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Fragen zur Rechtsentwicklung
in Mittel- und Osteuropa sowie den GUS-Staaten
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EDITORIAL

Das Heft wird eröffnet von einem Überblick von *Schloer* zur Entfaltung der Menschenwürdegarantie der ukrainischen Verfassung durch das Verfassungsgericht der Ukraine. Es zeigt sich, dass das Gericht – und ihm folgend die Literatur – aktiv Ansätze aus der Rechtsprechung des EGMR und anderer nationaler Verfassungsgerichte, aber auch aus der „Klassikerliteratur“ aufgreift. *Khanyk-Pospolitak* und *Brych* diskutieren die Abschaffung des formalistischen Zwangs zur Nutzung des „Beratungszimmers“ zur Entscheidungsfindung durch das Gericht zu Gunsten einer Verankerung des Grundsatzes der Geheimhaltung gerichtlicher Entscheidungsfindung. Beide Beiträge zeigen eine Tendenz zur Annäherung an europäische Standards.

Zwei Beiträge sind dem polnischen Zivilrecht gewidmet: *Soboń* diskutiert die strittige Frage des Grundes und der Bemessung von Schadensersatzansprüchen juristischer Personen wegen Rufschädigung. *Kozak* bespricht kritisch eine jüngere Entscheidung, in der die Kammer für Zivilsachen des Obersten Gerichtshofs Polens über die (Un-)Verjährbarkeit von Ansprüchen des Grundstückseigentümers gegen Dritte, die auf seinem Grundstück ein Bauwerk errichtet haben, auf Abkauf des Grundstücks.

Schließlich bespricht *Živković* den gerichtlichen Rechtsschutz in Steuersachen in Serbien. Sie setzt sich dafür ein, dass spezialisierte Spruchkörper für Steuersachen innerhalb der Verwaltungsgerichtsbarkeit geschaffen werden und sieht darin das Potential, den Rechtsschutz auf diesem Gebiet deutlich zu verbessern.

Wir wünschen eine interessante Lektüre.

Burkhard Breig

Bernhard Schloer*

Die Menschenwürde im ukrainischen Recht – Entwicklungen seit 2017

Abstract

Human dignity is a right according to the Constitution of Ukraine, but it was not in the focus of the of the jurisdiction of the Constitutional Court of Ukraine. But in April 2018, the court started his new approach towards this right. The human dignity was soon qualified as a right, but also as the basic constitutional value of the rights in the Constitution. Each additional decision fine-tuned the understanding of the human dignity: In the beginning, the court mentioned the right of life together with the right of human dignity. Because the right of life can be limited (see laws on police), this approach didn't meet the understanding of human dignity according to European understanding, which means, that the human dignity cannot be limited. But since 2023, the Court mentioned the latter right without the right of life, thus being in line with the continental understanding. Summarising the decisions, the Constitutional Court developed during 6 years a modern understanding of the right of human dignity. Impressing is also the tendency of the Court the analyse not only the decisions of the European Court of human rights but also those of national constitutional courts in Europe.

Keywords: Human dignity, constitutional rights, constitutional law, Ukraine.

Abstract deutsch

Die Menschenwürde ist gemäß der Verfassung der Ukraine als Grundrecht verbürgt. Sie stand jedoch nicht im Mittelpunkt der Rechtsprechung des Verfassungsgerichts der Ukraine. Im April 2018 begann das Gericht, sich diesem Recht neu zu nähern. Die Menschenwürde wurde bald als Recht, aber auch als der die Grundrechte fundierende Verfassungswert qualifiziert. Jede folgende Entscheidung präzisierte das Verständnis der Menschenwürde weiter. Zu Beginn erwähnte das Gericht das Recht auf Leben zusammen mit dem Recht auf Menschenwürde. Da das Recht auf Leben eingeschränkt werden kann (siehe Polizeigesetze), entsprach dieser Ansatz nicht dem europäischen Verständnis von Menschenwürde, wonach die Menschenwürde nicht eingeschränkt werden darf. Seit 2023 erwähnt das Gericht jedoch die Menschenwürde selbständig, ohne das Recht auf Leben, und steht damit im Einklang mit dem kontinentalen Verständnis. Zusammenfassend lässt sich sagen, dass das Verfassungsgericht in sechs Jahren ein modernes Verständnis des Rechts auf Menschenwürde entwickelt hat. Beeindruckend ist auch die Tendenz des Gerichts, Praxis nicht nur des Europäischen

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Gerichtshofs für Menschenrechte, sondern auch anderer nationaler Verfassungsgerichte in Europa heranzuziehen.
Keywords: Menschenwürde, Grundrechte, Verfassungsrecht, Ukraine.

I. Einleitung

In dieser Zeitschrift erschien 2017 eine umfangreiche Darstellung über die Bedeutung der Menschenwürde im ukrainischen Recht. In dem Beitrag wurde auch die fehlende Auseinandersetzung des Verfassungsgerichts mit der Menschenwürde erwähnt.[1]

Seit der Revolution der Würde gab es viele Entwicklungen im ukrainischen Recht, daher soll nachfolgend die juristische Behandlung der Menschenwürde der letzten Jahre gezeigt werden. Dabei liegt der Schwerpunkt auf der Rechtsprechung des ukrainischen Verfassungsgerichts, denn hier wurden wichtige Schritte gemacht: Das Gericht begann im April 2018, den Schutz der „Würde des Menschen" in seinen Entscheidungen als zentrales Recht des Menschen und als verfassungsrechtlichen Wert zu qualifizieren und Pflicht des Staates festzustellen, die Menschenwürde zu schützen. Im Folgenden werden diejenigen Urteile dargestellt, in denen das Gericht auf die Menschenwürde eingeht. Das sind nicht sehr viele, die Durchsicht der Rechtsprechung zeigt aber, dass die Menschenwürde inzwischen eine wichtige Grundlage für die Grundrechte in der Judikatur des ukrainischen Verfassungsgerichts ist.

Bevor auf die Entscheidungen zur Menschenwürde eingegangen wird, muss eine Entscheidung aus dem Jahr 2016 erwähnt werden, da sie im Zusammenhang mit dem Schutz der Grundrechte eine wichtige Rolle spielt. In dieser Entscheidung stellt das Gericht fest, dass der Staat nicht nur verpflichtet ist, Verletzungen von Rechten und Freiheiten zu unterlassen, sondern dass er auch verpflichtet ist, alle notwendigen und effektiven Vorkehrungen zu treffen, damit solche Verletzungen erst gar nicht geschehen können: „*Das Verfassungsgericht der Ukraine ist der Ansicht, dass der Staat bei der Erfüllung seiner Hauptaufgabe – der Bestärkung und Gewährleistung der Menschenrechte und Freiheiten (Artikel 3 Teil 2 der Verfassung der Ukraine) – nicht nur*

1 *Schloer, B.*, Die Menschenwürde im ukrainischen Recht, Osteuropa Recht 2017, S. 474; deutliche Kritik am Schweigen des Verfassungsgerichts übte: *Shyshkina E*. Розуміння людської гідності: виклики сучасних Українських реалії, у: Людська гідність є недоторканною, але що ми розуміємо під «гідністю», «людиною» та «людською гідністю»? // Матеріали міжнародного науково-практичного семінару «Людська гідність у праві Німеччини, Польщі та України» / Київ, 10 - 11 жовтня 2016; міністерство закордонних справ Федеративної республіки Німеччина; Центр німецького права Київського національного університету імені Тараса Шевченка; ГО Німецько-український правознавчий діалог. За заг. ред. *Б. Шлоера*, Харків, 2017. С. 17 і далі. (Übersetzung: *Shyshkina E.*, Das Verständnis der Menschenwürde: die Herausforderungen durch gegenwärtige ukrainische Realien, in: Die Würde des Menschen ist unantastbar – aber was verstehen wir unter „Würde", „Mensch" und „Menschenwürde"? Sammelband der Beiträge des internationalen Seminars „Menschenwürde im deutschen, polnischen und ukrainischen Recht", Kiew, 10. und 11. Oktober 2016; gefördert vom Auswärtigen Amt der Bundesrepublik Deutschland; Zentrum des Deutschen Rechts der Nationalen Taras-Schewtschenko-Universität Kiew; Deutsch-ukrainischer rechtswissenschaftlicher Dialog e.V., Hrsg. *B. Schloer*, Kharkiv, 2017, S. 177 ff.).

Verletzungen oder unverhältnismäßige Einschränkungen der Rechte und Freiheiten unterlassen soll, sondern auch geeignete Maßnahmen ergreifen soll, um die Möglichkeit ihrer vollständigen Realisierung durch alle, die seiner Hoheit unterstehen, sicherzustellen. Zu diesem Zweck sollen der Gesetzgeber und andere öffentliche Stellen für eine effektive gesetzliche Regelung sorgen, die den verfassungsrechtlichen Normen und Grundsätzen entspricht, und Mechanismen schaffen, die zur Befriedigung der Bedürfnisse und Interessen der Menschen erforderlich sind."[2] Das Gericht folgt hier die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte (EGMR) zu den Gewährleistungspflichten: „*Having regard to this, the Court considers that Article 5 § 1, first sentence of the Convention must equally be construed as laying down a positive obligation on the State to protect the liberty of its citizens*."[3]

Die zweite Vorbemerkung betrifft die Beachtung der EMRK und der Entscheidungen des EGMR: das ist eine gesetzliche Pflicht für alle Staatsgewalten aufgrund des Gesetzes über die Umsetzung der Entscheidungen und der Praxis des EGMR,[4] also auch eine Pflicht für das Verfassungsgericht.

Die dritte Vorbemerkung betrifft die Befugnis zum Einleiten eines verfassungsgerichtlichen Verfahrens: Nach Art. 150[5] kann ein Verfahren vom Präsidenten der Ukraine eingeleitet werden, von mindestens 45 Abgeordneten der Werchowna Rada, vom Obersten Gericht, vom Beauftragten der Werchowna Rada für Menschenrechte und von der Werchowna Rada der autonomen Republik Krim. Nach dem neuen Art. 151-1 kann eine natürliche oder juristische Person nach Erschöpfung des Rechtsweges eine Verfassungsbeschwerde gegen ein Gesetz einlegen, wenn sie meint, in ihren Rechten verletzt zu sein.[6]

Die letzte Vorbemerkung betrifft den 2016 eingefügten Art. 151-2 der Verfassung, der klarstellt, dass die Entscheidungen des Verfassungsgerichts endgültig und ver-

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2 Рішення Конституційного Суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) положення третього речення частини першої статті 13 Закону України „Про психіатричну допомогу" (справа про судовий контроль за госпіталізацією недієздатних осіб до психіатричного закладу) 1 червня 2016 року № 2-рп/2016, мот. част. 3, https://zakon.rada.gov.ua/laws/show/v002p710-16#Text (Entscheidung des Verfassungsgerichts der Ukraine über den Antrag des Beauftragten für Menschenrechte der Werchowna Rada der Ukraine bezüglich der Verfassungsmäßigkeit des dritten Satzes des ersten Teils von Artikel 13 des Gesetzes der Ukraine „Über psychiatrische Hilfe" (gerichtliche Kontrolle über die Krankenhauseinweisung handlungsunfähiger Personen in einer psychiatrischen Einrichtung, 1.06.2016 Nr. 2-rp/2016, Ziffer 3 der Begründung).

3 Z.B. EGMR, Storck v. Germany, 16.06.2016, Rdnr. 102 m.w.N., https://hudoc.echr.coe.int/eng?i=001-69374.

4 Закон України Про виконання рішень та застосування практики Європейського суду з прав людини, https://zakon.rada.gov.ua/laws/show/3477-15#Text. (Gesetz über die Durchsetzung der Entscheidungen und Anwendung der Praxis des Europäischen Gerichtshofs für Menschenrechte); s.a. *Schloer B*., Fn. 1, S. 483 f.

5 Artikel ohne Angabe des Gesetzes sind Artikel der Verfassung der Ukraine. Eine englische Übersetzung der Verfassung:https://zakon.rada.gov.ua/laws/show/en/254к/96-вр#Text.

6 Ст. 55, 56 закон України Про Конституційний Суд України. URL: https://zakon.rada.gov.ua/laws/show/2136-19#Text. (Art. 55, 56 Gesetz der Ukraine über das Verfassungsgericht); zur Verfassungsreform: Wieser B., Verfassungsänderung und Normenkontrolle in der Ukraine, Osteuropa Recht 2019, S. 67 ff.

pflichtend sind. Nach Art. 97 des Gesetzes über das Verfassungsgericht kann das Gericht eine (zuständige) staatliche Stelle verpflichten, das Urteil umzusetzen, dafür kann das Gericht auch eine Frist setzen.[7] Daher spricht das Gericht in einigen Entscheidungen die Verpflichtung des Gesetzgebers, der Werchowna Rada, aus, den für verfassungswidrig erkannten Rechtszustand zu ändern. Hier muss man sich die Art. 55 und 56 der Verfassung in Erinnerung rufen: sie regeln die Rechtsschutzgarantie und die Staatshaftung; dabei ist von „rechtswidrigen Entscheidungen, Handlungen oder Untätigkeit von staatlich oder kommunalen Organen“ die Rede. Das Parlament ist ein staatliches Organ, und es kann daher durch eine gesetzgeberische Untätigkeit, also das Unterlassen einer gebotenen Gesetzesänderung oder einer neuen gesetzlichen Regelung, Schadensersatzansprüche auslösen. Hier kann die Möglichkeit, ein Urteil mit konkreten Vollzugspflichten zu „bewehren“ eine effektive Maßnahme sein, vor allem in politisch kontroversen Verhältnissen.

II. Entwicklung der Rechtsprechung des Verfassungsgerichts der Ukraine im Einzelnen

Die nachfolgend unter 1. dargestellten Entscheidungen lassen sich in zwei Gruppen aufteilen: Entscheidungen, in denen es um Gesetze über staatlichen Leistungen ging, die für ein menschenwürdiges Leben nötig sind und Entscheidungen zu Gesetzen, die zu staatlichen Maßnahmen ermächtigten, die in die Menschenwürde eingriffen. Die Entscheidungen werden aber chronologisch dargestellt, denn so wird die Entwicklung der Rechtsprechung sichtbar. Die Entscheidungen, in denen die Menschenwürde nur eine marginale Rolle spielt, werden unter 2. knapp dargestellt.

1. Leitentscheidungen des Verfassungsgerichts der Ukraine zur Menschenwürde

a) In der Entscheidung vom 24.04.2018[8] hatte das Gericht auf Antrag des Ombudsmannes der Werchowna Rada der Ukraine zu klären, ob Art. 216 Teil 6 der Strafpro-

7 Kritisch zu solchen Entscheidungen: Окрема думка судді Конституційного Суду України *Мельника М.І.* стосовно Рішення Конституційного Суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) частини шостої статті 216 Кримінального процесуального кодексу України, № 5 https://zakon.rada.gov.ua/laws/show/na03d710-18#n48 , (Abweichende Meinung des Richters am Verfassungsgericht der Ukraine *Melnyk M.I.* zur Entscheidung des Verfassungsgerichts der Ukraine in der Sache über den verfassungsrechtlichen Antrag des Beauftragten für Menschenrechte der Werchowna Rada der Ukraine bezüglich der Verfassungsmäßigkeit von Teil 6 von Artikel 216 der Strafprozessordnung von Ukraine Nr. 5).

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zessordnung verfassungsgemäß ist. Diese Regelung betraf die Zuständigkeit für die Aufklärung von Straftaten, die auf den Territorien und in den Räumlichkeiten der Strafvollzugsbehörde[9] begangen wurden. Nach Art. 216 Teil 6 waren für solche Aufklärungen bestimmte Abteilungen dieser Behörde zuständig. Gerügt wurde ein Verstoß gegen Art. 3 (der Mensch ist der höchste Wert im Staat), Art. 27 (Recht auf Leben) und Art. 28 (Achtung der Menschenwürde), da durch die Eingliederung dieser Abteilungen in die Behördenhierarchie keine unabhängigen Ermittlungen möglich seien.

Das Gericht verweist zunächst auf seine Entscheidung vom 1.06.2016 (s.o.), wonach der Staat dafür zu sorgen hat, dass gegen Verletzungen von Grundrechten eine effektive Vorsorge zu treffen ist. Das Gericht verwendet in der Entscheidung vom 24.04.2018 die Begrifflichkeit des EGMR, der von der „positiven Pflicht" (*позитивний обов'язок держави*) des Staates spricht, Verletzungen vorzubeugen und der negativen Pflicht, keine Rechte zu verletzen.[10] Diese Pflichten entnimmt das Gericht aus Art. 3 in Verbindung mit den Rechten aus Art. 27 und 28 der Verfassung. Zur Menschenwürde führt das Gericht aus, „*Nach Ansicht des Verfassungsgerichts der Ukraine ist das Recht einer Person auf Achtung ihrer Würde sowie ihr Recht auf Leben unveräußerlich, unverlierbar, unantastbar und unterliegt dem bedingungslosen Schutz des Staates*."[11]

Die Gleichstellung des Rechts auf Achtung der Menschenwürde mit dem Recht auf Leben ist bei näherer Betrachtung irritierend, da das Recht auf Leben sehr wohl verletzt werden darf, das ist im Gesetz über die nationale Polizei im Zusammenhang mit dem Schusswaffeneinsatz detailliert geregelt, Art. 46 des Polizeigesetzes. Diese Gleichstellung hat das Gericht in seiner Entscheidung vom 20.12.2023 und vom 29.10.2024 aufgegeben.[12]

Da Art. 27 dem Art. 2 EMRK und Art. 28 dem Art. 3 EMRK entsprechen, zieht das Verfassungsgericht die Rechtsprechung des EGMR zu Art. 3 EMRK heran, wonach die Effektivität von Ermittlungen als wesentlich im Zusammenhang mit dem Recht auf Leben und dem Schutz der Menschenwürde qualifiziert wird. Im Ergebnis stellt das Verfassungsgericht die Verfassungswidrigkeit des Art. 216 Teil 6 StPO fest, da die nach der Regelung zuständigen Abteilungen weisungsgebunden sind und daher keine unabhängigen Ermittlungen möglich seien. Das verletze die Rechte nach Art. 27, 28 der Verfassung, da der Staat nicht die nötigen Maßnahmen ergriffen habe, um Verletzungen vorzubeugen[13] (manipulierte Ermittlungen). Das Gericht verpflichtet die Werchowna Rada Ukraine, diese Gesetze im Sinne der Entscheidung zu än-

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sungsmäßigkeit von Artikel 216 Teil 6 der Strafprozessordnung der Ukraine 24. April 2018 Nr. 3-p/2018).

9 Diese, dem Justizministerium nachgeordnete Behörde ist für den Strafvollzug in den entsprechenden Einrichtungen zuständig und hat hierzu territoriale Organisationseinheiten. URL: https://minjust.gov.ua/dkvs.

10 Fn. 8, Begründung 2.1.

11 Fn. 8, Begründung 2.1.

12 Siehe unten die unter II.1.e) und f) dargestellten Entscheidungen, Fn. 33 und Fn. 41.

13 Fn. 8, Begründung 2.3.

dern. Zu dieser Entscheidung haben zwei Richter abweichende Meinungen verfasst, zur Frage der Menschenwürde haben sie aber keine Anmerkungen.[14]

b) Die Entscheidung vom 22.05.2018[15] betraf ein Artikelgesetz, mit dem eine Reihe von sozialrechtlichen Gesetzen geändert wurde, was zur Kürzung von einigen Sozialleistungen führte; diese Entscheidung enthält die erste grundlegende Behandlung der Menschenwürde. Die Beschwerdeführer, 49 Abgeordnete der Werchowna Rada, rügten die Verletzung von Art. 46 (sozialer Standard), Art. 21 (Gleichbehandlung), Art. 22 Teile 2 und 3 (keine Minderung von bestehenden Rechten durch Gesetzesänderungen), Art. 8 Teil 2 (Verfassung gilt unmittelbar, Rechtsschutzgarantie).

Eine Frage, die im Zentrum der Entscheidung steht, betraf Art. 22, denn die Beschwerdeführer standen auf dem Standpunkt, dass das Änderungsgesetz die Sozialleistungen mindert, nach ihrer Auffassung Rechte mindert und daher die Teile 2 und 3 des Art. 22 verletzt seien.

Das Gericht löst das Problem, indem es Art. 22 zusammen mit Art. 64 Teil 1 (zulässige Einschränkung von Grundrechten) und Art. 157 (Verbot von Verfassungsänderungen, wenn dadurch Grundrechte abgeschafft oder eingeschränkt werden) betrachtet. Das Gericht bezieht das Verbot der Teile 2 und 3 nur auf bestehende verfassungsrechtliche Rechte und Freiheiten. Diese Verfassungsrechte können durch Gesetz eingeschränkt werden, wenn es ein legitimes Ziel dafür gibt, die Einschränkung verhältnismäßig und notwendig ist. Entscheidend ist, dass sie nicht in den Inhalt, in das Wesen des Grundrechts eingreifen, also in den Wesensgehalt antasten. Folglich betreffen die Aussagen des Art. 22 Teile 2 und 3 nicht die konkreten Sozialleistungen, deren Absenkung gerügt wurde. Ferner habe der Staat freies Ermessen, wenn er soziale Leistungen an die tatsächlichen finanziellen Möglichkeiten im Haushalt anpasst. Er muss aber die „menschenwürdige Existenz absichern. Dieser Auslegung des Art. 22 und die Gewährung der weiten Ermessensfreiheit der Werchowna Rada widersprechen die Verfassungsrichter *Касмінін О.В.*, *Мельник М.І.*, *Сас С.В.* und *Сліденко І.Д.* in ihren abweichenden Meinungen.[16] Darin weisen sie vor allem auf den Wider-

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14 Z.B. die abweichende Meinung des Richters am Verfassungsgericht der Ukraine *Melnyk M.I.* Fn. 7.

15 Рішення Конституційного Суду України у справі за конституційним поданням 49 народних депутатів України щодо відповідності Конституції України (конституційності) пункту 12 розділу I Закону України „Про внесення змін та визнання такими, що втратили чинність, деяких законодавчих актів України“ від 28 грудня 2014 року № 76-VIII 22 травня 2018 року № 5-р/2018, URL: https://zakon.rada.gov.ua/laws/show/v005p710-18#Text. (Entscheidung des Verfassungsgerichts der Ukraine auf Antrag von 49 Volksabgeordneten der Ukraine bezüglich der Verfassungsmäßigkeit von Punkt 12 des Kapitels I des Gesetzes der Ukraine „Über die Änderung und Außerkraftsetzung bestimmter Bestimmungen“ ukrainischer Gesetze“ vom 28. Dezember 2014 Nr. 5-r/2018).

16 Окрема думка судді Конституційного Суду України Сліденка І.Д. стосовно Рішення Конституційного Суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) частини шостої статті 216 Кримінального процесуального кодексу України. URL: https://zakon.rada.gov.ua/laws/show/v003p710-18#Text. (Abweichende Meinung des Richters am Verfassungsgericht der Ukraine Slidenko I.D. zur Entscheidung des Verfassungsgerichts der Ukraine in der Sache über den verfassungsrechtlichen Antrag des Beauftragten für Menschenrechte der Werchowna Rada der Ukraine bezüglich der Verfassungsmäßigkeit von Teil 6 von Artikel 216 der

spruch der Entscheidung zu vorherigen Entscheidungen zu Art. 22 Teil 2 und 3 hin, in denen das Gericht staatliche Leistungen in Zusammenhang mit den sozialen Grundrechten stellte.[17]

Zur Menschenwürde führt das Gericht aus: „*dass die Menschenwürde als ein durch Artikel 28 der Verfassung der Ukraine garantiertes Recht interpretiert werden muss und als ein verfassungsmäßiger Wert, der der menschlichen Existenz einen Sinn verleiht und die Grundlage für alle anderen verfassungsmäßigen Rechte, Maßstab für die Bestimmung ihres Wesens und ein Kriterium für die Zulässigkeit möglicher Einschränkungen solcher Rechte ist. Dies wird indirekt durch den einzigartigen Wert der Menschenwürde in der Verfassung der Ukraine bestätigt, wonach insbesondere das Leben und die Gesundheit, die Ehre und die Würde eines Menschen als höchste gesellschaftliche Werte in der Ukraine anerkannt werden (Artikel 3); alle Menschen sind frei und gleich in ihrer Würde und ihren Rechten (Artikel 21); jeder ist verpflichtet, sich strikt an die Verfassung der Ukraine und die Gesetze der Ukraine zu halten und nicht in die Rechte und Freiheiten, die Ehre und die Würde anderer Menschen einzugreifen (Artikel 68*).“[18]

Das Gericht stellt hier erstmalig fest, dass die Menschenwürde in zweierlei Hinsicht verfassungsrechtlich bedeutsam ist, sie ist ein Recht und ein verfassungsrechtlicher Wert, der das gesamte System der Grundrechte prägt und auf dem das System der Grundrechte beruht. Ruft man sich die Stellungnahmen in der Fachliteratur bis 2018 in Erinnerung, so findet man bei einigen Autoren, z.B. *Rabinowitsch* die Betonung des Wertes der Menschenwürde im Verfassungsrecht oder der Gesellschaft insgesamt.[19]

Aus dieser Doppelfunktion folgt für *O. Grischtschuk*, dass an die Feststellung einer Verletzung der Menschenwürde hohe Anforderungen zu stellen sind, es muss sich um eine erhebliche Verletzung handeln betont sie in ihrer Anmerkung zur Entscheidung vom 22.05.2018, sie hebt ferner hervor, dass das Gericht die Menschen-

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Strafprozessordnung von Ukraine), Links am Ende der Entscheidung: https://zakon.rada.gov.ua/laws/show/v005p710-18#Text.

17 Z.B.: Рішення Конституційного Суду України у справі за конституційними поданнями Верховного Суду України та 50 народних депутатів України щодо відповідності Конституції України (конституційності) положень абзаців третього, четвертого пункту 13 розділу XV „Прикінцеві положення“ Закону України „Про загальнообов'язкове державне пенсійне страхування“ та офіційного тлумачення положення частини третьої статті 11 Закону України „Про статус суддів“ (справа про рівень пенсії і щомісячного довічного грошового утримання) 11 жовтня 2005 року N 8-рп/2005 мот. част. 5, https://zakon.rada.gov.ua/laws/show/v008p710-05#Text; (Entscheidung des Verfassungsgerichts der Ukraine im Verfahren über Verfassungsvorlagen des Obersten Gerichtshofs der Ukraine und von 50 Volksabgeordneten der Ukraine zur Vereinbarkeit der Bestimmungen der Absätze drei und vier des Absatzes 13 des Abschnitts XV mit der Verfassung der Ukraine „Schlussbestimmungen“ des Gesetzes der Ukraine „Über die obligatorische staatliche Rentenversicherung“ und die offizielle Auslegung der Bestimmungen des dritten Teils von Artikel 11 des Gesetzes der Ukraine „Über den Status der Richter“ (betr. die Höhe der Rente und des monatlichen Lebenszeitfreibetrags) 11. Oktober 2005 Nr. 8-rp/2005, Begründung 5).

18 Fn. 17, Begründung 2.3.

19 *Schloer B.,* Fn. 1, S. 489 ff.

würde nicht für „Kleinigkeiten missbraucht“ habe.[20] *O. Grischtschuk* hat über die Menschenwürde habilitiert, sie kennt die Formulierung von *G. Dürig,*[21] dass die Menschenwürde keine „kleine Münze“ ist. Die erwähnten vier abweichenden Meinungen betreffen nicht die Ausführungen des Gerichts zur Menschenwürde, nur die zu Art. 22.

Im Ergebnis hat das Gericht der Beschwerde nicht stattgegeben.

c) In der Entscheidung vom 16.09.2021[22] entwickelt das Verfassungsgericht seine Position in der Entscheidung vom 22.05.2018 weiter.

Die Entscheidung betrifft die lebenslange Freiheitsstrafe nach der damaligen Rechtslage. Konkret ging es um Art. 81 des Strafkodexes, wonach eine vorzeitige Entlassung aus der Strafhaft möglich ist und Art. 82 des Kodexes, wonach eine Milderung des Strafvollzugs möglich ist. Beide Vorschriften enthalten keine Kriterien für diese Vergünstigungen oder Verfahrensregelungen für Entscheidung über den konkreten Strafvollzug. Der Beschwerdeführer rügte die Verletzung von Art. 28 der Verfassung.

Das Gericht beginnt die Begründung mit dem üblichen Verweis auf Art. 3 der Verfassung, wonach der Mensch mit seinen Attributen, darunter Leben und Würde, der höchste Wert im Staate ist. Darauf folgt diese Beschreibung der Menschenwürde: „*Der Mensch ist ein Schatz der Natur, aus dem die einem Menschen von Geburt an innewohnenden, also natürlichen Rechten und Freiheiten stammen. Die Menschenwürde als Quelle aller Menschenrechte und Freiheiten und deren Grundlage ist einer der Grundwerte des ukrainischen Verfassungssystems. Aus Artikel 3 der Verfassung der Ukraine ergibt sich die Pflicht des Staates, den Schutz und die Wahrung der Men-*

20 *Грищук О.*, Людська гідність – буттєво-аксіологіний фундамент прав людини. Право України 2018 № 9, с. 14, 24 (*Grischtschuk O.*, Die Menschenwürde als die wesentliche und axiologische Grundlage der Menschenrechte. Recht der Ukraine 2018 Nr. 9, S. 14, 24).

21 Грищук О., Конституційні цінності: Філософські та судові аспекти. 2-е вид., Київ 2020, с. 137 (Grischtschuk O., Verfassungswerte: Philosophische und gerichtliche Aspekte, Kyjiw 2020, S. 137); Ukrainische Übersetzung wesentlicher Ausschnitte des Aufsatzes von *G. Dürig*, in: Sammelband zum Seminar, Fn. 1, S. 72 ff., 80.

22 Рішення Конституційного Суду у справі за конституційними скаргами *Крупка Дмитра Володимировича* щодо відповідності Конституції України (конституційності) частини першої статті 81, частини першої статті 82 Кримінального кодексу України, *Костіна Володимира Володимировича, Мельниченка Олександра Степановича* щодо відповідності Конституції України (конституційності) частини першої статті 82 Кримінального кодексу України та за конституційною скаргою *Гогіна Віктора Івановича* щодо відповідності Конституції України (конституційності) частини першої статті 81 Кримінального кодексу України (справа про перегляд вироку особі, караній на довічне позбавлення волі) 16 вересня 2021 року, № 6-р(II)/2021, https://zakon.rada.gov.ua/laws/show/v006p710-21#Text. (Entscheidung des Verfassungsgerichts über die Verfassungsbeschwerden von *Dmytro Volodymyrovych Krupka* bezüglich der Vereinbarkeit des ersten Teils von Artikel 81, des ersten Teils von Artikel 82 des Strafgesetzbuchs der Ukraine, *Kostin Volodymyr Volodymyrovych* und *Oleksandr Stepanovych Melnychenko* über die Verfassungsmäßigkeit des ersten Teils von Artikel 82 des Strafgesetzbuches der Ukraine und über die Verfassungsbeschwerde von *Viktor Iwanowitsch Hogin* über die Verfassungsmäßigkeit des ersten Teils von Artikel 81 des Strafgesetzbuches der Ukraine (Überprüfung der Strafe einer zu lebenslanger Haft verurteilten Person) vom 16. September 2021, Nr. 6-p(II)/2021).

schenwürde zu gewährleisten. Eine solche Verpflichtung obliegt allen Subjekten der öffentlichen Gewalt",[23] betrifft also auch den Bereich des Strafvollzuges. Zu dieser Definition ist folgendes anzumerken: In der Entscheidung vom 22.5.2018 ist die Menschenwürde ein Wert, der die „verfassungsmäßigen Rechte" prägt. Hier ist die Menschenwürde ein Wert des „ukrainischen Verfassungssystems", also nicht nur der Grundrechte. Die Grundrechtsberechtigung für einen Menschen erst ab seiner Geburt ist zwar der Standard im ukrainischen Recht,[24] der für alle Rechte und Freiheiten des 2. Abschnitts behauptet wird. Er ist aber nicht von der Verfassung vorgegeben – im Gegenteil, diese Grenze wurde bewusst aus dem Entwurf für die geltende Verfassung herausgenommen.[25] Die positiven Pflichten des Staates, die das Gericht hier aus Art. 3 ableitet, hat das Gericht in seiner Entscheidung vom 1.06.2016 (s.o.) entwickelt und beeinflusst auch diese Entscheidungen.

Der nächste beachtenswerte Abschnitt der Begründung wird mit diesem Satz eingeleitet: „*Der Beitritt der Ukraine zur europäischen Rechtsordnung im Bereich der Menschenrechte durch die Ratifizierung der Konvention hat zur Folge, dass die Einführung und Anwendung strafrechtlicher Sanktionen in der nationalen Rechtsordnung nicht nur nach den nationalen Kriterien der Strafjustiz erfolgen kann*."[26] Die Beachtung der Rechtsprechung des EGMR ist zwar eine Pflicht des Gerichts, s.o. zweite Vorbemerkung, doch drückt diese Formulierung einen breiteren Ansatz aus. In der Folge werden die einschlägigen Entscheidungen des EGMR und von nationalen Verfassungsgerichten analysiert: des Bundesverfassungsgerichts mit dessen Feststellung „*Bei der Bestimmung der Strafart um des Bestands der Rechtsordnung willen wird der Täter nicht zum bloßen Objekt der Verbrechensbekämpfung unter Verletzung seines verfassungsrechtlich geschützten sozialen Wert- und Achtungsanspruchs*",[27] ferner Entscheidungen des polnischen Verfassungstribunals, des rumänischen, litauischen[28] und ungarischen Verfassungsgerichts. Das ukrainische Verfassungsgericht zitiert aus diesen Entscheidungen diesen Satz zur Menschenwürde: „*Leben und Würde sind unveräußerliche Eigenschaften einer Person und können daher nicht getrennt voneinander betrachtet werden*". An dieser Gleichsetzung von Leben und Menschenwürde hält das Gericht bis zu seiner Entscheidung vom 20.12.2023 und vom 29.10.2024 fest, dazu unten e) und f). Das Ergebnis dieser Analyse ist, dass eine lebenslange Freiheitsstrafe nur dann verfassungsmäßig ist, wenn es klare gesetzliche Mechanismen gibt, nach denen zu überprüfen ist, ob ein Verurteilter vorzeitig entlassen werden kann oder muss. Im Weiteren geht das Gericht auf die Funktion der Resozialisierung ein, die im Zusammenhang mit der Menschenwürde steht. Hier zitiert das Gericht nochmals das BVerfG mit der Feststellung, dass eine lebenslange Strafe nur

23 Fn. 22, Begründung 2.1.

24 Конституційне право України: підручник / за заг. ред. *Т. М. Слінько*. Харків, 2020. С. 355 (Verfassungsrecht der Ukraine, Lehrbuch, Hrsg. *T.M. Slinko*, Charkiv 2020, S. 355).

25 *Schloer B.*, Fn. 1, S. 481 m.w.N.

26 Fn. 12, Begründung 2.2.

27 BVerfGE 28, 389, 391.

28 The Constitutional Court of the Republic of Lithuania, decision from 29.12.2004, Case No. 8/02-16/…, III Nr. 11, URL: https://lrkt.lt/en/court-acts/search/170/ta1281/content. (Englisch).

dann mit der Menschenwürde vereinbar sei, wenn eine realistische Chance auf Freiheit bestünde.[29]

Das Gericht sieht in der Möglichkeit, eine Vergünstigung gnadenhalber zu erhalten, keine realistische Chance auf Freiheit und da das damalige ukrainische Strafvollzugsrecht keine Mechanismen für eine Veränderung der Strafe zugunsten des Häftlings vorsah, erklärte das Gericht die Art. 81 und 82 des Kriminalkodexes für verfassungswidrig und verpflichtete die Werchowna Rada, diesen verfassungswidrigen Zustand zu beseitigen.

d) Die Entscheidung vom 22.03.2023[30] betraf die Verfassungsmäßigkeit des Gesetzes über die Zwangsvollstreckung, im konkreten Fall einer Vollstreckung von Geldforderungen gegen einen Rentner. Gerügt wurde die Verletzung von Art. 21 (Gleichbehandlung), Art. 28 (Schutz der Menschenwürde), Art. 46 (Recht auf sozialen Schutz), Art. 48 (Recht auf ausreichendes Lebensminimum).

Das Gericht verweist auf seine Entscheidung vom 22.05.2018, wonach der Staat ein menschenwürdiges Leben garantieren muss: „*Das Verfassungsgericht der Ukraine betonte, dass ‚ein zwingender Bestandteil der Menschenwürde der Zugang einer Person zu sozialen Mindestleistungen ist, die ihr einen ausreichenden und würdevollen Lebensstandard ermöglichen‘*."[31] Das Gericht wiederholt dann die Definition der Menschenwürde aus der Entscheidung vom 22.05.2018 (s.o. 3.).

Als nächstes geht das Gericht auf das Sozialstaatsprinzip ein. Für die Realisierung des in Art. 46 verankerten Sozialstaatsprinzips sei die Menschenwürde der Dreh- und Angelpunkt. Daraus folge, dass der Staat vor Armut schützen muss und ein Minimum an Versorgung vorhalten, um ein menschenwürdiges Leben zu gewährleisten. Dann verweist das Gericht auf seine Entscheidung vom 1.06.2016 (s.o.), worin es die positive Schutzpflicht des Staates und die negative Pflicht zum Unterlassen von Grundrechtsverletzungen herausgearbeitet hat.

Im Weiteren geht das Gericht auf umfangreich europäische und internationale Standards und die Rechtsprechung von nationalen Verfassungsgerichten, z.B. BVerfGE 142, 353 ff. (Gewährung von Grundsicherung) ein. Im Ergebnis sind die angefochtenen Regelungen verfassungswidrig, da der Staat nicht seiner Pflicht genügt

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29 BVerfG Urteil vom 21.6.1977, BVerfGE 45, 187.

30 Рішення Конституційного Суду України у справі за конституційною скаргою *Лазуренка Ігоря Олександровича* щодо відповідності Конституції України (конституційності) приписів абзаців четвертого, п’ятого частини другої статті 70 Закону України „Про виконавче провадження“, абзаців третього, четвертого частини другої статті 50 Закону України „Про загальнообов’язкове державне пенсійне страхування“
(щодо гарантованості пенсії, що є основним джерелом існування, не нижче прожиткового мінімуму) 22 березня 2023 року № 3-р(II)/2023, https://zakon.rada.gov.ua/laws/show/v003p710-23#Text (Die Entscheidung des Verfassungsgerichts der Ukraine im Fall der Verfassungsbeschwerde von *Ihor Oleksandrovych Lasurenko* bezüglich der Verfassungsmäßigkeit der Bestimmungen der Absätze vier und fünf des zweiten Teils von Artikel 70 des Gesetzes der Ukraine „Über das Vollstreckungsverfahren“, Absätze 3 und 4 des 2. Teils von Artikel 50 des Gesetzes der Ukraine „Über die obligatorische staatliche Rentenversicherung“ (in Bezug auf die garantierte Rente, die die Hauptquelle des Lebensunterhalts darstellt und nicht unter dem Existenzminimum liegt) 22. März 2023 Nr. 3-p(II)/2023).

31 Fn. 30, Begründung 2.2.

hat, Grundrechtsverletzungen vorzubeugen: „*Ein Verstoß des Staates gegen seine positive Verpflichtung zur Gewährleistung eines Mindestsozialschutzes für eine Person gemäß den Bestimmungen des dritten Teils Artikel 46 der Verfassung der Ukraine, ein Verstoß, der die Menschenwürde als absoluten Wert leugnet, … verstößt daher gegen Artikel 1, 3, 8, 21, 28, 46, 48 der Verfassung der Ukraine.*“[32]

e) Die Entscheidung vom 20.12.2023[33] betraf die Verfassungsmäßigkeit des Art. 111 Teil 1 des Strafvollzugskodexes. Hiernach konnte Strafgefangenen ein Kurzbesuch bei seiner Verwandtschaft gewährt werden, wenn dort eine verwandte Person schwer erkrankt war oder ein Todesfall vorlag. Diese Erleichterung des Vollzugs betrifft aber nur solche Strafgefangene, die im leichten Strafvollzug untergebracht sind. Der Beschwerdeführer rügte die Verletzung von Art. 3 Teil 2, Art. 9 Teil 1, Art. 23, Art. 24 Teil 2, Art. 28 Teil 1, 2, Art. 51 da ihm ein solcher Kurzbesuch verweigert wurde, obwohl er schon 24 Jahre einsitzt und eine gute Beurteilung habe. Seine Versuche, die Erlaubnis gerichtlich zu erstreiten waren in allen Instanzen erfolglos.

Das Gericht verweist auf seine Entscheidung vom 16.09.2021 (s.o.3.), worin es festgestellt hat, dass die Menschenwürde ein absoluter Wert im europäischen Rechtskreis ist, ferner auf seine Entscheidung vom 22.05.2018 (s.o. 2.), wonach die Menschenwürde ein absoluter Wert sei, den jeder Mensch beanspruchen kann, also auch ein verurteilter Schwerverbrecher. Die Menschenwürde stellt ein unveräußerliches Recht dar: „*Die Menschenwürde ist ein absoluter Wert, der jedem Menschen innewohnt, auch wenn er wegen besonders schwerer Verbrechen verurteilt wurde; Die Menschenwürde kann von niemandem und unter keinen Umständen eingeschränkt oder geleugnet werden“*.[34] Die Menschenwürde wird also nicht mehr mit dem Recht auf Leben auf eine Stufe gestellt, sondern kann nicht eingeschränkt werden.

Weiter wiederholt das Gericht seine Position aus der Entscheidung vom 1.06.2016 (s.o.) zu den beiden Pflichten des Staates, Rechtsverletzungen zu unterlassen und dafür zu sorgen, dass solche nicht eintreten.[35] Das Recht auf Unverletzlichkeit des Familienlebens i.V.m. der Menschenwürde gibt jedem – auch dem verurteilten Straftäter – das Recht, sich als Persönlichkeit zu fühlen, die psychologische Bedürfnisse hat, insbes. bei schwerer Krankheit oder Tod naher Verwandter.[36] Im nächsten Abschnitt der Begründung zieht das Gericht entsprechende Entscheidungen nationaler Verfassungsgerichte aus der EU heran, das Urteil des BVerfG zur lebenslangen Freiheitsstra-

32 Fn. 30, Begründung 6.1.

33 Рішення Конституційного Суду України у справі за конституційною скаргою *Лужинецького Анатолія Олександровича* щодо відповідності Конституції України (конституційності) окремих приписів частини першої статті 111 Кримінально-виконавчого кодексу України (щодо особистого і сімейного життя особи, засудженої до довічного позбавлення волі) 20 грудня 2023 року № 11-р(ІІ)/2023. URL: https://zakon.rada.gov.ua/laws/show/v011p710-23#Text. (Entscheidung des Verfassungsgerichts der Ukraine über die Verfassungsbeschwerde von *Anatoliy Oleksandrovich Luzhynetsky* bezüglich der Verfassungsmäßigkeit einiger Bestimmungen des ersten Teils von Artikel 111 des Strafvollzugsgesetzbuchs der Ukraine (in Bezug auf das persönliche und Familienleben einer zu lebenslangen Haft verurteilten Person) vom 20. Dezember 2023 Nr. 11 -p(II)/2023).

34 Fn. 33, Begründung 2.2.1.

35 Fn. 33, Begründung 2.2.1.

36 Fn. 33, Begründung 2.3.1.

fe[37] und des lettischen Verfassungsgerichts „Short term leave of a detention facility in case of a death of a relative“[38] Da die Versagung eines Besuchs einen Eingriff in das Recht auf Familienleben darstellt, prüft das Gericht die Verhältnismäßigkeit der gesetzlichen Voraussetzungen der Versagung mit dem Ergebnis, dass die Regelung nicht verhältnismäßig ist. Im Ergebnis stellt das Gericht fest, dass der Staat nicht seine Pflicht erfüllt, die Stellung der Strafgefangenen hinsichtlich der Familienbesuche zu regeln, daher verstößt der Art. 111 Teil 1 des Kodexes gegen Art. 3, 8, 21, 23, 24, 28, 32, 64 der Verfassung. Hier wird die Werchowna Rada nicht nur verpflichtet, den verfassungswidrigen Zustand zu beseitigen, das Gericht setzt dafür nach Art. 97[39] des Gesetzes über das Verfassungsgericht eine Frist von drei Monaten; die Fristsetzung muss nicht begründet werden.

f) Die Entscheidung vom 29. 10. 2024 erging auf die Vorlage des Obersten Gerichts nach Art. 150. Das Oberste Gericht ließ den Art. 75 Teil 4 des Familienkodexes auf seine Verfassungsmäßigkeit überprüften. Die Regelung betraf die Unterhaltspflichten zwischen den Ehepartnern. Zur Menschenwürde stellt das Gericht fest, dass sie die Grundlage, die Quelle aller Rechte und Freiheiten und der grundlegende Wert im ukrainischen Verfassungssystem sei; aus Art. 3 fließe die Pflicht des Staates, die Menschenwürde zu schützen und zu verteidigen.[40] Damit folgt das Gericht seiner bisherigen Rechtsprechung. Dann stellt das Gericht fest, „*dass die Menschenwürde ein absoluter Wert eines jeden Menschen sei, sie kann unter keinen Umständen beschränkt werden*“.[41] Das Gericht setzt in dieser Entscheidung die Menschenwürde nicht mehr dem Recht auf Leben gleich (siehe oben II.1.a), b) und c)), das ja eingeschränkt werden kann, sondern betont, dass die Menschenwürde unverletzlich ist, also nicht eingeschränkt werden kann. Das bedeutet, die Auffassung des Gerichts zur Menschenwürde in der Entscheidung vom 20.12.2023 ist die jetzt maßgebliche Auffassung von der Menschenwürde im ukrainischen Verfassungsrecht.

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37 Entscheidung vom 8.11.2006, BvR 578/02, 796/02, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/11/rs20061108_2bvr057802.html?nn=68080.

38 The Constitutional Court of the Republic of Latvia, judgement on behalf of the Republic of Latvia in Riga, on15 January 2021 in the Case No.2020-21-01, Nr. 9.2 ff. https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/04/2020-21-01_Judgment.pdf#search=prison (Englisch).

39 Law of Ukraine on the Constitutional Court of Ukraine, Fn. 6.

40 Рішення Конституційного Суду України у справі за конституційним поданням Верховного Суду про відповідність Конституції України частини четвертої статті 75 Сімейного кодексу України від 29 жовтня 2024 № 1-р/2024, мот. част. 2.2, 2.6. https://zakon.rada.gov.ua/laws/show/va01p710-24#Text. (Entscheidung des Verfassungsgerichts der Ukraine im Verfahren über die verfassungsrechtliche Vorlage des Obersten Gerichtshofs zur Vereinbarkeit des vierten Teils des Artikels 75 des Familiengesetzbuchs der Ukraine mit der Verfassung der Ukraine vom 29. Oktober 2024 Nr. 1-r/2024, Begründung 2.2, 2.6).

41 Entscheidung des Verfassungsgerichts Fn. 40, Begründung 2.6.

2. Weitere Entscheidungen, in denen die Menschenwürde genannt wird

a) In der Entscheidung vom 11.10.2018[42] ging es um die Verfassungsmäßigkeit der Art. 8 Teil 2 und Art. 16 Teil 4 des Gesetzes über Bürgerbegehren, wonach geschäftsunfähige Personen keine Eingaben machen dürfen. Das Gericht verweist auf die Menschenwürde nur knapp im Zusammenhang mit Art. 3 der Verfassung und im Übrigen auf die Entscheidungen vom 29.12.1999 und 24.04.2018, s.o. 1.a), worin das Gericht die positive Schutzpflicht betont, die es in seiner Entscheidung von 2016 konkretisiert hat, s.o. Vorbemerkung. Das Gericht übernimmt lediglich die damals vorhandenen Positionen des Gerichts zur Menschenwürde und fügt keine weiteren hinzu.

b) In den Entscheidungen vom 7.11.2018[43] und 8.06.2022[44] und ging es um ein Gesetz zur Sozialpolitik und um eine strafprozessuale Regelung für juristische Personen. In diesen Entscheidungen wird die Menschenwürde nur genannt, aber nicht thematisiert und hat für die Entscheidungen keine Bedeutung.

c) Im Beschluss vom 14.11.2023[45] ging es um die Auslegung der Worte „гідні умови життя" (würdige Lebensbedingungen), „достатній рівень життя" (ausrei-

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42 Рішення Конституційного Суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) окремих положень частини другої статті 8, другого речення частини четвертої статті 16 Закону України „Про звернення громадян" (справа про звернення осіб, визнаних судом недієздатними) 11 жовтня 2018 року № 8-р/2018, https://zakon.rada.gov.ua/laws/show/v008p710-18#Text. (Entscheidung des Verfassungsgerichts der Ukraine in diesem Fall auf der Grundlage der verfassungsrechtlichen Vorlage des Kommissars für Menschenrechte der Werchowna Rada der Ukraine bezüglich der Übereinstimmung bestimmter Bestimmungen des zweiten Teils von Artikel 8 mit der Verfassung der Ukraine (Verfassungsmäßigkeit). zweiter Satz des vierten Teils von Artikel 16 des Gesetzes der Ukraine „Über Anliegen von Bürgern" (Fall von Anliegen von Personen, die vom Gericht als geschäftsunfähig anerkannt wurden) 11. Oktober 2018 Nr. 8/2018).

43 Рішення Конституційного Суду України у справі за конституційним поданням 50 народних депутатів України щодо відповідності Конституції України (конституційності) положень пункту 7 розділу II Закону України „Про запобігання фінансової катастрофи та створення передумов для економічного зростання в Україні" 7 листопада 2018 року № 9-р/2018, https://zakon.rada.gov.ua/laws/show/v009p710-18#Text (Entscheidung des Verfassungsgerichts der Ukraine auf Antrag von 50 Volksabgeordneten der Ukraine bezüglich der Verfassungsmäßigkeit der Bestimmungen von Abschnitt 7 von Kapitel II des Gesetzes der Ukraine „Über die Verhütung einer Finanzkatastrophe und die Schaffung von Voraussetzungen für das Wirtschaftswachstum in der Ukraine" 7. November 2018 Nr. 9/2018).

44 Рішення Конституційного Суду України у справі за конституційною скаргою *Кротюка Олександра Володимировича* щодо відповідності Конституції України (конституційності) пункту 4 частини першої статті 284 Кримінального процесуального кодексу України (справа щодо презумпції невинуватості) 8 червня 2022 року № 3-р(II)/2022, https://zakon.rada.gov.ua/laws/show/v003p710-22#Text (Entscheidung des Verfassungsgerichts der Ukraine auf die Verfassungsbeschwerde von *Oleksandr Volodymyrovych Krotyuk* über die Verfassungsmäßigkeit von Artikel 284 Absatz 4 des ersten Teils der Strafprozessordnung der Ukraine (Fall bezüglich der Unschuldsvermutung) 8. Juni 2022 Nr. 3-р(II)/2022).

45 Ухвала Конституційного Суду України про закриття конституційного провадження у справі за конституційним поданням 142 народних депутатів України щодо офіційного

chende Lebensbedingungen) und „прожитковий мінімум“ (Existenzminimum) in der Präambel zur Verfassung und in den Art. 3, 13, 17. Die Abgeordneten beanstandeten, dass diese Begriffe uneinheitlich ausgelegt würden. Das Gericht lehnte den Antrag von Abgeordneten der Werchowna Rada ab, da er nicht die Anforderungen nach dem Gesetz über das Verfassungsgericht der Ukraine erfüllte; sie hätten keine konkreten unterschiedlichen Auslegungen dieser Begriffe nachgewiesen. In seinem Sondervotum kritisiert *О. Первомайський* den Beschluss, da das Gericht die Anforderungen an diesen Antrag zu streng gesehen habe, was angesichts des Inhalts des Antrages, den Begriff „menschenwürdigen Lebensbedingungen“ und das „Menschenwürdige“ zu klären eine falsche Gewichtung von formalen Anforderungen gegenüber dem wichtigen Thema sei.

d) In der Entscheidung vom 26.02.2024[46] ging es um die Beschwerde gegen die Regelung bezüglich der Weiterführung eines verfassungsgerichtlichen Verfahrens wegen Rufschädigung durch die Witwe eines während des Verfahrens verstorbenen Richters. Die Beschwerde richtete sich gegen Vorschriften des Richtergesetzes und des Gesetzes über den obersten Richterrat, in denen die schriftliche Prüfung der Richter und die Anfechtung der Entscheidungen des obersten Richterrates über die Zulassung zum Richteramt geregelt ist. Der Richter war durch die Prüfung gefallen und hatte gegen die Entscheidung geklagt. Letztendlich erhob er Verfassungsbeschwerde, verstarb aber während des Verfahrens. Die Witwe führte das Verfahren fort und berief sich u.a. auf das Recht auf Achtung der Menschenwürde, denn die Entscheidung des obersten Richterrates, ihren Gatten nicht im Amt zu lassen, habe seine Würde und Reputation verletzt. Hier wird die Menschenwürde in ihrer Verbindung mit der beruflichen (wie privaten Ehre) gesehen, was lange Zeit die übliche Sichtweise der Menschenwürde war.[47]

тлумачення окремого припису абзацу четвертого преамбули Конституції України 14 листопада 2023 року № 17-уп/2023, https://zakon.rada.gov.ua/laws/show/vb17u710-23#Text. (Beschluss des Verfassungsgerichts der Ukraine über die Einstellung des Verfahrens auf Antrag von 142 Volksabgeordneten der Ukraine bezüglich der offiziellen Auslegung einer Bestimmung des vierten Absatzes der Präambel der Verfassung der Ukraine vom 14. November, 2023 Nr. 17-up/2023).

46 Ухвала Конституційного Суду України про закриття конституційного провадження у справі за конституційною скаргою *Малинникова Олега Федоровича* щодо відповідності Конституції України (конституційності) частин першої, другої, п'ятої статті 83, абзацу першого частини другої, частини десятої статті 85, абзацу першого частини першої, частини третьої статті 88 Закону України „Про судоустрій і статус суддів“ від 2 червня 2016 року № 1402-VIII, частини другої статті 57, пункту 12 розділу III „Прикінцеві та перехідні положення“ Закону України „Про Вищу раду правосуддя“ від 21 грудня 2016 року № 1798-VIII 26 лютого 2024 року № 14-у(II)/2024, https://zakon.rada.gov.ua/laws/show/v014u710-24#Text (Beschluss des Verfassungsgerichts der Ukraine über die Einstellung des Verfahrens im Fall der Verfassungsbeschwerde von *Malynnikov Oleg Fedorovych* bezüglich Verfassungsmäßigkeit des ersten, zweiten und fünften Teils von Artikel 83, Absatz 1 zweiter Teil, zehnter Teil von Artikel 85, erster Absatz des ersten Teils, Teil des dritten Artikels 88 des Gesetzes der Ukraine „Über die Justiz und den Status der Richter“ vom 2. Juni 2016 Nr. 1402-VIII, Teil zwei von Artikel 57, Klausel 12 von Abschnitt III „Schluss- und Übergangsbestimmungen“ des Gesetzes der Ukraine „Über den Hohen Justizrat“ vom 21. Dezember 2016 Nr. 1798-VIII 26. Februar 2024 Nr. 14-u(II)/2024).

47 *Schloer B.*, Fn. 1, S. 487 f.

Das Gericht zieht wieder intensiv die Rechtsprechung des EGMR und nationaler europäischer Verfassungsgerichte zur Frage der Rechtsnachfolge im verfassungsgerichtlichen Verfahren heran. In diesen Entscheidungen wird die Fortführung des verfassungsgerichtlichen (oder EGMR-Verfahren) nur in engen Ausnahmen zugelassen. Dabei wird eine Entscheidung des BVerfG von 2019 herangezogen, in der das BVerfG mit diesem Satz zitiert: „*Eine Rechtsnachfolge im Verfassungsbeschwerdeverfahren kommt grundsätzlich nicht in Betracht, weil diese Verfahrensart regelmäßig der Durchsetzung höchstpersönlicher Rechte dient. Ausnahmen sind im Hinblick auf solche Rügen zugelassen worden, die der Rechtsnachfolger im eigenen Interesse geltend machen kann*“.[48] Das Gericht lehnte die Rechtsnachfolge durch die Witwe im Verfahren ab, da das Recht der Menschenwürde untrennbar mit der Person des Verstorbenen verbunden sei.

Zu dieser Entscheidung liegt ein Sondervotum von *В. Городовенко* vor: Neben der nach seiner Auffassung fehlerhaften Anwendung der Geschäftsordnung des Verfassungsgerichts hat das Gericht seiner Meinung nach die Bedeutung der Menschenwürde verkannt und nicht ausreichend gewürdigt. Er weist auf die Mephisto-Entscheidung des BVerfG hin, wonach die Menschenwürde auch nach dem Tod zu schützen ist.[49]

e) In der Entscheidung vom 19.06.2024[50] hatte das Gericht über den Art. 176 StGB zu befinden, wonach bei bestimmten, im Zusammenhang mit der Kriegssituation stehenden Delikten automatisch U-Haft angeordnet wird. Das verletzt nach Ansicht des Beschwerdeführers die Art. 3 Teil 2 (Schutz der Rechte ist Aufgabe des Staates), Art. 8 Teile 1, 2 (die Verfassung hat den höchsten Rang und gilt unmittelbar), Art. 24 Teil 1 (Gleichheitssatz), Art. 22 Teil 3 (Keine Minderung bestehender Rechte bei Annahme neuer Gesetze), Art. 24 Teil 1 (Gleichbehandlung), Art. 28 (Schutz der Menschenwürde), Art. 29 Teile 1, 2 (kein willkürlicher Freiheitsentzug), Art. 55 (Rechtsschutzgarantie). Der Schwerpunkt der Begründung der Entscheidung liegt auf dem Recht auf Freiheit und gerichtlichen Rechtsschutz, die Menschenwürde wird nur in dem Zusammenhang erwähnt, dass die persönliche Freiheit essenziell für die Menschenwürde sei. Das Gericht erachtete die Regelung des StGB für verfassungsmäßig.

f) In der Entscheidung vom 18.07.2024 war Art. 615 des Strafprozesskodexes Gegenstand der verfassungsgerichtlichen Überprüfung.[51] Die Menschenwürde spielt in

48 BVerfG, Beschluss vom 11. November 2019 - 2 BvR 82/19 -, Rn. 1-5, https://www.bverfg.de/e/rk20191111_2bvr008219.html.

49 BVerfGE 30, 173, 194.

50 Рішення Конституційного Суду у справі за конституційними скаргами *Бичкова Сергія Андрійовича*, *Бая Анатолія Анатолійовича* щодо відповідності Конституції України (конституційності) частини шостої статті 176 Кримінального процесуального кодексу України, 19 червня 2024 року № 7-р(II)/2024, https://zakon.rada.gov.ua/laws/show/v007p710-24#Text. (Entscheidung des Verfassungsgerichts auf die Verfassungsbeschwerden von *Serhiy Andriyovych Bychkov* und *Anatoly Anatoliyovych Bai* bezüglich der Verfassungsmäßigkeit des sechsten Teils von Artikel 176 der Strafprozessordnung der Ukraine vom 19. Juni. 2024 Nr. 7-p(II)/2024).

51 Рішення Конституційного Суду у справі за конституційними скаргами *Оніщенка Руслана Ілліча*, *Гаврилюка Дмитра Михайловича* щодо відповідності Конституції України (конституційності) частини шостої статті 615 Кримінального процесуального кодексу України (справа про гарантії судового контролю за дотриманням прав осіб, яких

der Entscheidung keine Rolle, sie wird aber in der abweichenden Meinung des Richters *Wasil Lemak* (*Васил Лемак)* thematisiert. Er argumentiert auf der Basis der Entscheidung vom 22.05.2018, wonach die Menschenwürde ein Recht und ein verfassungsrechtlicher Wert ist und dass die Menschenwürde nicht eingeschränkt werden kann. Jede Person sei Träger der Menschenwürde, daher werde durch den Umgang mit Verdächtigen nach Art. 615 Teil 6 diese zum Objekt degradiert, damit deren Menschenwürde verletzt.[52]

III. Entwicklung in der Literatur

Hinsichtlich der Fachliteratur ist auf die Zeitschrift „Recht der Ukraine“ hinzuweisen, die im Heft 9 des Jahrgangs 2018 sechs große Beiträge zum Thema „Menschenwürde“ veröffentlichte: Den Aufsatz von *O. Grischtschuk*, Die Menschenwürde – Die ethischen und axiologischen Grundlagen der Menschenrechte,[53] von *St. Schewtschuk*, Die Menschenwürde im System der Verfassungswerte,[54] von *O. Bodiannikov*, Genealogie des Konzepts der Menschenwürde im Verfassungsrecht,[55] *V. Schischkin*, Das absolute Recht auf Menschenwürde (Positionen des Bundesverfassungsgerichts der Bundesrepublik Deutschland),[56] *Klimowitsch O.*, Aktuelle Tendenzen des Verfassungsrechts der USA hinsichtlich des Schutzes der Privatsphäre und der Men-

утримують під вартою) 18 липня 2024 року № 8-р(II)/2024, https://zakon.rada.gov.ua/laws/show/v008p710-24#Text. (Entscheidung des Verfassungsgerichts im Verfahren über Verfassungsbeschwerden von *Onishchenko Ruslan Ilyich* und *Gavrylyuk Dmytro Mykhailovych* bezüglich der Vereinbarkeit von Teil 6 des Artikels 615 der Strafprozessordnung der Ukraine mit der Verfassung der Ukraine (Verfahren über Garantien der gerichtlichen Kontrolle) über die Wahrung der Rechte von inhaftierten Personen) 18. Juli 2024 Nr. 8-р(II)/2024).

52 Окрема думка (збіжна) судді Конституційного Суду України *Василя Лемака* стосовно Рішення Конституційного Суду України у справі за конституційними скаргами *Оніщенка Руслана Ілліча, Гаврилюка Дмитра Михайловича* щодо відповідності Конституції України (конституційності) частини шостої статті 615 Кримінального процесуального кодексу України (справа про гарантії судового контролю за дотриманням прав осіб, яких утримують під вартою) https://zakon.rada.gov.ua/laws/show/na08d710-24#n2 (abweichendes Sondervotum des Richters des Verfassungsgerichts der Ukraine *Vasyl Lemak* zur Entscheidung des Verfassungsgerichts der Ukraine im Verfahren über Verfassungsbeschwerden von *Onishchenko Ruslan Ilyich und Havrylyuk Dmytro Mykhailovych* bezüglich der Vereinbarkeit von Teil 6 des Artikels 615 der Strafprozessordnung der Ukrainemit der Verfassung der Ukraine (Fall über Garantien der gerichtlichen Kontrolle über die Einhaltung der Rechte inhaftierter Personen).

53 *Грищук О.*, Fn. 20.

54 *Шевчук Ст.*, Людська гідність у системі конституційних цінностей. Право України 2018 № 9 с. 29–40.

55 *Водяннiков О.*, Генеалогія поняття людської гідності у конституційному праві. Право України 2018 № 9, с. 41-56.

56 *Шишкін В*, Абсолютність права людської гідності (позиції Федерального Конституційного Суду Федеративної Республіки Німеччина). Право України 2018 № 9, с. 57-75.

schenwürde[57] und von *Grischtschuk V.*, Soziale Konditionierung des Schutzes durch Strafrecht und des Schutzes der Menschenwürde in der Ukraine.[58] Der Aufsatz von *O. Grischtschuk* basiert auf ihrer Habilitation, inzwischen ist sie Richterin am Verfassungsgericht, *St. Schewtschuk* war damals Präsident des Verfassungsgerichts, *O. Bodiannikov* ist Berater der OSZE, *V. Schischkin* war Richter am Verfassungsgericht und *V. Grischtschuk* ist ein einflussreicher Hochschullehrer – also Personen von wissenschaftlicher Autorität und Einfluss auf Theorie und Praxis.

Eine interessante Veröffentlichung legte 2022 das von *R. Melnyk* geleitete Autorenkollektiv vor: Die rechtsvergleichende Darstellung der deutschen und ukrainischen Grundrechtslehre.[59] Hintergrund dieses von der ukrainischen Regierung geförderten Projekts war die defizitäre ukrainische Grundrechtslehre, das oben geschilderte Problem der Grundrechtsberechtigung des ungeborenen Lebens ist ein Beispiel. Diese Veröffentlichung enthält auch eine rechtsvergleichende Darstellung der Menschenwürde im ukrainischen und deutschen Recht und ist die gründlichste, die derzeit vorliegt, sie umfasst 129 Seiten. Zu den Autoren gehören u.a. die schon erwähnte *O. Grischtschuk*, ferner *R. Melnyk*, damals Direktor des Zentrums des deutschen Rechts an der *Taras-Schewtschenko*-Universität und mehrere ukrainische Verfassungsrechtler. Vergleicht man das Inhaltsverzeichnis dieses Abschnitts mit der Monographie (Habilitation) von *O. Grischtschuk*, so erkennt man ihren Einfluss auf dieses Kapitel.

Zunächst stellt das Autorenkollektiv fest, dass es im ukrainischen Recht keine einheitliche Auffassung des Begriffes der Menschenwürde gibt; das ist erklärlich, denn die Monographie ging am 1.2.2022 in den Druck, konnte daher die Entwicklung der Verfassungsrechtsprechung nur in ihren Anfängen einbeziehen; in der Literatur hat sich seit der Untersuchung von 2017 also nichts geändert.[60] Danach folgen theoretische Herangehensweisen an das Verständnis der Menschenwürde, hier wird zum ersten Mal die Objekttheorie von *G. Dürig* angesprochen (später umfassend). Bei der Behandlung der gesetzlichen Regelungen der Menschenwürde im ukrainischen Recht geht das Team auf den pränatalen und postmortalen Schutz der Menschenwürde mit Beispielen aus der Rechtsprechung des BVerfG ein,[61] was später im Zusammenhang mit der Grundrechtsberechtigung vertieft wird.[62] Diese Aspekte der Grundrechtsberechtigung sind für die ukrainische Rechtswissenschaft ungewöhnlich, das wurde oben schon erwähnt; die Monographie hat mit diesen Ausführungen noch weitere, derzeit noch unscharf gezeichnete Themen im ukrainischen Verfassungsrecht anhand

57 *Климович О.*, Сучасні тенденції конституційного права США з огляду права на приватність та гідність. Право України 2018 № 9, с. 76 – 97 (*Klimowitsch O.*, Aktuelle Tendenzen des Verfassungsrechts der USA hinsichtlich des Schutzes der Privatsphäre und der Menschenwürde, Recht der Ukraine 2018 Nr. 9, S. 76 - 96).

58 *Грищук В.*, Соціальна зумовленість кримінально-правової охорони і захисту гідності людини в Україні. Право України 2018 № 9, с. 98 – 108 (*Grischtschuk V.*, Soziale Konditionierung des Strafrechtsschutzes und des Schutzes der Menschenwürde in der Ukraine, Recht der Ukraine Nr. 9, S. 98 - 108).

59 Основні права людини: німецько-український правовий вимір: монографія / за ред. *Мельника Р. С.* – Одеса 2022. – 404 с. (Grundlegende Menschenrechte: die deutsch-ukrainische Rechtsdimension: Monographie / herausgegeben von *Melnyk R. S.*, 2022. - 404 S.).

60 *Schloer B.*, Fn. 1, S. 489 ff.

61 Fn. 59, S. 49 ff.

62 Fn. 59, S. 157 ff., 168 ff.

der Rechtsprechung des BVerfG behandelt. Es folgt der Abschnitt mit der Rechtsprechung des BVerfG zur Menschenwürde. Hier wird ausführlich die Objekttheorie dargestellt, auch mit dem Zitat, dass man die Menschenwürde nicht zur kleinen Münze missbrauchen darf.[63] Es folgen einzelne Aspekte des ukrainischen Verfassungsrechts, die im Zusammenhang mit der Menschenwürde stehen. Die Autoren legen ihre Auslegung des Art. 21 der Verfassung dar; hier decken sich deren Auffassung aus dem Jahr 2022 mit der Rechtsprechung des Verfassungsgerichts bis heute.

Wie eingangs geschrieben, enthält diese Monographie eine der ganz wenigen umfassenden Darstellungen zur Menschenwürde (und anderen grundlegenden Themen aus dem Gebiet der allgemeinen Grundrechtelehre). Aufgrund der beruflichen Positionen einiger Mitautorinnen kann diese Veröffentlichung Auswirkungen auf die Rechtsprechung des ukrainischen Verfassungsgerichts haben.

Im Lehrbuch zum ukrainischen Verfassungsrecht, das *T.M. Slinko* herausgab wird die Menschenwürde anhand der Urteile des Verfassungsgerichts vom 24.4.2018 und vom 22.5.2018 knapp dargestellt.[64] Damit steht dieses Lehrbuch in der Tradition der bisherigen Lehrbücher, die der Menschenwürde nur wenig Raum bieten.[65] In dem von der OSZE geförderten Lehrbuch wird die Menschenwürde ausführlich dargestellt,[66] daher hier eine kurze Beschreibung: Nach einem kurzen historischen Teil werden Art. 1 GG und Art. 30 der polnischen Verfassung genannt. Der Art. 30 enthält diesen Satz: „Sie [die Menschenwürde] bildet die ‚Quelle' der Freiheiten und Rechte des Menschen und des Staatsbürgers." Diese Rolle der Menschenwürde wird in den Entscheidungen anderer Verfassungsgerichte und des ukrainischen Verfassungsgerichts mit anderen Begriffen beschrieben, ob die polnische Verfassung für diese Begrifflichkeit in der Entscheidung des Gerichts das Vorbild war, ist nicht feststellbar. Bei der inhaltlichen Beschreibung der Menschenwürde werden diese Entscheidungen des Bundesverfassungsgerichts herangezogen: die Entscheidung zum Luftsicherheitsgesetz[67] und die Entscheidung BVerfGE 45, 187 zur lebenslangen Freiheitsstrafe,[68] ferner die Entscheidung des polnischen Verfassungstribunals zum polnischen Luftfahrtrecht.[69] Ferner wird die Objekttheorie von G. Dürig erwähnt.[70] Schließlich wird auf

63 Fn. 59, S. 91 ff.

64 Verfassungsrecht der Ukraine, Lehrbuch, Fn. 24, S. 343.

65 Siehe Sammelband zum Seminar, Fn. 1, S. 80.

66 Конституційне право: підручник / за загальною редакцією *М.І. Козюбри / Ю.Г. Барабаш, О.М. Бориславська, В.М. Венгер, М.І. Козюбра, А.А. Мелешевич*. - К.: Ваіте, 2021. – 528 с. (Verfassungsrecht: Lehrbuch / Gesamtausgabe *E. Kozyubra/ Yu.G. Barabash, O.M. Boryslavska, V.M. Wenger, M.I. Hahn, A.A. Meleschewitsch* - Kyjiw 2021. – 528 S.).

67 BVerfG, Urteil vom 15.2.2006 1 BvR 357/05, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/02/rs20060215_1bvr035705.html?nn=68080.

68 BVerfG, Beschluss vom 08. November 2006 - 2 BvR 578/02 -, Rn. 1-167, https://www.bverfg.de/e/rs20061108_2bvr057802.html.

69 Judgement of 30th September 2008, K 44/07 Permissibility of shooting down a passenger aircraft in the event of a danger that it has been used for unlawful acts, and where state securityis threatened, Nr. 13, 16, 19,http://www.europeanrights.eu/public/sentenze/Polonia-30settembre2008.pdf.

70 Fn. 66, S. 155 f. Es wird auf die Übersetzung des Aufsatzes von *G. Dürig* im Sammelband zum Seminar verwiesen, siehe Sammelband zum Seminar, Fn. 1, S. 72 ff.

die Verbindung von der Menschenwürde mit dem Sozialstaatsprinzip in der Rechtsprechung des BVerfG eingegangen. Zur ukrainischen Rechtslage verweisen die Autoren auf die Art. 3 und 28 der Verfassung, in denen die Menschenwürde als Wert und Recht genannt wird, auf die Entscheidung des Verfassungsgerichts zur Todesstrafe von 1999 und dann ausführlich auf die Entscheidung vom 22.05. 2018, in der das Verfassungsgericht die Menschenwürde als „Verfassungswert“ qualifiziert hat.

Die Autoren fassen den Begriff der Menschenwürde folgendermaßen zusammen: „*Die Menschenwürde ist ein vielschichtiger Begriff, der auch das Verbot umfasst eine Person zu demütigen, zu verfolgen, zu beleidigen; das Verbot ihrer unmenschlichen Behandlung; das Streben danach, immer so zu handeln, dass andere Menschen als Ziel geachtet werden, nicht als Mittel (I. Kants kategorischer Imperativ); Verbot, eine Person (ohne ihre Zustimmung) für wissenschaftliche und medizinische Zwecke oder andere Experimente zu benutzen; Schutz der Ehre einer Person, auch nach ihrem Tod; Pflicht, die Privatsphäre eines Menschen und ihr Recht auf persönliche Entwicklung zu achten*“.[71]

IV. Zusammenfassung

Die dargestellten Entscheidungen zeigen diese Entwicklungsschritte des Verständnisses der Menschenwürde: Die oft im Zusammenhang mit der Menschenwürde zitierte Entscheidung von 1999 hat nur soweit zur Klärung des Begriffs der Menschenwürde beigetragen, als das Gericht feststellte, dass das Leben und die Würde eng miteinander verbunden sind und nicht beschränkt werden dürfen.[72] Erst ab 2018 thematisiert das Verfassungsgericht die Menschenwürde. In der Entscheidung vom 24.4.2018 stellt das Gericht nur fest, dass die Menschenwürde ein unveräußerliches Recht ist, einen Monat später stellt es fest, dass die Menschenwürde ein Recht des Menschen ist und ein grundlegender Wert der Rechte der Verfassung ist. In der Entscheidung vom 16.9.2021 ist die Menschenwürde nicht mehr nur die Grundlage der Grundrechte, sondern des ukrainischen Verfassungssystems. Bis zum 20.12.2023 wurde das Recht auf Unverletzlichkeit der Menschenwürde mit dem Recht auf die Unverletzlichkeit des Lebens gleichgesetzt.[73] Durch die Entscheidungen vom 20.12.2023 und vom

71 Fn. 66, S. 157.

72 Рішення Конституційного Суду у справі за конституційним поданням 51 народного депутата України щодо відповідності Конституції України (конституційності) положень статей 24, 58, 59, 60, 93, 190-1 Кримінального кодексу України в частині, що передбачає смертну кару як вид покарання (справа про смертну кару) від 29 грудня 1999 року, N 11-рп/99, мот. част. 6, https://zakon.rada.gov.ua/laws/show/v011p710-99#Text, (Entscheidung des Verfassungsgerichts im Fall über die Verfassungsbeschwerde von 51 Abgeordneten der Ukraine über die Vereinbarkeit der Bestimmungen der Artikel 24, 58, 59, 60, 93, 190-1 des Strafgesetzbuches der Ukraine mit der Verfassung der Ukraine (Verfassungsmäßigkeit) in dem Teil, der die Todesstrafe als Strafe vorsieht (Fall der Todesstrafe) vom 29. Dezember 1999, Nr. 11-rp/99, Begründung 6.).

73 Siehe II.1.a), wo das Gericht das exakt so formuliert, in II.1.b) werden Leben und Menschenwürde im gleichen Zusammenhang genannt und II.1.c), wo mit solchen gleichstellenden Aussagen osteuropäische Verfassungsgerichte zitiert werden.

29.10.2024[74] (s. die oben unter II.1.f) dargestellte Entscheidung) ist wohl jetzt klargestellt, dass die Menschenwürde vollkommen unantastbar ist, also nicht – wie das Recht auf Leben - eingeschränkt werden kann. Damit hat die Rechtsprechung des ukrainischen Verfassungsgerichts mit den europäischen Standards gleichgezogen.

Im Einzelnen sind noch diese Anmerkungen zu machen:

2016 wurde in die Verfassung der Ukraine Art. 151-1 eingefügt, mit dem die Individualverfassungsbeschwerde eingeführt wurde. Das führte zu vermehrten Verfassungsbeschwerden wegen Verletzungen von Grundrechten. Bei den hier gezeigten Entscheidungen sind die meisten Verfahren durch Verfassungsbeschwerden nach Art. 151-1 initiiert worden (s. die unter II.1.c), d), f) und II.2.b), e), f) dargestellten Entscheidungen), an zweiter Stelle sind es Verfahren, die von mindestens 45 Abgeordneten nach Art. 151 eingeleitet wurden, nur drei vom Ombudsmann für Menschenrechte der Werchowna Rada nach Art. 150 und eine vom Obersten Gericht nach Art. 150.

Zur Entscheidung vom 22.05.2018 (oben II.1.b)) ist den abweichenden Meinungen noch ein weiterer Punkt hinzuzufügen: Das Gericht bezieht Art. 22 Teile 2, 3 nur auf Rechte, die im zweiten Teil der Verfassung genannt sind. Das sind die klassischen Grundrechte und soziale Rechte. Letztere haben i.d.R. eine zweiteilige Struktur, sie formulieren erst ein soziales „Recht“, z.B. Recht auf sozialen Schutz, darauf folgt die Feststellung, dass der Staat dieses Recht verwirklicht; einen direkten Anspruch enthalten die sozialen Grundrechte also nicht. Doch haben die einfachgesetzlichen Rechte, die das Gericht von der Wirkung des Art 22 ausgeschlossen hat, durchaus einen Bezug zum zweiten Teil der Verfassung.[75] Art. 22 Teil 2 und 3 wurden erst im Juni 1996 (also kurz vor der Annahme der Verfassung) in den Entwurf eingefügt[76] und erfuhren Kritik, dass dadurch die Politik auf den Status quo festgelegt würde; man versuchte anfänglich sogar, durch Berufung auf diese Regelungen die Schließung von überflüssigen Krankenhäusern zu verhindern und dadurch Arbeitsplätze zu erhalten (Art. 43, Recht auf Arbeit). Doch waren solche sozialpolitischen Regelungen die Voraussetzung dafür, dass die Abgeordneten des linken Spektrums der Verfassung zustimmten.

Die Objekttheorie von *G. Dürig* ist seit 2017 definitiv auf Ukrainisch zugänglich,[77] in den Entscheidungen des Verfassungsgerichts hat sie offenbar keinen Niederschlag gefunden,[78] jedoch vereinzelt in der Literatur.[79]

74 Siehe Fn. 40, die Vorläuferentscheidung vom 20.12.2023, oben II.1.e), Fn. 33.
75 So das Verfassungsgericht 2005, Fn. 17.
76 Stenogramm der Sitzung der Werchowna Rada Ukraine vom 19.6.1996, Bulletin Nr. 98 vom 19.6.1996, S. 50, https://www.rada.gov.ua/meeting/stenogr/show/3877.html.
77 Sammelband zum Seminar, Fn. 1, S. 72 ff.
78 Aber in der abweichenden Meinung zur Entscheidung vom 22.05.2018 (s.o. II.1) und zur Entscheidung vom 18.07.2024 oben II.2.f).
79 Z.B. *Грищук О.*, Verfassungswerte, Fn. 21; *Grischtschuk O.*, Fn. 20, S. 19; Lehrbuch, Fn. 66, S. 155 f.; Monographie Fn. 59, S. 91 ff.; *S. Holovatiy* zitiert nur die Entscheidung BVerfGE 27, 1, 6, in der das Bundesverfassungsgericht aber vom Objekt spricht, *Головатий С.*, Про людські права. Лекції, Київ 2016 с. 468 (*Holovatiy S.* Über die Rechte der Menschen, Vorlesungen Kyjiw 2016, S. 468).

Irritierend ist m.E. das Festhalten an der Grundrechtsberechtigung erst ab der Geburt.[80] Die Entstehungsgeschichte der Verfassung zeigt, dass die Arbeitsgruppe zur Erstellung der letzten Version des Verfassungsentwurfs nach intensiver Diskussion bewusst die Grenze „ab der Geburt“ aus dem Text herausgenommen hat.[81] Diese Frage ist in der Rechtsprechung des EGMR nicht abschließend geklärt,[82] aber die Rechtsprechung von nationalen europäischen Verfassungsgerichten, die das Verfassungsgericht ja reichlich auswertet, zeigt klar die Problematik und die Argumentation für die Bejahung der Grundrechtsberechtigung des Nasciturus (aber auch deren Ablehnung!). Doch ist es für das Verfassungsgericht ein Unterschied, ob es sich um die Praxis des EGMR handelt, die zu beachten ist[83] oder um Entscheidungen von nationalen Verfassungsgerichten, die man heranziehen kann, aber nicht muss.

Auffallend ist, wie intensiv das Gericht sich mit einschlägigen Urteilen nationaler Verfassungsgerichte in der EU auseinandersetzt, wobei die Entscheidungen des BVerfG am häufigsten herangezogen werden; das Gericht will seine Entscheidungen offenkundig mit denen europäischer Verfassungsgerichte harmonisieren, setzt sich aber auch von deren Rechtsprechung ab, z.B. die Gleichsetzung von Leben und Menschenwürde in den Entscheidungen des polnischen Tribunals und anderer Verfassungsgerichte, s.o. II.2.c). Ruft man sich in Erinnerung, dass das Gericht nur hinsichtlich der Rechtsprechung des EGMR die Pflicht hat, diese als Quelle zu verwenden, dann ist die Europäisierung des ukrainischen Rechts schon weit fortgeschritten. Betrachtet man die juristische Literatur, so ist der internationale Ansatz inzwischen eine Frage des Selbstverständnisses.[84] Aber man darf nicht vergessen, dass viele in Amt und Würden sind, die schon im Studium mit der EMRK und Elementen des Rechts verschiedener Länder Europas konfrontiert wurden.

80 Z.B. Entscheidung vom 22.05.2018, Fn. 15, Begründung 2.3.; Entscheidung vom 16.09.2021, Fn. 22, Begründung 2.1; Entscheidung vom 20.12.2023, Fn. 33, Begründung 2.2.1.

81 Fn. 25.

82 Siehe EGMR- Factsheet – Reproductive rights vom Dezember 2023, https://www.echr.coe.int/documents/d/echr/fs_reproductive_eng, S. 19, wo zu dieser Frage nur auf die Entscheidung *Vo* v. France vom 8.7.2004, https://hudoc.echr.coe.int/eng-press?i=003-1047783-1084371 verwiesen wird.

83 Siehe Fn. 4.

84 Siehe z.B. das in Fn. 79 zitierte Werk von *S. Holovatiy*, das ganz tief ausländisches Recht analysiert oder *Савчун М.*, Порівняльне конституційне право, Київ 2020 (*Savchun, M.* Vergleichendes Verfassungsrecht, Kyjiw 2020).

Roksolana Khanyk-Pospolitak and Yaroslav Brych*

A Paradigm Shift in the Ukrainian Judicial Process Regarding the Procedure for Rendering Court Decisions

Abstract

The article is devoted to the analysis of the provisions on secrecy of court decision-making introduced by the Law of Ukraine No. 4173-IX effective from 8 February 2025, the prerequisites for their adoption, and the first problematic issues of their application. Until 8 February 2025, a judge in Ukraine in commercial, civil and administrative proceedings had to render, draft and sign court decisions only in a special room – a "deliberation room", where no one else had the right to be present. It was found that the use of the deliberation room in practice had a significant number of institutional and procedural challenges, which led to a longstanding debate on the need to significantly update or abolish the deliberation room. With Law No. 4173-IX, the legislator in Ukraine decided to replace the secrecy of the deliberation room in civil, commercial and administrative proceedings with the secrecy of the court decision-making. In addition, it introduced clearer timeframes and stages for the rendering and pronouncement of the court decision. So far, the judicial community has already identified some different approaches to certain aspects of the application of the updated rules. It is hoped that the amendments will increase efficiency in civil, commercial and administrative proceedings and will have a positive impact on the enjoyment of the right to a fair trial.

Keywords: deliberation room, court decision-making, judicial, judicial proceedings of Ukraine, procedural efficiency, fair trial.

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Abstract deutsch

Der Artikel befasst sich mit der Analyse der Bestimmungen zur Geheimhaltung gerichtlicher Entscheidungen, die mit dem Gesetz der Ukraine Nr. 4173-IX mit Wirkung vom 8. Februar 2025 eingeführt wurden, den Voraussetzungen für deren Verabschiedung und den ersten problematischen Fragen ihrer Anwendung.

Bis zum 8. Februar 2025 durften Richter in der Ukraine in Handels-, Zivil- und Verwaltungsverfahren Gerichtsentscheidungen nur in einem speziellen Raum – einem Beratungsraum, in dem niemand sonst anwesend sein durfte – fällen, verfassen und unterzeichnen. In der Praxis zeigten sich dabei einige institutionelle und verfahrensrechtliche Probleme, was zu einer langjährigen Debatte über die Notwendigkeit einer grundlegenden Überarbeitung oder Abschaffung der Pflicht zur Nutzung des Beratungsraums führte. Mit Gesetz Nr. 4173-IX wurde die Geheimhaltung des Beratungszimmers in Zivil-, Handels- und Verwaltungsverfahren durch den Grundsatz der Geheimhaltung der gerichtlichen Entscheidungsfindung ersetzt. Darüber hinaus wurden klarere Fristen und Phasen für die Verkündung und Bekanntgabe der Gerichtsentscheidung eingeführt. Bislang hat die Justiz bereits einige unterschiedliche Ansätze für bestimmte Aspekte der Anwendung der aktualisierten Vorschriften identifiziert. Es ist zu hoffen, dass die Änderungen die Effizienz in Zivil-, Handels- und Verwaltungsverfahren erhöhen und sich positiv auf die Wahrnehmung des Rechts auf ein faires Verfahren auswirken werden.

Keywords: Beratungsraum, Entscheidungsfindung des Gerichts, Justiz, Gerichtsverfahren in der Ukraine, Verfahrensökonomie, faires Verfahren.

I. Introduction

In Ukraine, all court cases may be heard under one of five types of proceedings: civil, commercial, administrative, criminal or administrative offences. The most recent reform of civil, commercial and administrative proceedings took place in 2017 when the respective procedural codes were completely revised to improve the efficiency of the respective proceedings and harmonise their rules while maintaining the specifics of each.[1] Recently, one of the most significant changes to the civil, commercial and administrative proceedings of Ukraine since 2017 has been adopted: the procedure for rendering court decisions, in particular, the concept of a deliberation room has been abolished. This refers to the Law of Ukraine No. 4173-IX dated 19 December 2024 "On Amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges' and Certain Other Legislative Acts of Ukraine on Improving the Rendering and Pronouncing of Court Decisions" (hereinafter Law No. 4173-IX), which entered into force on 8 February 2025.

1 Explanatory Note to draft law of Ukraine No. 6232 of 23 March 2017 'On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts', available from http://w1.c1.rada.gov.ua, accessed 7 March 2025.

II. Prerequisites for Legislative Changes

1. Problematic Aspects of the Use of a Deliberation Room in Civil, Commercial and Administrative Proceedings in Ukraine

Many of the concepts envisaged by the Soviet procedural law before 1991 were transferred to the legislation of independent Ukraine, including the term "deliberation room".[2] At the same time, only the Civil Procedural Code of Ukraine and the Code of Administrative Procedure of Ukraine, both of which entered into force on 1 September 2005, enshrined the definition of this concept as "a room specially equipped for passing court decisions" (Part 1 of Article 195 of the Civil Procedural Code of Ukraine) and "a room specially designed for making court decisions" (Part 1 of Article 153 of the Code of Administrative Procedure of Ukraine), where the court goes after the debates and informs the parties of the approximate time of the court decision pronouncement.[3] It is curious that the term "'deliberation room" was included in the Commercial Procedural Code of Ukraine only on 3 August 2010, and a definition similar to these – only on 15 December 2017 (Article 219).[4]

The procedural legislation did not specify how the room should be equipped. At the same time, all three Codes had a provision "Secrecy of the deliberation room":

1. No one has the right to be in the deliberation room during the rendering of a court decision, except for the judges of the panel considering the case.
2. While in the deliberation room, a judge shall not be entitled to consider other court cases.
3. Judges shall not disclose the course of discussion and decision-making in the deliberation room.[5]

In addition, the Law of Ukraine "On the Judiciary and the Status of Judges" also obliged judges not to disclose information that constitutes secrecy of the deliberation room.[6]

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2 *Ya. O Brych,* Cancellation of the deliberation room: a step towards improving the efficiency of civil proceedings?Speech at the round table 'Protection of rights and interests of a person in the context of reforming private law in Ukraine', held on 28 February 2025 at the National University of Kyiv-Mohyla Academy.

3 The Civil Procedural Code of Ukraine as amended on 18 March 2004. Unless stated otherwise, all Ukrainian legislation cited in this article are available under https://zakon.rada.gov.ua/laws, accessed 7 March 2025.
The Code of Administrative Procedure of Ukraine as of 6 July 2005.

4 The Commercial Procedural Code of Ukraine as amended on 15 December 2017.

5 Article 195 of the Civil Procedural Code of Ukraine as of 1 September 2005 (Article 245 of the Civil Procedural Code of Ukraine as of 15 December 2017), Article 154 of the Code of Administrative Proceedings of Ukraine as of 1 September 2005 (Article 228 of the Code of Administrative Proceedings of Ukraine as of 15 December 2017) and Article 82-1 of the Commercial Procedural Code of Ukraine as of 3 August 2010 (Article 220 of the Commercial Procedural Code of Ukraine as of 15 December 2017).

6 Paragraph 5 of Part 7 of Article 56 of the Law of Ukraine No. 1402-VIII of 02 June 2016 'On the Judiciary and the Status of Judges' in version before 8 February 2025.

Certain technical requirements for a deliberation room were established by the State Building Standards of Ukraine “Buildings and Structures. Courts”, in particular:

(i) the area of a deliberation room should be not less than 9.0 m^2 and adjacent to courtrooms for consideration of civil (administrative, commercial) cases in courts of first instance; not less than 9.0–12.0 m^2 and adjacent to courtrooms for consideration of criminal cases in courts of first instance and in courtrooms of appellate courts; 16.0 m^2 for higher specialised courts of Ukraine;
(ii) the deliberation room should be adjacent to the courtroom from the procedural area and have a separate entrance from the procedural area of the courtroom. The entrance to the deliberation room from the courtroom should be located in such a way that judges do not come into contact with participants in the trial and visitors while moving;
(iii) each deliberation room should have a sanitary facility (with an entrance from the deliberation room) with an area of at least 2.0 m^2.[7]

It is worth noting that no regulations stipulate the technical equipment of such deliberation rooms. At present, due to the digitalisation of processes, it is not the size of the deliberation room that is more important for judges, but the availability of technical means (in particular, a computer) that allows them to render decisions faster. It is known that judges often already have certain templates/samples of court decisions.

Based on the technical requirements and procedural provisions on the secrecy of the deliberation room, the scholarly works argue that “the presence of the judge in the deliberation room is intended to ensure an integral and mandatory component of judicial independence as a constitutional principle of the organisation and functioning of courts in the professional activity of judges”.[8] We partially agree with this statement. Of course, as noted in case law, the purpose of secrecy of the deliberation room “is to ensure the independence and impartiality of judges in the discussion and rendering of a court decision”.[9] At the same time, “the court's leaving for the deliberation room” in Ukraine has actually become a ceremonial and routine function, especially in cases where judges conduct a sole sitting (most cases in all first instance courts). It is

7 Clause 6.2.2. State Construction Standards of Ukraine ‘Buildings and structures. Courts’ DBN B.2.2-26:2010, available from https://e-construction.gov.ua, accessed 7 March 2025.
8 *Prokhorov P.A.* Procedure for Adoption of Court Decisions in the Civil Procedure of Ukraine. Dissertation for the degree of Doctor of Philosophy in Law. National University ‘Odesa Law Academy’, Odesa, 2021, p. 89.
9 Decision of the Criminal Court of Cassation within the Supreme Court, 1 October 2019, Case No. 316/1358/17, https://reyestr.court.gov.ua/Review/84814458, accessed 7 March 2025.

worth noting that in 2023 almost 4.5 million[10] and in 2024 – 5.3 million cases[11] were pending in Ukrainian courts, which were considered by only 5000 judges.

An interesting opinion was also expressed by Judge *K. Sikora*, who noted that "a deliberation room is not a specific room, but rather a legal regime in which a judge (panel of judges) is operating while rendering a court decision that should exclude any influence of unauthorised persons on the discretion and will of judges. In other words, the main feature of a judge's presence in the deliberation room is the absence of contacts with persons who may directly or indirectly influence the essence of the decision being made".[12] Can the absence of such contacts be ensured only by the presence of the judge(s) in a special room as a "deliberation room"? It is doubtful, especially given the actual state of availability of such rooms in Ukrainian courts.

Courts are financed exclusively from the state budget of Ukraine.[13] This should guarantee the proper functioning of the judiciary. However, this guarantee is not fully implemented in practice. In particular, the level of meeting the financial needs of the courts of first instance and appellate courts in the state budget of Ukraine has generally decreased: from 79.1% in 2017, to 42.5% in 2021, increasing to only 51.4% in 2023.[14]

As of 24 February 2022, the beginning of the unprovoked and unjustified aggression of the Russian Federation against Ukraine, which largely changed the map of the court system, only 22% of the courts of first instance and appellate courts were located in premises that were as close as possible to the requirements of the State Building Standards of Ukraine described above.[15] In fact, one of the reasons for non-compliance with the latter was the insufficient number or absence of deliberation rooms, especially in the courts of first instance.[16] In this regard, some scholars have

10 Both the number of cases that came to the courts in 2023 and the number of cases considered in the context of war and staff shortages are impressive. see Chief Justice Stanislav Kravchenko, 9 February 2024, https://supreme.court.gov.ua/supreme/pres-centr/news/1554727, accessed 7 March 2025.

11 The Plenum of the Supreme Court heard information on the activities of the Supreme Court in 2024 and considered two constitutional petitions, 7 February 2025, https://supreme.court.gov.ua/supreme/pres-centr/news/1752242/, accessed 7 March 2025.

12 *K. Sikora*, ВКЗ у кримінальному процесі і воєнний стан – як це працює, проблемні питання, чим корисна практика? [EITC in criminal proceedings and martial law – how does it work, problematic issues, what is the usefulness of the practice?] Judicial and Legal Newspaper. 31 August 2022, available from https://sud.ua/uk/news, accessed 7 March 2025.

13 Paragraph 7 of Part 4 of Article 17 of the Law of Ukraine No. 1402-VIII of 2 June 2016 'On the Judiciary and the Status of Judges'.

14 *A. Adamska-Gallant* et al., ПРО РОБОТУ СУДОВОЇ СИСТЕМИ УКРАЇНИ В УМОВАХ ПОВНОМАСШТАБНОЇ ВІЙНИ ТА ВОЄННОГО СТАНУ [Analytical report on the work of the judicial system of Ukraine in the conditions of full-scale war and martial law], July 2023. pp. 9, 14, available from https://www.pravojustice.eu, accessed 7 March 2025.

15 Report on the activities of the State Judicial Administration of Ukraine for 2023. p. 19, available from https://dsa.court.gov.ua, accessed 7 March 2025.

16 *Brych,* fn. 2.

noted that "in practice, the concept of a deliberation room, as well as its secrecy, in some cases turns out to be a fiction".[17]

M. Hudyma and *M. Hudyma-Pidverbetska* noted that in many courts the deliberation room had "mainly a symbolic meaning and is usually used as a judge's office, from which the participants in the case are removed".[18] The High Council of Justice, the judicial governance body in Ukraine, also acknowledged in July 2024 that 'most court premises lack equipped deliberation rooms in the required number, but this does not prevent the use of a judge's office as a deliberation room'.[19] However, the actual use of the judge's office as a deliberation room, according to *R. Padun*, "makes it impossible to reach an accurate decision and does not give time to think about the case, because, in addition to the judge, there is an assistant or secretary, and people may also come in on other cases".[20]

In addition, the Civil Procedural Code of Ukraine, the Commercial Procedural Code of Ukraine and the Code of Administrative Procedure of Ukraine did not regulate the duration of the judge's (judges in collegial proceedings) stay in the deliberation room, indicating only that the judge should inform the parties to the case about the "approximate" time of the court decision, i.e. the time of his/her leaving the deliberation room. These Codes did not provide for the possibility of taking breaks during the judge's stay in the deliberation room,[21] although the Criminal Procedural Code of Ukraine has established since 2012 that the court may adjourn the deliberation room for rest at night.[22] Finally, the case law has allowed for such breaks for other types of proceedings as well:

> "a judge may leave the deliberation room before pronouncing a court decision during a break for rest (during working hours and after they end). If judges (judge) stay in the deliberation room for a long time, they may interrupt the meeting for rest at night, leave the deliberation room and rest in normal conditions until the beginning of the next working day".[23]

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17 *M.P. Kurylo,* Court decisions in different branches of procedural law: possibilities of unification. Scientific Bulletin of the International Humanitarian University. Series: Law: Jurisprudence 2013, 58.

18 *M.M. Hudyma, M.M. Hudyma-Pidverbetska,* The secret of the deliberation room as a guarantee of the independence of judges and a condition for the justice of a court decision: legal and moral aspects. Actual problems of national jurisprudence 2024, 16, 18-19. DOI: https://doi.org/10.32782/2408-9257-2024-3-3.

19 On providing an advisory opinion on the draft law No. 9445. High Council of Justice, https://hcj.gov.ua/doc/doc/46769, accessed 7 March 2025.

20 *R.V. Padun*, The secrecy of the deliberation room as a guarantee of independence and impartiality of the court. Innovative development of legal science in the context of modernisation of society. X International Scientific and Practical Conference (Kyiv, 28 February 2020), NAU 2020, pp. 159-160.

21 *Hudyma, Hudyma-Pidverbetska*, fn. 18, 19.

22 Part 2 of Article 367 of the Criminal Procedural Code of Ukraine No. 4651-VI of 13 April 2012.

23 Decision of the Civil Court of Cassation of the Supreme Court, 16 September 2021, Case No. 754/14463/18, https://reyestr.court.gov.ua/Review/99714160, accessed 7 March 2025. Paragraph 15 of the Resolution No. 7 of the Plenum the High Administrative Court of Ukraine of 20 May 2013 'On the Court Decision in an Administrative Case'.

Another procedural provision stipulating that court decisions are rendered, drafted and signed by the judges only in the deliberation room[24] seemed to be excessively formalistic. In practice, it is judge's assistants who prepare most draft court decisions upon the judge's instructions, which are finalised and signed by the judge in his or her office or in another convenient place in the court premises. In the busiest courts in Ukraine, a judge may sign more than a hundred court decisions per day. In view of the above, it was impractical for a judge to draft and sign court decisions only in the deliberation room.

It should also be noted that the case law has developed an approach whereby a violation of the rules on the secrecy of the deliberation room was not an automatic ground for quashing a court decision during an appeal or cassation review. Such a violation could only be ground for setting aside a court decision if it led to an erroneous resolution of the case, in particular, if it was proved that the judge communicated outside the deliberation room with a party to the proceedings or other persons regarding the case under consideration.[25] In practice, such cases are almost unknown.

2. Discussions on the Need for Change

As shown above, the use of the deliberation room in practice has had a significant number of both institutional (lack or insufficient number of deliberation rooms in courts) and procedural challenges (excessive formalism due to the need to draft and sign court decisions only in the deliberation).

Therefore, for many years there has been a debate about the feasibility of having a deliberation room in Ukraine.

M. Kurylo noted that the deliberation room is "one of the most important in the judicial process, since in this part of the court proceedings one of the most important and basic procedural documents – the court decision – is formed and generally drafted".[26]

M. Hudyma and *M. Hudyma-Pidverbetska* gave the following justification for the preservation of the deliberation room:

> "The existence of the institute of a deliberation room as a prerequisite for the rendering of a court decision is fully justified. In the case of a panel trial, there is an undeniable need for the panel of judges to be in a separate room to discuss and vote on the court decision. Although a judge does not have to consult with anyone when hearing a case alone, the fact that a court decision is often made in a difficult moral environment, where judges are highly responsible for a person's fate, necessitates that the judge go to a specially secluded room where he or she alone will be present. Judges often have to make decisions in complex cases, where it is necessary to carefully review the case file, analyse legislation and case law, which is certainly a complex mental process. All of this requires

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24 Parts 2, 4 of Article 259 of the Civil Procedural Code of Ukraine, Parts 2, 6 of Article 243 of the Code of Administrative Procedure of Ukraine and Parts 2, 4 of Article 233 of the Commercial Procedural Code of Ukraine in the versions from 15 December 2017 to 8 February 2025.

25 Paragraph 16 of Resolution No. 14 of the Plenum of the Supreme Court of Ukraine of 18 December 2009 'On Court Decision in a Civil Case'.

26 *Kurylo*, fn. 17, p. 58.

> a calm environment for the judge to concentrate, minimise distractions, and be able to make and write a judgement in a systematic manner, which, given sufficient time and appropriate external conditions, will avoid judicial errors without haste."[27]

Back in 2019, Supreme Court Judge *O. Kibenko* expressed the following arguments against the deliberation room: (i) it simply "eats up" the time of judges, parties and their representatives. Therefore, often, if an active discussion begins in the deliberation room, judges have to interrupt it, leave the deliberation room, resume the meeting and announce a break or postpone the consideration; (ii) the requirement to render a decision in the deliberation room immediately after hearing the explanations of the parties is an obvious atavism that is actively criticised by judges. The court of cassation should have enough time to make a balanced and reasoned decision, and not write it in a hurry in a deliberation room, in uncomfortable conditions, under pressure from significant time constraints.[28]

P. Prokhorov, who is also a judge, but of the first instance, noted in 2021 that "in today's realities, the institution of a deliberation room is not always appropriate, it seems that it should be of a completely different nature – instead of the secrecy of the deliberation room, the secrecy of the meeting of judges should be ensured, i.e. the discussions that take place outside the deliberation room during the preparation of draft court decisions and dissenting opinions".[29]

Finally, on 30 June 2023, two draft laws were registered in the Ukrainian parliament: No. 9445 "On Amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges' and Certain Legislative Acts of Ukraine on Improving the Rendering and Pronouncing of Court Decisions'[30] and No. 9446 'On Amendments to the Code of Ukraine on Administrative Offences and the Code of Criminal Procedure of Ukraine on the Procedure for Rendering and Pronouncing of Court Decisions'".[31] The draft laws are aimed primarily at removing the deliberation room from all types of court proceedings in Ukraine.

The Explanatory note to draft law No. 9445 stated, inter alia, that the concept of a "deliberation room" is a vestige of Soviet legislation, which today looks like excessive formalism and meet neither the purpose of introducing the term "secrecy of the deliberation room", which should primarily prohibit interference and influence on court decision-making, nor the essence of judicial activity, which involves the administration of effective justice within a reasonable time.[32]

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27 *Hudyma, Hudyma-Pidverbetska*, fn. 18, 22.

28 *O. Kibenko*, Чи потрібні відкриті судові засідання та нарадча кімната в суді касаційної інстанції? [Do we need open court sessions and a meeting room in the court of cassation?] 7 October 2019, https://supreme.court.gov.ua/supreme/pres-centr/zmi/795661/, accessed 7 March 2025.

29 *Prokhorov*, fn. 8, p. 98.

30 Draft law on Amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges' and Certain Legislative Acts of Ukraine on Improving the Rendering and Pronouncing of Court Decisions, https://itd.rada.gov.ua/billInfo/Bills/Card/42180, accessed 7 March 2025.

31 Draft law on Amendments to the Code of Ukraine on Administrative Offences and the Code of Criminal Procedure of Ukraine on the Procedure for Rendering and Pronouncing of Court Decisions, https://itd.rada.gov.ua/billInfo/Bills/Card/42181, accessed 7 March 2025.

32 Explanatory note to the draft law on Amendments to the Law of Ukraine 'On Judiciary and the Status of Judges' and Certain Legislative Acts of Ukraine on Improving the Rendering

In addition, the Explanatory note stated that the procedural laws of such as the United States of America, Canada, the United Kingdom, Germany, Switzerland, France and Poland were analysed, and it was noted that they do not provide for a special room or premises for decision-making.[33]

It is worth noting that the approach laid down in draft law No. 9445 was also criticised, in particular, by the High Council of Justice, judicial governance in Ukraine that provides binding advisory opinions on draft laws on the judiciary and the status of judges.[34] In its advisory opinion, the High Council of Justice noted that the deliberation room:

> "undoubtedly has an important practical purpose and is one of the methods of preserving the independence of a judge [...] The absence of the possibility of procedural 'seclusion' of a judge or a panel of judges to discuss the circumstances of a case significantly increases the risks of corruption and the risks of attempts to influence judges, which, in turn, undoubtedly affects the authority of justice in Ukraine".[35]

Despite some criticism, on 19 December 2024, the draft law No. 9445 was adopted as Law No. 4173-IX and entered into force on 08 February 2025. As noted above, it only applies to civil, commercial and administrative proceedings. At the same time, the draft law No. 9446, which deals with criminal proceedings and administrative offences, is currently pending in the Parliament and it is unclear when it will be adopted as law of Ukraine. Therefore, in the next section, we will focus on the analysis of those amendments to the procedural legislation that have already entered into force and are actively applied in civil, commercial and administrative proceedings.

III. Changing the Secrecy of the Deliberation Room to the Secrecy of the Court Decision-making under Law No. 4173-IX

1. Key Changes under Law No. 4173-IX

Law No. 4173-IX amended four legislative acts, namely: the Law of Ukraine "On the Judiciary and the Status of Judges" and three procedural Codes –the Civil Procedural Code of Ukraine, the Commercial Procedural Code of Ukraine and the Code of Administrative Procedure of Ukraine.

The amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" only concern the replacement of the concept of "secrecy of the room" with "secrecy of court decision-making" in the wording of the judge's obligation to keep

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and Pronouncing of Court Decisions, https://itd.rada.gov.ua/billInfo/Bills/Card/42180, accessed 7 March 2025.

33 *ibid*. (Note from authors: we will not refute or confirm the information in the Explanatory Note, as we have not studied the legislation of the respective countries).

34 Paragraph 15 of Part 1 of Article 3 of the Law of Ukraine No. 1798-VIII of 21 December 2016 'On the High Council of Justice'.

35 On providing an advisory opinion on the draft law No. 9445. High Council of Justice, https://hcj.gov.ua/doc/doc/46769, accessed 7 March 2025.

it confidential and the disciplinary offence for such disclosure.[36] The most important amendments to the procedural Codes include changing the stage of "court's leaving for deliberation room" to the stage of "court decision-making" and removing from all articles of the Civil Procedural Code of Ukraine, the Commercial Procedural Code of Ukraine and the Code of Administrative Procedure of Ukraine the term "deliberation room". The amendments to the procedural Codes are identical and include, in particular, the following:

(i) when moving to the stage of "court decision making", the court should not announce the approximate time of the court decision pronouncement, as previously provided, but the exact time of its pronouncement in the same court session;[37]
(ii) a novelty is provided that in exceptional cases, depending on the complexity of the case, the court may postpone the rendering and pronouncement of the court decision for a period not exceeding ten days from the date of transition to the stage of court decision-making, indicating the date and time of its pronouncement;[38]
(iii) the parameters of the secrecy of decision-making have been slightly changed given its replacement with the secrecy of the deliberation room. From now on, the discussion and adoption of the decision may take place in any court premises, while judges are prohibited from discussing the circumstances and case files, the application of the law and case law in the case, as well as the content of the court decision with persons other than the judges considering the case. Also, as of 8 February 2025, the judges are no longer prohibited from considering other cases during the decision-making stage;[39]
(iv) the rule on drafting and signing court decisions only in the deliberation room has been excluded. Currently, the only requirement is that the court decision is signed by judge(s) that considered the case, regardless of the physical venue of such signing;[40]
(v) the court has the right to issue a shortened (brief) decision, i.e. consisting of only the introductory and operative parts, and then issue a full decision, notifying the parties when it is ready. At the same time, until 8 February 2025, the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine and the Code of Administrative Court Procedure of Ukraine provided that the court decision is pronounced in the court session that concludes the public hearing of the case. In other words, if the court had a full decision ready, it had to read it aloud in

36 Articles 56 and 106 of the Law of Ukraine 'On the Judiciary and the Status of Judges' as amended on 8 February 2025.
37 Article 219 of the Commercial Procedural Code, Article 244 of the Civil Procedural Code of Ukraine and Article 227 of the Code of Administrative Procedure of Ukraine as amended on 08 February 2025.
38 *ibid*.
39 Article 220 of the Commercial Procedural Code of Ukraine, Article 245 of the Civil Procedural Code of Ukraine and Article 228 of the Code of Administrative Procedure of Ukraine as amended on 8 February 2025.
40 Parts 2,5 of Article 233 of the Commercial Procedural Code of Ukraine, parts 2,5 of Article 259 of the Civil Procedural Code of Ukraine and Parts 2,6 of Article 243 of the Code of Administrative Procedure of Ukraine as amended on 8 February 2025.

front of all participants present at the hearing, which could take hours. According to the amendments, the court may now pronounce only the introductory and operative parts of the full judgement and immediately hand over copies of the decision to the parties of the case that were present at the court hearing.[41]

2. Problematic Issues of Application of New Rules of Procedural Law

Even before the entry into force of Law No. 4173-IX, on 29 January 2025, the Supreme Court –the highest court in the Ukrainian judicial system – had already issued "Recommendations to Appellate and Local Courts in connection with the Abolition of the Deliberation Room", where it noted that the novelty was the abolition of the "deliberation room" as a specially equipped room for the passing of a court decision, where the court must go to pass and sign court decisions. At the same time, it emphasised that the general principles of rendering and pronouncing court decisions remained unchanged. The Supreme Court clarified that:

(i) the court decisions may be rendered and signed in any court premises where it is possible to discuss issues arising in the course of passing a court decision in a panel proceeding while ensuring the secrecy of the court decision. The court may leave the courtroom or remain in it to render a court decision;

(ii) by way of exception, Law No. 4173-IX empowers the court not to pass or announce a court decision immediately after the end of the court debates, but to postpone the court hearing for a period not exceeding ten days. During this period, the court must render a full court decision. No other procedural actions may be taken in the same case during this period, as well as at the court hearing scheduled for the pronouncement of the court decision. If a court adjourns a court hearing, it shall issue a ruling specifying the day and time of the court decision, and the participants shall be notified of such hearing in the manner prescribed by the procedural code. At the same time, there is no prohibition to consider other cases during this period;

(iii) a shortened (introductory and operative parts) decision may be pronounced at a court hearing. In this case, the full court decision is postponed for a period not exceeding ten days, and if the case was considered in a simplified procedure, not exceeding five days from the date of the completion of the case. The court shall notify the parties to the case of the time when the full court decision will be drafted after the pronouncement of the shortened (introductory and operative parts) court decision, but a new court hearing shall not be scheduled for its pronouncement.[42]

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41 Part 1 of Article 240 of the Commercial Procedural Code of Ukraine, Part 1 of Article 268 of the Civil Procedural Code of Ukraine and Part 1 of Article 250 of the Code of Administrative Procedure of Ukraine as amended on 8 February 2025.

42 Рекомендації апеляційним та місцевим судам у зв'язку зі скасуванням інституту «нарадчої кімнати» [Recommendations to Appellate and Local Courts in connection with the Abolition of the 'Deliberation Room'], 29 January 2025, https://supreme.court.gov.ua/supreme/pres-centr/news/1748287/, accessed 7 March 2025.

The Supreme Court's explanation of the need for a full decision to be made when a court exercises the right to postpone the decision-making is debatable, as the Civil Procedural Code of Ukraine, the Commercial Procedural Code of Ukraine and the Code of Administrative Procedure of Ukraine do not contain a clear provision on this.[43] Moreover, all of these Codes provide that in exceptional cases, depending on the complexity of the case, the drafting of a full decision may be postponed for a period not exceeding ten days, and if the case was considered in a simplified procedure, not exceeding five days from the date of completion of the case. Depending on the complexity of the case, the drafting of a full ruling may be postponed for a period not exceeding five days from the date of the pronouncement of the shortened (introductory and operative parts) ruling.[44]

In view of this, some first instance judges argue that the procedural law allows a judge to pronounce the introductory and operative parts of a decision in situations where the judge exercised the right to postpone the decision-making.[45]

The means to postpone the decision-making is also debatable. In the above recommendations the Supreme Court indicates that the court must issue a ruling that should be sent to the parties of the case. The Supreme Court itself already has a practice of issuing such rulings.[46] At the same time, some judges believe that it is not necessary to issue a ruling on the postponement of the case and notify the parties to the case if the right to postpone the decision-making is exercised by the court. Rather the court only informs them of the date and time of the pronouncement of the decision.[47]

We also anticipate that the absence of at least some examples of "exceptional cases" in the procedural Codes in which the decision-making may be postponed will facilitate the wider application of this rule.

We also believe that Law No. 4173-IX is flawed by not allowing a judge to inform a judge's assistant about the progress of the discussion during the court decision-making process to the extent necessary to draft a court decision, since in practice, it is the judge's assistant who prepares most of the first drafts of court decisions. The need to prescribe such a right in the law is also argued by *P. Prokhorov*.[48]

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43 *Brych*, fn. 2.

44 Part 6 of Article 233 of the Commercial Procedural Code of Ukraine, Part 6 of Article 259 of the Civil Procedural Code of Ukraine and Part 3 of Article 243 of the Code of Administrative Procedure of Ukraine as amended on 8 February 2025.

45 *O. Khotynska-Nor, A. Potapenko, D. Svoiak,* Основні новели Закону №4173-IX щодо вдосконалення ухвалення та проголошення судових рішень: коментарі членів авторського колективу законодавчих пропозицій [The main novelties of the Law No. 4173-IX on improving the rendering and pronouncing of court decisions: comments of the members of the author's team of legislative proposals] Judicial and Legal Newspaper. 27 January 2025, available from https://sud.ua/uk/news/, accessed 7 March 2025. *Brych*, fn. 2.

46 Ruling of the Supreme Court, 13 February 2025, Case No. 909/386/21, https://reyestr.court.gov.ua/Review/125191775, accessed 7 March 2025.

47 *V. Datsenko, D. Svoiak, O. Tykhanskyi,* Вилучення «нарадчої кімнати» з процесуальних кодексів – дискусійні питання на прикладі ЦПК [Abolition of the 'deliberation room' from the procedural codes – issues on the example of the Civil Procedural Code] Judicial and Legal Newspaper. 25 February 2025, available from https://sud.ua/uk/news/, accessed 7 March 2025. *Brych*, fn. 2.

48 *Prokhorov,* fn. 8, p. 100.

IV. Conclusions

Law No. 4173-IX provides for some of the most significant changes to the civil, commercial and administrative proceedings of Ukraine since 2017 regarding the procedure for rendering court decisions, abolishing the concept of a "deliberation room" as a special room only in which judges were to render, draft and sign court decisions, and replacing the secrecy of the deliberation room with the secrecy of the court decision-making.

For many years, the scholarly and judicial community in Ukraine expressed different views on the feasibility of the deliberation room, as its application in practice had a significant number of both institutional (lack or insufficient number of deliberation rooms in courts) and procedural challenges (excessive formalism due to the need to draft and sign court decisions only in the deliberation room).

In the end, the legislator did not choose to update this procedural instrument, but to abolish it completely to increase the efficiency of the process and the administration of justice within a reasonable time. In general, we consider changes introduced by Law No. 4173-IX to be positive, as they are aimed at introducing clear terms and stages of rendering and pronouncing a court decision in civil, commercial and administrative proceedings.

It should be noted that the judicial community has already identified some different approaches to certain aspects of the application of the updated rules regarding the method of postponement of the decision-making, as well as the possibility of adopting a shortened court decision following such postponement. In addition, the absence of at least some examples of "exceptional cases" in the procedural Codes in which the decision may be postponed will facilitate the wider application of the relevant rule. Nevertheless, hopefully, the introduced changes will increase the efficiency of civil, commercial and administrative proceedings and, in general, will have a positive impact on ensuring the right to a fair trial.[49]

We also expect draft law No. 9446 to be adopted as soon as possible, which would harmonise the approach introduced by Law No. 4173-IX in criminal proceedings and administrative offence cases as well, i.e. in the entire judicial system of Ukraine.

49 *Brych*, fn. 2.

Remigiusz Sobon*

Monetary Non-Pecuniary Damages for Infringement of a Legal Person's 'Good Name'

Abstract

This article examines the possibility and the application of monetary non-pecuniary damages in the case of infringement of a legal person's good name under Polish law. This article analyses how non-pecuniary damages to a legal person can be applied, by accessing views in doctrine and jurisprudence and assessing whether there are arguments against granting non-pecuniary damages to a legal person as a rule. Secondly, this article focuses on explaining the understanding of harm (as non-pecuniary loss to the reputation) in the case of a legal person, also through its functions. The presented arguments demonstrate that the traditional understanding of harm cannot be applied to a legal person and that the non-pecuniary loss in case of a legal person is supposed to be understood as worsening of the condition of a good name. This article further discusses the possibility for occurrence of non-pecuniary loss in different kinds of legal persons. It shows whether the potential for non-pecuniary loss is different whether a legal person is an entrepreneur or a non-profit organisation.
Keywords: non-pecuniary damages, harm, non-pecuniary loss, functions of non-pecuniary damages awarded to a legal person, good name, infringement of personal rights of a legal person, reputation.

Abstract deutsch

Dieser Artikel befasst sich mit der Möglichkeit und der Art und Weise der Anwendung des immateriellen Schadenersatzes im Falle der Verletzung des guten Rufs einer juristischen Person im polnischen Recht. Zunächst wird die Möglichkeit, einer juristischen Person immateriellen Schadenersatz zuzuerkennen, anhand der in Lehre und Rechtsprechung zu diesem Thema vertretenen Auffassungen analysiert und untersucht, ob es Argumente gibt, die dagegensprechen, einer juristischen Person generell immateriellen Schadenersatz zuzuerkennen. Zweitens geht es darum, das Verständnis des Schadens (als nichtvermögensrechtliche Beeinträchtigung des guten Rufs) im Falle einer juristischen Person auch anhand ihrer Funktionen zu erläutern. Die vorgebrachten Argumente zeigen, dass das traditionelle Verständnis des Schadens nicht auf eine juristische Person angewendet werden kann und dass der immaterielle Schaden im Falle einer juristischen Person als Verschlechterung des guten Rufs verstanden werden muss. Anschließend wird die Möglichkeit des Auftretens eines immateriellen Schadens bei verschiedenen Arten von juristischen Personen diskutiert. Es wird aufgezeigt, ob das Potential für einen immateriellen Schaden unterschiedlich

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ist, je nachdem, ob es sich bei der juristischen Person um einen Unternehmer oder eine gemeinnützige Organisation handelt.
Keywords: immaterieller Schaden, juristische Person, Ruf, Verletzung der persönlichen Rechte.

I. Introduction

In Polish civil law, personal rights (such as reputation, dignity, life or health) are, as stated in Article 23 of the Polish Civil Code[1] (hereinafter CC), attributed to a natural person (human being). In case of infringement of such a right, the person whose personal right has been infringed or whose personal right is threatened by the acts of another, may demand, first, that the action ceases to continue (provided it is unlawful). Secondly, he may demand that the infringer performs the actions necessary to remove effects of the infringement, which means making a statement of appropriate content and form. Those two measures are hereinafter referred to as non-monetary measures of protection of personal rights. Thirdly, according to Article 24 § 1 CC, under the rules provided by the Civil Code, a claim arises to monetary non-pecuniary compensation[2] or payment of an appropriate sum of money to a designated social purpose. Fourth, according to Article 24 § 2 CC, if there is harm because of the infringement of a personal right, the affected party may demand damages on general principles. Those are called monetary measures of protection of personal rights.

According to Article 43 CC, the rules on the protection of the personal rights of natural persons apply accordingly to legal persons. Therefore, it is necessary to consider which of the claims indicated in Article 24 CC will also apply to the protection of personal rights of legal persons. It should be noted that the legislator does not provide guidance on the understanding of the concept of application of these provisions to legal persons.[3] Undoubtedly, a legal person may use the means of protection of personal rights granted by law to a natural person.[4] A legal person is entitled to non-monetary measures of protection of personal rights.[5] There is also no doubt in the doctrine about the possibility of using a claim for damages, based on general princi-

1 Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny, t.j. Dz. U. z 2024 r. poz. 1061 z późn. zm. [Act of 23rd of April 1964 – Civil Code, OJ 2024, Item 1061].

2 Meaning monetary compensation for non-pecuniary loss (pol. *zadośćuczynienie*), hereinafter referred to as "non-pecuniary compensation". Non-pecuniary damages should be distinguished from pecuniary damages, hereinafter referred to as "damages", which are to be understood as compensation for pecuniary damage (pol. *odszkodowanie*).

3 *A. Kubiak-Cyrul*, Dobra osobiste osób prawnych, Cracow 2005, p. 128.

4 *A. Kubiak-Cyrul*, Ochrona dóbr osobistych osób prawnych w prawie polskim in: , J. Balcarczyk (ed.), Dobra osobiste w XXI wieku. Nowe wartości, zasady, technologie, Warsaw 2012, pp. 495-496.

5 *J. Frąckowiak*, Osoby prawne in: M. Safjan (ed.), System Prawa Prywatnego. Tom 1. Prawo cywilne część ogólna, Warsaw 2012, pp. 1201-1202, *K. Rataj, N. Skiba, P. Szczepanek*, Katalog dóbr osobistych in: I. Lewandowska-Malec (ed.), Dobra osobisteWarsaw 2017, pp. 111-112, *Kubiak-Cyrul*, fn. 4, pp. 495-496.

ples[6] in accordance with Article 24 § 2 CC.[7] However, it is controversial whether a legal entity may be entitled to a claim for non-pecuniary damages under third sentence of Article 24 § 1 CC.[8]

This article examines: first, whether non-pecuniary damages can be applied to violations of the reputation of legal persons, and second, if yes, how the amount of said non-pecuniary damages can be determined.

Non-pecuniary damages for infringement of the reputation of a legal person are regulated by Article 448 CC,[9] applied to a legal person accordingly due to the reference in Article 43 CC. Article 448 CC states that in the event of infringement of a personal right, the court may grant the person whose personal right has been infringed an appropriate sum as monetary non-pecuniary damages for the harm suffered or award an appropriate sum of money to the social purpose indicated by him, regardless of other measures needed to remove the effects of the infringement.

II. Doctrinal views on non-pecuniary damages for infringement of a legal person's reputation

Doctrinal opinions on application of Article 448 CC to legal persons are mixed. This is primarily because the traditional understanding of the word "harm" used in this provision, which is the basis for awarding non-pecuniary damages, causes interpretative difficulties. There is no doubt that harm (understood as non-pecuniary loss) in individuals ought to be understood as some kind of physical suffering. This was written as early as 1956 by Z. Radwański, who linked the (then novel) compensatory function of non-pecuniary damages to the amount of suffering experienced by the injured person.[10] A similar opinion is presented by A. Szpunar, who emphasises that harm consists of certain physical and mental suffering experienced by the injured.[11] Similar opinion is also expressed by authors of other publications.[12]

Therefore, when interpreting the concept of harm in the context of a legal person it is therefore necessary to reject its most traditional understanding. This is because it leads to the conclusion that non-pecuniary damages, by their very nature, cannot be granted to a legal person, because, as a non-human entity, it is not capable of

6 Which means rules stated in Art. 415 CC and further, i.e. on a fault basis, although not exclusively.

7 *Kubiak-Cyrul*, fn. 4, p. 496, *P. Machnikowski*, Odpowiedzialność za majątkowe skutki naruszenia dobra osobistego, in: J. Balcarczyk (ed.) Dobra osobiste w XXI wieku. Nowe wartości, zasady, technologie, Warsaw 2012, p. 20.

8 *P. Machnikowski, A. Śmieja,* Naprawienie szkody niemajątkowej, in: System Prawa Prywatnego. Tom. 6. Warsaw 2018, p. 256, *K. Świątczak*, Dobra osobiste osób prawnych w polskim prawie cywilnym, Łódź 2020, p. 75, *Frąckowiak*, fn. 5, p. 1199.

9 A legal person, for obvious reasons, cannot suffer personal injury, so Art. 445 CC will not apply.

10 *Z. Radwański*, Zadośćuczynienie za szkodę niemajątkową: rozwój i funkcja społeczna, Poznań 1956, p. 48.

11 *A. Szpunar*, Zadośćuczynienie za szkodę niemajątkową, Bydgoszcz 1999, p. 66.

12 See *Machnikowski, Śmieja*, fn. 8, p. 787, similarly *P. Sobolewski* in: K. Osajda, W. Borysiak (eds.), Kodeks cywilny. KomentarzWarsaw 2024, Art. 448 mn. 35-39.

experiencing mental suffering.[13] Such a view, even though it has been reflected in case law,[14] should be considered incorrect, because applying accordingly (as stated in Article 43 CC) does not mean applying the identical interpretation of Article 448 CC as in the case of individuals.

One of the solutions of this problem was to use the existing "theory of organs",[15] according to which the harm suffered by the legal person should be understood as harm suffered by members of its organs. Such a view should also be considered inaccurate.[16] Actions that are intended to infringe the personal rights of a legal person should be aimed at the essence of the organisational entity and its personality.[17] Thus, the discomfort and negative feelings of members of the organs of a legal person cannot be considered equal to violating the personal rights of legal persons. It is therefore impossible to consider that a legal person is capable of suffering harm through members of its organs.[18]

Many of the other answers in the doctrine are based on a rather oversimplified, pragmatic argumentation that omits, in part, the complexity of this problem. For example, J. Frąckowiak citing legal persons as an example, states that if personal rights do not involve the mental experiences of the injured party, there are no clear grounds for denying such a person non-pecuniary damage. He argues that the infringer of the personal rights of a legal person should not be put in a better position than the infringer of the personal rights of an individual.[19] Authors of other publications also argue in favour of granting non-pecuniary damages to a legal person, mainly citing systemic and purposive aspects, often supporting them with arguments about the intolerability of discrimination against legal persons.[20] A broader answer to this question is given by J. Koczanowski, approving the award of non-pecuniary damages to a legal person. He believes that the mere statement about possibility of granting non-pecuniary damages does not immediately mean that it will be granted in every

13 See *Machnikowski, Śmieja*, fn. 8, p. 787 and *Sobolewski*, fn. 12, Art. 448 mn. 35-39.

14 See Judgment of the Court of Appeals in Cracow of 28 September 2999, I Aca 464/99, Transformacje Prawa Prywatnego 3|2002, p. 131, Judgment of the Court of Appeals in Warsaw of 9 February 2007, VI Aca 960/06, Apelacja Warszawska 1|2008 item 103.

15 A theory according to which a legal person by means of its organs can act on a principle similar to a human being: he can think, express his will, and real collective persons are not only capable of legal actions, but also of expressing their will and acting – f.e. see *J. Mucha-Kujawa*, Teoretycznoprawne aspekty przedstawicielstwa organizacyjnego jako pragmatycznego sposobu reprezentacji osoby prawnej, Studia Prawnicze 3|2017, p. 151.

16 *P. Konik*, 'Krzywda spowodowana naruszeniem dobrego imienia osoby prawnej, in: A. Kaźmierczyk, K. Michałowskiej, M. Szaraniec (eds.), Verba volant, scripta manet. Księga jubileuszowa dedykowana Pani Profesor Bogusławie Gneli, Warsaw 2023, p. 453, Supreme Court decision of 24 September 2008, II CSK 126/08, Orzecznictwo Sądu Najwyższego Izba Cywilna 2|2009 item 58.

17 See *P. Lewandowski*, O relacji dóbr osobistych osób prawnych i osób fizycznych, Studia Prawnoustrojowe UWM 46|2019, p. 237.

18 *Konik*, fn. 16, p. 453.

19 J. *Frąckowiak*, Osoby prawne in: M. Safjana (ed.), System Prawa Prywatnego. Tom 1. Prawo cywilne – część ogólna, Warsaw 2007, p. 1087, this opinion has not been altered in the latest publication of the series – see *Frąckowiak,* fn. 5, p. 1202.

20 *Rataj, Skiba, Szczepanek*, fn. 5, p. 111 – 112, *N. Mrukowska*, Wizerunek gminy i jego ochrona, Warsaw 2020, pp. 186-187, *Świątczak*, fn. 8, p. 76, *Szpunar,* fn. 11, p. 210.

case of infringement. He points out that the court, when analysing a particular case, must determine the occurrence of non-pecuniary loss on the part of the injured legal person, using criteria that are as objectivised as possible.[21] A deeper analysis is undertaken by M. Kalinski, who denies the legal person's claim for non-pecuniary compensation, pointing out that the negative effects in terms of turnover or profit are cases of property damage, and thus cannot be compensated by non-pecuniary compensation. He recognises that non-pecuniary compensation cannot compensate for damage to a legal person in the form of loss of reputation.[22]

A. Kubiak-Cyrul undertakes a more complex analysis. She begins by stating that a legal person can also claim non-pecuniary damages. As arguments, she points to linguistic aspects (through the use of the words "the one whose personal right has been infringed" rather than using a word "person" in Article 448 CC) and the fact that a legal person is entitled to non-pecuniary damages under Article 212 § 3 of the Polish Penal Code[23] (hereinafter as "PC"). She also criticises the argument that legal persons, by their very nature, cannot suffer non-pecuniary harm, when the concept of harm is used in its traditional sense.[24]

One of the most interesting analyses about non-pecuniary damages in the context of the protection of the good name of legal persons was conducted by P. Konik. First, he attempts to determine what harm means in the case of legal persons, referring to the concept expressed in the jurisprudence, according to which the harm in such a situation is the non-pecuniary loss in the personal right in question. However, this concept, according to the author, poses several difficulties: in the case of reputation, this would require establishing how the reputation (good name) of the legal person worsened, and that this negative behaviour had a negative impact on this personal right. In many cases this seems very difficult (even sometimes impossible). He also raises the very important problem of the relationship between non-pecuniary loss and pecuniary loss to the legal person arising from harm to reputation. He rightly notes that in case of legal persons, especially in the case of entrepreneurs,[25] there is a different proportion of the non-pecuniary sphere to the pecuniary sphere than in the case of natural persons. The author concludes his analysis by saying that the potential for harm in legal persons is smaller than in natural persons.[26]

M. Safjan provides a particularly interesting perspective on this issue: analysing the content of Article 448 CC shortly after its introduction, he pointed to the fact that the compensatory functions of non-pecuniary damages granted to legal persons have increased in importance. He noted that the protection of the personal rights of legal persons is, in fact, about protecting the objectively understood interests of this person related to his personal rights. In his opinion, the loss compensated by non-pecuniary damages in this case should be understood broadly and include the interests of the

21 *J. Koczanowski*, Ochrona dóbr osobistych osób prawnych, Cracow 1999, p. 157.
22 *M. Kaliński*, Odpowiedzialność odszkodowawcza in: A. Olejniczaka (ed.), System Prawa Prywatnego. Tom 6. Prawo zobowiązań - część ogólna, Warsaw 2023, p. 108.
23 Ustawa z dnia 6 czerwca 1997 r. Kodeks karny, Dz. U. z 2024 r. poz. 17 with changes [Act of 6 June 1997 – Penal Code, OJ 2024, Item 17].
24 *Kubiak-Cyrul*, fn. 3, pp. 236-242.
25 Meaning a legal person conducting business in its own name, as stated in Art. 43^1 CC.
26 *Konik*, fn. 16, pp. 452 – 456.

legal person related to his personal rights, also in terms of hard to measure pecuniary loss.[27]

III. Judicial views on non-pecuniary damages for infringement of a legal person's reputation

Within such a practical problem, it is also impossible not to refer to the case law. The dominant opinion in case law of the Polish Supreme Court allows the application of non-pecuniary damages to cases of infringement of personal rights of legal persons. Just analysing older case law, the Supreme Court has already stated rather cautiously that Article 448 CC may apply in a situation where the plaintiff is a legal person, but this depends on the circumstances of the specific case.[28]

This opinion is also presented in more recent case law. The Polish Supreme Court, in the justification of its judgment of 24 September 2008,[29] noted that the interpretation of the concept of harm applied when the injured parties are natural persons does not exclude the application of Article 448 CC to legal persons. The Court stated that legal persons indeed experience non-pecuniary loss as a result of infringement of their personal rights, which cannot be measured in monetary amounts. In support of this thesis, the Supreme Court pointed out that the possibility of awarding non-pecuniary damages to a legal person is justified by the fact that previous case law in this context has emphasised that this institution has not only a compensatory function, but also a satisfying, repressive and preventive and educational function. This position is also widely endorsed in the case law of appellate courts in Poland.[30]

The problem of the amount of non-pecuniary damages awarded to a legal person was addressed by the Supreme Court in a later decision, in which it undertook an analysis of the non-pecuniary damages awarded to a charitable organisation. It held that the amount of non-pecuniary damages awarded to a non-profit must be, on the one hand, appropriate from the perspective of the infringement, and, on the other hand, constituting a clear hardship for the infringer of the personal right, to deter him and persons in a similar situation from taking such actions in the future.[31]

27 *M. Safjan*, Ochrona majątkowa po zmianie przepisów kodeksu cywilnego, Przegląd Prawa Handowego 1|1997, p. 11.

28 Supreme Court decision of 15 December 1975, I CR 887/75, LEX, No. 7780, which also finds recognition in the decision of the Supreme Court mentioned below and in the decision of the Court of Appeals in Warsaw of 18 June 2018, I Aca 132/17, LEX, No. 2520507 and other decisions.

29 Supreme Court decision of 24 September 2008, II CSK 126/08, Orzecznictwo Sądu Najwyższego Izba Cywilna 2|2009 item 58.

30 See Court of Appeals in Cracow decision of 3 October 2022, I Aca 1287/20, LEX, No. 3487889, Court of Appeals in Warsaw decision of 3 January 2022, I Aca 354/21, LEX, No. 3304521, Court of Appeals in Szczecin decision of 9 November 2020, I Aca 281/20, LEX, No. 3150088, Court of Appeals in Warsaw decision of 14 February 2019, I Aca 1354/17, LEX, No. 2637897.

31 Supreme Court decision of 13 January 2012, I CSK 790/10, LEX, No. 1129077, endorsed in appellate court decisions, for example Court of Appeals in Lublin decision of 24 May 2022,

Similar conclusions were also adopted in the reasoning of the Supreme Court resolution, the operative part of which accepted (although indirectly) awarding non-pecuniary damages to a legal person. The Court, in the reasons for the resolution, began its consideration by stating that Article 448 CC applies under Article 43 CC to legal persons, which allows legal persons to claim for non-pecuniary damages.[32]

The jurisprudence of the Supreme Court about non-pecuniary damages for infringement of personal rights of legal persons was summarised, in the Supreme Court's resolution of 3 October 2023.[33] Here the Court stated that Article 448 CC (now Article 448 § 1 CC) applies accordingly to legal persons (Article 43 CC). The Court first pointed out that, when comparing the personal rights of legal persons to the personal rights of natural persons, both their categories, their functions and purposes are different. In the case of a legal person, personal rights are intended to enable such person to function properly in accordance with the scope of its activities. The Supreme Court also stated that personal rights in case of a legal person cannot mistaken with infringement of the personal rights of individuals who are part of its bodies, because these individuals do not fill the personal substrate of a legal person.

Referring directly to the problem of awarding non-pecuniary compensation, the Supreme Court first emphasised that, the way of applying accordingly the rules on protection of personal rights of legal persons cannot be deduced from the linguistic interpretation of Article 43 CC. According to the Court, the interpretation of the concept of harm also does not exclude the possibility of awarding non-pecuniary damages to legal persons, even though they do not suffer physical and mental suffering. Harm, according to the Supreme Court, in the case of legal persons, should be understood as loss of a non-pecuniary nature resulting from the infringement of the personal right of a legal person. It was stressed that non-pecuniary loss is different from pecuniary loss, and this loss should not be compensated by non-pecuniary damages. It should be defined as non-pecuniary loss consisting of either the inability to or the impediment to the proper conduct of its business as before. Non-pecuniary damages in the case of a legal person are therefore aimed not at providing satisfaction, but at protecting its objective interests related to its personal rights. An additional argument of the Supreme Court is that non-pecuniary compensation, in addition to its compensatory function, also has a preventive, educational and repressive function. The Court also stresses that the compensatory function in the case of a legal person will be fulfilled if the awarded benefit will serve the legal person's business. The repressive and preventive-educational function, on the other hand, are derivatives of the compensatory function, and non-pecuniary damages that does not sufficiently fulfil the repressive and preventive-educational function does not also fulfil the compensatory function. Interestingly, the Court also referred to

I Aca 511/21, LEX, No. 3390489 and Court of Appeals in Warsaw decision of 10 April 2019, I Aca 17/18, LEX, No. 2689776.

32 Supreme Court resolution of 9 November 2017, III CZP 43/17, Orzecznictwo Sądu Najwyższego. Izba Cywilna 5|2018 item 49, with approving note by *M. Sekuła-Leleno*, Dochodzenie roszczenia o zadośćuczynienie pieniężne za naruszenie dóbr osobistych osób prawnych przez następców prawnych osoby prawnej. Glosa do uchwały SN z dnia 9 listopada 2017 r., III CZP 43/17, Glosa 4|2018, pp. 64-65.

33 Supreme Court Resolution of 3 October 2023, III CZP 22/23. LEX, No. 3609802.

the amendment to the Code of Civil Procedure[34] (hereinafter referred to as "CP"), which amended Article 1050 CP.[35] It notes that the amendment, which may result in the ineffectiveness of non-material measures for the protection of personal rights, may lead to a significant deterioration in the current protection of personal rights and may result in an increased demand for greater use of monetary protection measures.[36] Therefore, the Supreme Court in the resolution expressly approves granting (at least in principle) non-pecuniary damages to legal persons.

Analysing the views denying non-pecuniary damages to a legal person, one cannot ignore the position expressed by the Court of Appeals in Cracow, which stated that the harm referred to in Article 448 CC is in the form of physical and mental suffering, which cannot be attributed to a legal person. The Court found that it is impossible to identify a condition analogous to harm in a natural person in a legal person. Thus, according to the Court, a legal person is not entitled to monetary non-pecuniary damages[37]. This judgment met with little acceptance in subsequent case law.[38]

Summarising the discussion, it should be noted that most of both doctrine and case law approve granting non-pecuniary damages to a legal person for infringement of a personal right. This opinion seems to be correct. There are only a few arguments according to which a legal person should be denied non-pecuniary damage, most of which relay on traditional understanding of harm. Therefore, it must be said that as there are no reasons a legal person should be denied non-pecuniary damage, it should be, as a rule, applied to legal persons. That said, different kinds of legal persons may not be able to sustain non-pecuniary loss, and therefore not granted non-pecuniary damages.

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34 Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, Dz. U. z 2023 r. poz. 1550 with changes [Act of 17 November 1964, Code of Civil Procedure, OJ 2023 Item 1550].

35 According to Article 1050 § 4 CP "If, in cases of infringement of personal rights, the debtor does not submit a statement of the required content and in the appropriate form, despite setting a deadline for its submission and threatening him with a fine, the court shall impose a fine of up to fifteen thousand zlotys on the debtor and order that an announcement corresponding to the content of the required statement and in the appropriate form be published in the Court and Commercial Gazette at the debtor's expense. The provisions of Article 1052 and Article 1053 shall not apply. The publication in the Court and Commercial Gazette of the announcement referred to in the first sentence shall, to the extent covered by the announcement, result in the expiration of the claim stated in the enforcement title." This solution has been widely criticized by the doctrine – see *K. Drozdowicz*, Publikacja oświadczenia odpowiedniej treści i w odpowiedniej formie w Monitorze Sądowym i Gospodarczym w sprawach o naruszenie dóbr osobistych – uwagi na tle art. 1050 § 4 KPC, Monitor Prawniczy 6|2023, p. 340, a także *J. Jagieła*, Zmiana egzekucji sądowej roszczenia o usunięcie skutków naruszenia dóbr osobistych poprzez złożenie oświadczenia, Monitor Prawniczy 9|2023, p. 603.

36 Such as pecuniary damages and non-pecuniary damages.

37 Court of Appeals in Cracow decision of 28 September 1999, I Aca 464/99, Transformacje Prawa Prywatnego 3|2002, p. 131.

38 Court of Appeals in Warsaw decision of 9 February 2007, VI Aca 960/06, Apelacja Warszawska 1|2008 item 103.

IV. Non-pecuniary loss in the context of a legal person

As indicated above, non-pecuniary damages are awarded for non-pecuniary loss.[39] However, it is difficult to determine what non-pecuniary loss is in the case of legal persons. Any kind of pecuniary loss clearly cannot be compensated by non-pecuniary compensation.[40] Therefore, non-pecuniary loss remains entirely separate from pecuniary loss. According to the definition of non-pecuniary loss found in the older literature, it means the broadly understood deterioration of the situation of the person affected by it by the infringement of personal rights protected by law, taking into account that it has no effect in the pecuniary sphere of the victim.[41] Although *Z. Radwański*, the author of the above-mentioned definition, emphasised that non-pecuniary damages by its very nature cannot be granted to a legal person,[42] this definition may be accurate regardless of what entity was harmed by the infringement.

It should be emphasised that the reputation of a legal person, for the purposes of this paper, is understood as a situation in which every legal person is entitled to respect for its position and the value it holds in society, as well as the need to guarantee its future ability to carry out its function in the trade.[43] The Polish Supreme Court has stated that non-pecuniary loss suffered by a legal person should be defined as a non-pecuniary loss meaning such an infringement of its personal right that prevents or hinders the proper conduct of its business as before.[44]

At this juncture, it is necessary to distinguish between the non-pecuniary loss itself and its consequences. The non-pecuniary loss itself will be a deterioration of the reputation of a legal person,[45] understood as worsening other entities perception of that person.[46] The consequence of this non-pecuniary loss will be that the legal person is prevented or hindered from conducting its business properly. Non-pecuniary loss must therefore be considered first as deterioration of the reputation of a legal person, and only then from the perspective of its consequences, meaning its impact on current and future activities of the legal person.

V. Functions of monetary non-pecuniary damages

Non-pecuniary damages must fulfil three basic functions: compensatory, repressive and preventive-educational. The repressive function is realised when its amount is adequate to the wrongdoer's attitude towards the act (degree of guilt), and therefore when the non-pecuniary damages constitute a perceptible sanction for the wrongdo-

39 *Szpunar*, fn. 11, p. 63.
40 *Szpunar*, fn. 11, p. 73.
41 *Radwański*, fn. 10, p. 166.
42 *Radwański*, fn. 10, p. 168.
43 *Koczanowski*, fn. 21, p. 139.
44 Supreme Court resolution of 3 October 2023, III CZP 22/23. LEX, No. 3609802.
45 Supreme Court resolution of 3 October 2023, III CZP 22/23. LEX, No. 3609802.
46 *J. Sadomski* in: *K. Osajda, W. Borysiak* (eds.), Kodeks cywilny. Komentarz, Warsaw 2024, Art. 24 mn. 61.

er.[47] The preventive function means that non-pecuniary damages, must also have a preventive significance against possible future infringements.[48] The relationship of these three functions is based on their coexistence and complementarity: the compensatory function is dominant, and the repressive and preventive/educational functions are secondary, though still important.[49]

The compensatory function, being dominant,[50] raises a difficult problem of determining how to compensate (by awarding a monetary sum) loss which is inherently unquantifiable in money. Under the traditional understanding of the compensatory function, non-pecuniary damages should provide satisfaction to the injured party. This satisfaction is to be derived from the fact that the infringement of his personal right was met with an adequate response from the legal order.[51]

In the context of a legal person, the problem arises from its inability to feel satisfaction. It should be therefore emphasised that the compensatory function understood this way, for obvious reasons, cannot be fulfilled in the case of infringement of personal rights of a legal person.

As stated , the harm in the context of a legal person is a non-pecuniary loss to a given personal right,[52] meaning an objectively understood deterioration of that quality, regardless of the subject's feelings.[53] This means, that we should look for possible compensation in the improvement of the state of this quality, so the benefit awarded on this account enables the legal person as much as possible to continue operating in the way as before the infringement.[54] However, such a statement leads us to a question of how non-pecuniary damages can improve the state of this quality.

Consequently, it should be stated that non-pecuniary damages will fulfil the compensatory function if the amount is high enough to enable the legal person, at least approximately, to repair the non-pecuniary loss to its good name. The amount awarded should be set at a level that will enable the legal person to take appropriately effective measures to repair the infringement of his reputation. These may include, for example, measures in the form of organising advertising and promotional campaign, public relations activities or publication of relevant statements, aimed at improving the condition of the reputation of the legal person. In cases where the deterioration of the good name is less severe, measures such as informative publications on the website, social media, or articles in the press may suffice. The measure to improve the state of good name should depend on the extent of non-pecuniary loss to the legal person's reputation. Of course, it should be emphasised that in most cases it will not be possible to determine an amount that allows for perfect compensation of the non-material damage – the Court should be able to determine an amount that is appropriate, and therefore best suited to the purpose of non-pecuniary compensation.

47 *Sobolewski*, fn. 12, Art. 448 mn. 40-41.
48 *Machnikowski, Śmieja*, fn. 8, p. 760.
49 *Radwański*, fn. 10, p. 151.
50 Supreme Court resolution of 3 October 2023, III CZP 22/23. LEX, No. 3609802.
51 *Szpunar*, fn. 11, p. 79.
52 Supreme Court resolution of 3 October 2023, III CZP 22/23. LEX, No. 3609802.
53 Supreme Court resolution of 3 October 2023, III CZP 22/23. LEX, No. 3609802.
54 Supreme Court resolution of 3 October 2023, III CZP 22/23. LEX, No. 3609802.

At this point, it is also worth noting the problem of whether non-pecuniary damages fulfilling the compensatory function understood this way will compensate for property damage in the form of an expense or not.[55] Indeed, it can be argued that the pecuniary damages will also include the expense of reversing the pecuniary consequences of the infringement of a "good name". It is also important to state that the possible measures awarded as non-pecuniary damages for non-pecuniary loss to enable the legal person to reverse the effects of the infringement on its personal rights will also affect the amount of future lost earnings of the legal person. The question should therefore be raised as to whether the compensatory function understood in this way will not result in the non-pecuniary damages actually compensating the pecuniary damage. The answer for this question should be negative. Despite the undeniable effect of such non-pecuniary damages on the amount of future damages, the fact that non-pecuniary damages as presented are intended to compensate only for non-pecuniary loss remains unchanged. Possible side effects of non-pecuniary damages understood this way do not make the purpose of applying this institution different. This is because in the system of protection of personal rights, the means for remedying infringements affect each other and are impossible to be completely separated from each other. Even a judgment awarding pecuniary damages for infringement of the reputation of a legal person, being public, is likely going to affect future non-pecuniary loss. In addition, according to the prevailing view, compensated as pecuniary damages are expenses to prevent further pecuniary loss resulting from the infringement.[56] Using pecuniary damages to compensate for expenses for preventing non-pecuniary loss is not generally approved in the doctrine.[57] In my opinion, such expenses should not be compensated by damages. So, if the court awarding non-pecuniary damages in determining is based on what amount is needed to remedy the non-pecuniary loss to the reputation, the possible impact of these measures on the future pecuniary loss will remain only a side effect.

In connection with the interpretation presented, a question arises about the relationship of the non-pecuniary measure of Article 24 § 1 CC, i.e. the claim for the completion of actions necessary to remove the effects of the infringement, with the claim for non-pecuniary damages. These measures appear to have similar functions and similar purpose.

Said claim for the completion of actions necessary to remove effects of its infringement, is supposed to be, in a sense, remedying he harm done by the infringement,[58] meaning that this claim is supposed to remove or minimise the effects of the infringement, since by the very nature of personal rights their infringement is irreversible.[59] Actions necessary to remove the effects of the infringement are usually

55 As stated in Article 361 § 2 CC damages include the losses which the injured party has suffered (*damnum emergens*) as well as profits which it could have obtained, if no damage were inflicted (*lucrum cessans*). According to Polish doctrine an expense for remedying the effects of pecuniary damage made by the affected party can be construed as a loss, which can be redressed by awarding damages.

56 *Kaliński*, fn. 22, p. 127-128.

57 *Sobolewski*, fn. 12, Art. 361 mn. 70.

58 Supreme Court resolution of 3 October 2023, III CZP 22/23. LEX, No. 3609802.

59 *Sadomski,* fn. 47, Art. 24 mn. 142.

statements to which the infringer may be obliged. They may be, for example, an apology to the injured party, a retraction of the allegations made against the injured party or a correction of the published information.[60] Such statements should be made in an appropriate form and content, and thus be proportional in relation to the infringement and its consequences. It must also provide the injured party with a sufficiently comprehensive protection of his interests in the given circumstances, considering that no excessive and unjustified measures are applied to the infringing party.[61]

The entire system of protection of personal rights (excluding pecuniary damages) serves to repair the non-pecuniary loss to the fullest extent possible. Non-pecuniary loss, however, is repaired firstly by means of non-monetary protection measures directed at removing the effects of the non-pecuniary loss caused by the infringement.[62] This position is particularly supported by the fact that the claim for taking actions necessary for removing the effects of infringement only requires establishing the fact of infringement and its unlawfulness (which is presumed). This means it is granted regardless of the fault of the infringer. Therefore, the claim for reversing the effects of the infringement and the claim for non-pecuniary damages are both, by their very nature, intended to compensate non-pecuniary loss, and the non-pecuniary damages are intended to supplement the protection resulting from the claim for taking actions necessary to remove the effects of infringement.[63] It is also worth emphasising that the claim for the elimination of the effects of infringement, although aimed at compensating non-pecuniary loss, is granted regardless of its occurrence. However, according to the wording of Article 24 § 1 CC, it is left to the Court whether the form of the statement is appropriate, expedient and proportional to the infringement.[64] Thus, depending on the extent of the non-pecuniary loss, different measures may be appropriate to remove the effects of the infringement of a legal person's personal right.

The presented understanding of non-pecuniary loss also turns out to be particularly relevant from the perspective of the previously mentioned amended Article 1050 § 4 CP, according to which, in the event of failure to submit a statement in the appropriate content and form, despite the setting of a deadline for its submission and the threat of a fine, the court shall impose a fine of up to 15,000 zlotys and order the publication in the Court and Economic Monitor of an announcement corresponding to the statement. As convincingly justified in the doctrine and jurisprudence, this amendment may cause the ineffectiveness of measures of non-monetary protection of personal rights.[65] The financial sanction for the debtor for failure to comply with the judgment obliging the publication of an apology will, as a rule, not exceed 20,000 zlotys, so it is not uncommon that the cost of publishing the statement in accordance with the contents of the judgment (e.g. in a newspaper) will be higher than the amount

60 *Sadomski*, fn. 47, Art. 24 mn. 140.
61 *Sadomski*, fn. 47, Art. 24 mn. 142.
62 Constitutional Court decision of 7 February 2005, SK 49/03, Orzecznictwo Trybunału Konstytucyjnego 2|2005 item 13.
63 *Sadomski*, fn. 47, Art. 24 mn. 138.
64 Supreme Court decision of 11 February 2010, I CSK 286/09, LEX, No. 630167.
65 Supreme Court resolution of 3 October 2023, III CZP 22/23. LEX, No. 3609802, *Drozdowicz*, fn. 35, p. 340 and next, also *Jagieła*, fn. 35, p. 603 et seq.

indicated. Objectively, it is therefore more advantageous for the debtor in many cases to pay the fine and incur the costs of publication in the Court and Economic Monitor than to comply with the court judgment.[66] As non-pecuniary damages are intended to supplement the non-pecuniary protection of reputation, it should be emphasised that given the limited effectiveness of the non-pecuniary protection measure of apology, the importance of non-pecuniary damages as a pecuniary protection measure may increase.

As a rule, the Court during the proceedings (including the moment of ruling) does not have sufficient knowledge to assess the future enforceability of a claim. Thus, it may turn out that granting a costly in execution non-monetary measure in the form of a statements while granting non-pecuniary damages may result in extremely different consequences at the stage of execution of this judgment. On the one hand, there is always a significant risk of ineffectiveness of the non-material measure due to the problems with its enforcement, so from the perspective of the compensatory function of non-pecuniary loss, which applies to both of these measures, the protection resulting from the enforcement may not be sufficient. On the other hand, if the Court were to intentionally award greater non-pecuniary damages on the assumption that other non-monetary measures for the removal of the infringement will be enforced in accordance with Article 1050 § 4 CP, then it might turn out that if the judgment is voluntarily executed by the infringer, the non-pecuniary damages will be excessive.

From this perspective, a few possible solutions can be noted. First, in a situation in which the Court, analysing the evidence in the case, notes that the infringer of good name does not intend to comply with the judgment, it should consider reducing the severity of the non-monetary measure at the expense of increasing the amount of non-pecuniary damages. If, on the other hand, the Court has reason to believe that the debtor will comply with the judgment, it should consider awarding a costly non-monetary measure of protection and lower non-pecuniary damages. After all, the purpose of the Court is to provide the fullest possible protection of the infringed personal right according to the amount of non-monetary damage suffered. As a rule, however, Courts should be cautious about awarding measures of non-monetary protection of good name that are costly to execute, due to the debtor's probable calculation which will result in not executing such judgment in the form required by it. The cost of taking appropriate measures by the injured party to remedy non-pecuniary loss to good name should be awarded as non-pecuniary damages per its compensatory function.

While shaping the demand of the lawsuit in the case of protection of reputation, the plaintiff should also consider the possible difficulties in enforcing the claim. In such case, it may be reasonable, firstly, to waive the demand for the award of this non-monetary measure, or secondly, to demand the publication of a statement in the Judicial and Commercial Monitor[67] or another publication in which the costs of publication will not exceed the costs resulting from enforcement in accordance with Article 1050 § 4 CP, while increasing the amount of non-pecuniary damages claimed. As

66 *Drozdowicz*, fn. 35, p. 340 et seq.
67 *Drozdowicz*, fn. 35, p. 343.

such, it should be emphasised that this increases the importance of non-pecuniary damages as a means of compensating for the non-pecuniary loss to a personal right.

VI. Non-pecuniary damages for different types of legal persons

For different legal persons there are significant differences between the pecuniary and non-pecuniary areas of their activities. A typical legal person, which is an entrepreneur, will primarily perform functions of a pecuniary nature, so its main function and objective will be economic profit. However, the performance of pecuniary functions by a legal person does not mean, of course, that there cannot be any non-pecuniary loss to its assets. However, due to the significant differences among specific legal persons within even a single type of legal person, the question of the relationship of the pecuniary and non-pecuniary areas should be evaluated in each and every case.

Particularly pronounced non-pecuniary loss can be found in legal persons engaged in *pro publico bono* activities.[68] This is because usually their function in the trade will be purely non-pecuniary. It will be therefore necessary to determine what negative effects of infringement of the reputation of a legal person involve preventing or hindering the proper conduct of the activities of this legal person in accordance with its function in the trade. It is possible that persons and entities receiving support from non-profit will not be willing to continue to cooperate with it. Thus, the circle of those who will be able or willing to accept support from that non-profit will narrow, making it more difficult to carry out its activities. It is not difficult to imagine a non-profit accused of money laundering, whose main purpose is collecting funds for certain socially beneficial causes. In high probability, many individuals (or entities) receiving support from that non-profit will not want to receive them anymore due to an association with an entity whose public perception is negative. Similarly, non-pecuniary loss on the part of a *pro bono* entity may consist of a lack of volunteers willing to support its goals, often necessary, for example, collecting donations or providing assistance to the beneficiaries of such legal person's activities.

Similar non-pecuniary loss is much more difficult to find in legal persons who are entrepreneurs. In a situation where the number of clients for the products of the business (goods or services) reduces, the loss will in most cases be considered pecuniary loss. Therefore, it needs to be said that making it more difficult or impossible for that legal person to carry out its business as before will undoubtedly have pecuniary repercussions to an overwhelming extent.

It is interesting to consider a situation in which a legal person that is an entrepreneur simultaneously performs *pro publico bono* activities. For example, one can cite hypothetical companies whose activities result in carbon dioxide emissions into the atmosphere, which carry out free tree planting. Similarly, one can also cite companies that, which, besides business, to some extent also engage in free education of young people. Although there are also non-pecuniary aspects of the activities of such legal persons, in most cases the pecuniary interest of such a legal person is dominant,

68 For example, non-profits such as foundations or associations, as well as political parties.

and it is to this interest that the other goods and functions of its activities will be subordinated.[69] Therefore, in the case of the personal rights of legal persons who are entrepreneurs, the primary means of property protection of the personal rights of legal persons should be granting damages,[70] rather than non-pecuniary damages as in the case of natural persons.[71] However, if any non-pecuniary loss can be established in a particular case, it should be compensated by non-pecuniary compensation. In practice, however, the diversity of the trade may result in a situation in which the award of non-pecuniary damages is also justified in other cases.

VII. Conclusion

Summarising the above deliberations, it should be emphasized that a legal person cannot be denied the right to seek non-pecuniary damages for non-pecuniary loss. As a rule, non-pecuniary damages should, first, fulfil a compensatory function and, within its framework, also a repressive and preventive-educational function, which together should be realised in such a way that non-pecuniary damages cannot exceed the extent of non-pecuniary loss. Non-pecuniary loss in the case of a legal person will therefore mean damage to its good name resulting in the inability or impediment to the proper conduct of its activities in accordance with its function in the market. This finding, in turn, leads to the conclusion that the occurrence of non-pecuniary loss depends on the type of activity performed by a legal person. Determining the amount of non-pecuniary damages should therefore consist in setting an amount high enough to enable the legal person to remove, at least to a significant degree, the non-material effects of the infringement of its good name, and thus fulfil the compensatory function of non-pecuniary damages.

69 *Konik*, fn. 16, p. 455.
70 *Konik*, fn. 16, pp. 455-456.
71 *A. Szpunar*, Odszkodowanie za szkodę majątkową, Bydgoszcz 1999, p. 24.

Bartlomiej Kozak*

Commentary on the Resolution of the Polish Supreme Court of 17.8.2021, III CZP 79/19, OSNC 2021, No. 12, item 79

Abstract

Polish law provides for exceptions to the statute of limitations for certain claims connected with rights in rem. A particular constellation is disputed: If a third person builds a structure on a plot of land and the value of the structure significantly exceeds the value of the plot, the owner of the plot has the right to claim that the person who built the structure purchase the plot. While the Polish Supreme Court (Civil Chamber) holds that such a claim is not subject to the statute of limitations, the author disagrees.
Keywords: Polish Civil Code; Limitation Period and Rights in Rem; Rights in Land and Rights in Structures.

Abstract deutsch

Das polnische Recht sieht vor, dass bestimmte Ansprüche im Zusammenhang mit dinglichen Rechten nicht verjähren. Eine besondere Konstellation ist umstritten: Wenn ein Dritter auf einem Grundstück ein Bauwerk errichtet und der Wert des Bauwerks den Wert des Grundstücks erheblich übersteigt, hat der Eigentümer des Grundstücks das Recht, von demjenigen, der das Bauwerk errichtet hat, den Kauf des Grundstücks zu verlangen. Während der Oberste Gerichtshof (Zivilkammer) der Ansicht ist, dass ein solcher Anspruch nicht der Verjährung unterliegt, ist der Autor anderer Meinung.
Keywords: Polnisches Zivilgesetzbuch; Verjährungsfrist und dingliche Rechte; Rechte an Grundstücken und Rechte an Bauwerken.

I. Article 231 § 2 Polish Civil Code

The subject of this commentary is a critical assessment of the position on the invalidity of the claim under Article 231 § 2 of the Polish Civil Code (hereinafter: "CC"), as well as other theses presented by the Supreme Court in the commented resolution of 17.8.2021.

Article 231 § 2 CC reads as follows:

> 'The owner of land on which a building or other device has been erected with a value significantly exceeding the value of the plot of land occupied for this purpose may request that the person who erected the building or other device acquire ownership of the plot of land from him for appropriatecompensation."

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The subject of the claim analysed by the Supreme Court both in resolutions for ref. no. III CZP 109/18 and ref. no. III CZP 79/19 is to make a declaration of intent on the purchase of the plot on which the building or other device was built. It is important that the claim arises when the building or other device significantly exceeds the value of the plot occupied for this purpose. It should be noted that the addressee of the claim is the entity that erected the building or other device or its legal successor.

The subject of consideration by the Supreme Court was presented by the Prosecutor General. The Prosecutor General motivated the submission of the application by the need to remove discrepancies in the interpretation of law that were revealed in the jurisprudence of the Supreme Court in relation to the limitation of the claim under Article 231 § 2 CC. In addition, the Prosecutor General pointed to the need to assess the legitimacy of the resolution of the Supreme Court of 16 May 2019, III CZP 109/18,[1] according to which the claim under Article 231 § 2 CC is not time-barred. In his statement, the Prosecutor General stated that this resolution (i.e. III CZP 109/18) has an unacceptable, lawmaking character.

II. Factual and Legal Status in Resolution III CZP 109/18

The starting point for the analysis is to present the facts and justification of the Supreme Court formulated in the resolution of 16.5.2019., III CZP 109/18, which was an incentive for the Prosecutor General to submit a motion to resolve the legal issue resolved in the voted resolution.

1. Facts of Case III CZP 109/18

The case went to the Supreme Court as a result of a legal question presented by the Polish Court of Appeal. The subject of the case was an action under Article 231 § 2 CC of the owner of an undeveloped property for submitting a declaration of intent on its acquisition by an industrial enterprise. The basis for the claim was the construction of a gas pipeline on the property of the plaintiff.

2. Legal Justification of the Decision in Case III CZP 109/18

With regard to the claim of the owner of the land for the acquisition of ownership of the occupied plot by the person that built the pipeline, the Supreme Court emphasised that this claim is related to the right of ownership and results from the right to dispose of the property. The Supreme Court considered that the adoption of the limitation period for the claim under Article 231 § 2 CC leaves the owner with a further negative or debt collection claim. The court also refers to the concept of a real bond, as well as the renewable nature of the claim for the redemption of real estate. In its justification, the Supreme Court also stated that the claim "for the so-called 'buyout' under Arti-

1 Orzecznictwo Sądu Najwyższego Izba Cywilna (Rulings of the Civil Chamber of the Supreme Court – hereinafter: "OSNC") 2020, No. 3, item 24.

cle 231 § 2 CC, in fact, constitutes a kind of negative claim and, although it aims to change the legal status, it is not in opposition to Article 222 § 2 CC only supplements it."

The arguments presented by the Supreme Court in the resolution in case III CZP 109/18 were upheld and developed in resolution III CZP 79/19.

III. Theses of the Supreme Court Resolution

In this text, I will refer to the following theses of the Supreme Court:

1. On the unitary nature of the restitution claim and the claim under Article 231 § 2 CC;
2. On the existence of premises under Article 231 § 2 CC of a real bond and acceptance, i.e. 'resuscitation' of the claim under Article 231 § 2 CC each subsequent day;
3. On the inconsistency of the limitation period for the claim of the owner under Article 231 § 2 CC with the deadlines for the prescription of real estate under Article 172 CC.

After analysing the theses presented by the Supreme Court, I will present my own position on the limitation of the claim under Article 231 § 2 CC.

1. Unitary Nature of the Restitution Claim and the Claim Under Article 231 § 2 CC

In the justification of the judgment, the Supreme Court indicates that:

1. in terms of its nature and purpose, the claim under Article 231 § 2 CC serves to protect the same type of interests as a negatory action;
2. this claim [Article 231 § 2 CC], as the Supreme Court also noted, is a specialised form of a negatory action.

At the beginning of the considerations, it should be recalled that Article 140 CC grants the owner two basic rights in relation to things. Pursuant to this provision: the owner may, to the exclusion of other persons, *use the item* in accordance with the socio-economic purpose of his right (…). Within the same limits, he can *dispose of a thing* [emphasis added].

A restitution claim is directed against a person who violates property in a way other than by depriving the owner of actual power over the thing. The subject of the restitution claim is to demand the restoration of the legal status and the cessation of violations. *Actio negatoria* is directed against permanent and unlawful encroachment into the sphere of the owner's rights.[2] Restoring the legal status that the owner can claim is a condition in which no one interferes with the owner's property right.[3] In

2 *T. Dybowski*, in: Ochrona własności w polskim prawie cywilnym [Protection of property in Polish civil law] (rei vindicatio — actio negatoria), Warsaw 1969, p. 308.
3 *E. Gniewek*, in: *E. Gniewek* (ed.), System Prawa Prywatnego [The System of Private Law]. Volume 3. Prawo rzeczowe [Material Law], ed., Warsaw 2010 p. 779.

summary, the purpose of the restitution claim is to eliminate future interference *with the owner's right to use things* freely.

In the case of the claim under Article 231 § 2 CC. 'The owner of the land on which a building or other device with a value significantly transferring the value of the plot occupied for this purpose was erected, may request that the person who erected the building or other device acquire ownership of the plot from him for appropriate remuneration.' This claim, unlike a restitution claim, does not refer to the right of the owner to use the thing, but to a specific type of *disposition of the thing*. The subject of the claim is the request to submit a declaration of intent regarding the acquisition of ownership of the plot. This provision grants the owner the right to request a disposal action (conclusion of a contract transferring ownership) with the person who erected the building or other device.

In addition, it should be pointed out that petitory actions are inscribed in the property right, in the sense that they are a natural attribute of the property right, regardless of the existence of detailed regulations in the system of statutory law. In other words, the ability of the owner to demand from a third party the absence of interference with the right to property is a constitutive feature of that right. In the case of the claim under Article 231 § 2 CC, it cannot be stated that the core of the ownership right is the right to require the owner of the land to submit a declaration of will to purchase the plot. This claim arises in extraordinary situations, giving the owner the opportunity to dispose of the property without the need to obtain the consent of the person erecting the building or other facility.

The Supreme Court tried to equate the claim with Article 231 § 2 CC to a restitution claim in order to extend the first regulation on the lack of limitation of this claim (Article 223 CC). However, it cannot be assumed that these claims are single-type claims, as *they implement completely different attributes of property rights.*

In addition, reading the arguments presented by the Supreme Court, one can be convinced that in the event that the owner does not have a claim under Article 231 § 2 CC, i.e. with the claim for the acquisition of ownership of the plot by the owner, the alternative to this claim is a restitution claim. It should be noted, however, that the negative claim is updated only if the property right of the thing is violated *in a different way than by depriving the owner of the actual power over the thing*. In a situation where the owner does not have actual power over the thing, they are entitled to another petitioner's claim: a debt collection claim.

In conclusion, it should be pointed out that it is unjustified for the Supreme Court to state that the claim under Article 231 § 2 CC is a specialised form of a negatory action, as well as that these claims are of the same type.

2. Occurrence on the Basis of the Premises of Article 231 § 2CC of a Real Bond and Acceptance, of the Claim under Article 231 § 2 CC each Subsequent Day

At present, civil law claims arise when the conditions specified in the legislation have been met. In the case of the claim under Article 231 § 2 CC, the premises of the owner's claim to acquire ownership of the plot for appropriate remuneration are:

1. Erection of a building or other facility by a person that does not own the land on which the facility is erected;
2. The value of the erected building or other device significantly exceeds the value of the plot occupied for this purpose.

In the resolution discussed here, the Supreme Court concludes that in the case of Article 231 § 2 CC, there is a certain connection between the claim and the factual situation existing on the property, which consequently excludes its limitation. The Supreme Court refers here to the existence of a real bond structure and to the permanent revival of the claim. The court states that, "as a consequence, this claim is constantly 'being revived' and therefore, as can be understood, its maturity is constantly re-established 'every day separately'."

Real obligations are a category of obligations with properties that bring them somewhat closer to property rights. The subjects of these obligations are persons in a certain situation related to the thing (they are the owners, holders of the thing).[4] However, it should be emphasised that the term 'real bond' is a doctrinal formulation, and the analysis of individual code provisions leads to the conclusion that real liabilities constitute an extremely diverse group.[5]

The Supreme Court, referring to the concept of a real bond, states that the connection of the owner and holder with a specific factual situation (i.e. meeting the conditions of Article 231 § 2 CC) leads to the fact that the claim is revived every day separately, so the claim would not be time-barred, because the deadline would start every day separately.

It should be noted that the concept of a real bond under Article 231 § 2 CC is helpful in analysing subjective changes that may occur during the limitation period. It justifies granting the claim to the legal successor of the owner who was the original addressee of the claim under Article 231 § 2 CC, the attempt to justify the invalidity of the claim by referring to the concept of a real bond is so bad that the adoption of such a thesis leads to the situation that the debt collection claim – regardless of whether it would concern movable or real estate – would never expire. Assuming the Supreme Court's argumentation to be true, the debt collection claim of the owner to the holder for the release of movable property would never expire, because due to the feature of a real bond, it would "revive" every day separately.

Therefore, referring to the nature of a real bond is inaccurate. The debt collection claim is a property claim, so it is time-barred, and the exception is introduced by Article 223 CC.3. Inconsistency of the Limitation Period of the Owner's Claim with Article 231 § 2 CC with the Deadlines for the Prescription of Real Estate under Article 172 CC**.**

In the commented resolution, the Polish Supreme Court assumes that "limitation and prescription are two elements of the same, more general structure of private law, which is antiquity." In addition, the Supreme Court argues that both limitation and prescription serve a similar purpose. In the resolution, the Supreme Court takes the position that there should be consistency and coherence between these institutions,

4 *A. Kubas*, in: Budowa na cudzym gruncie [Construction on someone else's land], Warsaw 1972, pp. 118-119.
5 Ibid., p. 120.

and the adoption of the statute of limitations of the claim under Article 231 § 2 CC contradicts this.

It should be stated that the purpose of the institution of prescription is to remove the long-term discrepancy between factual situation and legal status. The purpose of the statute of limitations is to incentivise creditors to quickly pursue claims and punish them for taking too long to do so. It is reasonable to assume that in certain situations these institutions perform similar functions, but such a state of affairs cannot be treated as an axiom.

It is not difficult to see that the purpose and method of regulating these institutions is different. The statute of limitations is an institution of contract law and refers to the claim of a designated person, while the prescription is an institution of property law and refers to a designated thing.

The institution of prescription is of an orderly nature and leads to the granting of ownership to an entity that has been an independent holder of an object for a long time. This acquisition takes place *ex lege* and is a sanction for the owner for lack of interest in property rights.

In the case of limitation of claims, understood as the subjective right of one entity to demand specific behaviour from another entity, the expiry of the limitation period means that the entity to which the claim is addressed may evade the benefit by raising a plea of limitation. However, the claim is not unenforceable *ex lege* — the activity of the addressee of the claim in the form of raising the objection of the expiry of the limitation period is necessary here.[6]

The assumption that there should be full consistency between the statute of limitations and occupancy is an unjustified assumption. As an example, the limitation period for a debt collection claim for the release of movable property is six years, while three years are sufficient for the prescription of movable property in good faith (Article 174 § 1 CC). It should also be noted that the inconsistency of deadlines occurs in the opposite situation – those who steal movable property will never acquire ownership, due to lack of good faith, and the limitation period for a debt collection claim will expire after six years. On the other hand, a debt collection claim for the release of real estate is not time-barred, but the owner may lose ownership after 20 or 30 years as a result of prescription, so in fact the possibility of pursuing a debt collection claim is limited by the deadlines for prescription. Assuming the consistency of both institutions, there should be a connection between the limitation periods and the periods of prescription, which does not occur in the code provisions.

In addition, it should be noted that initially in the Polish Civil Code – until October 1, 1990 – there was a coherence between the period of prescription and limitation of the claim under Article 231 § 2 CC. With the entry into force of the Act of 28 July 1990 amending the Civil Code,[7] the dates of prescription were changed in Article 172 CC, extending them by ten years to twenty years. Before this amendment,

6 Another opinion is expressed by *P. Machnikowski*, in: *E. Gniewek, M. Machnikowski* (eds), Kodeks cywilny [Civil Code]. Komentarz [Commentary] Warsaw 2023, Article 117, according to which the effect of unenforceability of the claim arises by operation of law, and the fact of unenforceability may only be considered by the court in proceedings upon the debtor's objection or *ex officio*.

7 Polish Civil Code (Journal of Laws No. 55, item 321, as amended).

there was a coherence between the limitation of the claim under Article 231 § 2 CC (general term ten years), and the acquisition of real estate in good faith under Article 172 § 1 CC (also ten years).

Considering the above, the view that the consistency of the terms of prescription and limitation of claims raises to the rank of an axiom in the civil law system is not acceptable. It is true that these institutions have common features and an interpretation resulting in the consistency of these terms should be sought, but this fact cannot justify the *contra legem* interpretation of the invalidity of the claim under Article 231 § 2 CC.

IV. Claim under Article 231 § 2 CC becomes Statute-Barred on General Terms

Pursuant to Article 118 CC, the limitation period for property claims is six years, unless a special provision provides otherwise. The provision constituting an exception to Article 117 CC is Article 223 CC, which provides that the owner's claims provided for in the preceding provision (i.e. Article 222 CC) shall not be statute-barred if they relate to real estate. This provision refers to the expiration of the owner's claim for the surrender of the property (debt collection claim) and the claim for restoration of the legal status and for the cessation of infringements on the property (restitution claim). The purpose of the claims indicated in Article 222 CC is to regain the ownership of the property by the owner and to ensure that no violations are committed in the future.

By compiling the regulation of the lack of limitation of claims expressed in Article 223 CC under Article 231 § 2 CC, it should be noted that in the hypothesis of the norm from Article 223 CC, there is no claim of the owner to acquire ownership of real estate from him for appropriate remuneration. This claim is neither a claim for surrender of the item, nor a claim for restoration of the legal status and cessation of violations, and only these claims are referred to in Article 223 CC, compiling petitioner's claims under Article 222 CC with a claim under Article 231 § 2 CC, it can be seen that the claims under Article 222 CC are aimed at enabling the owner to exercise the right of ownership to the exclusion of other persons, and the claim under Article 231 § 2 CC grants the owner a special opportunity to dispose of the property, and in no way guarantees the owner the use of the property, and even deprives him of this right.

By analysing the limitation period of the claim under Article 231 § 2 CC, from a systemic perspective, it should be emphasised that Section V of Book II of the CC regulates the protection of property in civil law. There are provisions on petitory claims (and a special provision regulating their invalidity), supplementary claims (and a special provision regulating their limitation), claims for reimbursement of expenditures (and a special provision regulating their limitation) and a claim for the transfer of ownership of a plot for appropriate remuneration (Article 231 § 1 CC), as well as a claim for the purchase of a plot of land from the owner for appropriate remuneration (Article 231 § 2 CC). In the case of the last two claims, the legislator did not provide for a special provision regulating their limitation.

Based on the systemic analysis of the provisions of Section V of Book II of the CC, it cannot be concluded that the owner's claim to acquire ownership of the plot from him under Article 231 § 2 CC shall be time-barred on the same terms as petitioner's claims under Article 222 CC, the legislator, in Section V of Book II CC, settled several claims and provided for special limitation periods for some of them. In the absence of a limitation period, reference should be made to the general rule provided for in Article 118 CC, according to which, "unless a special provision provides otherwise, the limitation period is six years." According to this assumption, petitionary claims not related to real estate and claims under Article 231 § 1 and § 2 CC expire within the general period specified by the legislator in Article 118 CC.

Turning to the functional interpretation, it is reasonable to state that from the point of view of the purpose of the owner's claim for the acquisition of property from him, one can see both arguments for the expediency of the limitation of the claim on general terms and the invalidity of this claim.

Assuming the applicability of the general statute of limitations to the claim under Article 231 § 2 CC, a situation arises in which the owner is entitled to enforceable vindicatory and negatory claims, while potentially unenforceable –due to the expiration of the limitation period under Article 118 CC in connection with Article 231 § 2 CC and the raising of the limitation defence – is the claim for the acquisition of ownership of the property from the owner. Referring to the economic expediency and protection of the right to property, it is reasonable to state that the view on the invalidity of the claim under Article 231 § 2 CC better protects the owner's interests than applying the statute of limitations to this claim under general principles. On the other hand, it should be acknowledged that the state of unenforceability of the claim under Article 231 § 2 CC will arise only after the objection of limitation has been successfully raised by the addressee of the claim. In most cases, the addressee himself will be interested in acquiring ownership of the property, so the problem of limitation of the claim under Article 231 § 2 CC will be apparent. In the event that after the expiry of the period under Article 118 CC, if the recipient of the claim is not interested in acquiring ownership of the plot and raises the defence of limitation, the owner may invoke the defence of abuse of subjective rights, thereby nullifying the limitation defence. This allows the adjudicating court to consider the interests of both parties and a certain flexibility when it comes to the application of Article 231 § 2 CC.

It is assumed that raising an allegation of abuse of subjective right is of a subsidiary nature, and therefore it is permissible when there are no other measures that can effectively defend the interests of the individual.[8] In extraordinary situations, when after the expiry of the six-year limitation period under Article 118 CC, the recipient of the claim under Article 231 § 2 CC uses the plea of limitation in a manner contrary to the principles of social coexistence or contrary to its socio-economic purpose, it should be assumed that there is an abuse of the subjective right entitling to raise an objection under Article 5 CC.

In situations where the owner, due to his delay and negligence of interests, is not interested in the property, it is reasonable to state that he loses the right to demand the

8 A. *Zbiegień-Turzańska*, in: *K. Osajda* (ed.), Kodeks cywilny – Komentarz [Civil code – Commentary] Warsaw 2023, Article 5, mn. 136.

transfer of ownership for appropriate remuneration. In such a situation, he may either pursue petitory claims or try to resolve this issue contractually.

Analysing the norms of law, it can be seen that the legislator petrifies a legal status lasting continuously for a certain period of time, sometimes even despite the unlawful nature of this status: Article 117 CC in conjunction with Article 118 CC, Article 172 CC, Article 187 § 1, Article 255 CC, Article 293 § 1, Article 388 § 2, Article 901 § 2, Article 929 CC, Article 945 § 2 CC, Article 977[1] § 2 CC. Taking into account the cited provisions, it can be seen that the restrictions on the exercise of a given civil law in time depend on its nature and 'importance'.[9]

Claims become time-barred after six years. For some limited rights *in rem*, they expire after ten years of non-exercise. The possibility of losing ownership depends on the object of ownership. In cases of lesser importance (movables), this possibility exists after three years, and in cases of greater importance (real estate), property loss may occur after 20 or 30 years. There are some exceptions to the above deadlines. However, regardless of this, it can be seen that the qualification of the owner's claim to acquire ownership of the plot for appropriate remuneration in terms of nature and weight does not resemble rights that are time-barred for periods longer than six years. In addition, in the Polish Civil Code there is a very similar claim for the conclusion of an agreement transferring ownership of real estate under a previously concluded binding agreement, where the dispositive effect was excluded. Such a claim is time-barred on general terms.

Taking into account the nature, weight and similarity of the claim under Article 231 § 2 to other claims that are time-barred on general terms, recognising that the claim under Article 231 § 2 CC is not time-barred, it would be incompatible with other terms of 'antiquity' in civil law.

In the context of protecting the legitimate interests of the entity that built the building or other device with a value significantly transferring the value of the plot occupied for this purpose, it should be assumed that any attempts to recognise the claim under Article 231 § 2 CC are not beneficial to the person who brought the building. As previously indicated in civil law, one can see tendencies to successively weaken legal situations inconsistent with the facts. By transferring this idea to the analysed problem, it is necessary to interpret Article 231 § 2 CC, so that with the passage of time of ownership of the plot, it is more difficult to force a person to leave the plot, or to acquire it for remuneration specified strictly in the statutory manner.[10] Adoption of such a method of interpretation of Article 231 § 2 CC is in line with the general tendency to petrify the facts existing for some time, and also sanctions the owner's reluctance.

Adopting the thesis of the limitation of the claim under Article 231 § 2 CC on general principles, it can be noted that with the passage of time the owner consistently loses further rights related to the possibility of influencing the property. After six

9 By the importance of the law or civil law rights, I mean its economic significance (the main factor affecting the importance of the law is its market value).

10 Cf. Article 231 § 2 of the Polish Civil Code, according to which the remuneration must be 'appropriate'. After the expiration of the limitation period, the party interested in acquiring the property will have greater leverage in negotiating the price, as the limitation period for the claim under Article 231 § 2 of the Polish Civil Code has expired.

years from the construction of a building or other device, the value of which significantly transfers the value of the plot occupied for this purpose, the limitation period under Article 231 § 2 CC, and then after the lapse of 20 or 30 years, the owner loses the right of ownership as a result of the occupancy of the plot (provided that all conditions are met by the builder of the building). According to the position of the Supreme Court, after the loss of ownership the owner only has the least troublesome claim for remuneration for the non-contractual use of the item.[11]

Finally, it should be pointed out that there are also logical arguments in favour of the position that the claim under Article 231 § 2 CC is not time-barred. The main argument refers to the lack of limitation of the debt collection claim. Since the debt collection claim will not be time-barred, the question arises whether it can be reconciled with the earlier expiry of the weaker claim for the acquisition of ownership of the plot for appropriate remuneration.

In connection with the comments made earlier, it should be pointed out that this problem did not originally exist, due to the coherence between the limitation period and the prescription. Significant in the discourse is the fact that the problem really concerns only a claim against an independent holder in bad faith. If the independent holder in good faith was interested in retaining the plot, he could make an untimely claim under Article 231 § 1 CC,[12] or try to determine the price in a contractual manner. In the context of an independent holder in bad faith due to the fact that he is not entitled to a claim under Article 231 § 1 CC, it may not in any way oppose a debt collection claim. Despite this, it is reasonable to state that there is no axiological basis for the independent holder in bad faith to have means that will effectively nullify the debt collection claim – it is difficult to accept why a person who built a building in bad faith not on his own land should be protected in any way. If, on the other hand, the owner wants the independent holder to acquire ownership of the plot from him in bad faith, then within six years he may pursue claims under Article 231 § 2 CC, demanding 'adequate remuneration'. After the expiration of the limitation period, when the independent holder raises a plea of limitation, the owner may try to settle the issue of ownership in a contractual way. The owner may also submit a debt collection claim, but due to its slowness, there are no grounds to assume that it is also entitled to a non-binding claim under Article 231 § 2 CC.

The above-mentioned relations between the owner and the autonomous holder under Article 231 § 2 CC prove that the existence of an indefensible debt collection claim does not pave the way for the view that the claim under Article 231 § 2 CC expires on general terms. As indicated above, the adoption of this view is in line with the general tendency to modify the legal situation due to the long-term existence of a specific factual situation.

11 Resolution of the Supreme Court (7) of 3.4.2024, III CZP 103/22, LEX No. 3700378.

12 It should be noted that in the case of a claim under Article 231 § 1 there are serious expediency arguments in favour of the adoption of the lack of limitation. In particular, it should be noted that the invalidity of this claim results in the consistency of the system –an independent holder in good faith after 20 years of continuous possession will acquire ownership by way of prescription. Assuming that the claim under Article 231 § 1 becomes statute-barred on general terms and causes inconsistencies between the periods of limitation and prescription.

V. Conclusion

The above analysis leads to the conclusion that both the linguistic and systemic interpretation requires the assumption that the claim under Article 231 § 2 CC becomes statute-barred on general terms. The fact that the functional interpretation leads to inconsistent results cannot constitute a basis for adopting the thesis on the invalidity of the owner's claim under Article 231 § 2 CC. Due to the fact that the limitation of the claim on general terms under Article 118 CC also has its justification, it should be assumed that there is a possibility of literal, systemic and functional interpretation of Article 231 § 2 CC leading to uniform results. Pursuant to the above, the claim under Article 231 § 2 CC becomes statute-barred on general terms.

Lidija Živkovic*

Specialisation of Administrative Judiciary in Tax Matters: Any Hope for Serbian Taxpayers?

Abstract

The contribution illustrates principal deficiencies of the existing tax dispute resolution system in Serbia, with a special focus on the absence of court specialisation in tax matters. The core of the paper presents the author's research endeavouring to address the question whether specialisation of the Administrative Court in tax matters could be considered to be justifiable, having in mind the existing state of judicial protection of taxpayers' rights in Serbia. To the extent that the preceding question can be answered in the affirmative, the next step will be the choice of a mode of specialisation which is both preferable and attainable, taking account of the legal framework currently applicable in Serbia.
Keywords: judicial specialisation, tax disputes, external specialisation, internal specialisation, administrative judiciary.

Abstract deutsch:

Der Artikel zeigt wesentliche Mängel des Systems zur Beilegung von Steuerstreitigkeiten in Serbien auf, wobei ein besonderer Schwerpunkt auf dem Fehlen einer spezialisierten Gerichtsbarkeit für Steuerangelegenheiten liegt. Der Autor unterstreicht das Erfordernis einer Spezialisierung auf Steuerangelegenheiten innerhalb der Verwaltungsgerichtsbarkeit in Serbien und erörtert die Formen einer solchen Spezialisierung, die unter Berücksichtigung des derzeit in Serbien geltenden Rechtsrahmens sowohl wünschenswert als auch realisierbar ist.
Keywords: gerichtliche Spezialisierung, Steuerstreitigkeiten, externe Spezialisierung, interne Spezialisierung, Verwaltungsgerichtsbarkeit.

I. Introduction

The court system in Serbia comprises (1) courts of general jurisdiction (basic courts, higher courts, appellate courts and the Supreme Court), as well as (2) courts of special jurisdiction (commercial courts, Appellate Commercial Court, misdemeanour courts, Appellate Misdemeanour Court and the Administrative Court).[1] Tax disputes, which

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1 Art. 143 of the Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia ("OG RS") no. 98/06 and 115/21; Art. 14(2) – (4) of the Law on the Organisation of Courts, OG RS no. 10/23. The jurisdiction of the Serbian Constitutional Court is regulated in separate legislation.

are considered to be a subcategory of administrative disputes, fall within the jurisdiction of the Administrative Court.[2] In its current form, the Serbian Administrative Court was established in 2010, in the wake of a comprehensive reform of the court system in Serbia.[3] This marked an important step forward considering that, within the framework of the previous organisation of courts, administrative (including tax) disputes were adjudicated by designated panels within courts of general jurisdiction.[4] However, during a decade and a half long history of the "standalone" Administrative Court, no further efforts were made towards a more nuanced specialisation of administrative judiciary.

Statistics show that the Administrative Court has for a while now been the most burdened court in the country. As one of the crucial causes of this unfavourable and consistently worsening trend, studies have identified the continuous broadening of the Court's material jurisdiction.[5] Its jurisdiction now covers around 100 grounds for dispute, presupposing the application of more than 300 substantive laws and multiple bylaws.[6] Additionally, in the recent years, the Court has been severely understaffed. During 2023, the Court operated with more than 20% less judges than what the Decision of the High Judicial Council on the Number of Court Judges prescribes.[7] During 2022, this deficit was similarly pronounced (appro. 18%).[8] Indeed, in the first half of

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2 The Law on Tax Procedure and Tax Administration (hereinafter: LTPTA), which lays out rules of the tax procedure, is a *lex specialis* in regard to the Law on General Administrative Procedure (hereinafter: LGAP). LTPTA, OG RS no. 80/02, 84/02, 23/03, 70/03, 55/04, 61/05, 85/05, 62/06, 63/06, 61/07, 20/09, 72/09, 53/10, 101/11, 2/12, 93/12, 47/13, 108/13, 68/14, 105/14, 91/15, 112/15, 15/16, 108/16, 30/18, 95/18, 86/19, 144/20, 96/21 and 138/22; LGAP, OG RS no. 18/16, 95/18 and 2/23.

3 Reform was initiated in 2008 by the adoption of the Law on the Organisation of Courts, OG RS no. 116/08. The law became applicable as of 1 January 2010.

4 It should be borne in mind that the history of Serbian administrative judiciary dates back to 1869, when the Council of State (*Državni savet*) was established as the first administrative court, followed a year later by the adoption of legislation which, for the first time, defined the contours of an administrative dispute.

5 Government of the Republic of Serbia, National Strategy for Judicial Reform for the Period 2020-2025, OG RS no. 101/20, p. 16.

6 *J. Ivanović*, The Historical Development of the Administrative Judiciary of Serbia, in: V. Cucić (ed.), The Collection of Papers: 150th Anniversary of the Administrative Dispute in Serbia 1869–2019, Administrative Court of the Republic of Serbia – Faculty of Law of the University of Belgrade, Belgrade 2019, p. 72.

7 Art. 6 of the Decision on the Number of Court Judges, OG RS no. 88/15, 6/16, 11/16, 48/16, 73/16, 104/16, 24/17, 31/17, 54/17, 10/18, 14/18, 31/18, 58/18, 68/18, 102/18, 10/19, 48/19, 67/19, 20/20, 25/20, 78/20, 6/21, 10/21, 36/21, 67/21, 76/21, 90/21, 99/21, 30/22, 119/22, 137/22, 51/23, 93/23 and 117/23; *Upravni sud*, Godišnji izveštaj o radu Upravnog suda po materiji za period od 1. januara do 31. decembra 2023. godine [Annual Report of the Administrative Court per subject matter for the period 1 January – 31 December 2023], p. 5, available from https://www.up.sud.rs, 27 September 2024.

8 *Upravni sud*, Godišnji izveštaj o radu Upravnog suda po materiji za period od 1. januara do 31. decembra 2022 [Annual Report of the Administrative Court per subject matter for the period 1 January – 31 December 2022]. godine, p. 57, available from https://www.up.sud.rs, 27 September 2024.

2024, 11 new judges were appointed to the Administrative Court, which is expected to bring some alleviation of the existing case backlog.[9]

Reforms aimed at improving the Administrative Court's performance have been on the policymakers' agenda for years. Unfortunately, to this date we have seen little if any advancement to this end. The latest strategic document adopted by the Government of Serbia that is relevant in this respect was the 2020 Judiciary Development Strategy, which identified the following key measures to be undertaken in the future: (1) Introduction of the appellate level of administrative judiciary; (2) Enabling specialisation in administrative areas; (3) Strengthening the capacity of administrative judiciary through the appointment of sufficient number of judges.[10] Not only do policymakers seem to be aware of the need for a more specialised administrative judiciary in Serbia, but the same plea has been voiced internally, i.e. by the Administrative Court representatives themselves.[11]

Despite the fact that the specialisation of administrative judiciary seems to be recognised as a legitimate need within the Serbian judicial system, the question remains as to which specific subject matters within the scope of administrative disputes warrant specialisation, as well as which means of specialisation would provide the best remedy for the existing issues. Without dismissing the need for specialisation of the Serbian administrative judiciary in other fields, this article endeavours to address these questions from the point of view of tax disputes. It, thus, aims to serve as a starting point for a discussion on the improvement of the quality of judicial protection of taxpayers in Serbia.[12]

II. Judicial Specialisation as a Global Phenomenon

Judicial specialisation, as understood in this article, refers to *ratione materiae* specialisation within the judicial system in a particular jurisdiction. As a feature of a judicial system, it implies limited and often exclusive jurisdiction in one or several specific fields of law.[13] Specialisation based on the nature of the legal issues in contention be-

9 New judges were appointed in April 2024, for which reason the effects thereof are yet to become apparent in the years to come. Nevertheless, it should also be taken into account that the Administrative Court still acts with a deficit of five judges (58 judges are in office instead of 63, which is the number prescribed by the Decision on the Number of Court Judges).

10 National Strategy for Judicial Reform for the Period 2020–2025, 18. The lack of continuous training and development of expertise of judges has been identified as one of the key deficiencies of the overall judicial system already in the National Strategy for Judicial Reform for the Period 2013-2018, OG RS no. 57/13.

11 See e.g. the foreword to the Collection of Papers published to honour the 150th anniversary of administrative dispute in Serbia, written by the then president of the Administrative Court. *J. Ivanović*, Foreword, in: *Cucić*, fn. 6, pp. 16-17.

12 The following analysis builds on the conclusions of the author's previous work, which was narrowly focused on the specialisation of judiciary as a precondition for the introduction of a general anti-avoidance rule into the Serbian tax system. See: *L. Živković*, Opšta antiabuzivna pravila [General anti-avoidance rules], Doctoral Dissertation, Pravni fakultet Univerziteta u Beogradu, Belgrad 2023, pp. 251-257.

13 *M. Zimmer*, Overview of Specialized Courts, International Journal for Court Administration, 1|2009, p. 1.

tween the parties is the most ubiquitous dimension of specialisation in contemporary judicial systems.[14]

The results of an analysis conducted by the Consultative Council of European Judges (CCJE) show that judicial specialisation represents a widespread trend in European countries.[15] The same trend is also observable in other regions. As purported by the CCJE, judicial specialisation stems from *"the need to adapt to changes in the law rather than from any deliberate choice"*.[16] In other words, the primary reason for the widespread judicial specialisation is to cater to the ever-expanding body of legislation and its increasing complexity. Specialisation is intended to allow judges to gain expertise in particular, more narrowly focused legal subject matters. The goal is to ensure competent comprehension and correct application of the law. Thereby, specialisation is said to contribute to a higher quality of court decisions, boosting courts' authority within a particular jurisdiction. At the same time, specialisation is expected to result in greater consistency of court decisions, hence safeguarding a higher level of legal certainty.[17] Among the various legal subject matters in which a certain level of specialisation is evident across the surveyed countries, the CCJE lists taxation and public finances.[18]

As *Baum* succinctly put it, *"[j]udicial specialisation is a continuum rather than a dichotomy"*.[19] At one end of the spectrum we find a judge who *"hears cases in a wide range of legal fields, and no field accounts for a substantial proportion of the judge's work"*.[20] Conversely, a judge who *"hears cases in a single field of law"* is at the other end of the spectrum.[21] Nevertheless, it is possible to differentiate between several typical modalities of judicial specialisation on this spectrum, based on their scope and organisational features. Simultaneously, these various specialisation modalities differ in their potential effects and costs required for their implementation.

The most comprehensive modality of specialisation is the so-called formal,[22] or external[23] specialisation. It presupposes a division of work among courts and, as such, it is embedded in the court structure itself.[24] This may result in a separate specialised court being a part of the jurisdiction's general court system, or a separate hierarchy of

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14 *B. Opeskin*, The Relentless Rise of Judicial Specialisation and its Implications for Judicial Systems, Current Legal Problems, 1|2022, p. 146.
15 *Consultative Council of European Judges – CCJE*, Opinion (2012) No. 15 on the Specialisation of Judges, Council of Europe, Paris 2012.
16 ibid., para. 8.
17 ibid., para. 9-10.
18 ibid., para. 4, note 2.
19 *L. Baum*, Judicial Specialization and the Adjudication of Immigration Cases, Duke Law Journal, 8| 2010, p. 1534.
20 ibid.
21 ibid.
22 *L. Baum*, Probing the Effects of Judicial Specialization, Duke Law Journal, 7|2009, p. 1672.
23 *S. Glazebrook*, A Specialist Patent or Intellectual Property Court for New Zealand?, The Journal of World Intellectual Property, 5|2009, p. 525.
24 Certain authors refer to this modality of specialisation as judicial specialisation in a narrow sense. *A. Uzelac*, Mixed Blessing of Judicial Specialisation: The Devil is in the Detail, Russian Law Journal, 4|2014, p. 148.

specialised courts, i.e. specialised branches with or without their own appellate instance.[25]

Another modality of specialisation is the informal specialisation. It is also referred to as internal specialisation, underlining the fact that in this case the "division of work" is not apparent to the outside world, i.e. to the users of judicial protection.[26] From a comparative perspective, this is the most common form of judicial specialisation and it encompasses two different versions. The first one presupposes the creation of a specialised division or a panel within a particular court of general (or to an extent specialised) jurisdiction, which then receives cases mandating expertise in a particular field.[27] Another option is the so-called personal specialisation, which presumes the specialisation of individual judges within a particular court or court division.[28]

III. Judicial Protection of Taxpayers in Serbia Against the Backdrop of Preconditions for Judicial Specialisation

As observed by the Committee appointed by the US Chief Justice to study the problems of the US federal courts:

> Taxation is an extraordinarily specialised area of law, to which generalist judges can contribute little other than confusion, and it is a natural therefore for further experimentation with specialised courts.[29]

Without a doubt, this statement is not necessarily true for each and every judicial (and more broadly legal) system. Various expert analyses[30] and scholarly literature discussing the implementation of judicial specialisation in different fields and across legal systems have highlighted several preconditions that should be fulfilled, so that specialisation can be considered sensible in a particular case. To examine whether within the Serbian legal context the field of taxation is indeed *"a natural"* for *"experimentation with specialised courts"* it is imperative to carefully assess the existing legal framework and the broader circumstances in which tax disputes are adjudicated in Serbia, against the backdrop of commonly identified preconditions for judicial specialisation.

25 *H. Gramckow / B. Walsh*, Developing Specialized Court Services: International Experiences and Lessons Learned, Justice and Development Working Paper Series, World Bank, Washington D.C. 2013, p. 10.
26 *Uzelac*, fn. 24, p. 148.
27 *Gramckow / Walsh*, fn. 25, p. 11.
28 ibid; *Uzelac*, fn. 24, 149.
29 *Federal Courts Study Committee*, Working Papers and Subcommittee Reports 1990, p. 21, available from https://www.law.berkeley.edu, 22 September 2024.
30 *Administrative Conference of the US*, Specialized Review of Administrative Action: Recommendation No. 91-9, 1991, available from https://library.law.fsu.edu, 1 October 2024; *Gramckow / Walsh*, fn. 25, pp. 14-15.

1. Clear Delineation of a Subject Matter and Uniformity of its Administration

The first commonly emphasised precondition is that the legal subject matter in which specialisation is pursued needs to be sufficiently specific so that it can be differentiated without difficulty from claims in other fields.[31] Inability to clearly define and delineate a particular subject matter in practice can present as an insurmountable challenge to judicial specialisation.[32] This is because delineation is an essential prerequisite for the prevention of potential overlaps of jurisdictions. Jurisdictional overlaps detrimentally affect legal certainty and hinder access to justice. Within the Serbian legal system, this precondition seems to be fulfilled. Tax disputes are sufficiently specific to be easily differentiated from other administrative matters which fall within the scope of Administrative Court's jurisdiction. Tax disputes are disputes initiated against final (non-appealable) tax administrative acts. In tax disputes, the role of the respondent rests on the Ministry of Finance as the second-instance authority in the tax procedure.[33] Moreover, in line with Art. 47(1) of the Law on Administrative Disputes,[34] the Administrative Court is required to identify the subject matter of the dispute in the introductory part of its decisions in each case at hand. In practice, if a tax dispute is at stake, the Court specifies that it is adjudicating on a "tax case",[35] "tax legal matter",[36] sometimes even going so far as to specify the particular type of tax which is the subject of dispute (e.g. capital gains tax,[37] transfer tax,[38] property tax,[39] etc.).

Additionally, it is commonly highlighted that there needs to be uniformity in the manner in which the particular subject matter is being administered.[40] This precondition might be said to be fulfilled in the realm of taxation. The assessment, collection and audit of fiscal revenues are the competence of the Tax Administration as an administrative body within the Ministry of Finance. In addition, Art. 11(3) LTPTA states that, with the aim of ensuring uniform implementation of regulations within the jurisdiction of the Ministry of Finance, the acts issued by the finance minister in relation to the application of such regulations (e.g. explanations, opinions, instructions, guidelines, etc.) are binding for the conduct of the Tax Administration.

31 *Administrative Conference of the US*, fn. 30, p. 3A; *Zimmer*, fn. 13, p. 5.
32 *S. Miles*, The Price We Pay for a Specialized Society: Do Tax Disputes Require Greater Judicial Specialization?, Victoria University of Wellington Law Review, 2|2015, p. 367.
33 Art. 165(1) LTPTA.
34 The Law on Administrative Disputes, OG RS no. 111/09.
35 See e.g. judgments of the Serbian Administrative Court no. 24 U 19475/22 of 27 April 2023; no. 2 U 793/19 of 4 May 2023; and no. 6 U 30391/10 of 20 October 2011.
36 Judgments of the Serbian Administrative Court no. III-5 U 15829/18 of 31 October 2022; and no. 7 U 7567/10 (2009) of 14 October 2010.
37 e.g. in its Judgment no. 3 U 21184/20 of 2 March 2023.
38 e.g. in its Judgment no. II-10 U 7235/20 of 9 March 2023.
39 e.g. in its Judgment no. 1 U 5976/16 of 19 July 2018.
40 *Administrative Conference of the US*, fn. 30, p. 2C.

2. Sufficiently Extensive Caseload

Moreover, specialisation is considered sensible to the extent that it can be reasonably expected that the volume of cases in the particular field will be sufficiently large.[41] In addition, the volume of the caseload should, ideally, be more or less consistent over time, so as to ensure that specialisation is not just a temporary need.[42] This requirement aims at ensuring that specialisation indeed contributes to the alleviation of the burden borne by courts of general jurisdiction or generalist judges.[43] At the same time, a continuous and sufficiently voluminous caseload is a *conditio sine qua non* for (specialised) judges to actually develop the desired level of expertise in the field.[44]

It seems that, when it comes to the adjudication of tax disputes in Serbia, this precondition is also fulfilled. Tax disputes make up a significant share of the total number of new cases initiated before the Administrative Court.[45] According to publicly available data, taxation is among a few categories of administrative matters which account for the highest number of disputes initiated before the Administrative Court.[46] As of 1 January 2010, when the Administrative Court was established, until 31 December 2023, tax cases comprised annually an average of approx. 8% of all cases initiated before that Court.[47] It must be underlined that this figure includes only cases regarding taxes in the narrow sense of the word. Consequently, this figure does not cover disputes regarding fees, mandatory social security contributions, customs duties, nor e.g. disputes relating to the revocation of the tax identification number.

If we were to consider all fiscal revenues, their share in the total number of newly admitted cases would be considerably larger. Indeed, one may question the reasoning behind the view that not only taxes, but also other fiscal revenues should be considered when assessing the Court's caseload size. In our view, this is justified by the fact that fiscal revenues (taxes, fees, mandatory social security contributions and user

41 *Administrative Conference of the US*, fn. 30, p. 2A; *Zimmer*, fn. 13, p. 5.

42 *Zimmer*, fn. 13, p. 5; *E. Cazalet*, Specialised Courts: Are They a "Quick Fix" or a Long-Term Improvement in the Quality of Justice?, World Bank, Washington D.C, 2001, cited in: *Gramckow / Walsh*, fn. 25, p. 15.

43 *D. P. Currie / F. I. Goodman*, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, Columbia Law Review, 1|1975, pp. 63-65.

44 Indeed, judges develop their expertise not only through practice, but also through training which is specifically focused on a particular field.

45 During 2023, the Ministry of Finance – Department for Second-Instance Tax and Customs Procedure decided on regular and extraordinary legal remedies filed against tax administrative acts in 9865 cases. In 2022 it did so in 9902 cases. In this respect, it is important to note that slightly more than 25% of all second-instance tax administrative acts end up challenged before the Administrative Court. *Ministarstvo finansija*, Informator o radu 2024, p. 113, available from https://informator.poverenik.rs, 25 September 2024.

46 *K. Manojlović Andrić*, Zloupotreba prava na podnošenje zahteva u upravnom postupku i na podnošenje tužbe u upravnom sporu [Abuse of the Right to File Requests in Administrative Proceedings and to File Lawsuits in Administrative Disputes], Bilten Vrhovnog kasacionog suda, 1|2023, p. 213, available from https://www.vrh.sud.rs, 22 September 2024.

47 Information regarding tax cases has been provided to the author by the Administrative Court representatives through official channels. *Upravni sud Republike Srbije*, Dopis Su III 677/24, 5 August 2024. Information on the total number of new cases of the Administrative Court are presented in the Court's annual reports: https://www.up.sud.rs/cirilica/izvestaji-o-radu, 28 September 2024.

charges) are subject to the rules of tax procedure as set out by the LTPTA, unless otherwise provided by another law.[48] In this respect, the most obvious exception are customs duties, which are subject to the rules laid out in the Customs Act,[49] and for whose enforcement the competent authority is the Customs Administration, rather than the Tax Administration. Yet still, the rationale for the common approach to both tax and customs cases vis-à-vis judicial specialisation may be found in the fact that the second instance authority – whose decisions are being challenged before the Administrative Court – is the same in both cases: the Department for Second-Instance Tax and Customs Procedure within the Ministry of Finance.[50]

The above-noted share of tax disputes in the composition of Administrative Court's caseload between 2010 and 2023 serves only as the starting point in the analysis whether judicial specialisation in this field can be said to be a constant, rather than only a temporary need. In this respect, officially provided statistics exhibit an interesting trend. After the period in which tax cases made up around one fifth of all cases of the Administrative Court (in 2015 they made up 18.9% of all new cases, while in 2016 their share reached a staggering 21.46%), the period between 2017 and 2022 saw a continuous and notable decrease in the share of tax cases in the total number of new cases: from 8.14% in 2017 to only 2.65% in 2022.[51] Although these figures could, at least at first sight, be interpreted as evidencing a positive shift in taxpayers' satisfaction with the performance of the tax administration, the explanation for the described trend is rather discouraging. Namely, the decrease in the share of tax cases in the total number of Court's new cases is the result of a substantial increase in the total number of new administrative disputes, whereby cases initiated against instances of administrative silence represent a major portion.[52] In any case, the data for the last recorded year seem to suggest the beginning of the trend reversal. Namely, in 2023 tax cases accounted for 4.35% of all new cases before the Administrative Court.

3. Technical Complexity of a Subject Matter

Another widely advocated precondition for judicial specialisation is a regular occurrence of technically difficult factual questions permeating disputes in the particular field.[53] The logic behind this requirement is that, to the extent that a particular category of disputes is plagued by technical questions, generalist judges will need more time and effort to grasp their intricacies. According to *Legomsky*, technical complexity of a subject matter can be boiled down to several factors: (1) the size of the pertinent leg-

48 Art. 2 LTPTA.

49 Customs Act, OG RS no. 95/18, 91/19, 144/20, 118/21 and 138/22.

50 In addition, there has been an initiative, albeit suspended, to integrate the Tax Administration and Customs Administration into one single administrative body. *B. Radojković*, Gde su nestale milijarde evra iz budžeta [Where did the billions of euro disappear from the budget], Vreme, 2 October 2024, available from https://vreme.com, 12 October 2024.

51 In 2018 the share of tax cases was 7.75% of all new cases, in 2019 it was 6.92%, in 2020 it amounted to 4.92%, and in 2021 it fell to 4.15% of all new cases.

52 *B. Spaić*, Komparativna analiza uređenja sudova [Comparative Analysis of the Organisation of Court], CEPRIS, Belgrad 2022, p. 13.

53 *Administrative Conference of the US*, fn. 30, p. 2B.

islation, (2) its organisational complexity in the sense that provisions of a statutory scheme are intertwined, (3) the use of specialised terminology, and (4) fact-finding which requires expertise from fields other than law.[54]

In our view, this requirement may be said to be fulfilled when it comes to tax disputes. Tax disputes are traditionally considered to be among the most complex and technically demanding (administrative) disputes. To start with, substantive tax provisions are scattered in numerous and often voluminous[55] laws addressing different forms of taxes, as well as in Government regulations, by-laws issued by the minister of finance, and decisions of the local self-governing units' assemblies. At the same time, national sources of substantive tax law belong to the most frequently amended legislation.[56] Tax provisions are also contained in a large number of bilateral treaties[57] and several international conventions,[58] some of which are characterised by a rather peculiar and, in fact, unprecedented mechanism of application.[59] One must also not lose sight of the growing breadth and significance of soft law sources in the field of

54 *S. H. Legomsky*, Specialized Justice: Courts, Administrative Tribunals, and a Cross-National Theory of Specialization, Oxford University Press, Oxford 1990, pp. 24-25.

55 As a part of an effort to simplify tax legislation in the UK, *Gammie* underlined that: *"Length [of the statute] alone can be a source of complexity, reflecting the ease (or difficulty) with which it is possible to identify and comprehend relevant material and how much of it must be consulted to find the answer to particular issues*". *M. Gammie*, Tax Simplification, in: R. Chote, et al. (eds.), The IFS Green Budget, The Institute for Fiscal Studies, London 2008, p. 262.

56 See e.g. *C. Evans / P. Lignier / B. Tran-Nam*, The Tax Compliance Cost of Large Corporations: An Empirical Inquiry and Comparative Analysis, Canadian Tax Journal, 4|2016, p. 761.

57 As at 1 January 2024, in Serbia there are 64 bilateral double tax treaties in force.

58 Most importantly, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Official Gazette of the RS – International Treaties, no. 3/18 (hereinafter: Multilateral Instrument) and the Convention on Mutual Administrative Assistance in Tax Matters, OG RS – International Treaties, no. 8/19.

59 Here we refer to the Multilateral Instrument, a multilateral convention of public international law which is often characterised as an unprecedented legal instrument in the sense that it does not apply independently of double tax treaties that it aims to modify, but operates as a complementary tool. In other words, the Multilateral Instrument does not substitute the existing double tax treaties despite the fact that it regulates (to a large extent) the same subject matter. Rather, it applies alongside with the existing double tax treaties modifying thereby the application of some of their provisions. *A. Miladinovic / A. Rust*, Options Under the Multilateral Instrument, in: M. Lang et al. (eds), The OECD Multilateral Instrument for Tax Treaties, Wolters Kluwer, Alpen aan den Rijn 2018, p. 147. For a detailed analysis of this legal instrument's *modus operandi*, see: *L. Živković*, Conference of the Parties: A Future for a More Profound Multilateralism in Tax Matters?, Collected Papers of the Faculty of Law in Novi Sad, 3|2020, pp. 1125-1127.

taxation.[60,61] This, in turn, feeds into what *Legomsky* refers to as *"intertwined statutory scheme"*. By way of an example: for a judge to apply a provision of a double tax treaty, she must first ascertain whether the provision in question has been modified by the Multilateral Instrument. To do this, she needs to consult the Explanatory Statement to the Multilateral Instrument[62] which clarifies the peculiar mechanism of this convention's operation, as well as official positions vis-à-vis the Multilateral Instrument which Serbia, and the other contracting party, had deposited at the time of signing the Multilateral Instrument.[63] Once she has "'matched" the positions of the two contracting parties, so that she can identify the manner in which the former provision of a double tax treaty was modified by way of the Multilateral Instrument, its proper interpretation will require the consultation of the relevant OECD's BEPS Report,[64] some of which are dozens or even hundreds of pages long.

As for the presence of specialised terminology, tax law is notorious not only for the use of concepts and terms alien to all other fields of law (e.g. the concept of tax residence, thin capitalisation, or permanent establishment) but, more importantly, often employs terms which, despite being used in other legal areas (e.g. supply, salary, household), have their own tax-specific meaning.[65]

Lastly, the adjudication of tax disputes presupposes multidisciplinary knowledge. Their resolution mandates the ability of judges to integrate and apply expertise in the field of law, accounting, financial analysis, and fiscal policy. In any case, the com-

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60 The long-standing and highly influential soft law instruments have been the OECD Model Tax Convention on Income and on Capital, the UN Model Double Taxation Convention between Developed and Developing Countries, each supplemented by a Commentary, as well as the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter: OECD TP Guidelines). As of recently, the corpus of soft law instruments in the field of taxation has been substantially enlarged after the publication of 15 BEPS reports, as well as the Administrative Guidance on the Global Anti-Base Erosion Model Rules.

61 In numerous tax systems around the globe some of these soft law instruments have been integrated into hard law. Within the Serbian tax system, the OECD TP Guidelines have since 2013 been integrated into the legal framework of corporate income taxation through Art. 61a of Corporate Income Tax Law. This provision requires the minister of finance to rely thereon in the course of drafting rulebooks relevant for the application of transfer pricing rules. Exceeding 600 pages and highly technical in nature, this soft law instrument consequently became a relevant point of reference when interpreting Serbia's transfer pricing legislation.

62 *OECD*, Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, OECD Publishing, Paris 2017.

63 *The Republic of Serbia*, Status of List of Reservations and Notifications at the Time of Signature, available from https://www.oecd.org, 10 December 2024.

64 A brief overview of the 15 reports published as a part of the OECD's Base Erosion and Profit Shifting project is provided in: *OECD/G20*, BEPS Project Explanatory Statement, OECD Publishing, Paris 2016.

65 More than a century ago, *Enno Becker*, the father of the 1919 Tax Procedural Code of the German Reich (*Reichsabgabenordnung*), justified the introduction of the so-called economic approach to interpretation (*wirtschaftliche Betrachtungsweise*) by the need to prevent generalist judges from attributing civil law meaning to terms used in tax legislation. *W. Gassner*, Interpretation und Anwendung der Steuergesetze: Kritische Analyse der wirtschaftlichen Betrachtungsweise des Steuerrechts, Wirtschaftsverlag Dr. Anton Orac, Wien 1972, p. 18.

plexity of tax legislation and technicality of issues arising in tax disputes are here to stay. Over the past decade, we have been witnessing quite comprehensive and, more importantly, relentless developments in the realm of taxation, at both the international and regional level, and with significant spill-over effects on national tax legislation of countries around the globe. In the literature, this phenomenon has been referred to as *"'internationalisation of tax law"*.[66] As a result, keeping up with the said novelties is becoming increasingly difficult even for practitioners whose work is focused exclusively on taxation and who are renowned experts in the field.

Nevertheless, neither the substantial share of new disputes in a particular subject matter, nor the degree of their technical complexity necessarily imply that judicial specialisation in that field is needed. If generalist judges are managing to handle the existing caseload in a satisfactory manner, specialisation should, in principle, be ruled out. However, this is hardly the case when it comes to how tax cases are handled before the Administrative Court.

4. Efficiency of Case Disposition

First, the duration of tax disputes may be considered as an important indicator in this respect. Judicial specialisation is often advocated as *"a device to speed the disposition of cases"*.[67] Based on the official data provided by the Serbian Administrative Court covering the 2010–2023 period, the duration of tax disputes (i.e. the period between the filing of a lawsuit and the delivery of a judgment) was on average 2 years. More specifically, the data also show that since 2016 there has been a trend of striking increase in the duration of tax disputes. While in 2016 judgments were passed on average within 1.2 years after the initiation of a tax dispute, this interval increased to staggering 3 years in 2023.[68]

Obviously, the described trend is rather worrisome from the point of view of the right to trial within reasonable time, as an element of the right to a fair trial. The protection of taxpayers rights is, as a general rule, weakened by the reluctance of the European Court of Human Rights (ECtHR) to cover rights subject to tax disputes within the meaning of "civil rights", as stipulated under Art. 6(1) of the European Convention on Human Rights (ECHR), which guarantees the right to a fair trial.[69]

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66 *J. Kokott / P. Pistone / R. Miller*, Public International Law and Tax Law: Taxpayers' Rights, IBFD Journal Articles, 2|2021, p. 382.

67 *Legomsky*, fn. 54, p. 31.

68 The average duration of tax disputes was 1.6 years in 2017, 2.1 years in 2018, 2.3 years in 2019 and 2020, 2.5 years in 2021, and 3 years in 2022. Upravni sud Republike Srbije, Dopis Su III 677/24, 5 August 2024.

69 The ECtHR held that tax matters "form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant". *Ferrazzini v. Italy*, case no. 44759/98, dated 12 July 2001, paras. 29-31. Art. 6 ECHR does, however, apply with regard to disputes involving tax penalties to the extent that they constitute a "criminal charge", in line with the criteria elaborated in *Engel and Others v. the Netherlands*, case no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72. For an analysis of negative implications of the said approach of the ECtHR to (non-criminal) tax cases, see: *P. Baker*, 60 Years of the European Convention on Human Rights and Taxation, European Taxation, 12|2021, p. 531.

Nevertheless, being an essential element of the right to a fair trial, the right to trial within reasonable time is guaranteed by Art. 32(1) of the Serbian Constitution. Importantly, the *ratione materiae* scope of this provision is wider than that of the Art. 6(1) ECHR and therefore covers all rights and obligations subject to an administrative dispute, including those related to taxation.[70] Based on the standards developed by the ECtHR[71,72] the total duration of proceedings per level of jurisdiction of up to two years is, as a general rule, regarded as reasonable. In the case of proceedings which lasted longer than two years, the ECtHR will investigate whether certain objective reasons (e.g. the complexity of the case, or applicant's behaviour) justify the duration.[73] For the purpose of calculating the length of proceedings, the ECtHR has established a different methodology for different types of procedures. When assessing whether there has been a violation of the right to trial within reasonable time in administrative cases, the ECtHR views the procedure before the administrative authorities as an integral part of the "trial" within the meaning of Art. 6(1) ECHR.[74] Consequently, instead of considering only the duration of administrative dispute after the lawsuit is filed, the length of proceedings is calculated counting from the moment when the applicant first referred the case to the administrative authorities.[75] The ECtHR has long ago confirmed this approach in tax-related cases, too.[76]

70 *K. Manojlović Andrić*, Ustavnosudska zaštita ljudskih prava povređenih ili uskraćenih u upravnom postupku i upravnom sporu [Constitutional Protection of Human Rights Violated or Denied in Administrative Proceedings and Administrative Dispute], Bilten Vrhovnog kasacionog suda, 3|2017, pp. 142-143.

71 Serbia ratified the ECHR in 2004, whereby it accepted the jurisdiction of the ECtHR. In line with Art. 16(2) of the Serbian Constitution, the provisions of the ECHR are an integral part of the Serbian legal system and as such are directly applicable. In addition, the Law on Administrative Disputes also guarantees in its Art. 2 the trial within reasonable time.

72 In order to improve the level of protection of the right to trial within reasonable time – especially considering the large number of successful applications on this matter before the ECtHR against Serbia – and, at the same time, to relieve the Constitutional Court who had become overwhelmed by a substantial number of cases on this matter, a special Law on Protection of the Right to a Trial within Reasonable Time was adopted and has been in force as of 2016. This law explicitly lists criteria on the basis of which it shall be assessed whether applicant's right to trial within reasonable time has been violated. The law follows the standards established by the ECtHR to a considerable degree. Art. 4 of the Law on the Protection of the Right to Trial within Reasonable Time, OG RS no. 40/15 and 92/23. For a detailed analysis, see: *M. M. Salma*, Suđenje u razumnom roku – Pravna sredstva kojima se štiti pravo na suđenje u razumnom roku [Trial Within Reasonable Time – Legal Remedies for the Protection of the Right to a Trial Within Reasonable Time], Zbornik radova Pravnog fakulteta u Novom Sadu, 3|2015, p. 1005.

73 *European Commission for the Efficiency of Justice*, Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights, Council of Europe Publishing, Strasbourg 2018, p. 5, available from https://rm.coe.int.

74 The logic behind this approach is that the initiation of a (tax) administrative dispute is conditioned on the previous exhaustion of a legal remedy (appeal) in the administrative procedure.

75 *European Commission for the Efficiency of Justice*, fn. 73, p. 4.

76 Para. 91-92 of the Judgment of the ECtHR in *Janosevic v. Sweden,* case no. 34619/97, 23 July 2002. In this case the ECtHR calculated the duration of the proceedings from the date when the audit report was communicated to the taxpayer.

Consequently, once the duration of the proceedings before the tax authorities (Tax Administration and Ministry of Finance) is added up, the average three-year duration of tax disputes before the Administrative Court may easily fail to withstand the "reasonable time" requirement. Another factor contributing to the length of proceedings is the fact that the Administrative Court rarely ventures into resolving a (tax) case on the merits.[77] In other words, the Court usually limits its decision-making to the annulment of the challenged administrative act. Once adjudicated in favour of the taxpayer, the case is sent back to the competent tax authorities for retrial.[78] In practice, this means that the same case sometimes comes back to the Administrative Court as many as four times.[79] In line with the case law of the Serbian Constitutional Court, the fact that the same case had already been decided by the Administrative Court is considered as a factor that should prompt the judges to render the new decision in a shorter time span.[80] However, this is not always the case. It seems reasonable to assume that specialised judges would be more likely to take up on resolving tax cases on their merits.

Although tax disputes are, as a general rule, not considered as cases requiring urgent consideration (such as e.g. family disputes, cases involving juvenile defendants or defendants held in custody, employment disputes, etc.),[81] the delay in attaining judicial protection in tax disputes may have pronouncedly adverse effects on the users of judicial protection, i.e. taxpayers. Namely, pursuant to Art. 23(1) of the Law on Administrative Disputes, the filing of a lawsuit does not, in principle, postpone the enforcement of the (tax) administrative act that is being challenged before the court. Moreover, in contrast to what the rules of general administrative procedure presuppose,[82] the rules of tax procedure explicitly posit that the filing of an appeal against the first-instance tax administrative act does not suspend its enforceability.[83] Consequently, in the vast majority of cases the taxpayer will be obliged to pay the tax due[84]

77 Adjudication in a full jurisdiction dispute (*spor pune jurisdikcije*) presupposes that the Court's judgment will substitute the annulled (initially challenged) decision issued by the administrative authority.

78 Some authors have proposed that, to prevent the ping-pong effect, full jurisdiction should be mandatory once the challenged administrative act has been annulled but the administrative authority fails to act in line with the instructions the Court's provided in its judgement. *Z. Tomić*, Priroda stvari i domet Upravnog spora, Strani pravni život, 1|2023, p. 14.

79 *Council of Europe*, Right to a Trial within Reasonable Time – Comparative Overview, Council of Europe, Strasbourg 2022, p. 89. For examples of cases in which the Serbian Constitutional Court had found the violation of the right to trial within reasonable time in tax matters, see decisions: Už 3775/2022 of 16 May 2024; Už 281/2020 of 25 April 2024; Už 11753/2021 of 28 September 2023; Už 4953/2020 of 24 March 2022; Už 8081/2019 of 3 June 2021; Už 7363/2017 of 4 June 2020.

80 See decisions of the Constitutional Court of Serbia, Už 7363/2017 of 4 June 2020; and Už 8337/2015 of 6 July 2017.

81 *Council of Europe*, fn. 80, p. 12. In addition, Art. 50 of the Rulebook on Court Procedure contains *exempli causa* list of cases requiring urgent consideration. Specific subject matters presupposing urgent consideration are identified in separate laws. Rulebook on Court Procedure, OG RS no. 110/09, 70/11, 19/12, 89/13, 96/15, 104/15, 113/15, 39/16, 56/16, 77/16, 16/18, 78/18, 43/19, 93/19 and 18/22.

82 Art. 154(2) LGAP.

83 Art. 147(1) LTPTA.

84 The taxpayer has two routes to request the suspension of the challenged tax administrative act: as per Art. 147(2) LTPTA, as well as based on Art. 23(2) of the Law on Administrative

irrespective of the fact that neither the second-instance administrative procedure, nor the dispute before the Administrative Court have been finalised.

5. The Need for Continuous Expertise Development

The (tax) legislator seems to have recognised the need for strengthening the expertise of Administrative Court judges in (certain) tax matters. The Law on Determining the Origin of Property and Special Tax, which was adopted relatively recently, introduced mandatory, albeit one-off, training of Administrative Court judges who adjudicate cases in which decisions on the assessment of special tax are challenged.[85] Since no (sub)specialisation exists currently within the Administrative Court, any judge can – based on the generally applicable method of random allocation[86] – potentially be assigned to adjudicate such a case. As a result, the required training had to be organised for all judges and judicial assistants appointed at the Administrative Court.[87] Although institutionalised professional development of judges is nothing but a welcome practice, it is questionable whether the described approach is sensible. It would have been far more efficient – and specialisation would allow for that – if the training had been limited to judges who adjudicate (exclusively or predominantly) tax cases. Moreover, it is disputable if a one-off training on such a narrowly focused topic has any merits, as opposed to continuous professional development in tax matters, to which the training described here would be just a finishing touch.

6. The Quality of Judicial Decision-making

The quality of judicial decision-making is presumably the most important anticipated contribution of specialisation. For a plea for judicial specialisation to be well founded, deficiencies in the existing quality of rendered decisions need to have been identified. In this respect, inconsistent and inadequately and/or insufficiently reasoned judgements in a particular subject matter are usually singled out as shortcomings which could greatly benefit from judicial specialisation.[88] Although in the case of Serbia these deficiencies could be also addressed through the establishment of a two-tier administrative judiciary, whereby the appellate instance would influence both the harmonisation of judicial practice and the quality of reasoning in first instance decisions,

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Disputes. In the first case, it is the Ministry of Finance that decides on the request for enforcement suspension, while in the latter case the decision is issued by the Administrative Court.

85 Art. 21 of the Law on Determining the Origin of Property and Special Tax, OG RS no. 18/20 and 18/21.

86 Art. 49(1) Rulebook on Court Procedure.

87 *Upravni sud*, Seminar Primena Zakona o utvrđivanju porekla imovine i posebnom porezu [Seminar on the Application of the Law on Determining the Origin of Property and Special Tax], 1 December 2021, available from https://www.up.sud.rs 24 September 2024.

88 Owing to the expertise, familiarity, and fewer numbers of specialised judges, it is generally expected that their decisions will be more uniform than decisions of a substantially larger number of generalist judges. *Zimmer*, fn. 13, p. 2.

for the purpose of our analysis we focus only on material specialisation as a contributing factor.

A particularity of administrative disputes under Serbian law is that, in deciding on the legality of final administrative acts, the Administrative Court relies on the assessment of facts previously conducted by the competent authority in the administrative proceedings.[89] As a consequence, the Court is not required to address each and every claim made in a lawsuit, to the extent that these claims have already been presented by the plaintiff and assessed by the competent authority during the administrative procedure.[90] Moreover, under Serbian law, in both administrative procedure and administrative dispute the principle of free evaluation of evidence is applicable.[91] In other words, there is no formal ranking of various forms of evidence apt for ascertaining the facts of the case, nor is the degree of their weight predetermined.[92] The Court is, therefore, autonomous in selecting criteria to assess the probative value of evidence. To prevent arbitrary and unfair decisions, the key limitation to the principle of free evaluation of evidence lays in the obligation of the court to substantiate giving faith to certain evidence rather than others.[93]

Despite this, judgements of the Administrative Court in tax disputes are often insufficiently and/or inadequately reasoned. Not only is this the perception of the users of judicial protection, but the Serbian Constitutional Court has also confirmed this on multiple occasions. The most common weakness identified in the reasoning provided by the Administrative Court in its decisions lies in the disregard of the parties' arguments, evidence, and submissions that could be crucial for the outcome of the dispute.[94] Even though the Court's reasoning usually contains a detailed interpretation of the plaintiff's claims, their evaluation is often reduced to the blanket statement that they are not relevant for adjudication in the case at hand, despite the fact that they

89 Art. 355(2) Law on Civil Procedure (which is accordingly applicable to administrative disputes provided that a particular issue is not dealt with by the Law on Administrative Disputes) specifies that the reasoning of a judgement should contain: the parties' claims and their assertions regarding the facts on which those claims are based, evidence, facts established by the court, as well as the legal provisions on which the court based its judgment. OG RS no. 72/11, 49/13, 74/13, 55/14, 87/18, 18/20 and 10/23.

90 See for example decisions of the Constitutional Court of Serbia, no. Už 65/2012 of 25 March 2015; Už 1792/2016 of 23 November 2017; and Už 4610/2018 of 20 June 2019.

91 Art. 10 LGAP presupposes the following: (1) The authority is obligated to correctly, truthfully, and fully establish all facts and circumstances that are relevant for the lawful and proper resolution of the administrative matter. (2) The authorized official decides, based on their own conviction, which facts are considered proven, by way of a conscientious and careful evaluation of each piece of evidence individually and all evidence taken together, as well as on the basis of the results of the entire procedure.

92 Decision of the Constitutional Court of Serbia, Už 6092/2016 of 27 September 2018. *G. Carlizzi*, Scientific Questions of Fact between Free Evaluation of Evidence and Proof Beyond any Reasonable Doubt in the Criminal Trial, Quaestio Facti: International Journal of Evidential Legal Reasoning, 1|2020, p. 134.

93 Decision of the Constitutional Court of Serbia, Už 11820/2018 of 20 June 2019.

94 *K. Manojlović Andrić*, Pravo na obrazloženu sudsku odluku u upravnom sporu [The Right to a Reasoned Court Decision in Administrative Disputes], Glosarium, 28.03.2023, https://www.glosarijum.rs/, 10 December 2024.

sometimes involve claims crucial for the judgment.[95] As a result, the Constitutional Court ruled in relation to a number of tax disputes that the petitioner's right to a reasoned decision, as an element of the right to a fair trial under Art. 32(1) of the Constitution, had been violated,[96] because the contested decision of the Administrative Court was *"not reasoned in a manner that would eliminate doubts regarding arbitrariness of the proceedings and decision-making"*.[97]

A rather detrimental consequence of the described state of judicial protection of taxpayers in Serbia is the exceptionally limited influence of the Administrative Court's case law on the interpretation of tax legislation. This is especially troublesome when contrasted with the authority *de facto* accorded to the opinions issued by the Ministry of Finance on interpretation of tax legislation. Namely, despite the fact that, with the aim of ensuring uniform implementation of regulations under the jurisdiction of the Ministry of Finance, the LTPTA[98] presupposes that opinions issued by the Ministry are binding (only) for the conduct of the Tax Administration, case law of the Administrative Court shows that judges are hesitant to challenge the interpretation of tax law provisions adopted thereby.[99] The described practice may be presumed to result from the fact that judges feel ill-prepared to deal with tax-specific issues, for which reason accepting *prima facie* the Ministry's interpretation manifests itself as the path of least resistance. Obviously, this is highly problematic from the point of view of both the principle of legality, and the principle of separation of powers. It seems reasonable to assume that specialised judges with sufficient expertise on tax matters would be less inclined to take the interpretation of the Ministry at face value but would rather venture into interpreting tax provisions themselves.

IV. The Way Forward

The choice of the preferred means of judicial specialisation will depend on the aims which are intended to be achieved thereby, as well as the wider set of circumstances in which the court system operates in a particular legal system. Considering the organisational means of judicial specialisation presented above, the options could be boiled down to the establishment of: (1) a separate specialised tax court within the existing court structure; (2) a tax specialised department within the Administrative Court; or (3) a tax specialised panel or specialisation of a certain number of judges within the Administrative Court.

95 ibid.

96 See for example decisions of the Constitutional Court of Serbia, no. Už 3554/2010 of 3 October 2013; Už 65/2012 of 25 March 2015; Už 1792/2016 of 23 November 2017; Už 6092/2016 of 27 September 2018; Už 11820/2018 of 20 June 2019; Už 8700/2016 of 24 January 2019; and Už 4610/2018 of 20 June2019.

97 Decision of the Constitutional Court of Serbia, Už 11820/2018 of 20 June 2019.

98 Art. 11(3) LTPTA.

99 See e.g. Judgment of the Serbian Administrative Court no. U 6295/2016 of 9 November 2019.

Despite the fact that some authors have in the past expressed support for the establishment of a separate tax court within the Serbian judicial system,[100] it is our view that this would not (at least at this point in time) be an adequate solution for Serbia. Separate specialised tax courts are usually encountered in more populous and often federally organised countries, with far more robust tax systems.[101] In addition, the establishment of a fully-fledged specialised tax court would require constitutional and thorough legislative amendments, accompanied by the allocation of sufficient resources, for which it would be exceptionally difficult to mobilise necessary support.[102,103]

When it comes to the second means of judicial specialisation, i.e. the creation of a specialised tax department within the Administrative Court, the existing legislative framework may present itself as a hurdle in this regard.

Pursuant to Art. 37(1) of the Law on the Organisation of Courts, a court department is formed within a court in which several panels or individual judges handle cases regarding the same legal subject matter. On the basis of Art. 16(2) of the Law on the Organisation of Courts and in line with Art. 8 of the Law on Seats and Jurisdictions of Courts and Public Prosecutors′ Offices,[104] the Administrative Court has its seat in Belgrade and three departments: in Kragujevac, Niš and Novi Sad. Although the established departments reflect territorial judicial specialisation, they do not involve (further) material specialisation.

Matters regarding the internal organisation and operation of courts are regulated in greater detail by the Rulebook on Court Procedure,[105] which is issued based on Art. 74(2) of the Law on the Organisation of Courts. For courts which have a larger number of panels, or individual judges handling the same subject matter, Art. 15 of the Rulebook on Court Procedure mandates the establishment of certain departments

100 *D. Popović*, Cross-checking of Income Tax Returns with Worth Accretion: Serbia's Legislation in the Comparative Law Context, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 1|2022, p. 55.

101 Some examples are USA, Canada, Brazil, South African Republic, Germany, Philippines, Italy, Austria, and Portugal. See individual country reports in: *S. Whitehead* (ed.), The Tax Disputes and Litigation Review, Law Business Research Ltd, London 2019; *The South African Judiciary*, The South African Judicial System, https://www.judiciary.org.za/index.php/the-south-african-judicial-system, 15 December 2024; *The Court of Tax Appeals*, Expanded Jurisdiction, https://cta.judiciary.gov.ph/, 15 December 2024.

102 This seems all the truer given that a major focal point of the 2010 overhaul of the court network in Serbia was resource optimisation through a considerable reduction of the number of courts. For more on this issue, see: *V. Rakić Vodinelić / A. Knežević Bojović / M. Reljanović*, Reforma pravosuđa u Srbiji 2008-2012 [Judicial Reform in Serbia 2008–2012], PF Union – Službeni glasnik, Belgrad 2012, pp. 79-80.

103 It should also be noted that a recent comparative analysis of the organisation of courts conducted under the auspices of the Centre for Judicial Research (CEPRIS) has shown that many comparative jurisdictions are succeeding in addressing adequately the influx of new cases with a significantly smaller number of courts, as well as fewer judges, than is the case in the Serbian judicial system, for which reason this is not considered to be the key factor for the unsatisfactory level of judicial protection in Serbia. *Spaić*, fn. 52, p. 61.

104 OG RS no. 101/13.

105 OG RS no. 110/09, 70/11, 19/12, 89/13, 96/15, 104/15, 113/15, 39/16, 56/16, 77/16, 16/18, 78/18, 43/19, 93/19 and 18/22.

(e.g. criminal, civil), while it authorises the establishment of some other departments (those adjudicating e.g. employment, family, and status disputes, as well as for non-contentious, probate, enforcement, preparatory proceedings). The Rulebook on Court Procedure also contains a legal basis for the setting up of other departments, provided that such a need exists. It further lists *exempli causa* the department for the protection of intellectual property rights, and the department for media disputes. Nevertheless, in regards to the Administrative Court, the Law on the Organisation of Courts, which is an overarching legal act in relation to the Rulebook on Court Procedure, authorises only the establishment of (territorially based) departments outside the Court's seat.[106] As previously mentioned, this was indeed effectuated by the Law on Seats and Jurisdictions of Courts and Public Prosecutors´ Offices. We may, therefore, conclude that in the case of the Administrative Court, there seems to be no legal basis for the establishment of (additional) departments for adjudication on specialised subject matters, such as taxation.[107]

On the other hand, there appear to be no legislative obstacles for the organisation of specialised judicial panels within the Administrative Court. Art. 24 of the Law on Judges stipulates that cases are to be assigned to judges based on the court's annual work schedule in accordance with the Rulebook on Court Procedure, considering the complexity of the cases, and following the order predetermined for each calendar year, exclusively based on the case designation and number. Art. 47(2) of the Rulebook on Court Procedure stipulates that, when the number of cases *on a particular subject matter* is sufficiently large, the president of a particular court may allocate such cases to certain judges or certain panels within that court by way of an annual work schedule. In addition, Art. 49(1) of the Rulebook on Court Procedure regulates the assignment of cases to judges within a court. It specifies that newly received cases are first classified according to their urgency, type of procedure *or legal subject matter*, and then assigned based on the chronological order of their receipt, using a random judge assignment method, in accordance with the established annual work schedule.

Given that administrative disputes are, as a rule, adjudicated by panels of three judges,[108] two options could be considered in implementing the specialisation in practice. The first option would presuppose that the entire panel(s) consist of judges specialised in tax matters. The alternative option would be the allocation of one specialised judge per panel, so that this particular judge could act as the judge rapporteur. The latter option would require a lower number of tax specialised judges and would

106 Art. 16(2) Law on the Organisation of Courts.

107 It should, however, be noted that an additional department was actually formed within the Administrative Court, the so-called preparatory department (*pripremno odeljenje*), for which no explicit legal basis exists in the Law on the Organisation of Courts, albeit the authorisation for its formation may be found in Art. 15 of the Rulebook on Court Procedure. From this point of view, it may be argued that the same could be the basis for the establishment of a *ratione materiae* specialised departments, e.g. in the field of taxation. *Upravni sud*, Godišnji raspored poslova Upravnog suda za 2023. godinu [Annual Work Schedule of the Administrative Court for the year 2023], available from https://www.up.sud.rs, 27 September 2024.

108 Art. 8(2) of the Law on Administrative Disputes.

be especially suitable for adjudication in departments outside of the Court's seat, since these departments have a significantly smaller number of panels.[109,110]

V. Conclusion

For some time already, there appears to have been a general agreement among policy-makers and judicial representatives on the legitimacy of the specialisation of administrative judiciary within the Serbian judicial system. Yet the questions remained open as to: (1) which specific subject matters within the scope of administrative disputes warrant specialisation, and (2) which particular means of specialisation may be considered feasible within the current Serbian legal framework.

The analysis endeavoured to provide arguments in favour of specialisation of the Serbian Administrative Court in tax matters. We have shown that there is ample evidence suggesting that tax specialisation of administrative judiciary is highly desirable within the Serbian legal context and could, if implemented carefully, contribute substantially to improving the level of taxpayers′ rights protection. We further analysed the potential pathways for implementing tax specialisation of the Administrative Court, taking into account the existing body of legislation governing the organisation of the Serbian court system. We concluded that tax specialisation would be feasible even without the amendments of the current legislative framework, provided that it is implemented by way of establishing panel(s) consisting of judges specialised in tax matters or, when it comes to departments outside of the Court's seat, by allocating one specialised judge, who would act as judge rapporteur, per each panel.

As a concluding note, it is worth recalling the words of Judge *Easterbrook*:

> Much of the judge-centered scholarship in contemporary law schools assumes that judges have the leisure to examine subjects deeply and resolve debates wisely. Professors believe they have this capacity and attribute it to judges. Pfah! Professors, like most practitioners these days, are specialists. They devote lifetimes to understanding one or two fields in depth.[111]

This paper was intended to serve as a modest contribution to changing such a perspective.

109 Pursuant to Art. 113 of the Rulebook on Court Procedure, the president of the court specifies, by way of the annual work schedule, the number of panels and judges in departments outside of the Court's seat, as well as the legal subject matter and type of cases that are to be adjudicated in these departments.

110 In line with the Annual Work Schedule for the year 2023, in Belgrade, where the seat of the Administrative Court is located, seven panels were organised, while departments in Kragujevac, Niš and Novi Sad had between two and four panels. *Upravni sud*, fn. 107, pp. 4-8.

111 *F. H. Easterbrook*, What's So Special about Judges?, University of Colorado Law Review, 4|1990, p. 778.

AUS FORSCHUNG UND LEHRE

Zivilistische Lesungen in Almaty 2024

Die zivilistischen Lesungen in Almaty haben 2024 ihr 25. Jubiläum gefeiert, das ich virtuell von Berlin aus verfolgte. Wieder wurden an anderthalb Tagen unter der Leitung von Maidan Suleimenov Referate von meist 10 Minuten zu zivilrechtlichen Themen gehalten, an die sich eine öfters von Rolf Kniepers Interventionen angeregte Diskussion anschloss. Wie üblich, kamen Beiträge aus Usbekistan, Tadschikistan, Kirgistan, Aserbaidschan, Georgien, Moldawien. Russisch blieb die Arbeitssprache, von Russland war nur mehr in Spuren die Rede, von den früher sowjetischen Ländern fehlten die baltischen Länder, Weissrussland, Armenien und Turkmenistan ganz.

Diesmal ging es um Normen, ihre Definitionen und Abgrenzungen. Dazu legte Sulemeinov eine wie üblich beeindruckend detaillierte Arbeit vor. Der Unterschied zwischen zwingenden und dispositiven Normen, ihre Anwendung (der Teilnehmer aus Moldawien), ihr System, Kodizes, Normen und Verordnungen (Skryabin), Handelsgesetzbücher, Rechtsfamilien, eine vom kasachischen Justizministerium angekündigte Neubesinnung auf schuldrechtliche Normen im engeren Sinne, die vielen für den Finanzmarkt typischen Regeln (die Teilnehmerin aus Tadschikistan) und Prozesskostenhilfe im Lichte gesetzlicher Garantien (die Teilnehmerin aus Kirgistan)[1] wurden behandelt; Chanturia trug spannend zum Wechselverhältnis[2] von Normen und Rechtsschutz in den Urteilen zur Europäischen Menschenrechtskonvention, Karagussov (wie auch schon sehr detailliert in früheren Beiträgen) zur Steuerung durch gesellschaftsrechtliche Normen vor.

Wie auch schon früher schienen neue Themen wie die von Big Data[3] frisch aufgenommen zu werden, der mit den jeweils vorgeschlagenen Regelungen oder Begriffsbildungen verfolgte Schutzzweck hingegen war nicht leicht zu bestimmen. Wenn, wie in einem Beitrag von Karagussov,[4] Ursachen von Problemen benannt wurden, schienen

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1 Wie für kirgisische Beiträge typisch mit auffallend Bedacht, *Давлетбаева*, in: Сборник материалов Юбилейных Цивилистических чтений, состоявшихся в г. Алматы в 2024 году на тему «Нормы гражданского права», 2025, S. 543.

2 Dazu in der wohl vergeblichen Hoffnung auf eine sozusagen automatische Entwicklung von innerstaatlichen Rechtssätzen *Gutbrod/Hindelang*, The Missing Bits – To Be Substituted By BITs, in: https://www.academia.edu/10109870/The_missing_bits_to_be_substituted_by_BITs.

3 S. den Beitrag von *Омарова* in: Сборник материалов Юбилейных Цивилистических чтений, состоявшихся в г. Алматы в 2024 году на тему «Нормы гражданского права», S. 429 mit einer Vielzahl von Erwägungen z.B. zum Schutz von geistigem Eigentum und Know-how, aus dem aber der Schutz kasachischer Erfinder und Unternehmer im Gegensatz zu solchen in der übrigen Welt nicht klar wird.

4 Der Aufstand 2022 sei nach Сборник материалов международной научно практической конференции «Казахская цивилистика: становлении и развитие», 2024, S. 37 durch das Agieren „monströser staatlicher Gesellschaften“ verursacht worden, das der kasachische Präsident zu beschränken angeordnet habe.

Lösungsvorschläge eher unrealistisch, wenn, wie in den Beiträgen von Schramm, ausländische Entwicklungen dargestellt wurden, blieb offen, wie die jeweilige lokale Entsprechung aussähe. Kniepers Einschätzung der Entwicklung seit dem Zerfall der Sowjetunion blieb für sich stehen. Die Fragen zur Entwicklung des österreichischen Familienrechts schien eher auf – erfreuliches –persönliches Interesse als auf die praktische Relevanz von Regeln für gleichgeschlechtliche Ehen in Zentralasien hin zu deuten. Wieder entstand auch der Eindruck, bei eher Theoretischem (wie der Kategorisierung der Rechtsnachfolge oder der Stelle des Rechts in der Geschichte) komme es leichter zu einem gelegentlich auch kontroversen Dialog, Konkreteres (wie nichtvertragliche, insbesondere deliktische Ansprüche, die Schutzbedürftigkeit einzelner Personengruppen oder Verhaltensweisen, die Auswirkungen vorgeschlagener Änderungen)[5] werde zwar z.T. detailliert, aber eher wahllos bearbeitet und selten wieder aufgenommen. Meine Beiträge über die Jahre sollten die Verwendbarkeit von Recht auch im wissenschaftlichen Kontext unterstreichen, sie sind aber wohl als eher theoretisch wahrgenommen worden. Häufig wurde Yuri Basin als Ausnahmeerscheinung erwähnt,[6] häufig auf die persönlichen Beziehungen angespielt, die in Seminaren entstanden seien.

In Erinnerung bleibt mir aus der Seminarreihe, wie im Rahmen des Seminars Wissenschaftler unterschiedlicher Seniorität und Nationalität zusammenarbeiteten, wie viele interessante Gespräche am Rande und aus Anlass des Seminars stattfanden, dass die Teilnahme aus Europa auch dazu beitrug, autoritäre organisatorische Vorstellungen abzumildern. Eindrucksvoll waren auch Begegnungen mit Größen wie Abova, Yem und Vitriansky, aber auch mit an die Seite gedrängten, wissenschaftlich interessierten Praktikern, die in den Seminaren eine Heimat, eine kreative Herausforderung gefunden zu haben schienen.

Wieder ist ein, diesmal auch elektronisch verfügbares Buch mit Tagungsbeiträgen erschienen. Die GIZ trat zum letzten Mal als Mit-Organisatorin auf,[7] die Einstellung der Förderung wurde – soweit mir ersichtlich – auch im Internet nicht begründet.[8] Das bleibt umso unverständlicher, als die innere Ordnung in den zentralasiatischen Ländern geopolitisch für Europa immer wichtiger wird,[9] Reformbedarf anerkannt ist[10] und – bei allen Schwierigkeiten der entsprechenden Messung – durch die Seminare mit vergleichsweise geringen Mitteln eine unvergleichliche Wirkung erzielt wurde.

Dr. Max Gutbrod, Berlin

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5 So berichteten *Kot/Phribniy* bzw. *Dovgert* in: Научное наследие Профессора Юрия Григорьевича Басина и развитие гражданского права, 2023 S. 95 bzw. S. 235 über die Modernisierung des ukrainischen Zivil- bzw. internationalen Zivilrechts, ohne die Folgen einer derartigen Modernisierung zu behandeln.

6 In Научное наследие Профессора Юрия Григорьевича Басина и развитие гражданского право, 2023, finden sich persönlichere Erinnerungen an Basin. Auch der in Fn. 5 erwähnte Band ist Basin gewidmet.

7 Im Übrigen die Caspian University (https://cu.edu.kz) und die Kanzlei Zanger (https://zangerlf.com/ru/home).

8 Zum letzten Mal wurde das Seminar unterstützt von der GIZ. Lokale Beteiligung. Bei Suche jedenfalls mit Stichwort Kasachstan https://www.giz.de/de/weltweit/132361.html.

9 S. z. B. https://www.consilium.europa.eu/en/press/press-releases/2025/02/12/first-eu-central-asia-summit-to-take-place-on-3-4-april-2025/.

10 Ein kleines Beispiel: https://www.eeas.europa.eu/eeas/georgia-statement-spokesperson-developments-around-judicial-reform_en.

AUS JUSTIZ UND DER RECHTSPRECHUNG IN OSTEUROPA

Ungarn

Verfassungsgerichtsurteil 20/2024. (XI. 28.) AB über das Souveränitätsschutzamt

Das Urteil[1] erging auf die Rechtssatzverfassungsbeschwerde der ungarischen Sektion von Transparency International hin. Der Beschwerdeführer führte an, einige Bestimmungen des Gesetzes 2023:LXXXVIII über den Schutz der nationalen Souveränität, insbesondere einige Bestimmungen in Bezug auf das durch das Gesetz errichtete Souveränitätsschutzamt widersprächen der Meinungs- und Informationsfreiheit (Art. IX. Abs. 1 GrundG), dem Recht auf ein faires Verwaltungsverfahren (Art. XXIV. Abs. 1 GrundG), dem Recht auf Rechtsschutz (Art. XXVIII. Abs. 7 GrundG) und dem Recht auf ein faires Gerichtsverfahren (Art. XXVIII. Abs. 1 GrundG).

Zu den Aufgaben des Souveränitätsschutzamtes gehören neben allgemeiner beobachtender, bewertender und forschender Tätigkeit im Hinblick auf Risiken für die Souveränität Ungarns insbesondere auch Prüfverfahren, mit denen es staatliche und kommunale Behörden, Vereinigungen und Einzelpersonen überziehen kann. Derartige Prüfungsverfahren sollen u.a. Interessenvertretung, Desinformation oder Tätigkeiten zu Beeinflussung der demokratischen Meinungs- und Willensbildungsprozesse im Interesse ausländischer staatlicher oder privater Stellen aufdecken oder die Einflussnahmen ausländisch finanzierter Organisationen auf den Ausgang von Wahlen oder die Bildung des Wählerwillens ermessen. Das Souveränitätsschutzamt kann von den geprüften Stellen und Personen in weitem Umfang Auskünfte und Informationen anfordern, die die Betroffenen zu liefern verpflichtet sind. Darüber hinaus hat das Amt staatsanwaltsähnliche Ermittlungsbefugnisse, allerdings kaum eigene Sanktionierungsbefugnisse. Gegebenenfalls ist es verpflichtet, den Verdacht auf Ordnungswidrigkeiten oder Straftaten den zuständigen Behörden zu melden. Die Prüfberichte des Amtes werden veröffentlicht. Nicht erfasst werden die Subventionen und Zahlungen, die der ungarische Staat seinerseits an politische Parteien im Ausland leistet.

Bei der Zulässigkeitsprüfung zeigte sich das Verfassungsgericht großzügig und sah die engen gesetzlichen Voraussetzungen für eine unmittelbare Rechtsatzverfassungsbeschwerde als gegeben an. Unter anderem muss der Beschwerdeführer unmittelbar von der Rechtsnorm betroffen sein, was das Gericht mit dem Argument bejahte, dass die Behörde bereits Auskunftsverfahren gegenüber Transparency International wegen der Finanzierung aus ausländischen Quellen eröffnet habe.

In der Sache war die Verfassungsbeschwerde jedoch erfolglos. Vor dem Einstieg in die Grundrechteprüfung stellte es fest, dass die Errichtung des Amtes in dem neu eingefügten Art. R) Abs. 4 GrundG seine Verfassungsgrundlage habe. Außerdem hielt das Verfassungsgericht vorab die Klärung der Verfassungsbegriffe Souveränität und Verfassungsidentität für notwendig, welche nach An-

1 Urteil vom 28.11.2024, Magyar Közlöny 2024 Nr. 119.

OER 1/2025, DOI: 10.5771/0030-6444-2025-1-84

sicht des Gerichts historisch geprägt sind und zusammenhängen, aber nicht identisch sind. In länglichen Ausführungen erzählt das Gericht eine teilweise erfundene Nationalgeschichte der zunehmenden Konsolidierung der ungarischen Staatsgewalt nach, beginnend bei der Staatsgründung und mit Ausführungen u.a. zur Krakauer Union von 1440, mit der sich Ungarn und Polen zu einer „Schutzbastion der Christenheit" zusammengeschlossen haben sollen, und zu etlichen Gesetzen des 18. und 19. Jahrhunderts, die die Selbstständigkeit Ungarns innerhalb des Habsburgerreichs betonten. Schließlich wiederholt es noch einmal die in Art. E) GrundG zum Ausdruck kommende ungarische Auffassung, wonach auf der Ebene der EU die Mitgliedstaaten ihre Kompetenzen gemeinsam ausüben, was zudem bestimmte ungarische Verfassungswerte nicht verletzen dürfe.

In Bezug auf die Meinungsfreiheit stellt das Verfassungsgericht kurz und apodiktisch fest, dass das Souveränitätsschutzamt keine Sanktionen verhängen dürfe. Seine Zuständigkeiten seien – was sachlich falsch ist – rein berichtender Natur und könnten als solche den Schutzbereich der Meinungsfreiheit nicht berühren. Auf die administrativen Lasten, die die Auskunftsverfahren für die geprüften Stellen bedeuten, geht das Gericht mit keinem Wort ein. Diese Kürze der Grundrechtsprüfung steht in auffälligem Gegensatz zur ausufernden Länge der vorangegangenen Geschichtsstunden.

Das Grundrecht auf ein faires Verwaltungsverfahren sah das Verfassungsgericht gar nicht erst für eröffnet an, weil das Souveränitätsschutzgesetz die Verfahren des Souveränitätsschutzamtes nicht als Verwaltungsverfahren qualifiziere und – was wiederum sachlich falsch ist – dem Amt keine Befugnis zur verbindlichen Regelung übertrage.

Die Prüfung, ob das Recht auf Rechtsmittel verletzt ist, bezog das Verfassungsgericht auf die Entscheidung des Amtes, seine Prüf- und anderen Berichte zu veröffentlichen. Auch hier verneinte es kurz und knapp den Charakter als Verwaltungsentscheidung, weshalb sich die Frage nach einem Rechtsweg nicht stelle. Alle weiteren Beschwerdepunkte wies es als unzulässig ab.

In ihrem Sondervotum bejahte Verfassungsrichterin Ildikó Marosi den Verwaltungscharakter des Souveränitätsschutzamtes und führte aus, dass das Verfassungsgericht eine Verfassungswidrigkeit durch Unterlassen hätte feststellen müssen, weil bestimmte essenzielle Schutzbestimmungen für ein faires Verfahren und den Rechtsschutz fehlten.

Prof. Dr. Dr. h.c. Herbert Küpper