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Personal Search under Article 340 of the Customs Code of Ukraine: an Analysis of Judicial Practice

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Abstract
The article analyses judicial practice regarding the application of Art. 340 of the Customs Code of Ukraine, which governs legal relations concerning personal searches of individuals during customs control at Ukraine's customs border. The relevance of this study stems from the fact that personal searches, as an exceptional form of customs control, constitute interference with private life and may infringe the constitutional right to personal integrity, particularly given that the results of such searches may subsequently be used as evidence in criminal proceedings. The article provides a comparative analysis of the procedure governing personal searches under the Customs Code of Ukraine, personal searches under the Code of Ukraine on Administrative Offences, and searches conducted under the Criminal Procedure Code of Ukraine. The study presents the results of a comprehensive analysis of the legal positions adopted by the Supreme Court concerning the legal nature and grounds for conducting personal searches as an exceptional form of customs control authorised by a written decision of the head of the customs authority, where there are reasonable grounds to believe that a person crossing the customs border of Ukraine is concealing contraband or goods that violate customs regulations. Particular attention is devoted to the admissibility of evidence obtained during customs control, including personal search reports, as well as to the criteria used by courts to assess the legality and justification of personal searches, given that the sole statutory basis for conducting such searches is the existence of reasonable grounds to believe that a person is concealing prohibited items. As a result of the study, proposals to enhance legal certainty in the application of Art. 340 of the Customs Code of Ukraine were formulated.

Keywords: *personal search; customs control; customs border; right to personal integrity; judicial practice.*

Особистий огляд, відповідно до статті 340 Митного кодексу України: аналіз судової практики

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Анотація
Статтю присвячено аналізу судової практики застосування ст. 340 Митного кодексу України, спрямованої на регулювання суспільних відносин щодо проведення особистого огляду фізичних осіб під час проходження ними митного контролю на митному кордоні України. Актуальність теми даного дослідження зумовлена тим, що використання такої виняткової форми митного контролю як особистий огляд фізичної особи зумовлює втручання в її приватне життя й зазіхає на можливе порушення її конституційного права на особисту недоторканність, особливо з огляду на те, що результати такого огляду можуть згодом використовуватися як докази у кримінальному провадженні. Здійснено порівняльний аналіз процедури проведення особистого огляду, врегульованого Митним кодексом України, із процедурою проведення особистого огляду відповідно до Кодексу України про адміністративні правопорушення й особистого обшуку згідно із Кримінальним процесуальним кодексом України. Наведено результати комплексного аналізу правових позицій Верховного Суду щодо визначення правової природи та підстав проведення особистого огляду як виняткової форми митного контролю, який проводиться за письмовим рішенням керівника митного органу, та за наявності достатніх підстав вважати, що особа, яка прямує через митний кордон України приховує предмети контрабанди, чи товари, які є безпосередніми предметами порушення митних правил. Значну увагу приділено оцінці допустимості доказів (протоколів огляду), одержаних у межах митного контролю, а також критеріям, за якими суди оцінюють обґрунтованість застосування особистого огляду, зважаючи на те, що єдиною законодавчою підставою для його проведення є наявність «достатніх підстав» вважати, що особа, яка перетинає митний кордон України приховує предмети контрабанди. У результаті дослідження сформульовано пропозиції щодо забезпечення більшої правової визначеності у застосуванні ст. 340 Митного кодексу України.

Ключові слова: *особистий огляд; митний контроль; митний кордон; право на недоторканність особи; судова практика.*

Introduction

A personal search is an exceptional form of customs control that may be applied to individuals crossing Ukraine's customs border. Given the coercive nature of this measure, strict compliance with the procedural safeguards established by customs and constitutional law is essential to prevent violations of the rights to personal integrity and privacy.

Article 3 of the Constitution of Ukraine recognises the individual, as well as their life, dignity, inviolability, and security, as the highest social values. As emphasised by the Constitutional Court of Ukraine in Decision № 5-r(II)/2022 of June 22, 2022, "human freedom is, a priori, decisive and a priority for respect by the state as a whole and by state authorities", while "the constitutional presumption of human freedom necessitates the justification of any substantial restriction thereof by the state" [1].

The Constitutional Court of Ukraine has repeatedly stressed the close relationship between personal integrity, human dignity, and the right to private life. In Decision № 11-r(II)/2023 of 20 December 2023, the Court stated that the constitutional right to respect for private and family life derives directly from human dignity and guarantees a sphere of autonomous personal existence free from unjustified state interference [2].

Similarly, in Decision № 8-r(II)/2024 of 18 July 2024, the Constitutional Court emphasised that personal liberty and integrity are fundamental constitutional values, noting that violations of these rights have historically served as instruments for broader abuses of human rights [3].

The relevance of this study lies in the need to balance competing public and private interests. On the one hand, the state has a legitimate interest in protecting customs sovereignty, national security, and public safety, particularly under martial law and heightened border-control measures. On the other hand, personal searches involve direct interference with constitutional rights, including the right to personal integrity and the prohibition of arbitrary interference in private life.

Supreme Court case law demonstrates an attempt to balance the protection of state security and customs sovereignty with strict compliance with procedural safeguards governing exceptional forms of customs control. At the same time, legislative inconsistencies and the absence of clear statutory criteria defining "reasonable grounds" for conducting personal searches continue to generate legal disputes and inconsistent enforcement practices.

The growing number of court cases challenging the legality of personal searches further confirms the practical significance of this issue.

In judicial practice, disputes concerning the application of Art. 340 of the Customs Code of Ukraine primarily relate to the admissibility of evidence. Personal search reports and items seized during customs control often constitute key evidence in customs-offence proceedings and criminal cases involving smuggling. Consequently, the admissibility of such evidence depends directly on strict compliance with the requirements established by Art. 340.

These considerations determine both the relevance and practical significance of the present study.

Literature review

The issue of conducting personal searches within the framework of customs control lies at the intersection of customs law, administrative procedure, border security, and human rights standards. Meanwhile, domestic legal scholarship has examined the issues surrounding the implementation of Art. 340 of the Customs Code of Ukraine in a piecemeal manner, primarily through analyzing specific forms of customs control, the grounds for carrying out inspection measures, and the balance between security and human rights protection mechanisms.

One of the most relevant studies about personal searches is that by O.P. Fedotov, which focuses on intelligence as the basis for customs inspections [4]. The author highlights that, while intelligence is an essential prerequisite for enhanced customs controls, the legislation does not provide sufficient clarity on its content, sources, or reliability criteria. The researcher emphasizes the risks of excessive discretion on the part of customs authorities when using intelligence, and highlights the need for procedural safeguards to protect individuals during control measures. In the context of Art. 340 of the Customs Code of Ukraine, this position is particularly important, as the possibility of conducting a personal search is directly determined by the existence of "reasonable grounds" to believe that a person is concealing contraband or goods. However, the author does not analyze judicial practice regarding the application of such grounds, nor does he disclose the criteria by which the courts assess them.

The general theoretical context of customs regulation is explored in the work of V. Harashchuk, O. Dmytryk, and S. Fedchyshyn [5]. This work focuses on updating the definition of key categories relating to the movement of goods across Ukraine's customs border. The authors analyze how the fundamental concepts of customs law have transformed in the context of European integration and the modernization of customs legislation. They draw attention to the need to adapt customs control mechanisms to contemporary security challenges and international standards. However,

this work does not specifically examine the issue of conducting personal searches.

N. Golovai's work explores the theoretical foundations of customs control over the movement of goods and passengers' personal effects [6]. The author describes customs control as a comprehensive system of legal and organizational measures aimed at ensuring the state's customs security and compliance with procedures for moving goods across the customs border. However, the study is predominantly theoretical in nature and only briefly addresses the issue of procedural safeguards when applying the most intensive forms of control, particularly personal searches.

Studies from abroad on the digitalization of security practices are extremely important for understanding the current transformation of border control. Perle Møhl, for example, analyses how the nature of assessing an individual's "suspiciousness" has changed because of digital and biometric systems being used during border control [7]. She emphasizes that modern control is increasingly based on algorithmic risk assessment and the accumulation of personal data rather than direct observation by an official. This is significant for the study of personal searches, given the transformation of the criteria for establishing "reasonable grounds" for interfering with an individual's privacy.

Similar trends can be observed in the work of Bruno Martins, Kristoffer Lidén, and Maria Jumbert [8]. The researchers argue that modern border control is shifting increasingly towards digital monitoring systems, risk analysis, and processing large datasets, rather than physical inspections. However, the authors emphasize that digitalization does not eliminate the problem of discretion; it merely changes its form. This is because decisions on the application of coercive measures continue to be taken by officials based on their interpretation of risk indicators. This is relevant to analyzing Ukrainian practice in applying Art. 340 of the Customs Code of Ukraine, where courts frequently assess whether there is reasonable suspicion and whether there is sufficient factual evidence to conduct a personal search.

Michael Mora-Rodríguez examines the communicative and behavioral aspects of how suspicion arises during customs checks [9]. He analyses the structure of police interactions in the border zone between Spain and France, demonstrating that suspicion develops gradually through interaction between officers and individuals. The researcher emphasizes that the decision to intensify checks is often based not only on formal criteria but also on behavioral characteristics, manner of communication, and situational factors. These findings are relevant to the study of Ukrainian judicial practice, where the justification for a personal search is often also

linked to "suspicious behavior", raising questions about the clarity and verifiability of such grounds.

Thus, an analysis of the academic literature reveals a lack of comprehensive research dedicated specifically to analyzing the judicial implementation of Art. 340 of the Customs Code of Ukraine. Existing works predominantly address general issues of customs control, specific aspects of preventive inspections and border security, or the digitalization of control procedures. Domestic scholarship lacks a systematic analysis of the criteria courts use to determine "reasonable grounds" for a personal search, the procedural safeguards for individuals, the admissibility of evidence obtained from such searches, and the relationship between customs control and the standards that protect the right to privacy and human dignity. This gap makes further research into the judicial practice of applying Art. 340 of the Customs Code of Ukraine particularly relevant.

Materials and Methods

This study aims to provide a thorough analysis of the legal basis for conducting personal searches as an exceptional form of customs control. Such searches are carried out by the head of the customs authority or their deputy when there is reasonable suspicion that a person crossing the Ukrainian customs border is carrying contraband or goods that violate customs regulations.

The following research methods were employed in writing this article:

1. Formal-legal and systemic analysis methods were used to interpret the mandatory requirements of Art. 340 of the Customs Code of Ukraine, which sets out the preconditions necessary for a lawful personal search ("reasonable grounds"). These methods enabled the procedural guarantees established by law regarding state interference with citizens' rights to personal integrity and privacy to be systematised, as well as the legal positions of the Supreme Court regarding such interference.
2. The comparative legal method was used to distinguish between a personal search as an exceptional form of customs control and a personal search as defined in the Code of Ukraine on Administrative Offences, as well as a search of a person as an investigative measure conducted under the Criminal Procedure Code of Ukraine. The analysis focuses on identifying the similarities and differences in their authorisation and the scope of procedural safeguards during their execution.
3. The method of generalising case law enabled an analysis of the legal positions adopted by the Criminal and Administrative Cassation Courts within the Supreme Court in recent years.

This approach ensured the analysis was highly objective and reliable, and enabled the distinction to be made between statutory requirements and judicial interpretation. It also identified practical problems in the application of Art. 340 of the Customs Code of Ukraine.

Results and Discussion

A comparative analysis of personal searches conducted in accordance with the Customs Code of Ukraine, the Ukrainian Code on Administrative Offences, and the Ukrainian Criminal Procedure Code

In accordance with Art. 340 of the Customs Code of Ukraine, a personal search is an exceptional form of customs control carried out by written order of the head of the customs authority (or their deputy). This order is issued if there are reasonable grounds to believe that a person crossing the customs border of Ukraine, or present in the customs control zone or transit zone of an international airport, is concealing contraband items or goods that directly breach customs regulations or are prohibited from being imported into, exported from, or transited through Ukraine.

Article 340 of the Customs Code of Ukraine provides a detailed outline of the procedure for conducting a personal search. It also specifies the requirements for the private room in which the search is to be carried out, the report to be drawn up following the search, and the rights of the person subject to the search.

On August 26, 2025, the Cabinet of Ministers of Ukraine approved the draft of the new Customs Code of Ukraine by a formal decision and forwarded the text to the European Commission for assessment [10]. Article 671 of the draft [11], titled "Personal Search", was developed by experts from the Ministry of Finance and the State Customs Service of Ukraine based on EU customs legislation. It reproduces the provisions of Art. 340 of the current version of the Customs Code verbatim.

It is worth noting that the EU Customs Code [12] contains no provisions for regulating the physical search of individuals passing through customs controls at the European Union’s external borders. This gap in the legal framework is not an oversight, but a deliberate decision by the EU legislator. The application of the legal principle "expressio unius est exclusio alterius" is decisive in this case: if the EU legislators had intended to harmonise such procedures, they would have been explicitly included in the list of control measures. The absence of such regulation means that the EU Customs Code has not introduced a unified procedure for conducting personal searches.

However, since personal searches directly affect fundamental human rights, particularly the right to privacy and physical integrity, the procedural

rules governing their conduct are exclusively established by the national administrative, criminal, and criminal procedure legislation of each EU Member State. Regardless of the content of national legislation, interference by customs authorities with fundamental human rights is subject to strict scrutiny by the Court of Justice of the EU and the European Court of Human Rights. This requires reasonable, individualised suspicion and compliance with the principle of proportionality.

A comparative analysis of personal searches authorised under the Customs Code of Ukraine, the Code of Administrative Offences, and the Code of Criminal Procedure of Ukraine revealed the following similarities and differences.

All these procedures constitute an interference with an individual's right to personal integrity and private life. According to the consistent legal stance of the European Court of Human Rights, such interference must fulfil three conditions: it must be carried out "in accordance with the law", "pursue legitimate aims" (i.e. serve a legitimate purpose), and be "necessary in a democratic society" (see para. 47 of the ECtHR judgment in Savini v. Ukraine) [13].

All the above procedures also have one thing in common: ensuring compliance with legal procedures is essential to guarantee the lawfulness of state intervention. Breaching any mandatory procedural requirement may constitute grounds for declaring the evidence obtained inadmissible under the 'fruit of the poisonous tree' doctrine. Examples of such breaches include failing to comply with the requirement for equal gender representation, improperly involving witnesses, and – in criminal proceedings – the absence of mandatory video recording or a defence lawyer. In criminal proceedings, this is expressly provided for in Art. 87 of the Ukrainian Code of Criminal Procedure.

A key distinction between personal searches carried out under administrative procedures and procedural coercion in criminal proceedings is that the latter requires the highest level of procedural safeguards for the person subject to it. After all, the consequences may include criminal liability and significant subsequent restrictions on liberty. This is precisely why interventions carried out under the Code of Criminal Procedure of Ukraine are usually authorised by a judicial body (an investigating judge), ensuring an independent prior review of the necessity and proportionality of the intervention. In contrast, a personal search is usually authorised by an official from an executive authority based on an administrative decision. While administrative procedures can ensure a quick response for border or law enforcement controls, the lack of prior judicial review necessitates

stringent internal procedural safeguards, such as decisions being made in writing and a medical professional being present to examine the body. These safeguards are intended to compensate for the lower legitimacy standard. However, if such a search is used to gather criminal evidence covertly, there is a risk of violating the principle of admissibility of evidence, since the authorisation standard used for the initial intervention does not meet the requirements of the Code of Criminal Procedure of Ukraine.

This is precisely why the Supreme Court has repeatedly emphasised the fundamental difference between a personal search carried out as part of customs control and a search of a person, which constitutes an investigative (procedural) action under the Code of Criminal Procedure of Ukraine. In its ruling of 13 March 2025 on Case № 138/1081/23, the Criminal Cassation Court emphasised that a personal search, as defined in Art. 340 of the Customs Code of Ukraine, is not equivalent to a search of a person as defined in Art. 237 of the Code of Criminal Procedure of Ukraine [14]. This legal position determines the scope of the procedural safeguards applicable to individuals during customs control.

The Supreme Court justifies the application of less stringent procedural safeguards in border and customs zones on the basis that individuals crossing the state border are deemed to have consented to certain restrictions on their rights, as well as to obligations associated with the special legal regime of customs control. According to the Supreme Court, when a citizen knowingly enters an area subject to special legal regulation (i.e. undergoes border and customs control), they accept the risk of exceptional control measures being applied, including a personal search. The Cassation Criminal Court's legal position explains why, although constitutional rights are preserved, they are subject to stricter, less guaranteed rules that are necessary to ensure state security and sovereignty at the customs border. By contrast, in criminal proceedings, a personal search is a coercive measure not based on such implicit consent, and is therefore subject to a higher level of procedural safeguards. Thus, the individual effectively 'consents' to a different level of procedural safeguards than those applicable in general criminal proceedings, legally justifying the absence of a ruling by an investigating judge and the mandatory participation of a defence lawyer.

A personal search is an exceptional form of customs control, intended to detect any contraband or prohibited goods being transported across the customs border. In contrast, a search of a person under the Code of Criminal Procedure of Ukraine is an investigative measure carried out to locate and seize items or documents relevant to specific criminal proceedings. Such a search is usually "incorporated" into measures such as arrest or the search of a dwelling or other premises.

The procedure for conducting a personal search under the Customs Code of Ukraine differs significantly from that under the Code of Administrative Offences. While the Customs Code of Ukraine clearly regulates searches at the customs border and requires a written decision from the head of the customs authority, the Code of Administrative Offences contains less detailed procedural requirements. Academic literature even contains well-founded criticism of the current legislation in this area. Consequently, although they exist, the procedural safeguards in the form of requirements for witnesses are less stringent than those in the Customs Code of Ukraine and the Code of Criminal Procedure of Ukraine.

The legal framework for conducting personal searches under Ukrainian customs law: an analysis of legislation and case law

Article 340 of the Customs Code of Ukraine outlines clear yet ambiguous conditions for carrying out personal searches. Adherence to these conditions is essential for ensuring the legality of the procedure and the admissibility of any evidence obtained.

In accordance with Art. 340(1) of the Customs Code of Ukraine, a personal search may only be carried out if the following conditions are met simultaneously.

Firstly, a written decision by the head of the customs authority or their deputy is required to lawfully conduct a personal search. Unlike a search of a person in criminal proceedings, however, this decision is administrative in nature and is not subject to prior review by an investigating judge. Nevertheless, judicial practice shows that the absence of such a decision renders the search report inadmissible as evidence. Even if the factual circumstances (the discovery of contraband) are confirmed, the procedural defect in the document legitimising interference with a person's rights renders the search report inadmissible as evidence. Lawyers frequently highlight this violation in their cassation appeals, including in Case № 138/1081/23. In its ruling of 13 March 2025, the panel of judges of the Second Chamber of the Cassation Criminal Court of the Supreme Court stated that "the references in the appeal to non-compliance with the rules of personal search due to the absence in the case file of a decision by the head of the customs authority are not valid, since the defence did not express any interest in obtaining this decision and did not file the relevant motions during the implementation of the requirements of Art. 290 of the Code of Criminal Procedure of Ukraine, or during the conduct of the trial and appeal proceedings" [15].

As stated in the Odessa Administrative Court of Appeal's ruling of October 1, 2013, "the discovery and removal of a "Vacheron Constantin" watch from

Person_2's wrist essentially constitutes a personal search of the individual". At the same time, the panel of judges established that, on 26 December 2007, neither the Head of Boryspil Customs nor their representative issued a decision to conduct a personal search of the claimant. Therefore, the panel of judges agrees with the court of first instance's conclusion that the defendant, an inspector from Boryspil Customs' Customs Clearance Department № 1, violated the requirements for conducting a personal search when searching the claimant [16].

Since Art. 340 of the Customs Code of Ukraine states that this decision is a prerequisite, disregarding it makes the whole process unlawful. This means that the seized items are deemed to have been obtained in a material breach of the law and are therefore inadmissible as evidence.

Admittedly, the Criminal Cassation Court and the Administrative Cassation Court within the Supreme Court take different approaches to this matter. The Criminal Cassation Court adopts a stricter formalistic approach to compliance with the requirement for a written decision by the head of the customs authority or their deputy, considering procedural perfection to be mandatory. In contrast, when considering cases of administrative offences relating to breaches of customs regulations, the Administrative Court of Cassation adheres to its general legal position set out in para. 44 of the 9 December 2021 Decision. According to this, "a breach of the procedure for adopting an act should not, in itself, give rise to legal consequences for its validity, except in cases expressly provided for by law" [17]. However, if the procedural violation does not restrict a citizen's fundamental rights (e.g. the right to defence or the right to receive information on the grounds for the inspection) and constitutes a technical error (e.g. minor deficiencies in the drafting of the report), it may not be recognised as grounds for setting aside the decision on the violation of customs regulations.

The wide variety of approaches taken by the courts means that lawyers must have a clear understanding of whether a breach is substantive (i.e. infringing key individual rights that affect the outcome of the customs inspection) or procedural (arising from a technical inaccuracy). Generally, the courts proceed on the basis that only substantial violations, which directly affect the individual's rights and the admissibility of evidence, constitute grounds for declaring the personal search procedure unlawful.

It is also important that the individual is provided with a written decision from the head of the customs authority or their deputy for their information. An analysis of case law shows that it is important to confirm that the individual has been made aware of the decision, for example, by adding a note to the decision itself.

The second mandatory condition for the lawful application of a personal search is that there must be "reasonable grounds to believe that the citizen is concealing contraband or goods that directly constitute a breach of customs regulations, or that are prohibited from being imported into, exported from, or transported in transit through, Ukraine". While the Customs Code of Ukraine does not provide an exhaustive list of "reasonable grounds", this wording requires customs officials to possess specific, objective facts or information that justify such interference with an individual's right to personal integrity. These grounds must relate to a suspicion that goods are being concealed that constitute a breach of customs regulations or are prohibited from being moved across the border.

This provision is the most contentious, giving rise to a significant number of administrative disputes. The problem stems from the fact that the current customs legislation contains no regulatory clarification or an indicative list regarding the legal concept of "reasonable grounds". This term's vagueness creates considerable scope for discretionary personal searches and abuse of power by customs officials. In practice, officials may rely on operational intelligence, risk profiles, or their own assessment of suspicious behaviour during customs checks. Without clear legal regulation, challenging a decision on a personal search in the administrative courts becomes a dispute in which the parties seek to prove or disprove the objective existence of grounds for conducting such a search.

In the absence of clear criteria, courts hearing administrative disputes must carry out an "ex post facto" assessment of the reasonableness and objectivity of the actions taken by customs officials. If the customs authority cannot prove that, at the time the decision to conduct an inspection was taken, there was objective evidence indicating a high risk of concealment, the decision to conduct the inspection may be deemed unlawful. This underlines the urgent need to clarify the legal concept of "reasonable grounds" by amending Art. 340(1) of the Customs Code of Ukraine.

Despite the absence of a clear legislative definition of the term "reasonable grounds", an analysis of the Supreme Court's legal positions has revealed the following five criteria that the Court uses to assess the lawfulness of a personal search:

1. The requirement for objective information to exist: The Court proceeds on the basis that "reasonable grounds" cannot be based solely on the subjective suspicions or intuition of a customs official. There must be objective information (e.g. operational data, risk analysis results, or information from law enforcement agencies) indicating a high risk of concealment, specifically in relation to that person at the time the decision to search is made.

In particular, the ruling of the Kharkiv Administrative Court of Appeal, dated 26 September 2013, states: "The report from the Security Service of Ukraine in the Sumy region provides reasonable grounds for believing that the claimant may be transporting prohibited items across the border in her car or on her person, and therefore a search of the vehicle and a personal search were justified" [18].

2. Proper documentation of the reasons: although customs legislation does not expressly require the reasons to be set out in detail in the written decision of the head of the customs authority ordering a personal search, judicial practice effectively requires the customs authority to document the reasons so that they can be submitted to the court to prove that the decision was legal.

3. Direct link to smuggling (breach of customs regulations): the grounds must relate to a suspicion of concealing contraband or items that breach customs regulations or are prohibited from being moved. Grounds that are not directly related to these conditions cannot be deemed sufficient for the application of such an exceptional form of customs control.

The Odessa Administrative Court of Appeal's ruling of 27 March 2013 rightly notes: "The court of first instance correctly concluded that the aforementioned forms of customs control are applied when there are reasonable grounds to believe that a person crossing the Ukrainian customs border, or present in the customs control zone or transit area of an international airport, is concealing contraband or goods prohibited from export by Ukraine" [19].

4. Exceptional nature: The Court regards a personal search as an exceptional form of customs control. This means that the customs authority must demonstrate that less intrusive methods of control, such as questioning the person, examining their documents, or inspecting their belongings, were either impossible or ineffective in detecting concealment.

The Volyn Regional Court of Appeal ruling of May 13, 2013 states: "Contrary to Articles 339 and 340 of the Customs Code of Ukraine, the customs inspectors failed to exercise their authority to inspect and re-inspect hand luggage and baggage. Furthermore, in accordance with Articles 318, 320 and 544 of the Customs Code of Ukraine, within the limits of their powers, the customs inspectors could have requested a written declaration" [20].

5. The burden of proof lies with the customs authority. In the event of a judicial challenge to a decision to conduct a personal search, it is the responsibility of the customs authority to prove that there were "reasonable grounds". The court will conduct an "ex post facto" review to determine

whether these grounds existed and were reasonably justified at the time the decision was made.

Even when there is a written decision and reasonable grounds, strict compliance with the procedural safeguards set out in Articles 340(2-5) of the Customs Code of Ukraine is crucial for the legitimacy of a personal search. In other words, before the search begins, the customs official must present the person with a written decision authorising the search and inform them of their rights and obligations. They must also invite the person to voluntarily surrender any concealed or undeclared goods. The fact that the person has been informed of the decision and their rights, and has refused to surrender the goods voluntarily, must be certified by a note or entry on the decision itself, signed by the official.

Since "no written decision authorising the personal search was produced during the claimant's personal search by a customs official", the claimant was not informed of his rights and obligations during the search. He was also not asked to voluntarily hand over the undeclared goods. No report was drawn up in the form established by the central executive authority responsible for formulating and implementing state tax and customs policy. This report was not signed by the customs official who conducted the search, the citizen who underwent the search, or the witnesses present during the search. Such inaction on the part of the senior state inspector was classified by the Suvorov District Court of the city of Kherson as a "gross violation of the procedure for conducting a personal search, as provided for in Art. 340 of the Customs Code of Ukraine" [21].

Failure to comply with the requirements of Art. 340(3) of the Customs Code of Ukraine regarding the proper recording of a person's offer to voluntarily surrender goods and/or their refusal may be used as a basis for challenging the admissibility of the evidence in question, since it infringes their right to choose and have this duly recorded. However, this breach may not be grounds for rejecting evidence if it is proven beyond a doubt that the goods were concealed.

The Customs Code of Ukraine establishes several procedural safeguards to minimise violations of a person's honour and dignity during a personal search. The procedure must be carried out in a private room, and third parties not involved in the search must not be allowed to observe it. A personal search must be carried out by a customs official of the same sex as the person being searched, in the presence of at least two witnesses of the same sex. This is a mandatory requirement to ensure confidentiality and objectivity.

An analysis of case law has shown that claimants often challenge the results of a personal search on the grounds of a breach of the witness

appointment requirements (for example, if customs officials, their subordinates, relatives of the person subject to the search, or other interested parties are appointed). After all, witnesses must be impartial. Breaches of these requirements call into question the objectivity of the personal search procedure record and may result in the evidence being deemed inadmissible, infringing the individual's right to an objective record of the procedure.

A unique feature of the customs procedure is the strict requirement that personal searches must be carried out exclusively by a medical professional. This provision directly guarantees physical safety and the medical legitimacy of the procedure, given that customs operations may require contraband concealed inside the body to be detected. Therefore, the Customs Code of Ukraine sets out a stricter, albeit highly specialised, standard for protecting a person's health during a personal search than the general rules set out in the Code of Criminal Procedure of Ukraine.

In addition, before the start of the personal search, the individual has the right to familiarise themselves with the procedure for conducting it, and to provide explanations, submit requests, and make statements. These must be recorded by the customs official in the report.

In accordance with Art. 340 of the Customs Code of Ukraine, the report of a personal search must be signed by the customs official who conducted the search, the person who underwent the search, any witnesses present, and any medical professionals involved. The person who underwent the search has the right to make a statement, which must be recorded in the report.

In its ruling of March 17, 2009, the High Administrative Court of Ukraine rejected the appellant's argument regarding alleged violations committed against him during a personal search. The court concluded that there was no written record of the search and no entry in the logbook to that effect. Based on this, the court concluded that no such search had occurred [22].

In its ruling of August 13, 2015, the Kherson Regional Court of Appeal rejected the appellant's argument regarding several violations committed against him during the personal search. "The senior inspector of the State Fiscal Service conducted customs control in the form of an oral interview regarding the presence of goods subject to mandatory declaration when crossing the Ukrainian customs border, as documented in the interview Report № 0106/50801/15. According to the Report, which was signed by the appellant without comment, he voluntarily handed over the money he had concealed in his jacket pocket at the request of the customs officer; therefore, there was no need to conduct a personal search" [23].

In accordance with Art. 340(8) of the Customs Code of Ukraine, a copy of the report shall be provided to the individual. Failure to do so constitutes a breach of the individual's procedural rights. However, the Administrative Court of Cassation considers such breaches in the context of their materiality and impact on the overall lawfulness of customs official's actions.

As the Criminal Court of Cassation points out, since a customs inspection is a supervisory rather than an investigative measure, seizing items following such an inspection does not constitute a search. Therefore, a detention report does not need to be drawn up under Art. 208 of the Code of Criminal Procedure of Ukraine, provided the person was not detained.

Restrictions on the conduct of personal searches for certain categories of persons

In accordance with Art. 340(9) of the Customs Code of Ukraine, the following individuals are exempt from personal search: the President of Ukraine; the Speaker of the Verkhovna Rada of Ukraine; Members of the Verkhovna Rada of Ukraine; the Prime Minister of Ukraine; the First Deputy Prime Minister of Ukraine; the President and judges of the Supreme Court; the President and judges of the Constitutional Court of Ukraine; the Minister for Foreign Affairs of Ukraine; and the Prosecutor General, as well as their travelling companions. However, exempting the "family members" of senior officials from the exceptional form of customs control applied to all other persons could be seen as a violation of the constitutional principle of equality before the law. Granting senior officials and their family members a legal privilege that exempts them from customs control, even in such an exceptional form, could be used as grounds for legal action in cases where ordinary citizens are subjected to disproportionate searches.

The phrase "family member" is used repeatedly throughout the text of the Customs Code of Ukraine, not only in Art. 340(9), but also in Articles 359, 383, 384, 385, 386, 389, 391, 392, 580, and 587. However, the Customs Code does not specify which individuals are considered family members. An analysis of domestic legislation has revealed legal uncertainty regarding who should be considered "family members" of the officials. According to Art. 3 of the Family Code of Ukraine, a family consists of persons who live together, share a household, and have mutual rights and obligations. A married couple is considered a family even if they do not live together for valid reasons, and a child belongs to their parents' family even if they do not live with them.

According to Art. 64 of the Housing Code of Ukraine, a tenant's family members include their spouse, children, and parents. Other persons may

also be recognised as members of the tenant's family if they permanently reside with and run a joint household with the tenant. According to sub-para. 14.1.263 of para. 14.1 of Art. 14 of the Tax Code of Ukraine, a natural person's family members include their parents, spouse, and children (including adopted children) – these persons are classified as first-degree relatives – as well as their siblings, maternal and paternal grandparents, and grandchildren – these persons are classified as second-degree relatives.

In accordance with Art. 1 of the Ukrainian Law on the Prevention of Corruption, a declarant's family members include two groups of people:

1. The declarant's spouse and children until they reach the age of majority, regardless of whether they live with the declarant; and
2. Any other people who live with the declarant, share a household with them, and have mutual rights and obligations with them (except for people whose rights and obligations are not of a family nature), including people who live with the declarant but are not married to them.

To ensure legal certainty when applying the provisions of the Customs Code of Ukraine, we recommend amending the Code to specify the legal basis for applying the term "family member". Furthermore, we recommend removing the reference to "family members" in Art. 340(9) of the Customs Code of Ukraine to better implement the principle of equality in the regulation of personal searches as an exceptional form of customs control for family members of senior Ukrainian officials. The Constitutional Court of Ukraine emphasises in its Decision № 11-r(II)/2023 of December 20, 2023 that "the constitutional principle of equality, established by Articles 21 and 24 of the Constitution of Ukraine, applies to all components of the Ukrainian legal order, and it guarantees the equality of all people in their dignity and the inalienability of their fundamental rights. The introduction of legislative restrictions on the exercise of constitutional rights and freedoms cannot contradict this principle", emphasises the Constitutional Court of Ukraine in the paragraph of sub-para. 2.2 of para. 2 of the reasoning section of its Decision № 11-r(II)/2023 of December 20, 2023 [2].

Conclusions

An analysis of judicial practice concerning the application of Art. 340 of the Customs Code of Ukraine demonstrates that Ukrainian courts have developed a relatively consistent approach to personal searches as an exceptional form of customs control.

Judicial practice confirms that strict compliance with procedural safeguards is essential for ensuring the legality of personal searches and the admissibility of evidence obtained as a result. Because personal searches

constitute one of the most intrusive forms of customs control, courts subject their application to particularly rigorous scrutiny.

From the perspective of customs authorities, the legality and sustainability of personal searches depend primarily on compliance with formal statutory requirements, especially the existence of a written decision authorising the search and objective evidence demonstrating reasonable grounds for conducting it.

Supreme Court case law shows that courts apply strict standards when assessing the legality and proportionality of customs officials' actions. Any interference with constitutional rights, particularly the right to personal integrity and the right to respect for private life, must be justified by genuine and objectively verifiable risks rather than hypothetical assumptions.

Although Art. 340 of the Customs Code of Ukraine does not define the concept of "reasonable grounds", this legislative gap is partially compensated for through judicial review, which requires customs authorities to substantiate the legality of their actions with objective evidence.

Considering the Supreme Court's legal positions, defence strategies in disputes concerning the application of Art. 340 should focus primarily on documenting all procedural violations committed during the personal search and challenging the existence of the statutory prerequisites for conducting such searches.

Recommendations

To enhance legal certainty and reduce the risk of abuse by customs authorities, Art. 340 of the Customs Code of Ukraine should be amended. The following amendments are proposed:

1. Introducing a detailed statutory definition of the concept of "reasonable grounds" within Art. 340(1) of the Customs Code of Ukraine, supplemented by a non-exhaustive list of circumstances capable of constituting such grounds.

2. Amending Art. 340(9) of the Customs Code of Ukraine to eliminate unjustified exemptions from personal searches for senior public officials and their family members.

3. Introducing into Art. 4 of the Customs Code of Ukraine a statutory definition of the term "family member" for the purposes of applying Articles 359, 383-386, 389, 391, 392, 580, and 587.

The proposed amendments would improve legal certainty, strengthen procedural safeguards, and promote compliance with the constitutional principle of equality before the law.

References

[1] Constitutional Court of Ukraine. (June 22, 2022). *Decision № 5-r(II)/2022 in the case concerning the constitutional complaint of Oleksii Volodymyrovych Abramovych regarding the constitutionality of paragraph 2 of part two of Article 40 of the Housing Code of Ukraine*. Retrieved from https://zakon.rada.gov.ua/laws/show/v005p710-22#Text.

[2] Constitutional Court of Ukraine. (December 20, 2023). *Decision № 11-r(II)/2023 concerning the constitutionality of certain provisions of Article 111(1) of the Criminal Executive Code of Ukraine*. Retrieved from https://zakon.rada.gov.ua/laws/show/v011p710-23#Text.

[3] Constitutional Court of Ukraine. (July 18, 2024). *Decision № 8-r(II)/2024 concerning the constitutionality of Article 615(6) of the Criminal Procedure Code of Ukraine*. Retrieved from https://zakon.rada.gov.ua/laws/show/v008p710-24#Text.

[4] Fedotov, O. P. (2016). Intelligence as A Basis for Customs Inspection. *Problems of Legality*, *132*, 124-134. https://doi.org/10.21564/2414-990x.132.59710.

[5] Harashchuk, V.M., Dmytryk, OO., & Fedchyshyn, S. A. (2023). Movement of Goods Across the Customs Border of Ukraine: Updating the Content of Basic Categories. *Scientific Innovations and Cutting-Edge Technologies*, *1*(27), 198-210. https://doi.org/10.52058/2786-5274-2023-13(27)-198-210.

[6] Golovai, N. (2022). Customs Control over the Movement of Goods and Passengers' Personal Belongings: Theoretical aspects. *Economy and Society, 36*. https://doi.org/10.32782/2524-0072/2022-36-30.

[7] Møhl, P. (2022). Biometric Technologies, Data, and the Sensory Work of Border Control. *Ethnos, 87*(2), 241-256. https://doi.org/10.1080/00141844.2019.1696858.

[8] Martins, B.O., Lidén, K., & Jumbert, M.G. (2022). Border Security and the Digitalisation of Sovereignty: Insights from EU Borderwork. *European Security, 31*(3), 475-494. https://doi.org/10.1080/09662839.2022.2101884.

[9] Mora-Rodríguez, M. (2022). Resolving Suspicion Moment-by-Moment: The Overall Structural Organization of Police Encounters in the Spain – France Border Area. *Language & Communication, 87*, 161-178. https://doi.org/10.1016/j.langcom.2022.07.006.

[10] Ministry of Finance of Ukraine. (August 26, 2025). *The Government Approves the Draft of the New Customs Code of Ukraine for Assessment by the European Commission and Consultations with Business Representatives*. Retrieved from https://mof.gov.ua/uk/news/uriad_pidtrimav_proiekt_novogo_ mitnogo_kodeksu_ukraini_iakii_napravliaietsia_na_otsinku_ievrokomisiieiu_ta_dlia_konsultatsii_z_biznesom-5295.

[11] Cabinet of Ministers of Ukraine. (2025). *Draft Customs Code of Ukraine approved on August 26, 2025*. Ministry of Finance of Ukraine. Retrieved from https://mof.gov.ua/storage/files/Проект%20Митного%20кодексу%20України.pdf.

[12] European Parliament & Council of the European Union. (October 9, 2013). *Regulation (EU) No. 952/2013 laying down the Union Customs Code (recast)*. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02013R0952-20200101.

[13] European Court of Human Rights. (December 18, 2008). *Saviny v. Ukraine* (Application No. 39948/06). Retrieved from https://hudoc.echr.coe.int/eng?i=001-90360.

[14] Supreme Court of Ukraine, Second Judicial Chamber of the Criminal Cassation Court. (March 13, 2025). *Decision in Case No. 138/1081/23*. Retrieved from https://reyestr.court.gov.ua/Review/125876619.

[15] Supreme Court of Ukraine. (March 13, 2025). *Case No. 138/1081/23*. Retrieved from https://reyestr.court.gov.ua/Review/125876619.

[16] Odesa Administrative Court of Appeal. (2013, October 1). *Ruling in case No. 2-a-31/08/2110*. Retrieved from https://reyestr.court.gov.ua/Review/34458015.

[17] Supreme Court of Ukraine, Administrative Cassation Court. (December 9, 2021). *Decision in Case № 260/63/19*. Retrieved from https://reyestr.court.gov.ua/Review/101774588.
[18] Kharkiv Administrative Court of Appeal. (September 26, 2013). *Decision in Case № 1870/2a-2646/12*. Retrieved from https://reyestr.court.gov.ua/Review/34240449.
[19] Odesa Administrative Court of Appeal. (March 27, 2013). *Decision in Case № 2-a/1570/8630/11*. Retrieved from https://reyestr.court.gov.ua/Review/30335153.
[20] Volyn Regional Court of Appeal. (May 13. 2013). *Decision in Case № 163/603/13-p*. Retrieved from https://reyestr.court.gov.ua/Review/31109121.
[21] Suvorovskyi District Court of Kherson. (2015, April 3). *Decision in Case № 668/3687/15-a*. Retrieved from https://reyestr.court.gov.ua/Review/43459409.
[22] Higher Administrative Court of Ukraine. (March 17, 2009). *Decision*. Retrieved from https://reyestr.court.gov.ua/Review/3496405.
[23] Kherson Regional Court of Appeal. (August 13, 2015). *Decision in Case № 668/2626/15-p*. Retrieved from https://reyestr.court.gov.ua/Review/48482427.

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Legal systems in different political orders (using the example of Latin American countries)

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Abstract
The relevance of the study is determined by transformations in the political systems of modern countries, which affect the characteristics of legal systems and lead to changes in the manifestations of democratic systems. Such changes are clearly evident in Latin American countries. Research into the influence of political factors on legal systems will help prevent the negative manifestations of such processes in Ukraine during its own institutional reform. The purpose of this study is to identify the political causes and factors that contribute to differences within homogeneous legal systems. The task is to analyse the political systems of Latin American countries, identify key factors influencing the differences between these systems, and characterise the various processes that led to the transformation of their legal and political systems. For this purpose, the following materials were used: monographs, collections of articles by researchers, assessments by leading experts in political processes, annual classifications of countries according to the democracy index formed by The Economist, etc. The authors used a variety of scientific methods: philosophical (dialectical and hermeneutic), general scientific (systemic, structural-complex, content analysis, statistical-mathematical methods), and theoretical-legal methods (comparative-legal, historical-legal, formal-legal, legal forecasting method), and applied many principles, methods, and techniques of scientific research (principles of determinism and retrospective analysis, objectivity, historicism, classification, dogmatic-legal approach, principles of analogy, and logical analysis). The results of the study highlighted the peculiarities of different political systems in the Latin American region. The authors concluded that the legal systems of Latin American countries represent different groups of political systems. To divide into such groups, various factors should be taken into account, including the rule of law, democratic accountability of state bodies, and various indicators of democracy. Further research could explore

the impact of various political processes and reforms on the characteristics of individual national legal systems in Latin American countries.

Keywords: *legal system; political order; democracy index; South America; Central America; the Caribbean.*

Правові системи в умовах різних політичних порядків (на прикладі країн Латинської Америки)

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Анотація
Актуальність дослідження обумовлена трансформаціями, що відбулися в політичних порядках сучасних країн світу, які впливають на характеристики правових систем та призводять до змін у проявах демократичних порядків. Такі зміни яскраво простежуються на прикладі латиноамериканських держав. Дослідження впливів політичних факторів на правові системи сприятиме запобіганню негативним проявам таких процесів в Україні при реформуванні власних інституцій. Метою дослідження є з'ясування політичних причин, факторів, які тягнуть за собою появу відмінностей у однорідних правових системах. Завданням є аналіз політичних порядків країн Латинської Америки; виявлення ключових факторів, що впливають на відмінності між політичними системами латиноамериканських країн; характеристика різноманітних процесів, що обумовили трансформацію правових та політичних систем означених країн. Для цього були використані такі матеріали: монографії, збірки статей дослідників, оцінки провідних фахівців з політичних процесів, щорічні класифікації країн за індексом демократії, які формує The Economist, та ін. Автори використовували різноманітні наукові методи: філософські (діалектичний та герменевтичний), загальнонаукові (системний, структурно-комплексний, контент-аналізу, статистично-математичний метод) та теоретико-правові методи (порівняльно-правовий метод, історично-правовий, формально-юридичний, метод правового прогнозування), ними було застосовано багато принципів, способів та прийомів науково-дослідницької діяльності (принципи детермінізму та ретроспективного аналізу, об'єктивності, історизму, класифікації, догматично-правовий підхід,

принципи аналогії та логічний аналіз). Результатами дослідження стало висвітлення особливостей різних політичних порядків країн латиноамериканського регіону. Автори дійшли висновку, що правові системи держав Латинської Америки представляють різні групи політичних порядків. Для поділу на такі групи слід враховувати різноманітні фактори, серед яких верховенство права, демократична підзвітність державних органів, різноманітні індикатори демократії. Перспективами подальших досліджень є дослідження впливів різноманітних політичних процесів та реформ на характеристики окремих національних правових систем латиноамериканських держав.

Ключові слова: *правова система; політичний порядок; індекс демократії; Південна Америка; Центральна Америка; Карибський басейн.*

Introduction

Today, there are a large number of legal systems on the legal map of the world: national, subnational, supranational, and quasi-national. However, the legal system is most often associated with the national legal system – the legal system of a separate state. All national legal systems are separate, independent units, and at the same time have different, sometimes opposing, characteristics. At the same time, differences may exist even within legal systems that belong to the same legal family (group of legal families) and which, by definition, should have common or similar features. What is the reason for such different characteristics in similar legal systems?

It is known that various criteria and factors influencing these systems are taken into account when characterising legal systems. According to their formal characteristics, legal systems are grouped into legal families: Romano-Germanic, Anglo-American, religious, and traditional. It should be noted that even today, there is no single established and universally recognised classification of legal families among comparativists, so the authors of this article adhere to the classification developed by scholars at Yaroslav Mudryi National Law University [1, p. 37].

At the same time, legal systems can differ significantly from each other in terms of non-legal (essential) characteristics. These are external factors that can determine these differences: political, economic, cultural, moral, etc. This was noted in the classic studies of R. David, K. Zweigert, and H. Kotz, who considered ideology as one of the important factors underlying the classification of legal systems [1, pp. 34-36]. Therefore, two legal systems that belong to the same legal family and have a common historical origin can differ greatly in their characteristics.

Latin American countries, which include Central and South America and the Caribbean, are a prime example of such systems. On the one hand, they have similar legal systems. On the other hand, we can note big differences in ideology (in particular, legal), which affect relations in the field of protection and enforcement of human rights, the activities and powers of the president, parliament, governments, etc. The rule of law, human rights, and democracy are not universal, practically significant values for the legal systems of Latin American countries, which calls into question the inclusion of all these systems into a single group of Latin American law.

At the same time, the opposite opinion can also be found in scientific literature. Thus, Thomas Wright, when studying the history of the development of democracy in Latin America, emphasised that "compared to most of the world, including major regions of Asia, Africa, the Middle East, and most of the former Soviet republics, Latin America is a beacon of democracy" [2, introduction, XV]. Roberto Gargarella, Sebastian Guidi, and Conrado Hübner Méndes emphasised that in Latin America, "institutional views, declarations of rights, ideological foundations, and canons of constitutional thought exhibit a striking similarity that is far from accidental" [3], introduction, p. XV]. At the same time, this did not prevent them from noting that "since gainig independence, Latin America has become an important laboratory for constitutional experiments", that such "experiments in the Latin American region with constitutional transplants, political authoritarianism, hyper-presidential regimes, borrowing foreign legal instruments, and others will help to better understand constitutionalism and constitutional solutions to such problems" [3, introduction, pp. XVI-XVII].

It must be acknowledged that the problems of democratisation of legal systems in the modern period remain extremely acute throughout the world; at the same time, the number of authoritarian countries is, unfortunately, growing. Matthew C. Ingram and Diana Kapiszewski, in their study of the justice complex in Latin America, pointed out that it is very important to "understand why it has been and remains so difficult to establish the rule of law in many parts of the world" [4, p. 14]. Rachel Sieder, Karina Ansolabehere, and Tatiana Alfonso emphasised that "studies of law and society in Latin America focus on the relationship between law ... and ... the political environment, institutional forms and cultural characteristics" [5, p. 1].

We believe that studying the political systems of Latin American states will allow Ukraine to avoid repeating the mistakes of the countries of the Latin American continent and to borrow positive experience when modernising its political institutions. This is particularly useful today. Francis Fukuyama

has devoted several of his recent works to the study of the political orders of modern states and their components [6; 7]. Even before the Russian Federation's full-scale invasion of Ukraine, he noted that "Ukraine is important to the rest of the world. If it fails to modernise and returns to Russia's orbit, this will send a disturbing signal to the rest of Eurasia ... Russia understands this and is doing everything it can to prevent Ukraine from succeeding. Therefore, the young generation of Ukrainian leaders will have to ensure that their country truly achieves the proper balance between state, law, and democracy" [6, p. 8]. That is why the use of the political and legal experience of the states of the Latin American continent is important for the evolution and reform of the political and legal system of Ukraine, especially on the path to joining the European Union.

The purpose of this article is to identify the political reasons and factors that lead to differences in homogeneous legal systems. The authors set themselves the *task* of analysing the political systems of Latin American countries; identifying key factors influencing the differences between the political systems and legal systems of Latin American countries; and characterising the various processes that led to the transformation of the legal and political systems of these countries.

Materials and Methods

To identify differences in the political systems and political processes of Latin American countries that influence the emergence of differences in the characteristics of their legal systems, the authors used a variety of materials: monographs, collections of research articles, assessments by leading experts on political processes, annual country rankings based on the democracy index compiled by *The Economist*, etc. To this end, the authors drew on a variety of scientific methods and principles: philosophical, general scientific, and theoretical-legal methods, using many techniques and approaches from scientific research.

Among the general philosophical methods used in writing this article, *dialectical* and *hermeneutical* methods should be mentioned. *The dialectical method* made it possible to trace the development and various transformations of the political and legal systems of Latin American states and to clarify the universal and individual characteristics of the political orders of these legal systems. *The hermeneutic method* allowed the authors of the article to delve into the essence of political institutions through the interpretation of texts of normative legal acts of countries in Central and South America and the Caribbean.

The comparative legal method, which became the leading one in writing this article, contributed to the generalisation of the political and legal experience

of Latin American countries. It was used to clarify similar (homogeneous) or distinctive features and to determine the stages of development of the objects of study. The comparative legal method made it possible to compare the legal systems of Latin American countries, their political institutions, and procedures in order to identify similarities and differences between them. The comparison revealed the state of the legal system as a whole, taking into account the characteristics of individual political institutions that determined the differences between the legal systems of the region. It was the application of the comparative law method that helped to identify differences in the political systems of Latin American countries, which traditionally form a single group of Latin American law, but at the same time have different political characteristics and form different groups based on them. *The principles of determinism and retrospective analysis* contributed to the establishment of cause-and-effect relationships between processes.

The systemic method allowed us to consider the countries of Central and South America and the Caribbean as equivalent system units, in accordance with the requirements of which the research problem was formulated. *The principle of historicism* helped to examine and identify the significance of processes in the context of different periods, which also made it possible to formulate the differences between the political systems of Latin American countries. *The principle of objectivity*, together with the principle of historicism, contributed to the avoidance of outdated characteristics of the political systems of states and their components that affect the characteristics of the legal system of states.

The structural-complex method, classification method, dogmatic-legal approach, principles of analogy, and logical analysis made it possible to study the political and legal processes of various Latin American countries, identify their significance in the process under study, formulate general conclusions, and establish differences in the political systems of Latin American countries. *The content analysis method* allowed for a quantitative analysis of the texts of normative legal acts and scientific articles for the purpose of further interpretation of the patterns in the development of the process of transformation of political institutions in the countries under study.

The historical-legal method was used in the study of the formation and development of legal systems, their political institutions, elements, and stages of constitutionalism in Latin American countries and their administrative and legal regulation. It was this method that made it possible to better understand the dynamics of the research process and draw certain conclusions about the influence of the past on the current state of

development of political institutions and processes in the legal systems of the South American continent.

The formal-legal method provided an analysis of the powers of political actors in public administration in Latin American countries and made it possible to identify the main factors that determine the differences in the political systems (regimes) of the countries under study.

The method of legal forecasting was used to identify possible scenarios for the development of political and legal processes in Latin America and options for improving the situation in this area in countries that are classified as hybrid and authoritarian according to the democracy index.

The statistical and mathematical method made it possible to obtain and process quantitative indicators of the activities of political bodies and political institutions, to clarify the dynamics of such processes in various countries of Latin America.

Results and Discussion

General characteristics of legal systems and political orders in Latin American countries

French comparativist René David was one of the first to propose a classification of legal families, using two criteria simultaneously: legal technique and ideological. Under the ideological criterion, he meant factors of philosophy, economics, politics, morality, religion, etc. It follows from this that it is external factors (external legal factors) that can determine differences in similar legal systems [1, pp. 34-36]. It should be noted that after the dismantling of the socialist system at the end of the 20th century, the economic factor and the factor of official state ideology lost their fundamental significance. At the same time, it can be seen that in ideological matters, social values (primarily in the legal and political spheres) come to the fore, determining the direction of the relevant legal system and forming its semantic guidelines. It should be noted that this value factor cannot be considered exclusively external. Together with other factors, it determines what K. Zweigert aptly called "legal style" [1, p. 36]. Formal characteristics in different legal families include various features, among which are a unified (similar) system of sources of law (forms of law), systematisation of legislation and its forms, common historical origins, etc. According to these formal characteristics, legal systems within legal families are homogeneous.

As is known, there is an approach according to which the legal systems of Latin American countries constitute a separate group of Latin American law [1, p. 62]. These legal systems were similar to those of North America (USA) in the construction of the public sphere. After gaining independence,

Latin American countries turned to the US Constitution as a model when developing their own constitutions. This was because in the 19th century, after gaining independence, the vast majority of countries in the region chose a federal form of territorial organisation and a republican form of government (today, there are only four such federations left in the region – Brazil, Argentina, Venezuela, and Mexico). At that time, there was only one written constitution of a federal republic – the Constitution of the United States, which Latin American countries turned to as a model for developing their own constitutions [8, p. 411]. This explains the construction of the public law spheres of Latin American countries according to the American model. In turn, the sphere of private law in Latin American countries is built on the model of Romano-Germanic law, which spread in the region as a result of the influence of the legal systems of the metropolitan countries (Spain, Portugal). But in the modern period, the legal and political systems of Latin American countries differ greatly from each other.

F. Fukuyama understands political order as a combination of three basic categories of institutions: the state, the rule of law, and accountability mechanisms (democratic accountability) [6, p. 21]. As a category of political order, *the state* must distinguish between "the private interests of the head of state and the public interests of society as a whole" and "treat all citizens impartially, enforcing laws, appointing officials, and implementing political decisions without bias in favour of any particular group" [6, p. 21].

The rule of law is, according to F. Fukuyama, "the binding nature of general rules even for the most politically powerful players in a given society" [6, p. 13]. The researcher emphasises that "the rule of law should be distinguished from what is sometimes called 'rule by law,' when the ruler himself does not follow the orders he has issued" [6, p. 21].

Accountability is the response of state power to the interests of the whole society, and not to the interests of individual groups. [6, pp. 21-22]. Accountability can be understood both in procedural and substantive aspects. The procedural aspect is understood as the holding of periodic free and fair multiparty elections, through which citizens have the opportunity to elect and "discipline" their rulers. The substantive aspect implies sensitivity to society's expectations outside the electoral process. Accountability is most often understood as a set of procedures in modern democracies that "force the government to respond to the demands of its citizens. However, high-quality procedures do not necessarily guarantee a substantive result" [6, pp. 21-22].

In the annual ranking of countries by democracy index compiled by the Economist Intelligence Unit, Latin American countries are represented in all four groups: the first of which is full (complete or perfect) democracies,

the second is flawed democracies, the third is hybrid countries (transitional regimes from democratic to authoritarian), and the fourth is authoritarian countries. The compilers of the annual classifications take into account sixty indicators in five categories: elections and pluralism, civil liberties, government activity, political engagement of the population, and political culture [9, p. 9], that is, indicators that form an overall idea of the political order of a particular state.

In the 2024 ranking, Uruguay and Costa Rica were included in the first group of *full democracies* in the Latin American region. *Flawed democracies* are represented by countries such as Chile, Trinidad and Tobago, Panama, Suriname, the Dominican Republic, Argentina, Brazil, Colombia, Guyana, and Lesotho. *Hybrid regimes* exist in Paraguay, Peru, Mexico, Ecuador, Honduras, El Salvador, Guatemala, and Bolivia. *Authoritarian regimes* were established in Haiti, Cuba, Venezuela, and Nicaragua [9]. As we can see, the vast majority of Latin American countries are included in the group of flawed democracies and the group of hybrid countries. The authors of the article draw the attention of readers to the fact that at the time of preparation of this article, the ranking of countries with the Democracy Index for 2025 had not yet been published.

In her study of contemporary political history around the world, T. Orlova emphasizes that Latin American countries are characterized by "life in irreconcilable contradictions and antinomies, ... hence the weakness of institutionalization, the weakness of the legal principle, and the desire to compensate for it through spontaneous charismatic actions: coups, leadership cults, populist ideologies and organizations, and the informal economy" [10, p. 405] and draws attention to the fact that "the desire to strengthen the role of the state resulted in the seizure of power by military regimes" [10, p. 406].

For 25 years (1964-1989), military dictatorial regimes were widely represented in Latin American countries: the regimes of Juan Domingo Perón in Argentina, Getúlio Vargas in Brazil, Alfredo Stroessner in Paraguay, Augusto Pinochet in Chile, and others [10, p. 406], which were put to an end by the democratic revolutions of the 1980s. T. Orlova emphasises that these "revolutions eliminated all the 'iconic' military dictatorships, ... and put an end to the 'institutional authoritarianism' that had developed in Brazil and Argentina. It was these countries, according to the researcher, that "supported the world of military-technocratic dictatorships throughout Latin America" [10, p. 406].

The influence of these military regimes can still be traced today through the prevalence of delegated legislation in the system of sources of Latin

American law, the presidential form of government, the special role of the army, and others [8, pp. 413, 415].

Features of selected political systems in democratic countries in Latin America

Uruguay (ranked 15th) and Costa Rica (ranked 18th) are the only *fully democratic* countries in Latin America. Countries that "respect civil liberties and fundamental political freedoms, where the population is characterised by a high level of political culture, developed democratic principles, an effective system of government, an independent judiciary, and independent media" should be considered full-fledged democracies [9]. Such countries receive 8-10 points in the ranking.

Uruguay leads the democracy index among Latin American countries. And for good reason. The electoral process and pluralism are 10 (maximum) points, the functioning of the government is 9.29 points, participation in political life is 7.78 points, political culture is 6.88 points, and civil rights are 9.41 points. The overall score is 8.67 out of 10 possible; over the past year, the position in the rating has deteriorated by one point [9, p. 15].

Larraburu Conrado Ramos and Milanesi Alejandro, while studying the problems of public administration and state patronage in Uruguay for the period 2020-2025, characterised the activities of the united government headed by Luis Alberto Lacalle, the President of Uruguay. They examined various aspects of the political and professional characteristics of "appointees" and their role in the system of public administration, comparing different forms of patronage with institutional variables related to the party system and presidential powers [11, p. 362]. The researchers concluded that despite the "significant degree of politicization of public administration, there was no evidence of mass colonization of the administrative apparatus by political appointees", and that "the predominance of party professionals and programmatic technocrats reflects the highly institutionalized and programmatic nature of the party system in Uruguay and the coalition structure of the then ruling government" [11, pp. 373-374].

It should be noted that Uruguay's political order did not always meet the criteria of a perfect democracy. In 1996, Uruguay underwent constitutional reform, which, according to Germán Bidegain and Felipe Carozzi, "changed the electoral system, introducing, among other innovations, official primaries and a second round of voting in presidential elections" [12]. Although it was carried out "for reasons of short-term electoral expediency, in the long term the reform improved the ability of parties to participate in the formation of successful electoral coalitions" [12]. We see that the

components of the political order in Uruguay meet the requirements of a democratic order, which is confirmed by the country's classification as a group of perfect democracies.

Martin-Mayoral, Fernando and Plúa, María Gabriela Peñaherrera conducted a study on the relationship and interinfluences between income inequality and democratic and technical dimensions of governance in 22 Latin American countries from 1996 to 2023 [13]. The authors emphasized that they "reassessed the traditional view that higher quality governance uniformly reduces inequality", that "at the disaggregated level, political stability, rule of law, and regulatory quality are significantly associated with inequality", and emphasized that "governance reforms in Latin America should prioritize reducing the risk of unconstitutional regime change, improving the regulatory framework to promote competitive markets, and strengthening the independence of the judiciary to ensure equal access to justice. Such reforms can lead to stronger institutions and contribute to more inclusive and equitable social outcomes" [13, p. 1].

Costa Rica, which is also part of the group of full democracies and ranks 18th in the ranking, has undergone various reforms over time, primarily constitutional ones (for example, in 1977 and 2002). Carolina León Bastos and Víctor Alejandro Wong Meraz, in their article "Constitutional Reform and Its Limits in Costa Rica's 1949 Constitution", emphasized that "the political constitution of any country must ensure that its text is consistent with the reality in which it exists", underlining that "there are implicit limitations on that power, including political principles and fundamental rights, the separation of powers, and the principle of reform" [14]. These are important principles that influence the characteristics and changes in the political order. The electoral process and pluralism in the 2024 ranking for Costa Rica score 9.58 points, government functioning – 7.50 points, participation in political life – 7.78 points, political culture – 6.88 points, and civil rights – 9.71 points. Costa Rica's overall rating is 8.29 points out of a possible 10 [9]. Over the past year, the country's position in the ranking has deteriorated by one place, as in Uruguay.

Incomplete (flawed) democracies are those countries where elections are held according to democratic principles and are free, but certain problems may arise. At the same time, the fundamental rights and freedoms of citizens are valued. Also, incomplete democracies are characterised by a low level of political culture development, a low level of population participation in politics, and problems in the functioning of the governance system [9]. These countries score between 6 and 7.9 points overall. *Incomplete democracies* are represented by Latin American countries such as Chile (29th place), Trinidad and Tobago (45th place), Panama (47th place),

Suriname (48th place), the Dominican Republic (52nd place), Argentina (54th place), Brazil (57th place), Colombia (60th place), Guyana (69th place), and Lesotho (70th place).

Some unitary countries in Latin America (Colombia in 1992, Peru in 2002, Bolivia in 2005, and Chile in 2016) experimented with "strengthening their regional governments": they introduced elections for governors instead of their appointment, which is usually typical of federal countries [15]. On the one hand, all four countries aimed to create similar institutional tools, and on the other, each of these countries pursued decentralisation for a different purpose. Colombia pursued this form of decentralisation as part of constitutional reform, although the government's main expectation was to appease the rebels. In Bolivia, attempts were made to prevent the outbreak of civil war. The president of Peru pursued decentralisation to emphasise his difference from his predecessor, the dictator Alberto Fujimori, who had established an authoritarian regime. In Chile, the election of governors was conditioned by an attempt to suppress large-scale protests. Thus, the "institutional path" was caused by various reasons, but aimed at improving its political order towards its democratisation [15].

Brazil is the largest country in the South American continent and the Caribbean. It is actively developing in various directions, but has many internal problems that affect the characteristics of its political and legal systems. Brazil ranks 57th in the 2024 ranking, with a total score of 6.49 points: electoral process and pluralism – 9.58 points, functioning of government – 5 points, participation in political life – 6.11 points, political culture – 5 points, civil rights – 6.76 points [9]. Over the past year, the country has fallen six places in the ranking, indicating a serious threat to democratic institutions.

Augusto Zimmermann, in his work "Constitutions without Constitutionalism: The Failure of Constitutionalism in Brazil", writes that "in some Latin American countries, political stability relies less on "impersonal constitutions" and more on certain "personal pacts" established by political rulers. These pacts are often extralegal in nature, although they "provide order, relying on personal loyalty rather than the law to unite society". [16, p. 103]. Augusto Zimmermann believed that the institution of the presidency in Latin America had not been successful, emphasizing that it was characterized by a "significant inability to establish the rule of law" and "that the presidential systems of Latin America were in a state of constant, unstable fluctuation between abuse of power and its deficit" [16, p. 104]. The researcher also argued that legal norms must be based on unconditional public morality, otherwise "the rule of law may become an "unrealizable and even undesirable ideal, and ... society will quickly return to a state of arbitrary tyranny" [16,

p. 104]. The scholar considers one of the main obstacles to establishing the rule of law in Brazil to be the fact that democracy "in most of Latin America belongs to the realm of constitutions and codes rather than reality" and that "extra-legal actors of a socio-political nature can seriously threaten the satisfactory implementation of any constitutional basis" [16, p. 104].

Florentino Rico, Heidy Rico, Mario de La Puente, Jose Torres, Hernán Guzmán, in their study, analysed the political systems and fiscal responsibility relationships of ten Latin American countries for the period 2004-2023: Brazil, Venezuela, Chile, Nicaragua, Argentina, Peru, Bolivia, Ecuador, Uruguay, and El Salvador. To obtain high-quality results, these researchers used not only the Economist Intelligence Unit's democracy index, but also additional democracy indices from Freedom House (ratings with subcategories of political rights and civil liberties) and V-Dem (includes: *the liberal democracy index*, which measures the protection of individual and minority rights from state tyranny; *the electoral democracy index*, which assesses electoral principles, including clean elections and freedom of association; *the deliberative democracy index*, which assesses public deliberation in political decision-making; *the egalitarian democracy index*, which measures equal protection of social rights between groups; and *the judicial constraints on the executive index*, which assesses the executive branch's compliance with constitutional constraints) [17]. The authors emphasised that the region has experienced numerous transitions between democratic and authoritarian regimes, but in democratic countries of the region, the relationship between regime and fiscal performance is stronger [17]. "Countries with stronger democratic institutions have demonstrated greater resilience during economic challenges and better resource management during periods of growth" [17]. Tetyana Kostadinova and Milena Neshkova, in their study of leadership and corruption in 32 countries in Eastern Europe and Latin America, concluded that "personalist leadership through democratic elections can undermine accountability, fair governance, and the quality of democracy as a whole" [18].

Among the democratic countries of Latin America, democratic standards have deteriorated over the past year, and ratings have fallen in Uruguay (-1 place), Costa Rica (-1), Chile (-4), Trinidad and Tobago (-2), Brazil (-6), Colombia (-5), and Guyana (-2). Manifestations of democracy remained at the same level in Argentina, but increased in the Dominican Republic (+9 steps), Lesotho (+1), Panama (+1), and Suriname (+1).

The Economist Intelligence Unit's annual report for 2024, "Democracy Index 2024: What's wrong with representative democracy?", states that the main problem facing democracies is often cited as populism rather than the shortcomings of representative systems [9, p. 6]. Daniel Hellinger associates

populism with "a suit that politicians take off the hanger when they need to enlist public support to achieve a goal" [19, p. 128].

Political orders of individual hybrid and authoritarian states in Latin America

A *hybrid regime* is usually understood to mean states that are characterised by regular indirect violations during elections, which prevents them from being recognised as fair and free. In these countries, there may be government pressure on political opponents, a government that often exerts pressure on political opponents, a lack of judicial independence, widespread corruption, persecution and pressure on the media, a lack of the rule of law, profound shortcomings in the development of political culture, low levels of political participation, and problems with the functioning of the management system [9; 20]. Such states receive between 4 and 5.9 points [9]. Hybrid regimes in the Latin American region are represented by Paraguay (75th place), Peru (78th place), Mexico (84th place), Ecuador (85th place), Honduras (90th place), El Salvador (95th place), Guatemala (97th place), and Bolivia (103rd place).

Mexico is the northern part of Latin America. Daniel Hellinger, in his book "Comparative Politics of Latin America: Democracy at Last?" argues that some of the exceptional features of the Mexican political system (civilian control over the military, independent foreign policy, strong political institutions over several decades, and orderly political succession) are a legacy of the Mexican Revolution. Mexico was "the only country in the region where the military never came to power, as in Argentina, Brazil, and Chile, but the political system certainly became more authoritarian, relying less and less on popular consent over time" [19, p. 146]. Mexico's rating for 2024 increased by 6 positions; its total score is 5.32 points [9, p. 18].

Countries with no or extremely limited political pluralism should be considered *authoritarian*. In the vast majority of cases, they are based on absolute dictatorship, although they may have some traditional democratic institutions in a severely curtailed form, with constant violations of civil liberties and elections that are either non-existent or not free and fair. Other characteristic features include comprehensive censorship by the ruling regime, a ban on criticism of the regime, and a lack of independence in the judicial system. Authoritarian countries score less than 4 points in the Democracy Index [9; 19]. Authoritarian regimes are established in Haiti (131st place), Cuba (135th place), Venezuela (142nd place), and Nicaragua (147th place).

Cuba ranks 135th in the 2024 Democracy Index, with a total score of 2.58 points: electoral process and pluralism – 0 points, functioning of

government – 2.86 points, participation in political life – 3.33 points, political culture – 3.75 points, civil rights – 2.94 points [9, p. 20]. The ranking position has not changed in a year. Daniel Hellinger emphasised that "Cuban politics is more complex than the simple image of dictatorship so often portrayed in the American media. It is difficult to answer the question of how the Cuban political system actually functions and what the balance between consent and repression is" [19, p. 294]. The researcher points out that Cuban elections are characterised by a large number of candidates, they are "open to all, not just party members". At the same time, opposition parties are banned from participating in elections, and there are repressions of dissidents [19, p. 295].

In 2008, Cambridge University published a collective monograph entitled "The Rule of Law: Politics of Courts in Authoritarian States", whose authors decided to fill this gap in the scientific sphere, explaining their choice of topic by the fact that scholars usually focused on the problems of judicial activity in democratic states, trying to understand the reality of judicial policy in a non-democratic environment in the absence of transparency [21, introduction, p. 3]. The authors of the study argue that even for authoritarian states, legitimacy is important, "at least to save on the use of force, which is also a component of maintaining power", that authoritarian rulers try to "justify their questionable legitimacy by preserving judicial institutions that create the impression, if not the full effect, of restrictions on arbitrary rule" [21, introduction, p. 5].

Over the past year, democracy in hybrid and authoritarian states in Latin America has improved in Mexico (+6 places), Honduras (+5), El Salvador (+1), Guatemala (+3), and Bolivia (+3). Venezuela, Cuba, and Ecuador remained at the same level in the ranking, while Paraguay (-1), Peru (-1), Haiti (-2), and Nicaragua (-4) saw their ratings decline.

The authors of the Economist Intelligence Unit's annual report, "Democracy Index 2024: What's Wrong with Representative Democracy?", note a steady decline in the quality of democracy in Latin America and the Caribbean for the ninth consecutive year in 2024. At the same time, the report emphasises that "the region remains the third most democratic in the world after North America and Western Europe. It is ahead of Eastern Europe, Asia, and Australia, sub-Saharan Africa, the Middle East, and North Africa" [9, p. 52]. The report also identifies the strengths and weaknesses of democracy in Latin America. Among the strengths are above-average global results in the categories of electoral process and pluralism, political participation and civil liberties, and government functioning; among the weaknesses are the worst results in political culture [9, p. 52].

Conclusions

Thus, while there are common features of legal systems that allow them to be grouped, there are also distinctive political features that justify classifying such systems into different groups (subgroups). Due to the peculiarities of the legal and political order of Latin American countries, it becomes possible to have alternative approaches to placing their legal systems on the legal map of the world. Without a doubt, alternative classifications, depending on the available data and the specific interpretation of these data, are generally inherent in comparative law. However, the situation with Latin American countries is particularly specific. Taking into account political and legal factors (in particular, the role of the state, the functioning of the rule of law, and the existence of effective democracy) for the purposes of classifying legal systems, it can be stated that there are serious differences between Latin American countries themselves (*internal differentiation*) and significant differences between Latin American countries and countries with Romano-Germanic and Anglo-American legal systems (*external differentiation*). Of course, it can be argued that each classification will have certain advantages, and in fact, there are characteristics of each system that allow it to be placed within a particular legal family or to form one or more groups within the relevant family. But in this case, the researcher will be forced to formulate and justify the so-called predominance principle, which will be the basis for his choice.

The characteristics of the political order of the legal system are influenced by the following factors: the implementation of political decisions by the state without bias, the separation of the private interests of the head of state from the public interests of society as a whole, the rule of law as the obligation of general rules for absolutely everyone, the response of state authorities to the interests of society as a whole, rather than to the interests of individual groups; the current system of government, trust in the government, real independence of the judiciary, honesty, transparency, and independence of elections, voter safety, political pluralism, real and broad political freedoms of citizens, civil liberties of citizens, political engagement of the population, the level of development of the political culture of the population, the independence of the media, the absence of censorship, and the presence or absence of populism.

Latin American countries can be grouped into democratic and non-democratic countries based on their adherence to democratic principles. It should be noted that a countrys legal system's affiliation with a particular political system is a dynamic phenomenon and may change for the better (increased democratisation) or for the worse (decreased or lost democratisation).

References

[1] Pohrebniak, S.P., Lukianov, D.V., Bylya-Sabadash, I.O., & al. (2012). *Comparative Law*. O.V. Petryshyn (Ed.). Kharkiv: Pravo.

[2] Wright, T.C. (2023). *Democracy in Latin America: A History Since Independence*. Rowman & Littlefield. https://welib.org/md5/45b550ac9f94a55da144d7af129a16a9.

[3] Mendes, C.H., Gargarella, R., & Guidi, S. (Eds.). (2022). *The Oxford Handbook of Constitutional Law in Latin America*. Oxford University Press.

[4] Ingram, M.C., & Kapiszewski, D. (Eds.). (2019). *Beyond High Courts: The Justice Complex in Latin America*. University of Notre Dame Press.

[5] Sieder, R., Ansolabehere, K., & Alfonso, T. (Eds.). (2019). *Routledge Handbook of Law and Society in Latin America*. Routledge.

[6] Fukuyama, F. (2019). *Political Order and Political Decay: From the Industrial Revolution to the Globalisation Of Democracy* (T. Tsymbal & R. Kornuta, Trans.). Nash Format.

[7] Fukuyama, F. (2019). *The Origins of Political Order: From Prehuman Times to the French Revolution* (2nd ed., R. Kornuta, Trans.). Nash Format.

[8] Behruz, H. (2011). *Comparative Law: Textbook for Universities*. Phoenix.

[9] The Economist Intelligence Unit. (2025). *Democracy Index 2024: What's Wrong with Representative Democracy?* https://www.eiu.com/n/campaigns/democracy-index-2024/.

[10] Orlova, T.V. (2017). *Modern Political History of the World* (2nd ed.). Publisher PP Lysenko M.M.

[11] Ramos Larraburu, C., & Milanesi, A. (2025). Patronage in a Coalition Government: Political appointments in Uruguay (2020-2025). In *Handbook of Politicisation and Political Patronage* (pp. 362-374). Edward Elgar Publishing. https://doi.org/10.4337/9781035326242.00030.

[12] Bidegain, G., & Carozzi, F. (2025). Virtuous Outcomes of Instrumental Intentions? The Case of Uruguay's 1996 Constitutional Reform. *World Development*, *195*, 107107. https://doi.org/10.1016/j.worlddev.2025.107133.

[12] Martin-Mayoral, F., & Peñaherrera Plúa, M.G. (2026). Governance and Inequality in Latin America: Is there Evidence of an Institutional Kuznets Curve? *Economics of Governance, 27*(1), 1-39. https://doi.org/10.1007/s10101-025-00344-0.

[14] León Bastos, C., & Wong Meraz, V.A. (2025). Constitutional Reform and its Limits in Costa Rica's 1949 Constitution. *Revista Derecho del Estado, 63*, 105-129. https://doi.org/10.18601/01229893.n63.05.

[15] Eaton, K. (2025). Electing Governors: Complexities of Institutional Design in Latin America's Unitary Countries. *World Development, 196*. 107186. https://doi.org/10.1016/j.worlddev.2025.107186.

[16] Sellers, M., & Tomaszewski, T. (Eds.). (2010). *Rule of Law in Comparative Perspective, 3*. Springer.

[17] Rico, F., Rico, H., de la Puente, M., Torres, J., & Guzmán, H. (2025). Democratic Governance, Political Transition and Fiscal Responsibility. *Development Studies Research, 12*(1). https://doi.org/10.1080/21665095.2025.2506568.

[18] Kostadinova, T., & Neshkova, M. (2025). Personalist Leadership and Corruption: Evidence from Third Wave Democracies. *Politics & Policy, 53*(4). https://doi.org/10.1111/polp.70056.

[19] Hellinger, D.C. (2015). *Comparative Politics of Latin America: Democracy at Last?* (2nd ed.). Routledge.

[20] Wikipedia Contributors. (n.d.). *Democracy index*. Wikipedia. https://uk.wikipedia.org/wiki/Індекс_демократії.

[21] Ginsburg, T., & Moustafa, T. (Eds.). (2008). *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge University Press.

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Algorithmic Platform Moderation and Freedom of Expression in Ukraine

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Abstract
The article examines the transformation of freedom of expression under private algorithmic governance of the public digital sphere. The relevance of the topic is that global online platforms increasingly act as de facto intermediaries for political communication, news exchange, documentation of war crimes, and civic mobilisation, while Ukrainian legislation lacks a comprehensive model for their procedural accountability. The purpose of the article is to identify the legal risks of algorithmic moderation for freedom of expression and to substantiate a regulatory model suitable for Ukraine in the context of war, information aggression, and European integration. The methodology is based on doctrinal, comparative legal, functional, and systemic methods, as well as on the analysis of legal and policy materials concerning the European Union, the United States, the United Kingdom, Taiwan, and Ukraine. The results show that the European Union model provides the most developed procedural safeguards; the American model preserves excessively broad private platform discretion; the British approach emphasises risk-oriented service safety; and the Taiwanese model demonstrates the effectiveness of social resilience and non-punitive coordination. The article substantiates the need for a hybrid model for Ukraine that combines reasoned moderation decisions, internal and independent appeals, systemic risk assessment, an institutional channel of communication with platforms, and rapid response to disinformation, without granting the state censorship powers. Further research should focus on the development of a special law on digital services and platform governance.

Keywords: digital sovereignty; content governance; disinformation; procedural safeguards; systemic risks.

Алгоритмічна модерація платформ і свобода вираження в Україні

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Анотація
У статті досліджено трансформацію свободи вираження в умовах приватного алгоритмічного управління публічним цифровим простором. Актуальність теми зумовлена тим, що глобальні онлайн-платформи дедалі частіше виконують функції фактичних посередників політичної комунікації, новинного обміну, документування воєнних злочинів та громадської мобілізації, тоді як українське законодавство не містить цілісної моделі їхньої процедурної відповідальності. Метою дослідження є визначення правових ризиків алгоритмічної модерації для свободи вираження та обґрунтування моделі регулювання, придатної для України в умовах війни, інформаційної агресії та європейської інтеграції. Методологічну основу становлять доктринальні, порівняльно-правові, функціональні й системні методи, а також аналіз правозастосовних і політико-правових матеріалів щодо Європейського Союзу, Сполучених Штатів, Сполученого Королівства, Тайваню та України. Результати дослідження показують, що модель Європейського Союзу забезпечує найрозвиненіші процедурні гарантії; американська модель зберігає надмірно широку приватну дискрецію платформ; британський підхід акцентує ризик-орієнтовану безпеку сервісів; а тайванська модель демонструє ефективність суспільної стійкості й некаральної координації. Обґрунтовано доцільність гібридної моделі для України, яка поєднує мотивування рішень про модерацію, внутрішнє та незалежне оскарження, оцінку системних ризиків, інституційний канал взаємодії з платформами та швидке реагування на дезінформацію без надання державі цензурних повноважень. Подальші дослідження мають бути спрямовані на розроблення спеціального закону про цифрові послуги та платформне управління.

Ключові слова: *цифровий суверенітет; управління контентом; дезінформація; процедурні гарантії; системні ризики.*

Introduction

Freedom of expression remains one of the core guarantees of constitutional democracy. In Ukrainian constitutional law, it is protected by Art. 34 of the Constitution of Ukraine, which guarantees the right to freedom of thought and speech and the free expression of views and beliefs [1]. In the European human rights system, the same guarantee is protected

by Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms [2]. The case law of the European Court of Human Rights has consistently treated freedom of expression as one of the essential foundations of a democratic society, while also recognising that the internet has become a key infrastructure for public debate. This is visible, inter alia, in Delfi AS v. Estonia and Cengiz and Others v. Turkey, where the Court addressed the responsibility of online intermediaries and the importance of access to online platforms for political and social expression [3; 4].

The classical legal model of freedom of expression was built mainly in a vertical paradigm: an individual is protected from excessive interference by the state. However, the contemporary digital environment has changed the structure of communicative power. The practical boundary between visible and invisible speech, permitted and demonetised content, legitimate documentation, and prohibited graphic material is now frequently drawn not by courts or public authorities, but by private platforms through terms of service, community standards, and algorithmic moderation. Recent legal scholarship, therefore, increasingly treats algorithmic moderation not as a purely technical operation, but as a form of governance capable of affecting democratic discourse and fundamental rights [5]. Human rights organisations have also stressed that content moderation must be assessed by reference to legality, legitimacy, necessity, proportionality, transparency, and access to remedy, rather than only by reference to private contractual standards [6].

For Ukraine, this issue is not merely theoretical. Since the beginning of the full-scale Russian invasion, social networks, video platforms, and messengers have become channels for informing civilians, coordinating volunteer assistance, exposing disinformation, documenting war crimes, and maintaining international attention to Russian aggression. At the same time, Ukrainian media, and civil society organisations have reported wrongful restrictions on war-related content, and insufficient sensitivity of global platforms to the Ukrainian context [7]. Freedom House also noted that social media platforms, and search engines removed or restricted war-related content during the invasion, and that several Ukrainian social media pages sharing information about the war or organising support for the army were removed or limited [8].

The relevance of this study is therefore determined by the collision between three regulatory needs. First, Ukraine must preserve constitutional freedom of expression, and avoid transforming platform regulation into state censorship. Secondly, it must develop remedies against arbitrary or contextually incorrect moderation by transnational platforms. Thirdly, it must protect the information environment against hostile manipulation,

disinformation campaigns, and the weaponisation of platform architecture during war. These needs cannot be satisfied by the existing Ukrainian framework alone. The Law of Ukraine On Information and the Law of Ukraine On Media establish important general principles for information relations and media regulation, but they do not create a comprehensive legal status for very large online platforms, nor do they provide a special system of notice, explanation, appeal, risk assessment, and institutional cooperation in cases of algorithmic moderation [9–11].

The purpose of the article is to determine how algorithmic platform moderation affects freedom of expression and to substantiate a hybrid model of platform governance for Ukraine. To achieve this purpose, the article sets the following objectives: to clarify the theoretical shift from state interference to private platform governance; to compare the European Union, United States, United Kingdom, and Taiwanese approaches; to identify the main gaps in Ukrainian law; and to formulate legislative proposals that would combine procedural accountability, systemic risk assessment, institutional cooperation, and non-punitive resilience mechanisms.

Literature Review

The theoretical foundation of the study is formed by the scholarship on digital constitutionalism, platform governance, and algorithmic moderation. Celeste conceptualises digital constitutionalism as a normative response to the concentration of power in the digital environment and argues that constitutional principles must be reconsidered in light of private digital infrastructures [12]. Suzor similarly maintains that platforms exercise rule-making and enforcement functions over users and that the legitimacy of this governance should be assessed through the rule of law, including transparency, predictability, and procedural fairness [13]. These approaches are particularly relevant for the present study because they make it possible to move beyond the narrow contractual understanding of platform-user relations.

Gillespie's work is important because it shows that moderation is not a peripheral or exceptional activity of platforms, but a constitutive function of platform governance [14]. Platforms do not merely host expression; they classify, rank, amplify, suppress, and monetise it. Balkin develops this point from the perspective of freedom of speech theory. He distinguishes older models of speech regulation, centred on state restrictions, from new-school speech regulation, where states and private infrastructure providers interact in complex systems of indirect control [15]. In this sense, the problem is not only whether a user's post is removed, but also whether the architecture of visibility, recommendation, and monetisation has a chilling effect on public discourse.

The algorithmic dimension of moderation has been further developed by Gorwa, Binns, and Katzenbach, who describe algorithmic content moderation as a socio-technical system involving automated classification, human review, platform policy, and institutional incentives [16]. This understanding is essential for legal analysis because errors in moderation are not accidental defects of isolated decisions; they may be produced by the design of the system itself. When a classifier fails to distinguish documentation of war crimes from prohibited graphic violence, or satire from incitement, the resulting restriction can affect not only individual expression but also collective memory, journalism, and evidence preservation.

Recent research under the Digital Services Act [17] has brought this debate closer to positive law. Golunova argues that the DSA creates important transparency and accountability mechanisms, but that its tools must still be evaluated against the specific risks of algorithmised content moderation [5]. De Gregorio places European platform regulation within a broader constitutional transformation in which public law increasingly responds to private power in the digital sphere [18]. These studies are valuable for Ukraine because European integration requires not only the formal approximation of legislation, but also careful adaptation of European procedural safeguards to Ukrainian security conditions.

The literature, however, does not fully resolve the Ukrainian question. Most existing studies focus either on the European Union and the United States, or on general platform governance without considering the conditions of a state defending itself against a large-scale information and military attack. The Ukrainian case requires a model that protects the user from arbitrary private moderation, protects society from hostile manipulation and simultaneously prevents the state from obtaining unlimited power over online speech. This gap determines the specific contribution of the present article.

Materials and Methods

The article is based on qualitative legal research and combines doctrinal, comparative legal, functional, and systemic methods. The doctrinal method was used to analyse the legal content of constitutional and international guarantees of freedom of expression, the legal status of online platforms, and the procedural requirements applicable to moderation decisions. This method made it possible to determine whether existing legal categories, such as intermediary, editor, publisher, host, or media service provider, are sufficient to describe the role of very large online platforms in the contemporary information environment.

The comparative legal method was applied to four regulatory models: the European Union, the United States, the United Kingdom, and Taiwan. These jurisdictions were selected according to functional relevance rather than geographical similarity. The European Union was selected because the Digital Services Act is currently the most developed procedural model of platform accountability and is especially relevant for Ukraine in light of European integration [17]. The United States was selected because Section 230 of the Communications Decency Act remains the paradigmatic example of broad intermediary immunity and market-oriented platform regulation [19]. The United Kingdom was selected because the Online Safety Act 2023 represents a preventive and risk-based approach to service design and online harms [20; 21]. Taiwan was selected because it demonstrates an alternative model of democratic resilience based on civic technology, rapid response, public communication, and limited reliance on punitive takedown mechanisms [22; 23].

The functional method was used to compare not only formal legal rules, but also the functions performed by each model. The analysis, therefore, asks what each model actually does: whether it provides notice and reasons to the user; whether it creates an effective appeal mechanism; whether it requires independent review; whether it assesses systemic risks generated by platform architecture; whether it creates a channel of cooperation between the state, platforms, and civil society; and whether it avoids censorship. This approach is necessary because the same legal term may perform different functions in different regulatory systems.

The systemic method was used to evaluate algorithmic moderation as part of a broader socio-technical and legal system. The study does not treat a single deletion of content or account blocking as an isolated event. It analyses moderation as a chain of rules, automated detection, human review, platform incentives, appeal procedures, transparency reports, regulator competence and user remedies. This makes it possible to distinguish individual error from systemic risk. The method is particularly important in the Ukrainian context, where an erroneous platform decision may affect not only private communication but also journalism, evidence of international crimes, volunteer networks, and national security.

The empirical basis of the study is limited to documented public materials, including reports by civil society and international organisations concerning the impact of platform moderation on Ukrainian media and users [7; 8]. The article does not conduct an independent quantitative measurement of moderation decisions. This limitation is justified by the lack of full access to platform datasets and by the legal nature of the research. The purpose is not to calculate the total number of wrongful restrictions, but to

develop a normative and institutional model capable of responding to such restrictions when they occur. Accordingly, the conclusions are formulated as legal and policy proposals rather than statistical findings.

The research criteria were the following: protection of freedom of expression; availability of reasons and transparency; accessibility of appeal; independence of review; prevention of systemic risks; compatibility with national security; and resistance to state censorship. These criteria were applied to each foreign model and then used to design a hybrid regulatory proposal for Ukraine.

Results and Discussion

From state interference to private platform governance

The main result of the analysis is that freedom of expression in the digital environment can no longer be understood only as protection against state interference. In practice, the ability of a person, journalist, public authority, or civil society organisation to participate in public debate depends on the decisions of platforms whose rules are global, standardised, and often insufficiently sensitive to local context. A post may be removed, its visibility may be reduced, the account may be suspended, advertising may be disabled, or the content may be deprived of algorithmic distribution. Each of these measures may be formally private and contractual, but its social effect can resemble a public restriction on expression.

This does not mean that platforms should be deprived of moderation powers. On the contrary, moderation is necessary for removing unlawful content, reducing coordinated manipulation, protecting children, and preventing incitement to violence. The problem lies in the lack of procedural guarantees. When a platform restricts content without explaining the exact rule, without indicating whether the decision was automated, without providing an effective appeal, and without considering linguistic or wartime context, the user is placed in a jurisdictional vacuum. The user is formally bound by private rules, while the state is often unable to provide a practical remedy.

For Ukraine, this vacuum has a security dimension. The documentation of attacks on civilians, images of destruction, reports from occupied territories, and fundraising communications may be misclassified by automated systems. The CEDEM report demonstrates that Ukrainian media and content creators had to adapt their communication strategies because of blocks and insufficient communication from platforms; a significant number of respondents resorted to content adaptation or self-censorship to avoid further restrictions [7]. This is not simply a private inconvenience. If the fear of platform sanctions leads media actors to avoid publishing

evidence of war crimes, the effect reaches public memory, accountability, and international awareness.

At the same time, the Ukrainian state cannot solve the problem by taking direct control over permissible speech. Such an approach would contradict the constitutional logic of freedom of expression and would be vulnerable to abuse. Therefore, the proper legal response should be procedural rather than censorial. The state should not decide the truth of every disputed statement. It should establish guarantees that moderation decisions affecting users in Ukraine are reasoned, contestable, reviewable, and sensitive to the local legal and security context.

The European Union: procedural accountability and systemic risks

The Digital Services Act is the most useful comparative model for Ukraine because it shifts platform regulation from substantive state control over speech to procedural accountability. The DSA requires clearer terms and conditions, notice-and-action mechanisms, statements of reasons for restrictions, internal complaint-handling systems, out-of-court dispute settlement, and specific obligations for very large online platforms and search engines [17]. Its logic is not that the state should decide every moderation dispute. Rather, platforms must organise their decision-making in a way that is transparent, accountable, and open to challenge.

Several elements are especially important. Article 17 of the DSA requires online platforms to provide statements of reasons when they impose certain restrictions. Article 20 establishes an internal complaint-handling system. Article 21 creates the possibility of out-of-court dispute settlement. Articles 34 and 35 require very large online platforms and very large online search engines to assess and mitigate systemic risks, including risks related to fundamental rights, civic discourse, electoral processes, and public security [17]. These rules directly respond to the weaknesses of algorithmic moderation: opacity, lack of remedy, and insufficient attention to systemic effects.

The European model is not perfect. Golunova notes that the DSA creates innovative mechanisms, but that many of them are not specifically tailored to the peculiar threats posed by algorithmic content moderation [5]. The model also depends on institutional capacity, regulator independence, access to platform data, and effective certification of dispute settlement bodies. For Ukraine, these challenges would be even more serious because enforcement against transnational platforms requires both legal authority and political leverage.

Nevertheless, the DSA provides a normative core for Ukraine. Its strongest lesson is that protection of freedom of expression can be strengthened without transforming the state into a content censor. Procedural obligations,

risk assessment, and independent review are compatible with constitutional democracy because they regulate decision-making architecture rather than impose a single official truth.

The United States: immunity and market logic

The United States model is based on a different assumption. Section 230 of the Communications Decency Act provides that an interactive computer service shall not be treated as the publisher or speaker of information provided by another information content provider, and it also protects good-faith restrictions of objectionable material [19]. Historically, this rule supported innovation, protected platforms from excessive liability, and enabled the development of the open internet. It also reflects a strong distrust of state regulation of speech.

For the present study, the American model is useful primarily as a warning. Broad immunity can protect platforms from being overburdened by liability, but it does not automatically create effective remedies for users. If a platform wrongly removes content, reduces visibility, or suspends an account, the affected person may have very limited practical options. Market competition does not solve the problem when several platforms control the main channels of public communication. Nor does contractual consent solve the problem where the user has no realistic possibility to negotiate the terms of service.

The American model, therefore, cannot be transferred to Ukraine as a complete solution. In a wartime information environment, the absence of procedural obligations would leave Ukrainian users, journalists, and civil society organisations dependent on discretionary corporate decisions. At the same time, the American experience is valuable because it warns against overcorrection. A Ukrainian model should not impose such liability on platforms that they remove lawful but controversial speech out of fear of sanctions. The appropriate balance lies between immunity without accountability and state pressure without freedom.

The United Kingdom: safety by design and risk-oriented duties

The Online Safety Act 2023 represents a preventive and risk-based regulatory model. Instead of focusing only on individual items of content, it imposes duties related to the systems and processes through which online services manage illegal and harmful content, especially in relation to children and other vulnerable users [20]. Ofcom explains its role under the Act as ensuring that companies have effective systems in place to protect users from harm [21]. This model is important because it treats online harm as something produced not only by individual users, but also by the design of the service.

For Ukraine, the safety-by-design logic is relevant in the national security context. Recommender systems, viral amplification tools, anonymous channels, livestreaming, paid promotion, and automated account networks can be used not only for ordinary expression but also for coordinated information operations. A platform's architecture may enable manipulation even when no single piece of content is obviously unlawful. Therefore, a Ukrainian law should require large platforms to assess whether their functions create foreseeable risks to national security, democratic processes, access to reliable information and the safety of civilians during war.

However, the British model also requires caution. A broad online safety framework may create incentives for platforms to remove content defensively. If safety obligations are vague, they may reduce freedom of expression, especially for controversial political speech. For Ukraine, which faces both external information aggression and internal risks of excessive restriction, safety by design must be combined with strong freedom-of-expression safeguards. Risk assessment should not become a justification for suppressing legitimate criticism, journalism, satire, or documentation of violence.

Taiwan: social resilience and non-punitive coordination

Taiwan offers a different lesson. Its approach to disinformation has often relied on digital resilience, civic technology, rapid clarification, and cooperation between public institutions and civil society, rather than on mass takedown powers. The Ministry of Digital Affairs describes Taiwan's response to disinformation as one in which civil society took the lead in quarantining falsehoods and paying attention to information manipulation, enabling Taiwan to combat the infodemic with no takedowns [22]. Cofacts, a civic fact-checking project integrated with LINE, functions as a crowdsourced system connecting suspicious messages with fact-checking reports and alternative explanations [23].

This model is particularly attractive for Ukraine because it separates response to disinformation from censorship. The state does not need to block every false statement in order to reduce the harm of manipulation. It can support rapid verification, public explanation, media literacy, open data, and communication channels with platforms. In wartime, speed is essential. A false claim about mobilisation, evacuation, attacks on civilians, or international support may cause harm long before a court or regulator reaches a formal decision. A resilience model, therefore, complements, rather than replaces, legal remedies.

The weakness of the Taiwanese approach is that it cannot by itself compel global platforms to correct wrongful moderation or redesign harmful systems. Civic resilience is effective against falsehoods, but it does not

solve the problem of arbitrary private restrictions. Ukraine, therefore, needs Taiwan's speed and trust, but also the European procedural architecture and a risk-based approach to platform systems.

Ukrainian legal gaps

The Ukrainian framework contains important general rules but lacks a special platform governance regime. The Law of Ukraine on Information defines general principles of information relations and access to information [9]. The Law of Ukraine On Media modernises media regulation and addresses aspects of media activity, audiovisual services, and the powers of the national regulator [10]. The Law of Ukraine on Personal Data Protection is relevant to the processing of user data in digital environments [11]. However, none of these acts creates a full procedural framework for the moderation decisions of very large online platforms.

Several gaps are especially visible. First, Ukrainian users do not have a statutory right to receive a detailed and standardised explanation of why content was removed, visibility was restricted, or an account was blocked. Secondly, there is no specialised independent mechanism for reviewing platform decisions after the internal appeal has failed. Thirdly, Ukrainian law does not require large platforms to assess systemic risks caused by their recommendation systems, content moderation systems, advertising architecture, or design choices in the Ukrainian context. Fourthly, there is no permanent institutional channel through which Ukrainian authorities, civil society, and platforms can address repeated false positives, wartime context errors, and coordinated disinformation campaigns without resorting to direct censorship.

The absence of such a regime creates an asymmetry of power. A Ukrainian journalist, volunteer, or media outlet may depend on a platform for reach, fundraising, or international visibility, but the platform may treat the Ukrainian case as one among millions of global moderation events. The domestic court may not be an effective remedy when the platform has no meaningful local presence or when the dispute is resolved internally by automated systems. This asymmetry justifies legislative intervention, but only if the intervention is designed as procedural accountability rather than control over viewpoints.

A hybrid model of platform governance for Ukraine

The most appropriate solution for Ukraine is a hybrid model of platform governance. Its first component should be procedural accountability. A special law on digital services and platform governance should require large platforms operating in Ukraine to provide a reasoned notification for every significant moderation decision affecting content visibility, account

status, monetisation, or access to services. The notification should include the specific rule applied, the factual basis of the decision, the type of measure, the duration of restriction, whether automated tools were used, and information on available appeal mechanisms. This would adapt the procedural logic of the DSA to the Ukrainian context.

The second component should be an internal and independent appeal. Platforms should be required to maintain accessible internal complaint mechanisms in Ukrainian and, where relevant, English. After exhaustion of internal appeal, users should have access to an independent national or certified extrajudicial review mechanism. This could be organised as a Digital Ombudsman or a specialised board under an independent regulator. The body should not have general censorship powers. Its competence should be limited to assessing whether the platform decision is reasoned, proportionate, consistent with Ukrainian law and international human rights standards, and whether the platform has properly considered the Ukrainian context.

The third component should be systemic risk assessment. Very large platforms with a significant number of users in Ukraine should periodically assess risks arising from their algorithmic systems, content moderation policies, recommender systems, advertising tools, and crisis-response procedures. Such an assessment should cover risks to freedom of expression, access to reliable information, democratic processes, national security, children, journalists, human rights defenders, and users in occupied or frontline territories. The assessment should not be limited to illegal content. It should also address lawful but harmful manipulation, coordinated inauthentic behaviour, and wrongful suppression of socially significant lawful content.

The fourth component should be a Digital Resilience Coordination Centre. Such a centre could operate under the Ministry of Digital Transformation with participation of civil society, independent fact-checkers, media organisations, and academic experts. It should not be authorised to order content blocking. Its tasks should be rapid verification, communication with platforms, collection of recurring moderation problems, preparation of contextual guidance for platforms, and public explanation during disinformation campaigns. In this respect, Ukraine can borrow from the Taiwanese model without importing censorship powers.

The fifth component should be proportional enforcement. Sanctions should apply only where a platform systematically refuses to cooperate with legally established procedural mechanisms, ignores binding review decisions, fails to provide required transparency, or repeatedly neglects systemic risks affecting Ukrainian users. Sanctions should be economic and institutional

rather than viewpoint-based. The object of enforcement should be non-compliance with procedure, transparency, or risk-management duties, not disagreement with a particular editorial position.

Such a hybrid model would restore the role of the state as guarantor of freedom of expression without transforming it into the arbiter of truth. It would also recognise that digital sovereignty today means not isolation from global platforms, but the ability of a democratic legal order to require minimum standards of fairness, transparency, and accountability from private actors that structure public discourse.

Conclusions

The study demonstrates that freedom of expression in the digital environment is increasingly affected by private algorithmic governance rather than only by direct state interference. Global platforms define the visibility, reach, and practical effectiveness of speech through rules, classifiers, recommender systems, and enforcement practices. For Ukraine, this creates a specific constitutional and security problem: wrongful moderation may restrict journalism, documentation of war crimes, volunteer communication, and public mobilisation, while excessive state control over platforms would threaten censorship.

The comparative analysis shows that no foreign model can be copied mechanically. The European Union provides the strongest procedural safeguards and systemic risk logic; the United States protects innovation but leaves users with weak remedies; the United Kingdom contributes a safety-by-design perspective; and Taiwan demonstrates the value of rapid, trust-based, non-punitive resilience. Ukraine should therefore develop a hybrid model combining reasoned moderation decisions, internal and independent appeal, systemic risk assessment, institutional communication with platforms and a digital resilience centre without blocking powers. Such a model would strengthen constitutional freedom of expression, create practical remedies for users and media, and improve national security in the face of continuing information aggression.

References

[1] Constitution of Ukraine. (June 28, 1996). Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.

[2] Council of Europe. (1950). *Convention for the Protection of Human Rights and Fundamental Freedoms*. Retrieved from https://www.echr.coe.int/documents/convention_eng.pdf.

[3] Delfi AS v. Estonia [GC], Application No. 64569/09, European Court of Human Rights. (2015). Retrieved from https://hudoc.echr.coe.int/eng?i=001-155105.

[4] Cengiz and Others v. Turkey, Applications Nos. 48226/10 and 14027/11, European Court of Human Rights. (2015). Retrieved from https://hudoc.echr.coe.int/eng?i=001-156825.

[5] Golunova, V. (2025). Algorithmic Content Moderation and Freedom of Expression under the Digital Services Act. European Review of Public Law, 37(2), 1-36.
[6] Article 19. (2023). *Content moderation and freedom of expression handbook.* Retrieved from https://www.article19.org/resources/content-moderation-freedom-of-expression-handbook/.
[7] Centre for Democracy and Rule of Law, Internews Ukraine, & Lviv Media Forum. (2023). *Social Media's Impact on the Ukrainian News and Publishing Space after the Full-Scale Invasion.* Retrieved from https://cedem.org.ua/en/research/social-media-ukraine-war/.
[8] Freedom House. (2023). *Freedom on the Net 2023: Ukraine.* Retrieved from https://freedomhouse.org/country/ukraine/freedom-net/2023.
[9] Law of Ukraine No. 2657-XII "On Information". (October 02, 1992). Retrieved from https://zakon.rada.gov.ua/laws/show/2657-12#Text.
[10] Law of Ukraine No. 2849-IX "On Media". (December 13, 2022). Retrieved from https://zakon.rada.gov.ua/laws/show/2849-20#Text.
[11] Law of Ukraine No. 2297-VI "On Personal Data Protection". (June 01, 2010). Retrieved from https://zakon.rada.gov.ua/laws/show/2297-17#Text.
[12] Celeste, E. (2019). Digital Constitutionalism: A New Systematic Theorization. *International Review of Law, Computers & Technology, 33*(1), 76-93. https://doi.org/10.1080/13600869.2019.1562604.
[13] Suzor, N. (2018). Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms. *Social Media + Society, 4*(3), 1-11. https://doi.org/10.1177/2056305118787812.
[14] Gillespie, T. (2018). Regulation of and by Platforms. In J. Burgess, A. Marwick, & T. Poell (Eds.). *The SAGE Handbook of Social Media* (pp. 254-278). SAGE. https://doi.org/10.4135/9781473984066.n15.
[15] Balkin, J.M. (2018). Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation. *UC Davis Law Review, 51*(3), 1149-1210. Retrieved from https://lawreview.law.ucdavis.edu/issues/51/3/Articles/51-3_Balkin.pdf.
[16] Gorwa, R., Binns, R., & Katzenbach, C. (2020). Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance. *Big Data & Society, 7*(1), 1-15. https://doi.org/10.1177/2053951719897945.
[17] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act). (2022). *Official Journal of the European Union, L 277,* 1-102. Retrieved from https://eur-lex.europa.eu/eli/reg/2022/2065/oj.
[18] De Gregorio, G. (2022). *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society.* Cambridge University Press. https://doi.org/10.1017/9781009071215.
[19] Communications Act of 1934, 47 U.S. Code § 230. (2024). Retrieved from https://www.law.cornell.edu/uscode/text/47/230.
[20] Online Safety Act 2023, 50 (UK). (2023). Retrieved from https://www.legislation.gov.uk/ukpga/2023/50/contents.
[21] Ofcom. (2025). *Online Safety: Guidance and Implementation Materials.* Retrieved from https://www.ofcom.org.uk/online-safety.
[22] Ministry of Digital Affairs, Taiwan. (2022). *Introduction to Moda.* Retrieved from https://moda.gov.tw/en/.
[23] Cofacts. (2024). *Cofacts: Message Reporting Chatbot and Crowd-Sourced Fact-Checking Platform.* Retrieved from https://cofacts.tw/.

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Constitutional and Legal Framework for the Capacity of Local Self-Government in Ukraine in the Context of European Integration: the Experience of the Baltic States

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Abstract
The article is devoted to a topical issue in the context of Ukraine's European integration, namely the modernization of legislative regulation of mechanisms for ensuring the capacity of local self-government. The relevance of the study is determined by the need to take into account European experience, in particular that of the Baltic states, where the concept of "capacity" is widely used in legal systems as a tool for enhancing efficiency and ensuring the proper functioning of local self-government. This approach is based on the full implementation of the provisions of the European Charter of Local Self-Government, which establishes relevant standards. The article analyzes the doctrinal understanding of the essence of the concept of "capacity" and distinguishes it from related categories, in particular "actual ability". The current state of legal regulation of this concept in Ukraine and the specifics of its enshrinement in normative legal acts are examined. Considerable attention is paid to the analysis of the practices of the Baltic states as an example of effective ensuring the capacity of local self-government. The author proposes a definition of capacity as a socio-legal category that reflects the potential ability of municipal institutions and the system of local self-government as a whole to effectively exercise their powers, provided that the necessary resources and internal potential are available. Based on this approach, proposals for amendments to the Constitution of Ukraine are substantiated, aimed at strengthening the institutional, functional, and financial capacity of local self-government. It is determined that such changes should be based on the provisions of the European Charter of Local Self-Government and the best practices of the Baltic states.

Key words: *capacity; local self-government; subsidiarity principle; financial autonomy; European integration.*

Конституційно-правове забезпечення спроможності місцевого самоврядування в Україні в умовах євроінтеграції: досвід країн Балтії

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Анотація
Статтю присвячено актуальній в умовах європейської інтеграції України проблемі модернізації законодавчого регулювання механізмів забезпечення спроможності місцевого самоврядування. Актуальність дослідження зумовлена необхідністю врахування європейського досвіду, зокрема балтійських країн, у правових системах яких категорія «спроможність» широко використовується як інструмент підвищення ефективності та гарантування функціонування місцевого самоврядування. Зазначений підхід ґрунтується на повноцінній імплементації положень Європейської хартії місцевого самоврядування, яка закріплює відповідні стандарти. У статті проаналізовано доктринальне розуміння сутності поняття «спроможність» та здійснено його розмежування із суміжними категоріями, зокрема «реальною здатністю». Досліджено сучасний стан правової регламентації цієї категорії в Україні та особливості її закріплення в нормативно-правових актах. Значну увагу приділено аналізу практики балтійських країн як прикладу ефективного забезпечення спроможності місцевого самоврядування. Запропоновано авторське визначення спроможності як соціально-правової категорії, що відображає потенційну здатність муніципальних інституцій та системи місцевого самоврядування загалом ефективно здійснювати свої повноваження за умови наявності необхідних ресурсів і внутрішнього потенціалу. На основі сформульованого підходу обґрунтовано пропозиції щодо внесення змін до Конституції України, спрямовані на посилення інституційної, функціональної та матеріально-фінансової спроможності місцевого самоврядування. Визначено, що такі зміни мають ґрунтуватися на положеннях Європейської хартії місцевого самоврядування та кращих практиках балтійських країн.

Ключові слова: *спроможність; місцеве самоврядування; принцип субсидіарності; фінансова автономія; євроінтеграція.*

Introduction

Ensuring the capacity of local self-government is one of the central tasks of constitutional reform in Ukraine under the conditions of European integration. Notwithstanding the substantial progress achieved in the sphere of decentralization over the past decade, the constitutional and legal regulation of local self-government in Ukraine remains insufficiently aligned with the standards of the European Charter of Local Self-Government of 1985 (ECLSG) [1]. In particular, the concept of "capacity" as an independent legal category has yet to receive adequate constitutional entrenchment, which adversely affects the institutional, functional, and financial autonomy of local self-government bodies.

It is for this reason that the purpose of the present paper is to investigate the essence of local self-government capacity and to propose directions for constitutional amendments that would enhance its institutional, material-financial, and other dimensions, taking into account the constitutional and legal experience of Estonia, Latvia, and Lithuania – states that have undergone a transition from the Soviet model of local authority organization to a democratic system of local self-government similar to that of Ukraine – with respect to the entrenchment of the right and capacity of local self-government bodies as independent categories, the implementation of the principle of subsidiarity, and the securing of financial autonomy for local self-government bodies.

Literature review

The relevant experience of the Baltic states in constitutional and legal provisions for local self-government has been examined predominantly within the frameworks of comparative municipal law and European integration studies. Among Estonian scholars, particular attention should be paid to the papers of Viktor Trasberg [2] and Georg Sootla [3], who analyze the constitutional guarantees of financial autonomy for Estonian municipalities and the Supreme Court's (Riigikohus) practice in protecting the rights of local self-government. The demarcation between the own and delegated functions of local self-government bodies in Estonia is examined in detail by Sulev Laane, Sulev Mäeltsemees, and Vallo Olle [4; 5]. In Latvian legal doctrine, the issues of local self-government capacity are addressed by Edvīns Vanags [6], Inga Vilka [7], and Gundar J. King [8], including the Constitutional Court of Latvia's practice, with these scholars investigating the legal mechanisms for securing the independence of local self-government. In Lithuanian scholarship, the institutional capacity of

local self-government bodies under the conditions of European integration has been studied by Violeta Kiurienė [9] and Diana Šaparnienė and Aistė Lazauskienė [10], while the general theoretical foundations of the local self-government systems of the Baltic states and their comparative analysis have been examined by Daunis Auers [11].

In domestic scholarship, a comparative analysis of the Baltic models of local self-government in the context of reforming the Ukrainian system of local self-government has been conducted by O.O. Petryshyn [12], T.V. Lushahina and D. Yang [13], O.M. Antoniuk [14], Yu.R. Masyk and O. Chernezhenko [15], A. Murtishcheva [16], M. Biliak [17], and other scholars [18; 19]. Nevertheless, the question of the constitutional entrenchment of local self-government capacity in the Baltic states, as well as the prospects for its implementation in Ukraine, remains insufficiently studied, necessitating their examination in the present article.

Materials and Methods

The methodology of the paper involves the extensive application of general philosophical, general scientific, and specialized methods. The systemic method and the method of logical analysis were employed to elaborate and formulate concepts. Prognostic, systemic-structural, and comparative methods were applied to formulate proposals for amendments to Ukraine's legislation. Extensive use was made of the techniques of analysis, synthesis, and classification, which enabled the examination of "capacity" as a systemic category, the identification of its varieties, and the proposal of their definitions. The techniques of modeling and comparative analysis were employed to perceive and incorporate foreign experience.

The comparative study of the experience of the Baltic states – Estonia, Latvia, and Lithuania – is methodologically justified in light of several key factors: these states belong to the post-socialist legal space, have been full members of the European Union since 2004, and have comprehensively implemented the standards of the European Charter of Local Self-Government of 1985, which allows their experience to be regarded as a practical embodiment of the very international legal standards that Ukraine is seeking to attain under its European integration course. The Baltic states carried out constitutional and legal reforms of local self-government within a compressed timeframe – between 1991 and 1994 – and have accumulated over thirty years of experience in the functioning of reformed local self-government institutions, thereby enabling an assessment not only of the normative consolidation but also of the practical effectiveness of the relevant constitutional solutions. The constitutional systems of Estonia, Latvia, and Lithuania incorporate distinct models of

constitutional provision for local self-government capacity – ranging from a maximally detailed entrenchment of financial guarantees, as in Estonia, to a systemic framework approach, as in Lithuania – thus providing grounds for identifying alternative constitutional solutions that may be suitable in the context of the modernization of local self-government in Ukraine.

Results and Discussion

The Essence and Substance of Capacity

The capacity of local self-government represents a relatively novel legal category in domestic legislation. This category has constitutional roots; however, the Basic Law of Ukraine employs it exclusively in relation to the President of Ukraine (Articles 108 and 110) and judges (Articles 126 and 149[1]) to denote instances of incapacity to exercise their respective powers. Two conclusions may be drawn from this approach: first, the Constitution employs the term "incapacity", which is the antithesis of capacity, the latter having received no constitutional entrenchment; and second, incapacity in the context of constitutional regulation is used in an inseparable connection with powers, which indicates a close interrelationship between the two. At the same time, the Constitution does not employ this category in relation to the system of local self-government. Pursuant to Art. 140 (1) of the Constitution of Ukraine [20], local self-government is recognized solely as a right of the territorial community, with no indication that alongside this right, there must also exist a corresponding capacity.

Notably, Art. 2 of the Law of Ukraine "On Local Self-Government in Ukraine" defines local self-government as "the guaranteed by the state right and real ability of the territorial community", a formulation that invites inquiry into whether "real ability" and "capacity" are identical concepts [21].

It is noteworthy that the legislation of the Baltic states – members of the European Union – resolves this question more definitively. The Estonian Local Government Organization Act of 1993 (Kohaliku omavalitsuse korralduse seadus), in para 2, defines local self-government as the right, capacity, and obligation (õigus, võime ja kohustus) of the democratically formed authorities of a local government unit – a rural municipality or a city – to independently organize and manage local life based on laws, proceeding from the legitimate needs and interests of the residents of the rural municipality or city and taking into account the particularities of their development, as provided for by the Constitution [22]. Thus, the concepts of "right" and "capacity" are employed as non-equivalent yet parallel components of the legal status of local self-government bodies, directly reflecting Art. 3 of the ECLSG [1]. The Latvian Law on Local Governments of 2022 (Pašvaldību likums), in Art. 1, defines local self-government as

a derivative public entity possessing a decision-making body – a council – elected by the population, which independently ensures the performance of the functions and tasks established by legal acts in the interests of the population of its administrative territory and bears responsibility therefor [23]. The Lithuanian legislation – the Law on Local Self-Government of 1994 (Vietos savivaldos įstatymas, No. I-533, as subsequently amended) – in Art. 1 distinguishes between the right and real powers (teisė ir reali galia) of local self-government bodies, elected by the residents of an administrative unit, to freely and independently regulate and manage public affairs and to satisfy the needs of residents on their own responsibility [24].

Accordingly, within the legal orders of the Baltic states, "right" and "capacity (ability)" are regarded as distinct categories which, taken together, constitute genuine self-government – in contrast to Ukrainian legislation, where "real ability" is effectively equated with "capacity", without acquiring a clear and independent legal significance.

Examining the etymological essence of these concepts, O.O. Surkov notes that capacity denotes a potential possibility, the existence of conditions, resources, or a right (standard) that permit the accomplishment of a given task, whereas real ability refers to the actual performance of that task – the practical application of available possibilities under specific circumstances. The distinction lies in the transition from "I can" (theoretically or in terms of resources) to "I do" (in fact) [25].

Accordingly, capacity (capability) connotes the possession of resources, knowledge, instruments, and conditions for performing a task, while real ability denotes the skill to apply those resources here and now to achieve a concrete result.

O.H. Ros defines institutional capacity as the ability of an institution to perform its functions through the provision of an adequate level of professional training of personnel, as well as through appropriate processes, organizational structures, and resources of the institution concerned [26].

In the view of O.V. Bashtannyk, institutional capacity may be defined as the ability to regulate a particular type of socio-political relations within a political system, or the system as a whole in the case of the institution of the state, based on normative and value-based foundations – including the observance of human rights and freedoms and the reform of the governance system in accordance with European standards. Institutional capacity may further be characterized as the ability of a given structure to perform the functions assigned to it, which may constitute a set of tasks identified for the most comprehensive possible fulfillment of the organization's functions – drawing upon the necessary resource support [27].

A substantive analysis of the evolution of the concept of institutional capacity is also conducted by T. Zakharov [28] and I.Yu. Marko [29].

At the same time, in examining the doctrinal positions of scholars, attention should be drawn to the typological diversity of the internal content of capacity, according to which it encompasses not only the institutional dimension but also organizational, legal, human resources, material-financial, and other dimensions. This aspect significantly influences the definitions advanced by researchers.

In particular, a complex mechanism for determining the financial capacity of territorial communities is proposed by Ya.M. Kaziuk and V.T. Ventsel, who indicate that the most effective approach for this purpose is one developed based on calculating eleven proposed indicators and distributing territorial communities of Ukraine into quartiles in accordance with the computed values of those indicators, followed by the determination of the level of community capacity [30].

Taking into account the defining characteristics of the various types of capacity identified by researchers in their formulations, it is possible to advance an original understanding of the concept. In the authors' view, "capacity" is a more ideal category in comparison with real ability, and therefore constitutes a potential ability, presupposing the existence within the relevant institution or institutional system – such as local self-government – of a comprehensive set of diverse resources and internal potential that enable it to function at the highest possible level of quality and efficiency while expending the minimum amount of resources in the exercise of the greatest number of powers and the provision of services.

Beyond doctrinal approaches to defining and understanding the content of the concept of "capacity", its legal definition is of considerable importance.

While doctrinal frameworks offer valuable insight into the concept of 'capacity,' its precise legal definition carries significant weight in practice.

The concept of capacity in relation to the system of local self-government was first mentioned in the Law "On the Voluntary Amalgamation of Territorial Communities", although no definition was provided therein [31].

Subsequently, the concept of capacity as applied to the territorial community was embodied in the provisions of the Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Methodology for the Formation of Capable Territorial Communities" [32]. This act contains a definition of the concept of a "project-capable territorial community", subsequently referred to simply as a "capable territorial community". It is understood as the territorial communities of villages, settlements, and cities which,

as a result of voluntary amalgamation – or voluntary accession to an amalgamated territorial community – are able, independently or through the relevant local self-government bodies, to ensure an adequate level of public service provision, in particular in the fields of education, culture, healthcare, social protection, and housing and communal services, taking into account the human resources, financial provision, and infrastructure development of the relevant administrative-territorial unit. In this definition, capacity is defined by reference to ability, which indicates that the legislator has, in effect, equated these two categories.

The concept of capacity is also formulated in state sanitary norms and rules, where it is defined as a characteristic presupposing the existence of material, financial, and other resources in volumes sufficient for the effective performance of the tasks and functions of a healthcare institution in the provision of medical services at the level prescribed by the requirements of legislation [33].

It is noteworthy in this regard that capacity is defined not as a natural condition of a particular territorial community or local self-government system of a given territory, but rather as an artificial or conferred – that is, assigned – condition granted by the state. In other words, such a condition is bestowed by a decision of the Cabinet of Ministers of Ukraine. Illustrative in this respect is the provision of the Law of Ukraine "On the Voluntary Amalgamation of Territorial Communities", which stipulates that where the council of an amalgamated territorial community has adopted a decision refusing consent to the voluntary accession of another territorial community at the latter's initiative, the Cabinet of Ministers of Ukraine may annul the decision recognizing such an amalgamated territorial community as capable [31]. As is evident, this is enshrined as a right rather than an obligation of the Cabinet of Ministers of Ukraine to annul the relevant decision, meaning that it is precisely this body that acts as the institution determining the presence or absence of the capacity of a territorial community.

In Estonia, pursuant to para 2 of the Local Government Organization Act of 1993, the "right, capacity, and obligation" of local self-government bodies to independently organize and manage local life constitute three distinct categories: õigus (right), võime (capacity), and kohustus (obligation) [22]. A similar approach is found in Art. 2 of the Law on Local Self-Government of the Republic of Lithuania of 1994 [24], which refers to the right and real powers (teisė ir reali galia) of local self-government bodies.

The distinction between the concepts of "ability" and "capacity" in Latvian legislation is less explicit – for instance, in the Law on Local Governments [22] – given that the direct applicability of the ECLSG as a constitutional

standard is enshrined therein: the Charter constitutes the supreme law in the field of local governance. Its direct applicability has been recognized by the Constitutional Court of Latvia: the twenty-nine articles of the Charter ratified by parliament carry the same force as the principle of a democratic state enshrined in Art. 1 of the Constitution of Latvia. Upon ratifying the ECLSG on 22 February 1996, the ratification law stated that the Republic of Latvia undertakes to consider the articles and paragraphs of Part I of the Charter as binding upon itself. Accordingly, the concept of "capacity" in Latvian local self-government law is grounded in the direct application of Art. 3 of the ECLSG – as a constitutional standard rather than a discrete legislative provision. The most detailed and precise legislative parallel to Art. 3 of the ECLSG is thus demonstrated by Estonia.

The issue of ensuring local self-government capacity in Ukraine has, in the authors' view, rather deep roots and requires an analysis of the problem of implementing the provisions of the European Charter of Local Self-Government. It is precisely Art. 3(1) of the Charter that defines local self-government as the right and ability of local self-government bodies to regulate and manage, within the limits of the law, a substantial share of public affairs under their own responsibility and in the interests of the local population.

However, ensuring local self-government capacity in Ukraine requires not only implementing the provisions of Art. 3(1) of the ECLSG [1], but also taking into account the other standards contained in that instrument.

In this context, it should be emphasized that the Baltic states ratified the ECLSG without substantive reservations: Lithuania on 22 June 1999 (entering into force on 1 October 1999), Estonia on 28 September 1994 (entering into force on 1 February 1995), and Latvia on 27 April 1996 (entering into force on 1 August 1996). All three states ratified all the Charter's mandatory articles in full. Of fundamental importance is also the fact that within the legal systems of Estonia and Latvia, the ratified provisions of the ECLSG acquire direct effect as norms taking priority over conflicting acts of national legislation – pursuant to para 123 of the Constitution of Estonia [34] and as follows from the content of Art. 68 of the Constitution of Latvia [35], both of which enshrine the supremacy of ratified international treaties over domestic laws. In Lithuania, pursuant to Art. 138 of the Constitution, ratified treaties form an integral part of the national legal system [36]. This means that the provisions of Art. 3(1) of the ECLSG constitute a directly applicable constitutional standard in the Baltic states, rather than merely a guiding principle for the legislator – a circumstance that ensures a higher level of institutional capacity of their local self-government bodies.

The scope and level of capacity and their importance for the effective exercise of powers by local self-government entities

Ukrainian legislation contains criteria for assessing the capacity of territorial communities, as well as requirements intended to lead to the formation of capable territorial communities. All of these are set out in the aforementioned governmental resolution. Accordingly, the formation of capable territorial communities is carried out with regard to: (1) the ability of local self-government bodies to resolve public matters falling within their competence in order to meet the needs of the population of the relevant administrative-territorial units; (2) the historical, geographical, socio-economic, natural, ecological, ethnic, and cultural particularities of the development of the relevant administrative-territorial units; (3) the infrastructure development of the relevant administrative-territorial units; (4) the financial provision of the relevant administrative-territorial units; (5) labour migration of the population; (6) the results of the prior assessment of the level of capacity of capable territorial communities; and (7) the optimal networks of social infrastructure and the accessibility of public services in the relevant sectors.

The criteria for assessing the level of capacity, pursuant to the said regulatory act, are as follows: (1) the number of persons permanently residing on the territory of a capable territorial community; (2) the number of pupils receiving education in general secondary education institutions located on the territory of a capable territorial community; (3) the area of the territory of a capable territorial community; (4) the tax capacity index of the budget of a capable territorial community; and (5) the share of local taxes and levies in the revenues of the budget of a capable territorial community.

At the constitutional level in Ukraine, the territorial community is recognized as the primary subject of local self-government. At the same time, the elaboration of constitutional provisions at the legislative level demonstrates that powers in the sphere of local self-government are exercised predominantly by its bodies (Chapter 2 of the Law of Ukraine "On Local Self-Government in Ukraine" [21]).

The current political and legal situation in Ukraine reveals a certain idealistic character of the territorial community, whereby it constitutes the foundation of the local self-government system only in a formal sense – ensuring the formation of local self-government bodies and, in certain cases, exercising oversight over them. The forms of direct resolution of matters of local significance by the territorial community itself, as provided for by legislation, are either difficult to implement in practice or purely declaratory,

lacking any mechanism for their implementation. Consequently, in the Law of Ukraine "On Local Self-Government in Ukraine", a rather limited number of provisions are directly devoted to the territorial community – notably Art. 6. even though the territorial community embodies the principle of popular sovereignty and democracy at the local level, real power is concentrated in the hands of deputies and officials of local self-government bodies [21].

In this connection, it is possible to propose, at the constitutional level, a direction for reform that would, in effect, retain the territorial community as the primary subject, fully corresponding to the proposed concept of municipal dualism and enabling the realization of the provisions of the European Charter. At the same time, the primary advantage of local governance should be constitutionally vested in local self-government bodies, which should be designated as the principal subjects thereof.

Furthermore, the right of local self-government bodies, as enshrined in Art. 3(1) of the Charter, to resolve public affairs within the limits of legislation, fully corresponds to the provisions of Art. 19(2) of the Constitution of Ukraine [20], which enshrines the principle of legality in the operation of public authority bodies and extends it to the sphere of local self-government.

Instructive in this regard is the experience of the Baltic states with respect to the implementation of the principle of general residual competence of local self-government bodies – the so-called principle of "negative regulation". Thus, para 6(1) of the Estonian Local Government Organization Act of 1993 stipulates that local authorities are entitled to resolve and organize all matters of local significance unless these have been assigned by law to another body. Analogously, Art. 5(1) of the Latvian Law on Local Governments of 1994 provides for an open-ended list of local government functions accompanied by a general residual clause – whereby a local government may voluntarily implement initiatives in the interests of the residents of its administrative territory on any matter, provided that such matters do not fall within the competence of other institutions and that such activities are not restricted by other laws [23]. In Lithuania, Art. 14 of the Law on Local Self-Government of 1994 clearly distinguishes between autonomous functions (savarankiškosios funkcijos) and state-delegated functions (valstybinės funkcijos), expressly stipulating that the former are exercised by local self-government bodies without a separate legislative authorization [24]. Accordingly, in all three Baltic states, Art. 4(2) of the ECLSG [1] has been implemented at the legislative level: local self-government bodies have the full right to address any matter not excluded from their competence or assigned to another body. This fundamentally distinguishes them from Ukraine, where positive – that is, permissive – regulation is maintained: local self-government bodies are entitled to act

only within the bounds of powers expressly defined by law, pursuant to Art. 19(2) of the Constitution of Ukraine [20].

The role of the ECLSG in determining the directions of modernization of the constitutional regulation of the capacity of local self-government

Of considerable importance is the constitutional entrenchment of the principle of the capacity of local self-government bodies to exercise the relevant powers. Such capacity is invariably addressed to local self-government bodies rather than to the territorial community, thereby underscoring their status as the primary subjects. It is precisely local self-government bodies that would become the principal mechanism for the exercise of municipal authority and the executor of the community's will.

In this regard, it should be noted that the legal personality of local self-government bodies must be materially secured – meaning that it is necessary to constitutionally vest in those bodies the powers to exercise the rights of a subject of communal property. This would serve as a guarantee of the capacity of local self-government bodies to administer public affairs.

The Constitution is an instrument that concentratedly reflects the fundamental principles of the functioning of local self-government. Therefore, the detailed entrenchment of the entire local self-government system at this level is neither obligatory nor consistent with the requirements of constitutional legal technique. This does not impede the realization of the provisions of the European Charter and would promote the organizational independence of local self-government bodies.

At the same time, it is, in the authors' view, appropriate to enshrine at the constitutional level the principle that the executive bodies of local councils are accountable and answerable to those councils in the course of their activities. Answerability denotes a particular form of dependence of a body whereby its activities are subject to review by another body authorized to exercise oversight. The body subject to oversight is obliged both to afford the necessary conditions for such reviews and to report on its activities. Answerability is substantively broader than accountability, since it may entail the supervisory body's receipt of all necessary information, including reports, whereas accountability may also operate independently – that is, separately from the exercise of the oversight function.

It is further important that the constitutional norms expressly provide for representative bodies of local self-government at the district and regional levels to possess dedicated executive organs, in full conformity with the corresponding principle enshrined in the Charter.

Of significant importance for ensuring the capacity of territorial communities is the implementation of the ECLSG provision according to which local self-government bodies shall, within the limits of the law, have full discretion to exercise their initiative concerning any matter which is not excluded from their competence nor assigned to any other authority. To implement the said principle of the European Charter at the constitutional level, it is first necessary to reconsider the foundations of the national legal system and the principle of legality in the state, pursuant to which local self-government bodies are subject to the principle of "positive legal regulation" of their activities.

It should be noted that the European Charter seeks, within the framework of its provisions, to reconcile the principles of both positive and negative legal regulation. In particular, in defining the concept of local self-government in Art. 3(1), the Charter emphasizes the exercise and management of local affairs within the limits of the law, whereas Art. 4(2) takes a contrary position.

In the authors' view, the combination of the relevant principles in the Charter has been made to accommodate the specificities of the legal systems of the various states acceding to the Charter, each of which may determine for itself the principle of legal regulation most characteristic of the development of its local self-government system.

Furthermore, to ensure the sustainable development of local self-government and its capacity at the constitutional level, it is necessary to take into account the principle of subsidiarity, alongside the exercise of delegated powers and the further decentralization of state authority. Accordingly, with respect to the exercise of powers that reflect matters of local significance and are vested in local self-government bodies as their own, such bodies act in accordance with the principle of subsidiarity, whilst with respect to the exercise of delegated powers, they act in accordance with the principle of decentralization.

The experience of the Baltic states demonstrates that the principle of subsidiarity can be effectively entrenched at both the constitutional and legislative levels. In Estonia, para 154 of the Constitution expressly establishes that local matters are resolved and administered by local bodies independently, thereby embodying the principle of subsidiarity [34]. In Lithuania, the principle of subsidiarity is enshrined in Art. 14 of the Law on Local Self-Government [24], which provides that local self-government bodies, in accordance with the autonomous competence conferred upon them by that Law, enjoy freedom of action, initiative, and decision-making within the limits permitted by the Constitution of the

Republic of Lithuania, laws, and subordinate legislation; whilst Art. 120 of the Constitution stipulates that municipalities act freely and independently within the competence defined by the Constitution and laws. In Latvia, Art. 4(3) of the ECLSG is applied directly as a norm of immediate effect, and Art. 2 of the Law on Local Governments enshrines the principle that local governments independently ensure the performance of the functions and tasks established by legal acts [23]. Of fundamental importance is also the fact that in the Baltic states a clear mechanism for distinguishing between own and delegated functions has been established at the constitutional or legislative level: in Lithuania, for instance, Articles 15 and 16 of the Law on Local Self-Government contain exhaustive lists [24], whilst in Estonia Art. 154 of the Constitution distinguishes between autonomous and delegated functions – thereby precluding the imposition upon local self-government bodies of state tasks without corresponding financial provision [34].

Furthermore, at the legislative level, it is necessary to revisit the powers of state executive authority bodies that have been delegated to local self-government bodies and to recognize these as "own" powers, given that they are in practice exercised by local self-government on a permanent basis. In this regard, it is also appropriate to consider introducing new forms of delegation of powers.

It is likewise necessary to enshrine at the constitutional level the principle of the fullness of powers of local self-government bodies. Fullness of powers denotes their sufficiency for the effective exercise of all functions assigned to local self-government bodies. Such powers may not be transferred for exercise to any other body and must fall within the sphere of competence of local self-government bodies.

The entrenchment of this principle would constitute an important step towards delineating powers between local self-government bodies and state authority bodies, as well as towards enhancing the institutional capacity of local self-government to resolve matters of local significance. Furthermore, the implementation of this principle at the constitutional level would create additional conditions for the establishment, at the district and regional levels of territorial governance, of executive bodies of local councils – both district and regional – and would promote a transformation of the status of local state administrations in the direction of their exercise exclusively of certain supervisory functions over the legality of local self-government acts.

Of considerable importance is the provision for the executive bodies of local councils to have delegated powers adapted to local conditions. This may be achieved through their elaboration in the statutes of territorial

communities, which may provide for the particularities of the structural organization of local self-government executive bodies.

Art. 143(3) of the Constitution [20] stipulates that the state finances the exercise of these powers in full from the funds of the State Budget of Ukraine, or by attributing, in the manner established by law, certain national taxes to the local budget, and transfers to local self-government bodies the relevant objects of state property.

In the comparative context, it is of fundamental importance that in the Baltic states, the prohibition of unfunded mandates is enshrined with considerable rigour. In Estonia, para 154(2) of the Constitution [34] expressly establishes that obligations imposed upon local self-government bodies must be provided for by law and that the costs of their performance are financed from the state budget – constituting a direct constitutional prohibition of unfunded mandates that is absent from the Constitution of Ukraine [20]. In Latvia, Art. 6 of the Law obliges the state to ensure the full financing of delegated functions, with the state bearing responsibility for the lawful and effective performance of the delegated administrative task [23]. In Lithuania, Art. 9 of the Law on Local Self-Government stipulates that the state is obliged to provide local self-government bodies with the financial resources necessary for the performance of delegated state functions, with funds for their performance allocated from the state budget of Lithuania; whilst Art. 16 provides that in the performance of delegated state functions, local self-government bodies are guided by laws and implement resolutions of the Government [24]. The foregoing provisions demonstrate a robust system of financial guarantees for the state's delegated powers, as well as mechanisms for judicial protection of this right.

Moreover, the resolution of this issue lies in legislative revision of the sectoral delegated powers conferred upon executive bodies of local self-government, whereby the overwhelming majority of such powers would be reconstituted as own competencies.

The possibility of adapting the activities of executive bodies of local self-government with respect to the exercise of delegated powers to local conditions may, at the constitutional level, be secured by imposing upon local councils an obligation to adopt statutes of territorial communities.

As regards the delegation of powers, this system requires rationalization and must, at the constitutional level, be brought into conformity with the provisions of the European Charter.

The improvement of constitutional provisions and the implementation of the aforementioned ECLSG [1] standards will serve as a guarantee for the effective realization of European integration processes.

Conclusions

The concept of "capacity" of local self-government constitutes an independent legal category that cannot be equated with "real ability" as employed in current Ukrainian legislation. Capacity is an ideal socio-legal category that reflects a municipal institution's potential to function at the highest possible level of quality and efficiency, provided that the relevant resources, powers, and internal capacity are in place. Real ability, by contrast, is the actual realization of that potential under specific conditions. A clear delineation between these concepts constitutes an indispensable precondition for the proper and coherent legal regulation of the local self-government system.

The Constitution of Ukraine does not enshrine the concept of capacity within the local self-government system, thereby constituting a significant lacuna in the Basic Law. The use of the term "incapacity" exclusively with reference to the President of Ukraine and judges, combined with the definition of local self-government solely as a "right" of the territorial community without any reference to capacity as a parallel category, indicates that the constitutional regulation does not conform to the standards of the ECLSG. Addressing this lacuna is the primary task of constitutional reform in the sphere of local self-government.

The experience of the Baltic states convincingly demonstrates that the effective provision of local self-government capacity is possible only where it is constitutionally or legislatively entrenched as an independent category alongside the right to self-government. Illustrative in this regard is the approach of the Estonian legislator, who enshrined the triad of rights, capacities, and obligations of local self-government bodies as equivalent yet substantively distinct components of their legal status. This approach most precisely corresponds to the provisions of Art. 3(1) of the ECLSG [1] and may serve as a model for Ukrainian constitutional reform.

The principle of subsidiarity, enshrined in Art. 4(3, 4) of the ECLSG [1] has been implemented in the Baltic states at both the constitutional and legislative levels, ensuring an organic combination of decentralization and effective local governance. Ukraine must enshrine this principle directly in the Constitution, providing that matters of local significance are resolved by local self-government bodies independently, without interference from state authority bodies, unless otherwise expressly provided by law.

The principle of general residual competence of local self-government bodies – the principle of "negative regulation" – is enshrined in Art. 4(2) of the ECLSG [1] remains unimplemented in Ukraine. The current constitutional model, grounded in the principle of "positive regulation"

pursuant to Art. 19(2) of the Constitution of Ukraine [20], substantially restricts the initiative of local self-government bodies and narrows their functional capacity. The transition to the principle of negative regulation – whereby local self-government bodies are entitled to resolve any matter not expressly excluded from their competence – is a necessary step towards genuine, rather than declaratory, self-government.

The constitutional entrenchment of the prohibition on unfunded mandates is one of the most important guarantees of local self-government's financial capacity. The experience of the Baltic states is unequivocal: in Estonia, para 154(2) of the Constitution expressly prohibits the imposition of obligations on local self-government bodies without corresponding financing from the state budget; analogous provisions are contained in the legislation of Latvia and Lithuania. The Constitution of Ukraine [20] contains no such direct prohibition, which, in practice, leads to the systematic transfer of state tasks to local self-government bodies without adequate resource provision. Addressing this lacuna by introducing the necessary amendments to the Constitution is urgent.

At the constitutional level, it is appropriate to enshrine the concept of municipal dualism, whereby the territorial community remains the primary subject of local self-government as the holder of the right to self-government, whilst local self-government bodies serve as the principal subjects of its practical realization. Such a model is consistent with both the provisions of the ECLSG and the principles of democratic governance, ensuring a balance between local-level popular sovereignty and the effectiveness of municipal administration.

In conclusion, it should be emphasized that enhancing local self-government capacity in Ukraine is a complex undertaking that requires a systemic approach encompassing the institutional, functional, and material-financial dimensions simultaneously. The implementation of the proposed constitutional amendments, in conjunction with the comprehensive incorporation of the ECLSG provisions and due regard for the experience of the Baltic states, will make it possible to establish a sound constitutional and legal foundation for effective local self-government in Ukraine and will bring its legal system closer to the standards of the European Union.

References

[1] European Charter of Local Self-Government. (October 15, 1985). Retrieved from https://zakon.rada.gov.ua/laws/show/994_036#Text.

[2] Trasberg, V. (2009). Baltic Local Governments' Fiscal Situation: Two Decades of Reforms. *Journal of Baltic Studies, 40*(2), 179-200. https://doi.org/10.1080/01629770902884243.

[3] Sootla, G., & Laanes, L. (2015). Sources of Institutional Integrity and Contradictions of County Governance: Analyzing the Estonian Experience. *Transylvanian Review of*

Administrative Sciences, 11(46), 197-216. Retrieved from https://rtsa.ro/tras/index.php/tras/article/view/459/448.

[4] Brezovnik, B., Hoffman, I., & Kostrubiec, J. (Eds.). (2021). *Local Self-Government in Estonia*. Maribor: Institute for Local Self-Government Maribor. Retrieved from https://www.researchgate.net/publication/349411703_Local_Self-Government_in_Estonia.

[5] Maeltsemees, S. (2021). The Restoration of Estonian Statehood and the Position of Local Self-Government in it. *Estonian Discussions on Economic Policy*, *29*(1), 29-30. Retrieved from https://ojs.utlib.ee/index.php/TPEP/article/view/18334.

[6] Vanags, E., & Vilka, I. (2006). Local Government in the Baltic States: Similar but Different. *Local Government Studies*, *32*(5), 623-637. https://doi.org/10.1080/03003930600896244.

[7] Vanagas, E., Seimuskane, L., & Vilka, I. (2006). The Development of Democracy and Local Governance in Latvia. In Szücs, S., Strömberg, L. (Eds.). *Local Elites, Political Capital and Democratic Development.* VS Verlag für Sozialwissenschaften, Wiesbaden. https://doi.org/10.1007/978-3-531-90110-7_6.

[8] King, G.J., Vanags, E., Vilka, I. & McNabb, D.E. (2004). Local Government Reforms in Latvia, 1990–2003: Transition to a Democratic Society. *Public Administration, 82*, 931-950. https://doi.org/10.1111/j.0033-3298.2004.00425.x.

[9] Kiurienė, V. (2020). Administrative supervision of local self-government in the Baltic States: A comparative View. *The Journal of Education, Culture and Society, 11*(2), 394-410. https://doi.org/10.15503/jecs20152.394.410.

[10] Šaparnienė, D., & Lazauskienė, A. (2012). Local Government in Lithuania. In Moreno, A. (Ed.) *Local Government in the Member States of the European Union: A Comparative Legal Perspective*. Madrid: INAP, Retrieved from https://www.researchgate.net/profile/Juraj-Nemec/publication/304680758_Slovakia/links/5a02c595a6fdcc55a1605fca/Slovakia.pdf.

[11] Auers, D. (2015). *Comparative Politics and Government of the Baltic States: Estonia, Latvia, and Lithuania in the 21st Century*. Palgrave Macmillan. https://doi.org/10.1057/9781137369970.

[12] Petryshyn, O.O. (2020). Local Government Reform: the Experience of Latvia. *Information and Law, 2*, 158-169. https://doi.org/10.37750/2616-6798.2020.2(33).208110.

[13] Young, D. (2016). *Local Self-Government in the Scandinavian and Baltic Countries: an Overview.* Stockholm: SKL International. Retrieved from https://salarinternational.am/media/documents/SALAR_International_LocalGovNordicCountries_English.pdf.

[14] Antonyuk, O.M. (2023). Analysis of the Experience of Legal Regulation of Decentralization of Power in European States: Achievements and Shortcomings. *Scientific Bulletin of the International Humanities University. Series: Jurisprudence, 63*, 52-56. https://doi.org/10.32841/2307-1745.2023.63.11.

[15] Chernezhenko, O. (2019). Local Self-Government Bodies in the Republic of Lithuania. *Entrepreneurship, Economy and Law, 2,* 151-155. Retrieved from https://pgp-journal.kiev.ua/archive/2019/2/30.pdf.

[16] Murtishcheva, A. (2024). Conceptual foundations and principles of legal regulation of decentralization in selected European countries and in Ukraine. *Access to Justice in Eastern Europe, 7*(3), 201-222. https://doi.org/10.33327/AJEE-18-7.3-a000317.

[17] Murtishcheva, A., & Bilyak, M. (2024). Empirical Experience of Developing Local Self-Government in Norway and Latvia. *Public Law, 1*, 5-14. https://doi.org/10.32782/2306-9082/2024-53-1.

[18] Fedorenko, V.L., & Chernezhenko, O.M. (2017). *Constitutional Models of Local Self-Government in the EU Member States, Switzerland and Ukraine.* Kyiv: Lira-K.

[19] Batanov, O.V., Martselyak, O.V., & Berlinguer, A. (Eds.). (2020). *Local Self-Government in Ukraine and Foreign Countries: Comparative Legal Aspects*. Kyiv: Osnova.

[20] Constitution of Ukraine. (June 28, 1996). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.
[21] Law of Ukraine No. 280/97-BP "On Local Self-Government in Ukraine". (May 21, 1997). Retrieved from https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80#Text.
[22] Estonian Law No. 119 "On the Organization of Local Government". (June 14, 1993). Retrieved from https://www.riigiteataja.ee/akt/110022026012.
[23] Law of Latvia No. 2022/215.1 "On Local Self-Government". (October 20, 2022). Retrieved from https://likumi.lv/ta/id/336956-pasvaldibu-likums.
[24] Law of the Republic of Lithuania No. I-533 "On Local Self-Government". (July 7, 1994). Infolex. Retrieved from https://www.e-tar.lt/portal/lt/legalAct/TAR.D0CD0966D67F?csrt=9526632297015052091.
[25] Surkov, O.O. (2017). An Approach to Defining the Essence of Defence Forces "Target Capability", "Actual Capability", and "Ability" Notions to Improve Strategic Planning Basics. *Collection of Scientific Works of the Center for Military-Strategic Research of the Ivan Chernyakhovsky National Defense University of Ukraine, 1*(59), 35-40. Retrieved from https://znp-cvsd.nuou.org.ua/article/view/125486/119940.
[26] Ros, O. (2019), Essence and concept of normative legal provision of institutional capacity of representative local bodies. *Investments: Practice and Experience, 18*, 97-100. https://doi.org/10.32702/2306-6814.2019.18.97.
[27] Bashtannyk, O.V. (2023). Institutional/Institutional Capacity of Institutions of the Political System as an Analytical Category AND Functional Aspect of Public Administration. *Public Management and Administration, 2*(80), 83-88. https://doi.org/10.32840/1813-3401.2023.2.15.
[28] Zakharov, T. (2024). Rethinking the Concept of "Institutional Capacity": European Integration Aspect. *Visnyk of the Lviv University. Series: Philos.-Political Studies, 55*, 292-299. https://doi.org/10.30970/PPS.2024.55.35.
[29] Marko, I.Yu. (2018). Analysis of the Concepts of "Capability", "Opportunity" and "Capability" and Proposals for their Application in Documents of the Security and Defense Sector of Ukraine. *Social development & Security, 3*(5), 76-86. http://doi.org/10.5281/zenodo.1403879.
[30] Kazyuk, Ya.M., & Wentzel, V.T. (2024). Financial Capacity of Territorial Communities as a Key Element in Ensuring the Implementation of the Powers of Local Self-Government Bodies. *Bulletin of Kherson National Technical University, 1*, 357-364. https://doi.org/10.35546/kntu2078-4481.2024.1.50.
[31] Law of Ukraine No. 157-VIII "On the Voluntary Amalgamation of Territorial Communities". (February 5, 2015). Retrieved from https://zakon.rada.gov.ua/laws/show/157-19#Text.
[32] Resolution of the Cabinet of Ministers of Ukraine No. 214 "On Approval of the Methodology for Forming Capable Territorial Communities". (April 8, 2015). Retrieved from https://zakon.rada.gov.ua/laws/show/214-2015-%D0%BF#Text.
[33] Order of the Ministry of Health of Ukraine No. 354 "On approval of the State Sanitary Norms and Rules "Sanitary and Anti-Epidemic Requirements for Newly Built, Restored and Reconstructed Healthcare Facilities" and Amendments to Certain Regulatory and Legal Acts of the Ministry of Health". (February 21, 2023). Retrieved from https://zakon.rada.gov.ua/laws/show/z0562-23/ed20230221#n33.
[34] Constitution of the Republic of Estonia. (June 28, 1992). Retrieved from https://www.riigiteataja.ee/akt/115052015002.
[35] Constitution of the Republic of Latvia. (February 15, 1922). Retrieved from https://likumi.lv/ta/id/57980-latvijas-republikas-satversme.
[36] Constitution of the Lithuanian Republic. (October 25, 1992). Retrieved from https://www.e-tar.lt/portal/lt/legalAct/TAR.47BB952431DA/asr.

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Safety Warnings: Do They Grant an Indulgence from Product Liability?[1]

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Abstract
This article examines whether safety warnings can excuse or neutralize product defects under strict product liability. It addresses a persistent tension at the heart of modern product liability law: whether risk may be shifted to consumers through disclosure, or whether certain risks must remain with the producer irrespective of warning. The analysis proceeds from the premise that product liability is organized around defectiveness rather than fault. Within the European Union, defectiveness is determined by reference to the level of safety the public is entitled to expect, taking into account all relevant circumstances, including the product's presentation. Safety warnings, therefore, form part of the defectiveness inquiry, but their precise legal function remains contested. To clarify this function, the article combines doctrinal analysis of European Union legislation and case law with comparative insights drawn from the United States, England, and Canada. Particular attention is paid to the tripartite distinction between manufacturing defects, design defects, and failure-to-warn defects, which, while not formally embedded in European Union law, provides an analytically useful framework. The main conclusion is that warnings cannot be considered a general basis for exemption from liability. They cannot cure manufacturing defects, as this would undermine the regime's strict character by replacing the right to a safe product with a mere right to be informed of risks. In the context of design defects, the role of warnings is more limited and conditional. Where a reasonable alternative design exists, a warning cannot substitute for a safer design. Only where risks are irreducible, and no safer design is feasible, may an adequate warning suffice to render the product non-defective. Even then, warnings remain an imperfect safety mechanism, constrained by their dependence on user attention and behaviour. The article concludes that warnings are a necessary but inherently limited tool of risk regulation. They inform the assessment of defectiveness

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and may affect the apportionment of responsibility, but they cannot legitimize avoidably unsafe products.

Keywords: *product liability; non-contractual liability; civil liability; safety warnings; adaptation to EU law; defectiveness.*

Попередження про небезпеку: чи дають вони індульгенцію від відповідальності за дефектну продукцію?

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Анотація

У статті розглянуто можливість попередження про ризики виправдати або нівелювати дефектність продукції в межах режиму суворої відповідальності за шкоду, завдану дефектом продукції. Це стосується проблеми, що лежить в основі сучасного права відповідальності за продукцію: чи може ризик бути перекладений на споживача шляхом розкриття інформації, чи ж певні ризики мають залишатися на стороні виробника незалежно від наявності попередження. Дослідження ґрунтується на тому, що недоговірна відповідальність за дефектну продукцію організована навколо категорії дефектності, а не вини. У праві Європейського Союзу дефектність визначається через рівень безпеки, на який суспільство вправі обґрунтовано розраховувати, зважаючи на всі релевантні обставини, серед яких – презентація продукції. Відтак попередження є складовим елементом оцінки дефектності, однак їх достеменне правове значення залишається дискусійним. З метою з'ясування ролі попереджень у статті поєднуються доктринальний аналіз законодавства та судова практика Європейського Союзу з порівняльно-правовими спостереженнями права Сполучених Штатів, Англії та Канади. Особливу увагу приділено трикомпонентному поділу дефектів на виробничі, конструктивні та інформаційні, який, хоча формально й не закріплений у праві Європейського Союзу, однак на практиці виконує важливу аналітичну функцію. Основний висновок полягає в тому, що попередження не можуть вважатися загальною підставою звільнення від відповідальності. Вони не можуть усунути виробничі дефекти, оскільки це підривало б саму природу суворої відповідальності, замінюючи право на безпечний продукт правом бути поінформованим про небезпеку. У випадку конструктивних дефектів роль попереджень є більш нюансною та залежить від обставин. Якщо існує розумна альтернативна конструкція, попередження не може

замінити собою безпечніший дизайн. Лише за відсутності технічно та економічно здійсненної альтернативи належне попередження може забезпечити відповідність продукту вимогам безпеки. Водночас попередження залишаються недосконалим інструментом забезпечення безпеки, ефективність якого залежить від уваги та поведінки користувача. У підсумку доводиться, що попередження є необхідним, але внутрішньо обмеженим засобом регулювання ризиків. Вони враховуються при оцінці дефектності та можуть впливати на розподіл відповідальності, однак не здатні легітимізувати продукцію, небезпечність якої могла бути усунена.

Ключові слова: *відповідальність за дефектну продукцію; недоговірна відповідальність; цивільна відповідальність; попередження про ризики; адаптація до права ЄС; дефектність.*

Introduction

Can a warning excuse a defective product? More precisely, can a producer escape liability by alerting consumers to a risk that materializes?

A simple example captures the problem. A consumer purchases a chocolate bar containing nuts. While eating it, he encounters a fragment of a nutshell and breaks a tooth. The packaging, however, states: "May contain nut shells". Does this warning shield the producer from liability?

The example reveals a structural tension at the heart of product liability: can risk be shifted to the consumer through disclosure, or does the law insist that certain risks remain with the producer?

Similar tensions arise in other everyday contexts. Consider contraceptives accompanied by a notice that they do not provide 100 percent protection. If failure occurs, does the warning preclude liability? Or take children's products containing small detachable parts, often labeled with warnings about choking hazards.

These examples demonstrate that the legal effect of warnings cannot be reduced to a simple rule. Their role depends on deeper structural features of product liability, in particular the concept of defectiveness and the allocation of risk between producer and consumer. The analysis that follows seeks to clarify these issues by examining the function and limits of safety warnings within the framework of strict liability.

Materials and Methods

This study employs a doctrinal legal research methodology, complemented by structured comparative analysis. The selection of methods is determined by the nature of the research question, which concerns the legal significance of safety warnings within the framework of strict product liability. As the inquiry turns on the interpretation, coherence, and normative implications

of legal rules rather than empirical behavioral patterns, doctrinal analysis constitutes the principal methodological approach.

The doctrinal method is implemented through the systematic identification, interpretation, and critical evaluation of primary and secondary legal sources. The primary normative basis of the research consists of European Union legislation, in particular Directive (EU) 2024/2853 on liability for defective products [1] and Regulation (EU) 2023/988 on general product safety [2]. These instruments are analyzed using both textual and teleological interpretation, with particular attention to the provisions governing defectiveness, product presentation, and the role of warnings. Recitals are treated as authoritative interpretative aids, enabling reconstruction of the legislative intent and the internal logic of the regulatory framework.

Case law analysis constitutes the second core component of the methodology. Judicial decisions are examined as independent sources of law that concretize and operationalize statutory standards. The sample of cases was formed purposively, based on two cumulative criteria: (1) doctrinal relevance to the problem of safety warnings and defectiveness, and (2) jurisdictional representativeness. The selected decisions span multiple legal systems – including EU law, English law, United States law, and Canadian law – and reflect key doctrinal developments such as the consumer expectations test, the patent danger rule, the learned intermediary doctrine, and the relationship between design defects and warnings. This approach allows the study to capture both vertical coherence (between legislation and judicial interpretation within the EU) and horizontal coherence (across different legal traditions).

Comparative legal analysis is employed throughout as both a method and an analytical framework. The comparison operates along two axes. First, a vertical comparison assesses the consistency between EU legislative provisions and their interpretation by the Court of Justice of the European Union (CJEU). Second, a horizontal comparison contrasts the EU approach with common law doctrines, particularly those developed in the United States, which historically influenced European product liability law. The comparative method serves a functional purpose: it illuminates underlying structural principles and clarifies the limits of warning-based risk allocation.

Secondary sources – including monographs, comparative treatises, and peer-reviewed articles – are used to contextualise the analysis within broader academic debate and to reconstruct competing doctrinal positions. These sources also support the critical evaluation of existing interpretations and the formulation of normative conclusions.

Answering that question requires working through several layers of analysis. The paper proceeds in five parts. The first establishes the foundational character of product liability as a regime of strict liability – one in which the producer's fault is irrelevant, and the defectiveness of the product is the operative criterion. This principle has deep roots in American common law and is firmly enshrined in European Union law, most recently in Directive (EU) 2024/2853 on liability for defective products [1]. The second part examines how defectiveness is defined under EU law, with particular attention to the consumer expectations test that lies at the heart of the regime. The third part introduces a conceptual framework developed in American tort law – the tripartite distinction between manufacturing defects, design defects, and instruction defects – which, although not formally adopted in the EU Directive, continues to influence European legal thinking and will prove indispensable to the analysis that follows. The fourth part turns to safety warnings themselves: their legal function, the conditions under which they are required, and the doctrines – including the patent danger rule and the learned intermediary rule – that govern their adequacy. The fifth and concluding part of the analysis brings these threads together to answer the research question directly.

The central argument developed in this article is that safety warnings do not operate as a blanket exemption from liability. Their effect is contingent and context-dependent. They form part of the broader assessment of defectiveness, but they cannot, as a rule, legitimize a product that fails to meet the level of safety the law demands. The analysis that follows demonstrates how this conclusion emerges from the structure of strict liability, the normative nature of the consumer expectation test, and the limits inherent in risk communication as a regulatory strategy.

Results and discussion

1. Product Liability as a Strict Liability

Product liability is, at its core, a regime of strict liability [3-7]. Strictness is its most distinctive and consequential feature, and it sets product liability apart from the general law of tort, which ordinarily conditions liability on proof of fault [8]. In a conventional negligence action, a claimant must establish not only that she suffered harm caused by the defendant's conduct, but that the defendant failed to exercise the standard of care that a reasonable person would have observed, [9, Art. 4:101 and 4:102]. Product liability dispenses with that requirement entirely. The producer's fault – or its absence – is beside the point. What matters is not how the product was made, but what the product is: whether it is defective. The substitution of defectiveness for fault is the axis around which the entire regime turns, [10, p. 77].

This principle is firmly enshrined in EU law and has been maintained without interruption from the original Product Liability Directive of 1985 [11] through to its successor, Directive (EU) 2024/2853 [1]. Recital 2 of the current Directive states in terms that "liability without fault on the part of economic operators remains the sole means of adequately addressing the problem of fair apportionment of risk inherent in modern technological production" [1, rec 2].

The idea that a producer should be liable for a defective product regardless of fault did not originate in European law. It was first articulated – and most influentially developed – in American common law, from which European legislators consciously drew when constructing the 1985 Directive. The development of product liability in Europe as an autonomous area of law came considerably later, prompted by mass product disasters and the growing recognition that traditional tort responses were inadequate to address them [12, p. 20].

The intellectual foundations of strict product liability were laid in two landmark California cases. The first Escola v. Coca Cola Bottling Co. [13], decided in 1944. The facts were straightforward: a waitress was injured when a bottle of Coca-Cola, which had been delivered to her employer and left undisturbed for over thirty-six hours, exploded in her hand as she moved it from a case to a refrigerator. The bottle broke into two jagged pieces and inflicted a serious laceration, severing blood vessels, nerves, and muscles of the thumb and palm. The majority decided the case on conventional negligence principles. Justice Traynor, concurring, went further – and in doing so articulated what would become the foundational rationale for strict product liability.

In his concurring opinion Traynor J argued that negligence should no longer be the basis of a plaintiff's right to recover in such cases, and that a manufacturer ought to bear absolute liability whenever a defective product it placed on the market causes injury. The justification was grounded not in the producer's moral blameworthiness but in the practical logic of risk allocation. Three considerations drove the analysis. The producer is better positioned than any consumer to anticipate dangers, to guard against defects recurring, and to take corrective action across its entire production process. The injured consumer, by contrast, lacks any meaningful ability to inspect the product, to understand the manufacturing process, or to identify the source of a defect after the fact. And the cost of product-related injuries, if borne by the producer, can be spread across the price of goods and absorbed as an ordinary cost of doing business – a loss-spreading function that the individual victim is wholly unable to perform. On this reasoning, strict liability was not merely fair; it was the rational allocation

of a risk that is constant and general to the party best placed to manage and insure against it.

The second foundational decision is Greenman v. Yuba Power Products, Inc. [14], decided in 1963, in which the California Supreme Court – now with Traynor CJ writing for the majority – formally adopted strict liability in tort for defective products. The plaintiff had been seriously injured when a piece of wood flew out of a Shopsmith combination power tool and struck him on the forehead. Expert evidence established that inadequate set screws had been used to hold parts of the machine together, so that normal vibration caused the tailstock to move and release the workpiece. The Court held that proof of negligence was unnecessary. Reaffirming and extending the reasoning of Escola, it grounded strict liability in a straightforward principle of cost allocation: the losses caused by defective products should be borne by those who place such products on the market, not by the individuals who are powerless to protect themselves against them. A consumer who uses a product in the manner it was intended to be used, and is injured by a defect of which she was unaware, has done everything that could reasonably be expected of her. The producer, having placed the product into commerce and being best situated to know and address its dangers, is the appropriate party to bear the consequences when it falls short of the safety it implicitly represents.

The rationale that emerges from these decisions – and that underlies the EU legislative framework as well – rests on three interlocking considerations. The first is informational asymmetry: the producer knows, or is best placed to know, the risks inherent in its product, while the consumer does not and cannot. The second is risk management capacity: the producer is able to anticipate hazards, improve manufacturing processes, and take preventive measures that the consumer is powerless to take. The third is loss-spreading: the producer can insure against the risk of product-related injury and distribute that cost across the price of its goods, converting what would otherwise be a catastrophic individual loss into a diffuse and manageable social cost.

2. Defining Defectiveness

If product liability dispenses with fault, it must rest on a different organizing concept. That concept is *defectiveness* [12, p. 50; 15, Ch. 10]. It is the pivotal criterion that triggers liability and, at the same time, the principal filter through which claims are assessed. Yet, despite its centrality, defectiveness remains a nuanced and, at times, elusive notion [12, pp. 50-61; 16-18].

The starting point is the statutory definition. Under Art. 7(1) of Directive (EU) 2024/2853, a product is defective "where it does not provide the

safety that a person is entitled to expect or that is required under Union or national law". This formulation reflects a deliberate choice. The Directive does not ask whether the producer acted carefully, nor whether the product performs its intended function. Instead, it focuses squarely on *safety*. As the recitals clarify, the relevant benchmark is not fitness for purpose, but the absence of the level of safety that the public is entitled to expect, [1, rec. 30].

This distinction is not merely semantic. A product may be perfectly unfit for its purpose without being defective in the sense of product liability. A blunt kitchen knife is a familiar illustration: it fails to cut, yet it does not endanger the user. By contrast, a knife whose blade detaches during normal use is defective, because it creates an unacceptable risk of harm, [12, p. 50]. The law of product liability is therefore not concerned with disappointed expectations of utility, but with compromised expectations of safety.

In EU the core test underpinning this assessment is commonly described as the *consumer expectation test*. However, that label requires careful handling. The expectations in question are neither subjective nor empirical. The Court of Justice in *Boston Scientific Medizintechnik* (Joined Cases C-503/13 and C-504/13), emphasised that the benchmark is not the expectations of a particular user, but the *reasonable expectations of the public at large,* [19, paras. 37-38]. Therefore, the standard is *objective and normative* [12, pp. 50-53]. Courts are not bound by what consumers actually expect in practice, nor by prevailing market standards. Instead, they must determine – often with a considerable margin of appreciation – the level of safety that *ought* to be expected in a given context.

This normative dimension cuts both ways. On the one hand, it prevents liability from being driven by unrealistic or uninformed expectations. On the other, it allows courts to demand higher levels of safety than those reflected in existing practices or regulatory minima. The standard is thus dynamic. It evolves with technological progress, societal attitudes to risk, and the nature of the product in question.

Article 7(2) of the Directive provides a non-exhaustive list of circumstances to be taken into account when assessing defectiveness. Two features of this list merit particular attention for the purposes of the present analysis. The first is the inclusion of the product's presentation – which, as the commentary confirms, must be understood broadly to encompass marketing, advertising, packaging, instructions, and warnings [12, p. 56]. The manner in which a product is communicated to the public is therefore directly relevant to the assessment of defectiveness: inaccurate, incomplete,

or missing information will be taken into account and may, in appropriate cases, itself render a product defective [12, pp. 56-57]. The second is the reference to "reasonably foreseeable use", which Art. 7(2)(b) and Recital 31 make plain encompasses not only the product's intended use but also foreseeable *misuse* that is not unreasonable in the circumstances – such as the foreseeable behaviour of a distracted machine operator, or the foreseeable behaviour of children.

A useful bridge between the Product Liability Directive and the broader EU safety framework is provided by Regulation (EU) 2023/988 on general product safety [2]. While the Directive determines when a producer is liable, the Regulation defines what it means for a product to be safe in the first place. Under Art. 3(2), a product is safe if, under normal or reasonably foreseeable conditions of use, it presents no risk or only minimal risks compatible with its use. The assessment is similarly contextual and multifactorial, taking into account, inter alia, the product's characteristics, presentation, instructions, warnings, and the categories of consumers exposed to it (Art. 6). This alignment is not coincidental. The factors used to assess safety under the Regulation closely mirror those relevant for determining defectiveness under Art. 7 of the Directive. The two instruments thus operate in tandem: the Regulation articulates *ex ante* safety expectations, while the Directive enforces them ex post through liability. This conceptual continuity reinforces the centrality of safety – rather than fault – as the organizing principle of EU product liability law and provides an important interpretative lens for evaluating the role of warnings within that framework.

The notion of *risk* is particularly instructive for the present inquiry. Regulation (EU) 2023/988 defines risk as "the combination of the probability of an occurrence of a hazard causing harm and the degree of severity of that harm" (Art. 3(4)). This definition makes clear that safety is not an absolute concept, but one that depends on both the likelihood and the gravity of potential harm. The case law of the Court of Justice of the EU (CJEU) confirms that this calibration has direct implications for the standard of safety expected. In *Boston Scientific Medizintechnik*, concerning implantable cardioverter defibrillators, the Court emphasised that, given the function of such devices and the vulnerability of the patients concerned, the safety expectations are particularly high, [19, para. 39]. The logic is straightforward: the greater the potential harm, the more demanding the safety standard.

A similar approach can be observed in common law, where the Supreme Court of Canada in *Hollis v. Dow Corning Corp.* [20] voiced the same idea in the context of breast implants.

The Directive (EU) 2024/2853 resists any mechanical reliance on regulatory compliance. The newly introduced "safety required by law" test might suggest that a breach of safety rules automatically renders a product defective. Yet, as Rimkutė has shown, a closer reading reveals a more calibrated approach. Where a product violates mandatory safety requirements that are directly linked to the harm suffered, this may establish defectiveness or at least give rise to a presumption thereof, [10, pp. 84-85]. In other situations, compliance or non-compliance with regulatory standards is merely one factor among many. Not every regulatory breach translates into a lack of safety, and conversely, compliance does not guarantee that a product meets the level of safety the public is entitled to expect.

3. Three Types of Defects

The analysis of whether a safety warning can make up for a product defect depends, in no small part, on the type of defect in question. EU law, as seen above, does not formally distinguish between different categories of defectiveness – the Directive operates through the single, unified criterion of the safety the public is entitled to expect. Yet the categories developed in American tort law have not remained entirely alien to European legal thinking.

American tort law distinguishes between three types of product defect: manufacturing defects, design defects, and instruction defects (the last of which is also referred to as warning defects or failure-to-warn) [15, Ch. 10-12; 21, Ch. 5-8]. This tripartite framework was developed through case law and has since been expressly codified in section 2 of the Restatement (Third) of Torts: Products Liability (1998). Each category captures a distinct mode of product failure and attracts a distinct legal test.

A *manufacturing defect* arises when a specific unit of a product departs from its intended design, even though all possible care was exercised in its preparation and marketing [22, para. 39]. The product, as designed, may be perfectly safe; the problem lies in its execution. A bottle of Coca-Cola that explodes in a waitress's hand is the paradigm case: the design of the bottle was not at fault, but this particular unit was defective in manufacture. The applicable test is straightforward: the product failed to conform to its own intended specifications.

It is in the context of manufacturing defects that the strict character of product liability reveals itself most starkly. The cause of the manufacturing defect is legally irrelevant. Whether the defect arose from an error in the production process, from defective raw materials supplied by a third party, or from some unknown cause that cannot be identified at all – the producer

is liable. As Justice Traynor observed in his celebrated concurrence in *Escola*, the injury from a defective product "does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a part whose defects could not be revealed by inspection, or unknown causes that even by the device of *res ipsa loquitur* cannot be classified as negligence of the manufacturer" [13]. The producer cannot exculpate itself by demonstrating that it exercised all possible care. Because the defect is measured against the manufacturer's own design, there is no balancing of costs and benefits, nor any inquiry into whether a safer alternative was available. Liability is, in this respect, as strict as strict liability can be.

A *design defect* arises when the product conforms precisely to its intended design, but the design itself is unreasonably dangerous. Unlike a manufacturing defect, which affects individual units, a design defect inheres in every unit of the product – it is a systemic rather than a one-off failure. The definition in the Third Restatement identifies a design defect as arising when the foreseeable risks of harm imposed by the product could have been reduced or avoided by a reasonable alternative design, and the absence of that alternative renders the product not reasonably safe [22, para. 39]. Two tests have been developed in American jurisprudence to establish design defectiveness. The first is the *consumer expectations test:* a product is defective in design if it fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. The second is the *risk-utility test:* even if the product meets ordinary consumer expectations, it may nonetheless be defective in design if the plaintiff can show that its design caused the injury and the defendant cannot establish that the benefits of the challenged design outweigh its risks Barker v. Lull Engineering Co. [23]. California courts, in Barker, articulated these as alternative rather than cumulative tests – a plaintiff may succeed under either.

Embedded within the risk-utility test is the doctrine of *reasonable alternative design* [24; 25], which has become the dominant approach in American design defect litigation. The doctrine holds that a plaintiff alleging a design defect must ordinarily demonstrate that a safer alternative design was available and feasible – technically and economically – at the time of manufacture. This requirement prevents design defect liability from collapsing into a form of absolute liability: the mere fact that a product causes harm does not establish that its design was defective if no practicable safer design existed. Conversely, where a reasonable alternative design was available, and the manufacturer chose not to adopt it, the manufacturer cannot escape liability by warning users of the dangers inherent in the existing design.

An *instruction defect*, or failure-to-warn, arises when a product – sound in both manufacture and design – is nonetheless rendered unsafe by the absence or inadequacy of warnings or instructions concerning its dangers. This category acknowledges that even a properly manufactured and well-designed product may pose risks of which the user is unaware and against which a warning would enable the user to protect herself. The applicable test focuses on whether the manufacturer knew or should have known of the relevant risk, whether the risk was latent rather than obvious, and whether an adequate warning would have been provided to a reasonable user. These requirements are examined in greater detail in Part 4.

Neither the 1985 Directive nor the new one adopts this tripartite structure. The English court in A v National Blood Authority made this explicit, rejecting both parties' attempts to characterise the infected blood at issue as either a manufacturing or design defect, and holding that "there is no place for them in the Directive" [22, para. 39]. The court instead formulated its own distinction – between *standard products* and *non-standard products* – finding this a more tractable framework for applying Art. 6 of the 1985 Directive. A non-standard product differs from the product as the manufacturer intended it to be; a standard product conforms to the manufacturer's design. This distinction, as Burton J acknowledged, effectively captures much of the same ground as the American manufacturing/design dichotomy, without importing the doctrinal baggage that accompanies it in US jurisprudence [22, para. 41].

Yet the influence of American categories has not been entirely excluded. As Machnikowski's commentary observes, notwithstanding the court's formal rejection of the tripartite approach, "legislative and judicial practice in the Member States is influenced by the American approach" [12, p. 53]. In practice, courts in EU member states tend to apply the consumer expectations test to manufacturing defects, while bringing additional considerations – including elements of a risk-utility analysis – to bear on design and instruction defects [12, p. 53]. The categories thus operate informally, shaping the practical application of the unified EU standard even where they have no formal doctrinal standing.

This matters for the present analysis. The question of whether a safety warning can make up for a product defect does not admit of a single answer if the type of defect is left unspecified. The answer differs – sharply and for principled reasons – depending on whether one is dealing with a manufacturing defect, a design defect, or a warning defect.

4. The Role of Safety Warnings

Safety warnings are one of the circumstances to be taken into account when assessing the defectiveness of a product under EU law. They are most

directly relevant to what American tort law would classify as instruction defectiveness – the third category of the tripartite framework examined in the preceding section. Yet warnings occupy an ambiguous position in the law more generally. A product that carries no warning of a known and non-obvious danger may be defective for that very reason. At the same time, a warning is not a pass permitting the producer to place an unsafe product on the market. Understanding the role of warnings in product liability, therefore, requires examining, in turn, the conditions under which warnings are legally required, the standards of adequacy they must meet, and the inherent limitations of warnings as an instrument of consumer protection.

4.1. Warnings as a Component of the Product

Under Regulation (EU) 2023/988 on general product safety, manufacturers are required to ensure that their products are accompanied by clear instructions and safety information in a language accessible to consumers, wherever the product cannot be safely used without such information [2, Art. 9(7)]. Warnings feature expressly among the aspects relevant to assessing whether a product is safe [2, Art. 6(1)(d)]. This reflects a broader principle confirmed in the academic commentary: the presentation of a product must be taken in its broadest sense, encompassing not only its physical design but also its marketing, packaging, labeling, instructions, and warnings, and the product must be assessed as a whole in its entirety [12, p. 56]. Inaccurate, incomplete, or altogether absent information is taken into account in the safety assessment and may, in appropriate cases, itself be the ground on which a product is found defective. In the case of inherently dangerous products – pharmaceuticals, complex machinery, products intended for vulnerable groups – information about foreseeable risks is essential to the safety assessment, and its absence will weigh heavily against the producer [12, p. 56-57].

4.2. The Patent Danger Rule

A warning need not be given in respect of dangers that are patent, open, and obvious to any reasonable user. This is the *patent danger rule*, and its rationale is straightforward: a warning that tells the user nothing she did not already know adds nothing to her safety. Where a danger is readily apparent as a matter of common sense, no duty to warn arises because no benefit would be gained by requiring one. Conversely, the open and obvious defence should not apply where there are aspects of the hazard that are concealed or not reasonably apparent to the user.

Although *Darby v National Trust* [26] arose outside the products liability context, it remains one of the clearest judicial illustrations of the patent

danger principle in English tort law. In that case, the claimant's husband drowned while swimming in an unsupervised pond on National Trust land, and his widow brought a claim under the Occupiers' Liability Act 1984, arguing that the Trust had failed in its duty of care towards recreational visitors. The Court of Appeal dismissed the claim, holding that the risk of drowning in a natural pond was a patent, self-evident danger which any reasonable adult would recognise without the need for a warning. "One or more notices saying 'Danger No Swimming' would have told Mr Darby no more than he already knew" [26, para. 26]. Therefore, the Court found that "It cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so, the coast would have to be littered with notices in places other than those where there are known to be special dangers which are not obvious" [26, para. 27].

About products specifically, the rule is clearly illustrated by *Bogle v. McDonald's Restaurants Ltd.* [27], in which the English court considered claims brought by consumers who had suffered scalding injuries from hot drinks served at McDonald's restaurants. The drinks were served at temperatures between approximately 79 and 90 degrees Celsius – temperatures at which contact with skin for little more than a second would cause a deep-thickness burn. The claimants alleged, among other things, that McDonald's had been negligent in failing to warn of the risk posed by such temperatures. The court rejected this. Whether McDonald's had been negligent in failing to warn depended on an objective assessment of all the circumstances, including the customers' own appreciation of the risk. The court was satisfied that those who purchased coffee and tea could reasonably be taken to know that such drinks are served at temperatures capable of causing serious injury if spilled – this was a risk the public already appreciated. There was accordingly no duty to warn of a risk the consumer already understood.[2]

4.3. Requirements of an Adequate Warning

The content and intensity of the duty to warn vary with the level of danger the product presents in ordinary use. Where significant dangers attend the ordinary use of a product, a general warning will rarely suffice; the warning must be sufficiently detailed to give the consumer a full indication of each specific danger that may arise. The more serious the risk, the more exacting the requirement.

This principle, together with the related "learned intermediary" rule, is vividly illustrated by the decision of the Supreme Court of Canada in *Hollis v. Dow Corning Corp* [20]. In 1983, Ms Hollis underwent breast implant

[2] Yet compare the American case of *Liebeck v. McDonald's Restaurants, P.T.S., Inc.* [28].

surgery to correct a congenital deformity, acting on the advice of her surgeon, Dr Birch, who gave her no warning of the risks of post-surgical complications or of the possibility that the implants might rupture inside her body. In 1985, she noticed a lump and pain in her right breast; a subsequent operation revealed that the right implant had ruptured and that silicone gel had migrated. Her condition worsened after the removal of the implants. Crucially, Dow Corning had been aware since at least 1979 that implant ruptures could cause adverse reactions from loose gel, yet its warnings to physicians in 1976 and 1979 made no reference to these consequences, and attributed rupture only to abnormal squeezing or trauma. The Court of Appeal found Dow liable for failing to warn adequately of the risk of rupture, and the Supreme Court upheld that finding.

The Court emphasized that all warnings must be reasonably communicated and must clearly describe the specific dangers arising from the ordinary use of the product. For medical products designed for bodily implantation – given the intimate relationship between such products and the consumer's physical integrity – the standard of care in warning is necessarily high, imposing a heavy obligation on the manufacturer to ensure that all relevant risks are clearly, completely, and currently disclosed.

Hollis also examined the "learned intermediary" rule, which operates as an exception to the general principle that the duty to warn runs directly from the manufacturer to the ultimate consumer. In certain circumstances – typically where a product is highly technical and intended to be used only under expert supervision, or where the structure of its distribution makes direct communication with the end user unrealistic – a manufacturer may discharge its informational duty by warning a knowledgeable intermediary rather than the consumer. The paradigm case is the prescription pharmaceutical dispensed through a physician: the manufacturer needs to warn only the prescribing doctor, who acts as a learned intermediary between manufacturer and patient. The rationale is that the intermediary is best placed to assess both the properties of the product and the susceptibilities of the individual user, and to transmit appropriate information accordingly.

The rule is, however, strictly conditioned. It presupposes that the intermediary is genuinely learned – fully apprised of all relevant risks to a degree approximating the manufacturer's own knowledge. A manufacturer cannot claim the benefit of the rule where it has itself provided inadequate information to the intermediary, for that would defeat the very purpose the rule is designed to serve: ensuring that the consumer is fully informed. In *Hollis*, Dow Corning's warnings to Dr Birch were materially deficient –

understating both the likelihood and the consequences of rupture – and the learned intermediary rule accordingly provided no shelter. The primary duty to give a clear, complete, and current warning remained with the manufacturer, and it had not discharged it.

4.4. The Continuing Duty to Warn and Post-Sale Modifications

The duty to warn is a *continuing one*, extending not only to dangers known at the time of sale but also to dangers discovered after the product has been sold and delivered. It does not crystallize at the moment of sale and expire thereafter; it persists as new dangers come to the manufacturer's attention and as the product moves through the chain of distribution and use. This has particular significance in cases where a product is modified after sale in ways that create or amplify danger.

The point is strikingly illustrated by *Liriano v. Hobart Corp.* [29]. Luis Liriano, a seventeen-year-old employee, lost his right hand and forearm while feeding meat into a commercial meat grinder from which the safety guard had been removed by his employer. The grinder was manufactured and sold by Hobart in 1961, with a safety guard in place. Hobart subsequently became aware that a significant number of purchasers were removing the guards, and began issuing warnings about this danger from 1962, the year after the machine in question was manufactured and before it was acquired by Liriano's employer. At the time of the accident, the guard had been removed, Hobart had known of such removals, and the specific machine carried no warning. The district court dismissed Liriano's design defect claims but allowed his failure-to-warn claim to proceed; the jury found Hobart liable for failing to warn, apportioning five per cent of liability to Hobart and ninety-five per cent to the employer.

The New York Court of Appeals held that manufacturer liability may exist under a failure-to-warn theory in cases in which the substantial modification defence would preclude liability under a design defect theory. The reasoning was instructive. While it may be impossible to design a product to forestall all foreseeable post-sale modifications, the burden of warning against the dangers of such modifications is considerably lighter. The duty to warn is focused principally on the foreseeability of the risk and the adequacy and effectiveness of the warning – a far less demanding enquiry than the cost-benefit analysis required by a design defect claim. Hobart knew that guards were being removed; it was the party best placed to learn of such modifications and to pass warnings along the distribution chain. That knowledge generated a corresponding duty to warn, and its failure to affix any warning to the machine in question meant that duty went unmet.

4.5. The Inherent Limitations of Warnings

Even where a duty to warn exists and has been complied with, warnings are an imperfect instrument of consumer protection. Their efficacy as a means of preventing injury is inherently constrained, and this constraint has direct doctrinal consequences [30].

Twerski, Weinstein, Donaher, and Piehler identified the fundamental problem with clarity in their influential study of the use and abuse of warnings in products liability litigation [31, p. 509]. Warnings and knowledge of obvious dangers are of value only to users who are and can be attentive to them. But many product-related injuries arise precisely because of the inadvertent or impulsive acts of users who trip, fall, or momentarily lapse into forgetfulness. One of the principal functions of safety features – built into the design of the product itself – is to guard against exactly these foreseeable human failures. A warning cannot perform that function. It is addressed to the attentive, the informed, and the deliberate user; it has nothing to offer the user in the grip of an instinctive reaction, a moment of inattention, or a lapse of memory.

This does not mean that warnings are irrelevant to the reduction of risk. They often can and do bring the risk level down to an acceptable level, and in some cases, a well-crafted warning will be sufficient to render a product safe for its intended use [31, p. 509]. But warnings should not become the only focus of a product liability case. Where design can sharply curtail the level of danger at insignificant cost, the design modification is always the preferred alternative. The warning, in such a case, is not a substitute for a safer design – it is, at most, a complement to it.

The doctrinal picture that emerges from these authorities is therefore as follows. Warnings are a necessary but not sufficient condition of product safety. They need not address dangers that are patent. They are required wherever a product carries a non-obvious risk of which the consumer is unaware; they must be clear, specific, and proportionate in detail to the severity of the danger; and the duty to provide them is a continuing one. They may, in defined circumstances, be directed to a learned intermediary rather than the consumer directly. But they do not – and cannot – convert an otherwise unsafe product into a safe one simply by disclosing a risk. Whether a warning can go further still, and actually substitute for a product defect so as to defeat a liability claim, is the question to which the final section now turns.

5. Can Safety Warning Make Up for Manufacturing or Design Defects?

The preceding sections have established the architecture within which the central question of this paper must be answered. Product liability is a

regime of strict liability in which defectiveness, not fault, is the operative criterion. Defectiveness is assessed by reference to the safety the public is entitled to expect, taking into account the presentation of the product in its entirety, including any warnings accompanying it. Warnings are a legally recognized and in many cases, legally required component of a safe product, but they are an imperfect instrument whose efficacy is inherently constrained. The question that remains is the most important one: can a safety warning make up for a (another) product defect – and if so, under what conditions?

The answer is not uniform. It depends critically on the type of defect involved. As the analysis of the preceding sections has shown, manufacturing defects and design defects are conceptually distinct modes of product failure, and the role that a safety warning can play in relation to each is governed by different considerations and leads to different legal outcomes.

5.1. Safety Warning and Manufacturing Defect

A safety warning can never make up for a manufacturing defect. The proposition follows directly and necessarily from the strict character of product liability, and no departure from it is sustainable in principle.

A manufacturing defect, as established in Part 3, arises when a specific unit of a product departs from its intended design. The producer is liable because the product it placed on the market was not the product it intended to place on the market – it was, in the only sense that matters for the Directive, unsafe.

To permit the producer to escape that liability by pointing to a warning would be to negate the very essence of strict liability. If the producer could defeat a manufacturing defect claim by demonstrating that the product carried a warning – even a warning of the precise risk that materialized – the consumer's right to a safe product would be replaced by a right to be informed of the risk of receiving an unsafe one.

Recital 31 of Directive (EU) 2024/2853 confirms this analysis. It states in terms that "warnings or other information provided with a product cannot be considered sufficient to make an otherwise defective product safe, since defectiveness should be determined by reference to the safety that the public at large is entitled to expect" [1, rec 31]. The Directive is equally explicit that liability "cannot be avoided simply by listing all conceivable side effects of a product". These formulations are unequivocal: the presentation of a product, however comprehensive, however detailed, however carefully crafted, does not cure a defect. It is one circumstance among several relevant to the safety assessment; it is not a defence.

Return to the leitmotif example with which this paper opened. A chocolate bar carries the warning: "May contain nut shells". A fragment of shell is present in the bar and damages the consumer's tooth. The shell is not a feature of the bar's design – it is a contaminant, a departure from what the product was intended to be. It is, in the language of *National Blood Authority* case, a non-standard product: one that differs from the standard product the manufacturer intended to produce. The warning on the packaging cannot change that. The producer is liable because it placed a defective product on the market. The warning is beside the point.

5.2. Safety Warnings and Design Defects

The position in respect of design defects is more nuanced, and it is here that warnings may, in defined and demanding circumstances, play a more significant legal role.

As established in Part 3, the test for design defectiveness under US law – and the analogous enquiry under the EU consumer expectations test – asks whether the risks of harm inherent in the design could have been reduced or avoided by a reasonable alternative design. It is in the relationship between this enquiry and the role of warnings that the doctrinal complexity lies.

Machnikowski's commentary identifies the core principle with precision: whether a warning can render an otherwise unsafe product safe is not a question that admits of a uniform answer. In some cases, the provision of adequate information and warnings may be sufficient to bring the product within the safety expectations the public is entitled to hold, on the basis that the more information is provided to the targeted public, the lower the safety expectations that group may reasonably be expected to retain [12, p. 57]. In other cases – and this is the more common outcome – a warning will not suffice, because the legitimate safety expectations of the public remain higher than the product, even with its warning, is capable of meeting [12, p. 57-58].

The decisive criterion, therefore, is whether a reasonable alternative design was available. Where no reasonable alternative design existed – where the product could not, given the state of technical knowledge and without disproportionate cost, have been made safer – a warning of the residual risk may be sufficient to discharge the producer's obligations. In such a case, the warning is not covering up a remediable defect; it is communicating an irreducible risk inherent in a design that could not have been improved upon. A producer of a condom that carries a clear and accurate statement that the product does not guarantee complete protection against pregnancy or disease is not thereby admitting a remediable defect; it is disclosing an

inherent limitation that no alternative design could have eliminated. The warning, in such a case, is a legitimate and legally sufficient response to the risk.

This conclusion is, however, subject to a demanding condition: the warning must itself be adequate. It must meet all of the requirements identified in Part 4 – it must be clear, specific, and sufficiently detailed to give the consumer a full understanding of the risk in question; it must be proportionate to the severity of the danger; and it must be communicated to the person who will actually be exposed to the risk, whether directly or, where the learned intermediary rule applies, through an appropriately informed professional. A warning that is vague, incomplete, or buried in a document the consumer is unlikely to read will not suffice.

Where, on the other hand, a reasonable alternative design was available– where the producer could have redesigned the product to eliminate or substantially reduce the risk at proportionate cost, and chose not to – a warning cannot substitute for that safer design. This follows from the same logic that underlies the strict character of product liability. The producer who had the means to make its product safer and declined to do so cannot discharge its responsibility to the injured consumer by pointing to a label. Recital 31 of the Directive confirms that the assessment of defectiveness takes into account the presentation of the product, but that warnings cannot render an otherwise defective product safe. Where a reasonable alternative design existed, the product remains defective notwithstanding any warning, because the public is entitled to expect the safer version that was achievable. As the academic commentary recognizes, a warning is insufficient where it is possible to produce a safer product without extra financial burden and without affecting the utility of the product [12, pp. 57-58].

This is precisely the reasoning that animated the Massachusetts Supreme Judicial Court in *Uloth v. City Tank Corp*. [32]. The plaintiff was a refuse collection worker who lost his foot after it was caught in the shear point of a compaction mechanism on a refuse collection vehicle while he stepped onto the rear platform during the packing cycle. The defendants argued that their primary obligation was to warn of the danger, and that this discharged their responsibility entirely. The court declined to accept that proposition. A warning, it acknowledged, may in some cases reduce the likelihood of injury – but it cannot absolve the manufacturer or designer of all responsibility for the safety of the product where a modification to the design would have prevented the harm. The court was particularly attentive to the circumstances in which warnings fail altogether: where the user has no real alternative to engaging with the dangerous product, where the injury

arises from an instinctive reaction or a momentary lapse of attention, or where the risk manifests itself before any conscious response to a warning is possible. In all such cases, the warning is not merely insufficient – it is irrelevant to the outcome. The design modification, had it been made, would have prevented the injury regardless of the user's attentiveness. The warning could not have done the same. As the court stated plainly, where a slight change in design would prevent serious or fatal injury, the designer may not avoid liability simply by warning of the possible harm.

5.3. The Relevance of Warnings to Comparative Fault

The conclusion that a warning cannot substitute for a remediable design defect does not mean that warnings become legally irrelevant wherever a design defect claim succeeds. On the contrary, a warning may remain highly material in a distinct and important register: that of comparative fault (See: [33; 34]).

Article 13(2) of Directive (EU) 2024/2853 provides that the liability of an economic operator may be reduced or disallowed where the damage is caused both by a defect in the product and by the fault of the injured person or of any person for whom the injured person is responsible. Where a product carries an adequate safety warning that the injured person read, or ought to have read, and the injured person nonetheless proceeded to use the product in a manner the warning expressly cautioned against, that conduct may constitute contributory fault on the part of the injured person. In such circumstances, the liability of the economic operator – though not extinguished – may be reduced proportionately.

This is a significant qualification. A warning that cannot cure a design defect may nonetheless affect the apportionment of responsibility for the injury that results from it. The producer who designs a product with a remediable defect and fails to adopt the available safer design remains liable; but if the injured person disregarded a clear and adequate warning and acted negligently in doing so, the producer's liability may be reduced to reflect that shared responsibility. The warning, in this way, shifts from being a putative defence against liability to being a relevant factor in determining the extent of that liability.

The practical consequence is that producers operating under EU law have a dual incentive to provide adequate warnings even where a design defect may subsist. The first incentive is the possibility – in the narrow case where no reasonable alternative design exists – that adequate warnings may avert a finding of defectiveness altogether. The second is the more generally applicable possibility that adequate warnings, even where they do not defeat the defectiveness finding, may reduce the damages payable

by demonstrating that the injured person had been put on notice and bore some share of responsibility for the outcome.

Conclusion

The central question of this paper – do safety warnings exonerate the producer of a defective product from liability – can be answered as follows.

In the case of a manufacturing defect, the answer is no. To hold otherwise would dissolve the very foundation of the strict liability regime.

In the case of a design defect, the answer is more graduated. Where no reasonable alternative design was available and where the warning provided is genuinely adequate in content, clarity, and communication, the warning may be sufficient to bring the product within the safety expectations the public is entitled to hold, and no defectiveness finding will follow. Where, however, a reasonable alternative design was available, a warning cannot substitute for it: the product remains defective, and the producer remains liable. In that case, the warning is not irrelevant – it may bear on the question of comparative fault under Art. 13(2) of the Directive, potentially reducing the quantum of damages if the injured person disregarded it negligently. But it does not, and cannot, serve as an indulgence absolving the producer of responsibility for the harm its remediable design has caused.

The image with which this paper began captures the point neatly. A warning that a chocolate bar may contain nut shells cannot excuse the producer who places a nut shell in the bar. The consumer is entitled to a product that conforms to what it was intended to be, not merely to advance notice that it might not.

References

[1] Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on Liability for Defective Products and Repealing Council Directive 85/374/EEC (Text with EEA relevance). (2024). *Official Journal of the European Union, L*.

[2] Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on General Product Safety, Amending Regulation (EU) No. 1025/2012 and Directive (EU) 2020/1828, and Repealing Directive 2001/95/EC and Directive 87/357/EEC. (2023). *Official Journal of the European Union, L, 135*, 1-51.

[3] Adler, G.J. (1974). Strict Products Liability: The Implied Warranty of Safety, and Negligence with Hindsight as Tests of Defect. *Hofstra Law Review, 2*(2), Article 9, 581-604.

[4] Ausness, R.C. (2009). Product Liability's Parallel Universe: Fault-Based Liability Theories and Modern Products Liability Law. *Brooklyn Law Review, 74*(3), 635-667.

[5] Geistfeld, M. (2021). Strict Products Liability 2.0: The Triumph of Judicial Reasoning over Mainstream Tort Theory. *Journal of Tort Law, 14*, 403.

[6] González Castillo, J. (2024). Products Liability in Europe and the United States. *Revista Chilena de Derecho, 39*(2), 277-296.

[7] Priest, G.L. (1989). Strict Products Liability: The Original Intent. *Cardozo Law Review, 10*, 2301-2327.

[8] Karnaukh, B. (2018). Fault in Tort Law: Moral Justification and Mathematical Explication. *Problems of Legality, 141*, 54-64. https://doi.org/10.21564/2414-990x.141.126813.
[9] European Group on Tort Law. (2005). *Principles of European tort law: Text and commentary*. Springer.
[10] Rimkutė, D. (2025). The new EU Product Liability Directive: Doctrinal Analysis. *Access to Justice in Eastern Europe, 8*(Spec), 74-97.
[11] Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products. (1985). *Official Journal of the European Communities, L 210*, 29-33.
[12] Machnikowski, P. (Ed.). (2016). *European Product Liability: An analysis of the State of the art in the Era of New Technologies*. Intersentia.
[13] *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (Supreme Court of California, 1944).
[14] *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (Supreme Court of California, 1963).
[15] Fairgrieve, D., & Goldberg, R. S. (2020). *Product Liability* (3rd ed.). Oxford University Press.
[16] Borghetti, J.-S., Santos Silva, M., Fairgrieve, D., del Olmo Garcia, P., Keirse, A.L.M., Machnikowski, P., Rajneri, E., Schmon, C., Ulfbeck, V., Vallone, V., & Zech, H. (2021). Relevance of Risk-Benefit for Assessing Defectiveness of a Product: A Comparative Study of Thirteen European Legal Systems. *European Review of Private Law, 29*(1), 91–132.
[17] Henderson, J.A., Jr., & Twerski, A.D. (1991). Closing the American Products Liability Frontier: The Rejection of Liability Without Defect. *New York University Law Review, 66*(5), 1263-1331.
[18] Owen, D. G. (1996). Defectiveness Restated: Exploding the "Strict" Products Liability Myth. *University of Illinois Law Review, 1996*(3), 743-787.
[19] Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE, Joined Cases C-503/13 and C-504/13 (Court of Justice of the European Union, March 5, 2015).
[20] *Hollis v. Dow Corning Corp.*, (1995) 4 S.C.R. 634.
[21] Geistfeld, M. A. (2020). *Principles of Products Liability* (3rd ed.). Foundation Press.
[22] *A & Others v. National Blood Authority & Another*, (2001) EWHC QB 446.
[23] *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 573 P.2d 443 (1978).
[24] Cupp, R.L., Jr., & Polage, D. (2002). The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis. *New York University Law Review, 77*, 874-961.
[25] Henderson, J.A., Jr. (1978). Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform. *Cornell Law Faculty Publications*, *Paper 875*, 625-641.
[26] *Darby v. National Trust for Places of Historic Interest or Natural Beauty*, [2001] EWCA Civ 189.
[27] *Bogle v. McDonald's Restaurants Ltd.* (2002) EWHC 490 (QB).
[28] *Liebeck v. McDonald's Restaurants*, P.T.S., Inc., No. CV-93-02419, 1994 WL 16777659 (N.M. Dist. Ct. Aug. 18, 1994).
[29] *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 700 N.E.2d 303, 677 N.Y.S.2d 764 (1998).
[30] Purmehdi, M., Legoux, R., Carrillat, F., & Sénéchal, S. (2017). The Effectiveness of Warning Labels for Consumers: A Meta-Analytic Investigation into their Underlying Process and Contingencies. *Journal of Public Policy & Marketing, 36*(1), 36-53.
[31] Twerski, A.D., Weinstein, A.S., Donaher, W.A., & Piehler, H.R. (1976). The Use and Abuse of Warnings in Products Liability: Design Defect Comes of Age. *Cornell Law Review, 61*(4), 495-540.

[32] *Uloth v. City Tank Corp.*, 376 Mass. 874, 384 N.E.2d 1188 (1978).
[33] Kelly, K., & Schwartz, V. (2020). *Comparative negligence.* (6th ed.). Lexis.
[34] Schwartz, G.T. (1978). Contributory and Comparative Negligence: A Reappraisal. *The Yale Law Journal, 87*(4), 697-727.

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Strategies for Legal Protection of the Defendant in Disputes Over the Loan Debt Collection

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Abstract
In the context of economic instability and the expansion of digitalisation in the financial sector, there has been a significant increase in the number of court disputes related to the recovery of credit debt. The defendant (borrower in substantive legal relations) is typically the weaker party, which necessitates the development of effective protection mechanisms. In this regard, the purpose of the article is to analyse procedural and substantive legal instruments for protecting the rights of the defendant in credit disputes, taking into account recent judicial practice. To examine legislative acts and legal positions of the Supreme Court, the study employs formal-legal, case law analysis, comparative legal, and system-structural methods. The effectiveness of both passive and active defence strategies is analysed, including challenging the conclusion of electronic contracts, disputing the assignment of claims under factoring agreements (especially about "future claims"), applying statutes of limitations, and using the specific legal regime of martial law. The article emphasises the need for further research into issues of collective protection of debtors' rights and the improvement of mechanisms to combat fraud in the online lending field.

Keywords: *credit legal relations; protection of borrowers' rights; electronic contract; civil proceedings; commercial proceedings; judicial review.*

Стратегії правового захисту відповідача у спорах щодо стягнення кредитної заборгованості

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Анотація
В умовах економічної нестабільності та розширення сектору цифровізації фінансового світу спостерігається значне зростання кількості судових

спорів щодо стягнення кредитної заборгованості. Відповідач (позичальник у матеріальних правовідносинах) виступає, зазвичай, більш слабкою стороною, що потребує формування ефективних механізмів захисту. У зв'язку з цим метою статті є аналіз процесуальних і матеріально-правових інструментів захисту прав відповідача у кредитних спорах з урахуванням новітньої судової практики. Для дослідження законодавчих актів та правових позицій Верховного Судуву роботі застосовано формально-юридичний метод, метод аналізу судової практики, порівняльно-правовий та системно-структурний методи. Проаналізовано ефективність стратегій пасивного та активного захисту, зокрема, оскарження факту укладення електронних договорів, спростування переходу права вимоги за договорами факторингу (особливо щодо «майбутніх вимог»), застосування строків позовної давності та використання особливостей правового режиму воєнного стану. Наголошено на необхідності подальшого дослідження проблем колективного захисту прав боржників та вдосконалення механізмів протидії шахрайству у сфері онлайн-кредитування.

Ключові слова: *кредитні правовідносини; захист прав позичальника; електронний договір; цивільне судочинство; господарське судочинство; судовий розгляд.*

Introduction

The state of affairs regarding civil substantive legal relationships in Ukraine is characterized by a significant prevalence of loan legal relationships. The latter, unfortunately, are often transformed into protracted litigation due to the systematic violation of the balance of interests of the parties and the legal uncertainty of individual contractual provisions. The issue of protecting the rights of the defendant in cases of debt collection is becoming particularly topical in the context of the digitalisation of financial services and socio-economic challenges caused by martial law. Loan legal relationship, being an essential component of the financial system, has undergone significant changes due to the integration of digital technologies, which has created new risks for borrowers. It is referred to as concluding contracts without proper identification of the person, which, as noted by C.G.B. de Oliveira and co-authors, is one of the primary causes of loan disputes [1] or the imposition of unfair conditions through the almost formal automatic accession to the terms of similarly-named contracts.

The relevance of the chosen topic stems from the fact that the judicial practice of recent years, in particular 2024-2026, demonstrates ambiguity in the approaches of courts to resolving issues regarding the validity of factoring contracts, the accrual of interest after the expiration of the loan term, and the application of penalties. A vivid example of such practice is the judgement of Smila City and District Court of Cherkasy Region dated September 15, 2025 in the case 703/4464/25 [2], or the ruling of Mykolaiv

Court of Appeal dated January 26, 2026 in the case 484/3853/25, which reflects the key features of reviewing disputes of this category [3]. An example of resolving loan disputes in the indicated court cases confirms the need for in-depth research into the legal positions of generating an efficient strategy for the defendant's protection.

In certain cases, defendants, lacking special knowledge, take no account of the need to respond to the claim. This leads to ignoring the defence against the claim, which entails the collection of unjustified amounts of debt. A visual illustration of the situation where the defendant risks receiving a judgment not in his favour due to passivity or a faulty strategy is the judgment of the Desna District Court of Kyiv dated December 10, 2025, in the case No. 754/18805/25. These proceedings considered the claims of Credit-Capital Financial Company LLC for the collection of debt under a loan agreement for UAH 18,865.42. The consideration in the simplified claim proceedings without summoning the parties led to the situation whereby the absence of a reasoned response to the claim and professional objections allowed the creditor to actually collect the declared amount of debt without hindrance [4].

The objective of the paper is to identify and systematise the most efficient strategies for the legal protection of the defendant in loan disputes based on the analysis of legislation in force and current case law. In this regard, I consider it necessary to inquire into the issues of 1) analysis of the features of concluding and appealing electronic loan agreements; 2) the issues of transfer of the right of claim (factoring) as a basis for passive protection; 3) the limits of the borrower's liability, in particular in terms of accruing interest and penalties beyond the loan term; 4) the specifics of the application of the statute of limitations.

The state of affairs of the above issue is marked by certain legal positions of the Grand Chamber of the Supreme Court. In particular, courts are with increasing frequency pointing to the fact that the consumer is the weaker party to an obligation. This narrows the scope of the principle of freedom of contract and requires the lender to comply with the principles of good faith. In the meantime, disputes with factoring companies are becoming widespread, where the key issue is the validity of the assignment of the right of claim, which has not yet arisen at the time the factoring contract was entered into. According to S.A. Chvankin, the issue of identifying the parties when concluding online loans, where the risk of fraud remains high [5, p. 168], which correlates with the general risks of e-commerce and the need to assess the security of digital transactions [6] calls for special attention. An important aspect of legal regulation is also legislative changes aimed at supporting borrowers during martial law, which release

them from liability for late payment of obligations, but retain the obligation to repay the principal amount of a loan. Moreover, the analysis of case law necessitates a thorough analysis of debt calculations, since banks often include illegal commissions and payments for services that were not actually provided [7].

Literature Review

The issue of legal regulation of loan relationships and the procedural status of the defendant in civil proceedings determines a wide range of scientific research. It is hardly possible to analyse all publications relating to the topic within the framework of one article. However, among the works of scientists who studied the theoretical foundations of loan relationship, protection of the debtor's rights under the conditions of digitalisation, and writ proceedings in commercial proceedings, it is worth noting the achievements of A.O. Hromova, V.S. Bohomolova, M.V. Verbitska, V.M. Dereza, O.S. Kizlova, and V.Ya. Pogrebniak [8-13]. One of the pioneers in a thorough study of the procedural status of the defendant in civil proceedings was M.M. Vasylchenko [14], whose seminal works laid the ground for further study of this topic. At the same time, modern aspects of the procedural status of the parties, in particular the defendant and third parties, are disclosed in detail in one of the studies by K.V. Husarov [15]. Other works related to the topic mentioned at the beginning of this article are also known to the legal scientific literature, in particular, the research by A. P. Maulida and co-authors on the transformation of loan guarantees in the digital era [16], as well as the works by P.A. Gregorini and others on the jurimetric analysis of mass claims regarding bank liability [17].

Research methods

The methodological foundation of the study is made up of general scientific and special legal methods of cognition. The preparation of a comprehensive methodological foundation for this scientific article was made possible through the use of the thorough work of O.H. Danylian and O.P. Dzoban [18]. The regulatory framework for the study was the provisions of the Civil Code of Ukraine, the Law of Ukraine "On Consumer Lending" [19], and the Law of Ukraine "On Consumer Rights Protection" [20]. The empirical basis is an array of decisions and judgments of courts of various instances for the period 2018-2026.

The choice of approaches to develop the protection strategy is based on the analysis of two base scenarios: a "real loan", where the borrower acknowledges the fact of receiving funds, and a "fraudulent loan", where the party to the loan agreement did not express its will to execute it. The strategy for forming a sample of court decisions was based on the search

for legal positions of the Grand Chamber of the Supreme Court, which are mandatory for consideration by the courts of first and appellate instances, as well as the latest judgments of the aforementioned judicial authorities during 2025-2026, which reflect the trends in resolving disputes with factoring companies.

The application of the formal-legal method allowed us to analyse the content of regulatory legal acts regulating the accrual of interest, penalties, and the application of the statute of limitations. The case-study method was used for an in-depth analysis of specific legal cases where the courts refused to satisfy claims due to the plaintiff's failure to prove his claims or the omission of the statute of limitations. This approach allowed us to identify practical issues of law enforcement and propose effective plans of action for defendants and their lawyers.

Results and Discussion

In this academic paper, the author defines the strategies of the protection of the defendant in cases involving loan debt. The classification of such strategies is as follows.

Passive protection strategy

One of the most efficient protection strategies, particularly in cases involving factoring companies, is the so-called "passive protection", which involves requiring the plaintiff to prove that he has a right to claim while the defendant takes a passive position due to the possible illegitimacy of the plaintiff and the lack, in this regard, of proving his legal position before the illegitimate party. Relatively unpopular, but current case law indicates the passive behaviour of the defendant after receiving a decision to initiate proceedings in the case, while the court subsequently concludes that the claim must be dismissed due to the absence of a violation of the plaintiff's right by the opposing party.

In this regard, it is worthwhile noting that in numerous cases, when a claim is filed not by the original creditor but by the factoring company, the problem of proper confirmation of the transfer of the right of claim arises. Often, factoring contracts are concluded as framework agreements even before the specific debt arises. The Supreme Court, in its rulings (for example, dated 05.07.2017 in the case No. 752/8842/14-ц), emphasises that the transfer of the right of claim can be carried out only in relation to a valid claim that existed at the time of the transfer. The transfer of a future claim that was not individualised at the time of the conclusion of the factoring contract is doubtful in the context of Articles 638 and 1078 of the Civil Code of Ukraine [21]. This issue is global, since, as J. Oh notes in his research, the issue of debt structuring and the specifics of the sale of

troubled loans (loan sales) is invariably in the focus of attention of modern financial and legal doctrine [22].

Furthermore, in cases of online loans debt collection, it is critically important to prove that the defendant concluded the contract. If the loan contract is signed with a one-time identifier, the court must verify that the mobile phone number, for example, and the bank card actually belong to the borrower. If the debtor denies the fact of signing, the lack of evidence that the financial number of the communication device or card belongs to the defendant constitutes grounds for dismissal of the claim. In the case described, a critical argument in favour of the defendant was the court's request for information from banking institutions, which confirmed that the card to which the loan funds were transferred actually belonged to a completely different person. This leading case assuredly illustrates that the burden of proving the fact of concluding an electronic contract and the fact of receiving funds lies solely with the plaintiff. The absence of irrefutable evidence of proper verification of the borrower in the information and telecommunications system and the transfer of funds to his personal account has a direct consequence of recognising such an electronic contract as not concluded [23]. Therefore, the expectation of proper verification of the borrower is another factor that allows the defendant to exercise passive protection.

Strategy for regulatory levelling of penalties under the conditions of martial law

The introduction of martial law due to the military aggression necessitated the adjustment of many legal relationships. Loan legal relationships were no exception. It should be noted that the legislation of Ukraine provides for quite significant features of participation in the loan legal relationship of its participants during martial law. Thus, according to clause 18 of the Final and Transitional Provisions of the Civil Code of Ukraine, during the period of martial law and within 30 days after its termination, the borrower is exempted from liability specified in Art. 625 of the Civil Code of Ukraine, as well as from payment of a penalty (fine). Penalties accrued during this period are subject to write-off. This is an imperative norm, and attempts by creditors to collect such amounts are illegal. For the military, an even wider range of protection options against payment of excessive amounts on his part is provided. We are talking about not accruing penalties and exemption from paying loan interest. Part 15 of Art. 14 of the Law of Ukraine "On Social and Legal Protection of the Military and Members of their Families" establishes that the military, from the moment of conscription during mobilization and until the end of the special period, are not charged penalties, fines for failure to meet obligations to banks

and other institutions, as well as interest for using a loan are not accrued. This legislative provision is unconditional and does not depend on the fact of prior notification by the bank, but results directly from the status of the military [24].

Contra proferentem doctrine as a tool for interpreting the terms of a loan agreement in favour of the defendant

Under the conditions of the conclusion of the overwhelming majority of loan agreements by adhering to standard forms developed by financial institutions, the problem of interpreting unclear or ambiguous terms becomes of special significance. An efficient mechanism for protecting the defendant in such disputes is the application of the Roman legal *contra proferentem* principle (Latin verba chartarum fortius accipiuntur *contra proferentem* - the words of the agreement must be interpreted against the one who wrote them).

An analysis of the case law of recent years indicates the active implementation of this principle by the Supreme Court. The essence of the rule is that the person who included this or that term into the agreement must bear the risk associated with the ambiguity of such a term. This rule applies not only when the party has independently developed the term, but also in cases of using standard terms developed by third parties.

In national legislation, this principle is implemented through the provisions of Articles 213 and 637 of the Civil Code of Ukraine, as well as through a special provision of Part 8 of Article 18 of the Law of Ukraine "On Protection of Consumer Rights" [20], according to which unclear or ambiguous provisions of contracts with consumers are interpreted in favour of the consumer.

The Supreme Court in its rulings (in particular, dated May 14, 2022 in the case No. 944/3046/20 and dated October 5, 2022 in the case No. 352/1950/15-ц) produced the following legal opinion: if it is impossible to determine the true meaning of the contract term using general approaches to interpretation (Parts 3, 4 of Art. 213 of the Civil Code), the court must apply *contra proferentem interpretation* [25; 26].

In the legal relationship described, there are cases of banking institutions forming the terms of the contract in such a way that it is problematic to distinguish between interest for the lawful use of funds (Art. 1048 of the Civil Code) and interest as a penalty for late payment. The Grand Chamber of the Supreme Court in the case No. 910/4518/16 emphasises that in case of doubt about the nature of the payments (whether it is a payment for a loan or a penalty), the *contra proferentem* principle should be applied.

Enabling the creditor to charge both types of interest simultaneously leads to an imbalance and contradicts the principles of justice [27].

It should be noted that the *contra proferentem* principle is not just a technical rule of interpretation of the text, but a fundamental tool for ensuring fairness in contractual relationships. In disputes between the bank as a professional market player dictating the terms and conditions, and the borrower as the weaker party, this principle acts as a key safeguard against abusive practice. In my opinion, it performs an important preventive function: it stimulates financial institutions to formulate the terms of contracts as transparently as possible, because any legal "trick" or ambiguity will inevitably turn against the dishonest creditor himself.

Strategy of substantive objections

In many cases, contractual consolidation of substantive legal relationships occurs when several interest rates or different repayment terms are included in the content of the agreement. In such a case, the court must interpret the terms in a way that is beneficial to the weaker party (the borrower), recognising, for example, that the loan term was only 30 days, and further accruals are groundless. This position was reflected in the judgment of Poltava District Court of Poltava Region dated November 20, 2025, in the case No. 545/4305/25 [28].

One of the key elements in protecting the defendant against the claims in such cases is checking the correctness of the debt estimate. The Grand Chamber of the Supreme Court has established a consistent practice (ruling dated March 28, 2018, in the case No. 444/9519/12), according to which the creditor's right to accrue contractual loan interests is terminated after the expiration of the contractually specified term of the loan or in the event of a claim for early repayment [29].

An essential element of the strategy of substantive objections is the presumption that the party who prepared the draft agreement is an expert in the relevant field (bank, financial company). Until proven otherwise, the court must assume that it was the creditor, having subject matter expertise, who was able to lay down terms clearly and understandably. Therefore, any ambiguity (for example, hidden commissions, complex interest calculation formulas) is interpreted as a defect made by an expert who should not harm the consumer.

When analysing the legal consequences of the expiration of the loan term or making of an early demand, it is necessary to clearly distinguish the periods of loan debt accrual. Within the term of the contract, under Art. 1048 of the Civil Code of Ukraine, interest is accrued in accordance with the agreed terms, and a penalty in the form of a fine or penalty is applied

in case of a delay. At the same time, after the expiration of the loan term or in the event of the creditor making an early demand, the accrual of the specified interest and penalty is terminated, or their application is limited exclusively to the framework of Art. 625 of the Civil Code of Ukraine.

Particular attention should be given to the legal opinion regarding public contracts of adhesion. In cases where the borrower has signed only the application form, and the Terms and Conditions of Lending, which usually contain provisions on sizable interest and penalties, are not signed by him, such Terms and Conditions cannot be considered part of the agreement. Under such circumstances, the bank has the right to demand the return of only the principal amount of a loan, without accruing any interest or penalty. This approach is confirmed by case law, in particular the ruling of the Grand Chamber of the Supreme Court dated July 3, 2019, in the case No. 342/180/17 [30].

The attained results of a comprehensive analysis of case law indicate a gradual change in the paradigm in resolving loan disputes. Modern law enforcement is increasingly shifting away from a formalistic approach to the position of recognising the borrower as the weaker party in the obligation. This is particularly topical in the context of the mass distribution of online lending and accession agreements, where the debtor is actually deprived of the opportunity to influence the content of the transaction. The illustrative case law examples demonstrate that the efficient legal protection of the defendant in the modern period is based not so much on a simple denial of the existence of a debt, but on careful judicial control over the actions of the plaintiff and verification of the sufficiency of his evidentiary base.

Conclusions

Summing up the above, the key procedural strategies for protecting the defendant in cases arising from a loan legal relationships are reduced to the comprehensive application of a number of legal instruments. First of all, it is necessary to conduct an in-depth legal audit of the claims to identify unreasonably accrued interest beyond the loan term and the presence of illegal commissions.

An important stage is the verification of the plaintiff's substantive and procedural interest, which involves the request for a full chain of receivables assignment contracts and evidence of contractual payment, which is especially relevant in disputes involving factoring companies. An efficient way to protect the defendant is also the use of defects in the form of the loan agreement, in particular, a reference to the borrower's failure to sign the Terms and Conditions of the bank, which creates legal grounds for recalculating the debt and its collection only within the principal amount

of a loan. Additionally, it is mandatory to apply the statute of limitations by submitting a corresponding application, taking into account the specifics of the statute of limitations for each monthly payment. A separate vector of protection is the use of the features of the legal regime of martial law, which allows excluding from the calculation penalties and inflationary losses accrued after February 24, 2022. The scientific value of the research conducted lies in the systematisation of the current legal opinions of the Supreme Court for 2018-2026 and the development of practical guidelines to ensure efficient borrowers' rights protection under present-day conditions.

References

[1] Oliveira, C.G.B. de, Albuquerque, O. de P., Belotti, E.L., Lopes, I.F., Silva, R.B. de A., & Arbix, G.A.T. (2026). An Analysis of Facial Recognition in Banking Disputes Through Data Scraping from São Paulo Court of Appeal Decisions. *Applied Soft Computing*, *189*, 1-14. https://doi.org/10.1016/j.asoc.2025.114500.

[2] Decision of the Smila City District Court of Cherkasy Region in the case No. 703/4464/25. (September 15, 2025). Retrieved from https://reyestr.court.gov.ua/Review/130204117.

[3] Resolution of the Mykolaiv Court of Appeal in the case No. 484/3853/25. (January 26, 2026). Retrieved from https://reyestr.court.gov.ua/Review/133562342.

[4] Decision of the Desnianskyi District Court of Kyiv in the case No. 754/18805/25. (December 10, 2025). Retrieved from https://reyestr.court.gov.ua/Review/132565001.

[5] Chvankin, S.A. (2021). The Use of Electronic Evidence in Civil Cases Arising from Credit Agreements Concluded in Electronic Form. *Uzhhorod National University Herald. Series: Law, 63*, 165-170. https://doi.org/10.24144/2307-3222.2021.63.29.

[6] Zhang, C., Wang, Y., & Zhang, J. (2025). Identification and Evaluation of Key Risk Factors of Live Streaming e-Commerce Transactions Based on Social Network Analysis. *Journal of Theoretical and Applied Electronic Commerce Research*, *20*(3), 169. https://doi.org/10.3390/jtaer20030169.

[7] Financial Institutions are Recommended to Offer Consumer Clients Restructuring of Consumer Credit Debt or Credit Holidays. (April 14, 2022). Retrieved from https://bank.gov.ua/ua/news/all/finansovim-ustanovam-rekomendovano-proponuvati-kliyentam-spojivacham-restrukturizatsiyu-zaborgovanosti-za-spojivchim-kreditom-abo-kreditni-kanikuli.

[8] Hromova, A.O. (2021). *Invalidity of Credit Obligations Under the Civil Legislation of Ukraine.* Ph.D. (Law) Thesis. Kyiv: Taras Shevchenko National University.

[9] Bohomolova, V.S. (2025). *Protection of the Debtor's (Individual's) Rights in Credit Legal Relations in the Digital Age.* Ph.D. (Law) Thesis. Odesa: National University "Odesa Law Academy".

[10] Verbitska, M.V. (2011). *Writ Proceedings in the Civil Process of Ukraine.* Ph.D. (Law) Thesis. Lviv: Ivan Franko National University of Lviv.

[11] Dereza, V.M. (2022). Credit Unions in Ukraine: State and Prospects of Development. *Scientific View: Economics and Management*, *2*(78), 104-109. https://doi.org/10.32836/2521-666X/2022-78-16.

[12] Kizlova, O.S. (2011). *Pledge in Civil Law (Conceptual Provisions and Legal Nature).* Doctoral (Law) Thesis. Odesa: National University "Odesa Law Academy".

[13] Pohrebniak, V.Ya. (2016). *Civil Law Regulation of Consumer Credit Relations in Ukraine*. Ph.D. (Law) Thesis. Kharkiv: Yaroslav Mudryi National Law University.
[14] Vasylchenko, M.M. (1979). *Procedural Position of the Defendant in Civil Proceedings*. Kharkiv: Vyshcha Shkola Publishing House.
[15] Husarov, K.V. (2024). Defendants and third parties who do not state independent claims on the subject of the dispute in cases of compensation for damage caused by war. *Scientific Innovations and Advanced Technologies. Series: Law*, *3*(31), 529-537. https://doi.org/10.52058/2786-5274-2024-3(31)-529-537.
[16] Maulida, A.P., Angkasa, S., & Munir, A.B. (2026). Transforming Credit Guarantees in Indonesia: Legal Reform and Digital Innovation at Askrindo. *Journal of Law and Legal Reform*, *7*(1). https://doi.org/10.15294/jllr.v7i1.38585.
[17] Gregorini, P.A., Novais, M.E.C., & Bertran, M.P. (2025). Does a "Moral Damage Industry" Exist in Banking Litigation? A Jurimetric Approach. *Civilistica.com*, *14*(3), 1-24. https://doi.org/10.5281/zenodo.18307524.
[18] Danylian, O.H., & Dzoban, O.P. (2023). *Methodology of scientific research.* (2nd ed.). Kharkiv: Pravo.
[19] Law of Ukraine No. 1734-VIII "On Consumer Lending". (November 15, 2016). Retrieved from https://zakon.rada.gov.ua/laws/show/1734-19#Text.
[20] Law of Ukraine No. 1023-XII "On the Protection of Consumer Rights". (May 12, 1991). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.
[21] Resolution of the Supreme Court in the case No. 752/8842/14-ts. (July 5, 2017). Retrieved from https://reyestr.court.gov.ua/Review/69758990.
[22] Oh, J. (2025). Debt Structure and Loan Sales. *Asian Review of Financial Research*, *38*(4), 153-191. https://doi.org/10.37197/ARFR.2025.38.4.5.
[23] Decision of November 6, 2025, of the Shevchenkivskyi District Court of Poltava in the case No. 553/1092/24. https://reyestr.court.gov.ua/Review/131620464.
[24] Law of Ukraine No. 2011-XII "On Social and Legal Protection of Servicemen and Members of Their Families". (December 20, 1991). Retrieved from https://zakon.rada.gov.ua/laws/show/2011-12#Text.
[25] Resolution of the Supreme Court in the case No. 944/3046/20. (May 14, 2022). Retrieved from https://reyestr.court.gov.ua/Review/104052622.
[26] Resolution of the Supreme Court of October 5, 2022, in the case No. 352/1950/15-ts. Retrieved from https://reyestr.court.gov.ua/Review/106660077.
[27] Resolution of the Grand Chamber of the Supreme Court in the case No. 910/4518/16. (April 5, 2023). Retrieved from https://reyestr.court.gov.ua/Review/110279633.
[28] Decision of the Poltava District Court of Poltava Region in the case No. 545/4305/25. (November 20, 2025). Retrieved from https://reyestr.court.gov.ua/Review/132187383.
[29] Resolution of the Grand Chamber of the Supreme Court in the case No. 444/9519/12. (March 28, 2018). https://reyestr.court.gov.ua/Review/74838904.
[30] Resolution of the Grand Chamber of the Supreme Court in the case No. 342/180/17. (July 3, 2019). Retrieved from https://reyestr.court.gov.ua/Review/133695953.

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Decentralized Autonomous Organizations: the "Corporate Wrapper" as an Obstacle Épistémologique

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Abstract
The relevance of this study is driven by the necessity to transform modern civil law doctrine toward a post-non-classical stage. Civil law constantly faces challenges from newly emerging relationships. The new decentralized internet, Web3, has shifted the paradigm for perceiving the elements of civil legal relations; as this article demonstrates, a new legal object exists on the blockchain, even though current civil norms state otherwise. In this regard, decentralized autonomous organizations are not merely a technological phenomenon but also a challenge to existing civil law theories and an instrument for protecting human rights amid the identity crisis of the information society and "surveillance capitalism". The purpose of this work is to substantiate a paradigm shift in research on decentralized autonomous organizations and to analyze their legal status by deconstructing the values they defend: privacy, dignity, and autonomy. The methodology is based on the axiological and historical approaches to Roman law and Kantian ethics to comprehend the depth of privacy problems and the relevance of these decentralized entities, alongside the synergetic method, which views a decentralized autonomous organization as a dissipative structure. The results demonstrate that such an organization is an autopoietic system where the protocol acts as a slaving principle (teleonomy of the code), while in bifurcation points preserving teleology of the community. It is argued that applying general corporate laws is dogmatically flawed due to the absence of affectio societatis (mutual trust) and undermines the very causa finalis of these decentralized systems – advocating for a decentralized internet and a shift of power to users, rather than creating just another form of a limited liability company. Prospects for further research include the proposal to treat these decentralized organizations as a sui generis construct. It is concluded that regulators should create "strange attractors" by applying the legal construct of Zweckvermögen (purpose-bound patrimony) to smart contracts, allowing these structures to participate in offline legal relationships without destroying their unique nature.

Keywords: *Web3; privacy; smart contracts; autopoiesis; Zweckvermögen; legal personality.*

Децентралізовані автономні організації: «корпоративна обгортка» як obstacle épistémologique

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Анотація
Актуальність дослідження зумовлена необхідністю трансформації сучасної доктрини цивільного права в напрямі постнекласичного етапу. Цивільне право постійно стикається з викликами через появу нових відносин. Новий децентралізований інтернет – Веб3 (англ. – Web3) змінив парадигму сприйняття елементів цивільних правовідносин. Як демонструє ця стаття, на блокчейні існує новий об'єкт права, незважаючи на те, що чинні цивільні норми стверджують протилежне. З огляду на це, децентралізовані автономні організації є не просто технологічним феноменом, а викликом наявним цивільно-правовим теоріям та інструментом захисту прав людини під час кризи ідентичності інформаційного суспільства та «наглядового капіталізму». Метою роботи є обґрунтування зміни парадигми в дослідженні децентралізованих автономних організацій та аналіз їхнього правового статусу через деконструкцію цінностей, які вони захищають: приватності, гідності та автономії. Методологія ґрунтується на аксіологічному та історичному підходах до римського права й кантіанської етики для осягнення глибини проблем приватності та актуальності цих децентралізованих утворень, поряд із синергетичним методом, який розглядає децентралізовану автономну організацію як дисипативну структуру. Результати демонструють, що така організація є аутопоетичною системою, де протокол діє як принцип підпорядкування – телеономія коду, а в точках біфуркації зберігається телеологія спільноти. Доводиться, що застосування загальних норм корпоративного права є догматично хибним через відсутність affectio societatis (взаємної довіри) й підриває саму causa finalis цих децентралізованих систем – відстоювання децентралізованого інтернету та передачу влади користувачам, а не створення ще однієї форми товариства з обмеженою відповідальністю. Перспективи подальших досліджень включають пропозицію розглядати ці децентралізовані організації як конструкцію sui generis. Зроблено висновок, що регуляторам слід створювати «дивні атрактори», застосовуючи правову конструкцію Zweckvermögen (укр. – цільового майна) до смартконтрактів, що дозволить цим структурам брати участь в офлайн-правовідносинах без руйнування їхньої унікальної природи.

Ключові слова: *Веб3; приватність; смартконтракти; аутопоезис; Zweckvermögen; правосуб'єктність.*

Introduction

Modern civil law doctrine is undergoing a systemic transformation, caused by a shift of scientific rationality toward the post-non-classical stage. This stage requires not merely a formal-dogmatic analysis of legal rules, but a fundamental examination of the sociocultural context, historical genesis, and axiological foundations of the research object [1, p. 30-32]. Decentralized Autonomous Organizations (hereinafter – DAOs) are no exception; they cannot be grasped exclusively as a technological phenomenon (just as smart contracts are not merely a code and may be recognized as legal contracts) or, even less so, as merely another form of limited liability companies [2, p. 81; 3, p. 73]. DAOs emerge as a synergetic answer to the fundamental crisis of identity in the information society, a crisis which further undermines the basis of a democratic regime [4, p. 27].

To fully comprehend this crisis, one must comprehend that traditional civil law is founded on the anthropocentric paradigm of the Enlightenment, building upon Kant's moral philosophy, treating an individual as an autonomous subject, possessing will and consciousness [5, p. 41-47]. This implies that the individual's acts to enter into civil legal relations possess a volitional character, which is a precondition for their validity, passing through the consciousness of participants and expressing their authentic inner will. However, within the conditions of total digitalization, which is defined by Shoshana Zuboff as "surveillance capitalism", this autonomy is eroded [6, p. 26, 308]. Surveillance by algorithms, the capabilities of artificial intelligence, Big Data collection, and profiling transform the subject of law into an object of manipulation [6, p. 26, 308]. They strip the individual of privacy – the sphere of non-intervention, according to Hannah Arendt, where free will is built [7, p. 71]. Without this protected sphere, the intellectual-volitional character of legal activity is neutralized; the individual ceases to be an active creator of legal reality capable of rational decision-making, transforming instead into a passive object of automated manipulation. Historically, cryptotechnologies emerged to solve this dichotomy of privacy and control: "… for encryption is fundamentally a private act". [8]. However, contemporary legal doctrine frequently attempts to resolve the legal status of DAOs by employing unsuitable formal-dogmatic instruments, without the review of an ontology of DAOs.

Recent scholarship confirms that enclosing DAOs within traditional company law, such as ordinary partnerships or limited liability companies, is dogmatically incompatible with their decentralized architecture [9], and introduces centralized hierarchies that actively undermine the ecosystem's trust and social capital [10]. This proves flawed the regulatory assumption that DAOs operate as conventional businesses rather than infrastructural

assets [11]. While foundational scholars such as P. De Filippi and A. Wright have mapped the regulatory friction of lex cryptographia and the rule of code, their analysis primarily perceives decentralization as a mere institutional hurdle, focusing on the challenges it creates for countries seeking to establish liability and regulate intermediaries [3, pp. 5-7, 208]. Conversely, contemporary cybersecurity literature identifies the chilling effect of mass surveillance and device scanning on fundamental rights [12; 4], yet it lacks a concrete civil law dogmatic solution. Although recent scholarship has begun to shift the paradigm toward a post-non-classical understanding, such as V. Udianskyi's work, demonstrating how DAO ideologies were formulated by their ideologists, alongside F. Santoro's application of complex systems theory and autopoiesis to decentralized networks, an even deeper axiological analysis is required. The prevailing discourse fails to recognize that attempting to enclose DAOs within traditional corporate structures creates an *obstacle épistémologique* (epistemological obstacle).

Therefore, the research on DAO legal status must begin with a deconstruction of the values which DAOs are designed to defend: privacy, dignity, and autonomy. Without this analysis, any DAO legal framework would be insufficient, as it would ignore the very axiology of the object and inevitably lead to the epistemological trap of the "corporate wrapper". This research strives to demonstrate that philosophy, history, and civil doctrine are not disjointed from the study of DAOs, but provide a necessary synthesis to substantiate a paradigm shift in legal research and the application of classical laws to qualitatively new relationships.

The purpose of this study is to expose the existing epistemological obstacle in contemporary legal research and to resolve it through an axiological deconstruction of DAOs. To achieve this, the research builds upon existing genesis explorations of DAOs, and substantiates the autopoietic nature of the DAO by demonstrating the synthesis between the teleonomy of the protocol and the teleology of the community. Furthermore, recognizing that DAOs already exist as autonomous constructs capable of participating in civil transactions without state sanction, this study aims to formulate a "strange attractor" in civil law. By applying the doctrine of *Zweckvermögen* (purpose-bound patrimony), this study lays a further foundation for legal regime proposals that DAOs will naturally strive for to escape the high-entropy grey zone of legal uncertainty, allowing them to interact securely with the offline legal system without destroying their decentralized nature.

Literature Review

The technological and structural basis of DAOs was initially conceptualized in the studies of S. Larimer and V. Buterin. They established that

decentralized communities can function autonomously through smart contracts and internal capital, requiring minimal human involvement [2, p. 70].

The institutional and legal conflicts caused by such autonomy became the subject of research by P. De Filippi, and A. Wright. These scholars analyzed the contradiction between the autonomous legal nature of DAOs and the classical understanding of organizational forms. By describing the formation of lex cryptographia, they highlighted the fundamental conflict between the "rule of code" and the traditional civil law requirement to clearly identify the subjects of legal relations. Nevertheless, within their theoretical framework, these authors view decentralization primarily as an obstacle to state regulation and a problem for law enforcement, rather than a self-sufficient legal phenomenon and ontological idea [3].

Contemporary scholarship increasingly documents the formal-dogmatic failures of attempting to resolve this friction by means of existing corporate structures. B.C. Cantürk proves that classifying DAOs as ordinary partnerships or limited liability companies is dogmatically unworkable within Civil Law jurisdictions, as it imposes catastrophic joint liability and incompatible mandatory provisions. Furthermore, L. Weidener et al. emphasize that when DAOs are forced into traditional "legal wrappers" to mitigate this liability, the resulting hierarchical structures actively alienate participants and destroy the decentralized social capital of the network. This supports the assertion of S.L. Furnari and C. Villani that it is a fundamental flaw to regulate Protocol DAOs as traditional "businesses", since they instead function as neutral "infrastructural assets" [9-11].

Although the technological and organizational dimensions of DAOs have been extensively explored, the specific legal-dogmatic implications of their complex nature remain unresolved. F. Santoro researched the autopoietic nature of DAOs through the lens of complexity theory, substantiating that they function as self-producing and self-maintaining biological-like systems [13].

Furthermore, E. Bordeleau and N. Casemajor utilized the concepts of teleology and teleonomy in their analysis of the BeeDAO project, but applied them to propose a posthumanist, cybernetic governance model intended to automate and remove human decision-making [14].

The research by V. Udianskyi reviews genesis of DAOs as it was understood by the very ideologists, critiques "corporate wrapper" approach, establishes sorites paradox of infinite qualitative searches how much of decentralization a DAO should have and proposes recognizing DAOs as sui generis legal objects under civil law by applying A. von Brinz's doctrine of Zweckvermögen

(purpose-bound patrimony). However, this work is highly impacted by the Ukrainian perception of *Zweckvermögen* and proposes a foundations DAO legal regime for Ukraine [2].

A year earlier M. Schillig proposed to start a debate on *Zweckvermögen* as possible regulatory solution, adhering to the doctrine of A. von Brinz [15].

Materials and Methods

The methodological basis of this research is determined by the shift of scientific rationality toward the post-non-classical stage. This stage necessitates abandoning the exclusively formal-dogmatic approach, which has proven insufficient in contemporary legal doctrine and directly led to the epistemological obstacle of attempting to force decentralized networks into corporate wrappers (traditional corporate structures) [1; 2]. Instead, this study mandates a fundamental examination of the sociocultural context, historical genesis, and axiological foundations of the research object. To grasp the true legal nature of DAOs and to obtain new scientific results regarding their regulation, this study employs an interdisciplinary complex of general scientific, philosophical, and special legal methods, structured across three main stages of research.

In the first stage, the historical-legal and axiological methods are applied to deconstruct the values that DAOs are fundamentally designed to defend. The historical method analyzes the ancient prototypes of the right to privacy (such as the Roman *domus, existimatio*) to demonstrate its continuity, societal importance, and antifragility as an indispensable element of civil legal relations [16-19]. Building upon this, the axiological method, found in Kantian ethics, is utilized to substantiate the modern comprehension of autonomy. By applying the Kantian concept of the moral subject to distinguish between autonomy (free will) and heteronomy (submission to external laws), this method allows the study to evaluate the destructive impact of mass surveillance [5]. Furthermore, applying M. Foucault's metaphor of the Panopticon, this stage proves how surveillance transforms the active legal subject into a passive data source, thereby justifying why the preservation of a H. Arendt's "zone of shadow" via DAOs is an ontological necessity rather than a regulatory defect [7; 20].

The second stage of the scientific work employs the synergetic approach and the principles of complex systems theory to analyze both the external environment in which DAOs operate and their internal architecture. The synergetic method views a DAO as a complex, non-linear system developing through entropy, which requires adaptability and the continuous generation of new attractors [21; 22, pp. 199-205].

To conceptualize the specific organizational nature of DAOs within this environment, the third stage employs the systemic method and N.

Luhmann's concept of autopoiesis is applied [23]. This framework models the DAO as a dissipative structure existing in conditions of disequilibrium without a central governing node.

To substantiate how order emerges from this decentralization, the research applies H. Haken's "slaving principle" to the DAO protocol, evaluating it as a parameter of order – the teleonomy of the code, that subordinates the individual wills of token holders [24]. This approach is chosen specifically to prove why traditional corporate concepts, such as *affectio societatis* (mutual trust), are dogmatically inapplicable to trustless systems.

Finally, to resolve the epistemological obstacle without destroying the DAOs unique nature, the dogmatic method of civil law is applied to construct a theoretical model. This involves re-examining the classical Roman and Germanic legal construct A. von Brinz purpose-bound patrimony. This method is chosen to demonstrate how civil law can offer a "strange attractor" – a voluntary, naturally fitting legal regime that grants DAOs the capacity to participate in offline civil transactions as sui generis objects, successfully bypassing the inaptness of standard corporate liability while preserving their essential decentralized ontology.

Results and discussion

Privacy as the causa finalis of Web3

To comprehend the ontological depth of privacy problems, we must recognize that modern European civilization is built upon the idea of the dignity and autonomy of subjects – something impossible without privacy [16, pp. 1160-1161]. The crux of this idea is that privacy is an antifragile concept that has existed throughout the centuries of the civil law tradition's formation, and it withstood any trials of invasion against it.

Even though there was no definition of a privacy right articulated in Roman law, it already existed in proto-forms: such as the protection of the *domus* (home) and the legal defense of personal *existimatio* (dignity), meaning that privacy in civil law countries is an inalienable right that is imperative to protect [17, pp. 190, 193; 18]. Central to this is the rhetorical and legal legacy of Cicero, namely his oration "De domo sua", delivered in 57 BC before the College of Pontiffs [19]. This speech is not just a *case* on property restitution; it is a manifestation of subjecthood. Clodius attempted to transform Cicero's private space into a public sacred space, thereby symbolically and legally destroying Cicero as a citizen. Cicero argued: "What is more sacred, what more inviolably hedged about by every kind of sanctity, than the home of every individual citizen? Within its circle are his altars, his hearths, his household gods, his religion, his observances, his ritual; it is a sanctuary so holy in the eyes of all, that it were sacrilege to tear an owner therefrom" [19].

This argument has a fundamental significance for contemporary civil law in the following aspects:

1. Cicero defines a home not as a mere economic good, but as a space in which the magistrate's power is extinguished before the owner's power. This serves as the historical prototype for the modern right to privacy [17, p. 194]. Without this sanctuary, a citizen is stripped of their political existence – *bios*, becoming vulnerable to the whims of the mob or the tyranny of the state, and is thereby reduced to "bare life – a *homo sacer* [25, pp. 71-72, 116].
2. Even though Clodius's acts were formally lawful: utilizing the mechanisms of plebiscite and religious law to alienate Cicero's property, Cicero argued that a formal procedure used to intervene in private autonomy is fundamentally null and void. This serves as a direct historical analogy to modern attempts to legitimize mass surveillance through formal legal procedures (such as the recent EU Chat Control initiative), which undermine the very essence of the right to privacy [26, pp. 14-15; 27, pp. 18-19].

As Hannah Arendt subsequently develops this ancient thought, the private sphere, *oikos*, is the necessary darkness from which the light of politics emerges [7, p. 71, 372, 471]. Without a secure haven, devoid of the possibility to be left alone, an individual is unable to form an independent opinion, which is the imperative precondition for equal participation in a democracy [4, p. 28].

In the context of the digital era, the attempts by regulators to gain access to private keys through backdoors or to mandate client-side scanning can be viewed as entirely equivalent to Clodius's invasion into the home. It is the destruction of the boundaries that separate the subject from total control.

Extending this thought into Modern era philosophy, such a logical exercise must be built upon Kantian ethics, which provides the axiological foundation for the contemporary comprehension of autonomy. The Kantian concept of the moral subject necessitates the capacity for free will – autonomy, in strict contrast to heteronomy, which is the mere submission to external laws [5, p. 47, 371]. For the will to be genuinely free, it must be formulated within a sphere free from external coercion or algorithmic manipulation [6].

To understand the mechanics of this algorithmic manipulation, one must look to the paradigm of post-non-classical science. In physics, there is a fundamental epistemological principle: the observer inevitably affects the object of observation [28]. Projected onto social relations, this mechanism is accurately described by M. Foucault through the concept of the Panopticon.

Realizing the possibility of constant surveillance, the individual internalizes this external control and modifies their behavior, turning into a disciplined subject. Under the conditions of continuous monitoring, the subject is deprived of genuine legal autonomy. Instead of exercising free will, the person merely performs the behavioral model expected by the controlling actor [20, pp. 135, 200].

The modern digital world has turned into precisely such a global Panopticon, centralized platforms (collectively referred to as Web 2.0) and states accumulate extraordinary volumes of data, treating human experience as a free raw material for extraction [6, p. 20]. As debates over the EU Chat Control initiative demonstrate, modern technologies, specifically client-side scanning, enable the monitoring of even encrypted messages directly on users' devices. While the stated purpose of protecting children is legitimate, the method itself (the eradication of the privacy of correspondence) creates a precedent for absolute, limitless control [27; 12, p. 5, 8].

Contemporary cybersecurity experts warn that such mechanisms effectively erase the boundary between the private sphere and the public sphere, transforming personal devices into instruments of bulk surveillance [12, p. 5]. This constitutes a direct violation of the Kantian imperative: the human being is no longer treated as an end in itself, but is reduced to a mere instrument – a source of behavioral data for algorithms [5, p. 37]. In the conditions where every transaction and every word is visible, democracy degrades into a mere simulacrum, as citizens are stripped of their capacity for confidential organization and independent political opposition.

From a synergetic perspective, a democratic society is a complex, non-linear system that develops through the entropy of diverse thoughts and actions. Total surveillance drastically decreases this entropy; it unifies behavior and forces the system into a state of excessive order that is rigid and, consequently, highly fragile. To preserve its adaptability and evolutionary robustness, society must exist poised "on the edge of chaos" [29, pp. 862-866, 875]. It requires a protected zone of shadow where fluctuations and new ideas may spontaneously emerge, which may subsequently become new parameters of order – attractors.

The European Declaration on Digital Rights and Principles for the Digital Decade explicitly ties digital transformation to European values, placing the human being at the center and guaranteeing "freedom of choice", "safety and security", and "protection against unlawful and unjustified surveillance" [30]. However, these declarative norms starkly conflict with the technical reality of centralized platforms and state politics. The core epistemological

problem is not merely the surveillance itself, but the "prisoner's" constant awareness of its omnipresent possibility. Through the internalization of this asymmetric power, the intellectual-volitional character of the individual is dismantled, reducing the active civil law subject to a docile body.

However, Web3 possesses the ontological potential to reshape the totalizing mass surveillance trend described above. As Eric Hughes articulated in A Cypherpunk's Manifesto, "Privacy is not secrecy… Privacy is the power to selectively reveal oneself to the world" [8]. Web3 technologies empower participants with the structural ability to actualize this power without requiring the sanction or permission of the state or monopolistic corporations.

Nevertheless, Web3 is not an ideal, self-sufficient category that inherently guarantees a safe harbor for citizens. While proponents herald the paradigm where "Code is Law", foundational scholars such as P. De Filippi and A. Wright warn that this shift can easily lead to an "algocracy" where algorithms dictate human behavior, risking the creation of a dystopian "decentralized panopticon" [3, p. 55-56; 31, p. 19]. Every application, interface, and webpage is ultimately designed by a developer who retains the capacity to control what data is processed and surveilled. Although E. Hughes declared that "Cypherpunks write code", in the context of modern digital monopolies, this can result in a mere redistribution of power from the state to a new corporate "data priesthood" [6, p. 125; 8]. This actively contradicts the emancipatory core of Web3, replacing bureaucratic surveillance with an equally oppressive technological one. DAOs are the structural mechanism ensuring that Web3 never degrades into a mere redistribution of power from one corporation to another.

Herein lies the fundamental significance of the DAO. The pseudonymity and autonomy of a DAO – features that are frequently and systematically eliminated by regulators attempting to impose a formal-dogmatic "corporate wrapper» – are not mere technological side effects [2, p. 73]. They constitute the very *causa finalis* of the construct's existence. To successfully oppose transnational technology monopolies, any Web3 community or decentralized application – DeApp, requires funds, resources, and the legal capacity to conclude offline agreements, enabling it to accumulate capital, remunerate developers, and represent itself in civil transactions. Therefore, it is imperative for the state to develop regulations that preserve, rather than annihilate, the unique ontological features of the DAO.

By utilizing the DAO form, any Web3 applications achieve true decentralization, cementing their purpose into an immutable protocol. This protocol functions as the mechanistical teleonomy of DAO, which ultimately

serves and represents the conscious teleology of the community behind it. This ensures that users themselves can monitor adherence to the principles of Web3, proving that forcing a DAO into a traditional corporate wrapper is an epistemological obstacle that actively destroys its ontology and the very idea to defend privacy and autonomy.

Synergetic Analysis of DAO Structure

By applying the synergetic approach, the legal nature of a DAO can be seen through categories of self-organization and nonlinearity. A classical corporation is an institutional structure that strives for homeostasis (stability) and linearity (predictability) [29, pp. 876-879, 890-892]. It operates as a strict hierarchical system: the shareholders form the will, the board of directors articulates it, and management executes it, with liability and will moving vertically.

In contrast, a DAO is a dissipative structure that exists essentially in conditions of disequilibrium – a lack of thermodynamic balance that forces a system to evolve and change over time [21, pp. 143-145]. Lacking a central governing node, macroscopic order (such as financing decisions or protocol updates) emerges spontaneously from the chaotic, non-linear interaction of thousands of agents (token holders), mediated by the cryptographic code [13, p. 95]. In this context, the DAO protocol acts as an "attractor" – a state toward which the system naturally tends to evolve. However, this attractor does not rigidly dictate specific behavior for the individual agent; rather, it establishes the boundaries and measures of possible conduct [29, p. 863]. Furthermore, an absolute reliance on this slaving principle harbors a significant risk of "algocracy" where human discretionary choice is entirely abolished [3, p. 55-56]. It is precisely at critical moments of systemic instability, what synergetics defines as bifurcation points, that the DAO resolves this clash and reveals its true socio-technical nature [21, p. 160; 22, pp. 199-205].

While contemporary scholarship, notably the work of F. Santoro, has successfully applied the concept of autopoiesis to DAOs, demonstrating their self-producing, self-maintaining, and adaptive characteristics as complex systems, such analyses remain primarily phenomenological. Santoro identifies that a DAO, much like a biological organism, evolves and adapts without central control, pointing to the 2016 "The DAO" case as proof of a system attempting to self-create and self-maintain its structure [13, pp. 96-98].

Autopoietic Nature and Legal Classification

However, to resolve the formal-dogmatic crisis in civil law, it is necessary to deconstruct the internal mechanics of this operational closure through

the synergetic dichotomy between the teleonomy of the protocol and the teleology of the community.

Relying on N. Luhmann's systems theory, an autopoietic system does not interact directly with the external environment; it reacts exclusively to its own internal communications [23, pp. 183-187]. This creates a significant epistemological divergence from traditional jurisprudence. State law operates on the binary code of lawful/ unlawful [23, pp. 183-187]. In contrast, a DAOs operational closure means it functions strictly on its own internal binary code of valid/ invalid. The maintenance of this closed loop is driven by the teleonomy of the protocol – the unconscious, automated, algorithmic execution of smart contracts that realizes program determinism without any conscious expression of will at the exact moment of the transaction.

Herein lies the limit of pure autopoiesis and the necessity of human teleology – the conscious, purposive will of the community. The 2016 intervention in "The DAO" serves as the empirical proof of this dual socio-technical nature. From the perspective of pure algorithmic teleonomy (the absolute application of the code is law principle), the hacker's withdrawal of cryptocurrency was an entirely valid internal transaction. If the DAO were solely an automated agent, it would have mechanistically assimilated this event according to its protocol [2, pp. 70-71]. However, at this critical bifurcation point, the system survived exclusively because the teleology of the community intervened, utilizing social consensus to execute a hard fork that overrode the automated teleonomy of the code.

This demonstrates that a DAO is not merely a smart contract, autonomous agent or decentralized application; it is an organization anchored by human purpose [2, pp. 70-71]. Because of its autopoietic closure, a DAO cannot be regulated by direct external legal commands (heteronomy); state law simply cannot penetrate a system that only reads valid/invalid. Yet, because it is ultimately guided by human teleology, it possesses the characteristics of an organization. This proves that attempting to force DAOs into traditional corporate structures is a fundamental epistemological obstacle.

Strange Attractors as Regulatory Approach

Because state law cannot penetrate this system via direct commands, the resulting unregulated environment of a DAO is characterized by a high level of social entropy: the pseudonymity of voters fosters mistrust, the lack of mechanisms to hold actors liable creates risks of fraud and "rug pulls" (exit scams), and legal uncertainty is a blocker for investments [2, p. 66].

The role of the law is to insert negentropic factors. The recognition of a DAO as a new phenomenon with appropriate regulation is a new parameter of

order that structures the chaotic interactions of actors into predictable legal relationships. The regulator should not determine each step of a DAO, just as it does for joint-stock companies, as this is impossible to do for nonlinear systems like DAOs. However, it should create "strange attractors" – legal regimes that are so beneficial that DAOs will themselves strive for them [29, pp. 863-864, 907].

The linear thought of DAOs being mere corporations is a restrictive way of thinking which does not account for their true nature. DAOs do not need traditional corporate regulation, since they are a blockchain-native phenomenon, which, in contrast to traditional corporations, do not rely on the fiction theory of the origin of legal entities. This object exists not because of the state's will wrapped into formal recognition by the state in the corporate register, but because of the will of a large number of nodes and the participants behind them to create a DAO on a network [2, p. 85]. It may participate in transactions and enter into legally significant relationships on its own behalf, and not on behalf of some entity which is formally recognized by the state. The assumption that DAOs are unable to participate in legal relationships and everyday transactions, or to enter into contracts with counterparts is flawed; this is what DAOs do on an everyday basis. Any transaction on the blockchain is just another form of a simple contract, which is a legal matter of civil law [3, pp. 74-75, 148]. Therefore, regulators should apply strange attractors to account for the unique nature of DAOs and attract them to apply to this new legal regime for legal certainty.

The paradox of DAOs is that they are already active participants of legal relationships as autonomous objects in the online realm. If we were trying to make an analogy with a traditional business that also can create a wallet address on the blockchain, it does not work in the same manner. Any such logic would recognize such a business as a partnership, whereas a DAO is a sui generis structure in which, due to a lack of central control, there can be no partners. A traditional partnership requires *affectio societatis* – the conscious mutual trust to form a joint enterprise; as contemporary doctrine notes, it is "the complex of attitudes brought together by this 'multiform' concept, namely: a voluntary partnership, full equality between the partners, convergence of interests, give the partnership contract its specificity and enable it to be distinguished from other special contracts..." [32, pp. 262-265]. The required mutual trust is objectively absent in a trustless cryptographic network.

Therefore, a DAO is a unique concept, and it should be treated as a sui generis object, not fitting into the idea of legal entities [2, p. 86]. The defining element of a DAO is not its partners, who are pseudonymous

and hard to identify, but the purpose itself, which is the core idea of *Zweckvermögen* [2, p. 86; 15]. This legal construct may grant instruments for a DAO to participate in offline legal relationships, just as transnational corporations do, but in order to actually fulfill the true purpose of the DAO: to protect the individual from mass surveillance and to create an alternative to the coercive state structures [2, pp. 83-84].

Conclusions

Therefore, to overcome the *obstacle épistémologique* in the comprehension of DAOs, four core conclusions are established:

1. A DAO is not merely a technological shift, but a necessary ontological response to the identity crisis of the information society and "surveillance capitalism". This paper establishes that the pseudonymity and autonomy of a DAO are not technological side effects, but the very *causa finalis* designed to protect individual privacy and autonomy against the modern digital Panopticon.

2. The prevailing regulatory trend of imposing a formal-dogmatic "corporate wrapper" onto a DAO is a fundamental epistemological obstacle. Forcing DAOs into these traditional structures actively destroys their decentralized ontology and annihilates their core mission to defend privacy. Furthermore, traditional partnership models are dogmatically inapplicable due to the objective absence of *affectio societatis* in a trustless cryptographic network.

3. A DAO is a closed socio-technical system operating strictly on an internal binary code of valid/ invalid, creating a profound divergence from the state law binary of lawful/ unlawful. This paper introduces a novel deconstruction of this operational closure: while the system is maintained by the blind teleonomy of the protocol, bifurcation points (such as the 2016 "The DAO" hard fork) empirically prove that the system survives exclusively through the conscious teleology of the community. This proves DAOs are genuine human organizations anchored by purpose, not mere autonomous agents.

4. To resolve this epistemological crisis without destroying the DAOs nature and to overcome its incompatibility with the fiction theory of the legal person, the state must offer "strange attractors". This paper concludes that the most adequate civil law solution is to reclassify DAOs as objects of law sui generis through the classical doctrine of Zweckvermögen. Recognizing a DAO as a purpose-bound patrimony will account for the autopoietic nature of DAOs through their teleonomy, expressed in the purpose cemented in the protocol; moreover, at bifurcation points, it will enable the community to take control and express the true, conscious teleology of the people acting behind the technical veil.

References

[1] Punchenko, O.P. (2014). Methodological Innovations in Modern Scientific Cognition. *Humanities Bulletin of Zaporizhzhia State Engineering Academy, 1*(57), 27-37. Retrieved from http://nbuv.gov.ua/UJRN/znpgvzdia_2014_57_5.

[2] Udianskyi, V.V. (2025). Genesis and Legal Nature of Decentralized Autonomous Organizations: Personified Purpose and Algorithmic Will. *Theory and Practice of Jurisprudence, 1*(27), 64-90. https://doi.org/10.21564/2225-6555.2025.27.332083.

[3] De Filippi, P., & Wright, A. (2018). *Blockchain and the Law: The rule of code*. Harvard University Press. https://doi.org/10.2307/j.ctv2867sp.

[4] European Parliament, Directorate-General for Internal Policies of the Union. (2022). *The Impact of Pegasus on fundamental Rights and Democratic Processes*. European Parliament. https://doi.org/10.2861/031930.

[5] Kant, I. (1998). *Groundwork of the Metaphysics of Morals*. M. Gregor, Trans. (Ed.). Cambridge University Press. (Original work published 1785).

[6] Zuboff, S. (2019). *The age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. PublicAffairs.

[7] Arendt, H. (1958). *The Human Condition*. University of Chicago Press.

[8] Hughes, E. (1993). A Cypherpunk's Manifesto. *Activism*. Retrieved from https://www.activism.net/cypherpunk/manifesto.html.

[9] Cantürk, B.C. (2026). Correction to: Decentralized Autonomous Organizations: is a New Liability Regime Possible? Current Landscape of German and Turkish Company Law and a New Liability Regime Recommendation. In M. Lustenberger, F. Spychiger, & L. Küng (Eds.). *Decentralized Autonomous Organizations – Governance, Technology, and Legal Perspectives*. Springer. https://doi.org/10.1007/978-3-032-03273-7_10.

[10] Weidener, L., Heurich, B., & Lukács, B. (2026). Bridging Social Capital and Financial Incentives: Navigating Liability and Regulatory Challenges in DAO Governance. In M. Lustenberger, F. Spychiger, & L. Küng (Eds.). *Decentralized Autonomous Organizations – Governance, Technology, and Legal Perspectives*. Springer. https://doi.org/10.1007/978-3-032-03273-7_6.

[11] Furnari, S.L., & Villani, C. (2026). Regulation of Financial Protocol DAOs: Addressing the Problems of Decentralization and AI Governance. In M. Lustenberger, F. Spychiger, & L. Küng (Eds.). *Decentralized Autonomous Organizations – Governance, Technology, and Legal Perspectives*. Springer. https://doi.org/10.1007/978-3-032-03273-7_7.

[12] Abelson, H., Anderson, R., Bellovin, S.M., Benaloh, J., Blaze, M., Callas, J., Diffie, W., Landau, S., Neumann, P.G., Rivest, R.L., Schiller, J.I., Schneier, B., Teague, V., & Troncoso, C. (2024). Bugs in our Pockets: The Risks of Client-Side Scanning. *Journal of Cybersecurity, 10*(1), Article tyad020. https://doi.org/10.1093/cybsec/tyad020.

[13] Santoro, F. (2024). Autopoiesis in Decentralized Autonomous Organizations as Complex Systems: A Comparative Analysis and Case Studies. *International Journal of Blockchain Technology and Applications, 2*(2), 90-99. https://doi.org/10.18178/IJBTA.2024.2.2.90-99.

[14] Bordeleau, E., & Casemajor, N. (2025). Interspecies Cyber-Governance: BeeDAO and the Artistic Imaginaries of Blockchain for Planetary Regeneration. *Journal of Urban Technology, 32*(4), 69-92. https://doi.org/10.1080/10630732.2025.2475123.

[15] Shillig, M. (2024). From Corporate (Law) Theory to DAO (Law) Theory. Retrieved from https://dawo24.org/wp-content/uploads/2024/06/Abstract_16.pdf.

[16] Whitman, J.Q. (2004). The two Western Cultures of Privacy: Dignity versus liberty. *Yale Law Journal, 113*(6), 1151-1221.

[17] Periñán, B. (2012). The Origin of Privacy as A Legal Value: A Reflection on Roman and English Law. *American Journal of Legal History, 52*(2), 183-201.

[18] Giltaij, J. (2016). Existimatio as "Human Dignity" in Late-Classical Roman Law. *Fundamina, 22*(2), 232-249.
[19] Cicero, M. T. (n.d.). *De Domo Sua.*Retrieved from https://www.attalus.org/cicero/domo3.html.
[20] Foucault, M. (1977). *Discipline and Punish: The Birth of the Prison* (A. Sheridan, Trans). Vintage Books. (Original work published 1975).
[21] Prigogine, I., & Stengers, I. (1984). *Order out of Chaos: Man's New Dialogue with Nature*. Bantam Books.
[22] Danylian, O.H., & Dzoban, O.P. (2019). *Scientific Research Methodology*. Kharkiv: Pravo.
[23] Luhmann, N. (1989). Law as a Social System. *Northwestern University Law Review, 83*(1), 136-150.
[24] Haken, H. (1983). *Synergetics: An Introduction. Nonequilibrium Phase Transitions and Self-organization in Physics, Chemistry and Biology.* (3rd ed.). Springer-Verlag.
[25] Agamben, G. (1998). *Homo sacer: Sovereign power and bare life* (D. Heller-Roazen, Trans.). Stanford University Press. (Original work published 1995).
[26] Colneric, N. (2021). Legal Opinion Commissioned by MEP Patrick Breyer: Screening for Child Pornography. The Greens/EFA Group in the European Parliament. Retrieved from https://www.patrick-breyer.de/wp-content/uploads/2021/03/Legal-Opinion-Screening-for-child-pornography-2021-03-04.pdf.
[27] Anderson, R. (2022). Chat Control or Child Protection? *ARXIV*. https://doi.org/10.48550/arXiv.2210.08958.
[28] Dirac, P.A.M. (1967). *The Principles of Quantum Mechanics.* (4th ed.). Oxford University Press.
[29] Ruhl, J.B. (1996). Complexity Theory as a Paradigm for the Dynamical Law-And-Society System: A Wake-up Call for Legal Reductionism and the Modern Administrative State. *Duke Law Journal, 45*(5), 849-928.
[30] European Parliament, Council of the European Union, & European Commission. (2023). *European Declaration on Digital Rights and Principles for the Digital Decade (2023/C 23/01). Official Journal of the European Union*. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023C0123(01).
[31] De Filippi, P., & Hassan, S. (2016). Blockchain Technology as a Regulatory Technology: From Code is Law to Law is Code. *First Monday, 21*. https://doi.org/10.5210/fm.v21i12.7113.
[32] Leuciuc, E.G., & Ene, V.C. (2024). Affectio Societatis: An Analysis of Cohesion and Trust in the Structure of Limited Liability Companies. *European Journal of Law and Public Administration, 11*(2), 261-268. https://doi.org/10.18662/eljpa/11.2/247.

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Conceptualization of Human Dignity in European Union Law

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Abstract
The purpose of this article is to conduct an interdisciplinary study of the formation and development of the legal regulation of human dignity in the context of European integration. Human dignity is defined as a phenomenon with numerous manifestations that encompasses various legal frameworks. Although all elements of human dignity are disclosed and enshrined in the Charter of Fundamental Rights of the European Union, this concept is also invoked to strengthen and enrich EU law as a whole. The research employs interdisciplinary and terminological approaches, as well as dialectical, hermeneutic, historical-legal, comparative-legal, systemic-functional methods, and the method of legal modeling. Particular emphasis is placed on the potential of dignity as a guideline for legal interpretation and for shaping sustainable development policies within a united Europe. The case law examined in the article demonstrates that the Court of Justice of the European Union refers to dignity in cases related to various areas of legal regulation. The article highlights the importance of the activities of the Court of Justice of the European Union in interpreting human dignity as a fundamental value underlying the organization and functioning of the EU, as a general principle of law, and as an individual subjective right. Problematic issues concerning the relationship between the values enshrined in the Treaty on European Union and the rights guaranteed by the Charter of Fundamental Rights of the European Union are addressed. The significance of the Convention for the Protection of Human Rights and Fundamental Freedoms in the formation and development of EU legal regulation in the field of human rights is emphasized. The importance of enshrining human dignity at the level of the founding treaties and the Charter of Fundamental Rights of the European Union is substantiated. The theoretical generalizations and conclusions obtained within the framework of the research are based on the analysis of a wide range of doctrinal sources, as well as acts of international human rights law, primary and secondary EU law, EU soft law acts, and the constitutional legislation of individual states. The results of the study may be useful for conducting comparative legal research aimed at identifying approaches to the normative consolidation of human dignity in international law, European Union law, and the law of the Council of Europe; comparing the positions of the Court of Justice of the European Union and the

European Court of Human Rights on this issue; and improving domestic human rights legislation.

Keywords: *human dignity; EU values; general principles; human rights; EU Charter of Fundamental Rights; judicial interpretation; EU law.*

Концептуалізація людської гідності в праві Європейського Союзу

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Анотація

Метою статті є проведення міждисциплінарного дослідження становлення й розвитку правового регулювання людської гідності в умовах європейської інтеграції. Людська гідність визначається як феномен, що має численні прояви і охоплює різні правові рамки. Хоча всі елементи людської гідності розкриті і закріплені в Хартії ЄС про основні права, на неї посилаються для того, щоб зміцнити та збагатити право ЄС в цілому. У процесі дослідження застосовувались міждисциплінарний і термінологічний підходи, діалектичний, герменевтичний, історико-правовий, порівняльно-правовий, системно-функціональний методи, а також метод правового моделювання. Зроблено акцент на потенціалі гідності як орієнтира для правової інтерпретації та проведення політики сталого розвитку об'єднаної Європи. Прецеденти, що використовуються у статті, покликані довести, що Суд справедливості ЄС посилається на гідність у справах, пов'язаних з різними сферами правового регулювання. У статті наголошено на важливості діяльності Суду справедливості ЄС у питанні тлумачення людської гідності як фундаментальної цінності, що лежить в основі організації та функціонування ЄС, як загального принципу права і як суб'єктивного права індивіда. Порушено проблемні питання взаємозв'язку між цінностями, закріпленими в Договорі про ЄС, та правами, закріпленими у Хартії ЄС про основні права. Наголошено на значенні Конвенції про захист прав людини і основоположних свобод в питанні становлення й розвитку правового регулювання ЄС в сфері прав людини. Обґрунтовано важливість закріплення людської гідності на рівні установчих договорів та Хартії ЄС про основні права. Теоретичні узагальнення і висновки, отримані в межах дослідження, ґрунтуються на аналізі широкого спектру доктринальних джерел, а також актів міжнародного права прав людини, первинно, вторинного права ЄС і актів його «м'якого» права, конституційного законодавства окремих держав. Результати дослідження можуть бути корисними для проведення порівняльно-правових

досліджень стосовно визначення підходів до нормативного закріплення людської гідності в міжнародному праві, праві Європейського Союзу і праві Ради Європи; порівняння позицій Суду справедливості ЄС і Європейського суду з прав людини з означеного питання, а також удосконалення вітчизняного законодавства в сфері прав людини.

Ключові слова: *людська гідність; цінності ЄС; загальні принципи; права людини; Хартія ЄС про основні права; судове тлумачення; право ЄС.*

Introduction

The future of Europe in an increasingly fragmented world depends on a robust democracy, adherence to the rule of law, and the level of protection afforded to the values upon which the European Union is founded and operates. According to Art. 2 of the Treaty on European Union (hereinafter, the TEU), the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities [1]. In the EU Charter of Fundamental Rights, human rights and freedoms are grouped around six values of a united Europe, with "Dignity" occupying the first place among them [2].

The values enshrined in the primary law of the EU are common to all Member States. A. Matat, in his study, emphasizes the fact that the explanations to the EU Charter of Fundamental Rights regarding the content of Art. 1 state that the right to human dignity is not only one of the fundamental rights but also a constitutive principle underlying the entire system of individual rights in the EU [3, p. 237].

Human dignity as a value permeates not only the primary but also the secondary law and the law-enforcement practice of the EU. In particular, European Union legislation safeguards respect for human dignity in such areas of legal regulation as criminal justice, immigration, and labor rights, among others. Respect for human dignity also implies combating poverty and ensuring every individual's access to healthcare, education, and social support. The Court of Justice of the European Union contributes to the observance of human dignity when adjudicating human rights and equality cases; national courts, in turn, are likewise required to apply EU law to protect human dignity [4].

In the course of European integration, the issue of human dignity acquires particular salience for Ukraine. Respect for human dignity is enshrined at the constitutional level in Ukraine: Art. 3 of the Constitution recognizes dignity as one of the highest social values, while Articles 28 and 68 prohibit any encroachment upon it [5]. The preamble of the Association Agreement between Ukraine, on the one hand, and the European Union,

the European Atomic Energy Community, and their Member States, on the other (hereinafter, the Association Agreement), in turn, emphasizes that the Parties are, first, committed to a close and lasting relationship grounded in shared values, including respect for human dignity; second, that Ukraine, as a European country, shares common values with the Member States of the European Union and is determined to uphold them; third, that common values are key elements of the Association Agreement; and fourth, that Ukraine's political association and economic integration with the European Union will depend, inter alia, on Ukraine's progress in ensuring respect for those common values [6].

The experience of European integration of the countries of Eastern and Southern Europe, drawn from among the former post-socialist states, convincingly demonstrates that the successful realization of the values of a united Europe requires not only their formal entrenchment at the legislative level but also their effective implementation in practice. An awareness of this fact creates a need not only to transform domestic legislation but also to refine existing mechanisms capable of safeguarding human dignity across various spheres of social life.

Literature review

In the contemporary world, human dignity is perceived not as a philosophical abstraction but as a legally recognized standard at the international and regional (and, above all, European) levels, incorporating criteria for assessing the fairness, lawfulness, and proportionality of public and private action, and upon which legislators and courts in democratic, rule-of-law states rely [7].

For Ukraine, given the strategic course toward European integration enshrined in its Constitution, scholarly inquiry into the place and role of human dignity in European Union law assumes particular significance. In this regard, the research of C. Pagano merits attention, in which the scholar approaches human dignity as a legal principle guiding public officials in the interpretation, application, and enforcement of the norms of international human rights law, as well as European and national law relating to sustainable development [7]. No less compelling is the approach of V. Neagoe, in whose view, within the doctrine of natural law, human dignity may be regarded as a "mother right", as a core value (Art. 2 of the Treaty on European Union (hereinafter, the TEU) [1]), as a fundamental subjective human right that is inviolable and subject to respect and protection (Art. 1 of the EU Charter of Fundamental Rights [2]), and as a general principle of EU law that "enjoys a special status as an autonomous fundamental right" (Case C-36/02 Omega [8]). The obligation imposed

on candidate countries to respect and promote the values of a united Europe (Art. 49 of the TEU) renders the treatment of human dignity an effective benchmark for assessing a country's readiness for EU accession; consequently, the concept of human dignity also informs the Union's posture on the international stage (Art. 21 of the TEU). From a positivist-normativist perspective, V. Neagoe notes, human dignity is regarded as an important interpretive principle that reflects its considerable hermeneutic potential, which judges may draw upon in the administration of justice [9].

Problematic issues concerning the relationship between the values outlined in Art. 2 of the TEU and the rights enshrined in the EU Charter of Fundamental Rights, as well as the means of attaining "mutual trust" among Member States, are examined in the works of C. Dupré [10] and J. Jones [11]. The problem of adherence to EU values as a benchmark for the development of Ukraine's legal system is taken up in the scholarship of T. Komarova [12], V. Lomaka [13], A. Matat [3], L. Chekalenko [14], and other authors.

Among the publications devoted to defining the role of human dignity in the functioning of the European Union, particular attention is given to scholarly works addressing the problem of the democratic deficit, both at the EU level (I. Yakoviuk, L. Trahniuk [15]) and within individual Member States (most notably Poland (before 2023) and Hungary, where this deficit has manifested itself in gross violations of the value under discussion (C. Dupré [16; 17])).

Despite the substantial body of scholarship devoted to defining the place and role of human dignity in European Union law, this set of issues retains its salience, particularly because certain authors characterize human dignity as an "empty" concept (M. Bagaric, J. Allan [18]) or, at the very least, a contested one (P. A. Rodriguez [19], S. Cunningham [20]), or as a subjective idea that shifts with time and the observer and masks "a significant amount of disagreement and outright confusion" (M. Rosen [21]). In turn, P. Akaliyski and C. Welzel [22], as well as J. Ciechański [23], with whose position the present author finds it difficult to agree, question the desirability of arriving at a unified, politically motivated interpretation of fundamental values within EU law, since, in their view, doing so could undermine the project of European integration.

Although human dignity is one of the four universal values upon which the European Union is founded and operates, and which underpins EU law, it remains insufficiently substantiated in a concrete legal sense. This is reflected in the debates concerning its content and role in legal regulation (even the Court of Justice of the EU regards the principle of human dignity

as one of the most difficult to comprehend [25]), as well as in a number of crises the Union has confronted over the past decade and its less-than-optimal responses to them. Accordingly, there is a need for a concrete and expanded European interpretation of the Union value under discussion.

Materials and Methods

This article seeks to provide a legal account of the concept of human dignity through the prism of the European Union. At first glance, the subject of this article may appear unexpected, given that the economic component remained – and continues to remain – the defining vector of integration, not only before the establishment of the European Union but to the present day. Human dignity is a multifaceted concept whose emergence and development have been accompanied by a diversity and eclecticism of doctrinal commentary, which, objectively, complicates any attempt to determine its place and role within the legal order of a united Europe. In the course of the research, it became necessary to delineate the boundaries of the study, both formally and substantively, by focusing on the internal dimension of the concept within the EU legal order. The study is structured around an examination of the norms of the primary and secondary law of the Union, as well as an analysis of judgments of the Court of Justice of the EU that lay down the foundational propositions of this concept.

The study of human dignity drew on natural-law, positivist, and teleological approaches alike. This made it possible to disclose more fully the content of the concept under examination, as well as its connection with the general principles of law and with fundamental rights. The article traces the genesis of approaches to enshrining human dignity in EU law and analyzes the functions this phenomenon performs in the process of legal regulation of a united Europe.

Although the European Communities initially pursued a humanitarian mission and were guided by the aims of peace and social progress, for a long time, they did not operate with the concept of "human dignity". Gradually, however, under the influence of the Court of Justice of the EU and the European Parliament, this concept came to be legalized and entrenched, first in secondary and subsequently in primary EU legislation.

Legal regulation in the European Union is dynamic by nature, and the concept of human dignity, together with the sources in which it is reflected, forms the bedrock of the European paradigm and shapes the content and outer limits of the legal order of a united Europe.

The article demonstrates how the concept performs a protective function through the progressive recognition, at the normative level, of the right to respect for human dignity and the human rights flowing from it.

Results and Discussion

Dignity in philosophical and political-legal thought

Throughout the history of humankind, dignity has assumed a multitude of conceptual forms tied to theological ideas, morality, humanism, individual autonomy, personhood, flourishing, and self-respect. In the twentieth century, however, it came to be conceptualized as a holistic, ontological, and absolute principle [26, p. 49]. The development of European philosophical thought contributed to the gradual emergence of the notion of the intrinsic worth of every human being. During the Renaissance, the idea of the inherent worth of the human being was elaborated, presupposing recognition of the individual's autonomy and the creation of conditions conducive to free development [27]. An important contribution to the evolution of the concept was made by I. Kant, who in Groundwork of the Metaphysics of Morals emphasized that a human being must never be treated merely as a means: he or she is always an end in himself or herself [28].

R. Debes, in examining the questions of when the moralizing connotation of the term "dignity" entered common usage and whether this concept had previously existed under a different terminology, concludes that in his argumentation, Kant already employed the word "Würde", which was translated by the concept "dignity", although literally it meant "value". While at that time "value" was understood specifically as an economic category, Kant rejected such an interchangeable connotation in the use of the word "Würde", which prompted English translators to introduce a new term, namely, "dignity" [29].

Until 1850, R. Debes observes, the English term "dignity", together with its Latin root "dignitas" and its French equivalent "dignité", was not used to denote "the innate or unearned worth of a human being" [29]. Until that date, the word "dignity" was understood in the context of merit and a certain form of inequality; it denoted a social status associated with nobility, power, gentlemanly conduct, or ecclesiastical preferment. References to "dignity" are not to be found in either the Declaration of Independence or the Constitution of the United States, nor were they heard among the watchwords of the French Revolution (1789–1804).

National and international legal experience in the normative entrenchment of human dignity

Researchers encounter the first official use of this term in the sense in which it is used today in Art. 3(I)(c) of the Constitution of Mexico (1917) [30], although even there it did not yet expressly denote an inherent human worth. The concept was first codified only in the Universal Declaration of

Human Rights (1948) [31] through references to it in the preamble and in Articles 1 and 5 [32].

The reference to dignity in the preamble of the Charter of the United Nations[1] and in the Universal Declaration of Human Rights laid an important theoretical foundation for conceptualizing the idea of human rights at both the international and national levels. The preambles to the UN International Covenant on Civil and Political Rights [33] and the International Covenant on Economic, Social and Cultural Rights [34] recognize the inherent dignity of all members of the human family as the foundation of human rights, although human dignity itself is not singled out as a distinct human right. In the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) [35], although human dignity is referred to obliquely in Art. 3, the case law of the European Court of Human Rights nonetheless holds (*Case of Pretty v. the United Kingdom*, § 65) that respect for human dignity and human freedom is "the very essence of the Convention" [36].

Since the integrative process on the continent draws its inspiration from the cultural, religious, and humanist heritage of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality, and the rule of law [1], the concept of human dignity objectively forms the foundation of the European paradigm and shapes the content and outer limits of its legal order. However, as P. de Montalivet observes, "the transposition of a moral or religious precept into law, its transformation into a legal norm, necessarily entails the risk of divergence: in this case, divergence between the principle of dignity as it appears in philosophy or morality and that same principle as it appears in law", including the law of the European Union [26].

The role of the Court of Justice of the EU in the recognition of human dignity in the law of a united Europe.

As M. Durand-Mercereau notes, under contemporary conditions, the concept of human dignity occupies a privileged position in the EU Charter of Fundamental Rights. This was not always the case, however – any mention of it was for a long time absent from the law of the European Community. Although European integration was from the outset guided by the aims of peace and social progress and pursued an important humanitarian mission, references to this concept were absent until the establishment of the European Union, owing to integration's exclusively economic orientation. Nonetheless, owing above all to the efforts of the Court of Justice of the

[1] The Preamble to the Charter of the United Nations proclaims: "We the peoples of the United Nations determined … to reaffirm faith in fundamental human rights, in the dignity and worth of the human person".

European Communities, this concept was first recognized and subsequently entrenched, initially in the secondary and later in the primary law of the Union [37].

The role of the Court of Justice of the European Communities in the protection of fundamental rights took shape slowly. As is well known, the Treaty of Paris and the Treaties of Rome contained no provisions capable of serving as a legal basis for the protection of fundamental human rights and freedoms. The Court of Justice was compelled, step by step, to construct and develop this legal foundation. The first step in that direction came in the judgment in *Van Gend en Loos v. the Netherlands* (Case 26-62), in which a mere intimation of human rights was sounded: "Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage" [38].

The next significant step was taken by the Court in 1969 in *Erich Stauder v. City of Ulm* (Case 29-69), in which a direct reference was made to fundamental human rights: "Interpreted in this way, the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court" [39]. The Court confirmed its position in 1970 in the judgment in *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main, Germany* (Case 11-70), in which it once again emphasized: "… respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community" [40]. In 1974, in the judgment in *J. Nold Kohlen- und Baustoffgroßhandlung v. Commission* (Case 4-73), the Court further developed its position: reaffirming the conclusion previously expressed that fundamental human rights form an integral part of the general principles of law, it noted that since it draws its inspiration from the constitutional traditions common to the Member States, it "… cannot uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States". The Court also referred to the Convention for the Protection of Human Rights and Fundamental Freedoms, observing that it, together with other international human rights treaties, "can supply guidelines which should be followed within the framework of Community law" [41].

The revolutionary character of the position the Court took in the judgments in these cases lay, first, in the fact that the Court had recourse to the

general principles of Community law (a category into which fundamental human rights were now included) as a basis for ensuring the protection of the latter; and, second, in the fact that the Court established that the general principles of law are derived from the constitutional traditions of the Member States of the Communities, traditions common to those Member States.

The role of interpretation in defining the substance of the phenomenon of human dignity. The position of the Court of Justice of the EU has acquired considerable significance for understanding the content of human dignity and for defining its role in the development of the concept of human rights in European Union law. This is because the literal text of the founding treaties serves only as a starting point in the process of apprehending the meaning embedded in a given norm of law through its interpretation.

As to the law, Ch. Girard observes that the theory of interpretation presupposes the existence of a hidden aspect of the legal text, the disclosure of which would reveal the deeper meaning of a particular source of law. The discourses that sustain this idea "... are based on the conviction that there exists a determinate essence of law that can be mapped onto the idea of justice; that the judge is the organ formally designated by the State to deliver it; and that this natural foundation – itself legal in character, since it is binding – determines the legal solutions embodied in the textual and applied (jurisprudential) legal order through an understanding of the concept of human rights, and sometimes of fundamental rights" [42]. Interpreting Ch. Girard's reasoning, one may conclude that situations can arise in which, in engaging with the text of a founding treaty, a judge encounters the absence of an obvious answer – one that should in principle be supplied by the legislative authority and, in the case of an EU founding treaty, by the Member States that drafted and adopted it – which serves as proof that not all law consists in what has been laid down by legislation. É. Picard, in turn, observes that the matter may not concern the interpretation of the sense of the text, but rather, to a far greater extent and in a particular way, the text of the sense, which may express itself through means other than the text itself [43].

Case law invoking this principle began to take shape relatively recently. In *P v. S and Cornwall County Council*, decided on 30 April 1996, the Court of Justice of the EU made its first reference in a judgment to respect for dignity: "To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court is required to safeguard" [44]. In her opinion in Case C-36/02, Advocate General Stix-Hackl stated: "Human dignity, as a fundamental expression of an element of humanity grounded

simply in humanness, constitutes the foundation and starting point of all the other human rights distinct from it; at the same time, it is the point of convergence of the individual human rights, in light of which they must be understood and interpreted" (para. 76). She further emphasized that human dignity is a general principle, an evaluative principle, and an autonomous fundamental right amenable to judicial review (para. 81) [25]. The treatment of human dignity as both a right and a general principle also appears in Case C-377/98 [2001] ECR I-7079 [45]. References to human dignity are likewise found in Joined Cases C-34/95, C-35/95, and C-36/95 *De Agostini and Others* [1997] ECR I-3843 [46], in the submission of Advocate General Ruiz-Jarabo Colomer in his opinion in Case C-117/01 KB [2004] ECR I-0000, and in the submission of Advocate General Cosmas in his opinion in Case C-50/96 *Lilli Schröder and Others* [2000] ECR I-743 [25]. Thus, the Court of Justice of the EU effectively adopted the position that it regarded the principle of human dignity as a natural right pre-existing any legal construct, even one of a quasi-constitutional character.

It should be noted that the Court of Justice of the EU does not frequently invoke the right to dignity in its judgments, doing so only once or twice a year, whereas other rights enshrined in the Charter are relied upon far more often. This is explained by the fact that dignity is also reflected in many other, more specific rights [47].

Approaches to the entrenchment of human dignity in EU legislation

Gradually, the principle of human dignity has acquired clear normative entrenchment in the EU legal order, although this was preceded by debate over the manner of its formalization. Thus, no unanimity of views existed as to whether it should be referred to symbolically (for example, in the preamble) or enshrined in legal form, in numbered articles of a declaration of rights. If the answer to the latter question is affirmative, P. de Montalivet observes, a further question arises: should the provision on dignity be placed at the beginning of the text to underscore its foundational character, or further on in the text? Finally, is the scope of dignity confined to a particular field, or is it unlimited? [26, p. 50].

It is worth noting that, in constitutional theory and practice, at the level of international human rights law, and within regional legal systems, including European systems, no uniform approach to these questions has been developed:

– mention of dignity only in the preamble of an instrument: this mode of formalization is employed in the International Covenant on Economic, Social and Cultural Rights ("recognition of the inherent dignity", "rights deriving from the inherent dignity of the human person") [34]; evidently, in this Covenant, the scope of application is unlimited;

- reference to dignity both in the preamble and in the articles of an instrument with a delimited scope: this mode of formalization is employed in the Universal Declaration of Human Rights (1948), where dignity is mentioned in the preamble ("… faith in fundamental human rights, in the dignity and worth of the human person") and in Art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment") [31]. A similar mode of formalization is also employed in the UN International Covenant on Civil and Political Rights (mentioned in the preamble and subsequently in Art. 10: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person") [33];
- mention of dignity in the articles of an international instrument without emphasis on its significance for other human rights: this approach is employed in the Convention for the Protection of Human Rights and Fundamental Freedoms (!No one shall be subjected to torture or to inhuman or degrading treatment or punishment", Art. 3) [35].

Entrenchment of human dignity in the primary and secondary law of the EU

As regards the recognition of human dignity at the level of European Union law, it occurred relatively recently and proceeded in an evolutionary manner. A substantial portion of the human rights instruments of a united Europe were political in character. Thus, in 1977, the European Parliament, the Council, and the Commission adopted a Joint Declaration "Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms", which emphasized the following: first, that the treaties establishing the European Communities are founded on the principle of respect for law; second, that, in accordance with the position of the Court of Justice of the European Communities, the law includes, in addition to the norms enshrined in the founding treaties and subordinate Community acts, general principles of law and, in particular, fundamental rights; third, that, on the basis of the foregoing, paramount importance is attached to the protection of fundamental rights, as they derive in particular from the constitutions of the Member States[2] and from the European Convention for the Protection of

[2] It should be noted, by way of illustration, that Art. 1 of the Basic Law of the Federal Republic of Germany (1949) provides as follows: (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace and of justice in the world. (3) The following fundamental rights shall bind the legislature, the executive and the judiciary as directly applicable law [48].

Human Rights and Fundamental Freedoms; and fourth, that, in exercising their powers and in pursuit of the objectives of the European Communities, their institutions shall respect these rights [49].

On 17 February 1986, the Single European Act was signed, the preamble of which contained a provision on human rights (the Parties "determined to work together to promote democracy based on the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms, and in the European Social Charter"); human dignity, however, was not mentioned therein [50].

On 12 April 1989, the European Parliament adopted the Declaration of Fundamental Rights and Freedoms, the preamble of which stated that "with the aim of continuing and giving fresh impetus to the work of the democratic unification of Europe, … it is important for Europe to affirm the existence of a legal community founded on respect for human dignity and fundamental rights", and Art. 1 ("Dignity") declared that "human dignity is inviolable" [51].

The Community Charter of the Fundamental Social Rights of Workers, adopted in 1989, did not contain any direct reference to human dignity or to its connection with social rights. At the same time, the Charter links dignity with certain social rights, by affirming, first, that workers are to be afforded a fair wage (that is, a wage sufficient to ensure them a decent standard of living), and, second, that every worker of the European Community must, on reaching retirement age, be able to enjoy resources affording him or her a decent standard of living [52].

At the next stage of this evolution, a number of EU acts, predominantly of a "soft law" character, were adopted that raised the question of human dignity, namely:

– certain acts of EU secondary legislation were adopted as early as the late 1960s; in particular, Council Regulation (EEC) No 1612/68 of 15 October 1968 on the freedom of movement for workers within the

Beyond the German Basic Law, human dignity is referenced in the first article of the Constitutions of Portugal and Romania, and in the Preambles to the Constitutions of Bulgaria and Spain. The Constitutions of Belgium (Art. 23 affirms that everyone has the right to lead a life consistent with human dignity), Estonia (Art. 10 provides that the rights and freedoms enumerated in the Constitution conform to the principle of human dignity), Poland (Art. 30 emphasizes that the inherent and inalienable dignity of the person constitutes the source of the freedoms and rights of persons and citizens), and Finland (§§1, 7, 9, 19, 31) accord dignity a distinct role within the human rights framework, recognizing it as the source of other human rights and freedoms [47].
Among the remaining EU Member States, provisions relating to dignity are absent only from the Constitutions of Denmark, Cyprus, Luxembourg, Malta and the Netherlands.

Community [53] contained, in its preamble, a reference to human dignity (the right to freedom of movement was to be exercised, by objective standards, freely and with dignity);
- the European Parliament Resolution on Discrimination against Transsexuals of 12 September 1989, paragraph 1 of which expressed the conviction that human dignity and the protection of the human person necessarily entail the right to lead one's life in accordance with one's sexual identity [54];
- Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services [55];
- Council Resolution of 29 May 1990 on the Protection of the Dignity of Women and Men at Work [56];
- Commission Recommendation 92/131/EEC of 27 November 1991 on the Protection of the Dignity of Women and Men at Work [57];
- the Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services [COM (96) 483] [58];
- Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [59].

A genuine breakthrough in the normative recognition of the concept of human dignity would have been its entrenchment at the level of the founding treaties. The first step in that direction was taken in the Treaty on European Union. As already noted above, Art. 2 of the Treaty declared that the Union is founded on the values of respect for human dignity.

The formulation, at the level of the primary law of the EU, of the concept of human dignity vividly reflects the maximalist approach of its drafters. Support for this conclusion is found, first, in the fact that the Treaty (and, subsequently, the Charter as well) asserts "human dignity" rather than "the human person", thereby aligning itself with the position of the Court of Justice of the EU on this question. Second, beyond its status as a "foundational value", dignity is at the same time both a principle and a right, an indication of its dual objective and subjective dimensions [26].

The understanding of the concept of human dignity reflected in the EU Charter of Fundamental Rights (2000) [2] (dignity applies to all rights set out in Chapter I by virtue of the general recognition it receives in Art. 1 of the Charter) is similar to the approach normatively enshrined in paragraphs 1 and 2 of Art. 1 of the Basic Law of Germany[3]; it has served as a bridge

[3] Paras. 1 and 2 of Art. 1 of the Basic Law of the Federal Republic of Germany provide: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority" [48].

through which the other fundamental values of a united Europe, and the connections among them, may be more fully apprehended.

In the EU legal order, human dignity is regarded not in isolation but in conjunction with the other fundamental values enshrined in the Charter, namely:

- the value of "freedom" (Chapter II), the content of which is elaborated by means of the following principles: the right to liberty and security (Art. 6), respect for private and family life (Art. 7), the protection of personal data (Art. 8), the right to marry and the right to found a family (Art. 9), freedom of thought, conscience, and religion (Art. 10), freedom of expression and information (Art. 11), freedom of assembly and of association (Art. 12), freedom of the arts and sciences (Art. 13), the right to education (Art. 14), freedom to choose an occupation and the right to engage in work (Art. 15), the freedom to conduct a business (Art. 16), the right to property (Art. 17), the right to asylum (Art. 18), and protection in the event of removal or extradition (Art. 19);
- the value of "equality" (Chapter III)[4], around which the following principles are organized: equality before the law (Art. 20), the prohibition of any discrimination (Art. 21), respect for cultural, religious, and linguistic diversity (Art. 22), equality between men and women (Art. 23), the rights of the child (Art. 24) and the rights of the elderly (Art. 25), and the integration of persons with disabilities (Art. 26). The connection between dignity and equality may also be traced at the level of EU secondary legislation, in particular in the preamble of Regulation No 1612/68[5] [60].

The entrenchment of human dignity in the Charter is not confined to the articulation of a particular subjective right but appears as a fundamental value around which a system of norms is constructed that captures its various aspects (some authors emphasize the paramount place of dignity among fundamental human rights [61, p. 337]), namely: the right to life (Art. 2), the right to the integrity of the person (Art. 3), the prohibition of torture and inhuman or degrading treatment or punishment (Art. 4), and the prohibition of slavery and forced labor (Art. 5). The rationale for this

[4] Advocate General Stix-Hackl observes that the conception of the legal equality of all is inherent in the very idea of human rights in general and of human dignity in particular, which is why the expression "égale dignité" ("equal dignity"), encompassing both concepts, is frequently employed [25].

[5] The Preamble to Regulation No 1612/68 provides, inter alia: "Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing".

manner of concretizing the content of the value of human dignity is as follows: when human dignity is shaped and articulated in each fundamental right, it assumes a more concrete substantive form and operates as a benchmark for assessing and interpreting that right [25].

The maximalist approach to enshrining human dignity in the Treaty Establishing a Constitution for Europe and in the EU Charter of Fundamental Rights (2007). Human dignity was to be enshrined most solemnly in the Treaty Establishing a Constitution for Europe (2004) [62]. The demonstration of the maximalist approach to the definition of dignity, both in the mode of its affirmation and in the scope of its application, was to consist in the following:

First, the inclusion of the provisions of the EU Charter of Fundamental Rights within the Treaty itself, which entailed conferring upon them supreme legal force;

Second, human dignity was named first among the values of the Union (Art. 1-2), the promotion of which was acknowledged as an aim of a united Europe and which it advances in its relations with the rest of the world (Articles 1-3 and III-292);

Third, the place assigned to the provisions of the Charter within the structure of the Constitution:

(a) Art. I-9 ("Fundamental Rights") provided that the Union recognizes the rights, freedoms, and principles set out in the Charter of Fundamental Rights, while setting them out in a separate Part II of the Constitution; that it accedes to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which, however, does not alter its competence as defined in the Constitution; and that fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as those flowing from the constitutional traditions common to the Member States, constitute general principles of Union law;
(b) Part II of the Constitution sets out the Charter of Fundamental Rights of the Union directly, the structure and content of which reproduce the provisions of the Charter in its 2000 version.

Thus, in the Treaty Establishing a Constitution, the dignity of the human person was effectively formulated as a constitutional principle underlying the entire legal order of the European Union. This construction rested on substantial prior case law of the Court of Justice of the EU, which had appealed to human dignity as a value and as a general principle rather than as one of the fundamental rights.

The Treaty Establishing a Constitution was ratified by 18 Member States, when it was rejected in referenda in France (55% against) and the Netherlands (61% against) in May and June 2005, respectively, which rendered the continuation of ratification procedures by the remaining Member States impracticable.

The "period of reflection" that followed the failed ratification of the Treaty ultimately led to the conclusion of a new treaty. The Lisbon Treaty places less emphasis on strengthening a sense of identity among European citizens. This is borne out by the fact that its drafters abandoned the idea of incorporating the EU Charter of Fundamental Rights into the text of the founding treaties (so as to avoid accusations of excessive federalization of the European Union) and instead conferred upon the Charter legal force equal to that of the founding treaties while preserving its autonomy.

Because the EU Charter became part of the primary law of the EU, this entails the need to interpret EU law, including secondary law, in the light of fundamental rights. This means, in particular, that EU legislation, as well as Member State legislation implementing EU law, is invalid if it infringes the EU Charter [63].

On 15 February 2007, Council Regulation (EC) No 168/2007 of the European Union, establishing the European Union Agency for Fundamental Rights, responsible for monitoring the implementation of the Charter of Fundamental Rights in the Member States of the European Union, was published [64]. The Regulation emphasizes that deeper knowledge and broader understanding of issues relating to fundamental human rights in the Union contribute to their full observance. To achieve this end, the establishment of a dedicated agency was deemed beneficial. The Agency relies on its work on fundamental rights within the meaning of Art. 6(2) of the Treaty on European Union, including the European Convention on Human Rights and Fundamental Freedoms, and on those reflected in the Charter of Fundamental Rights, having regard to its status. Among the principal functions of the Agency were the following: the collection and analysis of data, the provision of opinions to EU institutions and Member States, and the development of a strategy of communication and dialogue. The adoption of the Regulation and the subsequent establishment of the EU Agency for Fundamental Rights attested to the Union's aspiration to promote the implementation of the Charter in the Member States.

Conclusions.

The concept of human dignity occupies a central place in the philosophical and political-legal inquiries of Europeans; nonetheless, its legal codification in international law was undertaken by humanity only after the Second

World War: the preamble of the Charter of the United Nations and Art. 1 of the Universal Declaration of Human Rights both contain references to dignity. The next step was the inclusion of a provision on dignity in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Together, the Universal Declaration of Human Rights and the two Covenants constitute the International Bill of Human Rights.

Regional integration organizations, the European Union and the Council of Europe in particular, likewise incorporate dignity into their human rights instruments. Dignity enjoys an especially elevated status in European Union law: references to it are contained in the Treaty on European Union and in the EU Charter of Fundamental Rights, as well as in the Union's secondary law. The Charter provides: "Human dignity is inviolable. It must be respected and protected". With the entry into force of the Lisbon Treaty, the Charter was placed on an equal footing, in legal force, with the founding treaties; as a consequence, the observance of dignity in fields falling within the scope of EU law has acquired a binding character.

Although dignity may be regarded as a discrete, enforceable right, the more prevalent practice is to perceive it, first, as a fundamental value of the European Union of considerable significance for understanding the content of other human rights and, second, as a general principle underlying the entire system of human rights in the EU. The integration of dignity into legal norms, policy, and institutional practice is essential to achieving a model of sustainable development that is not merely resilient but truly human-centered.

The integration of dignity into the norms of European Union law, its policies, and its institutional practice is an essential condition for the further construction of a democratic united Europe that is not merely resilient but truly oriented toward the human being, his or her interests, and his or her needs.

References

[1] Consolidated version of the Treaty of the European Union. (n.d.). Retrieved from https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF.

[2] Charter of Fundamental Rights of the European Union. (n.d.). Retrieved from https://eur-lex.europa.eu/eli/treaty/char_2012/oj/eng.

[3] Matat, A.V. (2025). European Human Rights Standards and their Implementation in Ukraine: Analysis of the EU Charter of Fundamental Rights. *Scientific Bulletin of Uzhhorod National University. Series: Law, 1*(89), 235-239. https://doi.org/10.24144/2307-3322.2025.89.1.32.

[4] Human dignity in the European Union (EU). (n.d.). Retrieved from https://valuesatvet.si/files/2025/06/Human-dignity-in-the-European-Union.pdf.

[5] Constitution of Ukraine. (1996, June 28). Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.
[6] Preamble. Association Agreement between the European Union and its Member States, of the One Part, and Ukraine, of the Other Part. (n.d.). Retrieved from https://www.kmu.gov.ua/storage/app/sites/1/uploaded-files/PREAMBLE.pdf.
[7] Pagano, C. (2026). Sustainable Development and the Protection of Human Dignity: Legal Perspectives Between International and EU law. *Bulletin of the Transilvania University of Braşov. Series VII: Social Sciences: Law, 18*(67, Special Issue), 49-54. https://doi.org/10.31926/but.ssl.2025.18.67.3.5,
[8] *Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. (n.d.). Retrieved from https://eu.vlex.com/vid/judgment-of-the-court-838526025,
[9] Neagoe, V. (2026). Human Dignity as a Principle of Interpretation of European Union law. *Bulletin of the Transilvania University of Braşov. Series VII, 18*(67, Special Issue), 137-146. https://doi.org/10.31926/but.ssl.2025.18.67.3.15.
[10] Dupré, C. (2021). The Rule of Law, Fair Trial and Human Dignity: The Protection of EU Values after LM. In *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (pp. 431-442). Berlin, Germany: Springer Berlin Heidelberg. https://doi.org/10.1007/978-3-662-62317-6_17.
[11] Jones, J. (2012). Human Dignity in the EU Charter of Fundamental Rights and its Interpretation before the European Court of Justice. *Liverpool Law Review, 33*(3), 281-300. https://doi.org/10.1007/s10991-012-9121-9.
[12] Komarova, T.V. (2024). EU Values as a Guide for Ukrainian Legal System. *Problems of Legality. Special Issue,* 61-82. https://doi.org/10.21564/2414-990x.166.315206.
[13] Lomaka, V. (2024). Legal Values as the Basis of the Legal Culture of Society. *Philosophy, Economics and Law Review, 4*(2), 84-96. https://doi.org/10.31733/2786-491X-2024-2-84.
[14] Chekalenko, L. (2013). European Values: Fundamental Principles of European Integration. *Ukraine Diplomatic, 14*, 628-640.
[15] Yakoviyk, I., & Tragniuk, O. (2025). "Democracy deficit" in the European Union: Problems and Possible Solutions. *Problems of Legality, 170*, 6-35. https://doi.org/10.21564/2414-990X.170.334538.
[16] Dupré, C. (2014). Article 1: Human Dignity. In: Peers S., Hervey T., Kenner J., & Ward A. (Eds.). *The EU Charter of Fundamental Rights: a Commentary* (pp. 3-24). Second Ed. CH Beck/Hart/Nomos, Oxford.
[17] Dupré, C. (2024). Hungary's Attacks on Human Dignity: Article 2 TEU and the Foundations of Democracy in the European Union. *European Law Journal, 30*(3), 260-283. https://doi.org/10.1111/eulj.12526.
[18] Bagaric, M., & Allan, J. (2006). The Vacuous Concept of Dignity. *Journal of Human Rights, 5*(2), 257-270.
[19] Rodriguez, P.A. (2015). Human Dignity as an Essentially Contested Concept. *Cambridge Review of International Affairs, 28*(4), 743-756. https://doi.org/10.1080/09557571.2015.1021297. [20] Cunningham, S. (2016). Reinforcing or Challenging Stigma? The Risks and Benefits of 'Dignity Talk'in Sex Work Discourse. *International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique, 29*(1), 45-65. https://doi.org/10.1007/s11196-015-9434-9.
[21] Rosen, M. (2012). *Dignity: Its History and Meaning*. Harvard University Press.
[22] Akaliyski, P., & Welzel, C. (2020). Clashing Values: Supranational Identities, Geopolitical Rivalry and Europe's Growing Cultural Divide. *Journal of Cross-Cultural Psychology, 51*(9), 740-762. https://doi.org/10.1177/0022022120956716.

[23] Akaliyski, P. (2019). United in Diversity? The Convergence of Cultural Values Among EU Member States and Candidates. *European Journal of Political Research, 58*(2), 388-411. https://doi.org/10.1111/1475-6765.12285.
[24] Ciechański, J. (2025). Common European Values and the Future of the European Union. *Stosunki Międzynarodowe – International Relations, 5*(3), 242-263. https://doi.org/10.12688/stomiedintrelat.17898.2.
[25] Opinion of Advocate General Stix-Hackl. Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn. (n.d.). Retrieved from https://infocuria.curia.europa.eu/tabs/document?source=document&text=&docid=49004&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5167564.
[26] De Montalivet, P. (2015). La Dignité Humaine sous l'Angle du Droit de l'Union Européenne Pierre. In B. Bévière-Boyer (Ed.). La Dignité Humaine en Santé France-Chine: Actes du colloque International tenu le 26 juin 2015 à la Chambre des Notaires de Paris (pp. 49-67). Retrieved from https://www.academia.edu/37971289/La_dignit%C3%A9_humaine_sous_l_angle_du_droit_de_l_Union_europ%C3%A9enne.
[27] Becchi, P. (2019). Human Dignity in Europe: Introduction. In P. Becchi & K. Mathis (Eds.). Handbook of Human Dignity in Europe (pp. 1-36). Cham, Switzerland: Springer.
[28] Kant, I. (2012). Groundwork of the Metaphysics of Morals. Cambridge, England: Cambridge University Press. Retrieved from https://cpb-us-w2.wpmucdn.com/blog.nus.edu.sg/dist/c/1868/files/2012/12/Kant-Groundwork-ng0pby.pdf.
[29] Debes, R. (2017). Dignity: a History. Oxford, England: Oxford University Press.
[30] Constitution of Mexico, 1917. (n.d.). Retrieved from https://hrlibrary.umn.edu/research/mexico-constitution.html.
[31] Universal Declaration of Human Rights. (n.d.). Retrieved from https://www.un.org/en/about-us/universal-declaration-of-human-rights,
[32] Debes, R. (n.d.). A history of human dignity. Retrieved from https://blogs.lse.ac.uk/theforum/a-history-of-human-dignity/.
[33] International Covenant on Civil and Political Rights. (December 6, 1966). General Assembly Resolution 2200A (XXI). Retrieved from https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.
[34] International Covenant on Economic, Social and Cultural Rights. (December 6, 1966). General Assembly Resolution 2200A (XXI). Retrieved from https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.
[35] European Convention on Human Rights as amended by Protocols No. 11, 14 and 15 supplemented by Protocols No. 1, 4, 6, 7, 12, 13 and 16. (n.d.). Retrieved from https://www.echr.coe.int/documents/d/echr/convention_ENG.
[36] Case of Pretty v. the United Kingdom (Application No. 2346/02). (April 29, 2002). Judgment, Strasbourg. Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60448%22]}.
[37] Durand-Mercereau, M. (2011). La Dignité de la Personne Humaine en Droit de l'Union Européenne: De la Genèse aux Fonctions du Concept. Doctoral (Law) Thesis. Paris, France. https://doi.org/10.70675/78ed1f36zb4f4z47abz8e6fz7e2e4c9c07fd.
[38] Judgment of the Court of 5 February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Reference for a preliminary ruling: Tariefcommissie – Netherlands. (1963). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61962CJ0026.

[39] Judgment of the Court of 12 November 1969. Erich Stauder v City of Ulm – Sozialamt. Reference for a preliminary ruling: Verwaltungsgericht Stuttgart – Germany. Case 29-69. (1969). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61969CJ0029&qid= 1775220545558.

[40] Judgment of the Court of 17 December 1970. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany. Case 11-70. (1970). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex-:61970CJ0011.

[41] Judgment of the Court of 14 May 1974. J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities. Case 4-73. (1974). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61973CJ0004&qid=1773556281544.

[42] Girard, C. (Ed.). (2010). Chapitre 1. L'accès au Fondement du Droit: De la Technicisation des Méthodes Jurisprudentielles à la Démultiplication des Autorités Jurisdictionnelles. In Des Droits Fondamentaux au Fondement du Droit (pp. 245-320). Paris, France: Éditions de la Sorbonne. https://doi.org/10.4000/books.psorbonne.105445.

[43] Picard, E. (1998). L'émergence des Droits Fondamentaux en France. Droit Administratif. No Spécial.

[44] P v. S and Cornwall County Council, Case C-13/94 [1996] IRLR 347. (1996). Retrieved from https://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20P%20v%20S.pdf.

[45] Case C-377/98. Judgment of the Court of 9 October 2001. Kingdom of the Netherlands v European Parliament and Council of the European Union. Annulment - Directive 98/44/EC - Legal protection of biotechnological inventions - Legal basis - Article 100a of the EC Treaty (now, after amendment, Article 95 EC), Article 235 of the EC Treaty (now Article 308 EC) or Articles 130 and 130f of the EC Treaty (now Articles 157 EC and 163 EC) - Subsidiarity - Legal certainty - Obligations of Member States under international law - Fundamental rights - Human dignity - Principle of collegiality for draft legislation of the Commission. (2001). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61998CJ0377.

[46] Judgment of the Court of 9 July 1997. Joined Cases C-34/95, C-35/95 and C-36/95. (1997). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61995CJ0034.

[47] Toggenburg, G. (n.d.). The 1st of all EU-r rights: Dignity and how the Charter Contributes. Retrieved from https://www.eurac.edu/en/blogs/eureka/the-1st-of-all-eu-r-rights-dignity-and-how-the-charter-contributes.

[48] Basic Law for the Federal Republic of Germany in the Revised Version Published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 22 March 2025. (2025). Federal Law Gazette, 2025, I(94).

[49] Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. (1977). *Eur-Lex.Europa.* Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31977Y0427(01).

[50] Single European Act: Agreement of 17 February 1986. (1986). Retrieved from https://zakon.rada.gov.ua/laws/show/994_028#Text.

[51] Déclaration des Droits et Libertés Fondamentaux. (April 12, 1989). Doc. A2-3/89. Retrieved from http://www.epgencms.europarl.europa.eu/cmsdata/upload/85fbfbc8-3587-4f67-902e-c61fcbe2158f/Plumb_Resolution_HumanRights_12_April_1989_FR.pdf.

[52] Community Charter of the Fundamental Social Rights of Workers. (n.d.). Retrieved from https://zakon.rada.gov.ua/laws/show/994_044#Text.
[53] Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers Within the Community. (1968). Retrieved from https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:31968R1612.
[54] Résolution du Parlement Européen du 12 septembre 1989 sur la Discrimination dont sont Victimes les Transsexuels. (September 12, 1989). Retrieved from https://transidentite.com/juridique/texteseuropeens/resolution_parlement_europe1989.pdf.
[55] Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the Coordination of Certain Provisions Laid down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive). (1989). Retrieved from https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF.
[56] Council Resolution of 29 May 1990 on the Protection of the Dignity of Women and Men at Work. (1990). Retrieved from https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990Y0627%2805%29:EN:HTML.
[57] Commission Recommendation 92/131/EEC of 27 November 1991 on the Protection of the Dignity of Women and Men at Work. (1991). Retrieved from https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=uriserv:c10917a.
[58] Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services [COM(96) 483]. (1996). Retrieved from https://eur-lex.europa.eu/EN/legal-content/summary/protection-of-minors-and-human-dignity-in-audiovisual-and-information-services-green-paper.html.
[59] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions. (1998). Retrieved from https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:31998L0044.
[60] Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers Within the Community. Document 31968R1612. (1968). Retrieved from https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:31968R1612.
[61] Israel, J.-J. (1998). *Droit des Libertés Fondamentales*. Paris, France: LGDJ.
[62] Treaty Establishing a Constitution for Europe: Protocols and Annexes. (2004). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2004.310.01.0001.01. ENG&toc=OJ%3AC%3A2004%3A310%3ATOC.
[63] The EU Charter of Fundamental Rights: An Indispensable Instrument in the Field of Asylum. (2017). Retrieved from https://ecre.org/wp-content/uploads/2017/02/The-EU-Charter-of-Fundamental-Rights.pdf.
[64] Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights. (2007). Retrieved from https://eur-lex.europa.eu/eli/reg/2007/168/oj/eng.

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The Quiet Revolution of Fundamental Rights Protection: How Independent Administrative Authorities are Reshaping Legal Guarantees in France

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Abstract
The right to an effective remedy is traditionally understood in France as access to a court. However, many individuals face social, economic, and procedural barriers that prevent them from exercising this right in practice. Procedural complexity, lack of knowledge about available remedies, and the burdens of litigation discourage vulnerable populations from claiming their rights. These obstacles are particularly acute in cases involving structural or systemic violations of fundamental rights, highlighting the limits of a purely judicial conception of rights protection. The study, therefore, focuses on French Independent Administrative Authorities, examining how their intervention may serve as a remedy to these limitations, with particular attention to the Defender of Rights and the General Controller of Places of Deprivation of Liberty. The research combines doctrinal analysis, examination of institutional reports, and study of empirical investigations conducted by these authorities. It evaluates both their individual casework and their structural interventions in public policy. The study demonstrates that these authorities redefine the right to an effective remedy as a socially situated process. By identifying patterns of non-recourse, overlapping vulnerabilities, and structural obstacles to justice, they intervene through mediation, legal information, field investigations, preventive oversight, and legislative proposals. Their recommendations influence administrative practices and statutory reforms. By combining facilitation, prevention, and normative initiative, they complement judicial protection without replacing courts, enhancing access to justice and strengthening institutional accountability. Future research may assess the impact of granting these authorities direct access to constitutional review. Comparative studies with other European ombuds institutions would also be relevant, as they could highlight differences and similarities in institutional design, procedural powers, and effectiveness, thereby informing best practices and potential reforms in rights protection.

Keywords: *independent administrative authorities; fundamental rights and freedoms; effective remedy; rule of law; access to justice; defender of rights; general controller of places of deprivation of liberty; systemic reform; soft law.*

Тиха революція у сфері захисту основоположних прав: як незалежні адміністративні органи переосмислюють правові гарантії у Франції

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Анотація
Право на ефективний засіб правового захисту традиційно розуміється у Франції як доступ до суду. Проте багато осіб стикаються із соціальними, економічними та процесуальними бар'єрами, які перешкоджають практичній реалізації цього права. Складність процедур, недостатня обізнаність про доступні засоби захисту та тягар судового розгляду стримують вразливі групи населення від відстоювання своїх прав. Ці перешкоди є особливо гострими у випадках, що стосуються структурних або системних порушень основоположних прав, що підкреслює обмеженість суто судового підходу до їх захисту. У зв'язку з цим дослідження зосереджується на французьких незалежних адміністративних органах, аналізуючи, як їх діяльність може слугувати засобом подолання зазначених обмежень, із особливою увагою до Захисника прав і Генерального контролера місць позбавлення волі. Дослідження поєднує доктринальний аналіз, вивчення інституційних звітів та аналіз емпіричних досліджень, проведених цими органами. Оцінюється як їхня діяльність щодо розгляду індивідуальних справ, так і структурні втручання у сфері публічної політики. Дослідження демонструє, що ці органи переосмислюють право на ефективний засіб правового захисту як соціально зумовлений процес. Виявляючи випадки невикористання засобів правового захисту, накладання вразливостей та структурні перешкоди доступу до правосуддя, вони втручаються шляхом медіації, надання правової інформації, проведення польових досліджень, превентивного нагляду та підготовки законодавчих пропозицій. Їхні рекомендації впливають на адміністративну практику та законодавчі реформи. Поєднуючи сприяння, превенцію та нормативну ініціативу, вони доповнюють судовий захист, не замінюючи суди, розширюючи доступ до правосуддя та посилюючи інституційну підзвітність. Подальші дослідження можуть оцінити вплив надання цим органам прямого доступу до конституційного контролю. Також доцільними є порівняльні дослідження з іншими європейськими омбудсманськими інституціями, що дозволить виявити відмінності та подібності в інституційному дизайні, процесуальних повноваженнях і ефективності, а також сприятиме формуванню кращих практик і можливих реформ у сфері захисту прав.

Ключові слова: *незалежні адміністративні органи; основоположні права і свободи; ефективний засіб правового захисту; верховенство права; доступ до правосуддя; захисник прав; генеральний контролер місць позбавлення волі; системні реформи; м'яке право.*

Introduction

The protection of fundamental rights and freedoms is a core requirement of the rule of law and modern democracy. In France, as in other established democratic systems, this task has traditionally been entrusted to the judiciary, with the right to an effective remedy before a court widely regarded as a foundational element of legal protection. In principle, access to an independent judge represents the ultimate safeguard against violations of individual rights, whether arising from public authorities, private actors, or the state itself. This model is grounded in the normative premise that access to justice ensures not only the recognition of rights but also their practical and effective enforcement. Through the adjudication of individual claims, courts are expected to uphold legal norms, provide redress for abuses, and deter future violations. In this regard, the judiciary is understood not merely as a guardian of legality, but as a central mechanism of democratic accountability.

This centrality of the judiciary in the protection of rights is also strongly reflected in French legal scholarship. As Professor Véronique Champeil-Desplats noted nearly two decades ago, "a review of contemporary textbooks on civil liberties, fundamental rights, or human rights leads to an unambiguous conclusion: today, judicial institutions are conceived as the ultimate guardians of rights and freedoms" [1, p. 12]. Despite the growing diversity of mechanisms designed to guarantee fundamental rights [2], their effectiveness continues to be understood primarily through the lens of judicial sanction. Indeed, the protection of rights has traditionally been associated with the notion of sanction [3, p. 93], most often one issued by an independent judicial authority in response to the violation of a legal norm. Legal action is now commonly described as the "primary vehicle for the realisation of rights" [4, p. 4]. The right to a judicial remedy, rooted in Art. 16 of the 1789 Declaration of the Rights of Man and of the Citizen, is understood as the right of all persons "to gain access to justice to assert their rights" [5, p. 90], and is now commonly described as the "right of rights" [6, p. 238], the "shield of other fundamental rights" [7, p. 3675], and the very guarantee of their effectiveness.

The doctrinal emphasis on judicial protection is further reinforced by judicial practice, particularly in the case-law of the European Court of Human Rights (ECtHR). According to the Court, "the rule of law cannot be conceived without the possibility of access to a judge" [8]. As a result, procedural guarantees are often prioritised over substantive ones. European

judges tend to sanction the absence of judicial oversight more readily than violations of rights themselves [9; 10, p. 251]. This approach is particularly evident in the field of prison conditions, where the requirements of Art. 3 of the European Convention on Human Rights (ECHR) are systematically combined with those of Art. 13, requiring both "preventive and compensatory remedies" [11]. Similarly, when the Council of Europe adopts a recommendation on the right of persons living in extreme poverty to access basic material needs, it emphasizes not only the recognition of such a right but also the necessity of its justiciability: "every person in such a situation should be able to invoke it directly before the authorities and, if necessary, before the courts" [12]. In this context, the effectiveness of rights remains largely dependent on the existence of a judicial remedy.

The effectiveness of this conception, built on an "enchanted vision" [13, p. 87] of access to justice, may legitimately be questioned today [14, p. 935]. While this framework remains essential, growing attention is being paid to its limitations, particularly when access to the courts proves difficult or ineffective for many individuals. Yet everyday experience and sociological research show that real access to justice is far from universal or fully effective. Multiple barriers limit the actual exercise of this right: procedural complexity, financial costs, lack of knowledge about available remedies, bureaucratic burdens and delays, and, at times, a lack of trust in the judicial system [15, p. 158]. These obstacles often intersect with social, economic, or cultural factors, leading to a "non-take-up" of rights that particularly affects the most vulnerable populations. In this context, the formal recognition of rights alone does not guarantee their effective realisation. In response to these shortcomings, the French model has, over the past few decades, developed an original institutional framework based on the creation and recognition of Independent Administrative Authorities (IAAs). These bodies, which enjoy established independence from the executive branch, are intended to complement the role of the courts in protecting fundamental rights, operating at various levels, from individual mediation to systemic oversight of public policy.

From a historical perspective, this type of institution was created in France by Law No. 78-17 of 6 January 1978, much later than in the United States [16][1]

[1] The first Regulatory Agencies or Independent Regulatory Commissions were created in the United States. For example: Interstate Commerce Commission (1887), Federal Trade Commission (1915), Federal Power Commission (1920), Federal Communication Commission (1934), Securities and Exchange Commission (1934). They had a regulatory function in order to reduce governmental centralization or to fight against monopolistic and unfair practices. In a report from 1937 (*Brownlow Report*), these agencies were presented as "a fourth branch of government". In the years 1960-1970, many agencies were invested with a regulatory power in social and interest fields: Environmental Protection Agency, Consumer Product Safety Commission.

or in the United Kingdom [17][2], for example. By Law No. 2017-55 of 20 January 2017, a significant reform was carried out. First, two categories of authorities were created: Independent Administrative Authorities (IAAs)[3] and Independent Public Authorities (IPAs)[4]. The difference between the two lies in the fact that Independent Public Authorities have legal personality, which enables them to have their own financial resources and to bring proceedings before a court. The second aspect of the 2017 reform was the reduction in the number of authorities, from 47 to 26 (17 IAAs and 9 IPAs).

The competences of Independent Administrative Authorities and Independent Public Authorities vary from one authority to another. In general, four types of powers can be distinguished: the power to issue opinions or recommendations; individual decision-making powers; regulatory powers, consisting of organising a sector of activity through the adoption of rules; and sanctioning powers where the rules laid down by these institutions are not respected. Through their activity, many of these authorities contribute, generally within their specialized fields, to the protection of fundamental rights. Some scholars describe this situation as "a pluralistic and increasingly competitive landscape" [18, p. 397], highlighting the "dynamic and evolving nature of this still-emerging continent of rights regulation through IAAs" [19, p. 6]. Among these authorities, the Defender of Rights *(Défenseur des droits)* [20; 21] and the General Controller of Places of Deprivation of Liberty *(Contrôleur général des lieux de privation de liberté) [22]* are the only ones specifically mandated to protect fundamental rights and freedoms.

Drawing inspiration from the Scandinavian ombudsman tradition [23, p. 499], the Defender of Rights is entrusted with a broad mandate to defend rights and freedoms – particularly in the context of relations between

[2] The American experience was brought to the United Kingdom, where have been created the QUANGOS (Quasi Autonomous Non-Governmental Organizations): public persons not under the authority of a minister, but which nevertheless contribute to the implementation of government policy. Three major categories of QUANGOS can be pointed up: those which perform administrative functions. These functions are quite varied: operational, regulatory by supervising and controlling activities of general interest, cultural and scientific, advising the central administration; the QUANGOS perform functions of an industrial and commercial nature: public enterprises, national companies (Bank of England, British Airways Corporation); the QUANGOS having judicial functions.

[3] Examples of French Independent Administrative Authorities: Commission for Access to Administrative Documents (*Commission d'accès aux documents administratifs*); Defender of rights (*Défenseur des droits*); National Commission for Computing and Freedoms (*Commission nationale de l'informatique et des libertés*); General Controller of Places of Deprivation of Liberty (*Contrôleur général des lieux de privation de liberté*).

[4] Examples of French Independent public authorities: Audiovisual and Digital Communication Regulatory Authority (*Autorité de régulation de la communication audiovisuelle et numérique*); High Authority for Health (*Haute autorité de santé*).

individuals and public administrations – because it consolidates within a single institution the powers previously entrusted to four Independent Administrative Authorities: the Mediator of the Republic, the Children's Ombudsman, the National Commission on Security Ethics and the High Authority for the Fight against Discrimination and for Equality [18, p. 397]. The very denomination of the new institution, referring explicitly to the "defence of rights", in itself marks a significant evolution. It signals a departure from the concept of the "judicial monopoly over the protection of rights" which had long been jealously guarded, as illustrated by parliamentary debates in 1972 concerning the creation of the Mediator of the Republic (*Médiateur de la République)*. At that time, it was notably proposed to call the office "Mediator, Defender of Rights and Freedoms", but this proposal was rejected by the Minister of Justice, who argued that the defence of rights and freedoms should remain the exclusive domain of the Council of State (*Conseil d'État*) and the Court of Cassation (*Cour de cassation*) [18, p. 211]. Another defining feature of this evolution lies in the constitutional recognition of this Independent Administrative Authority – the only one explicitly mentioned in the French Constitution[5] – thereby ensuring enhanced institutional protection and functional autonomy.

The awareness of the need to develop "new pathways to uphold rights" [24, p. 85], through the exploration of "non-judicial protection mechanisms" [25, p. 15], is also illustrated by the creation, in 2007, of another major Independent Administrative Authority: the General Controller of Places of Deprivation of Liberty *(Contrôleur général des lieux de privation de liberté),* which is "responsible for overseeing the treatment of persons deprived of liberty to ensure that their fundamental rights are respected"[6]. Its action falls within the framework of the Optional Protocol to the United Nations Convention against Torture, signed by France in 2005.

These IAAs exemplify a pluralistic and innovative approach to rights protection – one that goes beyond the strict confines of litigation. They combine legal expertise, sociological analysis, public outreach, institutional advising, and political engagement. This model reflects a form of *institutional pluralism* in the guarantee of rights, in which diverse actors and methods of action work together to enhance the effectiveness of rights, particularly for individuals facing vulnerability or exclusion. The health crisis has brought about significant upheaval in their activities and operational methods, while also fostering a more assertive conception of their role [26, p. 58-67]. During this period, they focused essentially on the defence of fundamental rights and freedoms undermined by the state of health emergency. This surge in

[5] Art.71-1 of the Constitution.

[6] Art. 1, Law No. 2007-1545 of 30 October 2007.

activity increased their visibility [27][7] and allowed them to consolidate their role as effective defenders of rights and freedoms.

During the colloquium jointly organised in February 2025 by the Court of Cassation, the Council of State, and the Defender of Rights, the First President of the Court of Cassation acknowledged that the Defender of Rights is "undeniably a pillar of the rule of law, just like the judiciary itself" [27, p. 29]. The Vice-President of the Council of State similarly stated that "the collaboration between the Defender of Rights and the administrative courts to safeguard freedoms is self-evident" [28]. These statements illustrate that IAAs are now fully integrated into the architecture of rights protection "as collaborators of the judiciary" [29, p. 54], reinforcing judicial guarantees through what Michel Foucault once described as the "multiplication of the judge's role" [29, p. 55].

The present study aims to analyse this distinctive French model through the lens of the role played by IAAs in the protection of fundamental rights. We argue that these institutions contribute to a renewed dynamic in which the effectiveness of rights is understood not solely as access to a judge, but also as a social, informational, and political capacity to claim and exercise those rights. First, we show how these authorities adopt a situated and pragmatic understanding of the right to an effective remedy, revealing the social and structural factors that hinder access to justice. In doing so, they uncover patterns of non-take-up that remain largely invisible to traditional judicial actors, thereby enriching conventional conceptions of fundamental rights. Second, we examine the practical and strategic responses deployed by the two IAAs, which combine roles in public information, access facilitation, mediation, and preventive action in public policy. Beyond the French case, this study seeks to contribute to broader reflections on systems of fundamental rights protection in which traditional judicial mechanisms are increasingly supported by a diversified institutional ecosystem.

Results and Discussion

1. A supportive role in judicial remedies: making the right to an effective remedy tangible

The effectiveness of the right to a judicial remedy depends on several cumulative parameters: easy access to a judge, compliance with standards of independence and impartiality, procedural speed, equality of arms, and the enforcement of judicial decisions. While these requirements are formally guaranteed in democratic legal systems, their effectiveness remains uneven in practice, particularly in situations involving structural or systemic

[7] The number of requests addressed to the Defender of rights have increased of around 10%.

violations of fundamental rights. Independent Administrative Authorities therefore, occupy a strategic position within the architecture of rights protection, enabling them to act as a "catalyst of judicial guarantee" [25, p. 38], by facilitating access to the courts (1.1) and reinforcing the impact of judicial decisions once rendered (1.2).

1.1. Facilitating access to judicial authorities

By using various avenues of action, which allow them to lower the practical and procedural barriers to access to courts, IAAs contribute to the effectiveness of judicial remedies. In the case of the Defender of Rights, its contribution lies first and foremost in the day-to-day handling of the individual complaints referred to it, the number of which continues to grow. In 2023, for example, the Defender of Rights received 137,894 complaints[8], requests for information, and guidance, marking a 10% increase compared to 2022. This upward trend reflects both the growing challenges faced by individuals in asserting their rights and the institution's expanding role in addressing emerging issues. Public service users accounted for 92,400 complaints, up 12%, largely due to difficulties in accessing services caused by excessive digitisation, office closures, and administrative burdens. Issues affecting foreigners remain a major concern, representing 28% of all complaints. Discrimination remains pervasive, with contacts to the anti-discrimination platform increasing by 25%, while whistleblower cases surged by 128% following the 2022 legal reforms strengthening their protection. Overall, these figures illustrate a continuous rise in the number of individuals seeking assistance from the Defender of Rights, underscoring both the institution's central role in safeguarding fundamental rights and the persistent obstacles faced by vulnerable populations.

The primary power the Defender of Rights mobilises for solving the cases it receives is undoubtedly that of mediation[9]. In the field of immigration law, mediation is particularly relied upon to address violations resulting from deficiencies in public services (difficulties in accessing administrative counters, excessive processing times, failure of the administration to respond, etc.). In practice, this avenue enables the resolution of 10 to 20% of the cases [30]. In the event of failure of an amicable settlement, assistance may be provided by helping victims to assemble their case file, identify the competent jurisdiction, and select the procedural avenue best suited to their situation. This form of assistance responds directly to asymmetries of information, expertise, and resources that frequently undermine effective access to justice.

[8] For more information, see: https://www.defenseurdesdroits.fr/rapport-annuel-dactivite-2023-la-banalisation-des-atteintes-aux-droits-et-libertes-inquiete-la-597.

[9] Art. 26, Organic Law No. 2011-333 of 29 March 2011.

In some cases, the initiation of judicial proceedings on behalf of individuals is also possible. Such action reflects the traditional definition of the Ombudsman as "one who pleads on behalf of another" [31, p. 387]. In addition, the Defender of Rights and the General Controller of Places of Deprivation of Liberty are both empowered to refer matters to the authority competent to initiate disciplinary proceedings for facts of which they become aware[10], and they must inform the Public Prosecutor when those facts appear to constitute a criminal offence[11]. This prerogative allows IAAs to act as institutional relays between individual grievances and judicial accountability mechanisms.

Although they are not parties to proceedings, IAAs also contribute to safeguarding the principle of equality of arms before the court by reducing the evidentiary burden borne by claimants. They play an expert role before courts by submitting observations either at the judge's request, acting as *amicus curiae*, or at their own initiative. In the case of the Defender of Rights, Art. 33-2 of the Organic Law authorises civil, administrative and criminal courts to invite it to submit written or oral observations and allows the authority to request leave to intervene as of right. This prerogative has been extended in practice to constitutional and supreme jurisdictions, including the Constitutional Council in the context of *ex-ante* review [32], as well as the Court of Cassation and the Council of State in support of referrals of priority constitutional questions (QPCs) [33, p. 863]. The intervention power is extensively exercised by the Defender of Rights in the field of visas. Such practice is explained by the frequent identification of violations of the limits and obligations that respect for fundamental rights imposes on the administration in this area. The same reason explains the Council of State's request for IAAs interventions in litigation concerning discriminatory identity checks [34].

In addition, and more innovatively, the Defender of Rights has developed since 2014 a sustained practice of third-party intervention before supranational jurisdictions, most notably the European Court of Human Rights, based on Art. 36 §2 of the European Convention on Human Rights, which allows any interested party, other than the applicant, to submit written observations [35, p. 341; 36, p. 67]. It is a way to provide information likely to assist the Court on questions of fact or law, and helps the judge to be in an optimal position to decide on a novel issue or a proposed reversal of precedent. The Defender of Rights has submitted twenty-six observations in cases falling within its field of competence defined in Art. 4 of the Organic

[10] Art. 29, Organic law No. 2011-333 of 29 March 2011; Art. 9, Law No. 2007-1545 of 30 October 2007.

[11] Art. 33-3, Organic law No. 2011-333 of 29 March 2011; Art. 9, Law No. 2007-1545 of 30 October.

law, especially in cases concerning the issue of administrative detention of children [37]; the reception and care of unaccompanied minors [38]; the conditions of the evacuation of a Roma family encampment [39]; the readmission of an asylum-seeking family to Hungary [40]; the reception conditions for asylum seekers [41]; the denial of family benefits to children entering France outside the family reunification procedure [42]; the effectiveness of remedies for challenging detention conditions [43]; interventions concerning bioethics issues [44]; and the use of intelligence techniques and their implications for lawyers and journalists [45].

Given the relatively small number of cases judged annually by the Strasbourg Court against France (around 20-25), it can be observed that the Defender of Rights' interventions are proportionally significant. An analysis of this list of observations shows that it intervenes before the European Court of Human Rights as a third-party participant when issues raised at the European level intersect with concerns that it regularly addresses through the examination of individual complaints and the review of legislative and regulatory texts. Thus, going beyond the immediate scope of the case, its interventions aim to extend the action conducted at the domestic level to remedy structural or systemic deficiencies affecting the protection of rights and freedoms.

The legal status of such observations raises questions regarding their compatibility with the adversarial principle, insofar as they transform IAAs into "propositional forces directed toward judges" [46, p. 466]. Nonetheless, rather than undermining judicial neutrality[12], these interventions may be understood as contributing to the quality of judicial decision-making, by providing empirically grounded analyses of administrative practices and their concrete effects on rights. In this sense, these authorities participate in a dialogical conception of adjudication, fulfilling their role in promoting rights and objectively defending the public-interest cause of respect for fundamental rights, without substituting themselves for the judge.

Even when they do not intervene directly in proceedings, IAAs increasingly function as "resource institutions" whose analyses and findings are mobilised by judges. The European Court of Human Rights frequently refers to the opinions of the Defender of Rights or the General Controller of Places of Deprivation of Liberty, in sections of its judgments devoted to the "relevant domestic legal framework" [47]. This reliance reflects the IAAs' capacity to document systemic practices and recurring dysfunctions that may escape judicial scrutiny limited to the facts of a single case.

[12] The 2020 parliamentary information report on the Defender of Rights recommends clarifying the use of this prerogative, stating that it "must be adapted to the conditions of the proceedings and respectful of the balance between the parties", https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b3203_rapport-information#.

This capacity for expertise before the courts is furthermore supported by enhanced investigative powers. The Defender of Rights and the General Controller of Places of Deprivation of Liberty can conduct thorough investigations on a timetable independent of the courts, including by hearing individuals or performing on-site inspections, and they enjoy broad access to administrative documents, while also having the power to issue formal notices to those concerned. If some documents or information may be refused – those covered by national defence, security, or foreign policy – the secrecy of investigation or criminal proceedings cannot be invoked against the Defender of Rights, nor can medical confidentiality or attorney-client privilege in lawyer-client relations if the concerned person expressly requests disclosure, while medical secrecy is no longer opposable to the General Controller of Places of Deprivation of Liberty if information is shared with inspectors possessing medical qualifications.

The significance of these investigative powers is illustrated by the case concerning the death of environmental activist Rémi Fraisse during a demonstration. While the European Court of Human Rights ultimately found no violation of Art. 2, it nonetheless emphasised: "the quality of the investigations carried out by the Defender of Rights, which he conducted *ex officio* and which gave rise to a particularly detailed decision" [48]. This acknowledgement confirms the authority's capacity to contribute substantively to the assessment of the effectiveness of domestic investigations.

Beyond their litigation-related interventions, the IAAs also carry out significant information and awareness-raising activities targeting specific groups. As an example, we can take the dissemination of the "General Controller of Places of Deprivation of Liberty norm" [49, p. 88] within detention-condition litigation by publishing its findings promptly so they can be used by lawyers and judges. The institution also produces "prison fact sheets" focusing on the material detention conditions of penitentiary establishments, which are made available to judges and lawyers as a reliable and impartial database of prisons [50, p. 8]. The General Controller also intervenes at a structural level by contributing to the elaboration of litigation strategies. In its 2024 thematic report on the *Effectiveness of Remedies Against Inhuman Detention Conditions*[13]*, it provides a critical assessment of the new specific remedy introduced by Art. 803-8 of the Code of Criminal Procedure [51]*[14] *following the judgment of the European Court*

[13] The report is available in French: https://www.cglpl.fr/publications/leffectivite-des-voies-de-recours-contre-les-conditions-indignes-de-detention.

[14] This Article provides a specific remedy, distinguishing according to the legal status of the detainee: applications by remand prisoners fall within the jurisdiction of the Judge of Freedoms and Detention (*juge des libertés et de la détention*), whereas applications by sentenced prisoners are examined by the Sentence Enforcement Judge (*juge de l'application des peines*).

of Human Rights in the J.M.B. v. France case (30 January 2020), in which the Court found that French law lacked an effective remedy capable of putting an end to detention conditions contrary to Art. 3 of the European Convention on Human Rights.

The General Controller's analysis is based in particular on a sample of 699 judicial decisions issued under this provision. It reveals a heterogeneous interpretation of admissibility criteria. Approximately 11% of applications were upheld, this rate revealing significant territorial disparities. Even where applications are upheld, their consequences remain limited. Based on these findings, the report encourages the development of complementary litigation strategies, such as systematically lodging an emergency application for the protection of fundamental freedoms (*référé-liberté*)[15] before the administrative courts in parallel with judicial proceedings under Art. 803-8, or making greater use of actions for administrative decisions annulment (*recours pour excès de pouvoir*) capable of leading to structural injunctions. Such proposals reflect a shift from case-by-case litigation toward procedural tools capable of addressing structural violations.

1.2. Highlighting failures in the enforcement of judicial decisions

For the European Court of Human Rights, the right to enforcement of judicial decisions constitutes an integral component of the right to a fair trial and to an effective remedy [52]. Yet the persistence of non-execution or partial execution of judicial rulings, particularly in sensitive areas such as migration, detention, or policing, remains a recurrent concern. IAAs have therefore assumed a visible role in denouncing these failures and reaffirming the binding nature of judicial decisions. Through their pedagogical role of reminding and explaining the law, they can "confer on a judicial decision the authority of the accepted thing" [53, p. 727], which it sometimes lacks.

The Defender of Rights warns in its 2023 annual report that disregarding the enforcement of judicial decisions allows public authorities to "free themselves from the rule of law and undermine the authority of judicial institutions". It concludes that such practices contribute, in the long-term, to an erosion of "the stability of the judicial system and the public's confidence in justice"[16].

[15] The *référé-liberté*, provided for in Article L. 521-2 of the Code of Administrative Justice, is an emergency procedure. It allows an applicant to request that the interim relief judge urgently order measures to safeguard the exercise of a fundamental freedom in cases where a public authority has committed a serious and manifestly unlawful infringement. In the context of this procedure, the administrative judge must rule within 48 hours.

[16] The report is available in English: https://www.defenseurdesdroits.fr/sites/default/files/2024-06/ddd_rapport-annuel-activite-2023_EN_20240603.pdf.

Beyond *public denunciation*, IAAs also intervene more concretely in the supervision of enforcement, urging authorities to adopt the necessary reforms to comply with judicial rulings. Through their "legal power to know" and "power to publicise" [54, p. 52], they deploy what may be called dissuasive and persuasive forces. This power of denunciation takes diversified and increasing forms: opinions and reports, joint op-eds, alerts and warnings, but more effectively, via *urgent recommendations* that the General Controller of Places of Deprivation of Liberty may adopt – making serious violations immediately visible via publication in the *Official Journal* [55; 56] – and by the capacity of the Defender of Rights to issue a *special public report* if its formal notices go unheeded.

More precisely, IAAs may intervene again after the judge to amplify decisions that have become definitive, via mechanisms to *monitor jurisprudence*. The Defender of Rights participates in the *supervisory process* conducted by the Committee of Ministers of the Council of Europe. Although it did not explicitly inherit from the Mediator of the Republic the power to issue injunctions to a challenged entity to comply with a judicial decision, the Defender of Rights has nonetheless endowed itself with such competence *ex officio*, including through on-site inspections. During the monitoring of the enforcement of the *Moustahi v. France* judgment concerning unaccompanied minors, it intervened several times with the ECtHR's execution service [57]. In this judgement pronounced on June 25, 2020, the European Court of Human Rights found several violations of the ECHR, which arose from the administrative detention of two children, their expulsion from Mayotte to the Comoros and the conditions of their removal, following their arbitrary attachment to an adult who had no authority over them, as well as from the lack of effective remedies. Notwithstanding this judgment, in decision No. 2022-023 of 27 January 2022, the Defender of Rights observed that the situation of minors in Mayotte, and the practices affecting them, remain a matter of concern. In particular, this concerns the arbitrary attachment of minors to third parties and the alteration of their dates of birth for administrative detention and removal from the territory.

The Defender of Rights submitted its findings and analysis to the Committee of Ministers of the Council of Europe, relying on individual complaints and situations reported both by its delegate in Mayotte and by an association operating at the Pamandzi detention centre. It further noted that remedies remain ineffective, as several children have continued to be removed from Mayotte in disregard of their fundamental rights. The Defender of Rights also addressed recommendations to the Committee, inviting it in particular, to postpone its examination of the case and to request additional information and further measures from France in order to ensure compliance with the judgment.

Taking into consideration the observations submitted by the Defender of Rights, on 9 March 2022 the Committee of Ministers invited the French Government to provide updated information by November 2022 and decided to resume its examination of the case in June 2023. The Committee emphasized in particular the need to appoint legal representatives for unaccompanied minors, to provide information on the contested practices (administrative detention of children, expulsion from Mayotte to the Comoros following their arbitrary attachment to an adult), and to adopt concrete measures to ensure that all authorities in Mayotte (in particular the Prefecture) comply with the requirements of the Court's judgment: before any removal, verifying the identity of the minors, the exact nature of their ties with the adults to whom they are attached, and the effective conditions of their care upon return.

The Defender of Rights reiterated its observations in 2023 and 2024 and called on the Committee of Ministers not to close the examination of the case. In its decision No. 2025-068 from 14 April 2025, it underlined that since its previous observations in 2024, the persistence of a troubling administrative practice can be noted, consisting in the arbitrary attachment of minors to adults with whom they have no legal ties, for the purpose of placing them in administrative detention and removing them from the territory. This practice is identified in numerous decisions pronounced by administrative judges in urgent judicial review (*référés-libertés*) in 2023 and 2024 and highlights the inadequacy of the verification mechanism put in place by the Government. The Defender of Rights also regrets that the prohibition on the detention of minors, enshrined in the Law of 26 January 2024, will only enter into force in Mayotte on January 1, 2027. Furthermore, the Defender of Rights underscores the continuing failure of the authorities to comply with the right to an effective remedy. It notes in particular the enforcement of removal measures despite the administration's awareness that an application for urgent judicial review (*référé-liberté*) had been lodged, prompting the judge to order the return of individuals who had been prematurely removed. In light of the continuing systemic deficiencies, the Defender of Rights called the Committee of Ministers, as in its previous decisions, not to close the examination of the case.

Through these repeated requests not to close the supervision procedure for the execution of the Court's judgment, the Defender of Rights aims to increase pressure on the French authorities to ensure the incorporation into domestic law and practice of the necessary measures for guaranteeing the effective rights and freedoms of individuals in the same situation as the applicant, thereby ensuring that access to the judge leads to concrete and enforceable outcomes. The same strategy has been adopted by the

Defender of Rights in the framework of the supervision of the execution of the judgment *Khan v. France* of 28 May 2019. In this case, the European Court of Human Rights found a violation of Art. 3 ECHR due to the failure of the French authorities to care for an unaccompanied migrant minor living for several months in the Calais "Jungle". In its decision No. 2020-144 of 10 July 2020, concerning a third-party intervention on the execution of the judgment *Khan*, it is underlined that the case illustrates the difficulties faced by many minors in transit and the shortcomings of the national reception and care system for unaccompanied minors, which persist throughout the territory, both in the Hauts-de-France region and elsewhere. This situation has been shared by numerous stakeholders and is reflected in the work of the Defender of Rights, in particular in its December 2018 report, *Exiles and Fundamental Rights, Three Years after the Calais Report*. That report contains numerous recommendations which remain relevant.

The Defender of Rights highlights not only serious difficulties regarding the initial reception and the absence of access to accommodation or assessment, although emergency care is legally guaranteed, but also problems in access to judges and the enforcement of court decisions, leaving minors homeless for weeks or months. As the quality-of-care arrangements remain insufficient, and access to healthcare, socio-educational support, and schooling is not consistently guaranteed, the Defender of Rights invited the Department for the Execution of Judgments to identify the appropriate general measures required to remedy systemic shortcomings and prevent further violations of Art. 3 of the Convention. On 2 December 2021, the Committee of Ministers of the Council of Europe requested the French Government to indicate the concrete and specific measures envisaged to ensure the effective protection of unaccompanied minors in transit.

In the absence of concrete action by the French Government, the Defender of Rights reiterated its previous findings in decision No. 2022-178 of 8 December 2022 and called on the Committee not to close the examination of the case. In response to this request, the Committee asked the Government to adopt additional protective measures. On 6 March 2025, the Committee of Ministers decided to close its examination of the case, having considered that the measures required under Art. 46 of the ECHR had been adopted despite the new decision No. 2024-139 of 3 October 2024 of the Defender of Rights, highlighting the insufficient character of the measures adopted by the Government. The conclusion of the Committee of Ministers does not reflect the observations submitted by the Defender of Rights. This can be one of the reasons why its activity in the supervision procedure for the execution of the judgment *Moustakali v. France* is still so strong.

In the case of the General Controller of Places of Deprivation of Liberty, this supervision function has been reaffirmed in the area of detention-conditions litigation, where remedies multiply without real effect. In its 2024 thematic report on the *Effectiveness of Remedies against Inhuman Detention Conditions*, the authority conducted a detailed analysis of administrative and judicial case-law relating to the procedure introduced by the April 8, 2021 Law to ensure more effectively the right to invoke before a judge the breach of the right to dignity in detention, and arrives at a rather negative assessment. It recommends procedural reforms to strengthen follow-up mechanisms, such as the automatic imposition of penalties for non-compliance or the organisation of follow-up hearings after injunctions are issued.

Through these monitoring and amplifying functions, IAAs act as *auxiliaries to the judge*, extending the practical reach of judicial decisions and reinforcing their authority. However, as the following section will demonstrate, their contribution to the effectiveness of the right to a remedy extends beyond litigation support and enforcement mechanisms alone, encompassing a broader reflection on the social conditions under which the right to an effective remedy may be meaningfully exercised.

2. A systemic role: strengthening the foundations of effective remedy

The right to a remedy is only effective – despite being enshrined in law and despite the existence of judicial avenues – if individuals can exercise it. Possessing a legal entitlement alone does not guarantee that rights will be mobilised or enforced. Through their work, human-rights ombudsmen assess not only the formal existence of rights but also the real obstacles to their exercise, moving beyond legal formalism to address the social and systemic dimensions of justice (2.1). While identifying barriers that prevent recourse, these authorities simultaneously deploy compensatory and preventive actions to reinforce the effectiveness of the right to a remedy (2.2).

2.1. Assessing the state of the right to an effective remedy

Former French Defender of Rights Jacques Toubon described the institution as a *"seismograph of fundamental rights"* [58], capturing emerging problems and litigation often invisible to judges or public authorities. IAAs use this diagnostic role to challenge the classical, proceduralist reading of rights, which equates protection with the mere possibility of judicial recourse. In the traditional view, a right is considered protected if it can be invoked before a judge to sanction its violation or enforce its respect. This conception is a proactive one and assumes that individuals have both the will and the means to assert their rights [59, p. 368]. It is based on a defensive and

voluntarist interpretation of rights, in which the right to bring a case to court is inherent to the very notion of a subjective right [60, p. 85; 61, p. 233]. Professor Walline said that such a situation is explained by the fact that "the judging machine is inert by nature" [62, p. 160]. Consequently, the individual must possess both the desire and the means to activate the right to a remedy.

This conception is challenged in practice. Legal capacity does not guarantee that a person can claim his or her rights. The sociology of legal processes [63, p. 691] shows that perceiving an injustice, translating it into legal terms, identifying the competent institution, and pursuing a judicial claim are sequential steps that many individuals, particularly those in vulnerable situations, cannot accomplish without support. To the lack of knowledge about available remedies must be added the cost and complexity of legal proceedings, the procedural delays, or the emotional and psychological burden of litigation [64, p. 189], which discourage vulnerable people from bringing a claim. All these elements illustrate that the guarantee of the right to remedy is not sufficient. People must also be *socially empowered* to exercise and claim this right.

The real-world obstacles to the use of remedies cannot be seen by the judge. Their role is to find legal solutions in the claims brought before them by individuals able to assert their legal standing. On the contrary, given their status and mandate, the IAAs can move beyond the voluntarist and universalist vision of access to justice, seeking instead to identify *real-world obstacles* to the use of remedies. Their situational analyses are conducted through the detection of *non-recourse* scenarios, by working in context, through field visits, investigations, complaints received, and multidisciplinary studies. This plural approach allows the human rights ombudsmen to develop the capacity to analyse the *social use and non-use* of the right to a remedy and identify their reasons, their conclusions and recommendations being a key source of information, not only for identifying the problems at stake and their underlying causes, but also for informing reflection on the social, economic and political solutions required to address them.

For example, in the Defender of Rights' 2017 *Survey on Access to Rights*, it is highlighted that 12% of public service users abandon their administrative procedures, a proportion rising among socioeconomically disadvantaged groups [65]. In addition, two studies supported by the Defender of Rights and published in 2023 investigated why vulnerable populations fail to assert their rights, revealing underutilization of the economic vulnerability criterion in anti-discrimination law and barriers to social housing access for low-income households [66].

In turn, in the thematic report on the *Effectiveness of remedies against degrading prison conditions*, the General Controller of Places of Deprivation of Liberty conducted interviews with detainees, lawyers, judges, and NGOs to assess how remedies are perceived and function in practice, rather than in abstract law. In the conclusions, it can be seen that the vulnerable situations that prevent people from exercising their right to a remedy, which are the most often overlapping, are: deprivation of liberty, economic or administrative precarity, social, territorial, or digital exclusion.

These empirical insights allow IAAs to uncover systemic barriers to justice, demonstrating that legal entitlement alone is insufficient. The right to a remedy thus requires not only formal recognition but also social empowerment. By highlighting patterns of non-recourse and overlapping vulnerabilities, IAAs intervene at both individual and structural levels. Through this approach, they reconceptualise the right to an effective remedy as a socially situated and institutionally mediated process, rather than a mere procedural entitlement. Their systemic role lies precisely in this shift: from adjudicating isolated violations to addressing the structural production of rights deficits. This evolution amounts not to a displacement of the judiciary, but to a quiet redistribution of normative authority within the architecture of rights protection. Building on this diagnostic capacity, IAAs are then able to take concrete steps to enhance access to remedies, both by providing guidance and information to rights-holders and by promoting systemic reforms, thus bridging the gap between the identification of problems and practical action.

2.2. Acting preventively and providing compensation

If the right to an effective remedy is a prerequisite for the effectiveness of other rights, its own operationalisation depends on several mechanisms, such as legal aid and, even more fundamentally, on access to information about existing rights and remedies. IAAs thus perform an educational and informational role. The Defender of Rights offers, in that regard, assistance by "informing any person who contacts it about the nature and scope of their rights (access to knowledge of rights) and about the means to assert them (access to the exercise of their rights)" [64, p. 193]. The same pedagogical work is done by the General Controller of Places of Deprivation of Liberty, notably through the publication of a Guide for detained persons, available in prison libraries. Written in clear and accessible language, it enables detainees to understand and become aware of their rights and possible legal remedies. These efforts reflect a shift from a reactive, case-based approach to a proactive, pedagogical strategy. In its report on the *Effectiveness of remedies against inhuman conditions of detention*, the General Controller further recommended strengthening detainees' access

to legal information by introducing an "annual hour-credit allowing them to receive advice and legal support from a court-appointed lawyer outside any pending procedure", as well as the creation of a "turnkey complaint kit" to facilitate judicial remedies.

However, access to these non-judicial authorities may itself be difficult for the rights-holders. Accordingly, through a "going toward" approach, the IAAs seek to make themselves more accessible. Counterbalancing the judge's institutional distance, they emphasise proximity, for instance, through the network of territorial delegates of the Defender of Rights, the development of digital anti-discrimination platforms, and the establishment of free telephone lines accessible to detainees. Their referral procedures are direct, free of charge, and do not require legal representation, making them more accessible than courts, to the point that they are sometimes described as being "preferred to the courtrooms" [64, p. 194]. The Defender of Rights may be seized directly, without the need to initiate parallel judicial proceedings [67, p. 447], by electronic means, without intermediary, by any person who considers himself wronged in the operation of a public service or organisation, even for acts committed in the past. Likewise, although the 2007 Law did not formally require the General Controller to respond to complaints, the institution voluntarily created a dedicated complaints division to ensure systemic processing of correspondence.

Another crucial distinction lies in temporality. Whereas judges intervene after a violation has occurred, IAAs operate in a broader and more anticipatory framework, seeking "to act at the source of obstacles to access to the courts no longer for a single claimant but for the greatest number» [64, p. 202]. As the Defender of Rights has explained, this implies shifting from a "case-centred" approach to one oriented toward "public policy", acting not only from "below" through individual complaints but also "from above" [68, p. 14] through structural engagement. The preventive oversight exercised by the General Controller of Places of Deprivation of Liberty exemplifies this logic*:* rather than responding solely to isolated malfunction, it identifies structural deficiencies and promotes systemic improvements. Similarly, in the field of anti-discrimination, the Defender of Rights has advocated the development of class actions capable of exposing systemic patterns of inequality and prompting courts to address discrimination in its structural manifestations [69]. Yet it also emphasises the need to go beyond litigation to engage institutions and social actors in a broader transformation of practices and behaviours [70].

Beyond oversight, prevention, and strategic litigation, IAAs also exercise a form of normative entrepreneurship by formulating concrete legislative and regulatory proposals aimed at remedying the systemic deficiencies

they identify in the course of their activities. Their recommendations do not merely call for better compliance with existing law; they frequently suggest amendments to statutory provisions or regulatory frameworks in order to address structural obstacles to the effective enjoyment of rights. In this sense, they operate as intermediaries between lived experiences of rights violations and the legislative process.

In the field of immigration law, the Defender of Rights has repeatedly intervened where unlawful or excessive administrative practices – particularly within certain prefectures – significantly hindered access to residence permits, including for individuals legally entitled to them. Through targeted recommendations, it has contributed to the clarification of legal requirements relating to proof of civil status, the production of valid passports, or acceptable evidence of domicile. In some instances, prefectural practices were amended following its interventions. In others, the Ministry of the Interior endorsed the Defender's analysis and disseminated clarifications to ensure more uniform and rights-compliant implementation nationwide [71]. These interventions demonstrate how soft-law instruments may effectively reshape administrative practice.

More significantly, the Defender of Rights has, on several occasions, advocated legislative reform. A notable example concerns the conditions for granting residence cards to beneficiaries of the disability allowance (Allocation aux adultes handicapés – AAH). The discriminatory effects of applying standard resource requirements to disabled foreign nationals were repeatedly denounced by the Defender of Rights. This mobilisation ultimately contributed to the 2016 legislative amendment exempting this category of beneficiaries from the resource condition for access to a residence card [72]. Although certain limitations persist, this reform illustrates the institution's capacity to translate structural findings into statutory change.

This role of promoting fundamental rights constitutes the most original part of the ombudsmen's oversight, the one least reducible to traditional juridical review. IAAs are thus able to free themselves from constraints weighing upon the judge – whether temporal, procedural, institutional, or political. If the judge cannot do everything [73, p. 2105], IAAs can perhaps do more. Unlike the judge's retreat behind the argument of the separation of powers, refusing to act as judge-administrator, IAAs do not hesitate to assume the role of "political entrepreneur" [74]. The absence of *res judicata* authority in their positions thus becomes "the strength of these weak institutions" [75].

This proactive posture, however, is not without criticism [76]. Public authorities and certain scholars have questioned whether such interventions

risk blurring institutional boundaries. The 2020 parliamentary information report on the Defender of Rights illustrates. Professor Bertrand Mathieu argued that its "interventions before judges are sometimes too partisan and used as an instrument to transform the law" [76]. A role he considers to belong to the legislator rather than to judicial proceedings. Similarly, the former President of the Administrative Court of Strasbourg described the Defender of Rights' observations in litigation as "para-judicial positions" insufficiently connected to the constraints of adjudication [76].

Although such criticisms are not entirely unfounded and may fuel legitimate debate aimed at improving institutional balance in the interest of litigants, they do not undermine the essential contribution of these authorities. On the contrary, their interventions play a crucial role in ensuring that fundamental rights are effectively protected, that public authorities remain accountable, and that the rule of law is substantively upheld. By combining facilitation, prevention, structural analysis, and normative initiative, IAAs contribute to a more comprehensive and socially grounded understanding of effective remedies. Their value, therefore, extends beyond individual cases and contributes to the broader functioning of a democratic society governed by law.

Conclusion

In France, Independent Administrative Authorities (IAAs) have gradually emerged as central actors in the protection of fundamental rights, reshaping traditional models of legal oversight. While the right to an effective remedy has long been conceptualised primarily through the judicial enforcement, the French experience reveals a more pluralist architecture of the rule of law. In this system, IAA complements, supports, and sometimes strengthens the role of the courts. Far from constituting a circumvention or dilution of judicial authority, their interventions reflect a redistribution of functions within the legal ecosystem.

Through their para-contentious role, IAAs such as the Defender of Rights, the General Controller of Places of Deprivation of Liberty act both as facilitators and guarantors of judicial effectiveness. They assist individuals in navigating complex legal pathways, provide technical expertise to judges, and alert public opinion to shortcomings in the enforcement of judicial decisions. These contributions enhance the procedural dimensions of justice – accessibility, transparency, and fairness – thereby reinforcing the legitimacy and authority of judicial outcomes.

Beyond litigation support, these institutions also perform a meta-contentious function. They diagnose systemic flaws, propose legal and procedural reforms, disseminate a culture of rights, and promote strategic

litigation to address normative gaps. Their intervention goes beyond identifying dysfunctions or encouraging compliance: IAAs formulate concrete legislative and regulatory proposals aimed at correcting structural shortcomings revealed through complaints and field investigations. In this capacity, they serve as institutional relays between social realities and the law-making process, contributing to the evolution of positive law. Their actions thus support both individual remedies and structural transformation of the justice system, making it more responsive to the social realities it is intended to regulate.

Crucially, IAAs embody a non-adversarial logic of rights enforcement. Operating through persuasion, expertise, and visibility rather than sanction, they expand the spectrum of protection without undermining judicial sovereignty. Their soft-law instruments – recommendations, opinions, reports – do not carry binding force but often acquire significant normative weight, especially when they are echoed in case-law or incorporated into legislative reforms. In this way, IAAs contribute to a "reflexive rule of law" [78, p. 215][17], which is open to institutional innovation, sensitive to context, and capable of adapting to the evolving demands of rights protection.

However, this model has inherent limits. First, despite their constitutional or statutory mandate to protect fundamental rights, neither the Defender of Rights nor the General Controller of Places of Deprivation of Liberty has the power to refer legislation directly to the Constitutional Council. In practice, these authorities frequently identify issues in the interpretation or application of the law, normative gaps, and potential constitutional concerns. The absence of a direct referral right contrasts with several European systems where ombuds institutions possess standing before constitutional courts. Granting such competence could enhance the consistency of their mission and strengthen their institutional role.

Second, the effectiveness of IAAs depends structurally on the persuasive force of soft law. Outside judicial proceedings – where their analyses may gain binding effect through court decisions – their recommendations do not impose legal obligations on political authorities. The implementation of the reforms relies on the executive or the legislature to act. While this limitation preserves democratic balance, it can also constrain timely and comprehensive reform.

[17] The "reflexive rule of law" refers to a legal system capable of self-assessment and adaptation, taking into account the practical effects of norms and social obstacles that may hinder the exercise of rights, in order to strengthen the real-world effectiveness of legal protection. This concept is not yet fully standardized in mainstream legal doctrine. It has been used, for example, by B. Archibald, who argued that hybrid and restorative justice models reflect a reflexive approach to the rule of law in deliberative constitutional democracies.

Nevertheless, the French model offers a significant contribution to international debates on access to justice and the diversified accountability mechanisms. In contexts where democratic institutions face growing scrutiny and rights violations persist despite formal guarantees, the role of IAAs is particularly relevant. Their capacity to operate at the intersection of law, society, and governance positions them as indispensable collaborators of the judiciary, as well as independent watchdogs, advocates, and reformers.

Ultimately, the recognition of IAA challenges the traditional hierarchy of legal actors. It encourages a more networked and pluralist vision of the rule of law, in which multiple institutions, each endowed with specific tools and legitimacy, work collectively to ensure that rights are not only proclaimed but also effectively realised.

References

[1] Champeil-Desplats, V. (2008). Effectivité et Droits de l'Homme: Approche Théorique. In V. Champeil-Desplats & D. Lochak (Eds.). *À la Recherche de l'Effectivité des Droits de l'Homme* (pp. 11-26). Presses Universitaires de Paris Nanterre.

[2] Dupré de Boulois, X. (2004). La Protection des Droits Fondamentaux par le Recours en Responsabilité Administrative. *Revue des Droits et Libertés Fondamentaux, 82.* Retrieved from https://revuedlf.com/droit-administratif/la-protection-des-droits-fondamentaux-par-le-recours-en-responsabilite-administrative/.

[3] Perrin, J.-F. (1979). *Pour une Théorie de la Connaissance Juridique.* Droz.

[4] Severin, É. (2014). Introduction: Une Enquête Juridique sur la Place du Collectif dans la Justice Contemporaine. In I. Omarjee, & L. Sinopoli (Eds.). *Les Actions en Justice au-delà de l'Intérêt Personnel* (pp. 97-118). Dalloz.

[5] Favoreu, L., & Renoux, T.-S. (Eds.). (1992). *Le Contentieux Constitutionnel des Actes Administratifs.* Sirey.

[6] Molfessis, N. (1997). *Le Conseil Constitutionnel et le Droit Privé.* L.G.D.J.

[7] Renoux, T.-S. (1993). Le Droit au Recours Juridictionnel. *JCP G, 1,* 3675.

[8] European Court of Human Rights. (February 21, 1975). *Golder v. United Kingdom* (No. 4451/70).

[9] Tamion, A. (2025). Le Process-Based Review dans la Jurisprudence de la Cour Européenne des Droits de l'Homme, ou le Problème de la Rationalité Procédurale dans les Démocraties Libérales. *Revue des Droits et Libertés Fondamentaux.* Chronique (No. 26).

[10] Sinkondo, M. (2005). Le Fabuleux Destin de l'Article 13 de la CEDH et ses Suites Heureuses pour les Garanties Individuelles. *Revue de la Recherche Juridique, 1,* 251-282.

[11] European Court of Human Rights. (November 19, 2020). *Barbotin v. France* (No. 25338/16).

[12] Council of Europe. (January 19, 2000). *Recommendation No. R (2000)3.*

[13] Commaille, J., & Dumoulin, L. (2009). Heurts et Malheurs de la Légalité dans les Sociétés Contemporaines: Une Sociologie Politique de la Judiciarisation. *L'Année Sociologique, 59*(1), 63-107.

[14] Schmitter, G. (2015). Étendue et Limites du Droit au Recours Juridictionnel. *Revue Française de Droit Constitutionnel, 104,* 935-952.

[15] Van de Walle, S., & Six, F. (2014). Trust and Distrust as Distinct Concepts: Why Studying Distrust in Institutions is Important. *Journal of Comparative Policy Analysis: Research and Practice, 16*(2), 158-174. https://doi.org/10.1080/13876988.2013.785146.

[16] Breger, M.J., & Edles, G.J. (2016). Independent Agencies in the United States: The Responsibilities of Public Lawyers. *Public Law.* Retrieved from https://scholarship.law.edu/cgi/viewcontent.cgi?article=1951&context=scholar.
[17] Cole, M. (1998). Quasi-Government in Britain: The Origins, Persistence and Implications of the Term "Quango". *Public Policy and Administration, 13*(1), 65-78. https://doi.org/10.1177/095207679801300105.
[18] Renaudie, O. (2011). La Genèse Complexe du Défenseur des Droits. *Revue Française de Droit Administratif, 139*(3), 397-408.
[19] Bioy, X. (2014). Actualité des Autorités Administratives Indépendantes dans le Domaine des Libertés Fondamentales (Chronique No. 2). *Les Petites Affiches, 65,* 6-16.
[20] France. (July 23, 2008). *Constitutional Law No. 2008-724 of 23 July 2008.*
[21] France. (March 29, 2011). *Organic Law No. 2011-333 of 29 March 2011.*
[22] France. (October 30, 2007). L*aw No. 2007-1545 of 30 October 2007.*
[23] Legrand, A. (2011). Ombudsmän Nordiques et Défenseur des Droits. *Revue Française d'Administration Publique, 139*(3), 499-506.
[24] Pleven, R. (December 14, 1972). *Journal Officiel de la République Française,* 6211.
[25] Balladur, E. (2007). *Une Ve République plus Démocratique: Comité de Réflexion et de Proposition sur la Modernisation et le Rééquilibrage des Institutions de la Ve République.* Retrieved from https://www.vie-publique.fr/files/rapport/pdf/074000697.pdf.
[26] Löhrer, D. (2014). *La Protection non Juridictionnelle des Droits Fondamentaux en Droit Constitutionnel Comparé.* Institut Universitaire Varenne.
[27] Danelciuc-Colodrovschi, N. (2023). What Role for Independent Administrative Authorities in Times of Crisis? An Analysis through the French Experience. *Civis Letter, 1,* 58-67.
[28] Défenseur des Droits. (March, 2021). *Activity Report for 2020.* Retrieved from https://lext.so/2EeC4K.
[29] Soulard, C., & Tabuteau, D.-R. (2025). Propos Introductifs du Colloque "Le Défenseur des Droits et le Juge". Retrieved from https://www.defenseurdesdroits.fr/retour-sur-le-colloque-le-defenseur-des-droits-et-le-juge-812.
[30] Foucault, M. (2004). La Redéfinition du Judiciable. *Vacarme, 29*(4), 54-57.
[31] Rivière, C. (2021). La Contribution du Défenseur des Droits au Respect Effectif des Droits des Etrangers. *Titre VII, 6.* Retrieved from https://www.conseil-constitutionnel.fr/publications/titre-vii/la-contribution-du-defenseur-des-droits-au-respect-effectif-des-droits-des-etrangers.
[32] Bousta, R. (2007). Contribution à une Définition de l'Ombudsman. *Revue Française d'Administration Publique, 123,* 387-397.
[33] Défenseur des Droits. (2018-2025). *Selected Decisions* (Nos. 2018-090, 2019-086, 2023-253, 2023-157, 2024-001, 2025-100).
[34] Lecis Cocco Ortu, A.-M. (2015). QPC et Interventions des Tiers: Le Débat Contradictoire entre Garantie des Droits de la Défense et Utilité des Amici Curiae. *Revue Française de Droit Constitutionnel, 104*(4), 863-886.
[35] Défenseur des Droits. (October 29, 2021). *Decision No. 2021-195*; Conseil d'État. (October 11, 2023). *Amnesty International France et autres* (No. 454836).
[36] Lester, A. (1988). Amici Curiae: Third-Party Interventions before European Court of Human Rights. In *Protecting human rights: The European Dimension. Studies in Honour of Gerard J. Wiarda.* Carl Heymanns Verlag.
[37] Burgorgue-Larsen, L. (2011). Les Interventions Eclairées devant la Cour Européenne des Droits de l'Homme ou le Rôle Stratégique des Amici Curiae. In *La Conscience des Droits: Mélanges J.-P. Costa* (pp. 67-81). Dalloz.
[38] Défenseur des Droits. (2015-2019). *Third-Party Intervention Decisions* (Nos. 2019-074, 2018-174, MDE-2015-035).

[39] Défenseur des Droits. (2018). *Third-Party Intervention Decisions* (Nos. 2018-058, 2018-003).
[40] Défenseur des Droits. (September 1, 2014). *Decision No. MLD-MDE-MSP-MDS-2014-111.*
[41] Défenseur des Droits. (February 9, 2017). *Decision No. 2017-059.*
[42] Défenseur des Droits. (June 19, 2014). *Decision No. MSP-2014-087* (third-party intervention in N.H. v. France).
[43] Défenseur des Droits. (June 3, 2014). *Decision No. MLD-MDE-MSP-2014-082.*
[44] Défenseur des Droits. (March 23, 2017). *Decision No. 2017-118* (third-party intervention in R.I. and Others v. France).
[45] Défenseur des Droits. (2017-2019). *Selected Decisions* (Nos. 2019-016, 2017-184).
[46] Défenseur des Droits. (September 27, 2017). *Decision No. 2017-280.*
[47] Mouchette, J. (2019). *La Magistrature d'influence des Autorités Administratives Indépendantes.* LGDJ.
[48] European Court of Human Rights. (August 21, 2015). *Yengo v. France* (No. 50494/12); European Court of Human Rights. (January 30, 2020). *J.M.B. v. France* (No. 9671/15).
[49] European Court of Human Rights. (February 27, 2025). *Fraisse and Others v. France* (Nos. 22525/21 & 47626/21).
[50] Lamy, V. (2020). La Circulation de la Norme du CGLPL dans la Jurisprudence Administrative. In E. Gallardo & M. Giacopelli (Eds.). *L'Elaboration d'un Droit de la Privation de Liberté: Étude autour des Recommandations Minimales du Contrôleur Général des Lieux de Privation de Liberté.* LexisNexis.
[51] Contrôleur Général des Lieux de Privation de Liberté. (2022). *Activity Report 2021.* Dalloz.
[52] France. (April 8, 2021). *Law No. 2021-403 of 8 April 2021.*
[53] European Court of Human Rights. (March 19, 1997). *Hornsby v. Greece* (No. 18357/91).
[54] Löhrer, D. (2016). Le Soutien du Défenseur des Droits à l'Exécution des Décisions De Justice. *Revue Française de Droit Administratif,* 727-739.
[55] Gélard, P. (2006). *Rapport de l'Office Parlementaire d'Evaluation de la Législation sur les Autorités Administratives Indépendantes* (Vol. 1). Parlement Français.
[56] Conseil d'État. (December 22, 2012). *OIP-SF* (No. 364585).
[57] Contrôleur Général des Lieux de Privation de Liberté. (November 12, 2012). Urgent Recommendations. *Journal Officiel de la République Française* (published December 6, 2012).
[58] Défenseur des Droits. (April 14, 2025). *Decision No. 2025-068.*
[59] Défenseur des Droits. (2019). *Annual Activity Report 2019.* Retrieved from https://www.defenseurdesdroits.fr/sites/default/files/2023-07/ddd_rapport-annuel-2019_EN_20200907.pdf.
[60] Roulhac, C. (2018). *L'Opposabilité des Droits et Libertés.* Institut Universitaire Varenne.
[61] Motulsky, H. (1973). *Écrits: Études et Notes de Procédure Civile* (Vol. 1, pp. 85-100). Dalloz.
[62] Carbonnier, J. (2001). *Flexible Droit: Pour une Sociologie du Droit Sans Rigueur.* LGDJ.
[63] Waline, M. (1926). *La notion Judiciaire de l'Exces de Pouvoir.* Dalloz.
[64] Blankenburg, E. (1994). La Mobilisation du Droit: Les Conditions du Recours et du non-Recours a la Justice. *Droit et Société, 28,* 691-703.
[65] Löhrer, D. (2020). La Fonction d'Aide à l'Accès au Juge du Défenseur des Droits. *Revue Française de Droit Constitutionnel, 121*(1), 189-221.
[66] Défenseur des Droits. (2017). *Annual Activity Report 2017.* Retrieved from https://www.defenseurdesdroits.fr/sites/default/files/2023-10/ddd_rapport-annuel-2017_EN_20180410.pdf.
[67] Défenseur des Droits. (2023). *Annual Activity Report 2023.* Retrieved from https://www.defenseurdesdroits.fr/sites/default/files/2024-06/ddd_rapport-annuel-activite-2023_EN_20240603.pdf.

[68] Cluzel-Métayer, L. (2011). Réflexions à Propos de la Saisine du Défenseur des Droits. *Revue Française d'Administration Publique, 139*(3), 447-460.
[69] Défenseur des Droits. (2024). *Droits des Usagers des Services Publics: De la Médiation aux Propositions de Réforme.* Retrieved from https://www.defenseurdesdroits.fr/sites/default/files/2024-06/ddd_rapport-mediation_2024_20240624.pdf.
[70] Défenseur des Droits. (January 25, 2025). *Opinion No. 24-01 on the Bill Relating to the Legal Framework for Class Actions.*
[71] Défenseur des Droits. (2024). *Cross-Cutting recommendations in the Field of Combating Discrimination.*
[72] Défenseur des Droits. (2017-2020). *Selected Decisions* (Nos. 2017-305, 2020-030).
[73] Défenseur des Droits. (2019). *Personnes Malades Etrangères: Des Droits Fragilisés, des Protections a Renforcer.* Retrieved from https://www.defenseurdesdroits.fr/sites/default/files/2023-07/ddd_rapport_personnes-malades-etrangeres_2019_20190510.pdf
[74] Goin, A., & Cadin, L. (2023). Le Juge ne Peut pas tout. *Actualité Juridique Droit Administratif,* 2105.
[75] Défenseur des Droits. (2024). *Droits des Usagers des Services Publics: De la Médiation aux Propositions de Réforme* (p. 16).
[76] Pedriana, N., & Stryker, R. (2004). The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965-1971. *American Journal of Sociology, 110*(3), 709-760. https://doi.org/10.1086/423587.
[77] Schmitz, J. (2025). Garanties Juridictionnelles et non Juridictionnelles au Défi de l'Effectivite des Droits. Re*vue des Droits et Libertés Fondamentaux,* Chronique No. 57. Retrieved from https://revuedlf.com/droit-administratif/garanties-juridictionnelles-et-non-juridictionnelles-au-defi-de-leffectivite-des-droits/.

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Nemo Judex in Re Sua and the “Standing Mandate” Procedure

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Abstract
The institutional failure of the United Nations Security Council to fulfill its mandate to maintain international peace and security has long been a focus of attention and remains a central topic of discussion – both in intergovernmental and doctrinal contexts – regarding the United Nations reform. Art. 27(3) of the United Nations Charter enshrines not only the procedural right of veto but also the procedural obligation for a party to a dispute to abstain from voting on resolutions pursuant to Chapters VI and VIII (Art. 52 (3)); however, this obligation is often disregarded. Such deliberate actions constitute a violation of the fundamental legal principle of nemo judex in Re Sua, "no one may be a judge in their own case" – which is why this study is relevant. The aim of the study is to analyze the impact of the new procedure "Standing Mandate" procedure on the obligation of a United Nations Security Council member to abstain from voting if it is a party to a dispute, how it contributes to increasing the transparency and accountability of this principal body to the United Nations General Assembly, and whether this mechanism constitutes the initial phase of implementing elements of accountability for abuse of rights within the organization. The article examines and analyzes existing proposals for United Nations transformation, reviews the outcomes of intergovernmental debates on United Nations Security Council reform in recent years, and analyzes shifts in the core positions of states in this context against the backdrop of numerous contemporary armed conflicts that have engulfed the world, as well as the very reasons for such incremental changes in views and approaches. To this end, the study employed a dialectical method at the philosophical level; empirical methods, such as comparative analysis, observation, and description; general logical methods, such as analysis and synthesis; as well as a specialized legal method. Among the findings of this study, the following should be highlighted: an examination and analysis of current trends in shifting approaches to the transformation of the United Nations and the rationale behind them, a theoretical and legal analysis of the possibility of using the veto initiative to unlock the procedural obligation enshrined in Art. 27(3) as a response to abuse of rights, as well as a theoretical and legal analysis of the further development of the application of the "Standing Mandate" procedure. The impact of United Nations General Assembly Resolution

76/262 in the context of enhancing the role of this principal organ, as well as its influence on the introduction of preventive mechanisms for accountability for abuse of rights into United Nations practice, remains largely unexplored, particularly in domestic doctrine. Further doctrinal research into the legal nature of this mechanism, as well as its implementation through extra-statutory reform, is imperative.

Keywords: *Veto Initiative; Standing Mandate; obligation to abstain from voting; accountability for abuse of power; UN reform; implied powers doctrine.*

Nemo Judex in Re Sua та процедура «Постійний мандат»

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Анотація
Інституційна неспроможність Ради Безпеки ООН виконувати свій мандат з підтримання міжнародного миру і безпеки вже давно є в центрі уваги та лишається основою дискусій, як міждержавних, так і доктринальних в питанні можливого реформування ООН. Стаття 27 (3) Статуту ООН закріплює не тільки процесуальне право вето, а й процесуальний обов'язок утримуватися сторони спору від голосування за резолюції на основі Глав VI та VIII (ст. 52 (3)), проте даним обов'язком часто нехтують. Такі умисні дії становлять порушення фундаментального принципу права nemo judex in re sua – «не можна бути суддею у власній справі», що й зумовлює актуальність даного дослідження. Метою дослідження є аналіз впливу нової процедури «Постійний мандат» на обов'язок члена Ради Безпеки ООН утриматися від голосування, якщо такий є стороною спору; того як вона впливає на підвищення рівня відкритості та підзвітності цього головного органу перед Генеральною Асамблеєю ООН, та чи є цей механізм початковою фазою впровадження в практиці організації елементів відповідальності за зловживання правом. У статті досліджуються та аналізуються існуючі пропозиції трансформації ООН, розглядаються результати міждержавних дебатів щодо реформи Ради Безпеки ООН за останні роки, проаналізовано зміни основних позицій держав у цьому контексті на тлі багатьох сучасних збройних конфліктів, які охопили світ, як і самі причини таких не радикальних змін поглядів та підходів. Для цього, в процесі дослідження було застосовано діалектичний метод філософського рівня; емпіричні методи, такі як: порівняльний, спостереження та описання; загально-логічні методи: аналіз і синтез; а також спеціально-юридичний метод. Серед отриманих результатів дослідження слід виокремити:

дослідження та аналіз сучасних тенденцій до зміни підходів трансформації ООН та їх обґрунтування, теоретико-правовий аналіз можливості застосування ініціативи вето для розблокування процесуального обов'язку закріпленого в статті 27(3) як відповіді на зловживання правом та теоретико-правовий аналіз подальшого розвитку застосування процедури «Постійний мандат». Вплив Резолюції Генеральної Асамблеї ООН 76/262 у контексті підвищення ролі цього головного органу, а також на початок запровадження в практиці організації запобіжних механізмів відповідальності за зловживання правом наразі є мало дослідженим, зокрема у вітчизняній науковій літературі. Подальше доктринальне дослідження правової природи даного механізму, як і спосіб його запровадження, шляхом позастатутного реформування – видаються нам як вкрай необхідні.

Ключові слова: *ініціатива вето; Постійний мандат; обов'язок утриматися від голосування, відповідальність за зловживання правом; реформа ООН; доктрина домислюваних повноважень.*

Introduction

This paper examines the issue of the application of Art. 27(3) of the UN Charter, which, in addition to a procedural right, establishes a procedural obligation for a party to a dispute to abstain from voting on resolutions under Chapters VI and VIII of the UN Charter (hereinafter referred to as the Charter). The article examines the prospects for unblocking this provision through a new mechanism adopted by UN General Assembly Resolution 76/262 *"Standing Mandate"* in 2022. The application of this procedural obligation by members of the UN Security Council (hereinafter the UNSC) has lacked consistent and systematic practice since 1946, leading to violations of the fundamental legal principle of *nemo judex in re sua* – "no one may be a judge in their own case". The article provides examples of existing proposals to reform the UNSC and the veto right, which, by their very nature, cannot be implemented without formal reform. In turn, the *"Standing Mandate"* procedure is an example of non-statutory changes based on the application of a progressive interpretation of the founding document through the doctrine of implied powers, which does not require formal amendments to the Charter and effectively leaves the untapped potential of this mechanism, which we have yet to see, explore, and analyze, unrealized.

The article provides examples of recent intergovernmental debates within the UNSC, along with some official positions of the organization's member states, which in recent years have demonstrated a cautious shift from the concept of the need for a global, formal transformation of the UN toward more targeted, non-statutory reforms. The lack of any progress on the issue of reforming the UN's principal organs is linked not only to the

extreme complexity of practically implementing the procedure for making formal changes enshrined in the Charter, which also serves a protective function, but also to the absence of a unified position among member states proposing reform packages, as they reflect diverging visions of equitable changes from various groups of states. The article provides examples and analyzes relatively new proposals by member states regarding the possibility of using the veto initiative to unblock the procedural obligation of UNSC member states, as enshrined in Art. 27(3). In addition, the article explores the theoretical potential of gradually granting the UN General Assembly (hereinafter the UNGA) greater oversight functions over the activities of the UNSC, in particular the ability to override the veto or, in exceptional cases, to assess an exercised veto as *ultra vires* – as a manifestation of responsibility and accountability within an international organization for the abuse of entrusted procedural rights.

It should be noted, however, that the issue of UN reform has attracted extraordinary and exceptional interest from both Ukrainian and international scholars. In particular, among recent studies on the reform of the UN, the UN Security Council, and the veto right, the following works can be mentioned: O. Kovtun, K. Gavlakova [1], O. Opanasenko [2], A.B. Mishchenko, R.V. Atashkade, and V.V. Teremko [3]. Among foreign scholars: J. Trent, L. Schnurr [4], M. Alene, M. Ali, K. Tadesse [5], J. Stagstrup, W. Cheng [6], G. Melling, A. Dennett [7], E. Parvanova [8]. At the same time, research into the legal nature of the *"Standing Mandate"* mechanism, as well as its impact on the process of transforming the UN in the context of maintaining international peace and security, and enhancing the UNSC's transparency, accountability, and responsibility to the UNGA, is relatively new in Ukrainian international law doctrine. In this regard, the following recent works in Ukrainian academic literature are worth highlighting: Kresin O.V. [9], Serdiuk V.M. [10]. Among foreign scholars, the issue of the *"Standing Mandate"* mechanism has been studied, in particular, by L. van den Herik, T. Maluwa [11], A. Peters [12], and R. Barber [13].

At the same time, research into the legal nature of the *"Standing Mandate"* mechanism, as well as its impact on the process of transforming the UN in the context of maintaining international peace and security, and enhancing the UNSC's transparency, accountability, and responsibility to the UNGA, is relatively new in Ukrainian international law doctrine. In this regard, the following recent works in Ukrainian academic literature are worth highlighting:

For example, A.B. Mishchenko, R.V. Atashkade, and V.V. Teremko conducted a comprehensive theoretical analysis of existing scenarios for UN reform in their study [3]. O. Kovtun, and K. Gavlakov, analyzed the G4

reform proposal and concluded that it is one of the most balanced, though they also highlighted some inconsistencies with Ukraine's position on the veto right [1, pp. 82-83]. E. Parvanova conducted an intergovernmental analysis of the possibility of granting the G-4 the status of permanent members of the UNSC and pointed to the advisability of introducing a qualified majority vote instead of the veto right for more effective intervention in situations of armed conflict [8, p. 76]. In his scholarly work on UNSC reform, O. Opanasenko paid particular attention to approaches for substantially increasing the transparency of the UNSC's work [2, pp. 103-104]. Regarding the transparency of the UNSC, L. Van den Herik and T. Maluva noted that it was primarily due to UNGA Resolution 76/262 that the spectrum of voices involved in the discussion beyond the UNSC was successfully broadened [11, p. 268].

Materials and Methods

The research materials included the UN Charter, which serves as a universal international treaty and the organization's founding document; UN General Assembly Resolution 76/262, *"Standing Mandate,"* adopted on April 26, 2022; the official positions of member states expressed during intergovernmental debates, particularly regarding the future of the UN, the reform of the UN Security Council, and the veto right; political statements by states; proposals for UN reform put forward by groups of member states; and the results of doctrinal studies by domestic and foreign scholars.

The methodology of this study is based on a comprehensive approach to analyzing the statutory provisions of Art. 27(3), particularly in the context of the formally established procedural obligation for a party to a dispute to abstain from voting on resolutions under Chapters VI and VIII of the Charter, as well as an analysis of the general historical practice of compliance with this provision. Additionally, the article analyzes the legal nature of the adoption of the *"Standing Mandate"* mechanism, its functional features, and their impact on enhancing the legal personality of the UN General Assembly vis-à-vis the UN Security Council. The article presents and analyzes examples of positive assessments of the veto initiative by member states based on the results of its application over four years. The article explores the mechanisms' as-yet-unexplored potential, taking into account the doctrine of implied powers upon which it was adopted. The analysis was conducted using the dialectical method at the philosophical level, which allows one to trace the struggle of opposites in the process of development. In particular, it compares the formal codification of the procedural obligation under Art. 27(3) with the actual history of its application, as well as the legal nature of the veto initiative as formally codified and the existing practice of its implementation.

The study also employs empirical methods, such as comparative analysis, observation, and description. The comparative method is used to identify and examine the similarities and differences between the *"Standing Mandate"* mechanism and the restrictive obligation enshrined in Art. 27(3), to understand whether they can complement one another. Specifically, as a manifestation of the UN General Assembly's oversight and appeal powers vis-à-vis the UN Security Council in the context of maintaining international peace and security. Observation is a method used in the study to track the latest official positions of member states regarding their proposals or those they have already supported on the issue of UN Security Council reform and the veto right, whether they have been modified in any way, whether new reforms are being proposed, and whether the general understanding of member states regarding the imperative need for formal reform is changing. The descriptive method was used to document the results obtained through the observation method.

Among the general logical methods used were: analysis – an examination of the legal nature of Resolution 76/262 and its adoption, its overall assessment by member states and an evaluation of its implementation, as well as the contradictions between its current formal provisions and practical application, with the potential to exert a real influence on the decision-making process within the UN Security Council as a supervisory or appellate body; synthesis – based on the analysis, developing a scientific and legal assessment within the existing system of operation of the principal UN bodies to utilize the influence of the veto initiative to restore the fundamental legal principle of *nemo judex in re sua* and to limit the right of veto through non-statutory reform based on the doctrine of implied powers. Likewise, to develop an assessment of the possibility of a further evolutionary interpretation of the *"Standing Mandate"* procedure in its future application.

In addition, a specialized legal method was employed to examine the provisions of international legal instruments regarding innovations in the activities of the United Nations.

Results and Discussion

A shift in focus regarding the transformation of the UN

Problems with the UN's institutional capacity to maintain international peace and security began to emerge as early as the first years of this universal international organization's inception. First and foremost, this can be attributed to the dissatisfaction of small states with the existence of the veto power, which creates privileged conditions and rights for certain member states, thereby partially contradicting the fundamental legal

principle *par in parem non habet imperium* (*"an equal has no authority over an equal"*). In addition, the decades of UN operations, and especially the UNSC, have clearly demonstrated a systemic institutional failure to fulfill its tasks as enshrined in the preamble and Chapters I and V of the Charter, as well as the practice of abuse of the procedural right of veto by the permanent members of the UNSC.

The ongoing process of developing proposals for the reform of the United Nations, and particularly the UNSC – including proposals to limit its powers, enhance the role of the UNGA, restrict the veto power, and expand the membership of the UNSC – has led to the formation of various coalitions among Member States that support one reform plan or another. Among the most well-known are: the G4 Group, Uniting for Consensus or the Coffee Club, the Ezulwini Consensus, the S-5, the E10, the L69 Group, and the Franco-Mexican Initiative. However, despite numerous viable proposals regarding the expansion of the UNSC's membership to include permanent, non-permanent, and semi-permanen[1] members, the restriction of the veto or even its abolition, and changes to the voting system, and adapting to new realities where a country's economic success and population size matter – which better reflects today's realities rather than the outdated framework established in 1945 – states are unable to reach a common consensus that would satisfy their equitable vision. The most acute contradictions stem from the fact that many states are convinced that they, specifically, should be included in the renewed UNCS, as well as the existence of approaches to limiting the veto right that differ radically from one another[2].

Intergovernmental debates within the UNCS and the UNGA on the reform of the UNCS persist to this day. However, since 2022, when the Russian Federation launched an aggressive war against Ukraine, these debates have gained significant momentum. Unfortunately, the armed aggression against the State of Palestine, U.S. military operations in the Latin American region, and joint military actions by the State of Israel and the United States against Iran further underscore the UN's paralysis in maintaining international peace and security and strengthen the arguments of states in favor of

[1] A third category of seats on the UNSC, proposed as a general concept to help reach consensus in disputes over which countries are more deserving of a permanent seat on the UNSC. In fact, semi-permanent members are more privileged than non-permanent members of the UNSC, but not as privileged as permanent members [14, pp. 206-210].

[2] The G4 group is prepared to give up its veto power in exchange for becoming a permanent member of the UNSC.
The Coffee Club proposes granting veto power on a regional basis (for example, Europe would have a single permanent representative on the UNSC who would represent the region's interests) [4, p. 69], [15, p. 7].
The position of African states, based on the principle of equality, calls for either the complete abolition of the veto or granting it in full to all new permanent members [5, pp. 70-72], [16].

reforming the UNCS and enhancing the role of the UNGA in matters of peace and security. Thus, beginning in 2022, UNGA Resolution 76/262 *"Standing Mandate"* [17] received particular attention; it has been viewed positively by nearly all member states participating in the annual discussions, including the permanent members of the UNCS. States welcomed this new procedure and its successful implementation, as the permanent members of the UNCS have already accounted for before the UNGA on their use of the veto in accordance with the procedure of Resolution 76/262 on 17 occasions, which improves transparency, openness, and accountability of the UNCS and enhances the role of the UNGA in these matters [18-22].

It is also worth noting that, over the years, when it came to reforming the UNSC, states have consistently promoted only the reform plans of their coalitions, which were formed as far back as the last century or at the beginning of the 21st century, without offering any substantially new proposals. However, since 2023, states[3] began to actively focus on Art. 27(3) of the Charter, which, in addition to the procedural right of veto, establishes a procedural obligation for a party to a dispute to abstain from voting on decisions based on Chapters VI[4] and VIII [23], [19-21]. For this provision to apply, it must be established that:

1) the resolution put to a vote is not procedural;
2) the resolution falls under Chapter VI or Art. 52(3);
3) there is a dispute;
4) a member of the UN Security Council is a party to the dispute [24, p. 2].

This provision has generally been overlooked[5]. Moreover, since 1946, it has not been the subject of established, consistent practice and has been virtually unused[6] [24, p. 2], while all global reform plans have envisaged

[3] Austria, Italy, Liechtenstein [19].

[4] In fact, this is very important, as there are well-founded arguments that UN peacekeeping operations should be regarded precisely as actions and measures based on Chapter VI of the Charter, rather than enforcement measures based on Chapter VII, which could, on a global scale, increase the scope and effectiveness of peacekeeping activities and contribute to the maintenance of international peace and security.

[5] The provision of the Charter set forth in Art. 27(3) is quite difficult to apply in practice, since such components of the prescribed formula as establishing the existence of a threat to peace and whether a permanent member is a party to the dispute fall within the jurisdiction of the UNSC itself, which effectively makes it impossible to establish the relevant fact and adopt the corresponding decision [23].

[6] In 1946, France and the United Kingdom raised objections regarding the existence of a dispute between Lebanon and Syria, on the one hand, and France and the United Kingdom, on the other; however, they abstained from voting on the question of whether a dispute existed. The United Kingdom abstained from voting: on draft resolutions concerning the Corfu Channel in 1947 (S/PV.122 and S/PV.127), 11 times on the Egyptian question; in 1947, on draft resolutions and amendments thereto (S/PV.198, S/PV.200,

a more comprehensive approach to transforming the procedural law governing the veto and its application[7]. In addition, not every situation involving a breach of international peace and security can be recognized as a legal dispute, as it constitutes a far more serious violation of international law; therefore, this statutory provision remained largely overlooked for a long time.

However, since 2023, some states have called on the Permanent Five to develop best practices for interpreting and applying this provision. In addition, in 2025, Slovenia proposed referring the matter to the International Court of Justice (hereinafter ICJ) for an authoritative interpretation of Article 27(3) and the methods of its implementation in cases of large-scale crimes and the penalties for ignoring it, as well as which vetoes should be considered ultra vires on this basis [6]. In our opinion, such a request for an advisory opinion to the ICJ regarding the use of the procedural right of veto in cases of mass atrocities, genocide, or to justify one's own aggression – which constitutes a violation of the fundamental principles of the UN – in cases where a permanent member is a directly interested party in the "situation" rather than necessarily in the "dispute," etc. – is entirely justified. Such an opinion could form the legal basis for future state practice in applying the internal procedures of the UN and the international organization as a subject of international law, which would establish the sources of its powers in accordance with the provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[8]. However, there is also a risk that the court will take a more conservative approach in resolving this issue and interpret the supremacy of veto as taking precedence over everything else, including the peremptory norms of general international law *jus cogens*.

It is equally important to mention the outcomes of the agreements reached by member states following the 2024 Summit of the Future and enshrined in the Pact for the Future, Global Digital Compact and Declaration on Future Generations. Thus, Action 41 (a) emphasizes the obligation to comply with all provisions of the Charter in the UNSC's decision-making process, including the provisions of Article 27(3). Paragraph (c) reinforces

and S/PV.201). Egypt abstained from voting once on the question of Palestine in 1950, explicitly invoking Art. 27 (3) (S/PV.524). Argentina invoked Art. 27 (3) and abstained during the adoption of Resolution 138 (1960) on the Eichmann issue (S/PV.868). India and Pakistan abstained from voting on relevant resolutions and decisions considered during their membership in the UNSC in 1950-1953 [24, p. 2].

[7] For example, a statutory restriction on the use of the veto in cases of mass atrocities and human rights violations, or a statutory restriction on the use of the veto solely to votes on resolutions based on Chapter VII of the Charter [25, p. 87], [14, pp. 212-213].

[8] Article 2, paragraph 1(j) [26]

the call for further democratization of the UNSC's working methods and improved interaction with the UNGA, including a review of voting mechanisms, in particular through the full implementation and application of UNGA Resolution 377 A (V) *"Uniting for Peace"* and the veto initiative. Paragraph (d), in turn, enshrines the right of UNGA members to participate in the work of the UNSC and its subsidiary bodies, to strengthen the Council's accountability to UN members and increase the transparency of its work [27, pp. 27-28].

A theoretical and legal analysis of the potential impact of a Veto Initiative on a party's duty to abstain from voting

In this context, the proposal to link the procedure for a permanent member – who is a party to the dispute – to refrain from exercising its veto with the new *"Standing Mandate"*[9] mechanism deserves special attention. In our view, such a combination represents a promising new approach to internal administrative procedures within the UN based on informal reform, which could positively impact the institutional capacity to act in the process of maintaining international peace and security. In general, the procedural unblocking of Art. 27(3) of the Charter regarding the abstention of an interested party embodies the general legal principle of *nemo judex in re sua* and would constitute a significant victory on the path to the gradual transformation of the UNSC's powers through the application of either an authoritative interpretation or the doctrine of implied powers, particularly when combined with the *"Standing Mandate"* procedure. Furthermore, as we have already noted in our previous studies of the veto initiative, this mechanism is a step toward establishing accountability for the abuse of the veto by creating, within the UNGA, a mechanism for public discussion of each instance of veto use and its subsequent critique by all , which could serve as a deterrent for permanent members in exercising this procedural right and lead to the full potential of this resolution being realized in the matter of accountability [10, pp. 254-255].

In our opinion, the new *"Standing Mandate"* mechanism does not explicitly provide for the possibility of assessing and making such decisions regarding the restriction of a disputing party's voting rights, nor is this consistent with the provisions of the Charter. However, the new procedure can serve as an effective tool and foundation for developing a gradual practice of restricting the voting rights of an interested party or holding a permanent member accountable who abuses procedural rights and violates the principles and objectives of the organization. In our view, the authors of the resolution intended for such actions to be evaluated during its drafting for subsequent procedural steps, just as the procedural obligation of the interested party

[9] Spain, Norway, Mexico, Belgium [20, p. 28].

to abstain from voting is enshrined in the Charter. Thus, with the adoption of UNGA Resolution 76/262, the level of transparency and accountability regarding the use of the veto has increased, allowing Member States to form their own positions and assess the actions of a permanent member of the UNSC.

It is equally important to note that calls for permanent members to be required to provide an official explanation for the use of the veto have been made since the end of the last century by representatives of various countries[10], and today this has become a reality with the introduction of greater transparency and accountability of the UNSC to the UNGA [28, pp. 788, 800, 809, 1154; 29, p. 64]. Back in the day, "The Elders"[11] emphasized in this regard that any explanation for the use of a veto by a permanent member of the UNSC must relate to the maintenance of international peace and security, rather than purely national interests of states [30, p. 96; 7, p. 296].

Possible ways to implement the "Standing Mandate" procedure as part of accountability for abuse of power and strengthening the role of the UNGA

The further procedural involvement of the UNGA in assessing voting within the UNSC and potential violations or abuses could well be applied in conjunction with an updated procedure or an updated interpretation of the *"Standing Mandate"* procedure, along with the procedural obligation enshrined in Art. 27(3), which could unlock this provision for decision-making under Chapter VI of the Charter. Thus, we believe that the use of the veto initiative in this context is possible in the following cases:

1. Forming a public assessment by UNGA member states through the adoption of a non-binding resolution on the nature of the situation and a conclusion as to whether a permanent member is a party to the dispute. It should be noted that even a UNGA recommendation, supported by an absolute majority of member states, is capable of exerting significant political pressure and serves as an expression of the will of the international community. For example, V.A. Vasylenko noted that the practical significance of recommendations lies in their "permissive effect", which is intended to highlight appropriate changes to existing norms and eliminate legal gaps, thereby outlining the contours of legally permissible models of behavior [31, p. 179].

[10] Slovakia, Germany, Small Five Group (Costa Rica, Jordan, Liechtenstein, Singapore, Switzerland).

[11] It consists of a diverse and independent group of global leaders working to promote peace and human rights, and was led by former UN Secretary-General Kofi Annan [7, p. 296].

2. Further informal refinement of the *"Standing Mandate"* procedure and the obligation to abstain from voting based on the doctrine of implied powers, as a derivation of the existing obligation, with the UNGA likely having the authority to make such a decision. From a scientific point of view and based on proposals from member states[12], there is a view that such supervisory powers should be transferred to the UNGA, along with the authority to override such a veto by a two-thirds of its majority.

For example, the representative of India argued that in national jurisdictions, a veto by the executive branch can be overridden by the legislative branch, and within the UN, the UNGA could play that role. Colombia advocated for the creation of an appellate body within the UNGA based on a special majority vote, which is similar to Ukraine's position, which proposed granting a special composition of the UNSC or the UNGA the right to override a veto if it is exercised by only one permanent member. The Non-Aligned Movement considered it necessary to enshrine the procedural possibility of overriding a veto, specifically a two-thirds vote of the UNGA based on the *"Uniting for Peace"* procedure and a progressive interpretation of Articles 11 and 24(1), which is identical to the Philippines' proposal [28, pp. 402, 405-406, 787, 798, 1145-1146].

Conclusions

Concluding, it is worth noting a relatively new understanding among member states regarding the processes of UNSC transformation. Indeed, there appears to be a slight shift away from maximalist demands for sweeping changes – which largely require formal reform supported by all permanent members of the UNSC – toward a gradual, targeted procedural limitation of the permanent members' powers, a gradual resolution of transparency and accountability issues, and the interpretation or informal extension of existing rights and obligations through the doctrine of implied powers. At the same time, large-scale plans remain and are supported by member states; however, as noted by B. Fassbender, the lack of consensus among coalitions of states on key issues – such as limiting the veto or determining who truly deserves to become a new permanent or semi-permanent member of the UNSC – and the complexity of the formal reform procedure push these plans into the background [14, pp. 206-210].

The renewed discussion regarding the need to interpret Art. 27(3) of the Charter and the development of a practice among permanent members for its application – in particular, the idea of implementing this through a new *"Standing Mandate"* procedure – is a positive step toward enhancing the UN's ability to respond to threats to peace and security during the early stages of conflict, based on an approach of informal reform. Many states

[12] Colombia, Ukraine, India, the Non-Aligned Movement, the Philippines.

express the understanding that the full potential of the veto initiative has not yet been realized, and we may yet see a gradual evolution of this very mechanism in conjunction with UNGA Resolution 377 *"Uniting for Peace"* [32] and their impact on enhancing the UNGA's role regarding the accountability of permanent members for the abuse of the procedural right of veto and the ability to influence such abuse. Furthermore, such use of the doctrine of implied powers in attempts to interpret the existing powers of the principal organs of the UN creates favorable conditions for non-statutory reforms of the existing instruments of the UNGA and the UNSC. And just as proposals were once made regarding a permanent member's obligation to report on every veto exercised, justifying its actions in accordance with the duty to maintain international peace and security or proposing alternative solutions to the issue – today this has become a reality in which, among other things, every state can express its position and condemnation, as well as adopt a general resolution within the UNGA on an issue that was vetoed within the UNSC and left without due attention. Similarly, based on these non-statutory changes, we can surmise that the direction of such reforms is moving toward interpreting the powers of the UNGA as an appellate body in exceptional cases – a development that may well eventually be put into practice.

References

[1] Kovtun, O., & Havlakov, K. (2025). UN Security Council Reform: The G4 model's Prospects in the Context of Political Polarization. *Actual Problems of International Relations, 1*(164), 76-84. https://doi.org/10.17721/apmv.2025.164.1.76-84.

[2] Opanasenko, O. (2025). Prospects for UN Security Council reform. *Foreign Affairs, 35*(1), 96-110. https://doi.org/10.59214/ua.fa/1.2025.96.

[3] Mishchenko, A.B., Atashkade, R.V., & Teremko, V.V. (2023). UN Reform Scenarios. *International Relations: Theory and Practical Aspects, 11,* 31-49. https://doi.org/10.31866/2616-745X.11.2023.278402.

[4] Trent, J., & Schnurr, L. (2018). *A United Nations Renaissance: What the UN is, and What it Could be.* Verlag Barbara Budrich. https://doi.org/10.2307/j.ctvdf03xp.

[5] Alene, M.N., Ali, M.S., & Tadesse, K.Y. (2023). Africa's Quest for Reform of the United Nations Security Council: A Just Cause Curbed by Unrealistic Proposals. *African Journal on Conflict Resolution, 23*(1), 60-83. https://doi.org/10.17159/ajcr.v23i1.16785.

[6] Stagstrup, J., & Cheng, W. (2025). Might or Right? The Prospect of an ICJ Advisory Opinion on the Security Council Veto. *EJIL: Talk! Blog of the European Journal of International Law.* Retrieved from https://www.ejiltalk.org/might-or-right-the-prospect-of-an-icj-advisory-opinion-on-the-security-council-veto/.

[7] Melling, G., & Dennett, A. (2025). The Security Council veto and Syria: Responding to Mass Atrocities Through the "Uniting for Peace" Resolution. *Indian Journal of International Law, 57*(3-4), 285-307. https://doi.org/10.1007/s40901-018-0084-9.

[8] Parvanova, E. (2023). Reforming the United Nations Security Council: Cross-Country Analysis of a G-4 Potential Permanent Membership. *Journal of the Bulgarian Geographical Society, 49,* 69-77. https://doi.org/10.3897/jbgs.e109546.

[9] Kresin, O.V. (2024). *UN General Assembly resolutions: Nature and significance in the context of the Russian Federation's War Against Ukraine.* Kyiv: Norma prava.

[10] Serdiuk, V.M. (2024). UN General Assembly Resolution 76/262 as a Strengthening of the Collective Response to the Use of the Veto Right in the UN Security Council. *Problems of Legality, 164,* 246-265. https://doi.org/10.21564/2414-990X.164.292237.
[11] Cai, C., Van Den Herik, L., & Maluwa, T. (2024). In A. Peters & C. Marxsen (Eds.). *The UN Security Council and the Maintenance of Peace in a Changing World* (p. 312). Cambridge: Cambridge University Press. Retrieved from https://www.cambridge.org/core/books/un-security-council-and-the-maintenance-of-peace-in-a-changing-world/un-security-council-and-the-maintenance-of-peace-in-a-changing-world/FE6CD3365E27A15A4A691C7660F3DC60.
[12] Peters, A. (2023). The War in Ukraine and Legal Limitations on Russian Vetoes. *Journal on the Use of Force and International Law, 10*(2), 162-172. https://doi.org/10.1080/20531702.2023.2264085.
[13] Barber, R. (2022). The Evolving Role of the General Assembly vis-à-vis the Security Council in the Maintenance of Peace. *Journal of International Peacekeeping, 25*(4), 305-336. https://doi.org/10.1163/18754112-25040001.
[14] Fassbender, B. (2003). All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council. *Max Planck Yearbook of United Nations Law, 7*(1), 183-214. https://doi.org/10.1163/138946303775160322.
[15] Fulci, F.P. (1999). Italy and the Reform of the UN Security Council. *The International Spectator, 34*(2), 7-16. https://doi.org/10.1080/03932729908456856.
[16] African Union. (March, 2005). *The common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus.* Executive Council, 7th Extraordinary Session, Addis Ababa, Ethiopia. Retrieved from https://www.inthenet.eu/wp-content/uploads/2023/08/Ezulwini-Consensus.pdf.
[17] United Nations General Assembly. (April, 2022). *Resolution 76/262: Standing mandate for a General Assembly Debate When a Veto is Cast in the Security Council.* Retrieved from https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/330/40/PDF/N2233040.pdf.
[18] United Nations Security Council. (June, 2022). *9079th meeting (S/PV.9079).* Retrieved from https://docs.un.org/en/S/PV.9079.
[19] United Nations Security Council. (September, 2023). *9410th meeting (S/PV.9410).* Retrieved from https://docs.un.org/en/S/PV.9410.
[20] United Nations Security Council. (March, 2024). *9571st meeting (S/PV.9571).* Retrieved from https://docs.un.org/en/S/PV.9571.
[21] United Nations Security Council. (November, 2025). *10043rd meeting (S/PV.10043).* Retrieved from https://docs.un.org/en/S/PV.10043.
[22] United Nations General Assembly. (November, 2022). *Concluding Debate on Security Council reform: Speakers urge More Representation for Developing Countries and Ending of Permanent Members' Veto Power (GA/ 12473).* Retrieved from https://press.un.org/en/2022/ga12473.doc.htm.
[23] United Nations. (June, 1945). *Charter of the United Nations.* Retrieved from https://unic.un.org/aroundworld/unics/common/documents/publications/uncharter/UN%20Charter_Ukrainian.pdf.
[24] Security Council Report. (April, 2014). *Monthly Forecast.* Retrieved from https://www.securitycouncilreport.org/monthly-forecast/2014-04/in_hindsight_obligatory_abstentions.php.
[25] Erdağ, R. (2014). How many is Greater than Five? A Comprehensive Model Proposal for the United Nations Security Council. *Alternatives: Turkish Journal of International Relations, 13*(4), 83-95. https://doi.org/10.21599/atjir.04046.
[26] United Nations General Assembly. (December 16, 1982). *Vienna Convention on the Law of Treaties between States and International Organizations or between International*

Organizations (A/RES/37/112). Retrieved from https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf.
[27] United Nations. (September, 2024). *Pact for the Future, Global Digital Compact and Declaration on Future Generations.* Retrieved from https://www.un.org/sites/un2.un.org/files/sotf-pact_for_the_future_adopted.pdf.
[28] Fassbender, B. (Ed.). (2020). *Key Documents on the Reform of the UN Security Council 1991-2019.*
[29] Rensmann, T. (2012). Main text. In B. Simma et al. (Eds.), *The Charter of the United Nations: A Commentary* (Vol. I, 3rd ed., pp. 27-69). Oxford: Oxford University Press. https://doi.org/10.1093/law/9780199639762.003.0052.
[30] Stojkovski, L. (2017). The Importance of the "Responsibility not to Veto" Debate: Are we "Manifestly Failing" R2P" In V. Sancin (Ed.). *Are we "manifestly failing" R2P?* (pp. 87-110). Ljubljana: Faculty of Law. Retrieved from https://www.researchgate.net/publication/337882265_The_Importance_of_the_'Responsibility_not_to_veto'_Debate.
[31] Vasilenko, V.A. (1982). *International Legal Sanctions.* Kyiv: Vyshcha Shkola.
[32] United Nations General Assembly. (November, 1950). *Resolution 377 (V): Uniting for peace.* Retrieved from https://www.un.org/en/sc/repertoire/otherdocs/GAres377A(v).pdf.

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