[2] See: Article 47 of the Charter of Fundamental Rights of the European Union, Official Journal of the European Union, L 326, 26.10.2012, pp. 391–407.

[3] See: D. Bodul, S. Grbić, Ž. Bartulović, *Pravo na pošteno suđenje i e-Pravosuđe: sistemska greška ili korak naprijed u zaštiti prava?*, "Harmonius: Journal of Legal and Social Studies in Southeast Europe" 2021, p. 19; M. Maika, *The Implementation of e-Justice within the Framework of the Right to a Fair Trial in Ukraine: Problems and Prospects*, "Justice in Eastern Europe" 2022, No. 3, pp. 252–255.

changes were implemented through amendments to the General Administrative Procedure Act and the Administrative Disputes Act, as well as a number of by-laws. When amending the legal framework that will regulate the functioning of the administrative dispute in the digital environment, it was necessary to take into account that the digitalisation of the judiciary goes beyond the technical level of the modernisation of the judiciary, and can have significant impact on the protection of the right to a fair trial.

The aim of this paper is to analyse how information communication technology (ICT) could be used more often in administrative court proceedings, all with the aim of speeding up these proceedings, facilitating citizens' access to court files and reducing costs for the parties participating in these proceedings. Also, the aim is to propose a relevant legal framework concerning digitalisation of the Administrative Judiciary in order to conduct administrative proceedings in an impartial, efficient and transparent manner and thus contributing to the respect for the right to a fair trial from Article 6 of the ECHR. In order to respond to the set objectives, the following text will present the development of administrative court proceedings in Croatia (Chapter 19.2), then the specifics of administrative dispute compared to other court proceedings (Chapter 19.3), and the legal framework for electronic communication in administrative court proceedings (Chapter 19.4). Furthermore, the text elaborates the impact of digitalisation on the respect for the right to a fair trial, namely a trial within a reasonable time (Chapter 19.6), transparency, and access to court records (Chapter 19.7), and the impartiality of the court in administrative matters (Chapter 19.8).

19.2. Development of Administrative Judicial Proceedings in the Republic of Croatia

The development of administrative judiciary in Croatia, i.e., the judicial protection of rights and interest of parties from the illegal work of the administration, has a long tradition, and traces its roots back to the legal regulation of administrative litigation in the Austria-Hungary Monarchy. Although the territory of Croatia went through

different state unions, the legal past shows a relatively high degree of continuity in the legal regulation of numerous issues of administrative judiciary (the question of the subject of judicial control, the control of the legality of acts, the dispute of full jurisdiction, etc.).[4]

Important changes in the administrative dispute procedure occurred with the adoption of the new Administrative Disputes Act in 2010. The changes affected the subject of the administrative dispute, abandoning the single-level administrative proceedings, prescribing the obligation to establish the facts and conducting a hearing, and expanding the possibilities for making reformation decisions in the administrative dispute.[5] The subject of the administrative dispute from the assessment of the legality of an administrative act was extended to the assessment of the legality of general acts of local and regional self-government units, legal entities that have public authority powers and legal entities that perform public service. The organisation of the court network was also changed in such a way that the one-level administrative court organisation was replaced with a two-level structure of the administrative court. Four new first-instance administrative courts were introduced, and the Administrative Court of the Republic of Croatia was renamed to the High Administrative Court of the Republic of Croatia.[6]

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[4] See: D. Medvedović, *Razvoj upravnog sudovanja u Hrvatskoj*, [in:] I. Korpić (ed.), *Europeizacija upravnog sudovanja u Hrvatskoj*, Institut za javnu upravu, Zagreb 2014, pp. 90–91. Also see: A. Đanić Čeko, *Razvoj pravne zaštite građana putem žalbe u upravnom sporu u Hrvatskoj*, "Croatian and Comparative Public Administration" 2021, Vol. 21, No. 3, pp. 489–528.

[5] D. Đerđa, Z. Pičuljan, *Nastanak i temelji instituti novog Zakona o upravnim sporovima*, *Europeizacija upravnog sudovanja u Hrvatskoj*, Institut za javnu upravu, Zagreb 2014, pp. 93–120.

[6] From 1 January 2012, the Administrative Court of the Republic of Croatia continued its work as the High Administrative Court of the Republic of Croatia. The Administrative Disputes Act, which entered into force on 1 January 2012, as well as the Law on Amendments to the Act on Courts, introduced a two-stage administrative dispute procedure. First-instance administrative courts were established in Zagreb, Split, Rijeka and Osijek, as well as the High Administrative Court of the Republic of Croatia. See: Administrative Dispute Act, Official Gazette of the Republic of Croatia No. 20/10; Court Act, Official Gazette of the Republic of Croatia No. 130/11.

Furthermore, until these legal changes, the Administrative Court could only exceptionally determine the facts of a case and this was envisaged only in three situations. The administrative court was entitled to establish the facts based on the state of the administrative authority file created in the administrative procedure. In relation to the above, the new Administrative Disputes Act introduced an important conceptual change in administrative disputes and prescribed the obligation of the direct establishment of the facts by the court and the mandatory holding of a hearing. Finally, important changes are related to the authority of the administrative court in hearing administrative disputes. The dominant cassation powers of the administrative court have been expanded to the mandatory substantive resolution of the administrative matter. This significantly changed the legal framework of administrative disputes in Croatia. We agree with Đerđa and Pičuljana that the aforementioned change represents a legal discontinuity in relation to the previous administrative judicial control of the public administration.[7] We can conclude that with these changes, an important reform phase of the administrative court proceedings in Croatia has been completed.

In addition to the change in the legislative framework, the consolidation of the efficiency of the administrative courts and the strengthening of the staffing of the administrative court was gradually implemented. Namely, the administrative court was faced with a large number of pending cases for years. For example, at the end of 2011 there were 32,452 pending cases.[8] Ten years later, the total number of pending cases at the administrative courts has significantly decreased, and at the end of 2021 it numbered 8,305 pending cases.[9] The above is certainly the result of the introduction of new administrative courts and a significant increase in the number of administrative judges and judicial advisers in administrative courts. Namely, the number of judges and court advisors has gradually

[7] See: D. Đerđa, Z. Pičuljan, *Nastanak i temelji institute…*, *op. cit.*, p. 94.

[8] See: Annual Report of the president of the Supreme Court on the state of judicial power for 2013, October 2014, pp. 62–65.

[9] See: Annual Report of the president of the Supreme Court on the state of judicial power for 2021, April 2022, pp. 80–82.

doubled compared to the number that existed at the Administrative Court of the Republic of Croatia. At the same time, the number of judges and judicial advisers at the High Administrative Court was gradually reduced, while at the same time their number at first-instance administrative courts was increased. Thus, in 2021 the number of judges and judicial advisers at the High Administrative Court was reduced to 42. The opposite trend occurred in 4 administrative courts of the first instance. In 2012 there were only 23 judges, but in the last few years that number has stabilised at 58–60 judges and court advisors.[10]

In parallel with the reform of the administrative dispute, the reform of public administration was taking place. Đanić Čeko and Guštin point out that the public administration reform had:

> *three significant reform phases, namely the phases of foundation, consolidation and Europeanisation, whereby, of all the mentioned phases, the Europeanisation phase is by far the most important phase of the Croatian public administration reform. Namely, in the phase of Europeanisation, the adoption of European administrative standards began, especially the strengthening of transparency and the fight against corruption. The latter phase also meant making the most of the possibilities of the ICT and digitalisation, and thus facilitating citizens' access to the public administration and its services.*[11]

Ten years should have passed for the initiation of new important reform changes that should bring citizens further steps towards better protection of citizens' rights, human rights and fundamental freedoms. It is a reform of the digitalisation of administrative court proceedings, which is not limited to the introduction of modern

[10] See: All Annual Report of the president of the Supreme Court on the state of judicial power from 2013 till 2022 on: https://www.vsrh.hr/izvjesca-o-stanju-sudbene-vlasti.aspx [access:17.04.2023].

[11] See: A. Đanić Čeko, M. Guštin, *Digitalizacija hrvatske javne uprave s posebnim osvrtom na sustav socijalne skrbi*, "Zbornik Radova Pravnog Fakulteta u Splitu" 2022, Vol. 59, No. 4, p. 793.

technologies into the judiciary but represents an important means of protecting the right to a fair trial. The digitalisation process of the Croatian judiciary began in 1999 with the introduction of the first information tools at the Administrative Court of the Republic of Croatia. It continued with the introduction of court management information system (CMIS or e-Files) in the courts. The aforementioned process began in 2001 and ended in 2021 with the introduction of CMIS at the administrative courts. The introduction of the CMIS to all courts in Croatia enabled real-time statistical and analytical monitoring of the work and functioning of the judiciary as a whole, monitoring different types of court proceedings, monitoring efficiency of individual courts, as well as monitoring of cases management of individual cases. A particularly important feature of the CMIS is the automatic and random assignment of cases to judges and court advisors. This functionality is extremely important because it is the European standard in ensuring the impartiality and independence of the judiciary as well as impartiality of individual judges.[12]

The next step in the digitalisation of the judiciary was aimed at the inter-connection or interoperability of different information systems used in the judiciary. Namely, the CMIS is not the only IT case management system developed at the judicial level. In addition to it, there is an IT case management system for the prosecutors and state attorney's office, an e-Land registry system, an e-Enforcement system, etc. In addition, this step had to create the prerequisites for creating a complete digital court file, as well as for replacement of the paper court case archive with a digital archive. In order to achieve this, it was necessary to ensure that all documents are created in digital form and that they are stored as such in an e-File. To achieve that, it was necessary to introduce electronic communication with digital signatures on all correspondence between courts and court users as well as to create electronic court decisions. So, all the documents in court proceedings could be stored electronically, avoiding any need for its scanning. A particular challenge when creating fully

[12] See: B. Ljubanović, B. Britvić Vetma, *Sustav eSpis u funkiji efikasnog djelovanja upravnih i sudskih tijela*, "Zbornik Pravnog Fakulteta Sveučilišta u Rijeci" 2020, Vol. 41, No. 1, p. 317.

digital files was to ensure the flow of all documents sent to the court in digital form. With these goals, the e-Communications project was designed in Croatia, which was firstly launched in 2017 at the Commercial Court in Bjelovar, and was gradually expanded to all commercial courts, and then to all municipal and county courts. Finally, administrative courts were included in the e-Communication system in 2022.[13]

The e-Communications project established a safe and fast way of electronic communication between the court and its users.[14] The first users who were connected to the e-Communication system were lawyers and public notaries. They were followed by bankruptcy trustees, state attorneys' offices, and court experts. The process of including all users in the system has not yet been completed. This particularly applies to all administrative bodies (state and local government administration) which have yet to establish e-Communication with administrative courts. The precondition for this is the digitalisation of the administrative procedure conduct by the administrative authorities, with the aim of creating a digital administrative file. Namely, this would enable electronic sending of files to administrative courts or remote access to the administrative files by administrative courts.

Finally, the technological development of societies is taking place at an ever-increasing speed, so that the previous successes in the digitalisation of the judiciary are already imposing new challenges and new activities in the reform of the judiciary. Digitalisation of the judiciary will create conditions for the use of artificial intelligence (AI) in the judiciary. Legal AI can theoretically play a significant role in the legal domain, as it can reduce heavy and redundant work for legal professionals, and it can also provide a reliable reference

[13] See more about the digitization of procedural law in Croatia: D. Bodul, J. Nakić, *Postojeće mogućnosti digitalizacije građanskog pravosuđenja – adekvatan odgovor u vrijeme krize?*, "Informator" 2020, No. 6625; S. Aras Kramar, *Novine u elektroničkoj komunikaciji u parničnom postupku*, "Pravo i Porezi" 2022, No. 9, p. 30; S. Aras Kramar, *Novi Pravilnik o elektroničkoj komunikaciji*, "Pravo i Porezi" 2022, No. 2.

[14] See more about electronic delivery: L. Vojković, *Dostava u parničnom postupku*, "Informator" 2023, No. 6776, p. 3.

to those who are not familiar with the legal domain, serving as an affordable form of legal aid.[15] Namely, the availability of data in digital format is crucial for the development of artificial intelligence in the judiciary, and it is the digitalisation and electronic communication that should lead to the creation of an electronic file and the electronic storage of all court decisions and submissions. This would provide the necessary data with which artificial intelligence could facilitate the search for relevant court practice, lead to an increase in the predictability of the outcome of court proceedings, and help in writing submissions and court decisions.[16]

19.3. Specifics of the Administrative Dispute and Their Impact on Respect for the Right to a Trial within a Reasonable Time

Administrative court proceedings have certain specificities in relation to other court proceedings (civil and criminal proceedings), which have a direct impact on the respect of the right to a fair trial from Article 6 of the ECHR. The specifics of the administrative dispute are directly linked to the length of administrative court proceedings as well as concern uncertainty related to the final decision on the merit by which rights and interests of citizens are determined. Excessively long court and administrative proceedings are one of the biggest problems of the Croatian legal system. Slowness in procedures and delay in the application of material norms represents a refusal of justice and, in fact, a special type of illegality[17] and at the same time a violation of fundamental human rights.

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[15] See: J. Kirsiene *et al*., *Digital Transformation of Legal Services…*, *op. cit*., pp. 152–153. See also: K.D. Ashley, *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age*, Cambridge University Press, Cambridge 2017.

[16] See more on use of AI in judiciary in: F. Spyropoulos, E. Androulaki, *Aspects of Artificial Intelligence on e-Justice and Personal Data Limitations*, "Journal of Legal, Ethical and Regulatory Issues" 2023, Vol. 26, No. 3, pp. 1–8.

[17] See: M. Sikić, *Pitanja uređenja i primjene pravne zaštite od šutnje uprave u Republici Hrvatskoj*, "Zbornik Pravnog Fakulteta Sveučilišta u Rijeci" 2008, Vol. 29, No. 1, p. 491.

In the administrative procedure, the administrative authority has the obligation to resolve the administrative matter by adopting an administrative act (decision). An administrative matter is considered to be any matter 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.[18] Decisions related to citizens' rights, taxes, permits, urban plans and the like are often made in administrative matters. These decisions can have significant consequences for the parties, so it is important that proceedings are held within a reasonable time to avoid unnecessary delays. Due to the specific monopoly position of the administration, there is a constant danger of them abusing their position, either by illegally denying citizens' requests, or by delaying or not deciding on requests. In this second case the problem is known as the silence of administration.[19] Instead of the administrative authority expressly making a positive or negative decision, it remains silent and thus creates an uncertain legal situation for the party.[20]

The quality of administrative court decisions can also be measured according to its pace.[21] Radulović concludes that the right to a trial within reasonable time is the right to fast (efficient) and at the same time "fair" justice.[22] Judicial activity should be guided by the principle of effectiveness in proceedings before the courts,

[18] See: Article 2 paragraph 1 of the Law on General Administrative Procedure, Official Gazette of the Republic of Croatia No.: 47/09, 110/21.

[19] See more on the silence of judiciary in: M. Šikić, *Pitanja uređenja i primjene pravne zaštite od šutnje uprave u Republici Hrvatskoj*, "Zbornik Pravnog Fakulteta Sveučilišta u Rijeci" 2008, Vol. 29, No. 1, pp. 491–521.

[20] See: J. Omejec, *"Razumni rok" u interpretaciji Ustavnog suda Republike Hrvatske*, [in:] J. Crnić, N. Filipović (eds.), *Ustavni sud u zaštiti ljudskih prava; interpretativna uloga Ustavnog suda*, Organizator, Zagreb 2000, p. 132.

[21] B. Britvić Vetma, *Europska konvencija za zaštitu ljudskih prava (članak 6) i Zakon o upravnim sporovima*, "Zbornik Radova Pravnog Fakulteta u Splitu" 2012, Vol. 49, No. 2, p. 409.

[22] See: A. Radolović, *Zaštita prava na suđenje u razumnom roku – realna mogućnost, (pre)skupa avantura ili utopija?*, "Zbornik Pravnog Fakulteta Sveučilišta u Rijeci" 2008, Vol. 29, No. 1, p. 282.

which manifests itself as a postulate of the quality of judicial protection, and through the working methods applied by the courts in the proceedings.[23] Therefore, the court is obliged to try to conduct the procedure without delay and with as few costs as possible. The same rule applies in administrative matters.[24]

In the event of a contest of an administrative act before the Administrative Court, the task of the court is to determine in the administrative dispute whether a legal decision was made by the administrative authority in concrete administrative matter.[25] The Administrative Disputes Act defines the goal of an administrative dispute. The goal of administrative litigation is 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 authority".[26] From this legal provision, it could be concluded that the goal of "administrative dispute today is not only to achieve that public authority respect objective law, but also that individuals are protected from the administration".[27] We can agree with Đerđa when he points out the importance of judicial control of the work of the administration. He points out that judicial supervision of the legality of the work of the administration, including the administrative

[23] See: J. Omejec, *"Razumni rok"…*, *op. cit*., p. 131.

[24] Article 10 of the Law on General Administrative Procedure defines the principle of efficiency and economy in such a way that it prescribes: "Administrative matters are handled as simply as possible, without delay and with as few costs as possible, but in such a way that all facts and circumstances essential to the resolution of administrative matter."

[25] For more on the administrative matter and administrative act, see: B. Britvić Vetma, N. Pičuljan, *Pravo uređenje i glavna obilježja upravnog postupka u Republici Hrvatskoj*, "Zbornik Radova Veleučilišta u Šibeniku" 2016, No. 3–4, p. 39. For more on the specifics of the administrative dispute, see: D. Jurić-Knežević, *Objektivni upravni spor – pogled na praksu Visokoga upravnog suda*, "Pravo i Porezi" 2016, No. 11, pp. 45–48. See also: G. Loje, *Upravno sudovanje I upravni spor*, "Pravo i Porezi" 2016, No. 11, pp. 58–60.

[26] See: Article 2 of Administrative Dispute Act. For more on the subject of the administrative dispute, see: D. Đerđa, *Upravni spor u Hrvatskoj: sadašnje stanje i pravci reforme*, "Zbornik Pravnog Fakulteta Sveučilišta u Rijeci" 2008, Vol. 29, No. 1, pp. 8–12.

[27] See: I. Jažić, *Utjecaj europskih standarda na upravni spor u Republici Hrvatskoj*, magistarski rad, p. 7.

disputes, represents one of the most important issues of administrative law in every country. The guaranteed degree of judicial protection, as well as its effectiveness, are key elements in the evaluation of any modern legal system. The principle of judicial protection safeguards individuals whose rights have been violated and prevents the executive and administrative authorities from exceeding their powers. As the application of the vast majority of European legal provisions are under the supervision of administrative courts, the European Union attaches great importance to the functioning of administrative courts.

Administrative court proceedings are often limited to a court supervisory activity in assessing the legality of administration authorities' decisions. However, it can be asserted that the administrative dispute is the most significant form of judicial control over legality of an administrative act, and the effectiveness of judicial supervision over the activity of the administration in every country largely depends on the proper organisation of this legal institute. Judicial supervision over the work of the administration is primarily aimed at protecting the rights of citizens, but it also has very strong implications for the economy of each country, given that trade and investments in general largely depend on the decisions of public authorities. Finally, the efficient work of administrative courts greatly contributes to the transparency of the work of the administration, represents an important role in the fight against corruption, and is the basic lever in the organisation of legal, efficient and modern administration.[28]

The next peculiarity of administrative proceedings refers to the circulation of court files. While the circulation of court files in civil and criminal matters takes place within the judicial system, in administrative matters the file is first submitted to the court by the administrative authorities, and only in the case of an appeal against the verdict is it submitted to a higher court.[29] In addition, as there

[28] See: D. Đerđa, *Neka rješenja novog uređenja upravnog spora u Hrvatskoj*, "Zbornik Radova Pravnog Fakulteta u Splitu" 2010, Vol. 47, No. 1, pp. 65–66.

[29] Along with the answer to the lawsuit, the defendant is obliged to submit to the court all documents related to the subject matter of the dispute. See: Article 32

is an e-File system, there are actually technical prerequisites to abolish the physical delivery of files to the higher court, since it can access the entire case remotely. The lengthy delivery of files between the administration authorities and the administrative courts, and among the courts of different instance can contribute to the length of the procedure and the violation of the right to a trial within a reasonable time. Similar problems were encountered in the Czech Republic, which introduced electronic data transmission through legal amendments in 2009 by introducing a new document delivery system.[30] If remote access to administrative authority files by administrative court was ensured, the need for physical file delivery would cease, and electronic delivery would speed up communication between administrative courts and parties to an administrative dispute. The precondition for a more efficient delivery system is the digitalisation of the entirety of administrative procedures before administrative authority and the establishment of interoperability between the e-File system that exists in administrative courts and those in administrative authorities.

Finally, success in an administrative dispute, does not mean that individual rights and interests are finally enforced. The outcome of administrative dispute is only the annulment of an unlawful administrative act. There is still need for enforcing the judgment of the administrative court. This means the adoption of a new administrative act by administrative authority which will address citizens' requests in line with the opinion of the administrative court judgment. Furthermore, the effective protection of a party in an administrative dispute and the establishment of legality assumes the obligation of the administrative authority to act in accordance with the judgment. Refusal of the administrative authority to enforce the court decision, acting contrary to the judgement and delaying its execution is a violation of Article 6 of the ECHR.[31] Đerđa points out

paragraph 4 of the Administrative Disputes Act, Official Gazette of the Republic of Croatia No. 152/14.

[30] See: D. Bodul, S. Grbic, Ž. Bartulovic, *Pravo na pošteno suđenje…*, *op. cit.*, p. 21.

[31] See: D. Jurić-Knežević, *Objektivni upravni spor…*, *op. cit.*, p. 16.

that the problem of effective enforcement of administrative court judgments also occurs in the Croatian legal system. Cases have been observed in administrative court practice where the administrative authority, as defendants in administrative disputes, do not act in accordance with the judgments of administrative courts. Despite the imperative law obligation to enforce the administrative court's judgement, some public authorities avoid delivering individual decisions, while others, if they make a new individual decision in a repeated administrative procedure, deviate from the court's legal understanding on the merit expressed in its judgment.[32]

The litigation position of an administrative judge is to a certain extent specific in contrast to a civil law judge. In a civil case, a judge resolves a dispute between two equal parties (between two natural and/or legal persons), while in an administrative court case, the administrative authority representing State or local government is on one side, and the individual is on the other side. In administrative dispute two parties are not equal, because the State arrays its entire apparatus against one individual. The execution of administrative and administrative court decisions places the administrative judge at the centre of the relationship between public authorities and citizens, and thus is the focus of constant review of whether the citizen is protected from the assault by the authorities.[33] When considering the enforcement of administrative court decisions, one should take into account the separate legal regime and the purpose of administrative disputes, which largely differentiates it from other court proceedings, especially from the civil or criminal ones. The specifics of administrative court decisions are reflected, for example, in no direct enforceability of the individual rights or obligations based on the judgment rendered, then in the special position of the defendant in the legal system and its monopoly

[32] See: D. Đerđa, *Izvršenje upravnosudskih odluka u Hrvatskom i usprednom pravu*, "Zbornik Radova Pravnog Fakulteta u Splitu" 2015, Vol. 52, No. 1, p. 132.

[33] See: B. Britvic Vetma, B. Ljubanovic, *Suradnja između nacionalnih upravnih sudova, Suda Europske unije i Europskog suda za zaštitu ljudskih prava u izvršavanju upravnosudskih odluka nakon Lisabonskog ugovora*, "Zbornik Radova Pravnog Fakulteta u Splitu" 2015, Vol. 52, No. 2, p. 445.

powers in undertaking certain legal actions, the impossibility of execution of judgment over the entire property of the defendant as a public authority, etc.

An important specific feature of judgments rendered in administrative disputes is reflected in the fact that, as a rule, they do not regulate a legal relationship from a material aspect, prescribing rights and obligations, but their purpose is to remove illegality from the legal system. The judicial function of administrative courts in the supervision of administrative authority activities consists in annulling an illegal decision, and the public authority is then supposed to render a new decision based on the reasoning of the verdict and to avoid repeating the mistake. Thus, the judgment rendered in an administrative dispute, as a rule, only removes an illegal individual decision from the legal system, and the competent authority should then either take some action or make another individual decision or refrain from making such a decision. As a result, a judgment rendered in an administrative dispute is not a direct source for enforcement of rights or imposition of obligations on a person, but rather an obligation for competent authority to act in order to protect such a right by passing adequate acts.[34]

19.4. The Legal Framework Regulating Electronic Communication in Administrative Court Proceedings

When observing the functioning of the judicial system as well as public administration, everything that has been achieved in the digitalisation of public administration and administrative judiciary is of particular importance. Thanks to digitalisation, the functioning of the system has been made possible in special conditions, such as the COVID-19 pandemic. It has been possible for citizens to initiate the relevant procedures for realisation and protection of their rights and interests before administrative bodies and administrative courts without the need to physically present themselves before these bodies. Important legal preconditions for the digitalisation of state

[34] See: D. Đerđa, *Izvršenje…*, *op. cit.*, p. 137.

administration were set in 2014, when the e-Citizens system was launched in Croatia.[35] Since then, that system has been constantly upgraded and it contains a number of digital services that enable the citizens to communicate electronically with the administration, thereby reducing the need for physical visits to public legal bodies.[36] The importance of digital systems is reflected in the speedy reactions of courts and public administration bodies, and the possibility of using a digital one-stop-shop, which fully enables the use of public administration services in one (virtual) place. The process of the digitalisation of the justice system and public administration leads to the increased accessibility of the courts and administration for the citizens. By using modern technologies, a significantly higher level of efficiency and transparency is achieved, and this has resulted in a higher level of responsibility in work. The citizens are given the opportunity to access information and services with significant time savings. However, in order for all this to be possible, it was necessary for administrative courts in Croatia to adopt the legal framework for electronic communication.

The legal framework for electronic communication and remote access to the administrative courts and public authorities consists of several laws and by-laws. Part of the legal framework consists of the legislation creating general conditions for the digitalisation of Croatian society as a whole, while others are specifically related to the proceedings before administrative bodies and administrative courts. The first group of laws includes the Electronic Signatures Act from 2002 and the State Information Infrastructure Act from 2014. The Electronic Signature Act has created a legal framework that regulates validity and legal effects of the use of electronic signatures as indispensable means of ensuring reliability in electronic

[35] The e-Citizens system was established with the aim of modernising, simplifying and speeding up communication between citizens and the public sector and increasing the transparency of the provision of public services. See website of e-Citizens: https://gov.hr/en [access: 14.05.2023].

[36] *Vidi*: A. Đanić Čeko, M. Guštin, *Digitalizacija hrvatske javne uprave…*, *op. cit.*, pp. 796–797.

communication.[37] The State Information Infrastructure Act creates legal conditions for functioning in a virtual environment.[38] Additionally, a Regulation on organisational and technical standards for connecting to the state information structure regulates the issue of how to connect different public e-Services.[39]

The legal framework governing the key issues of electronic communications with authorities in administrative matters are the Administrative Procedure Act,[40] the Administrative Disputes Act,[41] the Regulation on Electronic Communication,[42] the Regulation on the Work in e-File system,[43] and Court Rules of Procedure.[44] In addition, in an administrative dispute, the Civil Procedure Act could also be applicable.[45] The aforementioned legal framework defines the main issues of digital proceedings before administrative authority and administrative courts, such as the electronic submission of a lawsuit, appeal, delivery of court decisions, signing mode of submissions and decisions, and remote access to court records.

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[37] See: Electronic Signature Act, Official Gazette of the Republic of Croatia No.: 10/2002, 80/2008, 30/2014. Also see: F. Staničić, M. Jurić, *Pravni okvir za implementaciju informacijsko-komunikacijskih tehnologija u Hrvatsko upravno postupovno pravo*, "Zbornik Pravnog Fakulteta Sveučilišta u Zagrebu" 2015, No. 65, p. 639.

[38] See: State Information Infrastructure Act, Official Gazette of the Republic of Croatia No. 92/2014.

[39] See: Regulation on organizational and technical standards for connecting to the state information structure, Official Gazette of the Republic of Croatia No. 60/2017.

[40] See: General Administrative Procedure Act, Official Gazette of the Republic of Croatia No.: 47/09, 110/21.

[41] See: Administrative Disputes Act, Official Gazette of the Republic of Croatia No.: 20/10, 143/12, 152/14, 94/16, 29/17, 110/21.

[42] See: Regulation on Electronic Communication 139/2021, Official Gazette of the Republic of Croatia No. 27/2023.

[43] See: Regulation on the Work in e-File system, Official Gazette of the Republic of Croatia No. 35/2015.

[44] See: The Court Rules of Procedure, Official Gazette of the Republic of Croatia No.: 37/14, 49/14, 08/15, 35/15, 123/15, 45/16, 29/17, 33/17, 34/17, 57/17, 101/18, 119/17, 81/19, 128/19, 39/20, 47/20, 138/20, 147/20, 70/21, 99/21, 145/21, 23/22, 12/23, 122/23.

[45] See: Civil Procedure Code, Official Gazette of the Republic of Croatia No.: 148/2011, 25/2013, 70/2019, 80/2022, 114/2022.

The 2021 amendments to the Administrative Disputes Act made an important step towards the expansion of electronic communication between administrative courts and key stakeholders in administrative disputes. The Administrative Disputes Act defines two different groups of users of electronic communication with administrative courts. The first includes natural persons who can optionally participate in electronic communication, and others who are mandatory users of the electronic communication system. Pursuant to Article 49 of the Administrative Disputes Act, documents are submitted to the administrative court in written or electronic form via the information system.[46] Therefore, citizens have the option of choosing how to communicate with the court. However, such an alternative does not exist for all subjects of an administrative dispute. Mandatory participants in electronic communication are state administration authorities and other state bodies, local and regional self-government authorities, legal persons with public authority, state attorney's office, lawyers, notaries public, court experts, court appraisers, court interpreters, bankruptcy trustees and legal persons (hereinafter: mandatory participants in electronic communication).[47] It seems that this mandatory obligation of electronic communication, as well as its application to all ongoing administrative disputes, has created a favourable situation, so the system could become fully operational in a relatively short period of time.[48] In this way, the legal requirements were created for the almost complete transition to electronic communication in

[46] See: Article 49, Administrative Disputes Act, Official Gazette of the Republic of Croatia No. 110/2021, od 13.10.2021. It is an information system for electronic communication that collects, stores, preserves, processes and delivers the necessary information. See: Article 5 of the Regulation on Electronic Communication.

[47] See: Article 49 paragraph 6, Administrative Disputes Act, Official Gazette of the Republic of Croatia No. 110/2021, od 13.10.2021.

[48] The legislator prescribed the obligation of 'electronic communication with administrative courts for all pending administrative disputes', as well as the obligation "for legal entities to request access to the information system of electronic communication with administrative courts within one year from the date of entry into force of this Act through the competent ministry for judicial affairs". See: Article 7, Administrative Disputes Act, Official Gazette of the Republic of Croatia No. 110/21.

administrative proceedings. However, it should be recognised that despite the existence of the obligation of electronic communication, not all mandatory participants of electronic communication have yet joined.

The Administrative Disputes Act has provided for a similar approach to the submission and delivery of document to and from the court. The citizens are given the alternative between classic and electronic submission or delivery. Namely, if a party declares that it agrees to be served electronically, the court will serve that party via the information system. However, the provision of the Act also contains the presumption of consent to electronic communication in the case when a party submits a claim to the court in electronic form.[49] The possibility of choosing the method of delivery of court documents does not apply to the delivery of documents to mandatory participants in electronic communication. The court is supposed to always deliver court documents to these entities in electronic form via the information system.[50] The electronic court document is signed with a qualified electronic signature of an authorised person of the court with the application of a qualified time stamp and it contains a corresponding barcode or QR code, a control number and a website, which are used to check the authenticity of the document.[51] Through the information system, the court sends a letter to the addressee to his/her secure electronic mailbox, which must be downloaded by the addressee within 15 days. It will be considered that the delivery has been properly served even if the addressee does not confirm the receipt of the letter within that period.[52] Simultaneously with the sending of the letter via the information system, the information system also sends an e-mail to the addressee with an informative message informing him/her about the delivery of the letter and the legal consequences of avoiding to download the court submission.[53] Once the party has received (downloaded) the submission, the information system informs the

[49] See: Article 50 paragraph 2 of the Administrative Disputes Act.
[50] See: Article 50 paragraph 3 of the Administrative Disputes Act.
[51] See: Article 13 of the Regulation on Electronic Communication.
[52] See: Article 50 paragraphs 4 and 7 of the Administrative Disputes Act.
[53] See: Article 50 paragraph 5 of the Administrative Disputes Act.

court about the delivery with a confirmation in electronic form.[54] Although the legal obligation of electronic communication was introduced for certain addressees, the legislator open the possibility that delivery by electronic means would not be possible. In such a situation, they will deliver the letter in another way and state the reason for such delivery.[55]

The legislator has paid special attention to the issue of security of electronic communication. When regulating the sending and receiving of electronic shipments, one has taken care of security and authentic identification of the sender and receiver of letters. Namely, the addressee receives the letter from the secure electronic mailbox of the information system after proving his/her identity through the National Identification and Authentication System and electronically confirming the receipt of the letter.[56] In relation to the submission of the claim to the administrative court, the Administrative Disputes Act has more precisely prescribed the method of electronic submission of the claim to the court, stating that it is submitted "in electronic form via the information system".[57] The above excludes the possibility of sending a lawsuit to the court by e-mail as an insecure means of communication. Therefore, it is only possible to send documents electronically through the Court Electronic Communication System (e-Communication system), which is directly connected to the Information Court Management System (e-File),[58] and which thus enables direct storage of all documents in electronic form in the e-File system. This has created the key prerequisites for a gradual

[54] See: Article 50 paragraph 8 of the Administrative Disputes Act.
[55] See: Article 50 paragraph 10 of the Administrative Disputes Act.
[56] See: Article 50 paragraph 6 of the Administrative Disputes Act.
[57] See: Article 2 of the Act on Amendments to the Administrative Disputes Act.
[58] eSpis is a unique information system for managing and working on court cases, which consists of a standard application, computer and telecommunications equipment and infrastructure, system software and tools, and all data that is entered, stored and transferred from all types of registries in municipal, county, commercial and administrative courts, the High Commercial Court of the Republic of Croatia, the High Administrative Court of the Republic of Croatia, the High Misdemeanour Court of the Republic of Croatia, the High Criminal Court of the Republic of Croatia and the Supreme Court of the Republic of Croatia. See: Article 5 of the Regulation on Electronic Communication.

transition from paper files to electronic files, and ultimately to the creation of a digital court archive.

Regarding the calculation of deadlines and the formal requirements for electronically submitted documents, the Administrative Disputes Act stipulates that "the day when the information system confirmed the receipt of the claim to the applicant is considered the day the claim was submitted to the court to which it was addressed". It also prescribes the obligation to sign lawsuits in electronic form with a qualified electronic signature.[59] A claim in electronic form signed with a qualified electronic signature is considered handwritten.[60] If the electronically submitted documents contains any deficiency that precludes the court to act or if the submission is incomprehensible or incomplete, the court will inform the applicant about this electronically and will set a deadline by which time the applicant is obliged to remedy the deficiency, warns the applicant of legal consequences in case of failure to meet the deadline.[61] The legislator has also provided for sanctions for mandatory users of electronic communication in the event they do not respect this obligation. Thus, the Act prescribes that:

> *if the applicant who is a mandatory participant in electronic communication does not submit the documents in electronic form, the court will order him to submit them electronically*

[59] A qualified electronic signature is an advanced electronic signature that is created using qualified means for creating an electronic signature and is based on a qualified certificate for electronic signatures, in accordance with the regulations governing trust services for electronic transactions in the internal market of the European Union. See: Article 5 of the Regulation on Electronic Communication.

[60] The Administrative Disputes Act regulates the conditions that a submission to the court must meet in order to be considered orderly, prescribing the following: The submission must be understandable and contain everything necessary to be able to act on it, especially the court's mark, personal name or title, personal identification number and address of the party and persons authorised for representation, the subject of the dispute, content of the statement and signature. The submission in electronic form must be signed with a qualified electronic signature in accordance with special regulations. A submission in electronic form signed with a qualified electronic signature will be considered handwritten. See: Article 49 of the Administrative Dispute Act.

[61] See: Article 49 st. 5 of the Administrative Dispute Act.

within eight days. If the applicant does not submit the documents in electronic form within that period, it will be considered that the submission has been withdrawn.[62]

Table 1. *Form and signing of submissions in electronic form in Regulation on Electronic Communication*

Article 10
(1) Documents submitted to the court by an external user of the system are submitted in electronic form and are signed with his qualified electronic signature.
(2) The electronic signature certificate must be issued by a qualified trust service provider and must be valid at the time of signing, with the fact that, in case of justified suspicions of manipulation, the court may ask the trust service provider to verify the validity of the issued certificate for a particular natural or legal person.
(3) If the submission or attachment consists of several sheets, all sheets should be contained in one file, without blank sheets. Each submission and attachment should form a whole by itself, or if due to the amount of data they are submitted in several files, it is necessary to indicate in the name of the file that they form the same whole.
(4) When public documents that already exist in electronic form are attached to the submission, they are submitted in the original as a document electronically signed by the issuer of the document.
(5) Electronic submissions from paragraph 1 of this Article should be in PDF format or an equivalent format, and attachments can be in any electronic format.

Source: Own elaboration.

In relation to the right to access to court records (review court files), the amendments to the Administrative Disputes Act from 2021 have not affected that provision, so it remains vague and does not follow the trends with the development of technical possibilities for remote access to court records. The Act states that access to the electronic file can also be granted electronically.[63] In practice, access takes place without special authorisation using the e-Citizen system and identity verification through the National Identification and Authentication System.

[62] See: Article 49 st. 7 of the Administrative Dispute Act.

[63] See: Article 53 paragraph 4 of the Administrative Dispute Act. For more on the right to accesses court records, see: above in the chapter "The right to access to the court file case – remote access to case files".

Regarding the time aspect of application of new legal solutions related to electronic communication, the legislator has decided that such communication should not be limited only to cases that will be initiated after the entry into force of the Act, but rather to all pending cases. The Administrative Disputes Act stipulates in its transitional provisions that mandatory electronic communication of administrative courts with mandatory participants in electronic communication shall also apply to all administrative disputes in progress from the date of entry into force of the decision on meeting the conditions for electronic communication for administrative courts, issued by the minister responsible for judicial affairs, and after the conditions for this have been met in all administrative courts. Finally, all legal entities are obliged to request access to the information system of electronic communication with administrative courts within one year from the date of entry into force of this Act through the ministry responsible for judicial affairs.[64]

As already stated earlier, mandatory participants in electronic communication are the administrative authorities applying the General Administrative Procedure Act in their work. Precisely for this reason, in order to achieve the prerequisites for electronic communication between administrative courts and administrative bodies, it was necessary to simultaneously amend the General Administrative Procedure Act.[65] Although the General Administrative Procedure Act from 2010 contains a number of provisions that enable the establishment of the so-called electronic public administration, its amendments from 2021 have opened the way to further digitalisation of public administration.[66] The amendments to the Act of 2021 have created legal prerequisites for the creation of electronic files in administrative proceedings. Electronic communication has been declared as primary method of communication in

[64] See: Article 7 of the Administrative Dispute Act, Official Gazette of the Republic of Croatia No. 110/2021.

[65] See: General Administrative Procedure Act, Official Gazette of the Republic of Croatia No. 110/2021.

[66] See: A. Đanić Čeko, M. Guštin, *Digitalizacija hrvatske javne uprave…*, *op. cit.*, p. 793.

the administrative procedure.[67] The above refers to communication between public administration and parties and other persons participating in administrative proceedings. However, in relation to the citizens, the possibility of an alternative way of communicating with administrative bodies is still open. In their communication with the state administration, the citizens can submit documents in writing directly, send them by post, deliver them electronically or make oral statements on the record.[68] Submissions sent electronically with a qualified electronic signature are considered handwritten. Digitalisation of public administration also refers to the basic type of decision made in the administrative procedure – a decision, which, in addition to the signature of an official and an official seal, may also contain a qualified electronic signature of an authorised person or a qualified electronic seal of a public authority. In the case when the decision of a public authority is delivered through the information system, that document has to be certified with a qualified electronic seal.[69]

Amendments to the Administrative Disputes Act and the General Administrative Procedure Act of 2021 have created legal preconditions for the digitalisation of proceedings in administrative matters, the creation of digital court records, digital archives, and finally for the interoperability between IT system used by administrative authorities and e-File system used by administrative courts in administrative disputes. Therefore, the intention of these legislative solutions is that administrative bodies, administrative courts, parties and other participants in administrative procedure and administrative court proceedings primarily communicate electronically and using the state information infrastructure system.

[67] See: Article 75 paragraph 1 of the General Administrative Procedure Act.
[68] See: Article 71 paragraph 3 of the General Administrative Procedure Act.
[69] See: D. Đanić Čeko, M. Guštin, *Digitalizacija hrvatske javne uprave…*, *op. cit.*, p. 798.

19.5. Efficiency of Administrative Trials and Respect for the Right to a Trial within a Reasonable Time

The efficiency of administrative court proceedings and respect for the right to a trial within a reasonable time are key elements of the rule of law and legal protection of citizens, and their consistent application contributes to strengthening trust in the judicial system and preserving fundamental rights. The purpose of the right of "trial within a reasonable time" from Article 6 of the ECHR is to ensure legal certainty, i.e., to enable sufficient speediness of resolution of cases before the courts, so that the party does not remain in uncertainty regarding the outcome of their dispute for too long. This is a necessary precondition for a fair trial.[70] In assessing the existence of a violation of the right to a trial within a reasonable time in administrative matters, the question of how to calculate the duration of the procedure is key. That is, at what moment does the counting of time for determining the existence of a violation of the right to a trial within a reasonable time begin? In doing so, it is necessary to determine the beginning and end of the period that is relevant for calculating the duration of the court proceedings. Only when we have an exact determination of the total length of the procedure can we assess whether it is excessive.

In examining the respect for the right to a trial within a reasonable time in administrative matters, it is useful to analyse statistical data on the efficiency of the work of the administrative courts, especially the data showing age of the cases pending, i.e., by the year the administrative court proceedings were initiated. The data for 2022 in Table 2, "Efficiency indicators of the first instance administrative courts cases", shows that 5,325 cases remained unresolved at the end of the year. The mentioned number of cases pending does not indicate the existence of any serious problem in the efficiency of the administrative courts. In addition, efficiency indicators (clearance rate, disposition time) show that more cases were resolved

[70] 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, No. 6, p. 51.

than received. Also, average duration for resolving cases is around 200 days, which is not problematic. Table 3, "Age structure of pending cases", contains important data on the number of cases pending, the age of which is up to two years, which amounts to 92.79% of all pending cases. At first glance, these data seem excellent, but one should be careful in drawing such conclusions, namely, it needs be considered that the court proceedings were preceded by an administrative proceeding before administrative authority as well as the fact of a time difference from the moment the dispute arises to the moment the administrative dispute is initiated. In other words, it can be assumed that among these 92.79% there are ongoing court cases and those in which the right to a trial within a reasonable time has been already violated. In relation to the remaining 388 court cases pending, it can be established with great confidence that a violation of rights has already occurred. Finally, Table 4, "Cases pending according to the year of initiation of the administrative dispute", shows the age structure of the cases.

Based on the above data, we can assess that in Croatia the last few years the duration of administrative disputes has been significantly shortened, which guarantees the parties a faster fulfilment of administrative justice. Statistical data from the Ministry of Justice and Public Administration show that the average resolution of administrative disputes in Croatia today is less than one year.[71] However, it should be borne in mind that this is about the average duration of administrative disputes, so in some complex administrative matters court proceedings can last much longer.[72] The statistics in question should be analysed in a way that it takes into account the wider context of resolution of administrative matters. Also, one should bear in mind that these statistics do not include some important data that would enable a much more precise analysis and assessment. Namely, these data are limited only to activities before

[71] Statistical data on the work of administrative courts in Republic of Croatia, see: https://sudovi.hr/hr/statistike/upravni-sudovi [access: 01.07.2023].

[72] See: D. *Đerđa*, P. *Šamanić*, *Recentna stajališta suda Europske unije o zakonskom propisivanju rokova za rješavanje upravnih sporova*, "Hrvatska Pravna Revija" 2020, Vol. 20, No. 6, p. 39.

the administrative courts, and they do not contain information about the obligatory procedure and its duration that preceded the administrative dispute. The duration of the administrative dispute itself before the Administrative Court of the Republic of Croatia, namely, does not show the actual length of the "disputed" period of deciding on a specific administrative matter. Therefore, when deciding on a possible violation of Article 29 paragraph 1 of the Constitution of the Republic of Croatia and Article 6 paragraph 1 of the ECHR, in the part that refers to the reasonable length of the procedure, the duration of the administrative dispute should be taken into account together with the duration of the previous administrative procedure in the same administrative matter, with the condition that it is counted from the day when the "dispute" arose in the sense of Article 6 paragraph 1 of the ECHR.[73]

Also, the data do not show whether among cases pending before administrative court there are those that are repeatedly returned to the administrative court, when in fact it is the same case that could not be resolved on its merits. The duration of these cases is not visible due to the fact that same case always gets a new number every time it appears again before the administrative court. This means that of the cases shown as pending before the administrative court for as many as two years, there may in fact be a significant number of cases that have remained unresolved for more than 10 years. The Constitutional Court of the Republic of Croatia has pointed out that it is necessary to clearly identify those situations

[73] The Constitutional Court has assessed that the means of legal protection against the silence of the administration are very often not effective in speeding up the administrative procedures themselves, which is clearly demonstrated by the administrative practice in the Republic of Croatia. The Constitutional Court therefore determines that the inactivity or ineffectiveness of state administration bodies, other state bodies and legal entities with public powers, when deciding on the rights, obligations or legal interests of the parties in administrative proceedings in administrative matters, viewed together with the duration of the initiated administrative dispute, may lead to a violation of Article 29 paragraph 1 of the Constitution and Article 6 paragraph 1 of the Convention in the part that refers to the reasonable length of decision-making on the rights and obligations of the parties. See: paragraph 4.2 of the Decision of the Constitutional Court of the Republic of Croatia No. U-IIIA-4885/2005 of 20 June 2007.

in which the unreasonable length of decision-making on the rights, obligations or legal interests of the parties in administrative and administrative court proceedings is affected by the fact that the Administrative Court of the Republic of Croatia repeatedly returns an administrative matter for re-administrative proceedings, most often due to incompletely or incorrectly established facts. Such administrative and administrative judicial practices indicate significant deficiencies in the system of procedural administrative law in the Republic of Croatia. Since neither the appeal nor the lawsuit are intended to correct these deficiencies that result from the silence of the administration, nor can they be corrected by these legal means, the Constitutional Court concludes that the legal means intended to protect against the silence of administration do not in themselves represent an effective domestic legal remedy for the aforementioned situations. Therefore, the Constitutional Court determines that in situations of frequent repetition of administrative proceedings due to the annulment of administrative acts and the return of the case to re-administrative proceedings by the Administrative Court of the Republic of Croatia, there is a reasonable justification to look at the total duration of administrative and administrative court proceedings together, and on that basis judge assesses possible violation of the constitutional right guaranteed by Article 29 paragraph 1 of the Constitution and the right guaranteed by Article 6 paragraph 1 of the ECHR.[74] Therefore, in administrative procedural law, it is necessary to take into account the specifics of assessing the length in resolving administrative matters, and to emphasise the particularities of administrative court proceedings in relation to other court proceedings in the Croatian legal system. As a result of the above, the administrative dispute should be concluded no later than three years from the moment of the appeal in the administrative procedure before administrative authority. This is a moment when dispute arose. Therefore, this is a moment taken as the relevant moment of the beginning of the dispute between the party and the public authority. For example, it could be the case that the same dispute

[74] See: Odluka Ustavnog suda Republike Hrvatske broj: U-IIIA-4885/2005 od 20. lipnja 2007, paragraph 4.3.

has been returned to the public authority for resolution several times, from the moment of the first appeal in that case.[75] In such cases, the moment of the initial dispute is relevant.

We can illustrate the above with one concrete example. The plaintiff submits a case to the administrative court on 4 April 2023. The aforementioned case would be considered in statistics as a case that was initiated in 2023 and is not older than two years. From the above data, it could be concluded that in this particular case, everything takes place within a reasonable time frame. However, the aforementioned statistics do not show that the same case was already before the High Administrative Court, which rejected the administrative authority and confirmed the ruling of the Administrative Court in Zagreb from 2021.[76] But it also does not show that the dispute between the plaintiff and of the defendant arose in 2015 when the plaintiff contested the decision made by the administrative authority in the administrative procedure.[77] Also, the statistics do not show that the plaintiff had to initiate an administrative dispute on 16 March 2016 due to the silence of administration concerning his appeal. So, from this specific example, we can conclude that the analysis of available court statistical data should be approached cautiously, taking into account the functioning of the administrative court procedure. Furthermore, it is clear that in this case the resolution has been pending for more than 8 years, and not just one year. Therefore, for a more precise statistical monitoring of the functioning of administrative courts, it would be crucial to start recording data from the moment a dispute arises before the administrative authority and until the dispute is resolved, and not only to keep a record upon the initiation of administrative dispute before administrative court. It is also evident from this example that the plaintiff repeatedly addressed the administrative courts seeking protection of his

[75] See: D. *Đerđa*, P. *Šamanić*, *Recentna…*, *op. cit*., p. 39.

[76] See: Presudu Visokog upravnog suda, poslovni broj: Usž-532/22-3 od 15. prosinca 2022, te Presudu Upravnog suda u Zagrebu, poslovni broj: UsI-656/20-5 od 27. listopada 2021.

[77] See: Rješenje DUHIRH Klasa: UP/1-112-02/15-01/16, Ur. broj:537-05-01-15-01 od 13. studenog 2015.

rights. Therefore, for the precision of statistical monitoring, it would be important that the case is always kept under the same number.

Table 2. *Efficiency indicators of the first instance administrative courts cases (2022)*

Court	Cases pending at the beginning of year	Inflow of cases	Solved cases	Pending cases at the end of year	Clearance Rate (CR; %)	Disposition Time (DT; in days)	Average duration of resolved cases (in days)	Average duration of cases pending (in days)
Total – all administrative courts	6,190	12,724	13,589	5,325	107	143	196	357
Administrative court Osijek	517	1,779	1,731	565	97	119	106	237
Administrative court Rijeka	692	1,759	2,016	435	115	79	151	182
Administrative court Split	1,508	4,522	4,797	1,233	106	94	179	343
Administrative court Zagreb	3,473	4,664	5,045	3,092	108	224	261	410

Source: The data in Table 2 was generated from the Annual Report of the President of the Supreme Court on the state of judicial power for 2022.

Table 3. *Age structure of pending cases*

Age of court case	At the end of 2022		At the end of Q1 2023	
	number of cases pending	proportion of the total number (%)	number of cases pending	proportion of the total number (%)
Up to 2 years	4,940	92.79	4,676	87.19
From 2 to 4 years	344	6.46	623	11.62
Older than 4 years	40	0.75	64	1.19
Total	5,324	100.00	5,363	100.00

Source: The data in the Table 3 was generated from the Annual Report of the President of the Supreme Court on the state of judicial power for 2022 and 2023.

Table 4. *Cases pending at the end of 2022 according to the year of initiation of the administrative dispute*

Court	2022	2021	2020	2019	2018	2017	2016	2014	2009	Cases pending at the end of year
Administrative court Osijek	547	10	3	2	2		1			565
Administrative court Rijeka	417	14	1	1	0	2				435
Administrative court Split	965	172	83	7	3	1	0	1	1	1,233
Administrative court Zagreb	2,183	632	209	38	18	6	3	2		3,091
Total	4,112	828	296	48	23	9	4	3	1	5,324

Source: The data in the Table 4 were generated from the Annual Report of the President of the Supreme Court on the state of judicial power for 2009 until 2022.

In its judgments in the cases of *Božić v. Croatia*, *Počuča v. Croatia*, and *Smoje v. Croatia*, the European Court of Human Rights clearly pointed out the problems in protecting the right to a trial within a reasonable time in administrative matters.[78] In *Počuča v. Croatia*, the European Court pointed out that "a legal remedy is effective only if it is able to cover all the stages of the procedure that are objected to and take into account their total length".[79] A "reasonable period"

[78] See: Judgment of the European Court of the Human Rights in Case Počuča v. Croatia od 29.09.2006; Judgment of the European Court of the Human Rights in Case Božić v. Croatia of 29.06.2006, paragraphs 23, 31, 34; Judgment of the European Court of the Human Rights in Case Smoje v. Croatia of 11.01.2007, paragraphs 34, 45.

[79] The European Court of Human Rights pronounced it in the following words: "In this connection the Court reiterates that a remedy available to a litigant at domestic level for raising a complaint about the length of proceedings is 'effective', within the meaning of Articles 13 and 35 paragraph 1 of the Convention, only if it is capable of covering all stages of the proceedings complained of and thus, in the same way as a decision given by the Court, of taking into account of their overall length." See: Judgment of the European Court of the Human Rights in Case Počuča v. Croatia od 29.09.2006, paragraphs 34–35.

is not a period precisely determined in time, which, were it so would be valid in every case, but is a legal standard that the European Court of Human Rights judges and determines individually in each case, starting from the following elements: the complexity of the case; the way in which the authorities dealt with the case; the behaviour of the applicant himself that could have contributed to the prolongation of the procedure; special circumstances that could have justified the prolongation of the procedure; the significance of the outcome of the procedure for the party, i.e., the urgent need for an end to certain procedures (such as disputes on labour relations, disputes on social legal claims, disputes about parental rights, adoption, etc.).[80]

When the Court assesses whether a procedure was completed within a "reasonable time", the beginning and end of the duration of the procedure are first determined, and then it is assessed whether the time between these two specified points can be considered "reasonable".[81] Legal science and jurisprudence assess the question of the period in which the right to a trial within a reasonable time is violated in administrative court proceedings in different ways.[82] The European Court of Human Rights has confirmed the moment of the start of the contested procedure as a start of the relevant period. In situations where the conduct of court proceedings is conditioned by mandatory previous actions in administrative proceedings, the relevant period begins at the moment of investment of the legal means in the administrative proceedings, the use of which is a necessary precondition for the possibility of using court protection in an administrative dispute. This would mean that the administrative procedure that preceded the administrative dispute should also be

[80] See: J. Garašić, *O upravnom sporu pred Upravnim sudom Republike Hrvatske u svjetlu* čl. *6. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda*, "Zbornik Pravnog Fakulteta Sveučilišta u Rijeci, Supplement" 1998, p. 996. See more about the criteria and standards of "reasonable term": I. Goranić, *Suđenje u "razumnom roku"…*, *op. cit*., pp. 52–54.

[81] Ibid, p. 52.

[82] In her text, Otočan analyses the observance of 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, Vol. 57, No. 1, pp. 179–193.

included in the calculation of time when it was a prerequisite for initiating an administrative dispute.[83] Therefore, the moment of submitting the appeal to the second instance administrative body should be taken as the beginning of the relevant period. Furthermore, the European Court of Human Rights concludes that a constitutional lawsuit in relation to the protection of the right to a trial within a reasonable time before the Administrative Court cannot be considered an effective means, since the Constitutional Court does not take into account the entire duration of the procedure, excluding the procedure before the administrative bodies.[84]

The European Court of Human Rights reiterated its views on the initiation of proceedings and the effectiveness of legal means to protect the right to a trial within a reasonable time in its judgment in *Božić v. Croatia*.[85] In *Božić v. Croatia*, the Court points out as the main cause of the delay "a deficiency in the procedural system that enabled the repeated return of cases for repeated proceedings, which were necessary due to incomplete factual determinations".[86]

In addition to the importance of determining the beginning of the relevant period, when judging if the length was reasonable, the determination of the end of the specified period is equally important. In administrative matters, the meritorious decision on the rights of citizens is not completed even after the administrative court's verdict has been passed, so in such cases, the day when the decision

[83] S. Otočan, *Načelo učinkovitosti upravnog spora…*, *op. cit*., paragraph 36.

[84] The court highlighted this in the following words: "The above-cited practice (paragraph 27) 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 (see: Štajcar v. Croatia (dec.), No. 46279/99, 20 January 2000). That approach of the Constitutional Court differs from the one 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". *Vidi*: Ibid, paragraph 37.

[85] See: Judgment of the European Court of the Human Rights in Case Božić v. Croatia of 29.06.2006, paragraphs 32–34.

[86] See: Judgment of the European Court of the Human Rights in Case Božić v. Croatia of 29.06.2006, paragraph 36.

on the violation of the right to a trial was made within a reasonable time should be taken as the moment when the relevant period ends.

19.6. Transparency and the Right to Access to the Court Case File – Remote Access to Case Files

One element of access to justice is to ensure that the case is heard in public. The introduction of online court proceedings during the COVID-19 pandemic and continuing to use such online proceedings after the pandemic also raises the issue of ensuring that courts stay open to the public.[87] Transparency allows monitoring the work of the courts and thus limits the courts self-self-governance, and assures proceedings are conducted fairly. The electronic access to court records is merely a natural evolutionary stage of our justice systems. Public records, and court records among them, have always been transparent and should be kept as such, provided we continue to uphold the principles behind public access to judicial proceedings, physical or virtual. However, in the digital era, an overly open justice system could potentially have a "chilling effect". The privacy protection that currently exists for public records is largely designed for a world of paper records and has been slow to adapt to an age where information can be downloaded from the Internet in an instant.[88] Despite the power of a right, no right is absolute. Unrestricted and unfiltered access to court records damages the individual's interests invested in privacy and in maintaining his/her identity as well as the right to rehabilitation and to be forgotten. With the "right to be forgotten" it is now clear that a person sitting in a courtroom listening to a trial (or viewing documents relating to it) is subject to human limitations that a computer does not suffer from, making the physical open door an inherently much narrower right.

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[87] See: J. Kirsiene *et. al.*, *Digital Transformation of Legal Services…*, *op. cit.*, p. 151.

[88] J. Losinger, *Electronic Access to Court Records: Shifting the Privacy Burden Away from Witnesses and Victims*, "University of Baltimore Law Review" 2007, Vol. 36, No. 3, p. 426.

Therefore, when we talk about the transparency of the judiciary and the right to the public access to court records, it is important to take into account the existence of multiple differences between online and physical access to court cases. Achieving the right balance between competing interests requires abandoning the dichotomous "either-or" approach and replacing it with a contextual paradigm, accompanied by tailored solutions. Clearly, a categorical opposition to electronic access to court records is not an alternative. An overall rejection of digital access is not suggested even by those raising the most profound concerns on practices of online access.[89] Similarly, overly broad access that reaches beyond the interests of the right to information, allowing for either the exploitation or manipulation of the data is a mechanism with potentially devastating consequences. It is broadly agreed upon that technological advancements in the digital age does not need to change the long-standing presumption of openness. Rather, now more than ever, this presumption is subjected to questions of degree and conditions for the disclosure of judicial information. Bearing all this in mind, the Croatian model could serve as an inspiration on how to achieve the right balance in the protection of these conflicting interests.

The legal arrangement on accessing court records under the Croatian regime is influenced largely by the European governance framework and the strict European standard for privacy, as reflected, inter alia, by Article 8 of the ECHR and the Data Protection Directive.[90] The public nature of court hearings and the public pronouncement of sentences, as well as cases of exclusion of the public, are all prescribed by the Constitution of the Republic of Croatia.[91] Legislation provides for open hearing in administrative disputes. Namely, in an administrative dispute, the court decides on the basis of a verbal,

[89] See: T. Schwartz Maor, *Reconciling Privacy and Right to Information in Electronic Access to Court Records*, "King's Student Law Review" 2016, Vol. 7, No. 2, p. 97.

[90] See: Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[91] See: Article 120 of the Constitution of the Republic of Croatia, Official Gazette of the Republic of Croatia No. 85/2010.

direct and public hearing.[92] However, in accordance with the European standard dictating protection of the "sphere of intimacy" and "private life" of a legal party or third parties, Croatian legislation provides for the exclusion of the public from the hearing if this is required for reasons of privacy protection, data secrecy and other legally prescribed reasons.[93] The judgement is announced publicly at the hearing where the hearing is concluded, in such a way that the judge reads the decision publicly and briefly explains the reasons for his/her ruling.[94] The texts of final judgments of the High Administrative Court are published on the court's website, but after the parties have been anonymised.[95] In doing so it is important to point out that the public authorities as defendant have not been anonymised. This is in accordance with the widespread practice of anonymising court decisions before their publication.[96] This is in line with the established practice in many countries, as court decisions in most countries are available on various web platforms.[97]

Unlike public hearing, access to the court file is limited only to the parties to the dispute.[98] A party in an administrative dispute has the right to inspect the file. The right to inspect the file in administrative matters is one of the fundamental procedural rights of the

[92] See: Article 7 and Article 38 of the Administrative Dispute Act, Official Gazette of the Republic of Croatia No. 20/2010.

[93] Article 38 paragraph 2 of the Administrative Dispute Act provides: "If it is required by reasons of privacy protection, confidentiality of data and other legally prescribed reasons, the court will exclude the public for the entire hearing or part of it."

[94] See: Article 61 of the Administrative Dispute Act.

[95] See the case law of the High Administrative Court on the website of the High Administrative Court of the Republic of Croatia: https://sudovi.hr/hr/vusrh/sudska-praksa/odluke-visokog-upravnog-suda-republike-hrvatske-2021-godina [access: 10.09.2023].

[96] See: T. Schwartz Maor, *Reconciling Privacy and Right to Information…*, *op. cit.*, p. 97.

[97] See: Ibid, p. 80.

[98] See: Article 53 of the Administrative Dispute Act. For comparative approaches to non-party access regime to court records, see examples of Singapore, Australia and England in: V. Yeo, *Access to Court Records: The Secret to Open Justice*, "Singapore Journal of Legal Studies" 2011, No. 2, December, pp. 510–532. See also: J. Losinger, *Electronic Access to Court Records…*, *op. cit.*, p. 426.

parties arising from the Constitution, which guarantees the right to a fair procedure. The constitutional right to a fair trial, protected by Article 29 paragraph 1 of the Constitution of the Republic of Croatia, guarantees the legal protection of the parties in the decisions of the courts, but also of other state and public law bodies.[99] Access to parts of the case files may be denied if this is necessary to protect the public interest, the interests of one of the parties, or the interests of third parties.[100] In addition to the parties to the dispute, also some other participants in the administrative dispute have online access to the court file. These are primarily lawyers as representatives of the parties, court experts, and interpreters. Also, public authorities have the right of access as a defendant in the proceedings.

Table 5. *Access to court records in Administrative Dispute Act*

Article 53
(1) The parties have the right to be informed about the progress of the dispute and to look at the file and to copy documents from the file at their own expense, except for minutes of deliberation and voting and other documents marked with a certain degree of secrecy. Drafts of court decisions and preparatory texts created during the work on the case are not an integral part of the file. (2) Access to parts of the case file may be denied if it is necessary to protect the public interest, the interests of one of the parties, or the interests of third parties. (3) The review of case files is approved by the president of the panel, that is, by a single judge. (4) Access to the electronic file can also be granted electronically.

Source: Own elaboration.

[99] Ofak and Šikić point out that: "the Constitutional Court of the Republic of Croatia repeatedly reiterates in its decisions that the right to a fair trial guarantees everyone the fairness of the proceedings before all bodies that decide on his rights and obligations". Therefore, not only before the courts, but also before all other bodies authorized to decide on the rights and obligations of citizens and other persons. *Vidi*: J.T. Noonan Jr., *Judicial Impartiality and the Judiciary Act of 1789*, "Nova Law Review" 1989, Vol. 14, No. 1, pp. 123–142. See more about right to access to file in the administrative procedure: C.F. Costas, *Access to File: Right(s) of the Defence or Defence of the Right(s)?*, "Cluj Tax Forum Journal" 2018, No. 5, pp. 17–23.

[100] See: Article 53 of the Law on Administrative Dispute.

Access to the digital file is achieved by accessing the information system for electronic communication. The granting of access rights to the information system for electronic communication and the method of access to that system are prescribed in the provisions of Article 7 and Article 8 of the Rulebook on Electronic Communication.[101] The Rulebook makes a distinction between physical and legal persons regarding access to the digital file. Individuals access their digital court files relatively easily. In order to guarantee security as well as respect for the right to privacy, natural persons must be identified using the credentials of the National Identification and Authentication System of a significant or high level of security.[102] Credentials are means for electronic identification and authentication of external users and are generally used when signing up for electronic services of the e-Citizens system.[103] After the identity of the person has been confirmed, the natural persons can review all cases in all courts in Croatia where they are a party to the court proceedings. They do not have access to court cases in which they are not a party.

Legal entities and state bodies exercise the right to access the information system by submitting mandatory prescribed data to the system administrator (Ministry of Justice and Public

[101] See: Regulation on Electronic Communication 139/2021, Official Gazette of the Republic of Croatia No. 27/2023.

[102] The National Identification and Authentication System (NIAS) enables safe and reliable identification and authentication of users who access public electronic services through the appropriate credentials. Each citizen of the Republic of Croatia, who has been issued an acceptable credential, will have a unique electronic identity within NIAS, which will be used to access public e-Services. NIAS provides users with secure and simple access to electronic services "from the comfort of their armchairs", with only one login to the e-Citizens system (Single-Sign-On). Namely, once the user registers for the service through NIAS, he does not need to do it again when he uses the next e-Service connected to NIAS. See more about NIAS on: https://www.fina.hr/e-gradani [access: 11.04.2023].

[103] The e-Citizens system is a system that offers Croatian citizens many electronic services. The e-Citizens system was established by the Government of the Republic of Croatia with the aim of modernising, simplifying and speeding up communication between citizens and the public sector and increasing the transparency of the provision of public services. The e-Citizens system consists of: Central State Portal, User mailbox, National Identification and Authentication System. See also: S. Aras Kramar, *Novi Pravilnik…*, *op. cit*., p. 65.

Administration). Similarly, lawyers, notaries public, court experts, court appraisers, court interpreters and bankruptcy trustees exercise the right to access the system by submitting mandatory data to the Ministry of Justice and Public Administration as an authority that maintains lists of authorised participants in the electronic communication system. In addition, the state attorney's office accesses the system by directly connecting their own information systems with the Court Management Information System (e-Court file system). The system administrator is obliged, without delay, upon receipt of the mandatory data, to deliver a notification to the external user that he/she has been granted access to the system and that a secure electronic mailbox has been opened.[104]

There are several categories of judicial data and documents within access to court records. The term "court records" refer to the categories of legal documents used in different stages of the legal proceeding, such as complaint, briefs, court decisions, appeal, response to the appeal, depositions, evidence, court expert opinion, etc. Therefore, the parties have the possibility of viewing all the documents that have been digitally created in their case. Moreover, the parties can download the document from the Court Management Information System at any time, save it on their own computer and print it.

Remote access to court records brings several advantages to court users. Reviewing court records remotely from your own home or your own office without the need to physically go to court saves time and money.[105] This is especially important when the parties are geographically distant or when physical access to the court is difficult for them for any reason. So, remote access to court records could be seen as a contribution to improve equal access to courts for all

[104] See: S. Aras Kramar, *Elektronifikacija parničnog postupka nakon Novele ZPP-a iz 2019. godine*, "Pravo i Porezi" 2020, No. 9, pp. 49–50.

[105] Schwartz Maor points out that the significant added cost to physical access, as well as significant added difficulties in linking multiple information sources when conducting a physical search. See: T. Schwartz Maor, *Reconciling Privacy and Right to Information…*, *op. cit*., p. 78.

court users[106] especially to disadvantaged groups.[107] Digitalisation thus enables faster access to documents, information and court decisions. In addition, there is no longer any need to keep a paper case file, since it can be downloaded from the Internet at any time. So, the digitalisation of court proceedings creates not only a digital file, but also a digital court archive. An extremely important benefit of virtual access to the court file for natural persons is the possibility of systematic monitoring of the status of the case, observing of changes in the case, i.e., direct insight into all submissions to the court, records of hearings, and court decisions. In this way, parties to dispute are enabled to be more actively involved in handling their court proceedings. Informed parties no longer have to unnecessarily contact their own lawyer to find out some of the basic information in their case. Finally, the digitalisation of the court file and online access reduces the possibility of irregularities and manipulations in court proceedings.[108]

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[106] Lupo and Bailey point out that many case studies confirmed the benefits of accessibility and simplicity as effective mechanisms for bootstrapping e-Justice systems in ways that increase system diffusion. Moreover, it digitises a single, rote process and improves equitable access by offering lower filing fees for the online process than its offline equivalent, while at the same time allowing users (such as those who are less technologically literate) to switch to the paper-based procedure at any stage of the process. See: G. Lupo, J. Bailey, *Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples*, "Laws" 2014, Vol. 3, No. 2, p. 373.

[107] See: Z. Hosaneeva, *A Case for Persons with Disabilities: Using Digital Courts to Promote the Right to Access to Justice and the Rule of Law*, "Pretoria Student Law Review" 2022, Vol. 16, pp. 47–72.

[108] Donoghue emphasis that: "A focus upon the participative status of court users must be accompanied by a recognition that (despite the paradoxical policy emphasis upon technology as the gateway to improved access) technology cannot, in isolation, adequately address such a complex issue as access to justice when policy frameworks fail to incorporate measures to explicitly counteract the erosion of legal aid. Simply moving services online may in fact be counterproductive and serve to further entrench access to justice." See more about advantages, but also about risk of remote court technology: J. Donoghue, *The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice*, "Modern Law Review" 2017, Vol. 80, No. 6, pp. 1019–1025.

19.7. Impartiality in Conducting an Administrative Dispute

When determining civil rights and obligations, everyone has the right to a fair trial before an independent and impartial court. Respect for the independence and impartiality of the court is particularly important in administrative disputes. Namely, in an administrative dispute, the judge has a particular role and position in relation to the parties to the dispute. Administrative disputes are special legal procedures related to challenging the decisions of administrative authorities, such as ministries, agencies or other authorities that render administrative acts. A judge in an administrative dispute should be neutral and impartial towards all parties to the dispute including towards public authorities. His/her role is to ensure a fair trial and apply the law in an objective manner, without favouring any side. A judge must act independently and must not be influenced by external factors, such as political pressures or personal preferences. In particular, the aforementioned includes impartiality and independence towards the authorities involved in an administrative dispute as one of the parties to the dispute.

The right to a trial before an impartial and independent court is widely accepted as a cornerstone of a democratic judicial system. This principle is important not only as a means of ensuring a fair trial, but also because of its key role in ensuring public confidence in judicial decisions.[109] Attention was paid to the issue of court impartiality even at the time when court relations were governed by Roman law.[110] However, nowadays, the principles of independence and impartiality of the judiciary represent values recognised at the general

[109] See: K. Malleson, *Safeguarding Judicial Impartiality*, "Legal Studies" 2002, Vol. 22, No. 1, p. 53.

[110] Roman law provided for a procedure called *recusatio iudicis*: a litigant could challenge a biased judge and demand that he be removed. See: J.T. Noonan Jr., *Judicial Impartiality...*, *op. cit.*, pp. 12–31, 42. Bodul points out that attention was paid to the impartiality of the court even in the time of ancient Athens, when judges were chosen by dice. See: D. Bodul, *Još o digitalizaciji građanskog pravosuđenja: upravljanje i rad na sudskim predmetima*, "Informator" 2021, No. 6666, p. 1.

global level. These terms are given great attention in a number of international legal instruments. Thus, these terms are mentioned in Article 10 of the Universal Declaration of Human Rights, stating that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".[111] The right to a fair trial before an independent and impartial court is contained in Article 6 of the ECHR for the Protection of Human Rights and Fundamental Freedoms[112] as well as in Article 14 of the International Covenant on Civil and Political Rights.[113] The contents of the requirement of independence, with respect to the judiciary, was further elaborated in the Basic Principles on the Independence of the Judiciary endorsed by the General Assembly of the United Nations in 1985.[114] Finally, the content of the terms "independence" and "impartiality" is further defined by the Bangalore Principles of Judicial Procedure.[115]

The concepts of "independence" and "impartiality" are very closely related, but are yet separate and distinct. "Impartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" connotes absence of bias, actual or perceived.[116] The word "independence"

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[111] See: Article 10 of the Universal Declaration of Human Rights adopted by General Assembly of the United Nations 1948, Paris, NN-MU 12/2009.

[112] The European Convention on Human Rights (ECHR), https://www.echr.coe.int/documents/d/echr/convention_ENG [access: 05.05.2023].

[113] The International Covenant on Civil and Political Rights (ICCPR), adopted by General Assembly United Nations 1966 (Resolution No. 2200 A /XXI/) and enter into force 1976. See: https://pravamanjina.gov.hr/UserDocsImages/arhiva/pdf/medjunarodni/medjunarodni_pakt_o_gradjanskim_i_politickim_pravima.pdf [access: 05.05.2023].

[114] Adopted at the 7th session of the UN Congress on the Prevention of Crime and Treatment of Offenders, Milan, Italy, 1985, and endorsed by the General Assembly in Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[115] See: The Bangalore principles of judicial conduct, United Nations Office on Drugs and Crime, Vienna 2018.

[116] Gardner Geyh distinguishes three different dimensions of impartiality: procedural, political and ethical. By the procedural dimension, he means the impartiality that allows the parties a fair hearing. Under the political dimension, impartiality means that which promotes public trust in the courts. Finally, the

reflects or embodies the traditional constitutional value of independence. As such it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees. So, judicial independence could be perceived as "a set of arrangements designed to promote and protect the perception of impartial adjudication". Impartiality and independence are conceptually distinct values regardless how closely related the two notions might be in their functional purposes. Thus, impartiality refers to a state of mind on the part of the decision-maker which is free of actual or perceived bias. Independence, on the other hand connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantee.

In *Piersack v. Belgium*, the European Court of Human Rights developed for the first time a test to determine the impartiality of a court. The court stated that impartiality under Article 6 can be tested in two ways. One of the ways was a subjective approach, i.e., whether an individual judge was really biased. Secondly, with an objective approach, i.e., whether there was any appearance of bias or possible doubt as to whether bias exists.[117] However, ECHR added that:

> *it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach). In this regard, even appearances may be important. Justice must not only be done, but it must also be seen to be done. As the Belgian Court of Cassation has observed, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality*

ethical dimension of impartiality represents the standard of good behaviour of judges. The core of a judge's self-definition. See more about it: C. Gardner Geyh, *The Dimensions of Judicial Impartiality*, "Florida Law Review" 2013, Vol. 65, No. 2, pp. 493–552.

[117] See: Judgments of the European Court for Human Rights in Case Piersack of 1 October 1982, Series A No. 53, paragraph 46.

> *must withdraw. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.*[118]

Therefore, the right to a fair trial requires the impartiality of the judge, which implies that the judge is not burdened by prejudice in connection with the decision he/she makes, that he/she does not allow himself/herself to be burdened by extra-procedural information during the trial (whether it is the opinion of the public or some other form of pressure), but to base his opinion on the facts established in the court proceedings. The right to trial before an impartial court means that the judge does not have a special interest in a particular case, as well as that he/she does not already have an opinion about the procedure or the parties.[119]

The word "independence" reflects or embodies the traditional constitutional value of independence. As such, it does not mean only a state of mind or an attitude in the actual performance of judicial functions, but a status or relationship towards others, especially towards the executive branch of government, which rests on objective conditions or guarantees. Again, an overlap between independence and impartiality is expressly envisaged. But in dealing with the criterion of independence, many of the basic principles are addressed to conduct by other branches of government affecting the judiciary. They deal with such matters as qualifications, selection and training; conditions of service and tenure; secrecy and immunity; discipline, suspension and removal. All of these are matters involving potential activities of the legislature and executive as they might impinge upon judicial independence. The entitlements *vis-a-vis* other parties or their interests are reflected in few of the basic principles. In some, they are mentioned only indirectly and not by

[118] See: Judgment of the European Court of the Human Rights in Case of De Cubber v. Belgium, 26 October 1984, paragraph 26.

[119] See: M. Marochini Zrinski, A. Kvaternik, *Preservation of the Authority and Impartiality of the Judiciary as a Permissible Restriction of the Right to Freedom of Expression – Croatian and Convention Perspective*, "Zbornik Radova Pravnog Fakulteta u Splitu" 2021, Vol. 58, No. 4, p. 1058.

name. Against this background, it is not surprising that most of the consideration of the meaning of the requirement of independence appearing in Article 6(1) of the ECHR has been addressed to the constitutional or governmental posture of the relevant tribunal in its relations with the other branches of government.[120] Thus, judicial independence could be thought of as "a set of measures designed to promote and protect the perception of an impartial trial".

> *Impartiality and independence are conceptually different values, no matter how closely these two terms may be related in their functional purpose. Therefore, the impartiality refers to a decision-maker's state of mind that is free from actual or perceived bias.*[121]

Independence, on the other hand, does not mean only a state of mind or an attitude in the actual performance of judicial functions, but a status or relationship towards others, especially towards the executive branch of government, which rests on objective conditions or guarantees.

Impartiality is a state of mind and it is not possible to create such institutional protection that can guarantee that individuals will not allow themselves to be biased. However, it is still possible to show that the process of selection and appointment of judges as well as the case allocation mechanism is such as to contribute maximally to the promotion of the principle of impartiality at the systemic level.[122] An independent and exclusively merit-based appointments system which promotes the selection of a diverse judiciary is a key factor in creating an impartial pool of judges and promoting public confidence in the fairness of its decision-making. From this pool individual judges, with all their preconceptions, must ultimately be chosen to try the case either alone or in a small panel. The issue

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[120] M. Kirby, *Judicial Recusal: Differentiating Judicial Impartiality and Judicial Independence*, "British Journal of American Legal Studies" 2015, Vol. 4, Special Issue, p. 13.

[121] See more about the difference between the concepts of judicial independence and impartiality: M. Kirby, *Judicial Recusal…*, *op. cit.*, p. 16.

[122] See: K. Malleson, *Safeguarding Judicial Impartiality*, *op. cit.*, p. 63.

of how cases are allocated to each judge is therefore a key issue in the institutional arrangements for promoting impartiality.

For instance, in the United Kingdom, the system and the responsibility for decision-making on case allocation is divided between a number of different judges on a hierarchical basis.[123] Identifying the exact nature and limits of the responsibilities of all those involved in case allocation is difficult because much of the practice is governed by informal rules. Because so few people understand in detail how it works, there is a common perception amongst lawyers and legal commentators that there is an element of political interference in the process at the higher levels. Nevertheless, the lack of transparency and the relative informality of the process leaves the potential for improper interference open and, at the very least, gives rise to the perception that justice is not always being done. It is an act of faith in the system to conclude that because we do not know about any improper influence, it does not happen. The lack of evidence of manipulation may be proof of impartiality or merely the result of our lack of knowledge about the process.[124] One method of removing the opportunity for improper interference in the process would be to adopt a system in which cases are allocated to judges picked at random from a ballot of those who are available and qualified. The effect of such a system is that it removes the element of discretion from the process. Precisely in this respect, the digitalisation of the judiciary can provide institutional mechanisms in which the influence of the human factor on the assignment of cases is almost completely removed. The criteria for including and excluding judges from the pool must be objective and open so that discretion is applied at that point in a fair and accountable manner. The key advantage of a random allocation system is that it is more likely to gain the confidence of both judges and court users.

In digitised justice, it is possible to use an algorithm for random allocation of cases in accordance with pre-defined rules for automatic assignment of cases. The e-File information system is in use in Croatia. After the basic data about the file are entered in the

[123] See: Ibid, p. 67.
[124] See: Ibid, p. 68.

e-File system, the assignment of new cases to the judges is done by applying the e-File system's case allocation algorithm. Certain types of cases are assigned to judges according to the code lists of types of court cases from the annual work plan. The president of the court can, by means of a written reasoned order, determine the repeated automatic allocation of cases only in exceptional instances.[125] For example, in of the event of the exemption of the judge and/or other justified incapacity of the judge to whom the case was assigned, the president of the court will order a repeated automatic assignment in a written reasoned order.[126] Although the automatic assignment of cases represents a significant step in the selection of a judge who is impartial in relation to both parties, even here manipulation of the system is possible. However, with digital automatic allocation, a digital record remains of every external intervention in the system, and it is then possible to detect possible manipulations of the system much more easily. The criteria and rules for the inclusion and exclusion of judges from the random assignment must be objective and clearly defined so that discretion is applied at that moment in a fair and responsible manner.

19.8. Conclusions

The rights and interests of individuals 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 matters is usually preceded by mandatory proceedings before an administrative authority in line with Article 6 (Right to a fair trial) of the ECHR, "in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time". Considering the specifics

[125] See: Article 39 of the Regulation on the Work in e-File system, Official Gazette of the Republic of Croatia No. 35/2015.
[126] See: Article 40 of the Regulation on the Work in e-File system, Official Gazette of the Republic of Croatia No. 35/2015.

of exercising civil rights in administrative matters, digitalisation of administrative court proceedings could be an essential tool to strengthen the impartiality of the judiciary through random and automatic allocation of cases. Digitalisation of the judiciary also contributes to better management of courts and court proceedings by providing reliable statistical data for monitoring the work of judges and tracking the progress of court cases. It can also be a tool for better control and transparency of administrative procedures by ensuring citizens' access to their court cases remotely (online). Furthermore, digitalisation can be a tool of increasing the efficiency of the judiciary and speeding up court proceedings by introducing electronic communication between administrative authorities, citizens and the court itself. We can conclude that digitalisation can contribute to a fair trial in the following way:

1. Faster access to information: digitalisation enables faster access to documents, information and judgments thorough remote access to the court records. This can speed up the decision-making process, reduce red tape and allow parties to understand the status of their case more quickly.
2. Efficiency and reduction of errors: administrative-judicial procedures often involve extensive paperwork. Digitalisation can facilitate the tracking and management of documents, reducing the risk of document loss or damage and thereby reducing possible errors.
3. Increased transparency: digitalisation enables monitoring the status of the case online, access to documents and information about the procedure, and reduces the possibility of irregularities or manipulations.
4. Access to remote parties: digitalisation enables parties to participate in the proceedings without being physically present in court. This is especially important when the parties are geographically distant or when travelling is difficult.
5. Cost efficiency: digitalisation can reduce costs related to printing, copying and distribution of paper documents.

It is important to recall the advantages of digitalisation of the judiciary, and especially the possibility of electronic communication with the courts, during the COVID-19 pandemic when it was

the safest way to communicate with the courts. Namely, the parties no longer had to send documents via post or direct delivery to the court, but had the option of sending submissions from their own offices.

Acknowledging the mentioned advantages, one should not ignore the challenges and disadvantages brought by the digitalisation of the judiciary. Digitalisation can lead to inequality, as some parties still do not have access to technology or are not skilled enough to use it. This can create inequality in access to court proceedings. With digitalisation, the system's dependence on modern technologies also arises. With the introduction of electronic files and the creation of various digital platforms (e-File, e-Communication, e-Land registry, e-Enforcements), the work of the court becomes dependent on the proper functioning of these platforms. Technical problems or malfunctions can lead to the interruption of the procedure and the extension of the duration of court cases. Finally, digitalisation reduces the need for direct human contact. However, physical presence in the courtroom is still important since it enables emotional contact with the parties, but also a better understanding of the parties and their requests.

In order to ensure success in digitalisation of administrative court proceedings, it is important to proceed carefully and take into account all the advantages and challenges. This may include properly designing security protocols, providing technical support to parties who are less adept at using technology, and maintaining a balance between digitalisation and preserving the fairness of the process.

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PART IV

ADMINISTRATIVE JUSTICE REFORM

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Chapter 20. Reform of Administrative Justice in Ukraine

20.1. Introduction

After the restoration of Ukraine's independence in 1991, the question arose of building a truly sovereign and independent Ukrainian state, which should become a legal, democratic and social country. At the same time, this task required a radical change in the old Soviet system of governance and human rights protection. The problems of this system were manifested, on the one hand, in the fact that the set of reforms that the Ukrainian authorities of that time intended to implement could not be implemented due to the lack of an effective centre for such reforms – the Cabinet of Ministers of Ukraine, as well as the vertical of executive authorities, and, on the other hand, the "omnipresence" of the state in all spheres of human life and total control over people, which negated any attempts at reform.

The difficult thorny path that began 32 years ago continues to this day.

The Basic Law of our country declares that human rights and freedoms determine the direction of its activities. In addition, the state is accountable to the individual for its activities. Affirming and ensuring human rights and freedoms is the main duty of the state.[1] At the same time, such recognition should not be just a declaration or enshrined in law. This norm should be directly implemented,

[1] Constitution of Ukraine. Verkhovna Rada of Ukraine; Constitution of Ukraine, Constitution, Law of 28.06.1996 No. 254к/96-ВР.

i.e., provide for specific mechanisms and legal procedures enshrined in legislative acts and bylaws, through which every person on the territory of Ukraine can exercise their rights and protect them in the event they are violated. However, since the provisions of the Constitution of Ukraine are norms of direct effect, the latter imply the possibility of applying to the court as a judicial body to protect their rights directly on the basis of the Basic Law. It is worth emphasising that the postulate of a legal, effective state directly depends on the quality and effectiveness of the state's activities in guaranteeing and protecting human rights. The criteria of the rule of law are grouped quite well by O. Solomin. Among the main features of the rule of law, the latter singled out: the rule of law in all spheres of public life; legal equality of citizens; priority of inalienable human rights over the rights of any association; guarantee and protection of rights and freedoms; the principle of mutual responsibility of the state and the individual as well as the principle of separation of state power into legislative, executive and judicial branches.[2] All of these criteria and features clearly demonstrate that the state will be legal and effective only if they are implemented, and a proper system of bodies entrusted with the function of protecting human and civil rights and freedoms is created and ensured. This is also emphasised by international law, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to Article 6(1) of the ECHR, everyone is entitled to a fair and open and transparent hearing. Such a hearing must be conducted by an independent and impartial court. The court must consider everyone's case within a reasonable time. The court's decision should be announced publicly. An important guarantee of this is the presence of media representatives during the announcement. At the same time, these representatives may not be involved in the proceedings, during the entire trial, or a separate part of it, if there is a necessary interest in this.[3] In addition, Article 13 of the ECHR emphasises that

[2] *The concept of the rule of law: the modern context*, Scientific notes of NaUKMA, "Political Sciences" 2012, Vol. 134, pp. 3–7.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms (with Protocols) (European Convention on Human Rights), Council of Europe; Convention, International Document, Protocol of 04.11.1950.

everyone whose rights and freedoms have been violated, including if such violation has been committed by representatives of public authorities, has the right to an effective remedy before a national court.[4] The particulars of the application of these articles of the ECHR and violations of its implementation have been repeatedly discussed by the European Court of Human Rights, in particular in the decisions of: *Oleksandr Volkov v. Ukraine*, No. 21722/11, Grand Chamber judgment of 2013; *Burmych and Others v. Ukraine*, No. 46852/13, 47786/13, 54125/13, Grand Chamber judgment of 2017; *Polekh and Others v. Ukraine*, application No. 58812/15 and 4 other applications; *Engel and Others v. the Netherlands*, No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72; *Saunders v. the United Kingdom*, No. 19187/91; *Yalloch v. Germany*, application No. 54810/00; *Zhovner v. Ukraine*, application No. 56848/00, judgment of 29 June 2004; *Berlizev v. Ukraine*, judgment of 8 October 2021.

The administrative justice system of independent Ukraine dates back to the adoption of the Code of Administrative Procedure on 6 July 2005, which defines the jurisdiction and powers of administrative courts and establishes the procedure for conducting proceedings in administrative courts.[5] This day is the starting point for the establishment of one of the most important aspects of human and civil rights protection in a state governed by the rule of law. In view of this, one of the main features of the rule of law is the right to access justice and to a fair trial. As noted by domestic researchers of the administrative process, courts in Ukraine are called upon to administer justice and protect violated and disputed constitutional rights, freedoms and legitimate interests of a person and citizen[6]. In this context, it is worth referring to the Basic Law of our country, where Article 55 states that everyone is guaranteed the right to

[4] Convention for the Protection of Human Rights and Fundamental Freedoms (with Protocols) (European Convention on Human Rights), Council of Europe; Convention, International Document, Protocol of 04.11.1950.

[5] Code of Administrative Procedure of Ukraine, Law of Ukraine of 06.07.2005 No. 2747-IV.

[6] M.A. Komziuk, V.Y. Tsebynoga, *Problems of administrative proceedings in Ukraine in the context of judicial reform. Modern problems of administrative law and process*, Kharkiv 2017, pp. 135–137.

appeal in court against decisions or actions or inactions of representatives of the state, its officials and employees, as well as representatives of local self-government bodies. This means that everyone is guaranteed protection of their rights and freedoms in court. The court cannot deny justice if a citizen of Ukraine, a foreigner, or a stateless person believes that their rights and freedoms have been or are being violated, obstacles to their realisation have been or are being created, or other infringements of rights and freedoms have occurred. In this context, a court's refusal to accept claims and other applications and complaints filed in accordance with applicable law is a violation of the right to judicial protection, which, according to Article 64 of the Constitution of Ukraine, cannot be limited.[7] In addition, the Constitutional Court of Ukraine emphasises that the central place in the protection of human and civil rights and freedoms is the possibility of appealing against decisions, actions and inaction of the authorities. Thus, every person, regardless of affiliation with a particular state, has the right to appeal to a court of general jurisdiction against decisions, actions or inaction of any representatives of the state, which is a guaranteed right if a citizen of Ukraine, a foreigner, or a stateless person believes that their decision, action or inaction violates or infringes the rights and freedoms of a citizen of Ukraine, a foreigner, or a stateless person or impedes their exercise, and therefore requires legal protection in court. Such complaints are subject to direct consideration by courts, regardless of the fact that a previously adopted law may have established a different procedure for their consideration (appeal to a higher-level body or official in relation to the body or official that made the decision, took action or failed to act). At the same time, filing a complaint with a higher-level body or official does not prevent an appeal to be made to the court against such decisions, actions or inaction.[8]

[7] Decision of the Constitutional Court of Ukraine in the case on the constitutional appeal of citizens Protsenko Raisa Mykolaivna, Yaroshenko Polina Petrivna and other citizens regarding […], Decision of the Constitutional Court of Ukraine of 25.12.1997 No. 9-zp.

[8] Decision of the Constitutional Court of Ukraine in the case on the constitutional appeal of citizen Halyna Pavlivna Dziuba regarding the official interpretation of part two of Article 55 […], Decision of the Constitutional Court of Ukraine of 25.11.1997 No. 6-zp.

Thus, it is the duty of a state governed by the rule of law to create conditions that will help ensure guarantees for the exercise of subjective rights not only of Ukrainian citizens, but also of other persons legally staying on its territory in relations with administrative bodies. The realisation of this obligation necessitates the establishment of administrative justice in Ukraine, which, on the one hand, would protect the subjective rights of citizens, and, on the other hand, would ensure the legality of the activities of public authorities through judicial practice and, thus, contribute to strengthening the rule of law in the state. Thus, the introduction of administrative court proceedings is conditioned by the legal nature of public law disputes, where a citizen is confronted by a powerful administrative apparatus.

At the same time, it should be noted that the purpose of administrative justice should be to exercise only legal control, not control over the expediency of management activities. Administrative legal protection should be judicial legal protection, since it is the courts that best meet the requirements of independence and impartiality for human rights bodies.

The creation of administrative justice will not only guarantee the strengthening of law and order in the field of administrative activity, but will also enable an individual citizen to exercise his or her rights against public authorities by appealing against their unlawful decisions, actions or inaction. Thus, there will be a significant approach to the implementation of the provisions of Article 55 of the Basic Law.[9]

20.2. Preconditions and Necessity of Reforming Administrative Justice

An important guarantee of implementation of the constitutional principle of the State's responsibility for its activities before the individual is the right of everyone to appeal in court against decisions, actions or inaction of state authorities, local self-government

[9] Administrative justice in Ukraine – formation and development, https://minjust.gov.ua/m/str_4930/ [access: 28.10.2023].

bodies, officials and officers. The complexity of protection of such rights of citizens, their associations, and interests of legal entities in the field of public relations is explained by their subordination in these relations – to bodies and officials who perform administrative functions and have the right to make binding decisions. Therefore, the reliability of such protection should be ensured by consideration of administrative disputes by an independent authoritative body – a court, before which a citizen and state and local authorities and their officials are equal.

As a relatively young country, Ukraine often borrows the positive experience of developed countries. This practice is quite correct, and the right way to improve the existing and introduce the new. The administrative justice system needs such experience, perhaps more than anything else. Therefore, let's try to consider the main models of organisation of judicial resolution of administrative disputes. The modern world recognises the existence of two such models: the first one is typical for most developed countries of the continental European legal system, which consists in the existence of a separate branch of administrative courts within the judiciary (France, Germany, Italy, Turkey) or specialised administrative chambers within the structure of courts (Spain, the Netherlands). The undoubted advantage of such a model is the professionalism and experience of judges based on their clear specialisation. In addition, such a system helps to relieve the workload of general courts and enable them to concentrate on cases within their competence.

In the countries of the Anglo-Saxon legal system, the authority to consider claims against the authorities belongs to the general courts (UK, USA). This approach avoids the difficulties that sometimes arise in countries that follow the previous model when a citizen chooses a competent court due to the multiplicity of different courts. However, experience still shows that control over the authorities by general courts is not necessarily the best guarantee for the protection of human or civil rights. At the same time, it can lead to an accumulation of court cases in the judiciary and delay in the time of their consideration and resolution.

The idea of establishing specialised courts to consider complaints against acts (actions) of administrative bodies is gaining popularity

in Eastern European countries. Let us consider separately the position of the Republic of Poland on this issue. A great achievement in Poland is considered to be the adoption on 11 May 1995 of the Law on the Supreme Administrative Court, according to which the Supreme Administrative Court was established in Warsaw, with branches also in the voivodeships. Its task is to determine 'the measure of justice through judicial control over public administration'.[10] This legal act, on the basis of which certain tasks of administrative proceedings are realised, is already being actively changed and improved. Based on the positive experience of neighbouring states, a similar system of administrative courts has recently been established in Estonia. Pursuant to Article 3 of the Estonian Code of Administrative Court Procedure. In the first instance, administrative matters are adjudicated by the administrative courts, in the appellate instance by the circuit courts and in the final instance by the Supreme Court. The Supreme Court also determines petitions to review a case and other declarations provided in the law.[11]

Some fear of the idea of establishing administrative courts in Ukraine can be explained by a lack of understanding of their task. Many people associate the name "administrative court" with the consideration of cases of administrative offenses. However, this stereotype is wrong. Administrative courts do not hold citizens administratively liable; on the contrary, they are designed to protect people from the arbitrariness of the state, represented by state authorities, their officials and representatives of local self-government bodies. Such courts are designed to hear cases of "person versus state", which is a guarantee of the professionalism and authority of administrative courts. Citizens and legal entities may appeal to an administrative court against decisions, actions or omissions of executive or local government bodies and their officials, including decisions to bring them to administrative liability. The issue of imposing administrative penalties is decided by a judge of another court.

[10] J. Malec, D. Malec, *Historia administracji i myśli administracyjnej*, Kraków 2000, pp. 239–251.

[11] Code of Administrative Court Procedure, https://www.riigiteataja.ee/en/eli/527012014001/consolide [access: 28.10.2023].

The need to create administrative courts in Ukraine was caused, among other things, by the low authority of general courts and the low level of public trust in them. In our opinion, administrative courts will gain authority and respect faster than people's far from positive perceptions of general courts will change for the better.

Let us consider what cases should be attributed to the competence of administrative courts based on the example of other countries. For example, the German Regulation on Administrative Courts extends their competence to all conflicts of a public law nature, except for constitutional and legal disputes and disputes referred by federal law to the jurisdiction of other courts. In accordance with the German Law on Officials, administrative courts also hear cases related to official legal relations (relations in the civil service). All claims for damages resulting from the breach of public law obligations, as well as other claims for public law compensation, are heard by ordinary courts.[12]

In addition to resolving public law disputes, Estonian administrative courts are competent to issue permits for administrative actions in cases provided for by law. The issue of compensation for damage caused by an unlawful act or action of the administration is resolved differently in Estonia than in Germany. It also falls within the powers of the administrative court.[13] The same approach is found in Turkish law. Interestingly, the Turkish administrative court also compensates citizens for damage caused by improper fulfilment of the state's obligations to a person, for example, in cases of improper public order, terrorist acts, etc.

In neighbouring Poland, a mandatory prerequisite for applying to an administrative court is the rejection of the complaint by the administrative body that issued the challenged act or by a higher-level administrative body. Such a requirement allows the parties

[12] Verwaltungsgerichtsordnung, https://www.gesetze-im-internet.de/vwgo/BJNR000170960.html [access: 28.10.2023].

[13] Administrative Procedure Code of Estonia, https://www.juristaitab.ee/ru/zakonodatelstvo/administrativno-processualnyykodeks [access: 28.10.2023].

to resolve the conflict themselves and thus significantly reduce the number of lawsuits in court.[14]

In the United States, a preliminary administrative appeal is not required only in cases where the administration has clearly exceeded its competence, where the court is aware of the administration's opinion in similar cases, and where going through all administrative instances may cause irreparable harm to the person.[15] In Ukraine, according to Article 124 of the Basic Law of the state, all legal relations arising in Ukraine are subject to the jurisdiction of national courts.[16] Based on this, we do not recognise an administrative appeal as a mandatory stage that must precede going to court. This approach allows a citizen to choose the way to protect his or her rights: either to appeal to the administration, and if necessary, to the court, or to appeal directly to the court.

Based on the analysis of international experience and the requirements of Article 55 of the Constitution of Ukraine, the competence of administrative courts should primarily include consideration and resolution of disputes between individuals or legal entities and the administration, in which they believe that the administration has violated their rights or interests, including in the provision of management services, by its actions (decisions) or inaction.

Pursuant to Article 19 of the Code of Administrative Procedure, administrative courts are authorised to consider the following public law disputes:

I. To appeal against decisions of public authorities (regulatory legal acts or individual acts), as well as their actions or inaction, unless the law establishes a different procedure for consideration of such disputes:
   1) the bondholder administrator acting in the interests of the bondholders in accordance with the provisions of the

[14] Act of 30 August 2002 – Law on Proceedings Before Administrative Courts, https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/prawoo-postepowaniu-przed-sadami-administracyjnymi-16982717 [access: 28.10.2023].

[15] *Formation of the US Legal System*, http://surl.li/mmugd [access: 28.10.2023].

[16] Constitution of Ukraine [Electronic resource], Bulletin of the Verkhovna Rada of Ukraine 1996, No. 30, p. 141, http://zakon5.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80 [access: 28.10.2023].

Law of Ukraine "On Capital Markets and Organised Commodity Markets", with representatives of public authorities, in terms of appealing against its decisions (regulatory legal acts or individual legal acts), actions or omissions;

2) on the citizens' public trial, their acceptance and dismissal from it;
3) in relation to the exercise of their official powers in the field of management of public authorities, including delegated powers;
4) related to administrative agreements: their conclusion, execution, termination, cancellation or invalidation;
5) related to the exercise of the right of a public authority to go to court to resolve a public law dispute;
6) arising in connection with the election or referendum process;
7) in cases where a public authority that may provide access to public information fails to fulfil or improperly fulfils its duties;
8) in the event of disputes in the course of seizure or expropriation of property for public needs or for reasons of public necessity;
9) appealing against decisions of competition, medical and social, expert certification commissions and other similar bodies, when decisions of such entities are binding;
10) on staffing of public bodies and service in them;
11) in cases of appeal by individuals or legal entities against decisions, actions or omissions of the state customer in legal relations arising under the Law of Ukraine "On Defence Procurement"; the exception to the rule is the appeal of relations related to the conclusion of a public procurement contract (agreement) with the winner of a simplified tender using the electronic procurement system, as well as the amendment, termination and execution of public procurement contracts (agreements);
12) to appeal against decisions, actions or omissions of public authorities authorised to protect the state border, in

accordance with the Law of Ukraine "On the Liability of Carriers in International Passenger Transportation";

13) offences arising under the Law of Ukraine "On Rehabilitation of Victims of Repressions of the Communist Totalitarian Regime of 1917–1991" related to the exercise of powers by the National Rehabilitation Commission;
14) with public authorities to analyse the effectiveness of public-private partnerships and in connection with the implementation of the tender for determining a private partner and concession tender;
15) disputes arising in connection with the announcement, conduct and/or determination of the results of the tender for the private partner and concession tender;
16) on state regulation, supervision and control in the field of media.

II. Administrative courts cannot consider the following cases:
1) those within the competence of the Constitutional Court of Ukraine;
2) those to be resolved in criminal proceedings;
3) those dealing with the imposition of administrative penalties, except in cases specified by this Code;
4) with respect to relations that, in accordance with the law, charter (regulations) of a public association, self-regulatory organisation, are referred to its internal activities or exclusive competence, except for cases in disputes specified in paragraphs 9, 10 of part one of this Article.

III. Administrative courts do not consider claims that are derived from claims in a private law dispute and filed together with them, if this dispute is subject to consideration in a procedure other than administrative proceedings and is under consideration by the relevant court.[17]

In determining the range of legal acts that may be appealed to administrative courts, it is necessary to proceed from the principle

[17] Code of Administrative Procedure of Ukraine, Law of Ukraine of 06.07.2005 No. 2747-IV, Bulletin of the Verkhovna Rada of Ukraine of 09.09.2005, No. 35, pp. 1358, Article 446.

that no legal act (regulatory or individual) should be removed from the control of the courts in terms of constitutionality, legality of the act or its compliance with a legal act of higher legal force. This principle logically follows from the aforementioned constitutional provision that extends the jurisdiction of the courts to all legal relations arising in Ukraine. Unlike constitutional control, which is initiated only by authorised subjects, the mechanism of control by administrative courts is launched by the applying to them by interested parties.

The rules for delimiting the subject matter jurisdiction of administrative courts are provided for in Article 20 of the CAPU. Thus, local general courts, as administrative courts, have jurisdiction over the following:

1) administrative cases concerning decisions, actions, or inaction of public authorities in matters of administrative liability;
2) administrative cases related to the electoral or referendum process, regarding:
   - appeal against decisions, actions or omissions of precinct election commissions, precinct referendum commissions, and members of these commissions,
   - on issues related to the voter list,
   - appealing against actions or omissions of the media that violate the election and referendum legislation,
   - appealing against actions or omissions of a candidate for deputy of a village or settlement council, candidates for the position of village or settlement head, or their proxies;
3) administrative cases related to the stay of foreigners and stateless persons on the territory of Ukraine, including:
   - forced return of foreigners and stateless persons to their country of origin or a third country,
   - forced expulsion of foreigners and stateless persons from Ukraine,
   - detention of persons who are not citizens of Ukraine in order to establish information about their identity and (or) forcible expulsion from the territory of Ukraine,

- extension of the period of detention of such persons in order to establish information about their identity and (or) their forced expulsion from the territory of Ukraine,
- detention of such persons until a decision is made to recognise them as refugees or persons in need of additional protection in Ukraine, or stateless persons;

4) detention of foreigners or stateless persons for the purpose of ensuring their transfer in accordance with Ukraine's international readmission agreements; administrative cases in connection with non-fulfilment or improper fulfilment of their duties by officials of the state enforcement service in relation to the execution of court decisions mentioned above;
5) administrative cases concerning appeals against decisions of the National Commission for Rehabilitation in legal relations arising under the Law of Ukraine "On Rehabilitation of Victims of Repressions of the Communist Totalitarian Regime of 1917–1991".

District administrative courts have jurisdiction over all administrative cases, except those specified in parts one and three of this article.

The High Anti-Corruption Court has jurisdiction over cases involving the application of the sanction provided for in paragraph 1-1 of part one of Article 4 of the Law of Ukraine "On Sanctions".[18]

Appeals by individuals or legal entities against actions (decisions) or omissions of the administration are the main category of cases within the jurisdiction of administrative courts. If, along with appealing against the administration's decision, the plaintiff claims compensation for damage caused by its actions or inaction, the decision on it must be made by an administrative court, since it would be procedurally uneconomical to withdraw property claims related to unlawful actions of the administration from the jurisdiction of administrative courts. However, if such a property claim is filed separately from the appeal against the actions or inaction of

[18] Code of Administrative Procedure of Ukraine, Law of Ukraine of 06.07.2005 No. 2747-IV, Bulletin of the Verkhovna Rada of Ukraine of 09.09.2005, No. 35, p. 1358, Article 446.

the administration, it should be resolved in civil proceedings, and the decision of the administrative court should be prejudicial, i.e., binding on the civil court, in terms of the legal assessment of the administration's behaviour. Such rules are provided by Article 21 of the CAPU. Thus, a plaintiff may file several claims in one statement of claim if they are related to each other.

If a case involving related claims is territorially jurisdictional to different local administrative courts, the plaintiff may choose any of these courts. In the case of simultaneous jurisdiction of the district administrative court and, with respect to another claim, of the local general court as an administrative court, the district administrative court shall hear the case.

If the case concerning one of the claims is under the jurisdiction of the administrative court of appeal and the case concerning the other claim(s) is under the jurisdiction of the local administrative court, such case shall be considered by the administrative court of appeal.

It is prohibited to combine several claims that are to be considered in different proceedings into one proceeding, unless otherwise provided by law.[19]

Therefore, an individual or legal entity that is dissatisfied with the actions of the administration and has suffered damage as a result of them should determine, when applying to the court, what is more advantageous for them: a rather lengthy resolution by the administrative court of the issues of unlawfulness of the act and compensation for damage, or a faster recognition of the unlawfulness of the administrative act by the administrative court, and only then press for compensation for damages in civil proceedings, which will generally require more time, money and effort, but is less risky. By the way, next year the Law of Ukraine "On Administrative Procedure" will come into force, which regulates the specifics of administrative procedures in Ukraine. In particular, this law regulates the relations of executive authorities, authorities of the Autonomous Republic of Crimea, local governments, their officials, and other entities

[19] Code of Administrative Procedure of Ukraine, Law of Ukraine of 06.07.2005 No. 2747-IV, Bulletin of the Verkhovna Rada of Ukraine of 09.09.2005, No. 35, p. 1358, Article 446.

authorised by law to perform public administration functions with individuals and legal entities regarding the consideration and resolution of administrative cases in the spirit of a democratic and legal state as defined by the Constitution of Ukraine and in order to ensure the rule of law, as well as the state's obligation to ensure and protect human rights, freedoms or legitimate interests. This Law shall not apply to relations arising in the course of:

1) consideration of appeals from individuals containing proposals and recommendations on the formation of state policy, resolution of local issues, and regulation of public relations;
2) constitutional proceedings, criminal proceedings, judicial proceedings, enforcement proceedings (except for the execution of administrative acts), operational and investigative activities, intelligence activities, counterintelligence activities, notarial acts, execution of sentences, application of legislation on national security and defence, citizenship, granting asylum in Ukraine, protection of economic competition (except for cases on granting permits and conclusions for concerted actions, concentration of business entities);
3) civil service, diplomatic and military service, service in local self-government bodies, service in the police, and other public service;
4) realisation of the constitutional right of citizens to participate in all-Ukrainian and local referendums, to elect and be elected to state and local authorities;
5) appeal against public procurement procedures;
6) awarding state awards and honours;
7) granting pardons.[20]

Summarising the above views on determining the scope of competence of administrative courts, it can be concluded that administrative courts of Ukraine consider disputes in which one of the parties is a state authority, an authority of the Autonomous Republic of Crimea, a local self-government body, an official or an employee related to the exercise of their authority. This model of

[20] On Administrative Procedure, Law of Ukraine dated 17.02.2022 No. 2073-IX, https://zakon.rada.gov.ua/laws/show/2073-20#Text [access: 28.10.2023].

administrative justice is somewhat different from other countries of the continental legal system.

20.3. The Importance of Administrative Justice for the Protection of Human Rights and Freedoms

We propose to consider this issue in the context of the importance of reforming and improving administrative justice in our country by determining the procedure for protecting human and civil rights. Of primary importance is the method of appealing against decisions of actions or inactions of public authorities and local self-government bodies in court. When a case is considered by a court under the rules of general action proceedings, the parties to the case shall set forth in writing their claims, objections, arguments, explanations and considerations regarding the subject matter of the dispute exclusively in statements on the merits. Statements on the merits of the case include: a statement of claim; a response to a statement of claim (response); a response to a response; objections; and explanations of a third party regarding a claim or response. In addition, appeals, cassation appeals, etc. may also be filed. The grounds, time and order of submission of statements on the merits of the case are determined by the Code of Administrative Procedure or by the court in cases specified by a legal act. Submission of statements on the merits of the case is the right of the parties to the case. Failure of a public authority to file a response to a claim without good reason may be qualified by the court as recognition of the claim. The court may allow a party to the case to submit additional explanations on a particular issue that arose during the consideration of the case, if it deems it necessary. In the statement of claim, the plaintiff shall set forth his or her claims regarding the subject matter of the dispute and their substantiation. The statement of claim shall be filed in writing by the plaintiff or a person authorised by law to apply to the court in the interests of other persons. A statement of claim may be made by filling out a claim form provided by the court. At the plaintiff's request, an administrative court clerk may provide

assistance in preparing the statement of claim. The statement of claim shall include:

1) the name of the court of first instance to which the application is filed;
2) full name (for legal entities) or name (surname, name and patronymic) (for individuals) of the parties and other participants in the case, their location (for legal entities) or place of residence or stay (for individuals), postal code, identification code of the legal entity in the Unified State Register of Enterprises and Organisations of Ukraine (for legal entities registered under the laws of Ukraine), registration number of the taxpayer's account card (for individuals), if any, or passport number and series for individuals – foreigners;
3) indication of the price of the claim, a reasonable calculation of the amount to be recovered if the claim contains claims for compensation for damage caused by the challenged decision, actions, or inaction of the authority;
4) the content of the claims and a statement of the circumstances by which the plaintiff substantiates his or her claims, and, if a claim is filed against several defendants, the content of the claims against each defendant;
5) a statement of the circumstances by which the plaintiff substantiates its claims; indication of evidence confirming these circumstances;
6) information on the pre-trial settlement of the dispute – if the law establishes a mandatory pre-trial procedure for the settlement of the dispute;
7) information on measures taken to secure evidence or a claim before filing a statement of claim, if any;
8) a list of documents and other evidence to be attached to the statement of claim; indication of evidence that cannot be submitted together with the statement of claim (if any), indication of whether the plaintiff or other person has the original written or electronic evidence, copies of which are attached to the statement of claim;
9) justification of violation of the rights, freedoms, and interests of the plaintiff by the contested decisions, actions or omissions;

10) in cases of challenging regulatory legal acts, information on the application of the challenged regulatory legal act to the plaintiff or the plaintiff's affiliation with the subjects of legal relations in which the act is or will be applied;
11) the plaintiff's own written confirmation that he or she has not filed another claim or claims against the same defendant(s) with the same subject matter and on the same grounds.

If the statement of claim is filed by a representative, it shall additionally contain the information specified in paragraph 2 of part five of Article 160 in respect of the representative. If a claim is filed by a person who is authorised by law to apply to court in the interests of another person, the statement of claim shall specify the grounds for such application. If a statement of claim is filed by a person exempted from paying court fees in accordance with the law, it shall state the grounds for exemption from court fees. At the plaintiff's option, he or she may provide other information necessary to resolve the dispute. The statement of claim must be accompanied by copies of the statement of claim and copies of other documents in accordance with the number of parties to the case. If a claim is filed in electronic form, the claim shall be accompanied by evidence of sending a copy of the claim and copies of the attached documents to other parties to the case, subject to the provisions of Article 44 of the Code. When filing an administrative claim in paper form, a public authority is obliged to attach to the statement of claim a proof of sending copies of the statement of claim and attached documents to other parties to the case by letter with a description of the attachment. Such sending may be done electronically through an Internet portal, subject to the provisions of Article 44 of the Code.

If a public authority files a lawsuit to ban a political party, a copy of the statement of claim and copies of the documents attached thereto shall be sent to the court in accordance with the second paragraph of part three of Article 289-3 of the CAPU. The statement of claim shall be accompanied by a document confirming payment of the court fee in the prescribed manner and amount or documents confirming the grounds for exemption from payment of the court fee in accordance with the law. The plaintiff is obliged to attach to the statement of claim all available evidence

confirming the circumstances on which the claim is based (if written or electronic evidence is submitted, the plaintiff may attach copies of the relevant evidence to the statement of claim). If necessary, the statement of claim shall be accompanied by the plaintiff's petitions and applications for consideration of the case under the rules of simplified action proceedings, participation in the court hearing on consideration of the case under the rules of simplified action proceedings, exemption (deferral, instalment, reduction) from payment of the court fee, appointment of an expert examination, request for evidence, provision of free legal aid if the relevant authority refused to provide it, etc. If the deadline for applying to an administrative court is missed, the plaintiff must attach to the claim a request for the renewal of this deadline and evidence of the validity of the reasons for its missed deadline. An application for recognition of an individual act as unlawful or an administrative agreement as invalid shall also be accompanied by the original or a copy of the disputed act or agreement or a certified extract therefrom, and in the absence of the act or agreement, the plaintiff shall submit a request for its reclamation.[21]

It should be noted that the form of appeal to an administrative court should be a lawsuit, not a complaint. Why is this important? First of all, we note that the term "complaint" indicates the inequality of the complainant and the complained about. This inequality is justified in administrative and legal relations between a citizen and the administration, since these relations are based on the principle of subordination. This inequality is also preserved in procedural relations when appealing against administrative decisions in an administrative procedure. Therefore, the use of the term "complaint" in administrative appeals is justified. However, in our opinion, it is inadmissible to use it in the administrative court process, since both a citizen and the authorities are equal before the court. In addition, the term "claim", unlike "complaint", allows not only appealing an action (decision) or inaction (with a demand to declare it unlawful), but also making demands to oblige the administration to take

[21] Code of Administrative Procedure of Ukraine, Law of Ukraine of 06.07.2005 No. 2747-IV.

certain actions or refrain from doing so, to compensate for damage, etc. In addition, a lawsuit allows unifying the form of appeal to the court by both individuals or legal entities and administrative bodies.

I. The Code of Administrative Procedure describes the right to apply for protection of one's rights and its exercise in quite an interesting way. Thus, according to Article 5, every person has the right to apply to an administrative court in accordance with the procedure established by this Code if he or she believes that a decision, action or inaction of a public authority has violated his or her rights, freedoms or legitimate interests, and to request their protection by way of legal action:
   1) declaring a legal act or its individual provisions unlawful and invalid;
   2) declaring an individual act or its individual provisions unlawful and repealing them;
   3) recognition of the actions of the authority as unlawful and an obligation to refrain from certain actions;
   4) recognition of the act of such an entity in the form of inaction as unlawful and an obligation to take certain actions;
   5) recognition of an authority as incompetent in certain matters;
   6) satisfaction of the plaintiff's claims for recovery of funds from the defendant to compensate for damage caused by his/her unlawful decisions, actions or omissions.

II. The Code of Administrative Procedure establishes the freedom to choose the method of protection of the plaintiff's violated rights, freedoms or interests, if such method does not contradict the law.

III. The Code allows for the protection of violated rights by public authorities, other bodies and persons authorised by law to do so.

IV. Cases of appeal to the court by public authorities themselves are defined by the Constitution and laws of Ukraine.

V. No one may be deprived of the right to participate in the consideration of his/her case in accordance with the procedure established by this Code.

VI. A waiver of the right to go to court is invalid.
VII. Foreigners, stateless persons and foreign legal entities enjoy the same right to judicial protection in Ukraine as Ukrainian citizens and legal entities.[22]

The law provides for certain cases when a court transfers an administrative case to another administrative court if:

1) prior to the commencement of the case on the merits, the defendant's motion, registered in accordance with the procedure established by law, whose place of residence (stay) was not previously known, to transfer the case to the place of his residence (stay) is granted;
2) when initiating proceedings in a case, the court establishes that the case falls within the territorial jurisdiction (jurisdiction) of another court;
3) after opening the proceedings, the court finds that the case falls within the territorial jurisdiction (jurisdiction) of another court;
4) after satisfying the challenges (self-recusal) or in other cases, it is impossible to form a new court to consider the case;
5) the administrative court that considered the case has been liquidated or terminated for reasons specified by law;
6) one of the parties to the case is the court in which the case is being considered or a judge of that court;
7) the case is subject to consideration as an exemplary case in accordance with the procedure set forth in Article 290 of the Code of Administrative Procedure; the court shall transfer the administrative case for consideration to another administrative court that is geographically closest to this court; in the event of liquidation or termination of the work of an administrative court, the cases in its proceedings shall be immediately transferred to the court designated by the relevant law or decision to terminate the work of the administrative court, or if such a court is not designated, to the court that is geographically closest to the court that has

[22] Code of Administrative Procedure of Ukraine, Law of Ukraine of 06.07.2005 No. 2747-IV.

been liquidated or terminated; disputes between administrative courts regarding jurisdiction are not allowed.[23]

The activities of administrative courts should be based on somewhat different principles than those used in civil proceedings. The peculiarity of administrative proceedings is that in the process, an ordinary person is confronted by a powerful administrative apparatus, which employs more than one lawyer. In this regard, the parties possess unequal opportunities. In order to somehow correct this imbalance, the court should play an active role in the administrative process in order to assist a person in protecting his or her rights. To do this, the court should help the citizen to identify evidence that could prove the circumstances to which he or she refers; take measures to ensure that the person finds and submits additional information that the court may take into account when deciding the case; and on its own initiative, obtain evidence that the court believes is missing. Therefore, an administrative court, unlike a purely adversarial civil proceeding, where the court operates solely on the evidence submitted by the parties, must fully establish the circumstances of the case in order to make a fair and objective decision. This role of the court is based on a principle variously called the investigative, inquisitorial, or officialdom principle. The court must take measures to facilitate the reconciliation of the parties by proposing options for a compromise settlement agreement that takes into account the interests of both parties. It is clear that the terms of the settlement must not contradict the requirements of the law. Such terms, as a rule, may be formulated within the discretionary powers granted by law to the administrative authority.

Given the low level of legal awareness among ordinary citizens and their limited understanding of the legal intricacies of cases, legal literature suggests the necessity of introducing a presumption of fault in administrative cases against the subject of authority whose actions (decisions) or omissions are being challenged. The presumption of guilt would impose on the administration the obligation to employ reasoned arguments and to refer to evidence to prove the

[23] Code of Administrative Procedure of Ukraine, Law of Ukraine of 06.07.2005 No. 2747-IV.

legitimacy of its actions (decisions) or inaction and to refute the plaintiff's allegations of violation of his rights or interests. Such an approach would significantly strengthen the position of a citizen who is unable to use legal aid and has insufficient legal knowledge to prove the validity of his or her allegations in court.

When deciding on a claim filed by an individual or legal entity against the administration, the administrative court must conclude that the administration's behaviour complies with the law, but it must not assess the actions (or the act) of the administration for their appropriateness. The administrative court, based on the principle of separation of powers, should not interfere with the exercise of discretionary powers of the administration, if such exercise of powers does not exceed the limits established by the legal norm.

It is important from the point of view of the democratic nature of justice and the guarantee of the validity of a court decision to resolve the issue of sole and collegial consideration of administrative disputes.

For example, in the Netherlands, administrative cases are heard in the first instance by a single judge. However, if the judge believes that the case is too complex for a single judge to resolve, he or she will refer it to a panel of judges. According to the German rules of administrative proceedings, a case is referred to a single judge if it is not very complex in fact or law or is not of fundamental importance. In other cases, the case is reviewed by a panel of three professional judges and two judges on a voluntary basis (the latter are elected by the local community). This experience is worth considering when introducing administrative justice in Ukraine.

It is important that representatives of the people – people's assessors – are also involved in the consideration of administrative cases in the first instance, who, administering justice as part of a panel of judges, would help a professional judge to look at the case through the eyes of an ordinary citizen, and not only from the point of view of the dry letter of the law. Based on the fact that the Constitution provides that only persons with a higher legal education may become judges, we believe that it would be appropriate to provide that a citizen with a master's degree in public administration or sociology may also become a professional judge of an administrative

court. Such judges could hear cases only as part of panels of judges and would have to ensure the application of law in the light of the achievements of science in the field of administrative relations.

When creating a Ukrainian model of administrative courts, taking into account the best international experience in the field of administrative justice, it is necessary to find a variant of the organisation of judicial bodies and administrative proceedings that would promote the principle of 'the state for the individual, not the individual for the state'.

20.4. The Importance of Administrative Court Proceedings in Terms of the Realisation of the Postulate of an Effective, Reliable and Rule-of-Law State

The Constitution of Ukraine declares that a person is the highest social value of society, and that the state's activities are aimed at realising and protecting his or her legitimate rights, freedoms and interests. For example, Article 3 of the Constitution of Ukraine establishes that a person, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and direction of the state's activities.[24] The European legal space, to which our country aspires, obliges not only to establish world standards of democratic development of society, proclamation of human rights and freedoms, but also to create a system of their reliable implementation, protection and defence. Undoubtedly, in recent years, changes in public consciousness have significantly influenced citizens' ability to demand from the state, in accordance with the Constitution of Ukraine, the affirmation and protection of their rights and freedoms (part 2 of Article 3).

[24] Constitution of Ukraine. Verkhovna Rada of Ukraine; Constitution of Ukraine, Constitution, Law of 28.06.1996 No. 254к/96-ВР.

According to Judge Martin Steinkühler of the Federal Administrative Court of Germany, the state must, actively protect human rights and is called upon to do so:

> *This point of view is becoming increasingly relevant in the current times, when markets are being taken over by private monopolies and oligopolies. As a rule, those who have power – either because they belong to the ruling majority or because they manage to realise their interests contrary to the interests of the majority (for example, due to physical or economic superiority) – do not need human rights. Therefore, human rights mainly act to protect and benefit the minority and/or the weak. They are directed against those forces that, due to their legal and/or de facto position of power, are able to determine the living conditions of an individual (also against his or her will).*[25]

Article 1 of the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights".[26] However, at the constitutional level in Ukraine, certain categories of persons have exceptional guarantees of protection of their rights; this refers to the principle of immunity of officials as a kind of legalised exception to the general principle of equality of rights and freedoms of citizens. It should be noted that national legislation on human and civil rights and freedoms meets high international legal standards. It enshrines a democratic concept of relations between a person and the state, whereby a person in Ukraine is recognised as the highest social value, and changes the ratio and role of the

[25] M. Steinkühler, *Human Rights Protection and Administrative Proceedings*, [in:] O.M. Nechytailo (ed.), *Human Rights Protection in Administrative Proceedings: Current Status and Prospects for Development in Ukraine: Proceedings of the International Scientific and Practical Conference Dedicated to the 10th Anniversary of the Procedural Activities of Administrative Courts of Ukraine (Kyiv, 1–2 October 2015)*, Kyiv 2015.

[26] Universal Declaration of Human Rights of the United Nations: International document of 10 December 1948. Adopted and proclaimed by UN General Assembly resolution 217 A (III) of 10 December 1948.

structural elements of the legal status of a citizen, as rights and freedoms, rather than duties, come to the fore. However, today, the current legal status of Ukrainian citizens is characterised by weak social and legal protection, insufficient guarantee of rights and freedoms, and lack of necessary enforcement mechanisms, which raises the question of the reality of the exercise and protection of human and civil rights. Paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right of everyone to a fair and public hearing, taking into account the principles of reasonableness of the time limits for resolving the dispute on the basis of the independence and impartiality of judges of the national judicial system.[27] Building Ukraine as a rule-of-law and democratic state and its accession to the European Union require an effective mechanism for the protection of human rights and freedoms, one of the elements of which is an effective and responsible system of reliable judicial protection of individuals and legal entities against violations of their rights and legitimate interests, including by public authorities in the field of public relations. Moreover, ensuring guarantees of citizens' rights in relations with administrative bodies is the duty of the rule of law. This is what led to the need to create administrative justice in Ukraine, which, on the one hand, should protect individual rights, and on the other hand, through a unified judicial practice, ensure the legality of public authorities and contribute to strengthening the rule of law in the state. If we look back in history, we can see that in most countries administrative justice began to emerge in the second half of the nineteenth century. Of course, in different states it was formed individually (taking into account existing social conditions and traditions), being influenced by theoretical views established at that time. In our country, administrative justice is a special branch of justice. The attribute "administrative" indicates both the presence of an administrative element in the organisation of administrative justice (in terms of personnel) and in the procedure of its

[27] Convention for the Protection of Human Rights and Fundamental Freedoms (with Protocols) (European Convention on Human Rights), Council of Europe; Convention, International Document, Protocol of 04.11.1950.

functioning (elements of the administrative process), and the nature of cases resolved by administrative justice bodies (public disputes). The term "administrative justice" itself is ambiguous, due to the peculiarities of the formation of the relevant institution in certain legal systems, where attention is focused on both certain features of this phenomenon that are common to it and some peculiarities related to the nature of legal systems. The essence of administrative justice in its modern sense is inextricably linked to the philological interpretation of the components of this phenomenon. The adjective "administrative" (from the Latin *administratio* – "management") means a certain affiliation with organisational activities in the field of management, while "justice" (from the Latin *justita* – "justice") is nothing more than justice; a system of judicial institutions, their activities in the administration of justice. That is, in the literal sense, "administrative justice" is "justice that belongs to administration".[28] In the special literature, according to its legal nature and purpose, administrative justice is considered as a means of: protecting the rights, freedoms and interests of individuals from unlawful decisions, actions, inaction of subjects of power; ensuring the rule of law; ensuring legality in the exercise of executive and local self-government functions; judicial control over the legality of acts of public authorities; resolving specific administrative disputes between citizens and bodies exercising public authority. Traditionally, there are three main trends in the understanding of administrative justice. The first is administrative justice – a special procedure for resolving administrative and legal disputes by courts and other specially authorised state bodies.[29, 30] The term "administrative justice" covers not only the judicial procedure for consideration of administrative and legal disputes, but also the administrative

[28] Y.S. Pedko, *Establishment of administrative justice in Ukraine*, Monograph of V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, Kyiv 2003, p. 208.

[29] *Legal Encyclopedia: in 6 vols., Ukr. encyclopedia*, Kyiv 1998, Vol. 1: A–D, p. 672.

[30] V.S. Stefaniuk, *Administrative justice as a leading form of judicial protection of citizens' rights. Executive power and administrative law*, V.B. Averyanov (ed.), Kyiv 2002, p. 668.

procedure. The second tendency positions administrative justice as an independent branch of justice, the purpose of which is to resolve disputes between a citizen and a public authority or between public authorities (the so-called "administrative proceedings").[31] The third tendency considers administrative justice not only as a special type of judicial proceedings, but also as a system of specialised courts (judicial units) that carry out administrative proceedings.[32] These definitions have several common features, which are summarised as follows. Firstly, administrative justice is characterised by the inclusion in its jurisdiction of disputes arising in the field of administration between individuals or legal entities, on the one hand, and administrative bodies, on the other. Secondly, a jurisdictional body is a body specifically authorised to resolve this category of disputes. In some countries, this role is played by courts of general jurisdiction, which are completely independent of the executive authorities and resolve other disputes along with administrative disputes, while in other countries, special administrative courts are responsible for administrative disputes. In addition, special "quasi-courts" may be used as jurisdictional bodies that resolve disputes within a particular agency. Thirdly, administrative justice implies that administrative disputes are considered and resolved in compliance with the judicial procedural form, and civil procedural, administrative procedural or so-called "quasi- judicial" forms may be used.[33] The purpose of administrative justice is to exercise only legal control, not control over the expediency of administrative activities. Administrative legal protection should be judicial, as courts are the most likely to meet the requirements of independence and impartiality for human rights bodies. The creation of an effective administrative justice system should not only guarantee the strengthening of law and order in the field of administrative activity, but also enable an individual

[31] G. Braban, *French administrative law*, translated from French by S.V. Bobotov, Moscow 1988, p. 488.

[32] D.V. Kireev, *Administrative justice: modern approaches to the definition*, "Forum of Law" 2012, No. 33, pp. 287–291, http://archive.nbuv.gov.ua/e-journals/FP/2012_3/12kdvpdv.pdf [access: 28.10.2023].

[33] O.M. Paseniuk (ed.), *Administrative Justice of Ukraine: Problems of Theory and Practice. Judge's Handbook*, Kyiv 2007, p. 608.

citizen to exercise his or her rights by appealing against unlawful decisions, actions or inaction of public authorities.

The system of administrative courts is a unique guarantee of protection of subjective public rights and interests of individuals and legal entities of private and public law in their relations and interaction with public authorities and local self-government bodies, as well as with other public institutions. That is why ensuring the efficient functioning of the administrative court system in Ukraine is one of the primary tasks of the administrative reform of public administration, which defines the criteria for the successful implementation of European integration processes, which were intensified in 2014 in connection with the signing of the Association Agreement between Ukraine and the European Union, and recently, in connection with the consideration of documents on Ukraine's membership in the EU.

Summarising, it should be noted that the current model of the judicial system is characterised by a number of positive features in the context of its effective functioning in order to achieve the goal of administrative justice – optimal protection of rights, freedoms and interests of a person in legally unequal relations with public authorities. Thus, in the course of the ongoing judicial reform, Ukraine is introducing fundamental changes in the understanding of the judicial system, the definition of the components of legal personality of judges and the procedure for consideration and resolution of public law disputes in administrative proceedings. Changes have occurred in the legal regulation of the principles of the judicial system of the state, the establishment of the components of the system of administrative courts and their powers, the procedure for applying to court and the procedures for judicial review of administrative cases, the mechanism for selecting judges, the grounds and procedure for applying disciplinary measures to them, the system of ensuring the operation of courts and the principles of judicial self-government. In the context of the active reform of the judicial system of Ukraine, the issue of the legal status of an administrative court has become particularly important, as it allows not only to define its role in public relations in the administration of justice, but also to identify weaknesses and strengths in the regulatory framework for its legal status and activities, which allows improving the effectiveness

of the mechanism for protecting the rights and legally protected interests of individuals and legal entities in the field of public law dispute resolution. In addition, the existing judicial mechanism of protection carried out within the framework of administrative proceedings allows eliminating and preventing abuses by public authorities, including the state, and ensuring the right of everyone to restore violated rights by government agencies and state bodies. It should be emphasised that the effectiveness of the human rights protection mechanism, including judicial protection, is a guarantee of achieving certain social justice, a manifestation of overcoming the negative social consequences of violations of human and civil rights and freedoms, the ultimate goal of which is to ensure the reality of such rights.

20.5. Recent Trends and Developments in the Field of Judicial and Administrative Organisation

In recent years, Ukraine has been pursuing the path of European integration, including in the process of reforming the national judiciary. Undoubtedly, such a reform is becoming necessary, since in its current form the existing judicial system is increasingly demonstrating its inefficiency. That is why consideration of the current state and prospects for the development of administrative justice in Ukraine is one of the most urgent tasks both in theory and in practice. One of the main tasks at the current historical stage of Ukraine's development is to build an independent and fair justice, without which it is impossible to establish a legal and democratic state, to carry out any legal, economic and social reforms.[34] A positive development in the judicial reform was the adoption of the Law of Ukraine "On Ensuring the Right to a Fair Trial", which reformed the High Council of Justice, the High Qualification Commission

[34] The construction of administrative courts is one of the most important achievements of judicial reform in Ukraine. *Constitutional values: legal nature and practice of implementation. Collection of abstracts of the International Scientific and Practical Conference (Khmelnytskyi, 17 May 2019)*, "Leonid Yuzkov Khmelnytsky University of Management and Law" 2019, part 2, pp. 67–77.

of Judges of Ukraine, strengthened guarantees of judicial independence, detailed their rights and obligations, improved disciplinary procedures and provided mechanisms for updating the judicial system through the qualification assessment procedure. The law also restored the role of the Supreme Court of Ukraine as the highest judicial body and improved the mechanisms for the uniform application of the law, in particular through the coordination of legal positions between the chambers of the SCU. On 30 September 2016, the amendments to the Constitution of Ukraine regarding the judiciary came into force, marking the beginning of a new stage of constitutional reform of the Ukrainian judicial system. Thus, the Law of Ukraine "On Amendments to the Constitution of Ukraine (regarding justice)" No. 1401-VIII dated 2 June 2016 amended and supplemented the articles of Section VIII 'Justice' of the Constitution of Ukraine. It is interesting to note that the amendments to the Constitution on justice are aimed not only at fulfilling Ukraine's international obligations or the long-term recommendations of international experts, but also at bringing the standards of justice in our country in line with international standards. This is, first of all, the opportunity to transform the system, which is seriously limited by the provisions of the current Constitution. Of course, the constitutional stage of the judicial reform should give a qualitatively new impetus to resolving those fundamental issues that have not been resolved for many years. The main goal of further judicial reform in Ukraine should be to create legislative and organisational conditions for the establishment of an independent, effective and responsible judiciary in Ukraine that will earn the trust of the society.[35] The European integration of our country is of great importance in the process of reforming the judiciary.[36] Satisfying Ukraine's European integration aspirations requires the mandatory adaptation of our judicial system to the system of the Council of Europe and the European Union. The problem of improving the national justice system

[35] *Administrative proceedings as a form of ensuring the functioning of the modern state*, "Legal Novels" 2021, No. 13, Vol. 2, pp. 46–51.

[36] *Administrative Justice as a Component of the Administrative and Legal Mechanism for the Protection of the Public Interest*, "Actual Problems of National Jurisprudence" 2019, No. 4, pp. 138–143.

is of paramount importance for Ukraine as a country that has chosen democratic principles of development. The Strategy, developed with the support of the EU Project "Support to Justice Sector Reforms in Ukraine", has the force of a voluntary conscious commitment aimed at improving the quality of judicial services for citizens and bringing the domestic judicial processes closer to the best European standards. Demonstrating the judiciary's internal desire for change, this commitment was made by the judicial community represented by the Council of Judges of Ukraine, higher courts, the Supreme Court of Ukraine, the High Council of Justice, the High Qualifications Commission of Judges of Ukraine, the National School of Judges of Ukraine, and the State Judicial Administration of Ukraine. Administrative justice in Ukraine needs to be improved through its reform and transformation. It is important to study and implement the experience of leading countries, which will undoubtedly have a positive impact on administrative justice in Ukraine and will allow it to bring our system closer to international standards. In foreign countries, with the establishment of the rule of law, the institution of administrative justice became the guarantor of protection of subjective rights of citizens, the creation and development of which was based on such theoretical foundations as: the theory of the rule of law; the theory of separation of powers; the theory of division of law into public and private; the theory of state responsibility; the theory of administrative dispute.[37] In addition, the emergence and formation of administrative justice was based on factors of socio-historical and objective legal nature.[38] The adoption of a foreign model will undoubtedly have a positive impact on the process of building administrative justice in Ukraine. On the eve of the introduction of European-style administrative justice in Ukraine, theoretical and applied developments in this area, including comparative studies based on a deep study of foreign experience, are of particular

[37] A.V. Samus, *Administrative justice. The system of administrative justice in Germany. Modern trends in the legal science of Ukraine*, 121 Materials of the II International Scientific and Practical Conference (Vinnytsia, 18–19 March 2016), Kherson 2016, pp. 66–69.

[38] *Administrative justice in Ukraine and foreign countries: a comparative analysis*, "Scientific Bulletin of Kherson State University" 2014, Vol. 3, Issue 2, pp. 40–45.

relevance. With regard to building a system of administrative courts in Ukraine, special attention is drawn to the experience of organising and operating courts of administrative jurisdiction in Germany and France, two states that are close to Ukraine in geographicaland geopolitical terms as well as in legal terms. This is reflected, first of all, in the similarity of the structure of law, the understanding of the legal norm, and the system of sources of law. The administrative justice systems of Germany and France are developed, i.e., their organisational structure, functional purpose and powers meet the requirements and needs of protecting the rights, freedoms and legitimate interests of citizens. Their consideration and study are not only interesting, but also expedient at the current stage of reforming the judicial system of Ukraine, since the use of the positive experience of other states, taking into account national peculiarities, can have useful consequences.[39] Significant progress in the development of administrative justice was observed at the end of the eighteenth century, when the French revolution took place and the Conseil d'Etat was established, which recognised the difference between public and private law, as well as the need for a separate body to oversee the functioning of the government and its compliance with the provisions of public law. Over the period of its existence, the State has developed a mechanism for judicial review of the actions of the authorities, which still forms the basis of the judicial control system in France.[40] This model, which provides for the creation of a separate judicial body to review administrative actions of the government, had a great impact on the creation of administrative justice in Europe and around the world. As a result, in the 1860s and 1870s, the first administrative courts were established in Baden and Prussia, thus laying the foundation for the German system of administrative review. The main reasons for the establishment and introduction of European-style administrative justice in Ukraine are as follows:

[39] *Foreign experience in organizing administrative justice systems*, "Comparative and Analytical Law" 2013, No. 3-2, pp. 197–202.

[40] *Formation, development and tasks of administrative justice in Ukraine and in some foreign countries*, "Bulletin of the High Council of Justice" 2011, No. 4(8), pp. 15–25.

the need to strengthen guarantees for the protection of human rights against abuses of power by public authorities; the absence of an effective judicial procedure for resolving administrative cases that takes into account the specific nature of public-law relations; the insufficient authority of general courts, which, alongside administrative cases, also consider criminal cases and cases concerning administrative offenses, where the state is opposed to citizens. A positive consequence of the introduction of administrative justice, in addition to enhancing the protection of human rights in their interactions with the authorities, could also be the intensification of the development of administrative legislation and the doctrine of administrative law. Such development will be driven, on the one hand, by the needs of judicial practice, and, on the other hand, by the case law of administrative courts themselves.[41] The rule-setting significance of the administrative court practice is noted in the French literature as well. Although the doctrine does not recognise it as a source of law, in practice it is considered a very important tool for resolving conflicts in the field of administration. This shows the great role of the courts in shaping French administrative law.[42] A critical rethinking of the best practices of foreign countries in the field of administrative justice and its adaptation to the national context can significantly accelerate the implementation of an effective mechanism for the formation and implementation of state policy in the field of administrative justice. Thus, administrative justice, the main purpose of which is to provide the most favourable conditions for an effective and reliable mechanism for protecting the rights, freedoms and legitimate interests of citizens, plays an important role in the establishment of the rule of law, democracy and civil society. Today, it is important to intensify the development of administrative legislation and the doctrine of administrative law, which may be a positive consequence of the introduction of administrative justice along with the strengthening of human rights protection in its relations with

[41] *Genesis and current state of administrative justice in Ukraine*, "Entrepreneurship, Economy and Law" 2016, No. 6, pp. 105–109.

[42] I.B. Koliushko, R.O. Kuibida, *Administrative Justice: European Experience and Proposals for Ukraine*, Kyiv 2003, p. 146.

the authorities. The modern judiciary of Ukraine should take an appropriate place among other state bodies, having a set of functions that would be in line with international principles, the current conditions in the country and would allow for effective protection.

Reforming the administrative justice system in Ukraine is extremely necessary. Administrative justice should play a decisive role in ensuring the rule of law and protecting violated human and civil rights and freedoms in the field of administrative and legal relations. The need to create an appropriate legal mechanism that would ensure effective consideration of disputes between a citizen and the state was determined by the Concept of Administrative Reform in Ukraine (Decree of the President of Ukraine of 22 July 1998 No. 810). The main provisions of the Concept are the basis for reforming the public administration system in Ukraine, creating conditions for building a democratic, social, and legal state in accordance with the Constitution of Ukraine, and establishing and ensuring human and civil rights. It is determined that one of the key measures of administrative reform is the implementation of internal and judicial control over the activities of executive authorities and their officials, primarily from the standpoint of ensuring respect for the individual and justice.

At the same time, the formation of the administrative justice system became particularly relevant after the adoption of the Constitution of Ukraine in 1996. It is the Basic Law of Ukraine that stipulates that human and civil rights and freedoms are protected by the courts. Everyone is guaranteed the right to appeal in court against decisions, actions or omissions of state authorities, local self-government bodies, officials and employees.

Thus, every citizen has the right to resolve a dispute in court not only with any individual or legal entity, but also with the state. The introduction of administrative justice is also extremely important in view of the fact that administrative justice in a democratic, legal state embodies a mechanism of protection against unlawful interference by public authorities and their officials in the private life of citizens.

Thus, the creation of an effective administrative court system will facilitate the practical implementation of the principle of state-individual relations defined by the Constitution of Ukraine, according

to which "the establishment and maintenance of human rights and freedoms is the main duty of the state".

In accordance with these provisions of the Constitution of Ukraine, the Law of Ukraine "On the Judiciary and the Status of Judges" established the administration of justice in the form of administrative proceedings as one of the types of judicial protection. The Final and Transitional Provisions of the Law stipulated that the system of administrative courts was to be established within three years from the date the Law entered into force, that is, by 1 June 2005.

To ensure the functioning of this system of courts, it is important to create effective procedural tools.

Currently, there is no separate legislative act in Ukraine dedicated to the powers of administrative courts to resolve cases of administrative jurisdiction. Proceedings in cases arising out of administrative and legal relations are regulated by the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine, and the Code of Ukraine on Administrative Offenses. However, the specifics of these cases require the creation of new legal forms, as well as the availability of appropriate qualifications of judges in this area. Therefore, in order to implement the provisions of the Constitution of Ukraine, in particular Article 55, a draft Administrative Procedure Code of Ukraine was developed. In addition, the adoption of the Code will create a proper legal basis for the introduction of administrative justice and the administration of justice in administrative cases and will help protect human and civil rights and freedoms, as well as the legitimate interests of legal entities from violations by the state and local governments.

The draft Administrative Procedure Code of Ukraine (Reg. No. 1331) was adopted by the Verkhovna Rada of Ukraine in the second reading on 1 July 2004, except for certain provisions that were postponed to the third reading. The said draft Code establishes the powers of administrative courts to resolve cases of administrative jurisdiction, the procedure for applying to administrative courts and the procedure for conducting administrative proceedings.[43]

[43] I.I. Emelianova, *Main provisions of the draft administrative procedural code of Ukraine*, https://minjust.gov.ua/m/str_4831 [access: 28.10.2023].

We support the adoption of such a regulatory act, taking into account the innovations of today, because it is clear that the 2004 draft is not perfect, and therefore needs to be revised.

In conclusion, it is worth emphasising that after the Administrative Procedure Code of Ukraine comes into force, the legislative framework for the operation of the administrative court system will be created, as provided for by the Law of Ukraine "On the Judicial System and Status of Judges", which, in turn, will ensure the protection of human and civil rights and freedoms in the field of public law relations.

At the end of last year, quite a few judicial positions remained vacant, in particular, 1,840 judicial positions, which is 28% of the total number of judges. At the same time, this situation is characterised by an upward trend. In addition, according to Hryhorii Usyk, the Head of the High Council of Justice, there is a problem with the initial qualification assessment, which more than 2,000 currently active judges have not passed.

The staff shortage is an obvious problem that not only hinders citizens' timely access to justice, but also jeopardises the further functioning of the judiciary in Ukraine. For example, in 2022, judges from the courts in the occupied territories were sent not only to "follow cases" but also to courts where no proceedings could be conducted at all due to the lack or complete absence of judges. Thus, as of the beginning of April, 3 courts in Ukraine were not administering justice due to the lack of judges' powers, 12 courts had only one judge, and 2 judges were working in 67 courts.

This situation cannot be resolved by seconding judges either, as it is necessary to fundamentally change the process of selecting judges, which is carried out by the High Qualification Commission of Judges, which has not been functioning since 2019. Unfortunately, it may not proceed as quickly as Ukrainian society would like. The reason for this may be the imperfection of the competitive selection procedure for judges. This procedure should be transparent and meet the requirements of European standards.

To solve this problem, in 2023 a working group has already been set up under the Verkhovna Rada Committee on Legal Policy, which, in our opinion and that of experts, will be able to remedy the

situation with the shortage of judges. Ukrainian scholars believe that one way to improve this procedure is to change the priorities of the National School of Judges and the training of future judges there.

The local government reform, the main stage of which was completed in 2020, was supposed to affect almost all areas of interaction between citizens and the state, including the judiciary. Given the new district division, it was planned to optimise the system of local courts, thus finding a balance between their number and quality. In turn, this would increase the efficiency of the use of budgetary funds by saving costs for the operation of small courts: repair of premises, updating of equipment, salaries of court staff, etc.

The development of a methodology that would form the basis for optimising the court network began in 2021. It was planned that this process would be completed by 1 January 2023, but the full-scale invasion forced adjustments to be made. In particular, due to the occupation of part of Ukraine's territory, the number of courts that cannot administer justice has sharply increased. As a result, the workload of other courts has increased due to a temporary change in territorial jurisdiction. However, the need for this part of the reform has not disappeared, and difficulties with funding only increase its relevance.[44]

According to Article 4(3) of the Code of Administrative Procedure of Ukraine, an administrative court is a court whose competence is to consider and resolve administrative cases.[45]

In general, specialised administrative courts were first established in Ukraine after the Code of Administrative Procedure of Ukraine came into force on 1 September 2005. Prior to that time, administrative cases were resolved by district (city, city-district) courts in the course of proceedings in cases arising from administrative legal relations in accordance with the Civil Procedure Code of Ukraine of 18 July 1963. The current system of administrative courts of Ukraine was formed in accordance with the Decrees of

[44] *Next steps of judicial reform: what are they?*, https://lb.ua/blog/pravo_justice/552223_nastupni_kroki_sudovoi_reformi_yaki.html [access: 28.10.2023].
[45] Code of Administrative Procedure of Ukraine, Law of Ukraine of 06.07.2005 No. 2747-IV.

the President of Ukraine (in the respective version) No. 1417/2004 "On Establishment of Local and Appellate Administrative Courts, Approval of Their Network and Number of Judges" of 16 November 2004. According to part 3 of Article 21 of the Law of Ukraine "On the Judicial System and Status of Judges", local administrative courts are district administrative courts, as well as other courts determined by the procedural law. Thus, today in Ukraine, according to the Decree of the President of Ukraine "On the Establishment of Local and Appellate Administrative Courts, Approval of Their Network and Number of Judges", there are 27 district administrative courts (in each region, in the Autonomous Republic of Crimea, Kyiv and Sevastopol).[46]

This is where the problem arises, which leads to confusion for citizens as to which court to apply to, since administrative cases are considered by both administrative courts and local courts of general jurisdiction. This issue should undoubtedly be regulated at the legislative level, and the confusion with administrative courts and local courts of general jurisdiction should be eliminated.

20.6. Conclusions

Based on the foregoing, we can state that Ukraine generally has the organisational and legal prerequisites for the specialised administration of justice in the executive and administrative sector, and for the prompt and high-quality resolution of conflicts between administrative authorities (their officials) and citizens. Defending the guarantees of the independence of administrative justice remains relevant in the future. It is worth remembering that the Concept of the Judicial System Reform envisaged that at some stage the system of administrative courts should create a separate vertical of courts. Compliance with European standards of judicial power, ensuring stability and unity of judicial practice in administrative proceedings,

[46] *The system of administrative courts in Ukraine as a result of the reform of the judiciary: current realities*, pp. 47–51, https://ndipzir.org.ua/wp-content/uploads/2019/26.02.19/26.02.19-24-26.pdf [access: 28.10.2023].

strengthening of administrative justice and judicial proceedings in general is possible only if the administrative justice system is fully autonomous. Therefore, further development of statehood cannot take place without systematic improvement of such an institution of constitutional law as the judiciary.

The current political and legal realities of our country, along with the need to preserve the existing mechanisms for ensuring the effective administration of justice, require changes, but the relevant changes should be thoughtful and take into account all risks and opportunities.

In our opinion, it is advisable to divide the reform of administrative justice bodies into three stages. As for the reform of administrative justice bodies, it would be advisable, in our opinion, to start with legislation, since it is the legislation that is the basis for the division of labour of any state body and the development of all social relations in the state. As our research has shown, Ukrainian legislation in the field of administrative justice is imperfect and outdated. Of course, this situation needs to be regulated, and we believe that, following the example of other European countries, it is necessary to adopt a qualitatively new Administrative Procedure Code of Ukraine, which would provide for the efficient and effective construction of the system of administrative justice agencies of Ukraine, provide for rules for determining jurisdiction as well as rules of judicial review, so that courts can effectively and quickly consider administrative cases without turning them into a heavy load that is considered for years without making decisions.

The final stage of the reform should be improvement of the judicial selection system. The new procedural law should also provide for specific requirements for the selection of administrative court judges. The selection of judicial candidates in Ukraine is somewhat imperfect and to some extent corrupt. It is proposed to make this system open and transparent and without the involvement of persons who could express their subjective opinion on the suitability of a candidate to serve as a judge. We believe that the system of selection of judges, including those to administrative courts, should be as computerised as possible, which will help to avoid corruption in the selection process. The third stage we have identified is the unification

of the court system and the formation of clear rules for determining the jurisdiction of administrative courts in order to eliminate legal uncertainty among citizens as to which court to apply to when they need to protect their rights in an administrative proceeding, either a general court or an administrative court. The overload of general jurisdiction courts is also a factor contributing to distrust in the judicial system and a decrease in its prestige. Violations committed by judges themselves are partly caused by their excessive workload, as judges handle an extraordinarily large number of cases that they are unable to process in a timely manner. This leads to breaches of procedural timelines, insufficient examination of cases due to a lack of evidence, and, consequently, the adoption of incorrect or unlawful decisions, as well as other violations.

Obtaining the status of an EU candidate has put our country on the threshold of major reforms, so in order to take confident steps towards Ukraine's full membership in the EU, we must work together to build a democratic state, accumulating the best European practices and our own achievements. United by common values, we are on the path to independence and a decent future for our Ukraine.

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Chapter 21. Administrative Justice in the Czech Republic – Essential Principles and Exceptions to Them

21.1. Introduction

The chapter presents the basic principles on which administrative justice in the Czech Republic is based. These principles are the defining ideas that guided the hand of the legislator in the creation of the Code of Administrative Justice, at the same time they are an interpretive perspective when deciding on particular cases.

However, these principles do not exist in a pure form, and as is often the case in law, the Code of Administrative Justice regulates a number of exceptions to these principles. Most of the characteristics associated with administrative justice in the context of Czech legislation are derived from the proceedings on the action against the decision of an administrative authority. However, the Administrative Code also regulates other types of lawsuits and proceedings. In these other proceedings exceptions to the principles are more pronounced.

The chapter explains the essence of the basic principles, focusing on the control function of administrative justice, protection of individuals' public-law rights and cassation principle, but it also deals with specific exceptions to these principles. The author asks herself whether the exceptions do not, in their resulting effects, violate the fundamental concept of administrative justice in the Czech Republic.

21.2. The Ideas That Stand Behind Administrative Justice

In general, it may be said that the idea of administrative justice developed hand in hand with the concept of civil rights, democratic rule of law, and separation of powers. At its core, the emergence of administrative justice is primarily related to transforming an individual from a subject into a citizen.[1] While private rights in relations *vis-à-vis* individuals have been protected by the courts since time immemorial, the relationship between the state and the subject was not regulated by law at all, and if it was regulated, it depended only on the 'master' whether they would observe the law (*regis voluntas suprema lex*). The *superioritas* (later, the Leader or the Party) knew best what was right for the people, and in such conditions the idea that the exercise of authority should be subject to control or review by an independent body was unthinkable. The idea that even in the realm of *superioritas* (in relation of the *superioritas* to individuals) the citizens' rights should be protected by an independent court is therefore quite young. Administrative justice is based on the idea that the protection of the rights of individuals – until then provided exclusively in the sphere of private law and criminal law – should be extended to the relations of the state (power) towards citizens.[2]

Even the later historical development of administrative justice and the (non)existence of administrative justice in individual stages of the 20th century confirm that administrative justice relates to democracy and the rule of law. In those stages when the executive has prevailed over the law and the state did not function on the principles of democracy and with respect for civil rights, administrative justice does not exist at all (legally or factually) or its importance is

[1] In its essence, even socialist science recognised it this way, although it described it in different words. "The administrative judiciary, as it developed in Austria-Hungary, may be characterized as an expression of the political transformation of an absolute monarchy into a bourgeois constitutional state." J. Hromada, *Několik úvah o problému renesance správního soudnictví*, "Správní Pravo" 1969, No. 1, p. 3.

[2] M. Mazanec, *Správní soudnictví*, Linde Praha, Praha 1996, in particular, pp. 14–18.

limited and the possibilities of reviewing the acts of the executive are limited. On the contrary, in the stages of democratic functioning the administrative justice works, exclusions from the access to the court are limited, and the decisions of the administrative courts are respected in general, not only by the addressees of the decisions for whom they are binding, and the administrative judiciary can thus fully fulfil its mission.

As noted above, administrative justice is at its core related to the principle of separation of powers. The essential function of administrative justice is to establish a balance between the judicial and executive powers, and indirectly between the judicial and legislative powers as well. In an absolutist state, the judge in civil court proceedings is authorised by the sovereign to decide in private law disputes between subjects, i.e., between persons subject to sovereign power. The influence of civil law judges on the executive and legislative power is only indirect. The same applies to criminal justice.[3] In contrast, the task of a judge in administrative justice is to act outside the judiciary, especially towards the executive branch. Judges in administrative justice do not decide adversarial disputes between individuals who are subject to a superior authority, but review, according to established criteria, the exercise of superior power itself (implemented within the framework of public administration) and therefore decide in a dispute in which there is an individual on one side and a representative executive public power on the other side.

Administrative courts review the executive power in specific cases with namely designated actors. However, the outreach of such decision-making is significantly more comprehensive, as decision-making in specific matters affects administrative practice as such. Although administrative courts reveal shortcomings only in cases brought before them, on that platform, they interpret general and abstract legislation and explain links between legal institutions and provisions, as well as their connections with legal principles, while giving them a more tangible dimension in the justification of the decision bearing a human element. The decisions of administrative

[3] M. Mazanec, *Správní soudnictví*, *op. cit*., pp. 14–15.

courts, especially those of the Supreme Administrative Court, therefore, are a source of knowledge of administrative law and are often the means of cultivation of administrative practice.

Josef Baxa, the first president of the Supreme Administrative Court, said: "The jurisprudence, especially the one of the Supreme Administrative Court, has been loosening and cultivating that 'dry bureaucratic law', as the matter of administrative law is sometimes anointed, for a long time, and gives it real meaning and purpose."[4]

Michal Mazanec, the second president of the Supreme Administrative Court, describes this effect poetically:

> *It is not within the power of any authority to effectively control compliance with the law in every* […] *matter handled by an administrative authority, and it does not even make practical sense. However, it is often possible for the administrative court to influence the administrative practice of the entire state administration sector by a specific single case. With a single decision of the court, the entire departmental library of methodological instructions may be cut down; what is beautiful about administrative justice is that it happens.*[5]

The Grand Chamber of the Supreme Administrative Court has an even more traceable influencer effect. The main task of the Grand Chamber is to unify case law when there are contradictions in the existing case law or when a particular chamber intends to derogate from previous case law.

The task of case law is to resolve particular disputes; by its very nature, it focuses on the past and a specific case. However, this primary character of the decision-making activity of courts changes at the level of supreme courts, a fortiori within the jurisprudence of the unifying body within a supreme court. While the requirement

[4] J. Baxa, *Předmluva ke komentáři k soudnímu řádu správnímu*, [in:] Z. Kühn, T. Kocourek (eds.), *Soudní řád správní. Komentář*, Wolters Kluwer ČR, Praha 2019, p. 26.

[5] M. Mazanec, *Správní soudnictví*, *op. cit.*, pp. 16–17.

of the legality of decision-making activity is aimed at the possible correction of a decision of an individual case, ensuring the unity of the decision-making activity (Section (§) 12, Subsection 1 of the Code of Administrative Justice) is, by its nature, an activity focused primarily on the future. In accordance with Section (§) 17, Subsection 1 of the Code of Administrative Justice, the activity of the Grand Chamber concentrates primarily on the future-oriented unification of different legal opinions. The settled jurisprudence of supreme courts represents a legal rule in its material dimension. A change or clarification of this jurisprudence may then be considered an amendment to a legal regulation with the temporal effects that a change in legislation traditionally has.[6]

The influence of administrative court jurisprudence on administrative law and administrative practice is also traceable in a historical context. In our latitudes, administrative justice had a fundamental impact on the very formation of administrative procedural law. According to the Austrian Act 36/1876 of the Imperial Law Gazettes (*Reichsgesetzblatt*) on the establishment of the Administrative Court (*Gesetz betreffend die Errichtung eines Verwaltungsgerichtshofes*), the Administrative Court was obliged to revoke the decision of the administrative authority if it found that 'essential forms of administrative proceedings were not observed' (Section (§) 6, Subsection 2 of Act No. 36/1876 of the Imperial Law Gazettes). However, it was unclear what the 'essential forms' were like, and the shortcomings for which the authority's decision should be revoked were not defined in any way. The task of the Administrative Court at that time was essentially to fill in the gaps in administrative procedural law, which at that time had no general code and was laid down only in partial special regulations. On the platform of particular cases, the administrative court thus formulated the essential forms, thanks to which the decision of the administrative authority is a decision by law. The establishment of the administrative court and its subsequent jurisprudential activity (*Juristenrecht*) thus had a fundamental influence on the improvement of administrative procedural law and

[6] Resolution of the Extended Senate of the Supreme Administrative Court as of 21 October 2008, file No. 6 As 7/2005-97.

the decision-making practice of the authorities. Establishing an independent review institution enabled, first of all, to identify the shortcomings of the procedural law and eliminate them step by step.

However, the influence of administrative courts is evident also in current conditions and not only in the area of procedural law.

21.3. Administrative Justice in the Czech Republic – Concept and Essential Principles, Jurisdiction of Courts in Administrative Justice

As indicated above, the judicial review of public administration developed as part of the democratic ideology of civil society. In post-totalitarian states, the right to judicial review of acts of public administration is part of the package of democratisation measures. Judicial review of public administration acts is intended to protect individuals' rights, but indirectly, through the concept of the protection of individuals' rights, it also acts to protect objective law and the public interest.

As Emil Hácha, the chairman of the Supreme Administrative Court of the First Republic and renowned administrative law lawyer, pointed out, there are many definitions of administrative justice. However, it is advisable to work with these definitions with caution. The form of administrative justice varies from state to state, and the general definition usually reflects the type of administrative justice that is closest to the author of the definition, while the nature of other types is not captured.[7]

In this context, František Weyr defined administrative justice as an institution 'serving the protection of citizens against the mistakes of executive power'.[8] Adolf Merkl states that administrative justice shall be understood as:

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[7] E. Hácha, *Správní soudnictví*, [in:] *Slovník veřejného práva československého*, Volume 4, Eurolex Bohemia, reprint of the original issue, Praha 2000, p. 592.

[8] F. Weyr, *Československé právo správní: část obecná: (organisace veřejné správy a řízení správní)*, Nákladem Českého Akademického Spolku "Právník", Brno 1922, p. 111 [online].

> *a legal-technical means by which the activity of dependent (administrative) bodies is subordinated to the control of independent (judicial) bodies and which allows a court ruling to exclude inadmissible influences that may have affected an administrative official and as a result of their legal and political dependence during the implementation of an administrative act.*[9]

The concept of administrative justice may also be used in the sense of "jurisdictional decision-making by administrative bodies, consisting in deciding on the rights and obligations of citizens according to the relevant substantive and procedural legal standards,"[10] or "finding the right by administrative authorities in matters within the competence of public administration",[11] because administrative bodies, similarly to courts, make decisions in matters entrusted to them. However, such an understanding of the term administrative justice in the Czech context is rather relegated to the background in view of recent legislation. In this chapter, I will not use the term administrative justice in this sense, unless explicitly stated otherwise.

Even if we narrow the concept of administrative justice only to an institutionalised judicial system of public administration control, it is obvious that it is a differentiated system, especially in a global context. Authors who try to define administrative justice either offer a definition so broad that it is not really a definition,[12] or, as Hácha suggested, in the definition they overemphasise the features and elements of administrative justice according to the national legislation with which they are familiar.[13]

Quite consciously and deliberately, I commit this tendentious definition of administrative justice with regard to the intended

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[9] A. Merkl, *Obecné právo správní*, Part 2, Orbis, Praha–Brno 1932, p. 216.

[10] V. Mikule, *Teze k problematice správního soudnictví v ČSSR*, "Správní Právo" 1968, No. 5, pp. 281–282.

[11] D. Hendrych *et al.*, *Správní právo. Obecná část*, 9th Edition, C.H. Beck, Praha 2016, p. 367.

[12] M. Mazanec, *Správní soudnictví*, *op. cit.*, p. 14.

[13] E. Hácha, *Správní…*, *op. cit.*, p. 589.

audience in this chapter as well, as it is intended to create a frame of reference in the sense of 'what will be discussed'. I will therefore focus primarily on those features that characterise Czech administrative justice as it has developed into its present form, even though there are different models of what is referred to as 'administrative justice' in national legal systems.[14] Mainly basic organisational aspects are the criteria for differentiating the models (in particular, whether general courts decide in administrative justice,[15] whether administrative courts are separate specialised courts,[16] or whether special independent bodies are established, which are not part of the formal system of courts, although they have the attributes of courts and their representatives have a status similar to judges[17]), also the basic principles on which the decision-making process of courts in administrative justice is based (especially the principle of cassation or the principle of review), or the question of whether courts in administrative justice may determine the facts and take evidence (principle of full jurisdiction) or whether they are only referred to findings of facts recorded in the administrative file.[18] Other criteria

[14] M. Mazanec, *Správní soudnictví*, *op. cit.*, pp. 23 et seq.; E. Hácha, *Správní…*, *op. cit.*, pp. 592 et seq. More recently: V. Sládeček, V. Tomoszková *et al.*, *Správní soudnictví v České republice a ve vybraných státech Evropy*, Wolters Kluwer, Praha 2010.

[15] As is the case in the so-called 'Anglo-Saxon model', cf., for example: K. Thompson, B. Jones, *Administrative Law in the United Kingdom*, [in:] R.J.G.H. Seerden (ed.), *Administrative Law of the European Union, Its Member States and the United States*, 2nd Edition, Intersentia, Antwerpen 2007, pp. 250 et seq.

[16] As is the case, for example, in France, cf.: J.B. Auby, L. Cluzel-Métayer, *Administrative Law in France*, [in:] R.J.G.H. Seerden (ed.), *Administrative Law of the European Union, Its Member States and the United States*, 2nd Edition, Antwerpen 2007, pp. 78 et seq.; J.P. Jarnevic, *Les Jurisdictions administratives en France*, [in:] R. Šínová (ed.), *Olomoucké právnické dny*, Iuridicum Olomoucense, Olomouc 2008, pp. 665 et seq.

[17] Formerly, for example, independent administrative senates (*unabhängige Verwaltungssenate*) in Austria.

[18] The requirement of full jurisdiction results from the jurisprudence of the European Court of Human Rights (cf. e.g.: ECtHR judgment, Ortenberg v. Austria, 25 November 1994, Series A No. 295-B; Compare the judgement of the ECtHR, Sigma Radio Television Ltd v. Cyprus of 21st July 2011, Complaint No. 32181/04 and 35122/05; ECtHR judgment, Potocka and others v. Poland, Complaint No. 33776/96; ECtHR judgement, Tsanova Gecheva v. Bulgaria of 15 September 2015, Complaint No. 43800/12), in the current legal situation, it

may then be whether administrative courts review only the compliance of public administration acts with the law (which is the rule) or whether they also review, for example, proportionality or even other criteria (which is rather an exception to the rule).

The extent of the powers of the courts, or what acts of public administration (in terms of their forms) may be reviewed by courts in administrative justice, i.e., whether only decisions of public administration or other forms of public administration activity may be subject to review in administrative justice may also be compared.

In some countries, administrative justice is conceived essentially as an instance control (i.e., decision-making on remedies[19]), in some countries it is conceived upon the principle of subsidiarity (administrative justice therefore comes into play only when the public administration itself was unable to detect and correct some misconduct).

In the Czech context, one may speak of administrative justice in a functional and organisational sense.[20] Administrative justice in the organisational sense refers to the justice exercised exclusively by administrative courts. Administrative justice in the organisational sense is sometimes referred to as 'administrative justice' in the

is therefore a standard for the member states of the Council of Europe. Even doctrinally, it is inferred that only under the assumption of full jurisdiction is it possible to fulfil the essence and function of administrative justice (P. Průcha, *Aktuální otázky řízení před správními soudy. Dny práva 2009*, Masaryk University, Brno 2009, p. 116). However, in a comparative view of the legal systems of Council of Europe member states, there may be differences in what full jurisdiction entails.

[19] This basically corresponds to the German legislation (for more details, cf. e.g., E. Eyermann, L. Fröhler, *Verwaltungsgerichtsordnung Kommentar*, 15th Edition, C.H. Beck, München 2019; F. Kopp, W.-R. Schenke, *Verwaltungsgerichtsordnung Kommentar*, 26. Auflage, München 2020), however, we also have experience with this in our context. According to the Code of Civil Procedure as amended by Act No. 519/1991 Sb. (and before the adoption of the Code of Administrative Justice), administrative justice worked in a dual regime. On the one hand, within the framework of decision-making process on remedies for the set range of administrative decisions (instance review of decision of administrative bodies that are not final), on the other hand, as a review of valid administrative decisions after the exhaustion of proper remedies in administrative proceedings. Compare, for example: P. Průcha, *K ústavním základům správního soudnictví*, "Správní Pravo" 2018, No. 1–2, p. 62.

[20] P. Průcha, *K ústavním*…, *op. cit.*, p. 56.

narrow sense. Administrative justice in the functional sense includes any judicial review of acts of public administration or a new decision by a court of a matter previously decided by an administrative authority. Administrative justice in the functional sense thus also includes some powers of the Constitutional Court (e.g., deciding on constitutional complaints against decisions, measures or interventions of public authorities, which may also be administrative bodies, Section (§) 72 et seq. of the Constitutional Court Act) and general courts (in accordance with part V of the Code of Civil Procedure deciding on proceedings in matters that have been decided by another authority, i.e., in situations where public administration bodies decide on private-law rights[21]). Administrative justice in the functional sense is therefore also referred to as 'administrative justice' in a broader sense.

In the Czech legislation, the judicial review of acts of administrative bodies is differentiated according to whether the consequences of the decision affect the sphere of private-law rights or the sphere of public-law rights. If the effects are directed to the sphere of private-law rights, the jurisdiction of general courts is given, while the procedure is regulated by the Code of Civil Procedure. If the effects are directed to the sphere of public rights, the jurisdiction of courts in administrative justice is given, while the procedure is regulated by the Code of Administrative Justice (with subsidiary use of the Code of Civil Procedure). It is usually stated that there is no clear line of demarcation between public and private law, or that public and private law merge.[22] However, the differentiation of judicial protection against acts of public administration is one of the moments when

[21] It is, for example, about decision-making in disputes between a person performing a communication business and a participant or a user according to Section § 129 Act No. 127/2005 Sb., on electronic communication; disputes between a consumer and an energetic licence holder according to Section (§) 11q Act No. 458/2000 Sb., on business conditions and the performance of state administration in the energy sector; matters of registration of the right to real estate in the Land Registry; or compensation for damages in the case of expropriation. However, cases where administrative authorities decide on private rights are in the minority.

[22] For example: V. Sládeček, *Obecné správní parvo*, 4th Edition, Wolters Kluwer ČR, Praha 2019, p. 41; D. Hendrych *et al.*, *Správní právo…*, *op. cit.*, pp. 4 et seq.

a clear distinction between public law and private law is necessary.[23] Otherwise, there would be a risk that the matter would be decided by a court that does not have the authority to make a decision in such a matter. Competence disputes arising from the dualism of law in this sense (public law versus private law) are resolved by a special senate (the so-called 'conflict senate') established upon Act No. 131/2002 Sb. regulating decision-making in certain competence disputes, which was adopted in connection with the introduction of differentiated concepts of judicial protection against acts of public administration through the adoption of the Code of Administrative Justice.

From the substantive point of view, administrative justice is characterised by content relation to public administration,[24] therefore, in this context, the aspect of what is and is not public administration, which at first glance may appear as theorising, is a distinctly practical aspect.

Administrative justice (in the narrower sense) may also be described as public justice. According to the law, administrative justice serves primarily to protect individuals' public-law rights. According to Section (§) 2 of the Code of Administrative Justice, Courts in administrative justice provide protection to individuals' public-law rights of both natural persons and legal entities in a manner specified by this Act and under the conditions specified by this Act or by a special law and make decisions in other matters provided for by this Act.

According to Section (§) 4 of the Code of Administrative Justice, Courts of administrative justice decide on: a) actions against decisions made in the sphere of public administration by an executive authority, the autonomous unit of a local administrative authority, as well as by a natural person or legal entity or another authority if entrusted with decision-making about the rights and obligations of natural persons and legal entities in the sphere of public administration (hereinafter: the 'administrative authority'); b) protection against the inaction of an administrative authority;

[23] For more details, cf.: Z. Kühn, [in:] Z. Kühn, T. Kocourek *et al*., *Soudní řád správní. Komentář*, Wolters Kluwer ČR, Praha 2019, pp. 4–14.

[24] With reference to: A. Merkl, P. Průcha, *Aktuální…*, *op. cit*., p. 115.

c) protection against an unlawful interference of an administrative authority; d) competence lawsuits. Courts of administrative justice furthermore decide on a) election matters and in the matters of a local referendum, b) matters concerning political parties and political movements, c) the cancellation of measures of a general nature or parts thereof for contravention of the law.

The protection of public rights will be provided in proceedings against decisions of an administrative authority, in proceedings on actions to protect against the inaction of an administrative authority, in proceedings on actions to protect against illegal intervention by an administrative authority, in proceedings on a proposal to cancel a measure of a general nature or its parts because of a conflict with the law and in proceedings on cancellation of a service regulation adopted under the Civil Service Act.

If it is to concern the protection of public-law rights, it is necessary for the claimant to pursue the protection of their public-law rights and to state in the claim the facts by which some of their public-law rights were allegedly affected: "[…] administrative justice does not serve to ensure formally perfect administrative decisions, but to provide effective protection to the public rights of natural persons and legal entities."[25]

Providing protection for the individual's rights in relation to public power is the proper mission of administrative courts, which the law explicitly emphasises (Section (§) 2 of the Code of Administrative Justice). Thus, administrative courts do not exercise general control over public administration.

Beyond the protection of the individual's public-law rights, administrative courts decide other public law matters established by law. Specifically, it concerns electoral matters, matters of political parties and political movements, competence lawsuits (decision of some possible competence disputes) and proposals to cancel a service regulation.[26]

[25] Judgement of the Supreme Administrative Court of 15 July 2009, file No. 6 As 2/2009-112.

[26] For more details, cf.: Z. Kühn, *op. cit*., pp. 14–15.

It has already been emphasised that administrative justice represents the control of public administration carried out by independent bodies (courts) and one of the ideas behind administrative justice is the principle of separation of powers and the related principle of checks and balances.[27] Public administration manages public affairs, enforces laws and, at least functionally, it is part of the executive branch. Courts traditionally find the law. Both of the aforementioned branches of public power – the executive power and the judicial power – have their own organisational structure and their own tasks in the state, although some tasks or means of their implementation may be similar.[28] However, this does not change the basic idea that the executive power, if it interferes in the legal sphere of individuals, should be subject to review by independent courts.

> *If we base our assumptions on the fact that the mission of judicial activity is, in simple terms, to provide protection where the legal status of individuals has been violated, it is clear that judicial control is logically and objectively superior to state administration procedures in which such a violation of the law comes into consideration. This does not affect the protection whose provision by state administration authorities is possible and ultimately desirable.*[29]

However, the peculiarity of administrative justice compared to other types of justice in the Czech Republic is that it does not apply the law directly, as in the case in criminal court proceedings and civil court proceedings, but it reviews whether the administrative

[27] J. Boguszak, J. Čapek, A. Gerloch, *Teorie práva*, ASPI, Praha 2004, p. 244; J. Blahož, V. Balaš, K. Klíma, *Srovnávací ústavní právo*, ASPI, Praha 2004, p. 97.

[28] For details on the mutual relations of power components, cf.: V. Sládeček, *Obecné správní parvo*, *op. cit*., p. 34 et seq.; D. Hendrych *et al*., *Správní právo…*, *op. cit*., pp. 4 et seq.; P. Průcha, *Správní právo. Obecná část*, 6th Edition, Masaryk University and Doplněk Publishing House, Brno 2003, p. 265.

[29] J. Fiala, P. Mates, P. Průcha, *K problematice správního soudnictví*, "Správní Parvo" 1990, No. 5, p. 265.

authority has applied the law in an appropriate manner.[30] Thus, the administrative judiciary typically does not find the law, however, in individual cases presented to the administrative courts, it identifies shortcomings in the activities of the public administration and gives the public administration instructions on how to eliminate or correct the shortcomings. If the contested decision is defective (contrary to the law), the administrative court cancels such a decision of the administrative authority, while depending on the circumstances, it may also cancel the decision of the administrative authority of the first instance. We therefore speak of administrative justice as cassation justice.

Nevertheless, the control of public administration by administrative courts is limited by the principle *vigilantibus iura scripta sunt* and principle of subsidiarity (its own shortcomings shall first of all be eliminated and corrected by the public administration itself, and only when the corrective mechanisms of the public administration do not provide sufficient protection, judicial protection comes into play),[31] principle of proposal (the administrative court cannot 'take over' the case on its own initiative) and the scope of the claimant's objections (only those acts of public administration that are challenged by the claimant are reviewed only to the extent of what the claimant claims, while the claimant may effectively object only such misconduct by which they may actually be affected in their public-law rights).

> *The Code of Administrative Justice is by its nature a 'defensive' norm. It is not a 'control' norm which would allow anyone to initiate, by filing a claim in the administrative court, the control of any act of public administration. It is only intended to ensure the provision of legal protection in cases where public administration enters the legal sphere of natural or legal persons. The alleged interference with public-law rights is the very threshold criterion for standing.*

[30] Judgement of the Supreme Administrative Court of 25 January 2007, file No. 6 Ads 37/2006-40.

[31] Cf. Section (§) 5 of the Code of Administrative Justice.

> *Not all activity (or all misconduct) of the public administration is subject to judicial review by natural persons and legal entities, but only when the activity of the administration exceeds into their individuals' public-law rights.*[32]

However, the mentioned characteristics should be understood as principles, to which, as is the case in law, there are exceptions.

21.4. Administrative Justice and Exceptions to Essential Principles

In his paper titled *Aktuální otázky řízení před správními soudy* (*Current Issues of Proceedings before Administrative Courts*), Petr Průcha, the then judge of the Supreme Administrative Court, points out that in our conditions, administrative justice is associated with the control of public administration, however, in some cases, administrative justice is expected not to review, but to perform its own corrective actions within decision-making, when a possible error of administrative authority is remedied by a decision of the administrative court.[33] Průcha does not deny the control function of administrative courts, however, by means of an analysis of individual proceedings before administrative courts, he shows that in some proceedings before administrative courts, the control functions (and the principles associated with it) are modified or set aside in favour of the decision-making function. The review and control function of administrative justice comes to the fore in proceedings on an action against the decision of an administrative authority. Most of the characteristics associated with administrative justice in the context of Czech legislation are derived from the proceedings on the action against the decision of an administrative authority.

When reviewing a decision in proceedings on an action against a decision of an administrative authority (Section (§) 65 et seq. of the

[32] Judgement of the extended senate of the Supreme Administrative Court of 21 October 2008, file No. 8 As 47/2005-86.

[33] P. Průcha, *Aktuální…*, *op. cit.*, pp. 113–125.

Code of Administrative Justice), the administrative court builds on the factual and legal situation that existed at the time of the decision of the administrative authority when issuing the decision under review. Therefore, the subject of judicial assessment is precisely the situation that caused the claimant to file an action and which, according to the claimant's subjective belief, requires correction. The reason for the cancellation of the contested decision is illegality (with respect to substantive law – illegality of the decision, or procedural illegality – procedural defects). However, elements of a decision-making function may be traced even in the proceedings on an action against the decision of an administrative authority. In the event that the administrative court decides on an action against a decision by which the administrative authority imposed a penalty for an administrative infringement. If the claimant proposed it and the court comes to the conclusion that the penalty was imposed in an obviously disproportionate amount and at the same time there are no reasons for the cancellation of the decision (cassation is therefore the preferred solution if the reasons for it are met), the court may waive the administrative penalty or reduce it within the limits allowed by the law (Section (§) 78, Subsection 2 of the Code of Administrative Justice). In such a case, the administrative court does not cancel the administrative decision but makes the decision itself and replaces the decision of the administrative authority with its decision.

The elements of the decision-making function are also manifested in proceedings on an action against the illegal intervention of an administrative authority (Section (§) 82 et seq. of the Code of Administrative Justice). The court decides on the basis of the facts established on the day of its decision unless it decides only to determine whether the intervention was illegal. If the statement is to be only declaratory, the court builds on the factual and legal situation that existed at the time of the intervention. If the court comes to the conclusion that the action is justified, it determines that the intervention carried out was illegal, and if such intervention or its consequences continue or if there is a threat of its repetition, it prohibits the administrative authority from continuing to violate the claimant's right and orders which, if possible, restored the state before the intervention. If, according to the claim, it is to be (only)

determined that the intervention was illegal, the decision on actions against illegal interventions by administrative authorities is close to a decision-making function also in terms of the fact that access to judicial protection against illegal intervention is not conditional on the exhaustion of procedural means for protection in the line of public administration. In this case, the subsidiarity of administrative justice does not apply, while the court's decision provides, in a certain sense, primary protection.

In proceedings on competence actions (Section (§) 97 et seq. of the Code of Administrative Justice), the court based its decision on the factual and legal situation at the time of the decision-making process of the court. If the court finds the claim justified, it will determine which of the administrative authorities should conduct the proceedings and issue the decision.

In proceedings in matters of political parties and political movements (Section (§) 94 et seq. of the Code of Administrative Justice), the administrative justice performs the decision-making function, rather than a control, work when the court decides on the suspension of the activity of a political party or movement or on the dissolution of a political party or movement, or about resuming its activity. In electoral matters (Section (§) 88 et seq. of the Code of Administrative Justice), the decision-making function is manifested by the decision declaring the election or vote invalid.

21.5. Essential Principles of the Czech Administrative Justice – Summary

On the basis of the principles that characterise administrative justice (although, as I have shown, they may not apply absolutely), the basic defining elements of administrative justice may be summarised as follows:

i. it is the activity of courts endowed with the attributes of judicial independence, which are also formally separated from the system of bodies performing public administration;
ii. administrative justice is basically (that is, with exceptions) an activity of control, review;

iii. it serves for the subsequent review of the exercise of public authority in the area of public administration, which is manifested externally in certain forms;
iv. the court compares these authoritative forms of public administration activity with a set criterion, while this criterion is basically compliance with the law;
v. the review is carried out on the basis of a proposal in a specific matter;
vi. proceedings in administrative justice are, in principle, contested proceedings, and
vii. the purpose of the review is the protection of individual's public-law rights.

21.6. Protection of Public-Law Rights – *Locus Standi*

As already mentioned, administrative courts do not protect the legality of public administration actions in some general, objective dimension,[34] they do not provide any kind of abstract control of the legality of the activities of administrative authorities, nor do they guard doctrinal purity.[35] The Code of Administrative Justice expressly emphasises that the task of administrative courts rests primarily in the protection of the individual's public-law rights (Section (§) 2 Code of Administrative Justice).

Effective protection of public rights is an important interpretive perspective for courts in administrative justice according to the Czech legislation. This means that if it is possible to arrive at several possible results using standard methods of legal interpretation, administrative courts should give preference to such an interpretation which is in favour of the individual's public-law rights. This approach is confirmed by case law of the Supreme Administrative

[34] With reference to: Section (§) 14, Sub-section 1 of Act No. 60/1965 Sb. regulating the Prosecutor's Office, repealed by Act No. 283/1993 Sb., regulating the Prosecuting Attorney's Office; Z. Kühn, *op. cit.*, p. 3.

[35] Compare, for example, the Judgement of the Supreme Administrative Court of 11 March 2015, file No. 1 As 229/2014-48, or of 16th April 2020, file No. 4 Ads 448/2019-44.

Court explicitly stating it,[36] more often, however, this approach may be traced through an analysis of judicial interpretation.

The principle of protection of the individual's public-law rights coincides with the proposal principle, which also governs administrative justice, as already mentioned above. It is therefore up to the claimant whether or not to challenge the decision of the administrative authority with an action in court. Pursuant to Section (§) 65, Subsection 1 of the Code of Administrative Justice, the following applies: Anyone who claims that their rights have been prejudiced directly or due to the violation of their rights in the preceding proceedings by an act of an administrative authority whereby the person's rights or obligations are created, changed, cancelled or bindingly determined (hereinafter: the 'decision') may seek the cancellation of such a decision, or the declaration of its nullity, unless otherwise provided for by this Act or by a special law.

The provisions of Section (§) 65, Subsection 1 of the Code of Administrative Justice are aimed at protecting the rights of the claimant, however, the claimant may have their substantive rights reduced as a result of a previous violation of procedural standards in administrative proceedings, which led to the issuance of a disputed administrative decision. The legal definition is not precise, the jurisprudence prefers the term prejudice in the legal sphere.[37]

If the claimant files an action, they shall clearly define which statements of the administrative decision they are contesting, and specify for which factual and legal reasons they consider the contested statements of the decision to be illegal or void.[38] The claimant therefore has to claim in the action specific factual statements accompanied by specific legal arguments, from which it follows for what reasons the claimant considers the challenged decision to be illegal or void (cf. Section (§) 71, Subsection 1, Subparagraph d) of the Code of Administrative Justice). These claims shall be specific

[36] Compare, for example, the Judgement of the Supreme Administrative Court of 10 June 2021, file No. 6 Ads 235/2019-92, concerning miners' pensions.

[37] Resolution of the extended senate of 23 March 2005, file No. 6 A 25/2002-42.

[38] Judgement of the Supreme Administrative Court of 29 December 2004, file No. 1 Afs 25/2004.

and individualised precisely in relation to the claimant.[39] Administrative courts are in principle (that is, with exceptions) bound by the proposal and do not review the challenged act beyond the scope of the proposal *ex officio*. Thus, shallow pleadings and shallow arguments lead only to shallow judicial review. In this respect proposal principle works in connection with the principle of protection of individuals' public-law rights.

Pursuant to Section (§) 65, Subsection 2 of the Administrative Code of Justice, the following applies:

> *An action against a decision of an administrative authority can be made even by a participant to the proceedings before the administrative authority who is not entitled to file an action under Subsection 1, if the participant claims that his or her rights have been prejudiced by the administrative authority's acts in a manner that could have resulted in an illegal decision.*

Pursuant to Section (§) 65, Subsection 2 of the Code of Administrative Justice, the applicant is not affected in their substantive rights or in their legal sphere, but they were a participant to the administrative proceedings in which they claimed a certain interest under the law. The participation of non-profit organisations for the protection of nature, which under certain conditions participate in proceedings under the Building Act, is a typical example. While the standing according to Section (§) 65, Subsection 1 of the Code of Administrative Justice is not tied to participation in administrative proceedings, but to prejudice in the legal sphere, the standing according to Section (§) 65, Subsection 2 of the Code of Administrative Justice is, on the contrary, tied to participation in by administrative proceedings and not by prejudice in the legal sphere. In essence, the proceedings initiated on the basis of an action filed by the claimant pursuant to Section (§) 65, Subsection 2 of the Code of

[39] The Judgement of the Supreme Administrative Court of 27 October 2004, file No. 4 Azs 149/2004-52 or the Judgement of the High Court in Prague dated 19 January 1993, file No. 6 A 85/92-5.

Administrative Justice do not essentially concern the protection of the claimant's public-law rights.

21.7. Standing in the Public Interest

It is possible to consider establishing a so-called 'action in the public interest' as an exception to the principle of protection of public rights.

Under Section (§) 66, Subsection 1 of the Code of Administrative Justice, under the conditions determined by the laws governing the proceedings before the administrative authorities, the administrative authority which the law provides for shall file the action against the judgment. In the proceedings on the action against the decision, the administrative authority is traditionally in the position of the defendant, not the plaintiff. Nevertheless, the Code of Administrative Justice allows *locus standi* to be granted to an administrative authority under a special Act. Currently, however, such an act does not exist in the Czech law. Therefore, the provision in question is not currently applied.

According to Section (§), 66 Subsection 2 of the Code of Administrative Justice (called the 'special claim legitimation to protect the public interest') the claim can be made by the Attorney General if he or she finds a compelling reason for the submission in the public interest. According to Section (§), 66 Subsection 3 the claim can be made by the Ombudsperson if he or she proves a compelling reason for the submission in the public interest.

An action by the Attorney General or the Ombudsperson is inadmissible if the legal causes put forward if it has been applied in the same matter in another action already rejected by the court (Section (§ 66), Subsection 5 of the Code of Administrative Justice).

The entrenchment of this special right to sue may be considered a partial response to the abolition of the general supervision of the (socialist) prosecutor's office,[40] which existed before 1989.

[40] Compare Article 104 of Constitutional Act No. 100/1960 Sb., Constitution of the Czechoslovak Socialist Republic, according to which the prosecutor's office is in charge of the supervision of the consistent implementation and compliance

If the standing was granted exclusively to individuals defending their rights, in practice, it would not be possible to deal with cases where an illegal decision was issued 'in favour of the participant', as it may be assumed that this participant would not be interested in cancelling the illegal decision.

It should be emphasised that the special standing of the Attorney General and Ombudsperson to protect the public interest may only be used in cases where the decision of an administrative authority is to be contested by the action. It cannot be used in the case of other forms of administrative activity (i.e., in the case of administrative activity taken in the form of intervention or measures of a general nature) or in the case of administrative inaction.

The special action according to Section (§) 66, Subsection 2 of the Code of Administrative Justice was introduced to protect objective law (legality) in specific cases where (serious) public interest requires it.[41] Neither the Attorney General, nor the Ombudsperson files an action for the protection of the individual's public-law rights. Their right to sue is not tied to whether and how the administrative decision affected their sphere, or whether they participated in the proceedings in which the administrative decision was issued. The question of whether the individual's public-law rights have been affected is only reflected in the assessment of whether it is a decision within the meaning of Section (§) 65, Subsection 1 of the Code of Administrative Justice. This does not exclude that in a specific case the protection of the public interest may sound in favour of some individual's rights. Pursuant to Section (§) 66, Subsections 2 and 3 of the Code of Administrative Justice, an action is a remedy in the event that an administrative authority issued a decision in favour of a single participant in the administrative proceedings (who logically

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with laws and other legal regulations by the Ministries and other state administration authorities, national committees, economic courts and other organisations, as well as citizens is related to Act No. 16/1965 Sb., Section (§) 14 et seq. From related literature compare, for example, M.V. Savickij, *Prokurátorský dozor nad dodržováním zákonnosti v činnosti orgánů vyhledávání*, Statistické a evidenční vydavatelství tiskopisů, Praha 1963.

[41] Compare Judgement of the Supreme Administrative Court of 26 August 2015, file No. 2 As 103/2015-171.

will not be interested in filing an action pursuant to Section (§) 65 of the Code of Administrative Justice and initiate proceedings before an administrative court), although such a decision should not have been issued from the point of view of objective law.

At the same time, however, a serious threat to the public interest establishing the special standing according to Section (§) 66 of the Code of Administrative Justice is not limited only to cases of violation of the legal order in favour of certain person. The filing of an action is not prevented by the fact that at the time of its filing, extraordinary remedies before the administrative authorities may still be used.[42]

The consideration of whether there is a serious public interest in the matter within the meaning of Section (§) 66, Subsection 2 of the Code of Administrative Justice is not subject to review by administrative courts.[43] "The provisions of Section (§) 66, Subsection 2 of the Code of Administrative Justice therefore represent a 'procedural ticket' to proceedings on a lawsuit in situations where other persons do not want to or cannot initiate such proceedings".[44]

The conclusion that the existence of a serious public interest in the sense of a procedural ticket evaluated only by the Attorney General was already approved by the Constitutional Court of the Czech Republic. According to the Constitutional Court, such a conclusion does not contradict the right to a fair trial according to Article 36 of the Charter of Fundamental Rights and Freedoms.[45]

The argumentation is that the proposal to the court itself does not directly interfere with the constitutionally guaranteed rights

[42] Judgement of the Supreme Administrative Court of 5 November 2007, file No. 8 As 27/2006-70.

[43] Judgement of the Supreme Administrative Court of 5 November 2007, file No. 8 As 27/2006-70, published under No. 1455/2008 Sb. The Supreme Administrative Court. Cf. also the Resolution of the extended senate of the Supreme Administrative Court of 24 June 2015, file No. 2 As 103/2015-128.

[44] Resolution of the extended senate of the Supreme Administrative Court of 24 June 2015, file No. 2 As 103/2015-128.

[45] Judgment of the Constitutional Court of the Czech Republic of 30 May 2018, file No. I. ÚS 946/16.

of the beneficiary of the contested decision.[46] Matters initiated by an action in the public interest are then decided by the court, any infringement of fundamental rights and freedoms is in the hands of the judiciary; possible interference with (previously acquired) rights occurs precisely through a court decision. This is an essential argument why the special standing according to Section (§) 66, Subsection 2 of the Code of Administrative Justice does not contradict the constitutional guarantee of a fair trial according to Article 36 of the Charter of Fundamental Rights and Freedoms.

The situation is different as regards the 'procedural ticket' of the Ombudsperson. The law says that the Ombudsperson shall prove a significant reason for the submission in the public interest. Therefore, the Ombudsperson shall justify the existence of the public interest in reviewing the contested decision, and the court shall review the fulfilment of this procedural condition.

For the filing of an action by the Attorney General or the Ombudsperson, the Code of Administrative Justice sets a deadline of three years from the legal force of the decision (according to Section (§) 65 of the Code of Administrative Justice, individual claimants may file an action within the period of 2 months). The significantly longer period is justified by the different position of claimants according to Section (§) 66, Subsection 2 and 3 of the Administrative Code of Justice and the reduced possibility of detecting defects in the administrative decision. Neither the Attorney General nor the Ombudsperson is a party to the administrative proceedings (therefore the decision is not delivered to them), they may learn about the illegality and defects of the decision rather indirectly, usually out-of-process and probably with a longer time interval after the decision is issued. Therefore, the extension of the lawsuit period appears to be adequate and proportionate. The extended period allows for familiarisation with the decision, the challenge of which is being considered, and with the relevant facts justifying the threat to the public interest. The extended period thus enables a more responsible approach to exercising the special standing of

[46] Judgement of the Constitutional Court of the Czech Republic of 3 April 2018, file No. II. ÚS 3189/16, or Judgement of 30 May 2018, file No. I. ÚS 946/16.

the Attorney General and Ombudsperson. Even this conclusion has already been approved by the Constitutional Court. According to the Constitutional Court, a longer time limit for claimants in the public interest is not contrary to the principle of equality of arms.[47]

The procedural superiority of the Attorney General or Ombudsperson in proceedings initiated by an action in the public interest pursuant to Section (§) 66, Subsections 2 and 3 of the Code of Administrative Justice is only an apparent one. Public interest claimants are bound by the procedural rules in the same way as individual claimants. It also applies to public interest claimants with respect to the fact they have to apply the claims within the lawsuit period and only within the lawsuit period, they may possibly expand the claims. Even for an action in the public interest, the court is fundamentally bound by the claims and reviews the contested decision only to the extent defined by the claimant.[48] Even the Attorney General or Ombudsperson determine the grounds of the lawsuit by their claim of violation of law.

The obligation to exhaust proper remedies, which is otherwise determined, does not apply to an action in the public interest.[49] There is therefore an exception to the principle of subsidiarity of judicial protection in the case of an action in the public interest. Neither the Attorney General nor Ombudsperson has the right to file a remedy, while the participants might not be interested in applying a remedy, as the lawsuit may be filed even against the will and interests of the participants.[50]

The specific way of initiating the proceedings is then also reflected in the very decision-making about the action in the public interest and the resulting judgment. The administrative court assesses the intensity of the violation of the public interest in the proceedings on the lawsuit as part of the assessment of the reasonableness of the

[47] In addition to that, compare, the Judgement of the Constitutional Court of the Czech Republic of 30 May 2018, file No. ÚS I. ÚS 946/16.

[48] Judgement of the Constitutional Court of the Czech Republic of 3 April 2018, file No. II. ÚS 3189/16, or of 30 May 2018, File No. ÚS I. ÚS 946/16.

[49] Sections (§) 5 and (§) 68, Subparagraph a) of the Code of Administrative Justice.

[50] Compare the Judgement of the Court of Appeal in Brno 29 Ca 60/2006–44.

lawsuit. A lawsuit is justified only in cases where the illegality of an administrative decision is so intense that it disturbs a serious public interest.[51] In a judgement on an action in the public interest, there is a need to balance the public interest in maintaining objective legality and the interest in legal certainty and maintaining confidence in the legality of the exercise of public authority. Both elements are included in the principle of the rule of law.[52]

If it is established that an administrative judgement challenged by an action to protect the public interest is in violation of objective law or was issued based on procedural defects, the administrative courts shall take into account the reasons for the issuing of the unlawful decision and the consequences of any cancellation of such an administrative decision.

The Constitutional Court indicated model groups of cases that may arise. In simple terms, it may be summarised that if the participant in the administrative proceedings did not participate in the unlawfulness of the decision, the negative consequences for the individual should be minimised and the administrative court shall very carefully consider the necessity of a cassation verdict, even if the contested decision is objectively illegal. The principle of protecting confidence in the legality of the exercise of public authority is the reason, however, usually, this will also concern the protection of some substantive right depending on the nature of the right granted by the contested administrative decision. In cases where an individual had a hand in issuing an unlawful decision, for example, by intentionally submitting false documents, there is no reason to mitigate the consequences of the court's cassation verdict. The illegality of a decision issued on the basis of such false grounds

[51] Judgement of the Supreme Administrative Court of 28 April 2016, file No. 4 Azs 33/2016–48.

[52] Judgement of the Constitutional Court of the Czech Republic of 30 May 2018, file No. ÚS I. ÚS 946/16.

may be fully borne by the individual, as the individual does not testify in good faith.[53, 54]

The legal nature of the right to file an action in the public interest is also interesting. Indeed, there have been attempts to sue (as an illegal intervention) the very filing of a public interest action or related procedures (e.g., gathering documentation for the purpose of assessing whether the right to file a public interest action should be exercised). In administrative justice, only an administrative authority is suable [within the meaning of Section (§) 4, Subsection 1, Subparagraph a) of the Code of Administrative Justice], or more precisely an action in administrative justice may be filed only upon the assumption that an act or omission of an administrative authority is challenged. Administrative justice is characterised by a content relationship with public administration, the control exercised by the administrative courts therefore moves only within the boundaries of the public administration. It has already been ruled that in administrative justice the authority of the Attorney General to file an action against the decision of an administrative authority pursuant to Section (§) 66, Subsection 2 of the Code of Administrative Justice is a manifestation of the external control functions of the state *vis-à-vis* the public administration. Thus, it is not the exercise of public administration.[55] The implementation of this authorisation is therefore not subject to review in the administrative courts and the action challenging the interference consisting in the filing of an action in the public interest is therefore inadmissible. A similar conclusion may also be assumed in relation to the authorisation of the Ombudsperson.

As already stated, by implementing the authorisation according to Section (§) 66, Subsection 2 or 3 of the Code of Administrative Justice, the claimant does not interfere in the public interest with any (substantive) public-law right of an individual. The Attorney

[53] Judgement of the Constitutional Court of the Czech Republic of 30 May 2018, file No. ÚS I. ÚS 946/16.

[54] D. Hejč, *Správní žaloba nejvyššího státního zástupce z hlediska poslání správního soudnictví*, "Právník" 2023, No. 10, pp. 904–909.

[55] Compare the Judgement of the Supreme Administrative Court of 8 June 2022, file No. 6 As 65/2021-30.

General or the Ombudsperson only initiates proceedings before the administrative court, while only a possible subsequent court decision may interfere with the public rights of natural or legal persons.[56] For the existence of the jurisdiction of courts in administrative justice, the assumption of direct infringement of rights is not fulfilled (Section (§) 2 of the Code of Administrative Justice).

Implementation of the authorisation of the Attorney General or the Ombudsperson to file an action in the public interest is not reviewable in administrative justice, as it is not the performance of public administration and there is no direct infringement on the public-law rights of an individual. The same applies for legal acts or procedures directly related to the exercise of the right to file a public interest action (for example, the collection of file material in order to assess whether a public interest action will be filed).

Although the action filed pursuant to Section (§) 66 of the Code of Administrative Justice serves to protect the public interest, the Supreme Administrative Court has already stated that the authority of the Attorney General to file a lawsuit pursuant to Section (§) 66, Subsection 2 of the Code of Administrative Justice is also in line with the primary purpose of administrative justice, which is to protect public-law rights and which is expressed in Section (§) 2 of the Code of Administrative Justice.[57] Analogously, this conclusion also applies in relation to the action filed by an Ombudsperson pursuant to Section (§) 66, Subsection 3 of the Code of Administrative Justice.

First of all, it should be noted that Section (§) 2 of the Code of Administrative Justice expressly states that the protection of public-law rights may only be provided in the manner and under the conditions established by law. Thus, the purpose of administrative justice cannot be to provide absolute protection to public-law rights granted in every conceivable situation, i.e., even rights that were declared or constituted unlawfully. The provisions of Section (§) 2 of the Code of Administrative Justice cannot therefore be understood

[56] Compare, for example, the Judgement of the Supreme Administrative Court of 26 August 2015, file No. 2 As 103/2015-171.

[57] Judgement of the Supreme Administrative Court of 26 August 2015, file No. 2 As 103/2015-171.

in the sense that it authorises administrative courts to intervene in the performance of administrative activities only in cases where there occurs a violation of the law to the detriment of an individual, or the Attorney General or the Ombudsperson is prevented from initiating legal proceedings in favour of a certain person.[58]

21.8. Protection of Individuals' Public-Law Rights – the Material Concept of an Administrative Decision

The term administrative decision is, in addition to the term 'public-law rights', another key term of the Code of Administrative Justice. An action against a decision is the basic and dominant type of action in administrative justice. It is also the oldest type of claim, unlike other types of claims, it dates back to the beginning of administrative justice in our territory (cf. Act No. 36/1876 *Reichsgesetzblatt*). The definition of a decision for the purposes of administrative justice is contained in Section (§) 65 of the Code of Administrative Justice, which was cited in connection with the definition of who may be a claimant.

The Code of Administrative Justice defines a decision as an act of an administrative authority whereby the person's rights or obligations are created, changed, nullified or bindingly determined (Section § 65, Subsection 1 Code of Administrative Justice).

The definition contained in Section (§) 65, Subsection 1 of the Code of Administrative Justice shall be read in the context of Section (§) 4, Subsection 1, Subparagraph a) of the Code of Administrative Justice (which defines the administrative authority and therefore essentially defines what is public administration[59]) and Section (§) 2

[58] Judgement of the Supreme Administrative Court of 5 November 2007, file No. 8 As 27/2006-70, cf. also the Judgement of the Supreme Administrative Court of 16 November 2004, file No. 1 As 28/2004-106, published under No. 454/2005 Sb. the Supreme Administrative Court.

[59] Courts of administrative justice decide on a) actions against decisions made in the sphere of public administration by an executive authority, the autonomous unit of a local administrative authority, as well as by a natural person or legal entity or another authority if entrusted with decision-making about the rights

of the Code of Administrative Justice (which enshrines the principle of protection of public-law rights of individuals in the field of public administration). The definition of a (administrative) decision in the Code of Administrative Justice is an autonomous definition enshrined precisely for the purposes of administrative justice, therefore, it is not important whether or how an administrative decision is defined in other laws.[60] The tension between the term of the decision in the Code of Administrative Justice and the Code of Administrative Procedure may be an example of this. However, this issue deserves a separate analysis and is beyond the scope of this chapter.

In connection with the question of what is and what is not a decision of an administrative authority (and what may or may not be challenged by a lawsuit), the Supreme Administrative Court arrived at the conception of the material concept of an administrative decision relatively soon after its establishment. At the same time, the material concept of the administrative decision mainly follows the protection of the rights of the participants.

This material concept of an administrative decision emphasises how an act issued by an administrative authority behaves in the legal sphere of its addressee, or rather what effects it has (whether it was decided in a specific case of individually determined participants). The material concept takes a backseat to how such an act is denoted or how the procedure in which this act was issued is denoted.[61]

With regard to the protection of rights, the nature of the decision cannot be determined by whether the administrative authority itself considers the outcome of its procedure to be a decision or whether it denotes it as a decision and whether it observes the procedural framework established for issuing the decision. If, according to the law, an administrative authority is to issue a decision in a certain matter (whether in a situation where the form of the decision is expressly determined by law, or in a situation where materially it

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and obligations of natural persons and legal entities in the sphere of public administration (hereinafter: the 'administrative authority').

[60] Compare: Z. Kühn, *op. cit.*, p. 512.

[61] Ibidem, pp. 511–522.

is an act that establishes, amends, cancels or declares the rights or duties of individually determined addressees in a specific matter, while at the same time, the law did not exclude the form of a decision) and it omits this form, then for the purposes of administrative justice, this act shall be perceived materially as a decision of an administrative authority. It is therefore a decision, albeit an obviously flawed one (if the administrative authority does not consider the resulting act to be a decision, it apparently did not follow the rules established for the issuance of a decision, the resulting act does not meet the requirements of a decision, for example, it is not denoted as a decision, does not contain a justification or instruction on a remedy, etc.).

However, the case law did not approach the absolute dimension of the material concept and also requires certain formal elements.

According to the case law of the Supreme Administrative Court, a decision reviewable in administrative justice in proceedings conducted according to Section (§) 65 et seq. of the Code of Administrative Justice is therefore such an administrative act that meets the following material features: (i) the administrative act was issued by an authority in the scope of public administration; (ii) the authority decided on the rights and obligations of natural and legal persons; (iii) the decision-making process took place in the area of public administration; and (iv) the public rights of natural persons or legal entities must have been affected by the activity of the administrative authority. At the same time, however, the case law also establishes certain formal correctives: i) prescribed formalised form of the act, which usually contains a statement and justification; ii) the fact that the act is issued as part of a formalised procedure, even if it does not have to be a procedure in the sense of the Code of Administrative Justice or the Tax Code (Act No. 280/2009 Sb.); iii) documentation is made on the course and result of the procedure, iv) the resulting act is notified to the participants in the proceedings.[62]

[62] Resolution of the extended senate of the Supreme Administrative Court of 10 July 2018, file No. 9 As 79/2019-41, No. 3779/2018 Sb. the Supreme Administrative Court.

In the case of doubts related to the fulfilment of the formalities of borderline or non-standard acts for their classification as a decision according to Section (§) 65, Subsection 1 of the Code of Administrative Justice, the possibility of defending against such acts by means of an action brought against the decision should be preferred, as this procedure best fulfils the principles on which administrative justice in the Czech Republic is built. In order to fulfil the formal character of the decision, it is usually sufficient for the establishment, amendment, cancellation or binding determination of the rights of individually determined individuals (addressees) to be embodied in an act of an administrative authority with a prescribed written form and for the issuance of which the competence of the administrative authority is given upon conditions stipulated by law, which the administrative authority is obliged to assess.[63]

Due to the condition of at least certain essential procedural requirements, sometimes we also talk about the material-formal concept. This designation is terminologically more accurate and concise.

It is obvious that the protection of rights is at the background of the material concept of an administrative decision based on case law. This idea is quite correct. However, at the same time, in practice, it has brought about many disputed situations where it is not clear to the claimant (who may be a legal layman and may not necessarily be represented by a legal professional in proceedings before the regional courts) whether the act they holds in their hands and by which they feel affected is or is not a decision, i.e., whether it will or will not be considered a decision by the administrative courts. Therefore, it may not be obvious to the claimant which type of action to use. The Czech Code of Administrative Justice is based on the distinction between types of actions, with different conditions set for each type of claim (for example, different deadlines for filing a claim).

It may often be disputed whether an act issued by an administrative authority is a decision (at least in the material sense), or whether the act does not meet the legal and case law features of a decision,

[63] Judgement of 17 September 2019, file No. 1 As 436/2017-43, No. 3931/2019 Sb. the Supreme Administrative Court.

and it is necessary to use a 'residual' action against the intervention of an administrative authority.

Or, on the contrary, it may be questionable whether an action should be brought against the inactivity of an administrative authority, because the administrative authority did not issue a decision in violation of its legal obligation (the action it took towards an individual cannot be considered a decision even in the material sense), or whether the administrative authority is not inactive, because the action it took towards an individual may be deemed to be to a decision.

21.9. Cassation Principle – Review Role Versus the Role of Finding Justice

According to Section (§) 78 of the Code of Administrative Justice:

1. If the action is justified, the court revokes the contested decision as unlawful or for procedural faults. The court also revokes the contested decision as unlawful if it finds that the administrative authority exceeded the legally defined bounds of discretionary power or abused it.
2. If the court decides on an action against a decision whereby the administrative authority imposed a penalty on account of an administrative infringement, the court may, if there are no causes for the revocation of the decision in accordance with Subsection 1 but the penalty imposed was apparently unreasonably large, either waive the penalty or decrease it within lawful limits, if such a decision can be made on the basis of the facts from which the administrative authority started and which the court may have supplemented through its own evidence in nonessential ways and if such a procedure was proposed by the claimant in his or her action.
3. If the court revokes a decision, it may, depending on circumstances, also revoke the decision of a lower-level administrative authority which preceded it.
4. If the court revokes a decision, it simultaneously declares that it returns the matter to the defendant for further proceedings.

5. The legal position adopted by the court in the vacating judgement or a judgement declaring nullity is binding on the administrative authority in subsequent proceedings.
6. If the court revokes a decision of an administrative authority in a matter in which the court itself produced evidence, the administrative authority includes the evidence among the grounds for a new decision in the subsequent proceedings.
7. The court shall dismiss a claim if not justified.

As it has already been mentioned, Czech administrative justice is defined, among other things, through the principle of cassation. In the context of administrative justice, this principle is explained primarily in connection with the requirement of the separation of powers.[64] The principle of cassation is traditionally associated with Czech administrative justice, as it has a historical background. The administrative judiciary in Czechoslovakia and later in the independent Czech Republic is conceptually linked to the Austrian administrative judiciary, while the origin of the Austrian administrative judiciary is derived precisely from the separation of justice and administration.

The principle of cassation in administrative justice means that the administrative court does not discuss a matter already decided by an administrative authority again. The administrative court does not decide on the merits instead of the administrative authorities. Fundamentally it does not find the law in the merit, but (only) review the challenged act. Thus, administrative justice does not replace the tasks of the executive.

However, the principle of cassation shall be perceived differently in the context of administrative justice than it is perceived in civil procedural law. Indeed, administrative justice cannot be considered

[64] K. Čížek, *Obrys řízení správního*, Jindřich Mercy-ho sklad, Praha 1888, p. 144; K. Flieder, *Řízení před nejvyšším správním soudem dle zákonů o nejvyšším správním soudě a na podkladě stále prakse jeho*, Gustav Dubský, Praha 1921, p. 4; F. Weyr, *Československé právo správní…*, *op. cit.*, p. 116; J. Hoetzel, *Soudní kontroly veřejné správy*, Všehrd, Praha 1924, pp. 36–37; E. Hácha, *Nejvyšší správní soud*, [in:] *Slovník československého práva veřejného*, Volume 3, Eurolex Bohemia, Praha 2000, pp. 831, 859–860; on the difference between cassation and reformation also, for example, cf.: J. Hromada, *Několik úvah o problému…*, *op. cit.*, p. 6.

a corrective system with respect to public administration.[65] It is a separate system whose function is to provide original protection to rights arising in relations that are the subject of administrative law regulation. The court in administrative justice cannot directly grant the claimant any right or impose an obligation, as this pertains only to the administrative authority in the exercise of public administration. The provision of judicial protection in administrative justice is realised by the cancellation (i.e., cassation) of the contested administrative act. Cassation administrative justice does not turn a matter that was an administrative matter at the beginning of the proceedings into a judicial matter in its final stage, but it leaves it in its original character.[66]

In administrative justice, we do not encounter an 'affirmative' judgement of the court. This is typical for correctional systems (which, however, the Czech administrative justice is not) and is based on 'instance' relationships between authorities of the same type (which, by the nature of the matter, administrative authorities and courts are not).

A manifestation of the cassation principle of administrative justice is the binding of the administrative authority to the legal opinion expressed by the court in its (cassation) decision.[67] Administrative courts do not decide on the merits, they only cancel the defective decisions of administrative authorities and give a binding legal opinion on the disputed issue that was the subject of review.

It is therefore more accurate to perceive the principle of cassation in the context of administrative justice in connection with the review and control role of administrative courts, which comes after the executive (public administration) fulfils its task. Proceedings before administrative courts are of a review nature, the legal or constitutionally guaranteed right is declared or constituted by the administrative authority, the administrative court then only

[65] J. Macur, *Správní soudnictví a jeho uplatnění v současné době*, Masaryk University, Brno 1992, p. 66. From contemporary authors, see, for example: L. Potěšil, *Kasační stížnost*, C.H. Beck, Praha 2022, p. 56.

[66] A. Merkl, *Obecné právo správní*, *op. cit*., p. 237.

[67] E. Hácha, *Nejvyšší…*, *op. cit*., pp. 831, 859–860.

reviews the decision of the administrative authority within the scope of claims. Even the view of the Constitutional Court of the Czech Republic confirms the review nature of administrative justice.[68]

The cassation principle manifests itself in a different form in deciding on cassation complaints.

According to Section (§) 102 of the Code of Administrative Justice, a cassation complaint is a remedy against a final decision of a regional court in administrative justice, by which a party to the proceedings from which this decision arose, or a person participating in the proceedings (hereinafter: the 'complainant'), demands the cancellation of the court decision. A cassation complaint is therefore an extraordinary remedy.[69]

While in the regional court, the claimant contests the act of the administrative authority, in proceedings at the Supreme Administrative Court through a cassation complaint, the complainant challenges the decision of the regional court, the subject of which was the review of that act of the administrative authority. The subject of the review of the proceedings before the regional administrative court and the proceedings on the cassation complaint is therefore different, and for this reason, the meaning of the principle of cassation in connection with the cassation complaint is also different. In connection with a cassation complaint, one may talk about the concept of the cassation principle as a remedial system, however, not in the relationship between public administration versus court, but in the relationship between the court (in this case, the regional court) versus a superior court (in this case, the Supreme Administrative Court).[70]

The Supreme Administrative Court should review and evaluate, for the purposes of the cassation complaint filed, the contested decision of the regional court and the conclusions expressed by the regional court. With the correct application of the cassation

[68] Judgment of the Constitutional Court of 30 May 2018, file No. I. ÚS 946/16.

[69] In contrast to this: 'cassation appeal to the Supreme Administrative Court' according to Article 173 et seq. Act of 30 August 2002 – Law on Proceedings Before Administrative Courts.

[70] With reference to: J. Macur, *Správní soudnictví…*, *op. cit.*, p. 173; L. Potěšil, *Kasační…*, *op. cit.*, p. 59.

redressal system, it is not the task of the Supreme Administrative Court to re-decide the claim, let alone the case itself, as it was (usually in two instances) decided by the administrative authorities.

In the case of proceedings and decisions of the Supreme Administrative Court on a cassation complaint, the principle of cassation in the above sense prevails. When the Supreme Administrative Court makes a substantive decision on a cassation complaint, while if it is a justified cassation complaint, the Supreme Administrative Court will cancel the decision of the regional court and return the case to it for further proceedings. If the cassation complaint is not justified, the Supreme Administrative Court will reject it upon its decision.

However, Section (§) 110 of the Code of Administrative Justice entrusts the Supreme Administrative Court with somewhat broader powers of judgement, thereby departing from the principle of cassation. This provision allows the Supreme Administrative Court to simultaneously cancel the decision of the regional court and decide to stop the proceedings, reject the motion or referral of the matter if the reasons for this have already been given in the proceedings before the regional court. It is only possible to proceed in this way if the reasons for stopping the proceedings already existed at the time of the proceedings before the regional court and did not arise subsequently, for example, as part of the cassation complaint proceedings. The deviation from the pure principle of cassation is made in the interest of the principle of speed and procedural economy. As a consequence, the decision of the Supreme Administrative Court on the cassation complaint also terminates the proceedings on the action. The matter is not returned to the regional court because this court, which is bound by the expressed legal opinion, would have no other option than the one for which the Supreme Administrative Court has already decided on the cassation. The regional court, with a certain delay, would decide exactly as the Supreme Administrative Court had already determined. This solution is therefore applied in situations where it is clear that after the cancellation of the decision of the regional court, the proceedings at the regional court should no longer continue and the regional court should not deal with the matter in question.

Section (§) 110, Subsection 2, which was inserted into the Code of Administrative Justice by the so-called 'major amendment with effect from 1 January 2012', also deviates from the principle of cassation.[71] Pursuant to Section (§) 110, Subsection 2 of the Code of Administrative Justice, if the Supreme Administrative Court cancels the decision of the regional court and if there are reasons for such a procedure in the proceedings before the regional court at the same time as the cancellation of the decision of the regional court, the Supreme Administrative Court may decide on its own discretion depending on the nature of the case, in particular as follows:

a) on cancellation of the decision of the administrative authority or declaration of its nullity,
b) on the cancellation of measures of a general nature or part thereof, or
c) to decide 'substantially' in cases of providing protection in matters of local and regional referendums.

Such a procedure is in accordance with the cassation nature of administrative justice as a system, while it fulfils the principle of cassation of the entire administrative judiciary, however, it is a departure from the purely cassation nature of the cassation complaint.[72] Even in this case, the interest in the speed of management and procedural efficiency is the reason for the departure from the principle. As a result, this regulation rationalises the decision-making process in the matter, as it also gives the Supreme Administrative Court the possibility (in certain cases) to cancel both the decision of the regional court and the originally challenged administrative decision at the same time. This eases the burden on regional administrative courts.[73]

On the one hand, the principal concept of the administrative justice system chosen by the legislator shall correspond to the requirements arising from the separation of powers, but on the other hand,

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[71] Act No. 303/2011 Sb.

[72] L. Potěšil, *Kasační…*, *op. cit.*, pp. 56 et seq.

[73] P. Průcha, *Ohlédnutí za změnami v úpravě správního soudnictví v České republice*, [in:] I. Papáčová (ed.), *Verejná správa na rázcestí*, Univerzita Komenského v Bratislavě, Bratislava 2018, p. 147.

partial concessions from the control principle may be allowed if their purpose is to provide truly effective judicial protection to individuals.

The appropriateness of the concept of cassation in the context of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms (which also applies to some matters falling under the purview of public administration) may be the subject of discussion, for the jurisprudence of the European Court of Human Rights in Article 6 requires full jurisdiction.

21.10. Moderation of Administrative Penalty

According to Section (§) 65, Subsection 3 of the Code of Administrative Justice, if the administrative authority has decided on a penalty on account of an administrative infringement, the person on whom the penalty was imposed may seek a release from the penalty or its reduction within the limits provided for by the law by means of an action.

According to Section (§) 78, Subsection 1 of the Code of Administrative Justice, if the action is justified, the court revokes the contested decision as unlawful or for procedural faults. The court also revokes the contested decision as unlawful if it finds that the administrative authority exceeded the legally defined bounds of discretionary power, or abused it. According Section (§) 78, Subsection 2, if the court decides on an action against a decision whereby the administrative authority imposed a penalty on account of an administrative infringement, the court may, if there are no causes for the revocation of the decision in accordance with Subsection 1 but the penalty imposed was clearly unreasonably large, either waive the penalty or decrease it within lawful limits, if such a decision can be made on the basis of the facts from which the administrative authority started and which the court may have supplemented through its own evidence in nonessential ways and if such a procedure was proposed by the claimant in his or her action.

Moderation right of the court in administrative justice may be defined as a special legal power of the administrative court activated by the claimant's proposal to moderate the administrative penalty

imposed on the accused for an administrative infraction to a certain amount, which may be assessed as clearly disproportionate. Thus, in the case of moderation of an administrative penalty for an administrative infraction, the administrative court decides on the merits and finds fair law, not just reviews and (if necessary) revokes it.[74]

This is an exception to the principle of cassation, because cassation itself is replaced by an appeal. It is also an exception to the separation of administrative justice from public administration and the requirement of subsidiarity.[75]

When applying the moderating authority, the administrative court departs from the cassation role and from the requirement of subsidiarity of the control of public administration activities.

The anchoring of the moderation authority results from the requirements given in Article 6, Subsection 1 of the European Convention on Human Rights relating to the right to a fair trial in proceedings on 'criminal charges', which, according to ECtHR, is also applied to (some) administrative infractions through an extensive interpretation.[76]

In its case law, the Supreme Administrative Court also refers to moderation as an exception to the principle of cassation.[77] This is a completely exceptional procedure, as the review is applied as a rule in administrative justice, which does not give the court the power to change the decision itself.[78] If the administrative court decides according to Section (§) 78, Subsection 2 of the Code of Administrative Justice, it replaces administrative discretion with judicial discretion, however, it is a permitted intervention by which the court does not question the conclusion of the administrative authority

[74] A. Merkl, *Obecné právo správní*, *op. cit*., pp. 237–239.

[75] L. Potěšil *et al.*, *Soudní řád správní*, Leges, Praha 2014, p. 567.

[76] P. Molek, *Právo na spravedlivý proces*, Wolters Kluwer, Praha 2012.

[77] Judgement of the Supreme Administrative Court of 13 June 2008, file No. 2 As 9/2008-77.

[78] Judgement of the Supreme Administrative Court of 21 August 2008, file No. 7 As 16/2008-80.

that the claimant violated the law and committed an administrative infraction.[79]

With respect to the fact that this is an exception to the essential principles on which administrative justice is based, the authorisation according to Section (§) 78, Subsection 2 of the Code of Administrative Justice should be used restrictively, while administrative courts should be restrained when exercising the moderating authority so as not to interfere with the executive power as this would be a breach of the system in the division of powers.

The inclusion of the right of moderation in administrative justice took place due to the effort of the legislator to achieve full compliance of the Code of Administrative Justice with Article 6 of the European Convention on Human Rights and the principle of full jurisdiction.[80] With this effort, the legislator responded to the finding of the Constitutional Court, which cancelled the previous regulation of administrative justice contained in the so-called 'part five of the Civil Procedure Code' (Act No. 99/1963 Sb.). According to the Constitutional Court, the administrative court shall be empowered not only to consider the legality of the penalty, but also its adequacy.[81]

There is even an opinion that follows directly from Article 6, Subsection 1 of the European Convention on human rights:

> *that in the field of administrative punishment the court should have the last word on the sanction. The Convention does not require the court to impose every single punishment, but the court shall at least review all aspects of the sentence.*

[79] Judgement of the Supreme Administrative Court of 30 September 2010, file No. 7 As 71/2010-97.

[80] The legislators, on p. 62 of the explanatory report to the Code of Administrative Justice, stated that: "On the other hand, it was necessary to react in a completely new way to the need to ensure the compliance of legislation with the standards of human rights protection of the modern era."

[81] Judgement of the plenary session of the Constitutional Court of 27 June 2001, file No. Pl. ÚS 16/99, by which the Constitutional Court abolished the fifth part of 'administrative justice' of Act No. 99/1963 Sb., of the Civil Procedure Code, as amended.

Therefore, the court shall have the possibility to review the adequacy of the administrative penalty, including the review of the administrative consideration of the appropriate amount of the administrative penalty.[82]

According to the Supreme Administrative Court, the idea and purpose of moderation (is not the search for the 'ideal' amount of the penalty by the court instead of the administrative authority, but its correction in cases where the sanction, moving within the legal scope and corresponding to all the principles for its imposition and taking into account the criteria needed for its individualisation clearly did not correspond to a generalisable idea of the adequacy and fairness of the penalty. In the case of administrative penalties that are less serious from a general point of view, the moderation of the penalty will therefore usually be rarer than in the case of significant penalties.[83]

When it comes to the decisions of the Supreme Administrative Court in the proceedings on a cassation complaint, the Supreme Administrative Court does not have the same authority as a regional court (Section (§) 78, Subsection 2 of the Code of Administrative Justice). The Supreme Administrative Court in proceedings on cassation complaints reviews a judgement in which moderation authority was applied, and it cannot itself replace the consideration of the regional court regarding the moderation of the amount of the penalty. In relation to the discretion of the regional court, the Supreme Administrative Court may only evaluate whether the regional court did not exceed the legally established limits of this discretion, did not deviate from them or did not abuse its discretion, or whether its reasoning is reviewable and logically non-contradictory.[84]

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[82] Z. Kühn, *op. cit.*, p. 528.

[83] Judgement of the Supreme Administrative Court of 19 April 2012, file No. 7 As 22/2012-23.

[84] According to the Judgement of the Supreme Administrative Court of 19 December 2013, file No. 2 As 130/2012-20. These conclusions were also explicitly confirmed in the Judgement of the Supreme Administrative Court dated 6 April 2021, file No. 4 Ads 55/2021-16.

21.11. Conclusions

The administrative justice in the Czech Republic serves primarily to protect the individual's public-law rights. In favour of this principle, the case-law of the Supreme Administrative Court has developed the material concept of an administrative decision.

An action against a decision of an administrative authority is the most common type of type of judicial protection in the Czech administrative justice. Most of the principles associated with the Czech administrative justice are derived from the proceedings on the action against the decision of an administrative authority. However, the Code of Administrative Justice also regulates other types of lawsuits and proceedings. In these other proceedings, exceptions to the principles are more pronounced.

A diversion from the review role of administrative courts, which is linked to the cassation principle, in favour of a finding-law role, can be seen, for instance, in proceedings on an action against the illegal intervention of an administrative authority, on competence actions and in matters of political parties and political movements.

However, even in proceedings on an action against an administrative decision, there are elements of a diversion) from the review role in favour of decision-making role. An example is the court's power of moderation of an administrative penalty. However, this exception serves to streamline the individual's public-law rights. We can therefore conclude that, although the court's power to moderate an administrative penalty deviates from the principle of cassation, as a result, it does not violate the basic concept of administrative justice, as it supports the primary purpose as to why administrative justice in the Czech Republic exists. Partial diversions from the review principle may be allowed if their purpose is to provide effective judicial protection to individuals.

A significant diversion from the principle of protection of the individual's public-law rights is represented by the *locus standi* of the Attorney General and the Ombudsperson, which serves primarily to protect the public interest and objective legality. Nevertheless, the Supreme Administrative Court, as well as the Constitutional Court of the Czech Republic have already stated that the special

locus standi of the Attorney General and the Ombudsperson to protect public interest does not really conflict with the principle of the individual's public-law rights. Administrative justice cannot provide absolute protection to the individual's rights granted in every conceivable situation and it cannot provide protection to rights that were declared or constituted contrary to the law. Even the Code of Justice explicitly states that the protection of the individual's public-law rights may only be provided in the manner and under the conditions established by law.

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