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”Blind Spots” of Judicial Review of Disputes with the State and Their Impact on the Protection of Fundamental Rights: From Immunity of Privileged State Authorities to Ensuring Effective Legal Remedies

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JURISPRUDENCIAL SIBLINGS? THE *RULE OF LAW* AND THE *RECHTSSTAAT* AS THE TWO TRACKS TO THE SOCIETY, PUBLIC SPHERE AND THEIR NORMATIVE FRAMEWORK

Abstract. In this paper, we engage with Professor Martin Loughlin's article *The Rule of Law: A Slogan in Search of a Concept* (2024). Considering the above, (1) we put forward three research theses. To substantiate them, (2) we briefly outline and discuss arguments concerning the emergence of the concept of the Rule of Law in twelfth-century English common law, as formulated by the American constitutional historian Charles Howard McIlwain. (3) Since McIlwain's thesis on the medieval distinction between *jurisdictio* and *gubernaculum* has been addressed in the works of Gianluigi Palombella, we also present key elements and points of Palombella's arguments regarding the Rule of Law as distinct from the *Rechtsstaat*. (4) Considering the historically shaped characteristics of the Rule of Law, we analyse the process through which it was operationalised by the Court of Justice of the European Union (CJEU), before focusing on the legal definition of the 'rule of law' provided in Regulation (EU, Euratom) 202/2092 of the European Parliament of 16 December 2020. (5) Finally, while wrapping up analyses, we briefly indicate factors that require up-to-date analysis to arrive at a comprehensive comparative characterisation of the Rule of Law and *Rechtsstaat* concepts (descriptive phase), and to facilitate the reconstruction of divergent normative expectations within the key elements of each concept (normative-descriptive phase).

Keywords: the Rule of Law, legal state (*Rechtsstaat*), medieval constitutionalism, public sphere, Court of Justice of the European Union (CJEU), CJEU Regulation (EU, Euratom) 202/2092

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JURYSPRUDENCYJNE POKREWIEŃSTWO? KONCEPCJA PRAWORZĄDNOŚCI I KONCEPCJA PAŃSTWA PRAWNEGO JAKO DWIE KONKURENCYJNE DROGI KSZTAŁTOWANIA SPOŁECZEŃSTWA, SFERY PUBLICZNEJ I ICH RAM NORMATYWNYCH

Streszczenie. W niniejszym artykule odnosimy się do artykułu profesora Martina Loughlina pt. "The Rule of Law: A Slogan in Search of a Concept" (2024). Biorąc powyższe pod uwagę, (1) przedstawiamy trzy tezy badawcze, aby je uzasadnić, (2) krótko przedstawiamy i omawiamy argumenty dotyczące pojawienia się koncepcji praworządności w XII-wiecznym angielskim prawie zwyczajowym, sformułowane przez amerykańskiego historyka konstytucji Charlesa Howarda McIlwaina. (3) Ponieważ teza McIlwaina dotycząca średniowiecznego rozróżnienia między *jurisdictio* i *gubernaculum* została omówiona w pracach Gianluigiego Palombelli, przedstawiamy również kluczowe elementy i punkty argumentacji Palombelli dotyczące praworządności (RoL) w odróżnieniu od koncepcji państwa prawnego – *Rechtsstaat*. (4) Biorąc pod uwagę ukształtowane historycznie cechy charakterystyczne składające się na koncepcję praworządności, analizujemy proces, w ramach którego została ona wdrożona przez Trybunał Sprawiedliwości Unii Europejskiej (TSUE), a następnie skupiamy się na prawnej definicji „praworządności" zawartej w rozporządzeniu Parlamentu Europejskiego (UE, Euratom) nr 202/2092 z dnia 16 grudnia 2020 r. (5) Na zakończenie analizy wskazujemy pokrótce czynniki, które wymagają aktualnej analizy, aby uzyskać kompleksową charakterystykę porównawczą pojęć praworządności (RoL) i państwo prawa *Rechtsstaat* (faza normatywno-opisowa) oraz ułatwić rekonstrukcję rozbieżności w ich ujmowaniu.

Słowa kluczowe: praworządność, państwo prawa – (*Rechtsstaat*), średniowieczny konstytucjonalizm, sfera publiczna, Trybunał Sprawiedliwości Unii Europejskiej (TSUE), rozporządzenie TSUE (UE, Euratom) 202/2092

1. INTRODUCTION, RESEARCH THESES, AND METHODOLOGY

The concept of the 'rule of law' is currently being shaped in European judicial rulings. Referring to Loughlin's study, this can be seen as an exemplification of the recent face of the rule of law, which is 'the' rule of judicature (Loughlin 2024, 518). In our view, it is crucial that it does not remain (randomly) context-dependent but instead evolves into a fully-fledged concept, developed through debates and discussions on its normative meaning and socio-institutional consequences. As Geranne Lautenbach aptly emphasises: "The rule of law is intricately bound up with the historical, ideological, and institutional context in which it has developed. (…) Also, within this context, it can be shown which institutions have been devised to realise the aims of the rule of law" (Lautenbach 2013, 18). Consequently, we believe that in-depth research on the historical, institutional, political, social, and economic aspects of the rule of law in the light of its two-track development – namely, through the framework of medieval English law and the Enlightenment German concept of the *Rechtsstaat* – is a most urgent and pressing matter.

In light of the above, we argue as follows:

Thesis 1: The concepts of the Rule of Law (**RoL**) and the *Rechtsstaat* (**RS**) were created and developed in response to the specific challenges faced, at different times, by societies evolving along distinct paths on either side of the English Channel.

In this context Professor Loughlin notes that "Turning to the European experience, we see that the modern state emerged from a variety of medieval empires, realms, and principalities" (Loughlin 2021, 181). Indeed, in the case of the RoL, it was primarily the post-conquest administrative integration of the three kingdom-areas – Wessex, Mercia and Danelaw – that played a key role, with common law serving as a key unifying factor. Conversely, in the case of the RS, it was the formation of statehood through the shaping of a common identity that was legally articulated. However, the processes related to the centralisation of the RS on the Continent occurred much later, that is, following the French Revolution, so on the eve of tendencies and operations to decentralise the Crown's governmental powers, hence a separate question, which we will not answer here, is whether this decentralisation contributed to, or even, enabled the persistence of the Crown and its government to this day. Nevertheless, it would seem that an awareness of the developmental trajectories of contemporary forms of government can contribute to a more comprehensive understanding of the political processes of which we are a part.

Thesis 2: When discussing the European Union (EU), the use of the term 'the rule of law' in isolation – in other words, addressing political issues solely through the lens of RoL, without also considering the RS – can entail the imposition of normative expectations rooted in the English legal tradition on societies that operate under the normative framework of RS. Consequently, this can be confusing for all participants in the political-legal discourse: citizens, officials, politicians, not to mention philosophers.

In his paper, Professor Loughlin astutely identified this very issue:

> The fragility of the rule of law is most dramatically exposed, however, in those situations where the two tracks have been drawn together in ambitious constitution-building projects. This has been the challenge faced by Eastern European post-communist regimes. Here, the aim has been to establish simultaneously an independent nation-state, a democracy operating according to the rule of law, a vibrant civil society, and a market-based economy. This ambitious task has generally been promoted through EU membership, and therefore by privileging a technocratic mode of government imposed by the EU's economic constitution and policed by an active judiciary. As the recent experiences of many of these countries indicate (Hungary, Poland, Czechia, Slovakia, Romania), the rule of law seems increasing to be seen domestically as a tool of the new capitalist entrepreneurs, and so-called 'illiberal democracy' is now touted in some quarters as a response to two decades of 'undemocratic liberal' reforms. (Loughlin 2024, 520)

In contrast to the flood of critiques that have recently inundated scholarly journals, Professor Loughlin's diagnosis of contemporary European issues regarding the RoL stands out constructively. His analysis considers the clash between two historically developed perspectives encapsulated in two different concepts (RoL and RS), each referring to lawfulness but both proving insufficient when it comes to identifying comprehensive normative expectations for democratically enacted law that guarantees justice in our contemporary reality. This gives rise to certain key questions: Will the emerging concept of the RoL be consciously and deliberately shaped by us? Will we be aware of its implications? Will it take individuals into account, or will it rather be focused on institutions? Will it succeed in harmonizing the claims of both of these stakeholders? Or perhaps its development, despite being dressed up in the revered terminology of the RoL, will not move towards any such harmony?

Thesis 3: The intertwining of normative expectations highlighted above may pose a challenge for the conceptualisation of the European Union – a multicentric system (Łętowska 2005, 3–10) in which the content of the Rule of Law and the *Rechtsstaat* are currently *clashing*. In other words, institutions, legal solutions from various legal systems, and social models are all competing with each other (Meierhenrich 2021, 39).

The three theses are interrelated, hence the arguments are formulated and elaborated simultaneously in this paper. To make the task feasible, our approach has tailored the text to a specific audience. We assume that the European reader is sufficiently familiar with the tradition of the *Rechtsstaat*, so the emphasis of this paper falls on the history of common law theory and philosophy.

Given that Melanie Smith has already examined the tension between the CJEU and the ECtHR regarding the interpretation of RoL and its three functioning meanings in EU law – as a 'constitutional norm, policy tool, and value' (Smith 2019, 575; comp. Moreiro González 2024, 1–13) – our paper, due to formal constraints, will focus on the evolution of RoL interpretation within the EU from 2018 to 2024, giving particular consideration to the crucial role of judicial bodies, especially the CJEU and the national courts of the Member States.[1]

2. THE HISTORY OF COMMON LAW IN A NUTSHELL: THE SIGNIFICANCE OF THE 12TH AND 13TH CENTURIES FOR THE DEVELOPMENT OF THE RULE OF LAW

Charles Howard McIlwain, in his work *Constitutionalism Ancient and Modern* (McIlwain 2007), posits that the defining feature of English law is the limitation of power inherent in the concept of the RoL. He traces this limitation primarily (though not exclusively) to the preserved and analysed writings of

[1] The progressive judicialisation of the EU RoL principle has recently been pointed out by e.g. Polak (2024, 171–208).

Henry Bracton[2] from the medieval period. This is the first of McIlwain's theses relevant for our article **(ChHM_T1)**.

McIlwain's thesis has had a significant impact on scholarly work that considers the history of the rule of law in England. For example, Gianluigi Palombella references the work of George L. Haskins, who, 15 years after McIlwain's 1940 study, wrote about the RoL in a similar vein in his work from 1955:

> After 1259 there appeared a noticeable reluctance to permit alterations in common law, and we soon hear of cases in which writs brought by the king were quashed by his own judges. […] To this extent at least, the rule of law was extended to limit prerogative action and to prevent the king from making further changes in the substantive rights and procedures of his subjects.

Moreover:

> But this was not all. The remarkable feature of the development was that the <u>rights and remedies</u> of the common law came to be identified with the rule of law itself (Palombella 2009a, 9)[3] – authors' emphasis.

For the purposes of this discussion, it is important to note that, according to McIlwain:

a) the English law tradition of limiting power is the oldest in Europe (McIlwain 2007, 15–16), having been effectively in place since the Middle Ages. In historical terms, this distinguished the Kingdom of England from contemporaneous continental political formations.

b) This tradition is the heart of English constitutionalism, and

c) due to its venerable age, there was no perceived need for a codified constitution to limit power (McIlwain 2007, 16).
It is important to emphasise that English (or 'Anglo-Saxon') constitutionalism does not have the statutory nature typical of the RS framework, exemplified in the Kantian model of autonomous, rational, and legislative will.[4] For centuries, the RoL has synchronised the workings of the Crown's institutions, rendering a codified constitution unnecessary.

d) This practice of law application, coupled with the crucial recognition of what constitutes law by common courts (the bottom-up and common filtering of legal norms), stands in contrast to the tradition of

[2] Henry de Bracton is the author of perhaps the best-known medieval treatise on English law *de Legibus* from 1256, followed only by Blackstone's systematic work from 1758. Cf. Tubbs (2000, 7–22).

[3] It is footnote 30 to the text (Haskins 1955, 529–538). Precisely, the passage cited by Palombella comes from (Haskins 1955, 535–536).

[4] Cf. Immanuel Kant, "The concept of every rational being as one who must regard himself as giving universal law through all the maxims of his will, so as to appraise himself and his actions from this point of view, leads to a very fruitful concept dependent upon it, namely that *of a kingdom of ends.* By a *kingdom* I understand a systematic union of various rational beings through common laws": *Groundwork of the Metaphysics of Morals:* 4: 433; in Kant (2008, 83).

written continental law and centralised control of legal norms – centralised norm-setting.

However, two additional factors are crucial for understanding the development of these divergent traditions:

- From a historical perspective, to fully understand common law and the relationships it fostered between legal entities, it is important to appreciate the centrality of private law and the institution of contract, which have traditionally held greater significance than public law. This has created a distinctive tension within the RoL between these branches, a dynamic that remains very tangible today, and to which we will return in a later section.
- As A.V. Dicey emphasised, in common law, the term "The 'rule of law' lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, <u>are not the source but the consequence of the rights of individuals</u>, as defined and enforced by the Courts" (Dicey 1915, 121 – authors' emphasis). In other words, the RoL is characterised by the openness of legal sources, to which the judiciary has privileged access.

e) It is essential to highlight the connection between the emergence of 'Anglo-Saxon' constitutionalism and the process of centralising English law. McIlwain argues that until the early seventeenth century, both in England and on the Continent, "constitution" always means a particular administrative enactment much as it had meant to the Roman lawyers. The word is used to distinguish such particular enactments from *consuetudo* or ancient custom (McIlwain 2007, 23). These acts were significant for the very effective and comparatively rapid centralisation of law in England, particularly involving the incorporation of varied local customs from southern Britain (Langbein et al. 2009, 12; Van Caenegem 1988, 11, 23 et seq.). He describes this **process of centralising English law** as follows:

> The common law of England is an English *jus gentium* compounded of many pieces of local custom. In like fashion the *jus gentium* of Rome consisted of the legal principles "common" to the Italian states which Rome's expansion merged in the Roman judicial system. Among the unsung heroes of English constitutionalism are the great justiciars of Henry II, such as Richard de Lucy and Ranulf Glanvill, who were doing for English law what, centuries before, the long line of obscure but important *praetores peregrini* had done for the Roman. (McIlwain 2007, 49–50; similarly writes: Clanchy 1998, 109–112)

f) McIlwain views the process of centralising English law through the lens of an analogy with Roman law, and this has significant implications for us. The argument supporting the pivotal role of the medieval period in shaping English constitutionalism and the concept of the RoL is related to the thesis **(ChHM_T2)** on the particular – and in our view, 'subversive' – influence of

Roman law on common law.[5] This influence can be considered subversive because, in our view, it represents a **methodological meta-influence of Roman law on common law** that occurred precisely in the twelfth and thirteenth centuries. As a result, by the end of the thirteenth century, English law had developed a form of 'resilience' (a kind of unique systemic immunity) against any future attempts to adopt solutions from Roman law in a mimetic manner (McIlwain 2007, 54).

In the light of primary sources and contemporary research, McIlwain's views can certainly be debated as regards the specifics of what is 'common' in English common law and how it developed during the medieval period and later (Tubbs, 2000; Haskins 1955). The key and undeniable value of McIlwain's contribution is his emphasis on the **pluralism of legal sources, the unsystematic nature of the law** (as indicated by the reference to *ius honorarium* oriented towards *aequitas*), and the significant **role of judges**, especially in the twelfth and thirteenth centuries (McIlwain 2007, 50). McIlwain also points out another analogy between Roman and English law: **the substantial role of legal fictions** in both systems. These enhance the **flexibility of the law** in the hands of interpreting judges, thereby enabling the law to better respond to the issues currently faced by its addressees (McIlwain 2007, 51).

g) In medieval common law, private law and public law were closely intertwined. One might question whether this **close connection between private and public law** truly reflects the influence of Roman law on English law, as this seems debatable, especially when considering the early development of the Kingdom of England. However, for the purposes of our discussion, this is a secondary issue, in the sense that the fact of this proximity and its significance is undeniable (McIlwain 2007, 56). McIlwain emphasises what Haskins would continue to stress seventeen years later: the limitation of the king's power through the fact that cases involving the ruler were judged by exactly the same courts that judged the cases of his subjects. In essence, **the common courts adjudicated matters concerning what was fundamental to the law, common to every legal subject, namely issues of property** (Langbein et al. 2009, 13) **and, at the same time, liberties**.

It is noteworthy that the consequences of this exceptionally close connection between private and public law were extensively and deeply discussed at the turn of the twentieth and twenty-first centuries, in relation to Europeanisation processes and the phenomena of New Public

[5] It is worth recalling here that the teaching of Roman canon law was banned by Henry II at the highly significant Assize of Clarendon (1166), exactly 100 years after the Battle of Hastings, which re-secularized the kingdom and, among other things, introduced trial by jury. Later, Henry III prohibited the teaching of civil law in London.

Management and Post-New Public Management. This was a new trend in public management, borrowed from the English law tradition and applied on the Continent, where the category of operational efficiency was extrapolated from the private to the public sphere (Veraldi 2023, 479), without significant normative distinctions being made between them. In this paper, we therefore posit that another characteristic feature of the RoL is precisely this **close connection between private and public law, or, as Palombella emphasizes, the irreducible tension between them, which is quite foreign to the statutory culture of the *Rechtsstaat***. In the latter, the legitimisation of the private sphere, based on interests, is significantly different from the legitimisation of the public sphere, typically grounded in the notion of the common good or deontological categories, and only exceptionally based on the category of social interest.

h) Another important and specific way in which Roman law influenced English law is connected with McIlwain's interpretative thesis concerning medieval source texts **(ChHM_T3)**. According to McIlwain, Bracton consciously and competently – due to his evident and recognised knowledge of Roman law and Latin – redefined the key Roman law formula determining the sources of English law as 'only an authoritative promulgation by the king of what the magnates declare to be the ancient custom' (McIlwain 2007, 65), which the king could not change in accordance with his arbitrary will. Notably, the king could change the law arbitrarily, but then he would be acting against the very principle legitimising his power – namely, against the oath he had taken to protect the (private) rights of individuals (McIlwain 2007, 76) – thus making his actions *ultra vires* (McIlwain 2007, 77). McIlwain argues that **the essence of medieval English constitutionalism is precisely this legitimisation of royal power through the endorsement of the will of the people, who wish for their individual private rights to be effectively protected, and for peace to be maintained**. Crucially, it can be said that this medieval English constitutionalism sanctioned the centralisation of the legal system in the name of protecting the private rights of the individual.

Interestingly, eight to nine centuries later, similar tendencies can be observed in the development of European constitutionalism. The essence of expanding the powers of EU institutions, and thus the reason for centralising the legal system, is the protection of fundamental rights as embodied in the Charter of Fundamental Rights of the EU.[6]

[6] It was the European courts: the CJEU and the ECtHR, invoking the protection of individual rights, that led to the operationalisation of the RoL and, using Loughlin's terminology, supported the development of the 'Rule of Judicature.' We can note a vital dialogue conducted between the ECtHR (which initially had a stronger legitimacy to creatively enshrine the rights of the individual) requiring protection against the oppressive state apparatus provided by the Convention (ECHR),

i) A key issue that McIlwain **(ChHM_T4)** identified and that Palombella has subsequently adopted as a central theme in his publications and discussed extensively is the **dual conceptualisation of power** characteristic of medieval English constitutionalism, reflected in the concepts of *jurisdictio* and *gubernaculum*.

> To him (Bracton) leges (in the narrow sense of the word), *constitutiones*, and *assisae* are nothing more than administrative orders and therefore a part of 'government' – something which 'pertains to the administration of the realm (*pertinet ad regni gubernaculum*)' – and as such are properly within the king's exclusive control. Definitions of 'right,' on the other hand, share the character of the immemorial custom they define, and these, Bracton says, "since they have been approved by the consent of those using them and confirmed by the oath of kings, can neither be changed nor destroyed without the common consent of all those with whose counsel and consent they have been promulgated" (McIlwain 2007, 75).[7]

In brief, the concept **of *gubernaculum* pertains to the public sphere**, overseen by the ruler, while the concept of ***jurisdictio* refers to the private sphere,** which requires protection and is safeguarded through the ruler's oversight of the public sphere. Thus, the concept of power is dual in nature, which contrasts sharply with the separation of powers at the core of the RS concept.

Before analysing selected passages from Palombella's works, it is important to highlight two key points from McIlwain's research: first, the discussion of *gubernaculum* and *jurisdictio* in England had parallels on the Continent, particularly in debates over the interpretation of Roman sources, notably regarding the distinction between "the *merum et mixtum imperium et jurisdictio* of the Roman law sources" (McIlwain 2007, 86, footnote 36). In other words, **the Continental equivalent of the English law tension between private and public spheres was the tension between legislative and executive power**.

Second, while Roman law influenced English common law at a methodological meta-level, it did not influence English common law by producing solutions directly modelled on those of Roman law. According to Sir Maitland, what impacted English law in the twelfth century was rather the **rationalism of Roman law** (Pollock, Maitland 1968, first published 1895, ciii–civ).

and the CJEU. A bridge to this dialogue was the interpretation of, in particular, Article 47 of the Charter of Fundamental Rights, which made it possible to transpose the standards developed, e.g. against the background of Article 6 of the ECHR, into the body of the CJEU's jurisprudence. See Polakiewicz and Kirchmayr (2021, 361).

[7] McIlwain quotes firstly Folio 55 B and then Folio 1B (references 21 and 22) (Bracton 1922).

3. THE CHARACTERISTIC TENSION IN THE RULE OF LAW BETWEEN *GUBERNACULUM* AND *JURISDICTIO*, OR THE HISTORICAL NATURE OF LEGAL CONCEPTS

Gianluigi Palombella, in *The Rule of Law and its Core* (Palombella 2009a) and *The Rule of Law Beyond the State: Failures, Promises, and Theory* (Palombella 2009b, 451, 453–454) – here one can see the *Rechtsstaat* associated with *gubernaculum*) tackles the dichotomy between *gubernaculum* and *jurisdictio*. While Palombella's approach to these concepts is interesting and inspiring, it overlooks some key aspects that McIlwain highlighted, such as the nuanced interpretation of the reception of Roman law by English common law.

The essence of Palombella's reading of the *jurisdictio* and *gubernaculum* dichotomy is contained in the following passage:

> Contrary to the *Rechtsstaat* (or the *Stato di diritto*), understood as a peculiar form of the State, the rule of law as an *ideal* presupposed that, in part, positive law lies beyond the disposal or "will of men", of the King, or of the sovereign power. Accordingly, as a *relationship*, the rule of law provided a link between two essential western law domains, harking back to the medieval tradition evoked through the couple *jurisdictio- gubernaculum*, i.e. justice and sovereignty. (Palombella 2009a, 1)

First, Palombella suggests the **key to the conceptual pair of *jurisdictio* and *gubernaculum* lies in the tension that arises between them**, which he describes as "the *tension between a law of justice and the law from sovereignty* (which today for us means democracy)" (Palombella 2009a, 21). The dual concept of power is therefore relational, and as such generates inherent tensions.

Second, we should note that he redefines the power denoted by the term *gubernaculum*, shifting the focus from executive power to legislative power, and this is how sovereignty should be understood in his works. It is worth mentioning that McIlwain, from whom Palombella draws inspiration, not only presented the original thesis on Bracton's redefinition of the sources of law, according to which the king declares what the magnates, after consultations, deem to be ancient custom, but he also emphasised that *gubernaculum* refers to the public aspect of power – the authority the sovereign exercises to protect individual rights, liberties, and property, as pledged in the coronation oath.[8] A point worth considering is that the tension resulting from Palombella's reinterpretation of the terms – namely, between judicial power and democratic processes – is a characteristic feature,

[8] Understanding the concept of the contract and the fact that in English law, 'the vassal of my vassal is my vassal' – and that the sovereign was exclusively the king – is key to grasping Thomas Hobbes's contractualism. At the same time, it is also crucial for understanding the political role of the king's advisory bodies (the aristocracy) and the transformation of the King's Court.

but more so in contemporary contexts, such as in the construction of power in the United States (Scalia 2002, 73–86).[9]

Palombella also omits other elements of common law emphasised by McIlwain that are familiar from historical accounts, as well as the tension between the legislative and executive powers characteristic of the Continent. For example, after the Norman Conquest, power in England – especially within the legal system – was centralised more rapidly and efficiently than on the Continent. This was largely due to the Assize of Clarendon (1166) and subsequent assizes, such as the Assize of Novel Disseisin. This was a pivotal process that introduced a form of *ius gentium* in England through the development of the common law. In our view, this centralisation of power, especially within the legal system, has multifaceted and fundamental significance in the light of Palombella's thesis regarding the characteristic tension in the RoL – which he conceptualises as a binary opposition – between *gubernaculum* and *jurisdiction*.

The upshot of this tension was the generation of *constraints* and *control* over the royal power and prerogatives associated with *gubernaculum*, which in all likelihood later served as the foundation for the concept of 'checks and balances'. It is worth noting that in regions such as the Polish-Lithuanian Commonwealth, a similar tradition of land assemblies began to develop approximately a hundred years later (Zwierzykowski 2006, 63–71). However, this tradition is not typically interpreted as foundational to the RoL, as it lacked the second component of the tension – the centralised power through which the king, exercising his authority within *gubernaculum*, could effectively and fully realise his sovereign power. In other words, the tension between the pair of concepts might have developed not only because the protection of *jurisdictio* by the king became an effective basis for legitimising royal power in twelfth-century England but also because the king was strong and effective enough, and his power sufficiently centralised, to actually fulfil his coronation oath. In contrast, on the Continent, the situation was quite different. The ravages of war prevented or delayed the emergence of sovereign states until the Peace of Westphalia (1648), which would subsequently or simultaneously facilitate the processes of centralisation of power.

[9] Antonin Scalia reminds us: "When Europeans speak of the separation of powers, it is generally a synonym for the independence of the judiciary. That is a part of separation of powers, to be sure, but only a very small part. In our system it includes, in addition, not only separation between the two political branches, but also, as far as the courts are concerned, supremacy (within their own house, at least) with regard to interpretation of the Constitution. Thus, unlike in England, our courts – state as well as federal, courts of first instance as well as courts of last resort – can ignore a duly enacted law of the legislature" (Scalia 2002, 74–75).

In the words of Paul Tiedemann:

> The basic idea of the formal Rechtsstaat is to domesticate the state […]. Domestication by statutes demands first the internal separation of legislative and executive powers. […] It is rather a mechanism of mutual hampering. […] The separation of power tends also to improve the rationality of rule. […] Rationality of rule is in itself a contribution to the safeguard of freedom because it protects against senseless and arbitrary restriction of freedom, i.e. it protects against sacrifices of freedom that are not connected with a common benefit. (Tiedemnann 2014, 174)

We agree with Palombella's thesis on the fundamental dual tension inherent in the RoL – it is not a vertical tension characteristic of the RS, where 'law comes from above', from the legislator, but rather a horizontal tension among 'equals'. However, regardless of how we interpret the duality created by *gubernaculum* and *jurisdictio*, it is essential to recognize **that common law and its particular version of the RoL are rooted in the recognition of pluralism and the openness of legal sources** – the very factors that generated this dual tension. The constitutional closure of legal sources significantly reduces this tension.

It is this pluralism that leads McIlwain to compare English common law to *ius gentium*. What was always 'common' in common law, then, were the common courts, where everyone's affairs – particularly those concerning property and the liberty tied to property (land) – were adjudicated in the same manner.

It is important to recall what McIlwain strongly emphasises: "On the Continent, the transition from the medieval theory of dominium to the modern theory of sovereignty – the theoretical concomitant of the development of the modern nation-state – was made largely in the form of a changing interpretation of the *merum et mixtum imperium et jurisdictio* of the Roman law sources" (McIlwain 2007, 83, footnote 36). In other words, **the transition from the medieval theory of *dominium* to the modern theory of sovereignty occurred on the Continent through a shifting interpretation of the tension between, on the one hand, the powers to make laws (and issue orders)**[10] **and, on the other hand, the powers to enforce the death penalty (civil law system) following a proper judicial process**. This generated the need for a conceptualisation of the separation of powers that was different from the need for the checks and balances that originated in medieval England.

j) As Palombella rightly emphasises, the concept of **the RoL is historically shaped** (Palombella 2009a, 9), and "the meaning of the Rule of Law depends on an enduring continuity with its own past" (Palombella 2009a, 8). Thus, the tension reflected in it between the rights of private individuals and public power is, in our view, historically mirrored in English institutions and culture. A historically shaped concept is not analytically created, and therefore all contextual elements – culture,

[10] The transition entails the following distinction: on the Continent issued orders are expected to make order, while in England/UK commands are made in order to govern.

institutions, society, as well as the knowledge and perceptions of citizens concerning all of these elements – are of crucial importance for its connotations and interpretation. Concepts such as the Rule of Law or the *Rechtsstaat* are historical in nature as they designate the principles and functioning of various national, governmental, or public institutions, the societal knowledge embedded in these principles, and citizens' competence to exercise their rights through these guaranteed institutions. As Jürgen Habermas aptly points out:

> [D]emocratic institutions of freedom disintegrate without the initiatives of a population *accustomed* to freedom. Their spontaneity cannot be compelled simply through law; it is regenerated from traditions and preserved in the associations of a liberal political culture. (Habermas 1999, 130–131)

Thus, one can only speak of legal institutions to the extent that there are citizens who possess the necessary skills and habits to use them in a competent manner – a competence which is shaped through a spontaneously – but reflectively – formed tradition. Therefore, when building institutions, it is essential to understand and appreciate the tradition into which they are to be integrated, and to recognise who their competent users could be, rather than merely considering them as abstract addressees.

4. ON THE FAILURE TO DISTINGUISH BETWEEN THE CONCEPTS OF THE RULE OF LAW AND THE *RECHTSSTAAT* – A CASE STUDY

A comprehensive understanding should always be – from a philosophical perspective – critically grounded. Thus, it is important to emphasise that the RoL originated in a system that sought to balance judicial and executive powers in response to both the privatisation and publicisation of law. Historically, the RoL addressed the dual tensions arising from the strong centralisation of power, which set it apart from (made it heterogeneous in relation to) the classic continental notion of balancing and tri-partition. Nowadays, the RoL is considered the rationale behind the principle of the tri-partition of power and the principle of the balance of powers. This evolution underscores the significance of the RoL in shaping modern governance (Varga 1973, 205 et seq.; Varga 2021, 245 et seq.; Varga 2022).

This can be highly perplexing since – unlike the RS, with its flagship tripartite tension – the concept of the RoL is genetically encoded with a system of the sources of law that is open and pluralistic, which generates a dual tension. Consequently, in the **concept** of RoL significant emphasis is placed on the active and creative role of the courts (Davies 2014, 1579), while **in RS the key role is assigned to the assumption of the rational legislator and the closed system of the sources of law** (Nowak 1987, 137–146, 147–164). At the same time, it is recognised that it is the idea of the rational legislator that safeguards the axiological dimension of both legal interpretation and accurate legislation: "On the one hand, it protects us from the arbitrariness of individual lawyers; on the other hand, it prevents the practice of law from reflecting the political opportunism that guides the conduct of actual lawmakers" (Kozak 2002, 154).

In the classic RoL, the centralisation of power is legitimised by the protection of private interests. In contrast, in the concept of RS, individual interests do not take precedence – as per the legal argument – over the public interest. Let us note that the term 'rule of law' is *expressis verbis* articulated within the framework of EU law: it appears in in EU legal regulations; and the EU bodies, including the Court of Justice of the EU (CJEU), employ this term. As is well known, at the proclamation level, the RoL was enunciated long ago. It suffices to recall, for example, Article 2 of the TEU,[11] which states:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. (Authors' emphasis)

It is clear that, in this provision, the term 'rule of law' serves as a rhetorical device rather than a fully articulated concept.[12] Its primary function is to indicate certain axiological preferences of the legislator and to refer to the EU as a community of pluralist values (Burgess 2017). Hence, it seems that **the proclamation of the values associated with the term RoL did not originally entail that the sphere of EU *law* would be dominated by the English law notion of RoL**, or that (in the conceptual sphere) **the notion of the RS or *'etat du droit'*, which is typical for Continental systems, i.e. the systems of most EU Member States, would be – to all intents and purposes – rejected.**[13]

The point is that the 'rule of law' is a term that characterises common law and thus a term that functions in the English language (sic!). It should therefore be noted that when legal acts are translated into the equivalent legislation in the national languages of the EU Member States, the term is most often translated – into these national languages – through the concept of 'the state of law'/ *Rechtsstaat*. In Polish official translations of EU legal acts, the term 'the Rule of Law' is rendered as 'państwo prawa (the state of law)' or 'the legal state (państwo prawne)' sometimes as 'lawfulness (praworządność)', but not as 'the rule of law (rządy prawa)'. In official translations of EU legislation, the term 'Rule of Law' is rendered as follows: French – *L'État de droit*; Spanish – *El Estado de Derecho*; German – *Die Rechtsstaatlichkeit*; Croatian – *Vladavina prava*; Slovak – *Právny*

[11] TEU – Treaty on the European Union (OJ. 2004, no. 90, item 864/830 as amended; C 202/13).

[12] However, there are authors for whom the concept is clear, e.g. Pech (2022).

[13] On the differences, see Varga (1973, 205 et seq.; 2021, 245 et seq.; 2022).

štát; Maltese – *L-istat tad-dritt*, Czech – *právním státě*; Danish – (*I henhold til*) *retsstatsprincippet*; Estonian – Õigusriigis *peavad*; Irish – *Leis an smacht reachta*; Italian – *Lo Stato di diritto;* Latvian – *Tiesiskums*; Lithuanian – *teisinės valstybės principu;* Hungarian – *A jogállamiság*; Dutch – *De rechtsstaat*; Portuguese – *O Estado de direito*; Romanian – *Statul de drept*, Finnish – *Oikeusvaltioperiaate*; Swedish – *Rättsstaten*.

This prompts the question: why is this the case? Is it a way of forming a new tradition in which the two terms are made equivalent; or is it rather a legacy of a moment when the Continental countries and the UK (i.e., pre-Brexit) attempted to frame the future together, and thus the translations – equivalent according to the equivalence of all EU languages[14] – were meant to respect the two different traditions in which the EU Member States had operated for centuries? Or was it simply a conceptual oversight? We, again, say 'yes' to Professor Loughlin who states that "Formulations such as *Rechtsstaat* and *l'État de droit* have emerged from different constitutional traditions with different political histories. Despite the similarity of their formulations, these expressions are not direct equivalents" (Loughlin 2010, 313).

At the same time, it is worth pointing out that **in the initial construction of the EU**, when the Executive was dominant and the Judicial power was the guardian of rights, with the (initially) minor importance of legislative bodies (as they acted in an opinion-making rather than a law-making manner), **provided favourable conditions for the reception of precisely the English law concept of RoL.** This thesis is confirmed by the analysis of the content of the treaties, the preservation of the division of competencies between the EU and the Member States, but also by the path that the EU took from 2018 to 2023, with the fundamental participation of judicial bodies – both the national courts of the Member States and the CJEU.

As it is rightly observed:

> In what can now be considered some of its most groundbreaking judgements of the last years, the Court (CJEU) has taken upon itself to protect the EU principle of the rule of law by infusing it with normative life. In this sense, the Court has made clear the justiciable nature of the rule of law in the EU, as well as progressively expanded its own jurisdiction over matters falling under its ample umbrella. (Polak 2024, 173; similarly: Spieker 2023)

4.1. The procedural framework for conceptual transformation – assumptions

Two mechanisms provided for in the treaties have proven crucial for the conceptual transformation: the so-called preliminary ruling procedure (Article 267 TFEU)[15] and the infringement procedure (Article 258 TFEU).

[14] See Regulation No. 1 defining the language regime of the European Economic Community (OJ 17, 6.10.1958, p. 385).

[15] TFEU – OJ 2004.90.864/2 – Treaty on the Functioning of the European Union – consolidated text taking into account the amendments introduced by the Treaty of Lisbon.

It should be emphasised that they were not initially treated as mechanisms established for the protection of the RoL, since the RoL was indicated as **a value** in the above-cited Article 2 TEU and was considered to be fall in the sphere of the Member States' autonomy (Pech 2016, 1062 et seq.; Van Elsuwege, Grimmelprez 2020, 8 et seq.; Rizcallah, Davio 2020, 122 et seq.; Kochenov, Bárd 2019, 243 et seq.), i.e. **their autonomous interpretation of values**. It is worth mentioning that under the preliminary ruling procedure, it is the national court that refers the question to the CJEU for a preliminary ruling, which thereby reinforces the status of national courts as European courts.

The infringement procedure is triggered by the European Commission (EC) in the event that a Member State is found to have violated one of its obligations under the ratified Treaties (Article 258 TEU).[16] It should be noted that before the CJEU framed its own jurisdiction through the operational interpretation of the RoL, it used to respond in RoL cases, at the request of the EC, through this very EU mechanism (Article 258 TFEU) (Polak 2024, 178). Presently, a third mechanism has also been added to the two basic modes, which has served to transform, clarify and concretise the operational framing of the RoL within the framework of European constitutionalism. This third mechanism, set forth in Article 263 TFEU,[17] is explicitly indicated in Regulation (EU, Euratom) 2020/2092 of December 16, 2020, *on the general system of conditionality for the protection of the Union's budget*[18] (hereinafter the *Regulation*). In the event of the sanctioning procedure provided for in this *Regulation* being triggered, a decision of the EU Council freezing EU funds against a state violating the rule of law may become the subject of a complaint under the procedure outlined in Article 263 TFEU.

In other words, based on the aforementioned two mechanisms (preliminary questions and the infringement procedure), the CJEU developed an operational formulation of the RoL, and in the last step, based on the acquis of case law, a legal definition of the RoL was introduced into EU secondary law for the first time (Article 2 of *the Regulation*).

From the perspective of the theses put forward in this article, this concluding step, i.e. establishing a legal definition, is of crucial importance. The conceptualisation of RoL in the EU initially resulted from the interpretative rulings of the CJEU and was thus a product of the actions of the judiciary, yet the law-making role of the courts is part of the traditional English law concept of the RoL. However, due to the diverse cultural contexts of the Member States and the strong normative influence of the cultural patterns of the RS, there was

[16] It is worth mentioning that also other provisions were considered as a normative source for strengthening the rule of law (Kochenov 2011).

[17] Case C-274/14 Banco de Santander SA, ECLI:EU:C:2019:802 (Butler 2020).

[18] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general system of conditionality for the protection of the Union's budget. Official Journal of the EU 2020 L 433 I/1.

a desire for a ‘definitional’ closure in statutory law. Ultimately, therefore, the adoption of a legal definition of RoL in *the Regulation* can – in our view – be seen precisely as a manifestation of the conceptual friction between the English law understanding of Rule of law and the *Rechtsstaat* framework.

4.2. Phases in the development of an operational conception of the Rule of Law

The ruling of the Grand Chamber of the CJEU of 27 February 2018 is considered to have constituted an ‘interpretational touchstone’ or significant breakthrough in terms of its previous jurisprudence – case C-64/16 (preliminary reference Associação Sindical dos Juízes Portugueses v. Tribunal de Contas).[19]

It was in this judgment **that the CJEU laid the foundations for the operational approach to RoL by recognising that Article 19 TEU concretises the value of RoL as defined in Article 2 TEU**. By this concretisation of the value of the RoL, Article 19(1) TEU states that:

> Everyone whose rights and freedoms guaranteed by the law of the Union have been violated shall have the right to an effective remedy before a court, following the conditions laid down in this article.

Nevertheless, it is important to note that **a decisive element** of the aforementioned **operational framing of the RoL was Article 47 of the Charter of Fundamental Rights**,[20] **which legitimised the RoL by reference to the protection of the fundamental rights of the individual**, according to which: “Everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”

On the basis of these specific provisions, the Court confirmed that the right to an effective remedy for violation of rights and freedoms shall be guaranteed by an impartial and independent court. This **right to an effective remedy and its institutional guarantees were thus explicitly linked to the RoL formula**. This operational formulation of the RoL has enabled uniform guarantees to be extended to all national courts, perceived as courts of a common system of justice, with the CJEU as its guardian. Thus, there has been a clearer uniformisation of the EU judiciary under the umbrella concept of the access to effective judicial remedy (enriched by all guarantees for an independent judiciary established in Art. 47 of CFR).

As the Court has explicitly stated, the very existence of effective judicial review to ensure respect for Union law is an integral feature of the RoL and

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[19] ECLI:EU:C:2018:117. Cf. Bonelli and Claes (2018, 620 et seq.); Schmidt and Bogdanowicz (2021, 1061–1100).

[20] Charter of Fundamental Rights of the European Union, 26 X 2012, OJ C 326/02. See about the normative potential of the Charter (Lazowski 2013, 573 et seq.; Eeckhout 2002, 940 et seq.).

requires independent judiciaries.[21] The Court elaborated on its earlier theses about the scope of EU law regarding the exclusive competences of the Member States, and the effect of this judgment was to state that **the organisation of the judiciary of individual states is not the exclusive domain of the Member States**. We note that this can be interpreted, from the perspective of sections **(2)** and **(3)** of this article, as a political move, characteristic of the moment when the tension between *gubernaculum* and *jurisdictio* was identified, in the process of transforming the RoL, just as it was in medieval common law. After all, a law controlled by the judiciary is more flexible than a law stiffened by the control of the legislature. The question that then emerges is this: How exactly should we understand the *gubernaculum* in the EU and with whom, with what body or bodies, should the figure of the ruler / king be associated? Is it the executive bodies of individual EU Member States, or some other strictly EU bodies? However, if it is centralisation proceeding in accordance with the Simmel-Coser principle, then identification of the 'external threat' would also be important at this point.

One can further note a whole series of decisions by the Court, i.e. those concerning Poland, though also Romania,[22] Malta and Bulgaria, in which **the operational formulation of the RoL was elaborated by identifying specific features of judicial systems** and safeguards of independence, including judicial independence and the non-transferability of judges, or certain organisational changes in the judiciary (e.g., in the context of disciplinary proceedings against judges), which were introduced by the Member States, and which the Court considered to have lowered the standard of the rule of law at the moment of the country's accession to the EU (Kochenov, Pech 2021).

Nevertheless, due to the heterogeneous judicial systems of the Member States, which were already formed at the time of accession, the Court faced the charge of establishing a different RoL standard for each Member State. The solution adopted to justify its line of jurisprudence was the principle of ***non-regression***, interpreted from Articles 2 and 49 of the TEU as applied in the judgment of April 20 2021, *Repubblika* (Case C-896/19) (Kochenov, Dimitrovs 2021; Łazowski 2022, 1803–1822). The CJEU, by answering the preliminary questions posed by the Maltese court regarding the national rules for the appointment of judges, not only once again confirmed the competence of the CJEU to assess the rules for the appointment of judges in terms of their compatibility with EU law, but more importantly, **the CJEU stated for the first time that a Member State**

[21] See C-64/16, ECLI:EU:C:2018:117, paras 32–36. of the Judgment in Case C-64/16 Judgment of the Court (Grand Chamber) of February 27, 2018 in Case C-64/16 Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, ECLI:EU:C:2018:117.

[22] On May 18, 2021 the Grand Chamber of the CJEU issued a judgment in the case of the justice system reform in Romania. *Asociaţia Forumul Judecătorilor din România, et al.* C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, ECLI:EU:C:2021:393. See Kadlec and Kosar (2022, 1823–1852).

may not introduce changes to its legislation that lower the level of protection of judicial independence and thus violate an aspect of the RoL. The tool for checking a given change – and its authorisation or lack thereof – **is the CJEU's case-by-case assessment, i.e. full individualisation of approval for each Member State**. This aroused resistance from some states, articulated by invoking charges of violating the equality of states and creating double standards for new and old EU members. The analysis of the RoL criteria was thus an *ad casum* analysis, because it involved different judicial systems and varying aspects of violations, due to which the uniformity of the operational approach of the RoL was considered to be under threat.

4.3. Referring to the formal and substantive approaches to the Rule of Law

The scholarly literature distinguishes between formal and substantive approaches to the RoL (Raz 1979, 10). Formal conceptions emphasise the requirement to observe the law, regardless of its content, and focus on procedural aspects (the procedural criteria to which the law must conform). Substantive approaches are based on the distinction between 'just and unjust law,' and assume that the requirement to observe the RoL applies solely to just law, i.e. law with specific content. It is recognised that the mere fact a law is in force does not necessarily render it applicable, since a law, to have any merit at all, must also be a 'just law': it must meet requirements embodied in values external to itself (in this case, a system of norms). Both approaches to the RoL also include, in addition to the postulate of the legitimate action of the organs of state power, those postulates that relate to the specific features that the law should possess (e.g., relating to the way the judicial power is formed; guarantees of its independence and autonomy from other authorities). In the formal approach to the RoL, the focus is not so much on compliance with the law as on respecting laws that meet appropriate formal requirements, one of which is legal certainty. We can say that such requirements concern the way law is enacted, the separation and protection of different branches of government, and adherence to the principle of separation of powers (Kordela 2008, 589).

The formal and substantive concepts of the RoL do not compete with each other in the sense that for the most part they address different issues. The pragmatic importance of the substantive concept of the RoL is primarily manifested in the fact that it can influence the application and interpretation of the law by the courts. Under certain conditions, it can modify the norms of positive law in a just manner; in systems of statutory law, the courts then acquire certain law-making powers at the expense of the legislature. Formal RoL concepts seem more stable, but in legal rather than political terms, since in the latter case they can also be prone to instrumentalisation. This becomes manifest in the absolutisation of the formal aspects of law over the content of norms (Varga 2022, 13 et seq. See also: Burgess 2017, 195; May, Winchester 2018).

Relating the substantive and formal conceptualisations of the Rule of Law, as a matrix, to the operational view of the RoL developed by the CJEU's jurisprudence, we note that the latter fits into **the substantive view to the extent that it legitimises the law-making activities of judicial bodies**. However, analysing how the CJEU itself interprets the law-making competence of the Court, as well as the way in which it relates the values protected by Union law to specific formal guarantees regarding the right to an effective remedy, we note that **these guarantees are already associated with the formal formulations of the RoL, rather than the substantive ones**.

4.4. Codifying the Rule of Law – an analysis of the *Regulation*

The grounds for legislative attempts to define the RoL can be traced to the 'awakening of the supranational system' (Bogdandy et al. 2021). An element of this phenomenon identified by scholars is the recognition that the mechanisms set out in Article 7 TEU aimed at guaranteeing the RoL do not facilitate adequate responses to Member States who are alleged to be backsliding with regard to the RoL. Indeed, as András Sajó rightly points out:

> It will be difficult to find systemic violations of RoL in smart illiberal democracies, because (1) the EU lacks clear common *benchmarks*, and even if *ex post* such *benchmarks* are agreed upon (which is highly unlikely), applying them retroactively is highly problematic for RoL *abhors* natural law; (2) the legal concept of RoL is uncertain, even if it has enough consistency to find specific violations on formal grounds (e.g., violation of retroactivity, etc., lack of authorization) (Sajó 2019, 371).

Sajó refers to the enigmatic nature of the operational formulation of the RoL and the need to make it more precise. Consequently, it can be noted that 'this need' eventually led to legislative attempts. With the strengthening of the lawmaking powers of EU bodies, this was made possible only with the aforementioned *Regulation* on the Protection of the EU's Financial Interests (Halmai 2019, 186 et seq.; Kirst 2021, 103 et seq).

Article 2 of the *Regulation* explicitly states that "For the purposes of this Regulation, the following definitions shall apply [...]." From a legal perspective, this means that the *Regulation* constructs what could be termed a legal definition, or more precisely, a projective definition with a limited scope of application.[23] This is because it is not a universal definition, but one established solely for the interpretation of this particular piece of legislation. However, since it is the first such definition established in EU (secondary) law, its importance will undoubtedly grow. All the more so since Article 2 of the *Regulation* explicitly indicates that the RoL "refers to the value of the Union listed in Article 2 of the TEU." Thus, the quoted provision both defines the RoL for the purposes of the *Regulation* as well as exemplifies

[23] On legal definitions, see Dybowski (2021, 350–364).

and directly delineates the content of the term as expressed in treaty law. This makes the provision legally significant, as it directly defines the RoL in secondary law for the first time. This definition, in turn, in our opinion, is a manifestation of the clash between traditional the Rule of Law and the *Rechtsstaat*. Interpretations of the meaning of the RoL in CJEU jurisprudence (law-making interpretations) are being grafted into statutory law, and in such a way, from the perspective of the RS concept, the system of sources of law is being completed.

Article 2 provides the accepted definition of the *RoL*, which is worth quoting here *in extenso*:

> Rule of law refers to the value of the Union listed in Article 2 TEU. It includes the principle of legality, which means a transparent, accountable, democratic and pluralistic lawmaking process; the principle of legal certainty; the prohibition of arbitrariness in executive action; the principle of effective judicial protection, including access to justice, provided by independent and impartial courts, including with regard to fundamental rights; the principle of separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood in a manner that takes into account the other values and principles of the Union enshrined in Article 2 TEU. (Authors' underlining)

To adequately determine and clarify the definition of the RoL from Article 2 of the *Regulation*, it is also necessary to take into account subsequent provisions, especially Articles 3 and 4. Thus, respectively, Article 3 of the *Regulation* indicates that:

> [F]or the purposes of this Regulation, a violation of the rule of law shall be indicated by: (a) jeopardizing the independence of the judiciary; (b) failing to prevent arbitrary or unlawful decisions by public bodies, including law enforcement agencies, failing to correct such decisions or impose penalties for them, withholding financial and human resources affecting the proper functioning of such bodies, or failing to ensure a situation of no conflict of interest; (c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and the failure to enforce judgments or limit the effective investigation of violations of the law, the filing and support of charges in connection with such violations, or the imposition of penalties in connection with such violations.

Let us note that the adopted definition of RoL is also flexible here. *The genus of* the definition is based on a verbal formula according to which "a violation of the rule of law shall be indicated by ...". Thus, in this sense, the definition has a synoptic, illustrative character. It is not difficult to see that the categories it invokes are open-ended and refer to situations that are largely undefined, in terms of both their objective and subjective scope.

Article 4(2) of the *Regulation*, which lays down the rules for adopting measures to respond to violations of the RoL, also contains an equally flexible formula. On the one hand, the *Regulation* introduces seven types of RoL violations, relating to the scope of the *Regulation* under review, i.e. the protection of EU budgetary interests. The point is that the legislative solution adopted is only superficially detailed, since the last of the categories, contained in point (h) and concerning "other situations or actions of bodies, relevant to the sound financial management of the Union's budget or the protection of the Union's financial interests," clearly indicates that the rather extensive catalogue of violations is not exhaustive, as it only constitutes *a numerus apertus*, and thus only specifies exemplary violations.

Ultimately, the EU legislator's operational treatment of the RoL, well-established in the jurisprudence, is validated by a legislative act in the form of the cited *Regulation*. However, the definitions contained therein do not really bring us closer to decoding the content of the concept of the RoL, as the mechanisms for imposing sanctions contained in the *Regulation* underscore the discretion and autonomy of the authorised bodies of the Union as to the assessment of violations that have occurred. This, in turn, means that **we are returning 'to the beginning' of the historical-institutional forging of the RoL concept**, when the executive power was centralised **for** the protection of the rights of individuals, yet was also subject to constraint from the judiciary.

The introduced mechanism of conditionality raised doubts regarding the risk of its instrumentalisation. Concerns were expressed primarily by two countries for which the first stage of Article 7 TEU procedures had already been initiated, i.e. countries for which the CJEU had repeatedly found violations falling within the RoL infringements defined in the *Regulation*, namely Poland and Hungary. These states brought actions based on Article 267 TEU: C 156/21 and C 157/21, which led to further judgments of the CJEU, while simultaneously triggering the third path of activating the Court's competences.

Under two judgments of the Court (sitting in full) on February 16 2022 (C-156/21, Hungary v. European Parliament, Council of the European Union, and Case C 157/21, Republic of Poland/Parliament, Council of the European Union), both complaints were dismissed (Moreiro González 2024, 4–5). In the context of the present discussion, it is necessary to stress that both countries challenged the right to define the concept of the rule of law, as well as the various categories of rule of law violations outlined in the *Regulation*.

The objection raised by the aforementioned states claimed that a valid legal basis for *Regulation* 2020/2092 was lacking. It was argued that the ***Regulation***, adopted on the basis of Article 322(1)(a) TFEU, **could not establish a definition of the concept of RoL**, **could not specify the grounds for violations of the rules that make up the concept**, **nor could it authorize the Commission and the Council to further clarify the requirements for compliance with the RoL**. It has also been argued that *Regulation* 2020/2092 establishes a new mechanism, not provided for in the treaties, for monitoring Member States' compliance with the *RoL*. Thus, it produces effects tantamount to an amendment of the Treaties, which cannot be accomplished through a mere provision of secondary legislation.[24]

[24] See the OPINION OF THE REPRESENTATIVE GENERAL MANUEL CAMPOS SÁNCHEZ-BORDONA submitted on December 2, 2021. 1 Case C-157/21 Republic of Poland

These claims were soon dismissed by Advocate General Manuel Campos Sánchez-Bordon, for whom "there is nothing to prevent the EU legislature from defining it (RoL) more precisely in a specific area of application."[25] The Advocate General recalled that the *Regulation* contains a list of seven legal principles that must be interpreted in light of the other values and principles of the Union expressed in Article 2 TEU. Furthermore, Article 3 of the *Regulation* identifies certain grounds for violation of the RoL principles, while Article 4(2) contains an illustrative list of elements that may lead to a violation of these principles. According to the Advocate General, the legislator sought to facilitate the application of the RoL principles and increase legal certainty. He also argued that the characterization of the RoL by reference to the said principles meets the minimum requirements of clarity, precision and predictability that the principle of legal certainty entails.

In alignment with the reality of the RoL in the context of the EU's founding acts, as shaped by the CJEU jurisprudence, this term should be understood solely through reference to the values shared by all the Member States, and in accordance with Article 2 TEU and their interpretation in CJEU jurisprudence. The adopted formula, like the classic English concept of the RoL, **leads to the centralisation of power to protect the rights of individuals and legitimises the law-making activity of the courts (especially the CJEU), so at the end operative concept of RoL means rather the 'rule of judicature'**.[26] It can be assumed that such a general definition would not meet the expectations of the Member States steeped in the culture of the RS, who may find it difficult to accept the concept of the RoL that, in a sense, 'genetically' presupposes the creative role of the judiciary (even though vectorially limited to the protection of values and restriction of executive power) (Davies 2014, 1579). As a side note, one must admit that the creative, law-making activity of the CJEU has already been noted by legal scholars for some time; and undoubtedly, as of 2018, it has significantly strengthened and been evident in the context of 'giving content' to the RoL.

Thus, in view of the regulations cited above, it is clear that the RoL designates certain values (Scheppele, Kochenov, Grabowska-Moroz 2020, 3 et seq.; Mader 2019, 133 et seq.):

> which most fully convey what is defined in legal studies as the elements necessary for the formal understanding of the RoL. At the same time, these features – as so-called boundaries and undefinable values – cannot be explicitly or exhaustively determined. It is worth noting that the cited *Regulation*, even though it attempts to specify these premises in as many as three ways – 1) legal definition, 2) indicated areas of potential violations, and 3) exemplification of

v. European Parliament, Council of the European Union Poland/Parliament and Council (europa.eu) (Accessed: 13.01.2024).

[25] See Advocate General Manuel Campos Sánchez-Bordona: Hungary's and Poland's complaints against the system of conditionality introduced to protect the Union's budget in case of violations of the rule of law should be dismissed (europa.eu) (Accessed: 13.01.2024).

[26] Similarly Loughlin (2024, 10).

specific violations – ultimately emphasises that possible areas and examples of violations are merely illustrative.

Nonetheless, the verbalisation of a legal definition of RoL does not mean that the process of conceptualising the operational RoL, also referred to as the progressive judicialisation of the protection of the RoL in the EU, has not been completed. Within the framework of its formation, we may note further elements, e.g. related to the issue of admissibility of requests for preliminary ruling, and indeed, the possession by the requested body of the so-called 'Judicial Competence', i.e. the status of being a court within the meaning of EU law. The body of CJEU jurisprudence keeps growing. It may be noted that in recent judgments, the CJEU revisited positions presented in the famous Getin Noble Bank judgment of 29 March 2022[27] concerning the admissibility of preliminary requests from so-called 'fake judges' (Pech 2021). In this regard, let us point to the recent judgment handed down on 21 December 2023, LG v National Council of the Judiciary,[28] or the Judgment of the Grand Chamber of 9 January 2024, G, Joined Cases C-181/21 and C-269/21.[29] It is therefore rightly pointed out that:

> In a series of revolutionary "leaps forwards", the Court has infused the rule of law with normativity and equipped national courts with the means to protect their judicial independence through the combination of Articles 2, 19(1) TEU and 267 TFEU […] The result, however, is that there now exists a vast and continuously expanding body of jurisprudence on the basis of the general framework of Articles 2 and 19(1) TEU that risks transitioning from baseline criteria to harmonization references alongside an equally growing number of infringement procedures. (Polak 2024, 203)

5. CONCLUSIONS

In our paper, firstly, we agree with Professor Loughlin that widespread misunderstandings of the concept of Rule of Law – and at the same time of the *Rechtsstaat* – are prevalent today.

Thus, we shed light on how the revered concepts of the RoL and RS have been shaped by history, making the RoL the main point of reference. These concepts define the principles and functions of various institutions – national, governmental, and public – and depend on society's understanding of these principles. They rely on citizens' competence to exercise their rights within these guaranteed institutions (Juchacz, 2020). For this reason, when Laurent Pech claims that the RoL is a "well-established and well-defined principle of EU law" (Pech 2022, 107–138), but not through "a single, detailed provision exhaustively defining the meaning and scope of the rule of law," (Pech 2022, 120) his claim

[27] Case C-132/20 Getin Noble Bank/Grand Chamber ECLI:EU:C:2022:235.

[28] C-718/2145, ECLI:EU:C:2023:1015.

[29] ECLI:EU:C:2024:1.

makes sense if – and only if – he assumes that legal concepts, just like the RoL, pertain to a common legal or even constitutional culture. It seems that this is what Pech actually intends to suggest in his article, by writing about RoL being simultaneously a value, a principium, and a rule (Smith 2019, 561–576). However, such a culture is historically shaped and is therefore grounded in a certain tradition – it is not simply produced by issued acts. Thus, it would be sound and promising to engage in a discussion of the key philosophical and theoretical assumptions from which constitutional culture draws. Because one either draws principia from a common, historically, socially, politically, and institutionally shaped conceptual tradition, or one simply refers to a precisely defined set of conventional valid provisions. And our question to readers is this: at what point in its development is the European Union now, and what would be the soundest action for it in this regard?

In our view, as justified in the paper, the existence and effectiveness of legal institutions depend on citizens possessing the skills and habits necessary to use them in a competent manner, and these have been developed through a spontaneously yet reflectively shaped tradition. Therefore, when building institutions, they should not be aimed abstract addressees: it is crucial to understand the traditions such institutions are part of and who their competent users could be. Moreover, it should be borne in mind that institutions interact with one another, thereby forming the institutional foundation of a system – e.g. democratic, or potentially failing to provide such a foundation.

In this – historically, institutionally, socially etc. – shaped context we highlighted, among other things, a certain convergence in the processes of centralising power between, on the one hand, the emergence of common law as *ius gentium* and, on the other, the current development of EU law. However, it is not clear exactly which power – EU, international or, however, national – is being centralised, and this, in our view, warrants further investigation. We have also drawn attention to a particular feature of the law functioning as *ius gentium* – its rationalism and use of legal fiction – which could be worth reflecting on in the context of the search for common EU terms adapted to the different traditions and systems of nation states (Lorenz Arold, 2014). Moreover, we stressed a certain distinctiveness of the approach to the separation between the public sphere in the RoL and RS traditions. After more than a decade of various crises that have hit the EU and the world (financial, migration, Covid, wars triggered by Russia), the concept of a European public sphere should be re-addressed (Veraldi 2023, 471–492).

Based on the outlined analysis of how the CJEU has constructed an operational and ultimately legal definition of the RoL, we can conclude that the current definitions of the RoL, ostensibly developed from scratch, are theoretically and institutionally highly confusing. The operational concept of the RoL seems to focus on values that, elsewhere in the legal act, are identified as principles. This aligns with Robert Alexy's theory of principles and value-based interpretation.

Therein, principles are the embodiment of values and, therefore they should 'be weighed' in the frame of the so called 'optimisation' process, in contrast to rules which should be applied only based on an 'all or nothing' formula (Alexy 1989, 2019). This theoretical framework is clearly rooted in the RS tradition, particularly in relation to constitutional norms. Originally, in its historically shaped sense, the RoL responded to the tensions between *jurisdictio* and *gubernaculum*, focusing on the protection of liberties (often linked to franchise) and individual property adjudicated in common courts. On the other hand, RS defined the tension between legislative and executive power, resulting in public authority acting "on the basis of, and within the limits of, the law" (as exemplified by Article 7 of the Polish Constitution).

The adventures we have presented in interpreting the operational definition of RoL as constructed by the CJEU, i.e. in (dis)recognising it, are illustrative of the statement made by Meierhenrich, namely that:

> Whereas in the rule of law tradition, the law has always tended to function as a limit to politics, in the *Rechtsstaat* tradition, the law has been both lever and language of politics. The difference is not trivial. In the former legal imaginary, the law is a constraint on rule, in the latter a conduit of rule. (Meierhenrich 2021, 57)

This difference in the traditions is important for understanding legal concepts and definitions, as well as how they are shaped and constructed. Legal definitions that lack theoretical and historical-institutional shaping appear to be unstable, as they are (institutionally) assembled on an ad hoc basis and are (legally) uncertain in terms of both their foundations and precise boundaries. Such definitions, being examples of institutional-systemic engineering, even when initiated with good intentions, seem too vulnerable – given their socio-individual and national stakes – to the 'whirlwinds of history' and 'interpretative shifts'. It can be said that they contain incomplete lists of objectives (the problem of foundations) and gesture towards undefined areas of public competence, which are consequently assessed on a case-by-case basis. This negatively affects the authority of the law and undermines legal security and certainty, which are among the most fundamental components of both the RoL and the RS (Kordela 2008, 589).

In summary, the analyses conducted regarding the historical-institutional shaping of the concept of the RoL and the transformation of this term within the EU – from its operational understanding to its legal definition – indicate that we are likely witnessing a stage of strong centralisation of judicial power in the EU, akin to the centralisation of royal power in medieval England. In twelfth and thirteenth-century England, the phenomenon of centralisation contributed to the formation of the RoL as we know it from the common law system, generated by the dual tension identified by McIlwain as the conflict between *jurisdictio* and *gubernaculum*. However, it is unclear with which body or bodies the *gubernaculum* power in the EU should be identified: with Member States or EU structures? And what exactly were the factors that revived the tension?

Another challenge in this context is to clearly pinpoint the elements of the RS that indisputably come into conflict with the process of centralising the EU judiciary. The essence of the historical-institutional centralisation of royal power and, in opposition to it, the development of a unified common law system, was the bottom-up filtering of law – precisely as common law – by the common courts. Meanwhile, the centralisation of judicial power in the EU, somewhat contrary to the idea of introducing requests for preliminary rulings to strengthen the significance of the national judiciary of Member States, strengthens the CJEU as a supervisory body with highly discretionary competence with respect to generating the interpretation of EU law.

Moreover, supervision over the source of legality forms the basis of the tension between justice and sovereignty, which is foreign to the nature of the RS. This tension is alien to the RS for at least two reasons: first, the need to control open, pluralistic sources of law, preceding written constitutionalisation, is characteristic of a fully-fledged RoL. The RS, on the other hand, involves the closure of legal sources and their elegant hierarchisation – from Kant, through Hegel, to Kelsen. Here, one starts with abstract-general categories, which are quite foreign to the pragmatic thinking characteristic of English law. At the same time, a multicentric order provides an impetus for employing tools that facilitate faster ordering – tools that are familiar from the RoL. Again, in the words of Meierhenrich on the RoL vs RS distinction:

> In England, liberalism, not paternalism, was the guiding vision of politics, and thus central to the construction of law as a social imaginary. In accordance with this construction, law was widely regarded as a check on – not channel of – sovereign power. (Meierhenrich 2021, 46)

Secondly, the tension characteristic of the RS is the conflict between the legislative and the executive power, or more precisely, as Schmitt notes, administrative power. This tension, previously seen as one of the significant problems of the EU and the 'Brussels administration', completely disappears from view when the term RoL comes into play. Can we assume that this problem has already been solved?

For the most important difference between the two concepts – the RoL and the RS – is the abovementioned difference concerning plurality (common law) and closed (RS) sources of law. Both solutions constrain and check power, but power is conceived and distributed or channeled differently in these two frameworks. In RoL constitutionalism Parliament is the ultimate sovereign (Bogdandy et al. 2021, 385), but "common law emerges organically, bottom-up,"[30] from court decisions and practices, while parliamentary statutes are ultimately subject to control by the courts. The very fact that the sources of law are open in this framework, and that the system, in this very sense, is pluralistic, is something that constrains the power

[30] As Dr. Stephen Dersley used to repeat during seminars.

of the sovereign – after all, it is the *common* law, not the sovereign's law (i.e. not the king's law or a parliamentary statute). While in the closed RS system the law is supposed to utter the abstract-general (universal) provisions and aim at closure. Consequently, the sources of conventional rules for legal actions are strictly formalised and settled by law (Janusz-Pohl 2017). This means that whoever controls this system and most of all the sources of law is the sovereign in a very specific sense, which is discussed below. Now let us note that this perfectly aligns with the thesis put forward by Meierhenrich, namely that "Nineteenth-century paternalism […] conjured a vision of politics *sui generis*, a vision betwixt and between absolutism and liberalism. It is from this vision of politics that the *Rechtsstaat* tradition sprang" (Meierhenrich 2021, 46. Compare: Tiedemnann 2014, 172).

The source of the tradition (and of *the* vision of politics), thus covered, is significant in at least two ways. Firstly, it made some states, seduced by the coupling of RS with legal positivism (Meierhenrich 2021, 53), more susceptible to communist influence (in terms of structure, institutions, and ways of socialising people-citizens). Secondly, especially in post-communist countries, which had to fight for their freedom against the communist-power abuse, it was also a source of identity, the ultimate source of 'we, the people'. Thus, again (backward looking), it is about sovereign identity-shaping. And this historically shaped institutional, legal, political and also social situation is the reason why there is a constant struggle between national legislators, constitutional courts, and the EU bodies and courts. One could metaphorically say that the current RS is greatly surprised that, instead of forming an identity through political terms on its own, it has to negotiate it with other institutions, which, within the closed sources of the RS, are not sufficiently competent for such extensive cooperation.

In the common law tradition, something like a doctrine (*Rechtslehre*) essentially does not exist, as decisions and their justifications are what matter. However, it might be worthwhile to reconsider – within the terms of philosophical-theoretical methodological comparison – both concepts as historically and institutionally shaped. Examining the types of tensions that shaped the RoL and RS anew, the way these concepts 'taught' institutions, citizens, and rulers how to cope with these tensions, and where the side effects of this 'coping' (understood dialectically) appeared. What competence did citizens need to acquire, and how did they understand the law? What competence did lawyers have to acquire in order to deal with this? This also prompts reflection on whether the operational understanding of RoL is now something entirely separate, something that has completely broken away from its English law origins, and which thus could be seen merely as a product of postmodernist thinking.

And the most important issue – taking citizens seriously – where are the (EU?) citizens in all of this? How can they make their voices heard beyond demonstrations on the streets – where they protest rather than engage in discussion – or rather, where they protest in order to then be able to engage in effective discussion?

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RETHINKING STATE ACT IMMUNITY DOCTRINE IN THE ADMINISTRATIVE JURISPRUDENCE IN THE CONTEXT OF CRISES

Abstract. This article re-examines the contemporary role and transformation of the state act immunity doctrine within European administrative jurisprudence, focusing on crisis-driven decision-making. Combining doctrinal analysis with an in-depth examination of Lithuanian administrative case law arising from the migration crisis and subsequent national security-related measures, the article demonstrates that absolute or broadly construed immunity is no longer compatible with European constitutional standards grounded in the protection of subjective rights, proportionality, and effective judicial review. Through an analysis of asylum, residence permit, and visa-related cases, the article shows how administrative courts have progressively restored and reshaped judicial control in areas traditionally characterised by extensive political discretion. European Union law – particularly the Charter of Fundamental Rights of the European Union and the case law of the Court of Justice of the European Union – emerges as the central normative framework guiding this development. The Lithuanian experience illustrates how courts have strengthened reasoning requirements, ensured procedural fairness, and resisted attempts to shield administrative decisions from review based on abstract national security arguments.

Keywords: state act immunity, judicial review, administrative courts, national security, migration law, effective judicial protection, European Union law

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PONOWNE PRZEMYŚLENIE DOKTRYNY IMMUNITETU AKTÓW PAŃSTWOWYCH W ORZECZNICTWIE ADMINISTRACYJNYM W KONTEKŚCIE KRYZYSÓW

Streszczenie. Artykuł podejmuje ponowną analizę współczesnej roli oraz ewolucji doktryny immunitetu aktów państwowych w europejskim orzecznictwie administracyjnym, ze szczególnym uwzględnieniem decyzji podejmowanych w warunkach kryzysowych. Łącząc analizę doktrynalną z pogłębionym badaniem orzecznictwa litewskich sądów administracyjnych ukształtowanego na tle kryzysu migracyjnego oraz następczych środków opartych na argumentach bezpieczeństwa narodowego, artykuł wykazuje, że absolutnie lub zbyt szeroko rozumiany immunitet nie jest już zgodny z europejskimi standardami konstytucyjnymi opartymi na ochronie praw podmiotowych, zasadzie proporcjonalności oraz prawie do skutecznej ochrony sądowej.

Analiza spraw dotyczących azylu, zezwoleń na pobyt oraz polityki wizowej pokazuje, w jaki sposób sądy administracyjne stopniowo przywracają i przekształcają kontrolę sądową w obszarach tradycyjnie charakteryzujących się szeroką dyskrecjonalnością polityczną. Prawo Unii Europejskiej – w szczególności Karta praw podstawowych Unii Europejskiej oraz orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej – wyłania się jako kluczowe ramy normatywne ukierunkowujące ten proces. Doświadczenie litewskie ilustruje, w jaki sposób sądy wzmocniły wymogi uzasadniania rozstrzygnięć, zapewniły sprawiedliwość proceduralną oraz przeciwstawiły się próbom wyłączenia decyzji administracyjnych spod kontroli sądowej na podstawie abstrakcyjnych argumentów bezpieczeństwa narodowego.

Słowa kluczowe: immunitet aktów państwowych, kontrola sądowa, sądy administracyjne, bezpieczeństwo narodowe, prawo migracyjne, skuteczna ochrona sądowa, prawo Unii Europejskiej

1. INTRODUCTION

The doctrine of state acts immunity, which stems from the classic principle of the separation of powers, remains an important category of public law today. Not only does it recall the traditional idea of political autonomy, but it also becomes an important criterion for reassessing the resilience of the rule of law, especially in the face of state crises.

Historically, this doctrine has long been based on the assumption that certain areas of decision-making, particularly those related to foreign policy, national security, or strategic state interests, must remain outside the jurisdiction of the courts. This protected not only the balance of powers, but also the state's ability to respond quickly and effectively to strategic challenges. However, at the same time, the doctrine has always raised the question of implementing the principle of the supremacy of law – every case of limited control carries the risk of lowering the standard of effective judicial protection.

Today, this risk is particularly evident in the context of state crises. In such situations, where decisions are based on broad discretion and national security arguments, the question of the scope of their judicial review becomes particularly relevant. Although this issue appears to be primarily a constitutional one, in practice it is mainly dealt with by administrative courts when examining individual disputes that have arisen during state crises. As C.A. Bradley and R.A. Posner have noted in their analysis of the doctrine of political questions related to the doctrine of immunity of state acts, the latter should be sought not “at the top of Mount Olympus, but at the foot of the mountain” (Bradley, Posner 2023, 1089). In other words, this doctrine is revealed not so much in theoretical models of the separation of powers as in the daily practice of administrative courts, where the interests of the state inevitably clash with the guarantees of effective protection of rights.

The migration crisis is one of the contemporary examples that allows us to examine how the doctrine of immunity functions today, and what challenges it poses to the effective protection of rights. The doctrine of immunity becomes a kind of stress test, showing how stable the rule of law can remain when it is under pressure from political and security crises. Migration cases, in which decisions are based on national security arguments, belong to the broader context of emergency law, in which the tension between political discretion and judicial control is probably at its most intense.

This article seeks to reveal how the doctrine of immunity of state acts, which has traditionally defined the limits of the competence of administrative courts for a long time, is being reinterpreted in contemporary European public law. This analysis focuses on the main theoretical assumptions of this doctrine, trends in its application in European and Lithuanian administrative case law, and the migration crisis, which highlights the relevance of this doctrine in the context of the rule of law and effective judicial protection. Together, these aspects form the basis for a broader discussion on the role of administrative courts and their potential activity when traditional control models are no longer sufficient to respond to the challenges posed by contemporary crises.

2. THE THEORY OF IMMUNITY OF STATE ACTS AS A BASIS FOR LIMITING THE COMPETENCE OF ADMINISTRATIVE COURTS

The role of administrative courts in public law has traditionally been linked to their function of ensuring the supremacy of law and providing individuals with an effective means of defense in disputes with the state. However, this function has been limited from the outset by the recognition that certain state decisions do not fall within the scope of judicial review. In different legal systems, these limits have been justified by different doctrines of judicial self-restraint, which sought to maintain the balance of powers or ensure the autonomy of political power. In legal doctrine, the doctrine of immunity from government decisions is based on the assumption that certain areas of decision-making are not subject to judicial review. These doctrines emerged as a means of preserving the balance of powers and ensuring that issues related to political discretion, national security, or foreign policy are not transferred to the jurisdiction of the courts. The doctrines are interpreted differently. The classical model provides that courts should refrain from reviewing only when the constitutional system itself imperatively requires it. The functional model is based on the practical limitations of the courts' competence or available information, while the prudential model considers the doctrine to be an instrument that helps to preserve the authority of the courts and make rational use of their resources. However, despite these differences, all models of interpretation share a common feature: the complex application of the doctrine in practice, which leads to ongoing debates about its legitimacy and necessity.

The doctrine of political questions, the French concept *of actes de gouvernement*, and other national traditions can provide valuable insights into the arguments used to justify the protection of state decisions from judicial review and how this concept has evolved over time in the development of modern administrative justice.

One of the most prominent models of limited judicial review is the doctrine of political questions, which essentially recognizes that certain issues fall within the realm of the political process rather than the jurisdiction of the courts. This doctrine relies on the wisdom of the political branches of government and the need for efficiency, secrecy, speed, and flexibility in pursuing national interests. It is argued that this approach ensures that the court understands its limits as one branch of government and assesses whether a particular issue is better dealt with by another branch of government. This position is based on arguments that the assessment of state acts may lack clear legal criteria, cause practical difficulties in investigating the facts, and not always ensure that court decisions are actually enforced (Franck 1992, 56). In the United States, this doctrine was widely applied for a long time, but in later case law, its scope of application was narrowed – judicial review became the rule, and the political question doctrine became more of an exception (Harvard Law Review 2016; Cole 2014).

In the legal tradition of the United Kingdom, issues of limited judicial review are often associated with the doctrine *of justiciability*. The literature emphasizes that this doctrine is based on the assumption that certain decisions, such as those in the areas of foreign policy, high-level political discretion, or resource allocation, may be considered unsuitable for judicial review. However, some significant decisions show a consistent movement towards a broader right to judicial protection. A frequently cited example is *the Council of Civil Service Unions v Minister for the Civil Service (GCHQ case)* decision, which recognized that even in cases involving royal prerogatives, courts may apply standards of legality and rationality (Paul 2010). In 1984, based on royal prerogative powers (Order in Council), Margaret Thatcher's government banned GCHQ (Government Communications Headquarters) employees from joining trade unions, citing national security risks (Bradley, Ewing 2011). Subsequent *Miller* case law relating to the United Kingdom's withdrawal from the European Union further demonstrated that particularly important constitutional issues do not fall within the scope of absolute non-justiciability (Elliott 2020, 625–646).

At the same time, the doctrine of political questions has not taken root in German constitutional doctrine – courts exercise judicial review even in the most sensitive areas of state governance. As Kommers points out, German law does not have a category of issues that would automatically be excluded from the scope of judicial review (Kommers 2019). This active role of the courts is often linked to the historical view of the supremacy of law, which after World War II became a fundamental principle of democracy and social stability (Franck 1992).

In the continental tradition, the French doctrine *of actes de gouvernement* played a particularly important role. According to this concept, state immunity was linked to sovereign acts, and initially, a political purpose was sufficient for an act to fall outside the jurisdiction of the courts. Later, as the concept of the rule of law gained strength, this approach was revised, and the concept of political motive was replaced by the desire to determine the nature of the act more objectively. A line was sought between strategic management decisions and ordinary administration, which must be accountable to the courts. As these concepts proved to be too abstract in the long run, an empirical assessment was adopted in practice – each situation is analysed individually. Contemporary French law distinguishes between two categories *of actes de gouvernement*: issues arising from the relationship between the executive and legislative branches (e.g., decisions to submit a bill) and issues related to international relations (e.g., ratification of international treaties) (Bell, Lichère 2022).

The argument of human rights protection has had a significant influence on the development of these doctrines. Both international standards and the practice of the European Court of Human Rights emphasize that no doctrine of limited judicial review can completely eliminate the right to an effective remedy. These arguments have prompted some European countries to undertake legal reforms aimed at ensuring greater access to justice. One of the most striking examples is the reform of administrative justice in Spain, where the 1998 Law on the Organization of Administrative Courts clearly states that even decisions considered politically motivated cannot be excluded from judicial review if they raise the issue of human rights protection. This is enshrined in the preamble to the aforementioned law (Saunier 2019, 421–444).

The development of Lithuanian law also illustrates how the integration of European Union law and international human rights standards has led to significant changes in the areas of public administration and administrative justice. The practice of Lithuanian administrative courts shows that even with the limitations of jurisdiction provided for in procedural law relating to the exercise of state power, judicial review cannot be understood as absolutely negating the right to an effective remedy. This case law emphasizes the fact that the contested act was adopted by the President of the Republic, the Government, or the Seimas does not in itself imply the absence of judicial jurisdiction. The limits of judicial review are interpreted systematically, taking into account the interest of the person and the possible intensity of the human rights violation (Gedmintaitė, Masnevaitė, Paužaitė-Kulvinskienė, Teisė 2025, 8–32). In addition, the doctrine of the Constitutional Court establishes that there are no acts that are, in principle, excluded from the scope of constitutional review (Constitutional Court of the Republic of Lithuania Roulings of 5th April, 2000; of 30th December, 2003). This means that even when deciding on issues related to the prerogatives of state power, the guarantee of judicial protection is considered an essential element of the principle of the supremacy of law. The debate over the extent of judicial control over discretionary powers reflects an attempt to reconcile the constitutional principle of separation of powers with the requirement that public authority remain subject to legal control (Paužaitė-Kulvinskienė 2026, 39). Political institutions determine the content of law, but later it can begin to conflict with it (Alexander 2018, 363). It should be emphasized that political desigions are less predictable and reliable than law. The primary aim of political institution is to create rules that become law. Through the political process, political positions are adopted as legal acts. However, once established through the political process, positive law begins to constrain politics itself; that is, political actors become bound by the requirements set by law.

This concise context of doctrinal issues clearly shows that a broad approach to the immunity of acts of state authority is becoming increasingly isolated. The evolution of these doctrines suggests that absolute immunity is no longer regarded as exclusive in contemporary public law; increasingly, even the prerogatives of state power are viewed as subject to the rule of law. As Aharon Barak points out, the benefits of a broad doctrine of non-justiciability are far less than those of a narrower approach. The more non-justiciability is expanded, the less judges can bridge the gap between law and society and protect the constitution and democracy. Therefore, the author suggests that this doctrine should be treated with extreme caution (Barak 2006). The former justice of the Lithuanian Constitutional Court and the European Court of Justice professor Egidijus Jarašiūnas has expressed the view that “not the denial of law, but its consolidation is the guiding principle of contemporary society” (Jarašiūnas 2003).

The context of crises can make this topic particularly relevant, as the application of broad discretion and national security arguments highlight the tensions between the autonomy of political power and the requirements of effective judicial protection. In such circumstances, it becomes clear to what extent the doctrine of immunity of state acts is compatible with these requirements and how it shapes the role of courts in the architecture of human rights protection. The migration crisis provides a particularly appropriate analytical context here: it combines the dimensions of national security, international obligations, and the protection of fundamental rights, with the disputes that arise primarily reaching the administrative courts, thus allowing the practical significance of the aforementioned tensions to be revealed most clearly.

3. STATE CRISES AND JUDICIAL CONTROL: MIGRATION CASE LAW

Indeed, migration processes and the challenges of managing them are becoming one of the most challenging tests of traditional legal doctrines and court practice in administrative justice. Large-scale refugee flows, geopolitical crises, and the need to protect state borders determine decisions that are often given special political discretion. However, human rights protection standards require that effective judicial protection and compliance with the principle of proportionality be ensured in these areas as well.

One of the most important issues in contemporary migration jurisprudence is the limits of the discretion granted to state authorities and the scope of judicial review. Although decisions in the field of migration are often based on a special public interest – national security, public order, or extreme circumstances – this discretion cannot be absolute. The courts consistently emphasize that even in politically sensitive situations, the principles of the rule of law must be respected, proportionality must be ensured, individual situations must be assessed, and decisions must be sufficiently reasoned.

These standards are highlighted by three areas of administrative case law: (i) judicial review of restrictions adopted during extreme situations, (ii) review of immigration decisions based on national security arguments, and (iii) visa policy, where national security discretion is most extensive.

3.1. Regulation of emergency situations: restoration of judicial review during crises

The way judicial control is ensured during crises became particularly evident in Lithuania in 2021, when the country faced a massive influx of migrants at its border with Belarus. On July 2, 2021, a state-level emergency was declared, which, despite the fact that the actual arrival of migrants has significantly decreased, remains in force to this day. In these circumstances, a series of legislative amendments came into force, significantly restricting the rights of applicants for international protection.

The decisions of the legislature were presented as necessary measures to ensure national security. They established that, in an emergency situation, third-country nationals who had crossed the border illegally were not considered to have entered the country (the so-called legal fiction) and therefore were not given the opportunity to apply for international protection. Irregular arrival became an independent basis for *de facto* detention of asylum seekers, often without any individual administrative decision being taken, even though EU law clearly states that illegal presence alone cannot justify such restrictions. In addition, the jurisdiction of the Supreme Administrative Court of Lithuania as the court of last instance in asylum cases was temporarily suspended, and first-instance decisions became final.

This process provides a clear example of how the doctrine of immunity of state acts may be incorporated into legislation, with the goals of protecting national security and preventing excessive strain on administrative institutions and the judiciary being expressed through a legal mechanism limiting the exercise of subjective rights. However, court practice has shown that even in the context of a mass influx of migrants, the protection of fundamental rights cannot be denied. In its ruling, the Supreme Administrative Court of Lithuania held that the regulation of the legal status of foreigners under the Law on the Legal Status of Foreigners creates legal uncertainty, as it fails to provide an effective mechanism for reviewing the legality of restrictive measures. The Court also emphasized that the declaration of a state of emergency does not extinguish a person's constitutional right to judicial protection. (Supreme Administrative Court of Lithuania, administrative case No. A-4270-492/2021). Based on Article 109 of the Constitution, which establishes the exclusive competence of courts to administer justice and their independence, Lithuanian administrative courts began to rule on the application of alternative measures to detention *ex officio*, thus filling the gap in legal protection created by the legislature (Supreme Administrative Court of Lithuania, administrative case No. eI-5-662/2023).

A major turning point in establishing this case law was the ECJ's decision of 30 June 2022 in the case of *Valstybės sienos apsaugos tarnyba* (C-72/22 PPU), which clearly stated that Article 72 TFEU cannot justify a regulation that effectively deprives a person of the right to apply for international protection (ECJ, case of *Valstybės sienos apsaugos tarnyba* (C-72/22 PPU)). The Court emphasized that the threat to public order or security posed by a mass influx cannot be an absolute ground for restricting the exercise of fundamental rights, and that the Lithuanian government had not provided convincing arguments regarding the impact of the measures on ensuring public order or security.

Although this case law has to some extent restored the balance between judicial review and the limits of the discretion of the legislative and executive branches in extreme situations, it has not resolved the question of how to assess individual decisions based on national security prevention arguments. This issue has become particularly relevant in the context of growing geopolitical tensions and security challenges in the region.

3.2. National security arguments in the field of immigration control and the principle of proportionality

In the context of geopolitical tensions arising from Russia's war against Ukraine, national security arguments have become a cornerstone for restricting the rights of foreigners in the area of migration. The Law on Restrictive Measures in Response to Military Aggression against Ukraine, adopted in 2023, made it possible to suspend the issuance or renewal of residence permits to Russian citizens for general national security reasons. At the same time, measures were taken not only to stop issuing new permits, but also to revoke previously granted long-term residence permits in order to prevent threats to national security. In many cases, the argument of a threat to national security was based on the foreigner's answer to the question of who Crimea belongs to.[1] This institutional practice quickly highlighted the tension between the logic of national security prevention and the principle of proportionality, which requires an assessment of the individual context.

In this regard, it is important to note that in areas of political sensitivity, such as migration control or national security, legislators and administrative authorities have considerable discretion. The justification for the doctrine of immunity of state acts in this area is linked not only to state sovereignty but also to institutional competence. It is often considered that the executive and political institutions have better access to sensitive information – intelligence data, diplomatic negotiations, the context of international relations – and are therefore better placed than the courts to take decisions on migration, security or foreign policy. This logic seems to suggest that judicial control in this area should be limited, as overly active intervention by the courts could jeopardize the effective protection of state interests.

In Lithuania, this question of balance became particularly relevant when restrictive measures began to be applied to persons considered to pose a risk to state security, primarily citizens of the Russian Federation and Belarus or persons with close ties to Lithuania. Despite the absolute prohibition on extending residence permits in Lithuania enshrined in national law, the Supreme Administrative Court of Lithuania ruled that this rule cannot be applied mechanically and that individual circumstances – such as family ties, long-term residence in Lithuania, and integration – must be assessed in terms of proportionality (Supreme Administrative Court of Lithuania, case No. eA-1745-1188/2024).

[1] https://www.15min.lt/naujiena/aktualu/lietuva/kam-priklauso-krymas-sis-klausimas-lietuvoje-gyvenancia-ukrainiete-atvede-iki-teismu-56-2210986 (Accessed: 01.06.2026) or https://www.lrt.lt/naujienos/lietuvoje/2/2256671/lietuvai-nepavyko-issiusti-i-rusija-panevezietes-neatsakiusios-kam-priklauso-krymas?srsltid=AfmBOoovA4SIOSR8ArtGB75Tyy-Er8IMgxN_cbtadpOz4gPpqvRDYFH (Accessed: 01.06.2026).

Similar provisions have been developed in cases concerning the revocation of permanent residence permits (Supreme Administrative Court of Lithuania, administrative case No. eA-1304-968/2024). The court emphasized that even strong social ties with Lithuania – for example, birth and long-term residence in the country – do not in themselves confer immunity from decisions taken on the grounds of national security. However, in such cases, the authorities have a particularly high duty to provide justification: they must clearly explain what factual circumstances give rise to a real and sufficiently serious threat to national security and to what extent the restriction is considered a proportionate interference in the person's life.

This line of case law reveals a general principle that coincides with the doctrine developed by the ECJ: arguments of national security, although recognized as particularly important, cannot be considered automatically superior or unreviewable. In this regard, the Lithuanian administrative courts consider the judgment of the Court of Justice of the European Union (ECJ, case of *GM v. Országos Idegenrendészeti Főigazgatóság* (C-159/21)) and considered one of the essential precedents, on which the provision is based that even in matters of national security, judicial review must be ensured in full, regardless of the desire of state institutions to act under conditions of considerable discretion. In this judgment, the ECJ formulated key standards: decision-making authorities must independently assess all factual circumstances, ensure comprehensive reasoning, and not allow the conclusions of the authorities responsible for national security to be accepted as self-evident. This requirement is based on the right to effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and the right to good administration enshrined in Article 41. These standards have been consistently transposed into the practice of the Supreme Administrative Court of Lithuania, which emphasizes that the deciding authority cannot rely solely on the unmotivated opinion of a specialized authority, the factual basis of which has not been disclosed (Supreme Administrative Court of Lithuania's, administrative case No. A-1303-442/2024; administrative case No. eA-1596-629/2025; administrative case No. A-1502-552/2024; administrative case No. eA-1049-575/2024, etc.).

Thus, administrative case law consistently emphasizes that institutions must justify their decisions by clearly demonstrating the real and sufficiently serious nature of the threat. In this way, national security is recognized as a particularly important public interest, but at the same time, the importance of the principle of proportionality is emphasized.

3.3. Discretion in visa policy: The role of procedural justice as a counterbalance

In the field of migration policy, the scope of discretion is not uniform – it varies depending on the nature of the decision and the impact of the regulated situation on human rights restrictions. Unlike in asylum or residence permit cases, institutions are granted even greater discretion in the context of visa issuance. A visa does not create a subjective right to enter the territory of a Member State but is considered a means of regulating migration flows based on arguments of public interest, foreign policy, and national security. Therefore, decision-makers are granted considerable discretion in assessing both the facts and the political context.

However, the more discretion is given to institutions, the greater the risk that decisions will be based on abstract formulations or mere formal references to the public interest. In such circumstances, the question of the intensity of judicial review in visa cases becomes more acute in terms of doctrine: how to define the limits of institutional discretion so that judicial review remains effective but does not interfere with the prerogatives of the executive branch.

This issue has gained exceptional importance in the practice of the Supreme Administrative Court of Lithuania: the extended panel of judges of the Supreme Administrative Court of Lithuania has addressed the issue of the grounds for visa refusal and the limits of judicial review on three occasions (Supreme Administrative Court of Lithuania, administrative case No. eI-5-662/2023). This reveals that ensuring procedural fairness in the field of visa policy was not an isolated problem, but rather a systemic defect. Indeed, the cases examined by the extended panel of judges reveal a consistent range of defects in visa issuance procedures. The first case (Supreme Administrative Court of Lithuania, administrative case No. eI-5-662/2023) identified a legislative gap that prevented the obligation to state reasons from being fulfilled, the second (Supreme Administrative Court of Lithuania, administrative case No. A-1249-968/2023) identified a lack of reasons for an individual decision, and the third (Supreme Administrative Court of Lithuania, administrative case No. eA-716-789/2025) identified a situation where the reasons were written down but not submitted in time, thus hindering the person's right to prepare their defense. In all cases, it was consistently emphasized that even with very broad discretion in the context of national security or foreign policy, administrative decisions cannot be based on abstract formulations. These precedents clearly showed that even under the broadest discretion granted to institutions, the principles of procedural fairness and good administration cannot be disregarded: a decision on a visa must be reasoned, submitted on time, and accessible to the party to the dispute. Ensuring procedural fairness becomes an essential benchmark for defining the legitimate use of discretion.

However, this case law should not be understood as an attempt to substantially limit the discretion of authorities in visa policy. The Supreme Administrative Court of Lithuania, relying on the case law of the ECJ, has recognized that decision-makers in this area have broad discretion, and therefore judicial review is limited and confined to the elimination of obvious procedural defects. In this regard, the Court of Justice of the European Union has clearly emphasized that the competent authorities have broad discretion in assessing visa applications, and the role of the courts is limited to reviewing obvious factual or legal errors (ECJ judgment *in Fahimian*, C-544/15, EU:C:2017:255, paragraphs 44 to 46, ECJ judgment, *Koushkaki*, C-84/12, EU:C:2013:862, and ECJ judgment *Minister van Buitenlandse Zaken*, C-225/19 and C-226/19, EU:C:2020:951, paragraph 48). It is precisely this case law of the Court of Justice of the European Union that has been systematically adopted by the Supreme Administrative Court of Lithuania in developing standards for the judicial review of visas. In its practice, the Supreme Administrative Court of Lithuania consistently relies on the provisions formulated by the CJEU regarding the scope of discretion, control of manifest errors, and procedural guarantees – the obligation to state reasons for the decision and to ensure individual assessment (Supreme Administrative Court of Lithuania, administrative case No. eA-130-822/2025). In this respect, visa cases clearly differ from other migration law disputes, where courts are required to conduct a comprehensive review of the factual and legal circumstances, *ex nunc* if necessary.

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The migration case law reviewed shows a consistent construction of a model of balance between state discretion and judicial control. Although states have the right to exercise broad control over migration policy based on arguments of national security, public order, or geopolitical interests, this discretion is never absolute. It is European Union law that has become the framework on which this balance is based: the provisions of the Charter of Fundamental Rights of the European Union and the case law of the ECJ define the essential standards of effective judicial protection, good administration, motivation, and proportionality. The practice of Lithuanian administrative courts has shown that even in extreme situations, these principles cannot be disregarded – the courts have restored judicial control mechanisms, strengthened the requirements for reasoning in national security cases, and, in the area of visas, established standards of procedural fairness.

This framework is not yet complete. The latest preliminary rulings of the Supreme Administrative Court of Lithuania (ECJ judgment, case C-147/25[2]) show that issues of national security and the intensity of effective judicial review remain at the center of case law.

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[2] It should be noted that the request for a preliminary ruling by the Supreme Administrative Court of Lithuania in case C-147/25 is directly related to the European Union's restrictive measures against representatives of the political authorities of the Russian Federation, including Vladimir Putin. This context not only gives the case geopolitical relevance, but also raises a fundamental question: how far can national courts go in their judicial review when decisions are based on arguments of the highest level of foreign policy and national security?

4. PROACTIVITY AS A NORMATIVE RESPONSE TO THE RISKS POSED BY THE DOCTRINE OF BROAD DISCRETION

The search for a balance between limiting discretion and judicial review leads to a broader question: what is the mission of the modern administrative court? The tasks facing European administrative courts today show a conscious departure from the concept of formal control.

When reviewing the tasks currently assigned to European administrative courts, the term "judicial control" is deliberately avoided. The institutional and constitutional status of independent administrative courts implies that they are not merely supervisory or controlling bodies – they act as equals to other branches of government, with the fundamental task of safeguarding the principles of the rule of law and ensuring the protection of human rights and legitimate interests. Although the function of administrative courts has traditionally been associated with reviewing the legality of public administration, in contemporary European legal culture, their role is increasingly understood as an active and value-based activity aimed at ensuring that state decisions comply with the highest standards of the rule of law.

In the postmodernist conception of law, the primary purpose of administrative law is to enforce the rights and legitimate interests of individuals, business entities, or associations in their relations with the state. The heyday of postmodern administrative law began in 1956, when the Vice-President of the French Council of State was invited to testify before the Franks Committee, which was reviewing the judicial control of ministerial powers. The Franks Committee was a UK parliamentary committee established in 1956 to examine and make recommendations on the control of ministerial powers and administrative management. The committee was chaired by Lord Franks (William Franks) and its aim was to assess how the use of government powers could be improved to ensure greater accountability and transparency in public authorities. The Commission examined various aspects of administrative management (Bell, Lichère 2022). This relationship, in which public authorities are on one side and individuals are on the other, becomes the most important criterion for evaluating public administration activities and in the event of a dispute in court. Therefore, in a modern state based on the rule of law, public administration has at least two tasks. One of them is classic, seeking to achieve public interest goals in the context of national security, environmental protection, fair and competitive economic activity, and other areas of common good. The other is respect and attention to human rights, freedoms, and legitimate individual interests. These objectives are not hierarchically subordinate – they are equal, so when resolving disputes, the administrative court must find a reasoned balance and ensure their compatibility. Whether it's about national security and migrants' rights or other competing values, the main task stays the same – to make sure there's a fair balance.

The idea of European administrative justice has historically developed as case law, in which courts play an active role not only in reviewing the legality of decisions, but also in forming practical standards, filling gaps left by the legislator, and interpreting general principles of law. Such dynamic development of law is particularly important when administrative courts are faced with new, unprecedented situations that require not only formal verification, but also value-based choices based on the ideal of the rule of law.

Therefore, the pursuit of not only legality but also justice in the relationship between the individual and the state becomes a key task for administrative courts. It is increasingly emphasized that the formal existence of a law that provides for the possibility of appealing a decision does not in itself guarantee effective judicial protection. Judicial control must be real and capable of assessing whether the actions of state institutions comply with human rights protection standards and proportionality requirements. This is particularly important in cases where decisions are considered politically sensitive and, as a result, there is a tendency to apply a model of limited judicial review.

From this perspective, the active role of the administrative court becomes a counterbalance to the doctrine of limited judicial review. It ensures that even in politically sensitive areas, the principles of the rule of law do not remain merely declarative. However, this role is not self-evident – it constantly faces tensions between the separation of powers, the limits of discretion, and the requirements of human rights protection. Although the active judge paradigm opens up a direction for further jurisprudential development rather than providing a definitive answer, this direction seems more sustainable than the doctrine of limited review, which, by leaving broad scope for institutional discretion, risks turning judicial protection into a mere procedural ritual.

5. CONCLUSIONS

1. The doctrine of immunity of state acts, which historically was an essential expression of the separation of powers and the autonomy of political power, is no longer considered an insurmountable barrier to judicial control in European public law today. Its current development reflects a change in approach, determined by the principles of the doctrine of the protection of subjective rights: immunity is increasingly understood as a means of balancing the limits of political expediency and the application of the law, while at the same time ensuring effective protection of rights and proportionate protection of human rights. In this context, it is becoming increasingly clear that the overly broad application of immunity restricts rather than strengthens the legal system.

2. The experience of the migration crisis in Lithuania has revealed that the standard of effective judicial protection, arising from national constitutional doctrine and the foundations of European human rights law, has become a common legal framework that has allowed administrative courts to maintain human rights protection standards even in exceptional circumstances. When deciding on asylum applications, residence permits, or visa policy cases, the courts encountered situations in which national security arguments and broadly understood political discretion could have overshadowed this standard. However, case law has shown the opposite: based on European Union law, the courts have restored the effectiveness of judicial review, established stricter requirements for the reasoning of decisions in national security cases, and confirmed that even in the broadest areas of discretion, the requirements of procedural justice cannot be disregarded.
3. Normative analysis shows that the active role of judges in contemporary administrative justice is inseparable from implementing the rule of law. Acting as guardians of constitutional democracy, courts must ensure that even in times of crisis or exceptional circumstances, state decisions do not violate the principles of proportionality, good administration, and the protection of human rights. In this context, the doctrine of immunity of state acts is no longer an absolute barrier to judicial review – it becomes a diagnostic tool that helps to identify so-called "blind spots," i.e., those areas of judicial control where arguments of national security or political discretion pose the greatest threat to the guarantees of effective defense. Lithuania's experience shows that, by developing the doctrine of the protection of subjective rights, courts are able to gradually fill these gaps: they no longer see immunity as a privilege that separates state power from control, but use it as a criterion for assessing whether state actions are compatible with the protection of fundamental rights. In this way, "blind spots" cease to be inevitable gaps in case law and become a starting point for strengthening the principle of the rule of law.

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JUDICIAL SAFEGUARDS OF MEMBERS' OF PARLIAMENT AND MUNICIPAL COUNCILLORS' COMPETENCE

Abstract. This article examines the judicial protection of the public-law competence of members of parliament and municipal councillors (hereinafter also – deputies). Its topicality arises from the fact that Latvian legislation does not provide a legal mechanism by which a deputy may individually safeguard his or her public-law competence. While the Latvian legal system offers remedies enabling deputies to defend their subjective rights as private persons, it does not regulate whether and how they may protect their subjective public rights, i.e. their competence.

Against this background, the Constitutional Court of the Republic of Latvia has adjudicated three cases in which this legal lacuna became evident. In these judgments, the Court articulated its perspective and developed an approach to ensuring effective legal protection, even in the absence of legislative amendments.

The article argues that constitutional courts can play a decisive role in filling such "white gaps" in the system of legal protection. By doing so, they ensure the comprehensive safeguarding of rights and maintain the balance of constitutional democracy, particularly in situations where the legislature delays in fulfilling its constitutional responsibilities.

The article's contribution lies in conceptualising mandate-related competences as enforceable subjective public rights and in proposing effectiveness criteria – timeliness and enforceability – for judicial remedies in competence disputes where legislation is silent.

Keywords: member of parliament, municipal councillor, public competence, infringement, judicial review

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SĄDOWE GWARANCJE KOMPETENCJI POSŁÓW I RADNYCH MIEJSKICH

Streszczenie. Artykuł analizuje sądową ochronę kompetencji publicznoprawnych posłów i radnych gminnych. Aktualność problematyki wynika z faktu, iż ustawodawstwo łotewskie nie przewiduje mechanizmu prawnego, dzięki któremu deputowany mógłby indywidualnie chronić swoje kompetencje publicznoprawne. Choć system prawny Łotwy zapewnia środki ochrony umożliwiające deputowanym obronę ich praw podmiotowych jako osób prywatnych, nie reguluje on kwestii, czy i w jaki sposób mogą oni chronić swoje publiczne prawa podmiotowe, tj. kompetencje.

Na tym tle Trybunał Konstytucyjny Republiki Łotewskiej rozpoznał trzy sprawy, w których ujawniła się ta luka prawna. W wydanych orzeczeniach Trybunał przedstawił własne stanowisko oraz wypracował podejście zmierzające do zapewnienia skutecznej ochrony prawnej, nawet przy braku zmian legislacyjnych.

Artykuł dowodzi, że trybunały konstytucyjne mogą odgrywać decydującą rolę w wypełnianiu takich „białych plam” w systemie ochrony prawnej. W ten sposób gwarantują one kompleksową ochronę praw oraz utrzymanie równowagi demokracji konstytucyjnej, zwłaszcza w sytuacjach, gdy ustawodawca opóźnia się w wypełnianiu swoich konstytucyjnych obowiązków.

Wkład artykułu polega na ujęciu kompetencji związanych z mandatem jako podlegających ochronie, wykonalnych publicznych praw podmiotowych oraz na zaproponowaniu kryteriów skuteczności – terminowości i wykonalności – dla środków ochrony sądowej w sporach kompetencyjnych w sytuacji, gdy ustawodawstwo milczy.

Słowa kluczowe: poseł, radny miejski, kompetencja publiczna, naruszenie, kontrola sądowa

1. INTRODUCTION

Effective legal protection is the central pillar of the legal order of any democratic state. This notion encompasses both institutional access to the courts and the functional effectiveness of legal remedies. The protection of fundamental rights is one of the indispensable elements of a democratic state. For this reason, its full expression must remain at the core of a democratic polity, and in a truly democratic state it is difficult to imagine circumstances in which an individual would not be guaranteed access to a court.

At the same time, an integral element of a democratic state is popular sovereignty. A democratic state is characterized by the ability of its people to govern their own state. The people constitute both the foundation of legitimacy and the source of state power (Stern 1984, 594; Ziemele, Osipova 2024, 677, 679). The principle that power belongs to the people necessarily raises the question of how that power is to be exercised and administered.

In a democracy, decisions are taken through the expression of free will. Yet the corollary of free will is the absence of unanimity: the more individuals participate in the formation of a common position, the less likely it is to be unanimous. Decision-making in a democratic state is therefore made possible by majority rule (Sodan, Ziekow 2020, 63). However, a majority does not signify a static entity;

those who form the majority in one decision may constitute a minority in another, and vice versa.

A democratic state is distinguished by its attitude towards minorities: by guaranteeing their right to participate in deliberations, and – when their rights are infringed – by providing them with the opportunity to challenge the legality of majority decisions and to obtain effective redress for the violations sustained.

This article addresses the following research questions: (1) whether and under what conditions the public-law competence of a representative mandate may qualify as an enforceable subjective public right; (2) which judicial remedies may provide effective protection of such competence in the absence of explicit legislative regulation; (3) how the Constitutional Court's case-law has reshaped the remedial landscape for municipal councillors and members of parliament in Latvia; and (4) what minimum requirements of effectiveness (including timeliness and enforceability) should be met to ensure that judicial protection is not merely theoretical. The analysis employs the doctrinal legal method and case-law analysis, moving from specific judicial decisions to general conclusions regarding legal protection in competence disputes.

2. PROTECTING THE COMPETENCE OF MUNICIPAL COUNCILLORS

2.1. Introduction to the problem field

Until 2018, the prevailing view in administrative litigation was that an administrative court lacked jurisdiction to adjudicate disputes between a municipal councillor and the municipal council (Supreme Court of Latvia 2018). According to Articles 2 and 121 of the Administrative Procedure Law, administrative courts are entrusted with ensuring the observance of human rights in specific public-law relations between the state and a private individual. Their jurisdiction covers the actions of the executive branch in such relations, typically manifested in the form of an administrative act, factual conduct, or a public-law contract (Administrative Procedure Law). Consequently, unless a municipal councillor acted as a private individual in legal relations with the council, he or she was not recognised as having the right to seek judicial protection of infringed public-law competence through administrative proceedings.

A municipal councillor, however, does not act as a private individual in relations with the council. Both the councillor and municipal organs (such as the council or its committees) operate within the sphere of public law and the framework of public administration. Each organ performs specific functions and is endowed with corresponding rights to carry them out. In exercising these rights, disputes may arise regarding their lawful use. Generally, such disputes in public administration would be resolved hierarchically by complaint to a higher authority. Yet no hierarchical relationship exists between a municipal councillor and a municipal organ: the councillor's status is grounded in the free representative mandate obtained through democratic elections. This excludes the possibility of councillors being subordinated to municipal organs, and therefore the law does not provide for such disputes to be resolved by appeal to a higher authority. Because the exercise of councillors' participatory rights and their legal relations with municipal organs take place within the sphere of public law and the framework of state administration, disputes between councillors and municipal organs are of an internal nature. Normally such disputes would be settled by a higher authority within state or self-government administration, but in this case no such authority exists, since municipalities constitute an institutionally specific subject of state administration.

A municipal councillor holds a specific public-law status. This status is determined by Article 101(2) of the Constitution and relevant legislation (Law on the Status of a Local Government Council Councillor; Law on Local Governments). A councillor exercises his or her rights without the need for special authorisation, relying solely on the mandate conferred by election. As the Constitutional Court has emphasised, under the relevant legal provisions a municipal councillor is a representative of the residents of the respective local government territory, representing them collectively. From this duty to represent the inhabitants' interests arises the free representative mandate. The performance of a councillor's duties and the exercise of his or her rights constitute the exercise of public power for the benefit of society.

These two features – the internal nature of the dispute and the public-law status of the councillor – exclude the possibility that a municipal organ, in relations with a councillor, would act through the issuance of an administrative act or that its conduct would fall under the concept of factual action. Thus, municipal council decisions affecting the exercise of councillors' participatory rights – such as refusal to place an item on the agenda of the council or a committee, refusal to provide requested information, or denial of the right to speak or vote in council meetings – do not qualify as administrative acts or factual conduct.

Since a councillor does not act as a private individual in relations with the council, but as a person exercising a public-law status (competence), administrative courts held that recourse to them was not available (Supreme Court of Latvia 2013). This position was confirmed as late as 2016 by the Supreme Court in a case where a municipal councillor had requested information from the council in order to exercise his competence, but the council had refused to provide it (Supreme Court of Latvia 2016). As a result, the competence of municipal councillors could not be protected against majority decisions.

2.2. The Constitutional Court's response

In 2018, the Constitutional Court examined a case concerning the legality of an order issued by the Minister supervising municipal activities, whereby the minister suspended a decision of a municipal council establishing council committees. The minister argued that the majority of the council had failed to respect the rights of minority councillors to participate in the committees in proportion to the election results and the number of mandates obtained. In certain committees, the number of councillors representing the ruling majority had been disproportionately increased. The Court found that the minister had no authority to suspend the operation of an individual legal act. Nevertheless, the Court provided a broader assessment of where and in what manner an individual municipal councillor could address infringements of his or her public-law competence and mandate rights (Constitutional Court of the Republic of Latvia 2018).

First, the Constitutional Court pointed out that the point of departure is the principle of a state governed by the rule of law. From this principle derives the requirement of effective protection of infringed rights. As early as 1999, the Constitutional Court had recognised that the principle of the rule of law entails the requirement that no legal norm or executive action that infringes an individual's rights may remain beyond judicial review (Constitutional Court of the Republic of Latvia 1999). Therefore, in cases of infringements of a councillor's rights, the principle of the rule of law requires that the councillor must have the practical possibility to enforce his or her rights, including the elimination of the infringement.

Second, the Constitutional Court concluded that a municipality is not a constitutional organ of state power and that the Court does not adjudicate disputes between municipalities and their councillors.

Third, the Constitutional Court analysed the legal relations between a municipal council and its councillors. It affirmed that the status of a councillor, together with the rights and obligations attached to it, is of a public-law nature. Accordingly, individual decisions of a municipal council or its institutions that affect the exercise of a councillor's subjective public rights are neither administrative acts nor factual conduct.

At the same time, the Court emphasised that although administrative acts and factual conduct are the classical objects of administrative court review, excluding certain forms of executive action and infringements of subjective rights from review, given the diversity of administrative action, would be contrary to the objectives set out in Article 2 of the Administrative Procedure Law. That provision requires comprehensive judicial review of executive actions and public-law relations, ensuring that subjective rights can be effectively protected in court proceedings. Accordingly, the Constitutional Court concluded that disputes concerning the exercise of a municipal councillor's subjective public rights, or the determination of their content and scope, fall within the jurisdiction of the administrative courts.

2.3. The impact of the Constitutional Court's judgment

Shortly after the Constitutional Court's judgment, the Administrative Cases Department of the Supreme Court overturned a lower administrative court's refusal to initiate proceedings and accept an application in which a municipal councillor contested the council's refusal to provide information necessary for the councillor's activities and to ensure equal access to the municipal information bulletin (Supreme Court of Latvia 2018).

Likewise, the Constitutional Court's ruling established legal certainty in cases concerning the protection of individual rights of municipal councillors in disputes with municipal councils regarding observance of the principle of proportionality in the composition of council committees (Supreme Court of Latvia 2024). At present, such disputes may be pursued individually by each councillor in administrative court, without the intervention of the supervisory ministry overseeing municipal legality. Moreover, it is now possible to obtain interim relief immediately, rather than only after years of litigation, by which time the councillor's term of office might already be nearing its end or have expired. Effectiveness of judicial protection in competence disputes must be assessed not only by formal access to a court, but also by the practical ability to restore the infringed competence within the relevant political term. For elected representatives, time is a strategic resource: if proceedings are excessively lengthy or if interim measures are unavailable, the mandate-related right may become moot before a final judgment is delivered. Therefore, the availability of interim relief and procedural timeliness is not merely a technicality but a key element of the rule-of-law requirement of effectiveness. Moreover, enforcement is integral to effective protection. A judgment that recognises an infringement but cannot be implemented in a manner restoring participation, access to information, or proportional representation in bodies of the council does not fully vindicate the mandate. In competence disputes, enforcement often requires institutional compliance rather than monetary compensation. This underscores the need for remedies that can produce organisational effects – such as orders to provide information, to place an item on the agenda where legally required, or to reconstitute committees in line with proportionality – so that the representative mandate can be exercised in substance, not only in theory.The judgment also has broader significance: opposition councillors may defend themselves against the majority in other situations involving proportionality, including the functioning of commissions and boards.

Thus, the Constitutional Court's judgment marked an important turning point in the Latvian legal system by enabling municipal councillors to obtain effective protection of their competence. The Court's findings effectively "closed" the legal vacuum that had previously existed regarding the resolution of disputes over councillors' competence. Although this matter is still not expressly regulated in statutory law, the Constitutional Court's conclusions, together with the case-law of the Supreme Court, have established a functioning and effective system of legal protection in this respect.

3. PROTECTING THE COMPETENCE OF MEMBERS OF PARLIAMENT

3.1. The competence of the Constitutional Court and the principle of application

In democratic states, it is characteristic of constitutional courts not only to review the conformity of legal norms with the constitution, but also to adjudicate disputes over competences among constitutional state organs (Neimanis 2019, 12). In this way, the supremacy of the constitution – its highest legal force – is comprehensively ensured in all legal relations, including the mutual interaction of constitutional state organs. Such cases fall, in classical terms, within the jurisdiction of a constitutional court.

The Constitutional Court cannot initiate proceedings on its own motions; rather, its activity is based on the principle of application. The Court may commence and adjudicate a case only on the basis of an application submitted by entitled participants. The circle of such applicants is defined by the law governing the Court's operation (Neimanis 2019, 57).

In Latvia, the Constitutional Court has jurisdiction to review disputes concerning the conformity with law of acts adopted by the Saeima, the Cabinet of Ministers, the President, the Speaker of the Saeima, and the Prime Minister, except for administrative acts. These are understood as disputes among constitutional state organs or their constituent parts – disputes over the exercise of competences, i.e. the rights and duties assigned in public law. According to the law, the right to submit an application in such cases belongs to a rather narrow group: the President, the Saeima, the Cabinet of Ministers, and not fewer than twenty members of the Saeima (Law on the Constitutional Court).

Thus, where a dispute arises between an individual member of the Saeima concerning the exercise of rights deriving from his or her mandate and another constitutional organ or its part, the individual member does not have access to the Constitutional Court. Since no other court has competence to resolve such disputes either, the result would be that the deputy is left without judicial protection.

3.2. Conflict between a member of the Saeima and the Saeima: The Constitutional Court's response

In 2019, at the request of the Prosecutor's Office, the Saeima adopted a decision authorising the prosecution of one of its members. According to the Rules of Procedure of the Saeima, a deputy against whom criminal proceedings have been initiated loses the right to participate in the sittings of the Saeima, its committees, and other institutions in which the Saeima has elected or appointed him or her, until the termination of criminal proceedings or the entry into force of a conviction. The deputy also loses the right to receive full remuneration and allowances. The member of the Saeima submitted a constitutional complaint, arguing that this provision of the Rules of Procedure was contrary to the right to hold public office and to the presumption of innocence.

In examining the application, the Constitutional Court was first confronted with the question whether the restrictions imposed by the Saeima itself on the performance of a deputy's mandate constituted limitations on the deputy's fundamental rights. The Court concluded that the rights attached to the parliamentary mandate include participation in the work of the Saeima – taking part in sittings of the Saeima and its committees, and speaking and voting therein – as well as participation in institutions to which the Saeima has elected or appointed the deputy, and the right to remuneration for the performance of these duties. Every deputy is part of the Saeima, a constitutional organ of state power. The office of deputy is a public-law office; the specific rights and powers attached to it are elements of public-law competence. In exercising the rights and powers belonging to the mandate, a deputy performs public-law functions and does not act as a private person. At the same time, these public competences may overlap with fundamental rights, such as the right to participate in parliamentary elections and to be elected, as well as freedom of expression and other liberties.

The Court noted that, in cases of infringements of individual fundamental rights, the Law on the Constitutional Court provides for a constitutional complaint as a remedy. However, the contested norms also affected the rights and powers belonging to the parliamentary office, deriving from Article 5 of the Constitution. In cases of such infringements, the legislator had not provided the possibility for an individual deputy to submit an application in a dispute between constitutional organs. Since the principle of a state governed by the rule of law requires effective mechanisms for the protection of infringed rights, and since it is incompatible with this principle that protection should be denied merely because no procedural remedy has been provided, the Court concluded that shortcomings in the mechanisms for protecting the rights of a constitutional organ or its constituent parts may be remedied by a constitutional complaint, which by its nature and procedural preconditions is the closest available remedy. This was all the more justified since the legislature had already conferred competence on the Constitutional Court to adjudicate disputes among constitutional organs or their constituent parts, but had not provided a procedural instrument by which an individual member of the Saeima – himself or herself a constituent part of a constitutional organ – could protect the powers of office in case of infringement (Constitutional Court of the Republic of Latvia 2019).

In other words, in the absence of a secondary procedural rule ensuring full and effective access to the Constitutional Court, but in the presence of a primary rule conferring competence to protect such rights, the Court held that another legal instrument, namely the constitutional complaint, must be used to secure such protection in practice and effectively.

3.3. The impact of the Constitutional Court's judgment

The Constitutional Court again faced restrictions on the exercise of an individual deputy's mandate when it examined a complaint concerning the obligation imposed on all deputies during the COVID-19 pandemic to demonstrate solidarity with the wider society by undergoing compulsory vaccination. Non-compliance with this requirement resulted in a prohibition on exercising the rights of office. In this case too, the deputy challenged the restriction on his mandate rights. Since the Constitutional Court had already recognised that a member of the Saeima may protect restrictions on his or her competence by means of a constitutional complaint, the question of admissibility did not give rise to hesitation. The Court examined the merits and held that the restrictions imposed on the rights and powers of the parliamentary office were unjustified (Constitutional Court of the Republic of Latvia 2023).

4. LESSONS LEARNED AND IMPLICATIONS

Different procedural models may be used to safeguard mandate-related positions and competences of elected representatives. What matters most, however, is that a dispute-resolution and legal-protection mechanism is available at all, and that it is effective – providing timely and enforceable protection against unlawful restrictions and thereby preventing majority rule from turning into majority domination.

The Latvian experience in safeguarding the competences of municipal councillors and members of parliament highlights several important lessons for constitutional democracy.

First, the principle of effective legal protection is not confined to private individuals but extends equally to elected representatives. Both municipal and parliamentary deputies hold a public-law mandate, and the infringement of their competences constitutes not only an institutional irregularity but also an impairment of democratic representation.

Second, the jurisprudence of the Constitutional Court illustrates how constitutional justice can compensate for legislative omissions. For municipal councillors, the Court extended administrative judicial review to cover disputes concerning participatory rights, thereby closing a long-standing gap in the protection of local representatives. For members of the Saeima, it recognised that restrictions imposed by parliamentary rules may constitute violations of fundamental rights and competences, thereby allowing individual deputies to lodge constitutional complaints. In both instances, the Court ensured that no exercise of public authority remains beyond judicial scrutiny.

Third, these judgments underscore the centrality of minority protection in representative democracy. Effective legal remedies for councillors excluded from committees or for deputies suspended from parliamentary functions guarantee that majority rule does not degenerate into majority domination. Constitutional adjudication thereby acts as a safeguard of institutional balance and pluralism.

Taken together, these developments demonstrate that constitutional justice serves not only as a guardian of fundamental rights but also as a guarantor of the structural integrity of democratic governance. By recognising the enforceability of deputies' public competences and ensuring access to judicial remedies, the Latvian Constitutional Court has reinforced the rule of law and enhanced the legitimacy of both parliamentary and municipal institutions.

5. CONCLUSIONS

1. Effective protection applies to representatives as well as private persons

The rule of law requires that infringements of municipal and parliamentary deputies' competences be subject to judicial review, since these rights are integral to democratic representation.

2. Deputies' rights are public-law competences

Municipal councillors and members of parliament do not act as private individuals; they exercise a public mandate, and any restriction of their functions is an infringement of public authority.

3. Constitutional justice fills legislative gaps

In the absence of statutory remedies, the Constitutional Court extended administrative judicial review to councillors and admitted constitutional complaints from individual MPs, thereby ensuring effective legal protection.

4. Minority protection is essential for democracy

Judicial remedies enabling opposition councillors or deputies to contest majority decisions prevent majority rule from turning into domination, safeguarding pluralism.

5. The Constitutional Court guarantees institutional balance

By recognising deputies' competences as legally enforceable, the Court reinforced the rule of law and enhanced the legitimacy of both parliamentary and local representative institutions.

6. Effectiveness requires timeliness and enforceability

In competence disputes involving elected representatives, judicial protection must be capable of restoring the infringed competence within the term of office and must be supported by remedies that can be effectively implemented.

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DISCRETIONARY POWERS OF THE STATE TO IMPOSE ADMINISTRATIVE SANCTIONS TO ECONOMIC ENTITIES IN THE LITHUANIAN FINANCIAL SECTOR: FROM ADMINISTRATIVE IMPLEMENTATION TO JUDICIAL CONTROL

Abstract. This article examines the scope and limits of administrative discretion in the application of administrative liability to the economic entities in the financial sector, as well as its judicial oversight in Lithuania. Two opposing scholarly perspectives on discretion are outlined, followed by a distinction between administrative and judicial discretion as well as a formulation of the theoretical foundations and core elements of administrative discretion. Particular attention is given to the principle of proportionality, which serves as a key criterion for assessing both the proper exercise of administrative powers and their judicial review. Empirical findings indicate significant shortcomings in ensuring proportionality, revealing that current practices do not fully secure the objectives set by the legislator. Moreover, the analysis highlights instances where judicial control of administrative discretion is either insufficient or exceeds its boundaries, thereby undermining the essential elements of discretion. The article concludes that both administrative and judicial practices require refinement to strengthen proportionality, consistency, and adherence to the legislator's intent in the application of administrative liability.

Keywords: discretion, administrative discretion, judicial discretion, judicial review, proportionality

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UZNANIOWE UPRAWNIENIA PAŃSTWA DO NAKŁADANIA SANKCJI ADMINISTRACYJNYCH NA PODMIOTY GOSPODARCZE W SEKTORZE FINANSOWYM LITWY: OD STOSOWANIA ADMINISTRACYJNEGO DO KONTROLI SĄDOWEJ

Streszczenie. Artykuł analizuje zakres i granice uznania administracyjnego w stosowaniu odpowiedzialności administracyjnej wobec podmiotów gospodarczych sektora finansowego, a także sądową kontrolę tej odpowiedzialności. Przedstawiono dwa przeciwstawne stanowiska doktryny dotyczące natury uznania, dokonano rozróżnienia między uznaniem administracyjnym a sądowym oraz sformułowano teoretyczne podstawy i kluczowe elementy uznania administracyjnego. Szczególną uwagę poświęcono zasadzie proporcjonalności, która stanowi podstawowe kryterium oceny zarówno prawidłowego wykonywania kompetencji administracyjnych, jak i ich kontroli sądowej. Wyniki badań empirycznych wskazują na istotne braki w zapewnieniu proporcjonalności, ujawniając, że obecna praktyka nie w pełni realizuje cele wyznaczone przez ustawodawcę. Analiza pokazuje ponadto przypadki, w których kontrola sądowa uznania administracyjnego jest niewystarczająca lub wykracza poza swoje granice, podważając istotne elementy uznania. Artykuł konkluduje, że zarówno praktyka administracyjna, jak i sądowa wymaga udoskonalenia w celu wzmocnienia proporcjonalności, spójności i zgodności z intencją ustawodawcy w stosowaniu odpowiedzialności administracyjnej.

Słowa kluczowe: uznanie, uznanie administracyjne, uznanie sądowe, kontrola sądowa, proporcjonalność

1. INTRODUCTION

In legal scholarship, numerous perspectives exist on the nature and implementation of discretion. Yet, a particular subtype of discretion – administrative discretion – has received comparatively less attention. Administrative discretion is exercised by public administrative bodies in the performance of various functions,[1] one of the most significant being the supervisory authority's imposition of administrative liability to natural or legal persons. In this context, discretion is applied within strict legal boundaries that are intended to prevent arbitrary decision-making. At the same time, administrative liability is shaped not only by the exercise of administrative discretion itself, but also by judicial discretion, which operates through the review of administrative decisions and further reinforces the limits imposed on public authorities. Taken together, administrative and judicial discretion form a unified system governing the application of administrative liability, with the fairness – or, conversely, the shortcomings – of discretion determining the outcomes of liability in practice.

[1] The legal doctrine in Lithuania advances that administrative discretion differs from legislative administrative discretion (which is delegation of legislative powers to the public bodies) and is defined by the ability to exercise freedom of decision-making, legislative implementation functions and filling-in of procedural and material voids (Urmonas, Prancevičienė 2002, 58).

Because discretion plays such a broad role in legal relations, both in the administration of justice and in the daily functioning of public administrative bodies, it is essential to establish clear boundaries and ensure effective oversight of its use. Without such safeguards, the risk of arbitrariness in public administrative significantly increases. This article therefore investigates how administrative discretion is exercised in Lithuania, how courts supervise its implementation, and what consequences these practices hold for administrative liability. The analysis draws on an empirical study of supervisory measures applied by the Bank of Lithuania, considering both the Bank's own application of such measures and the judicial review of its discretionary decisions. The research is conducted through the lens of one of the most important yet broadly interpreted legal principles – the principle of proportionality. By examining administrative discretion and its judicial control in this way, the article assesses their impact on administrative liability while identifying key theoretical and practical challenges in ensuring that discretion is exercised lawfully, proportionately, and in line with legislative intent.

2. ADMINISTRATIVE AND JUDICIAL DISCRETION: KEY ASPECTS

Legal decision-makers operate within certain boundaries that define their freedom to interpret legal norms in different ways or to select among alternative paths of legal reasoning. This freedom of choice is referred to as *discretion*, commonly defined as "the right of an official or state body to resolve an issue at its own discretion" (International Dictionary of Foreign Words). Thus, the essential features of discretion include the application of law (decision-making), the authority to issue decisions with binding force, and the empowerment (freedom) to act within limits prescribed by law.

According to Dworkin (2004, 60), discretion does not amount to absolute freedom; rather, it is constrained by standards of rationality, justice, and other normative requirements. In his view, so-called "hard cases" admit of only one correct answer (Dworkin 2004, 405). For Dworkin, both coherence and political morality imply that the best interpretation of legal materials is always attainable, with truly indeterminate cases being rare (Dworkin 2006, 205–208). On this basis, he even proposes discarding the doctrine of discretion altogether (Dworkin 2004, 108). In contrast, Barak's purposive theory of interpretation regards discretion as the determination of the ultimate purpose of a legal norm. As he argues, "without judicial discretion there can be no interpretation of law; the only question is whether such discretion should be broad or narrow" (Barak 2005, 208), a view consistent with Hart and Sachs's (1958, 144) position that discretion entails a choice among several legally justified alternatives, all of which are valid. For Barak (2005, 209–213), in "hard cases" two judges may reach opposite but equally lawful outcomes. Here, judicial tasks involve assigning weights to competing purposes, resolving conflicts among principles, and engaging in balancing and weighing – arguably the most difficult responsibilities entrusted to courts (Barak 2006, 164–165; Barak 1989, 126). While this balancing approach appears to allow the "calculation" of a correct answer, thereby softening Dworkin's critique of discretion, it nonetheless leaves space for multiple legally justified solutions. Balancing values is not a mathematical operation; it depends on the interpretative route chosen, and thus courts may legitimately adopt different solutions in hard cases. Despite theoretical divergences, both perspectives agree that discretion is limited – procedurally and substantively – by requirements such as rational decision-making, protection of legitimate expectations, and equality of parties. Thus, no decision-maker ever enjoys unlimited freedom. For Barak (1989, 116–118), judicial reasonableness has both objective and subjective components.

The *objective element* requires awareness that a decision falls within the "hard case" zone, recognition of the limits of discretion, and consideration of the relevant factors (Barak 1989, 135–138). Decision-makers must also appreciate the law-making dimension of interpretation, whether by reinterpreting existing provisions or adapting them to new realities, and thus act consciously (Barak 1989, 140–142). Yet, in administrative discretion this legislative element is absent: public administrative bodies do not provide authoritative interpretations of law but issue individual administrative acts binding only on the parties concerned. Consequently, they are expected to adopt consistent decisions under similar circumstances. Finally, the decision-maker must understand the purpose of the relevant legal norm (Barak 1989, 143–146). This purposive element can be seen as a necessary component of legal interpretation prior to exercising discretion. Indeed, the boundaries of the objective element of discretion so narrowly constrain public administrative bodies that, in practice, only one legally defensible path of reasoning may remain, subject to subsequent judicial review.

The *subjective element* of discretion is equally constrained. Although several alternatives may be legally defensible within the "zone of reasonableness," the choice among them must be rational rather than arbitrary, never reducible to mere chance (Barak 1989, 118, 135). Personal qualities, experience, and attitudes of the decision-maker also play a crucial role in how discretion is exercised. Still, public administrative bodies enjoy narrower freedom of choice than courts. As Bakševičienė (2017, 73) notes, the subjective freedom of administrative actors is restricted by their institutional functions and subordination. Moreover, while judges may exercise discretion in an "active" or "self-restrained" manner (Barak 1989, 148; 2006, 264–265), this is possible only in contexts where judicial discretion operates – namely, in hard cases where courts may create or preserve legal norms. By contrast, administrative bodies, when issuing individual acts, cannot create new law, and thus their discretion cannot manifest as activism or self-restraint.

A crucial dimension of the subjective element is preventing arbitrariness and ensuring limits on decision-making (Linkevičiūtė 2006, 66) to curtail excessive discretionary power (Davis 1969, 217). Administrative discretion is therefore subject not only to stricter limits but also to judicial review. Both Linkevičiūtė (2006, 67) and Bakševičienė (2017, 73–74) stress that courts supervise the legality and fairness of administrative discretion through judicial discretion. Yet this control is itself limited: courts must respect the decision-making freedom of administrative bodies and restrict review to determining whether an authority committed a manifest error of fact or law, abused its powers, clearly exceeded the boundaries of discretion, violated procedural rules, relied on inaccurate facts, or acted contrary to the purposes for which it was established and empowered (see Lithuanian Supreme Administrative Court rulings: No. A415-2203/2006; No. A261-2286/2012; No. A525-2952/2012; No. A492-435/2014). In principle, then, administrative discretion within its lawful limits should remain "purely" discretionary, exercised solely by the administrative authority, with courts refraining from substituting their own preferences for reasonable administrative choices.

Nonetheless, the boundaries of judicial control over administrative discretion are not entirely clear. Courts in Lithuania administer justice under the Constitution of the Lithuanian Republic and may, in a given case, adopt what they perceive as the "correct" decision, thereby effectively supplanting the administrative authority's exercise of discretion.

3. INITIAL INTERPRETATION OF THE RULES: UNCLEAR LIMITS OF LIABILITY AND QUESTIONABLE PROPORTIONALITY

The Bank of Lithuania is the supervisory authority responsible for overseeing financial markets and applying sanctions to licensed financial institutions. The exercise of administrative discretion in this context depends entirely on the authority's interpretation of both the *objective* and *subjective* elements of law. Specific legislation (*lex specialis*) enumerates over ten different types of sanctions, each of which may theoretically be applied to any given violation. Thus, whenever grounds for sanctioning exist, the Bank of Lithuania has, at least in principle, the power to impose any sanction. The supervisory authority evaluates the nature and seriousness of the violations, along with other mandatory circumstances, and then selects the appropriate measure.

This evaluative process is inherently subjective, particularly where violations do not involve measurable economic harm or identifiable financial gain. While the Bank of Lithuania has established five categories of violations severity – minor, light, moderate, serious, and very serious (Sanctions Calculation Guidelines 2018, para. 6) – the criteria for distinguishing between these categories remain opaque. Although the Guidelines indicate that severity is assessed according to the nature, scope, and consequences of the violation, no objective reference points exist to delineate clear boundaries between categories. As a result, the Bank of Lithuania retains broad discretion to determine the severity category of a violation and, consequently, the sanction to be applied.

Beyond the classification of violations, the principle of *proportionality* plays a decisive role in shaping sanctions, particularly fines. It should be noted that according to legal scholarship (Kargaudienė 2005, 34) the doctrines of administrative discretion and principle of proportionality are closely intertwined, and the success of their application is interdependent. Therefore, further analysis of the use of administrative discretion is prepared through the lens of the principle of proportionality. Under Article 43^3(10) of the Law on the Bank of Lithuania, fines are calculated in three stages: (1) determination of the maximum fine; (2) consideration of mitigating and aggravating circumstances; and (3) adjustment of the calculated fine to ensure proportionality. While this three-step methodology is theoretically sound, the third stage allows the Bank of Lithuania to alter fine amounts even in cases involving similar – or nearly identical – violations. This raises concerns about the consistency and predictability of proportionality assessments. As Danėlienė (2009, 110, 112) argues, proportionality requires public authorities to use only those measures strictly necessary for fulfilling their functions, always preferring the least restrictive alternative. The absence of such restraint would undermine the balance of competing interests that lies at the heart of a democratic society (Barak 2012, 220, 226).

To evaluate how the third stage is applied in practice, this study analyzed the Bank of Lithuania's sanctioning activity in 2023–2024.[2] Using a conservative method, we assumed that each violation[3] fell within the "moderate" category,[4] disregarded the impact of mitigating and aggravating factors, and estimated what

[2] Due to the lack of publicly available data and the relatively small fines, penalties imposed on currency exchange operators (2) and on a crowdfunding service provider are not included in the sample.

[3] We will distinguish violations of internal control, credit risk, own funds requirements, and anti-money laundering and counter-terrorist financing (hereinafter – AML/CTF) prevention requirements into separate groups, since the Bank of Lithuania imposes separate fines for breaches of these categories. Taking into account the grouping of AML/CFT violations applied by the Bank of Lithuania in Administrative Case No. eA-9-822/2024 before the Supreme Administrative Court of Lithuania (LVAT), and the fact that LVAT did not dispute such grouping, it is appropriate to classify AML/CTF prevention violations into the following categories: assessment of overall AML/CTF risk of activities, identification of the client and the client's representative, determination of the purpose and nature of the client's business relationship, monitoring of clients' business relationships and transactions, compliance with international financial sanctions, and internal control requirements. To determine the number of violations (for which fines are imposed), the provisions on infringements of legal acts publicly disclosed by the Bank of Lithuania, as well as its press releases, are also used.

[4] According to the Bank of Lithuania's Sanctions Calculation Guidelines, moderately severe infringements are the third out of five categories of severity, with 20% of the maximum fine applied. In other words, moderately severe infringements represent the most "average" category.

the baseline fine should have been. The dataset included 19 fines imposed for violations of various legal requirements and 18 fines for breaches of the Law on the Prevention of Money Laundering and Terrorist Financing (PPTFPĮ). Since the legislator has set stricter sanctions for PPTFPĮ violations,[5] the analysis distinguishes between these two groups. Results are presented in Annexes 1 and 2. The analysis of these results yields several conclusions:

1. *Widespread reliance on discretion in the third stage*: The Bank of Lithuania adjusted fines in nearly every case. While the assumption of "moderate" severity may not always hold, the data indicate that the Bank left the second-stage fine unchanged in only two cases. In all other cases, fines were substantially reduced, with reductions exceeding 60% for general violations and more than 90% for PPTFPĮ violations.
2. *Greater use of discretion in PPTFPĮ cases*: If PPTFPĮ violations were hypothetically classified as "serious," reductions in the third stage would approach 96% of the baseline fine. This demonstrates the Bank's broad freedom to assign virtually any fine level in these cases, presenting it as proportionate.
3. *Proportionality linked to revenue ratios*: The Bank of Lithuania appears to assess proportionality primarily by comparing fine amounts to the institution's annual revenue. Excluding outliers, fines for PPTFPĮ violations ranged between 0.4% and 2.64% of annual revenue (average 1.55%), while fines for other violations ranged from 0.21% to 3.34% (average 3.7%). These findings support the conclusion that proportionality assessments are guided by past practice and relative revenue benchmarks, rather than by objective statutory criteria.
4. *Contradicting legislative intent:* Despite stricter statutory provisions for PPTFPĮ violations (minimum maximum fine of €5.1 million compared to €100,000 for other violations), the Bank of Lithuania imposed proportionally lighter fines for such cases. On average, fines for PPTFPĮ breaches were more than 2% of annual revenue lower per violation than fines for other breaches. This undermines the legislator's clear intent to treat money-laundering violations more severely.
5. *Disproportionate treatment of smaller institutions*: Institutions with lower annual revenues faced proportionally higher fines. For example, in PPTFPĮ cases, entities with revenues under €3 million (10 cases) were fined an average of 7.22% of annual revenue (2.18% per violation), while larger entities (8 cases) were fined only 2.43% (0.76% per violation). A similar pattern was observed in other cases, where fines against smaller institutions

[5] The AML/CFT Act does not provide for the mildest sanction – public disclosure – and the maximum fine cannot be less than EUR 5,100,000, whereas under the Law on Banks the minimum maximum fine is EUR 100,000 (Article 74(6) of the Law on Banks).

were up to ten times higher in relative terms than those imposed on larger entities. While it is true that smaller revenues magnify the proportional impact of even modest fines, the overall pattern indicates systemic disproportionality disadvantaging smaller financial institutions.

Taken together, these findings demonstrate that the Bank of Lithuania exercises exceptionally broad administrative discretion in imposing fines. It determines the severity category of violations with little transparency, frequently reduces calculated fines by more than 90% in the third stage and applies sanctions in ways that contradict legislative intent by treating PPTFPĮ violations more leniently and disproportionately burdening smaller institutions. This suggests that the current regulatory framework grants the Bank an overly wide margin of discretion – one that requires tightening to ensure sanctions are consistent, proportionate, and aligned with legislative objectives. Leaving aside possible legislative solutions to this issue, the following section turns to the second major constraint on administrative discretion: judicial review.

4. JUDICIAL REVIEW AS AN ESSENTIAL SAFEGUARD AGAINST IMPROPER IMPLEMENTATION OF ADMINISTRATIVE DISCRETION

The model for delineating the boundaries of administrative discretion is dual in nature. First, discretion is limited *a priori* through legal regulation, which narrows the scope of decision-making available to public administrative bodies. Second, discretion is constrained *ex post* through judicial review of administrative decisions. Judicial control of administrative discretion thus embodies a "double discretion." This raises a central problem: to what extent should judicial discretion remain distinct from administrative discretion, and how far should courts go in reviewing the latter?

In practice, courts often evaluate the proportionality of sanctions by examining the reasoning behind administrative decisions. In some cases, this results in the annulment of certain violations and the modification of the imposed fine. For example, in 2019 the Bank of Lithuania imposed a fine of €880,000 on Šiaulių Bankas AB for seven violations of the PPTFPĮ. The court annulled three of the violations and reduced the fine to €440,000 (Vilnius Regional Administrative Court, Case No. eI4-1462-764/2022). Notably, the annulment of three violations should have resulted in a fine of €510,000; however, the court further reduced the fine by an additional €70,000, invoking the principle of proportionality. This precedent illustrates several problematic aspects of judicial control over administrative discretion.

First, the court did not provide any numerical justification for its further reduction of €70,000, leaving the additional decrease entirely unsubstantiated.

Second, in assessing proportionality, the court relied twice on the same mitigating circumstances. The Bank of Lithuania had already taken into account the institution's cooperation and remedial efforts in the second stage of calculating the fine, reducing the base fine by 30%. The court nevertheless reused these same factors to justify a further reduction. Since the court did not find the Bank of Lithuania's initial reduction unlawful or insufficient, its double use of these circumstances lacked any legal basis. Similarly, the court's reliance on minor procedural breaches had already been considered at the first stage of the fine calculation when assigning violations to their respective severity categories. The absence of any finding of misclassification makes the reuse of this factor equally unjustified.

Third, the reduced fine of €440,000 corresponded to 0.54% of annual revenue, barely above the statutory minimum of 0.5% set under Article 39(1)(2) PPTFPĮ. Given that this minimum applies per violation (and four violations were established), both the Bank of Lithuania and the courts appear to have misapplied the statutory provisions. The further reduction was therefore *contra legem*, undermining the explicit requirements of the PPTFPĮ. This resulted in a paradox: the principle of effective judicial protection was applied in a manner overly favorable to the violator, disregarding the legislator's expressly established minimum sanction.

Judicial activism becomes even more evident when courts effectively substitute their judgment for that of the administrative body. Such judicial behavior has been criticized in legal scholarship (Paškevičienė 2019, 251). In its ruling of 19 June 2024 (Case No. eA-201-552/2024), the Supreme Administrative Court of Lithuania annulled the revocation of a license for unlicensed electronic money activities (while confirming other violations), and replaced it with a suspension of the license until 1 July 2024.[6] The court reasoned that no aggravating circumstances had been established, that mitigating circumstances existed, and that the violations had not caused negative consequences for clients or other financial institutions. It concluded that the objectives of supervision and sanctioning under the PPTFPĮ and the Law on Payment Institutions would be sufficiently met by a temporary suspension rather than revocation.

This precedent also raises critical questions about the limits of judicial control over administrative discretion and the principle of effective judicial protection. Replacing one supervisory measure with another should not fall within the scope of judicial review, as such intervention contradicts both the established case law of the Lithuanian Supreme Administrative Court (e.g., Cases No. A415-2203/2006, No. A261-2286/2012, No. A525-2952/2012, No. A492-435/2014) as well as the necessary distinction between administrative and judicial discretion. In this case, the court failed to respect either the objective or subjective elements of discretion.

[6] This case examined whether the Board of the Bank of Lithuania, by its decision of 16 April 2020, had valid grounds to revoke a financial institution's payment institution license for seven AML/CFT violations, failure to comply with client fund safeguarding requirements, providing false information to the Bank of Lithuania, and conducting electronic money issuance activities without authorization.

From the perspective of the *objective element*, the court ignored the statutory purposes of license suspension under the Law on Payment Institutions (2022 revision, Art. 8(5)–(6)), which restrict suspension to cases where violations can be remedied swiftly (within two months). By substituting the sanction, the court effectively imposed a suspension exceeding four years, subsequently lifted only two weeks after its ruling. The judicial protection afforded in such cases cannot be regarded as effective. By replacing a four-year license revocation with a suspension of only two weeks, the court effectively condemned the institution to a repeated revocation. For an entity that had ceased operations for several years, restoring activity and complying with the legal requirements imposed on licensed institutions within such a short timeframe was practically impossible.[7]

Moreover, by substituting revocation with suspension, the court restricted the institution's ability to pursue damages, since during the four-year period in question the institution could not reasonably have conducted licensed activities. The ruling therefore created a paradoxical compromise: the *ultima ratio* measure of revocation was formally annulled in favor of the institution, while at the same time the supervisory authority was shielded from potential liability arising from the improper exercise of administrative discretion.

This judicial approach raises serious concerns about the guarantee of effective judicial protection. The practice is particularly unfavorable to entities challenging supervisory measures. Even when one violation and the harshest sanction are annulled, the court may exercise its discretion in such a way that the institution ultimately remains in the same position as if the most severe measure had been upheld. This indicates not only the ineffectiveness of judicial protection in practice but also a deeper failure to safeguard the most basic element of justice – the right to a fair hearing and meaningful remedy.

From the perspective of the *subjective element*, judicial activism must be reasoned and rational. If the court assumed the role of deciding the sanction, it should have assessed all seven factors listed in Article 43^3(7) of the Law on the Bank of Lithuania. Instead, it selectively referred to aggravating/mitigating circumstances and negative consequences without addressing the remaining factors or rebutting the Bank of Lithuania's assessment. This selective reasoning contradicts Barak's view that an "active judge must be more restrained than a restrained judge" (1989, 150), a principle of particular importance in Lithuania where judicial precedent constitutes an official source of law (Kūris 2009, 142). The errors committed in this case therefore demonstrate a fundamental failure to implement judicial discretion in accordance with its subjective element, undermining the principle of effective judicial protection itself.

[7] The institution returned its license to the Bank of Lithuania within the two-week period (https://www.lb.lt/lt/naujienos/uz-bruc-bond-uab-siurkscius-ir-sistemingus-istatymu-pazeidimus-panaikinta-mokejimo-istaigos-licencija).

5. CONCLUSION

Seemingly antagonistic perspectives of affirming and denying discretion can be reconciled when considering which actor exercises discretion in "hard cases." Dworkin's denial of discretion carries particular weight in the administrative sphere, since public administrative bodies, when making decisions, neither create law nor administer justice; rather, they carry out functions delegated by the legislature. For this reason, in exercising administrative discretion, an authority cannot act "creatively" or "constrainedly," but must identify the specific lawful course of action. The implementation of discretion requires both an objective element (awareness of discretion) and a subjective element (choosing among possible solutions). Finally, administrative discretion is also bound by objective limitations and subject to judicial review.

With respect to administrative discretion, the legislature establishes certain boundaries within which public administrative bodies must act to reach proportionate decisions. Nonetheless, an empirical assessment of the application of the principle of proportionality in administrative discretion – based on sanctions (fines) imposed by the Bank of Lithuania in 2023–2024 – revealed that almost every decision was treated as a "hard case." Discretion was exercised expansively, in disregard of legislative intent, and the principle of proportionality was not preserved, particularly in the unequal treatment of entities with higher versus lower annual revenues. Even though supervision of economic entities is bound to be a discretion-intensive area, legislators should introduce legal "checks" to balance the current discretionary liability system and protect the legislative intent.

Judicial review plays a critical role in defining the limits of administrative discretion. An analysis of disputes between the Bank of Lithuania and financial market participants indicates that courts frequently assume an overly "active" role. They issue decisions without sufficient interpretation of law, fail to justify the rationality of their rulings, and neglect both the objective and subjective elements of discretion as well as the balancing of competing values. This deficiency in the quality of judicial reasoning results in paradoxical outcomes that, at times, even conflict with legal norms.

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1 annex

Analysis of the fines imposed by the Bank of Lithuania in 2023–2024, excluding violations of the Law on the Prevention of Money Laundering and Terrorist Financing

	Annual revenue (EUR ‘000)	Number of infringe-ments	Maximum Fine (EUR ‘000)	Stage I Fine (EUR ‘000)	Imposed Fine (EUR ‘000)	Stage III Fine Change (%)	Fine as % of Annual Income	Per-Violation Fine as % of Annual Income
KogoPay UAB	299	3	100	60	30	–50,0	10,03	3,34
UAB Guru Pay	3300	4	330	264	85	–67,8	2,58	0,64
Flywire Europe, UAB	24 980	1	2498	499	40	–92,0	0,16	0,16
Revolut Bank, UAB	403 450	1	40 345	8069	200	–97,5	0,05	0,05
PayRay Bank, UAB	8464	4	846	677	210	–69,0	2,48	0,62
UAB “NexPay”	3417	1	341	68	50	–26,8	1,46	1,46
BENKER UAB	0	1	100	20	27	35,0	/	/
UAB STANHOPE FINANCIAL	868	2	100	40	48	20,0	5,53	2,76
Demivolt, UAB	9	1	100	20	3	–85,0	33,33	33,33
UAB BLUE EMI LT	0	2	100	40	6	–85,0	/	/
UAB SME Bank	6956	5	695	695	170	–75,6	2,44	0,49
SatchelPay, UAB	2515	1	251	50	25	–50,3	0,99	0,99
UAB STANHOPE FINANCIAL	868	1	100	20	9	–55,0	1,04	1,04
Via Payments UAB	13 559	1	1355	271	70	–74,2	0,52	0,52
UAB “Glocash Payment”	1099	1	109	21	10	–54,5	0,91	0,91
UAB “Finansinės paslaugos” Contis	42 473	2	4247	1698	180	–89,4	0,42	0,21
PCS Transfer, UAB	175	1	100	20	6	–70,0	3,43	3,43
Ambr Payments, UAB	23	1	100	20	2	–90,0	8,70	8,70
CBI Money UAB	0	2	100	40	12	–70,0	/	/
Average:						**–60,4**	4,60	3,70

Source: Compiled by the author, based on: Sanctions applied by the Bank of Lithuania; Audited data of electronic money institutions for 2022 and 2023; Audited financial statements of Revolut Bank UAB, UAB SME Bank, and PayRay Bank UAB.

Analysis of the fines imposed by the Bank of Lithuania in 2023–2024 for violations of the Law on the Prevention of Money Laundering and Terrorist Financing

	Annual revenue (EUR '000)	Number of infrin-gements	Maximum Fine (EUR '000)	Stage I Fine (EUR '000)	Imposed Fine (EUR '000)	Stage III Fine Change (%)	Fine as % of Annual Income	Per-Violation Fine as % of Annual Income
UAB "Pyrros Lithuania"	681	3	5100	3060	40	–98,7	5,87	1,96
UAB "NIUM EU"	505	3	5100	3060	40	–98,7	7,92	2,64
UAB "PHOENIX PAYMENTS"[a]	57 327	3	5732	3439	970	–71,8	1,69	0,56
UAB Etapay	929	3	5100	3060	280	–90,8	30,14	10,05
Paylar, UAB	747	3	5100	3060	40	–98,7	5,35	1,78
Verified Payments, UAB	1790	4	5100	4080	110	–97,3	6,15	1,54
UAB "TransferGo Lithuania"	22 256	3	5100	3060	310	–89,9	1,39	0,46
Finci, UAB	2350	2	5100	2040	30	–98,5	1,28	0,64
UAB "NexPay"	3417	5	5100	5100	125	–97,5	3,66	0,73
Wittix, UAB	3638	2	5100	2040	55	–97,3	1,51	0,76
Via Payments UAB	13 559	1	5100	1020	100	–90,2	0,74	0,74
Transactive Systems, UAB	3971	4	5100	4080	280	–93,1	7,05	1,76
UAB EXCHANGELT	2244	3	5100	3060	45	–98,5	2,01	0,67
LTL Kredito unija	2267	3	5100	3060	25	–99,2	1,10	0,37
Valyuz, UAB	2394	3	5100	3060	55	–98,2	2,30	0,77
UAB Finansinės paslaugos "Contis"	42 473	5	5100	5100	840	–83,5	1,98	0,40
UAB "Maneuver LT"	5801	2	5100	2040	80	–96,1	1,38	0,69
"Secure Nordic Payments", UAB	2092	7	5100	7140	210	–97,1	10,04	1,43
Average:						**–94,2**	5,09	1,55

[a] The only fine imposed by the Bank of Lithuania in 2023–2024 for violations of the PPTFPĮ, where the maximum fine was calculated based on the financial institution's income rather than the amount specified in the law.

Source: Compiled by the author, based on: Sanctions applied by the Bank of Lithuania; Audited data of electronic money institutions for 2022 and 2023; Audited financial statements of credit union LTL.

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LEGISLATIVE OMISSIONS IN CONSTITUTIONAL JURISPRUDENCE: UKRAINIAN PRACTICE IN A COMPARATIVE VIEW

Abstract. Every legal system contains, to a greater or lesser extent, legal relationships that are not regulated. However, they ought to be regulated by general legal norms and, for this reason, they constitute gaps in the law.

Owing to their importance and their connection with the principle of constitutionality, legislative omissions have become the subject of intensive study in contemporary legal doctrine. In analysing the development of the functions of Constitutional Courts, increasing reference has been made not only to their role as a "negative legislator" but also as a "positive legislator", a role that bodies exercising constitutional review are progressively finding easier to perform.

Leaving aside evolutionary justifications ("function creates the organ", in which necessity confers power), intrusion into the sphere of the legislator's freedom of discretion is generally alarming (at least in theoretical terms). The legislator is responsible for enacting laws and, moreover, for deciding when they should be adopted.

Keywords: constitutional justice, constitutional jurisdiction bodies, legislative omissions, judicial practice, gaps in law

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ZANIECHANIA USTAWODAWCZE W ORZECZNICTWIE KONSTYTUCYJNYM: PRAKTYKA UKRAIŃSKA W UJĘCIU PORÓWNAWCZYM

Streszczenie. Każdy system prawny charakteryzuje się większą lub mniejszą liczbą stosunków prawnych, które nie są regulowane przez ogólne normy prawne, choć powinny być, i które z tego powodu stanowią luki w prawie. Ze względu na swoje znaczenie i pozycję w odniesieniu do zasady konstytucyjności, luki prawne są przedmiotem intensywnych badań we współczesnej doktrynie prawnej. Analizując rozwój funkcji sądów konstytucyjnych, nieustannie wspomina się o roli nie tylko „negatywnego ustawodawcy", ale także „pozytywnego ustawodawcy", którą coraz łatwiej od czasu do czasu pełnią organy kontrolujące konstytucyjność. Pomijając uzasadnienia ewolucyjne („funkcja tworzy organ", w którym to przypadku to konieczność nadaje władzę), ingerencja w sferę swobody konfiguracji ustawodawcy jest ogólnie niepokojąca (oczywiście z teoretycznego punktu widzenia). Ustawodawca jest odpowiedzialny za tworzenie praw, a ponadto za podejmowanie decyzji o tym, kiedy je przyjąć.

Słowa kluczowe: sprawiedliwość konstytucyjna, organy jurysdykcji konstytucyjnej, luki legislacyjne, praktyka sądowa, luki prawne

1. INTRODUCTION

The issue of controlling the constitutionality of legislative omissions is considered one of the most turbulent and fascinating topics in modern constitutional law. This is evident when considering the significant challenges that judicial review of legislative inaction poses to legal dogma. Dominant legal doctrines across various European countries acknowledge the presence of legal gaps and offer diverse definitions for them. These varying definitions are inherently linked to different conceptualizations of what a legal gap entails. Furthermore, these differing approaches have paved the way for the classification of such gaps.

The essential elaboration of the Constitution by the legislator, the role that the legislative branch must assume in this process of constitutional concretization, and the discretion afforded to the legislator in determining the timing of such development, constitute the first of the most significant challenges that constitutional dogma must address.

The constitutional oversight of legislative inaction faces two hitherto insurmountable difficulties: what the sanction for such inaction should be, and how the fulfillment of the legislative obligation can be ensured. Providing supervision without enforcement authority does not seem to be an effective remedy. Nevertheless, the term "unconstitutionality by omission" encompasses diverse issues that will be analyzed in the following sections.

2. THE CONCEPT AND TYPOLOGY OF "LEGISLATIVE OMISSIONS" IN THE CONSTITUTIONAL PROCESS

The problem of legal gaps is extensively analyzed in the legal doctrines of modern states; however, there is no singular approach to defining the concept of a 'legal gap' or the methods for filling it. For instance, the German jurist Karl Engisch defines legislative gaps as the absence of specific rules for a particular form of behavior. He categorizes these gaps as either conscious (political and legal gaps) or unconscious, as well as distinguishing between primary and secondary gaps (Sales 2013). In Georgian legal doctrine, the concept of a legal gap is interpreted as "an issue that requires consideration and resolution, yet is neither addressed nor regulated by any legal norm" These gaps are further classified into visible and invisible, as well as primary and secondary gaps (Goradze 2021). The presence of an invisible gap is known to the legislator. However, the legislator deliberately refrains from correcting this flaw, making it clear – according to G. Horod – that the key to solving the problem lies in ethics rather than in law (or other legal acts).

In his classic work on this topic, Mortati sought to define a general concept of omission that would allow for the subsequent classification of the "species" in which it manifests (Mortati 1972). At the same time, he established a clear distinction between omission and the closely related concept of "gaps." Thus, in general, a legislative omission refers to any failure to enact a provision required by the Constitution. Unlike a simple gap, an omission always constitutes a breach of an obligation. While gaps may arise involuntarily, an omission results from a deliberate act of will and can be likened to a clearly negative position taken by the legislator. Therefore, the meaning of an **omission** can be identified as a peculiar expression of the legislator's will, following the ancient maxim: *ubi lex voluit dixit, ubi noluit tacuit* (where the law wanted, it spoke; where it did not want, it remained silent). However, Mortati's initial definition does not establish definitive terms for every scenario. Consequently, the primary issue remains the precise meaning of 'omission' and its specific characterization in relation to the concept of a "gap."

The anomalies that provoke objections against the legislature are, therefore, the absence of normative acts which the interpreter of the Constitution perceives as omissions, revealing a legislative mandate ignored by the legislature. In this way, they are distinguished from lacunae, which are gaps identified by the interpreter of a law when applying it, in terms that can be rationally deduced from the intention of the "systemic" legislator, and whose correction through *ad casum* regulations is not aimed at contradicting that intention, but rather at its execution.

Wessel fundamentally denies the violation of rights due to the absolute inaction of the legislator ("*eine Grundrechtsverletzung durch ein absolutes Unterlassen des Gesetzgebers*"), which, needless to say, occurs when the legislature omits a constitutionally necessary legislative provision. It follows that the Federal

Constitutional Court of Germany (herafter, BVerfG) rejected a constitutional complaint challenging a violation of the fundamental right to the free development of the individual ("*eine Verletzung des Grundrechts auf freie Entfaltung der Persönlichkeit*") as inadmissible ("unzulässig"). The complaint was rejected because the legislator had failed to implement a law that would provide everyone with the opportunity to assert a claim commeasurate with this right (Wessel 1952).

The aforementioned constitutional judge proceeds to discuss relative omission (*relatives Unterlassen*), pointing out that the legislator is reproached for violating fundamental rights when it is accused of regulating only specific legal requirements for a certain group, in violation of the principle of equality ("*unter Verletzung des Gleichheitsgrundsatzes*"). In such a case, according to Wessel, the constitutional complaint is actually directed not against an omission, but against a positive action of the legislator ("*die Verfassungsbeschwerde in Wahrheit nicht gegen eine Unterlassung, sondern gegen ein positives Handeln des Gesetzgebers*"). In this case, the remedy for the complaint, if duly founded, could lead not only to a review of the actions of the legislator – who, due to the "inaction of a certain group" ("*durch Unterlassung der Beteiligung einer bestimmten Gruppe*"), violated Article 3 of the Grundgesetz, but also to a declaration of unconstitutionality ("*die Feststellung der Verfassungswidrigkeit*") This, in turn, would lead to the nullity of the partial regulation ("*die Nichtigkeit der gesetzlichen Teilregelung*"). Wessel's conclusion is unequivocal: "*In derartigen Fallen láge stets eine unmittelbare Grundrechtsverletzung durch den Gesetzgeber vor*" (in such a case, there would always be an immediate violation of fundamental rights by the legislator) (Wessel 1952).

The conclusion from the above is that, for Wessel, absolute omissions (*Absolutes Unterlassen des Gesetzgebers*) are those characterized by a complete absence of legislative development of a constitutional provision. In contrast, relative omissions (*relatíves Unterlassen*) imply partial regulation that, by omitting certain groups from the exercise of a right, violates the principle of equality. Based on the author's formulation, it is evident that the significance of this dual typology lies in the consequences associated with each type: the justiciability of relative omissions as opposed to the non-justiciability (or lack of control) of absolute omissions.

Taking into account that legal doctrine is reflected in various ways within constitutional jurisprudence (General Report of the XIVth Congress 2008), G. Khrystova emphasizes that "only a small part of constitutional courts consider legal gaps due to the complete inaction of the legislator or other subject of lawmaking" ("unconditional omission"). Most courts exercise constitutional review over legislative gaps only as a result of the improper action – rather than the inaction – of the legislator ("relative omission"). In the latter case, a law or other legal act characterized by the absence or insufficiency of a legal prescription, or a group of prescriptions, becomes the subject of constitutional review (Khrystova 2020).

The analysis of constitutional legal theory and practice provides grounds to define a legislative omission as a violation of constitutional norms and principles. This violation manifests in the failure of authorized subjects, primarily state bodies such as the Verkhovna Rada of Ukraine, to establish a legislative basis for an effective legal mechanism to properly regulate essential social relations. The need for such regulation is directly required or mandated by the Constitution of Ukraine (Kolodii, Ternavska 2024).

According to A. Krusyan, gaps in constitutional law are characterized by several key factors: constitutional and legal norms do not regulate a specific type of social relations; such norms are entirely absent from constitutional legislation; the methods for the constitutional regulation of these relations have not been established; and the principles upon which their regulation should be based are not fixed within the constitutional framework (Krusian 2021).

The National Report of the Constitutional Court of Ukraine on: "Problems of Legislative Gaps in Constitutional Jurisprudence" noted that the Court's competence does not include the investigation or identification of legislative gaps, nor the assessment of the constitutionality of omissions in legal regulation." An analysis of constitutional norms indicates that the Constitution of Ukraine does not provide for special procedures to address such legislative gaps.

3. THE CONCEPT OF THE CONSTITUTIONAL COURT AS A "POSITIVE" OR "NEGATIVE" LEGISLATOR

When studying legislative omissions and aiming for their complete and systematic analysis, it is worth examining their definition, the subjects involved, and the procedure for their detection. Undeniably, the courts occupy the dominant and most important place in this process.

In Germany, 1957 and 1958 marked a turning point in the BVerfG's jurisprudence. In its judgments of February 20, 1957, and June 11, 1958, rendered regarding constitutional complaints, the Court unequivocally recognized that unconstitutionality may arise not only from an act but also from legislative inaction. Notably, both cases involved partial omissions, marking the first steps toward the BVerfG's dogmatic recognition of the "arbitrary exclusion of benefit" ("*Willkürlicher gleichheitswidriger Begünstigungsausschluss*") as a violation of the principle of equality. However, judicial review was not limited to such omissions. In a pivotal decision on January 29, 1969, the Federal Constitutional Court went further by examining the absolute inaction of the legislator. This landmark case warrants at least a brief examination.

With this decision, the BVerfG ruled on a constitutional complaint ("*Verfassungsbeschwerde*") filed against a judgment of the Kiel Regional Court. The lower court had prioritized several pre-constitutional provisions of the Civil

Code, even though they violated the principle of equality for children born out of wedlock ("*uneheliche Kinder*") compared to children born in wedlock ("*eheliche Kinder*"). This equality is expressly mandated by Art. 6(5) of the Basic Law (GG), which at the time was still awaiting legislative implementation.

In view of the legislative delay, the BVerfG held that it was no exaggeration to conclude that the "reasonable time" limit had expired. Twenty years after the Basic Law's entry into force, the legislator had still not regulated fundamental aspects of life as required by Art. 6(5), despite passing numerous laws that were significantly less urgent from a constitutional perspective. Furthermore, the Court maintained that once the "reasonable time" for Parliament to fulfill its duty had passed, and given the relatively straightforward nature of the constitutional provision, ordinary courts could (and should) apply the constitutional rule directly.

In short, the German Court not only addressed relative omissions but also absolute omissions in cases where legislative inaction led to the application of unconstitutional norms that conflicted with fundamental rights and values.

According to legal doctrine, the Spanish Constitutional Court does not, in principle, exercise legislative functions. The Court itself stated this in one of its earliest decisions: "The Constitutional Court is the supreme interpreter of the Constitution, not the legislator, and may only be asked to rule on the conformity or non-conformity of provisions with the Constitution" (STC 5/1981, of February 13) (Requejo Pagés 2007).

This ruling must be applied with particular caution and restraint, given that

> [T]he law, as an expression of the will of the people, can only be repealed or amended by representatives of that will. Only if a legal provision violates the Constitution is this Court empowered to repeal it. However, this power may be exercised only when grave and compelling reasons so require: when a constitutional body or a significant part thereof confirms the existence of such a violation, or when, if such a violation were not declared, the judicial body would find itself violating the Constitution, since, in accordance with the rule of law (Article 117.1 of the Constitution), it does not have the power to disregard it, even if it considers it to be contrary to a superior but prior norm. When these serious and compelling reasons are absent, respect for the legislature requires that this Court refrain from making any declaration. (STC 17/1981, June 1, FJ 4) (Requejo Pagés 2007)

Thus, the role of the Constitutional Court corresponds to that of a so-called "negative legislator." However, the normative nature of the Constitution – which is binding upon all public authorities, including the legislator – and its incorporation of the "social state" as a structural principle, have changed this dynamic. This reflects a shift away from the liberal view of the Constitution as a norm that merely limits public authority. Instead, the constitutional text now includes specific mandates for legislative action and proclaims a general duty to intervene in social reality to align it with constitutional ideals.

Consequently, the protection of the Constitution depends on the legislator taking the positive actions established by the constituent assembly. Therefore, legislative silence – where the Constitution mandates action – constitutes an unconstitutional omission that can only be remedied by enacting the required regulations (Requejo Pagés 2007).

This fundamental position underpins constitutional jurisprudence, which is strongly inspired by the philosophy of self-restraint. Scholarly doctrine generally agrees that the Constitutional Court has avoided both excessive activism and total passivity. Instead, it has managed to exercise its powers in a manner that respects the balance with the authority of the legislator.

This favorable assessment is undoubtedly linked to the Court's efforts to align the limits of its jurisdiction with the boundaries of constitutional interpretation. Consequently, legislative gaps were only addressed when a remedy could be achieved without resorting to lawmaking functions that lie outside the scope of judicial activity. In other words, the Court corrected the legislature's regulatory negligence using judicial methods where possible, while leaving the resolution of gaps that fall within the political sphere to the electoral process (Requejo Pagés 2007).

The principle of the separation of powers and the jurisdictional nature of the Constitutional Court imply that, ideally, only the legislative body should correct such omissions. However, the normative character of the Constitution and the legislature's accountability to the electorate emphasize the need to eliminate legislative silence that contradicts constitutional mandates. This can be achieved through a judicial declaration of unconstitutionality and, where feasible, by filling the normative void using the instruments available to the Court. Such a process represents a complex balancing act. It provides the constitutional basis for the proactive role the Court must inevitably play when addressing these cases.

The study of legislative omissions in the practice of the Constitutional Court of Ukraine is particularly relevant in comparative-law scholarship because Ukrainian legal doctrine has traditionally approached gaps in the law either as a problem of general legal theory (Matat 2016) or within discrete branches of law, including civil procedural law (Kalashnyk 2016), criminal procedural law (Zabarnyi 2017), and criminal enforcement law (Bielkina 2020). Gaps in law were also studied in the context of judicial lawmaking. S. Shevchuk identifies the need to resolve issues arising from inconsistent or contradictory legislation, as well as the presence of gaps and ambiguous provisions during judicial proceedings, as a primary reason for the emergence of judicial lawmaking in Ukraine (Shevchuk 2007). Appealing to the legislature is ineffective and may delay the judicial process. In addition, the Court cannot refuse to conduct judicial proceedings on the grounds of the existence of these problems (Yasynok 2023).

Viewed from a comparative perspective, the development of the concept of legislative omission in the practice of the Constitutional Court of Ukraine indicates that the Court has only recently begun to recognize this phenomenon in its jurisprudence.While the concept is still in its formative stages and lacks complete doctrinal integrity, several key provisions can already be identified.

First, the legislator has an obligation to provide legal regulation at the statutory level for specific social relations – particularly those that are insufficiently regulated – whenever such a duty is expressly or implicitly enshrined in the Constitution. Second, this regulation is necessary to comply with constitutional mandates and to ensure that fundamental rights and freedoms are fully protected, guaranteed, and implemented. Third, the legislator's failure to fulfill this constitutional duty results in a violation of constitutional provisions, especially those defining rights and freedoms, often leading to excessive restrictions or discrimination. Finally, a legal norm may be recognized as unconstitutional insofar as its regulation is insufficient. In such cases, the legislator is required to regulate these relations, often following specific requirements set forth by the Court (Gorodovenko 2024).

In its Decision No. 3-r/2022 dated December 23, 2022, the Court held that the current legislative regulation regarding the recalculation of pensions for constitutional complainants and other persons entitled to pensions under Article 37 of Law No. 3723 is not a mere legislative gap (lacuna). Instead, it constitutes a legislative omission that violates the Constitution of Ukraine. To develop, specify, and detail the provisions of Articles 3, 8, 24, and 46 of the Basic Law of Ukraine, the recalculation of pension amounts must be regulated by an act adopted by the Verkhovna Rada of Ukraine. The state's failure to provide a legislative basis for an effective mechanism to recalculate pensions and other social benefits – which serve as a primary source of livelihood – demonstrates the illusory nature of constitutional guarantees regarding the right to social protection. Such legislative omissions in the regulation of social relations violate several constitutional norms and principles, effectively rendering the right to social security ineffective.

Judge of the Constitutional Court of Ukraine O. Pervomaiskyi expressed a separate opinion in case No. 1-252/2018(3492/18). This case concerned the constitutional petition of 47 People's Deputies of Ukraine regarding the constitutionality of specific provisions of Article 6 of the Law of Ukraine "On Television and Radio Broadcasting" and Articles 15, 15-1, and 26 of the Law of Ukraine "On Cinematography."

Judge Pervomaiskyi noted that the absence of proper legislative regulation regarding legal liability, where such regulation is constitutionally mandated, should be qualified as a legislative omission rather than a mere legislative gap (lacuna). He emphasized that while a gap can be overcome through law enforcement, a legislative omission constitutes a direct violation of the Basic Law of Ukraine. The existence of a legislative omission in the regulation of legal liability may indicate the illusory nature of the constitutional guarantees established by paragraphs 1 and 22 of Part 1 of Article 92 of the Basic Law of Ukraine. This lack of clear legislative grounds undermines the principle that the acts which constitute offenses and the corresponding legal responsibility must be determined exclusively by the laws of Ukraine.

In another separate concurring opinion, Judge of the Constitutional Court of Ukraine Oleg Pervomaiskyi addressed the case of Serhiy Mykolayovych

Vasylenko's constitutional complaint. This case concerned whether paragraph 6 of Section II ("Final and Transitional Provisions") of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding Priority Measures for the Reform of the Prosecutor's Office" was constitutional in light of guarantees of prosecutorial independence.

Judge Pervomaiskyi emphasized that the Court did not specify whether the procedure for compensating material or moral damage caused by unconstitutional acts and actions – as required by Article 152(3) of the Constitution – is currently regulated or if a legislative omission exists. In his view, the Court's restraint in this matter was appropriate. He argued that since the ordinary courts are the primary subjects of law enforcement, they are capable of determining this issue independently.

A similar observation can be made regarding the doctrine established by the Italian *Corte Costituzionale*. In its Decision No. 190 of 1970, the Court declared Article 304-bis of the Code of Criminal Procedure unconstitutional not for what it stated, but for what it omitted. Specifically, the Court found the provision constitutionally illegitimate insofar as it excluded the right of a defense lawyer to be present during the interrogation of their client.

This ruling faced radical rejection by the ordinary courts, which opposed its application. They argued that by remedying a legislative omission, the *Corte Costituzionale* had exceeded its functions. In Decision No. 62 of 1971, which Giuliano Amato described as unusual, the Court sought to supplement the existing body of law in a way that critics claimed went beyond its judicial mandate.

The Italian Constitutional Court upheld this position. Referring to the "sindacabilitá delle omissioni del legislatore che si resolvono in violazione di precetti costituzionali" (the reviewability of omissions by the legislator that result in the violation of constitutional precepts), the Court noted: "sindacabilitá che non si puó in assoluto escludere senza far venir meno in amplia misura le garanzie del sistema" (reviewability that cannot be excluded without significantly undermining the guarantees of the system). It should be acknowledged that the case in question falls under the category of relative omissions. The legislative body's failure to provide for such measures resulted in discriminatory treatment, as the prosecution was permitted to be present during interrogations while the defense was excluded. This discrepancy led to a violation of the principle of the equality of arms (égalité des armes). In any case, the Italian Court also had the opportunity to examine the legislator's absolute omissions in detail.

In determining the systemic position of the Constitutional Tribunal (CT), defining the basic concepts of its jurisdiction and the specific nature of legislative omissions plays a crucial role. However, since these terms are judicial constructs of the Tribunal that are not yet firmly established in jurisprudence, significant problems arise regarding the delimitation of its jurisdiction. The challenge of defining the scope of the Tribunal's competence has been addressed numerous times. The tools used in its jurisprudence to distinguish between acts subject to constitutional review and those excluded from this sphere have not yet produced transparent or predictable standards. This is largely due to the specific criteria applied in its practice (Stefanicki 2017).

According to the established case law of the Constitutional Tribunal, legislative omission is understood as the failure to adopt (issue) a normative act contrary to an existing legal obligation. Legislative omission consists of an overly narrow definition of the scope of applying a legal norm. If a legislative omission falls outside the jurisdiction of the Constitutional Tribunal, it falls within its competence. In the latter case, the Tribunal decides whether the provisions of a binding normative act are lacking, without which it may raise constitutional doubts (cf., for example, the Decision of the Constitutional Tribunal of May 6, 1998, reference no. K 37/97, OTC ZU No. 3/1998, para. 33; October 9, 2001, case No. SK 8/00, OTC ZU No. 7/2001, para. 211; November 16, 2004, case No. P 19/03, OTC ZU No. 10/A/2004, para. 106; Decision of the Constitutional Tribunal of July 14, 2009, case No. SK 2/08, OTC ZU No. 7/A/2009, para. 117). Thus, a claim of unconstitutionality may relate both to what the legislator has regulated in a particular act and to what it has omitted, despite a constitutional obligation to include such regulation. The case law of the Constitutional Tribunal has established that in instances of partial or incomplete regulation, it is possible to challenge the specific scope of that regulation. However, the Constitutional Tribunal cannot substitute itself for the legislator. The assessment of such contested regulations cannot result in the legal framework being supplemented with provisions that are merely desirable from the perspective of the applicant's interests.

The distinction between a "legislative omission" (unconstitutional inaction) and "incomplete regulation" (legislative under-inclusiveness) depends on whether there is a qualitative identity or a significant similarity between the issues regulated in a provision and those left outside its scope. In its jurisprudence, the Tribunal has exercised particular caution when making such classifications. Finding a hasty similarity between unregulated issues and those explicitly addressed in a provision exposes the Tribunal to accusations of exceeding the scope of judicial review and usurping lawmaking powers (cf. the Decision of the Constitutional Tribunal of March 5, 2013, Case No. K 4/12).

In the case law of the Constitutional Court of Romania, the concepts of legislative vacuum and legislative omission have been used to date in two categories of decisions: a) decisions in which the legislative vacuum was invoked as an argument for finding specific legal provisions unconstitutional; b) decisions in which the Court found inadmissible certain exceptions of unconstitutionality alleging legislative omissions and effectively requesting that the Court supplement the contested normative acts with additional provisions.

Thus:

a) By Decision No. 62 of January 8, 2007, of the Constitutional Court, Law 278/2006, which repealed the offenses of insult and defamation from the Criminal Code, was declared unconstitutional. The grounds for the Decision included, among other things, the following: "The legal object of the offenses of insult and defamation, provided for in Articles 205 and 206, respectively, of the Criminal Code, is the dignity, reputation, and honor of the person."

b) The Constitutional Court consistently rejects as inadmissible exceptions of unconstitutionality which, by criticizing the lack of a legal provision with the content desired by the authors of the exceptions, seek to amend the law. In such cases, the Court maintains that it cannot act as a positive legislator and that the authority to adopt, amend, or supplement legislation belongs exclusively to the legislature. To support this position, it relies on Article 2(3) of Law No. 47/1992 on the organization and functioning of the Constitutional Court, which states that "the Constitutional Court shall rule only on the constitutionality of acts," together with Article 11(1) of the same law, which provides that "the Constitutional Court shall rule only on the constitutionality of the acts referred to it, without being able to amend or supplement the provisions subject to review."

4. CONCLUSION

In general, the legislative branch has shown a clear willingness to remedy the shortcomings identified by the Court. This stems either from an awareness of its own constitutional responsibility or from a desire to avoid the consequences of interim measures developed by the Court to fill identified gaps. Relative omissions – or imperfect and insufficient legislation – are relatively common in ordinary law, particularly regarding the principles of equality and non-discrimination. The same applies to imperfect legislative regulation of guarantees concerning state intervention in fundamental freedoms.

The methods available to the Court to remedy such omissions primarily consist of two approaches. First, the Court may require the judiciary to integrate imperfect rules through the use of analogy. Second, the Court may combine a formal declaration of unconstitutionality with annulling effects. By removing the consequences of imperfect rules and preventing their future application, the Court effectively compels the legislature to exercise its legislative powers.

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BEYOND PROCEDURAL STAGNATION: SUBSTANTIVE RESOLUTION OF DISPUTES ARISING FROM CHINESE NORMATIVE ADMINISTRATIVE DOCUMENTS

Abstract. Normative Administrative Documents (NADs), commonly known as 'red-headed documents' play a significant role in the Chinese system of administrative governance. However, due to their sheer volume and the lack of clear procedural standards in their formulation, they have frequently become a source of rights infringements and administrative disputes, exposing blind spots in the fundamental rights protection. In the article, we advocate introducing direct judicial review for NADs. This proposal is not aimed at fully embracing strong-form review but rather conceptualises direct review as a limit on limits. In the first section, we concisely reconstruct the current incidental review system and formulate the research problem by identifying the challenges of procedural stagnation, specifically conceptual ambiguity, weak enforcement, and limited legal effect. In the second section, we compare existing reform approaches and evaluate the relative superiority and feasibility of direct judicial review. In the third section, the article proposes a non-linear, multi-level, and differentiated model of normative oversight, centred on the substantive resolution of administrative disputes and tailored to the functional characteristics of NADs. This model distinguishes between instrumental, generative, and displacive types of administrative disputes and coordinates administrative reconsideration, administrative litigation, and constitutional review.

Keywords: normative administrative documents, judicial review, substantive resolution of administrative disputes

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POZA STAGNACJĄ PROCEDURALNĄ: MATERIALNE ROZSTRZYGANIE SPORÓW WYNIKAJĄCYCH Z CHIŃSKICH ADMINISTRACYJNYCH DOKUMENTÓW NORMATYWNYCH

Streszczenie. Administracyjne dokumenty normatywne (NAD), powszechnie znane jako „dokumenty z czerwonym nagłówkiem", odgrywają istotną rolę w chińskim systemie zarządzania administracyjnego. Jednak ze względu na ich ogromną liczbę oraz brak jasnych standardów proceduralnych przy ich tworzeniu, często stają się źródłem naruszeń praw i sporów administracyjnych, ujawniając luki w ochronie praw podstawowych. W artykule opowiadamy się za wprowadzeniem bezpośredniej kontroli sądowej NAD. Propozycja ta nie zmierza do pełnego przyjęcia silnej formy kontroli, lecz ujmuje kontrolę bezpośrednią jako „ograniczenie ograniczeń". W pierwszej części zwięźle rekonstruujemy obecny system kontroli incydentalnej i formułujemy problem badawczy poprzez wskazanie wyzwań stagnacji proceduralnej, w szczególności niejednoznaczności pojęciowej, słabego egzekwowania oraz ograniczonej skuteczności prawnej. W drugiej części porównujemy istniejące podejścia reformatorskie i oceniamy względną przewagę oraz wykonalność bezpośredniej kontroli sądowej. W trzeciej części artykułu proponujemy nieliniowy, wielopoziomowy i zróżnicowany model nadzoru normatywnego, skoncentrowany na materialnym rozstrzyganiu sporów administracyjnych i dostosowany do funkcjonalnych cech NAD. Model ten rozróżnia instrumentalne, generatywne oraz wypierające typy sporów administracyjnych oraz koordynuje ponowne rozpatrzenie administracyjne, postępowanie sądowoadministracyjne i kontrolę konstytucyjną.

Słowa kluczowe: administracyjne dokumenty normatywne, kontrola sądowa, materialne rozstrzyganie sporów administracyjnych

I. INTRODUCTION: THE EMERGENCE OF NORMATIVE ADMINISTRATIVE DOCUMENTS AS A BLIND SPOT IN JUDICIAL REVIEW

Normative Administrative Documents (NADs), commonly referred to in China as "red-headed documents," are documents other than administrative regulations, decisions, and orders issued by the State Council, as well as ministerial and local government rules. According to the *Notice of the General Office of the State Council on Strengthening the Formulation and Oversight of Normative administrative Documents*, these documents are formulated and publicly issued by administrative organs or legally authorised entities within their statutory powers and procedures. They relate to the rights and obligations of citizens, legal persons, and other organisations, are universally binding, and are repeatedly applied within a given time frame. Despite their subordinate legal status in the hierarchy of norms, NADs play a pivotal role in administrative governance, serving as key instruments for implementing higher-level laws and functioning as the *de facto* basis for administrative enforcement. However, due to their vast quantity, low-level issuing bodies, and lack of strict procedural regulation, they frequently lead to arbitrary infringements of citizens' rights.

To understand the challenges NADs pose to judicial review, it is necessary to introduce the institutional context of the judiciary and constitutionalism in the People's Republic of China. Unlike jurisdictions with general judicial review powers, China maintains a distinct separation between the constitutional and administrative judicial systems. The power of constitutional review, including the oversight of legislation, resides exclusively with the National People's Congress (NPC) and its Standing Committee, rather than the courts. The People's Courts exercise judicial power through administrative litigation to supervise specific administrative acts. This structure creates a tension: while courts must resolve disputes involving NADs, they historically lacked the power to review these abstract norms directly. In 2014, the Administrative Litigation Law of the People's Republic of China (ALLPRC) was amended to introduce an incidental review mechanism (Articles 53 and 64), allowing courts to review the legality of NADs when they serve as the basis for a specific administrative act. Furthermore, the 2023 revision of the Administrative Reconsideration Law (ARLPRC) positioned administrative reconsideration as the main channel for dispute resolution, granting reconsideration bodies enhanced powers to review such documents.

Despite these reforms, the oversight of NADs remains a "blind spot" in fundamental rights protection. The current incidental review system faces "procedural stagnation," characterized by conceptual ambiguity, weak enforcement, and limited legal effect (Huang Xianxiong 2023, 51). The oversight mechanisms of NADs remain limited to incidental review and a symbolic "filing and review" process. To address these issues, this article advocates introducing direct judicial review for NADs. This proposal is not aimed at fully embracing strong-form review but rather conceptualises direct review as a "limit on limits." We propose a non-linear, multi-level, and differentiated model of normative oversight, centred on the substantive resolution of administrative disputes and tailored to the functional characteristics of NADs. This model distinguishes between instrumental, generative, and displacive types of administrative disputes and coordinates administrative reconsideration, administrative litigation, and constitutional review, with filing and review by the NPC serving as the institutional intermediary. Specifically, this article seeks to address two interconnected research questions: (1) How can a differentiated scrutiny model be conceptually defined to distinguish between the instrumental and generative nature of NADs, and what are the corresponding judicial standards for each? (2) What procedural linkages are required to coordinate the People's Courts' judicial findings with the NPC's filing and review system to ensure the systemic rectification of unlawful norms?

Methodologically, this article employs a combination of systemic analysis, functional comparison, and empirical observation. First, the research relies on a systemic method to interpret key legal concepts, such as legality under Article 64 of the ALLPRC, within the broader hierarchy of the Chinese legal system. Second, it adopts a functional comparative method, drawing on the experiences of the United States, Germany, Italy, and Mexico. These jurisdictions are selected not to serve as a blueprint for direct transplantation, but as a heuristic tool to develop a "differentiated scrutiny" model tailored to China's specific national context. This context is defined by four critical factors: (1) Administrative Scale: the unprecedented volume and diversity of red-headed documents across multiple levels of government; (2) Constitutional History: the long-standing central role of the NPC in constitutional supervision since the 1954 and 1982 Constitutions; (3) Unitary Logic: the necessity of maintaining legal uniformity within a vast territory that lacks a decentralized judicial review tradition; and (4) The Current Reform Mandate: the recent institutional shift toward the substantive resolution of administrative disputes as a primary goal of judicial modernization. By synthesizing these factors, the article seeks to move beyond abstract theory toward a pragmatic oversight framework that respects China's path-dependency while addressing the modern challenges of the administrative state.

The article is structured as follows. In Part II, we analyse the current "procedural stagnation" difficulties faced by the incidental review system and identify three core problems: conceptual ambiguity, weak enforcement, and limited legal effect. In Part III, we assess existing reform approaches and argue for the relative advantages of conditional direct judicial review while evaluating its feasibility. Part IV draws on the theoretical model of the relationship between the administrative state and constitutional order to construct the proposed coordinated, multi-layered supervisory system. Finally, we conclude by summarising the theoretical advantages of this model for the effective supervision of normative documents and the substantive protection of citizens' rights.

II. PROCEDURAL STAGNATION: THE PRACTICAL DIFFICULTIES OF JUDICIAL SUPERVISION OF NORMATIVE ADMINISTRATIVE DOCUMENTS

Although designed to promote the substantive resolution of administrative disputes and to protect the lawful rights of parties, the incidental review mechanism for AND has, in practice, demonstrated signs of procedural stagnation and institutional malfunction. According to Articles 53 and 64 of the *ALLPRC*, the key features of the incidental review system include: (1) The requirement of **normative character**: courts may only review "normative documents"; documents falling outside this category cannot be examined. (2) The **requirement of basis**: only those normative documents that serve as the basis for a specific administrative act can be subject to review. (3) The requirement of an **incidental nature**: such review may only be initiated together with litigation against a specific administrative act (Chen Yunsheng 2019, 166).

In practice, the procedural steps for incidental review are as follows: first, whether the claimant has raised the review request within the legal time limit; second, whether the document in question qualifies as an NADs; third, whether the document has a basis relationship with the challenged administrative act; and fourth, whether the court finds the normative document unlawful (Wang Chunye

2021, 82). However, courts frequently decline to conduct the review during the first three procedural stages. Even when entering the fourth stage of substantive review, courts tend to affirm the legality of the document passively, and even where they issue negative assessments, the effect of such findings remains doubtful. Specifically, the system of incidental review faces three major difficulties:

1. Conceptual ambiguity: Procedural filtering and the shrinking of review opportunities

In judicial practice, due to ambiguities in the definition and application standards of key concepts like the object and conditions of review, the effectiveness of procedural review is undermined, and opportunities for individuals to seek remedies are significantly reduced.

1.1. *Defining ambiguity: Normative Administrative Documents*

There is no uniform standard for determining what constitutes NADs. Existing scholarly approaches include procedural appearance theory, substantive content theory, authoring body theory, and case-by-case assessment (Hu Dong, Yu Boyang 2023, 139). However, these theories often suffer from overly narrow scope or unclear criteria. Administrative bodies issue a wide range of documents, such as notices, opinions, measures, announcements, and meeting minutes. Some may not appear to meet formal legislative characteristics while still exerting binding force on citizens' rights and obligations in practice. Courts may inconsistently apply or overemphasise formal aspects when determining whether documents qualify as NADs eligible for review. In addition, non-binding internal documents or policy guidelines may serve as the *de facto* basis for administrative enforcement, producing legal effects in disguise (Ye Bifeng 2024). Courts' inconsistent approaches to the reviewability of such documents often result in the exclusion of documents that ought to be examined.

1.2. *"Basis requirement": Excessive restriction of the scope of review*

Courts sometimes interpret the term **"basis"** narrowly, treating only documents explicitly cited in administrative decisions as the legal basis for administrative acts (Zhou Lejun, Zhou Youyong 2019, 149), while disregarding those normative documents that materially influence administrative acts but are not formally referenced. Moreover, when an act is based on multiple documents or primarily on superior legal norms with additional elaboration by subordinate documents, courts may believe the review of the NADs unnecessary. Finally, if the administrative organ claims its actions were based on lawful higher-level norms while treating the problematic document as a mere internal reference or operational guidance, claimants may struggle to prove the document served as a "direct basis."

1.3. ***"Incidental requirement": The unfulfilled demand for independent review***

In some cases, the NADs itself has immediate legal effects or poses real threats to citizens' rights, such as restrictive market access rules or generalised fee standards, but there may be no specific administrative act that allows for litigation to serve as the basis for incidental review. Additionally, the incidental nature of the system prevents preventive remedies, as claimants must wait until a specific administrative act infringes their rights before initiating review. This increases the costs and risks of seeking remedies. Claimants may also miss the opportunity for incidental review if they are unable to initiate litigation against a specific administrative act due to issues such as time limits or insufficient evidence.

2. Weak review enforcement: Judicial restraint and excessive deference

Even when NADs enter the scope of judicial scrutiny, courts frequently adopt a restrained stance and demonstrate excessive deference to administrative judgment. This is rooted in the traditional avoidance of "political questions" and exacerbated by blurred boundaries under the expanding administrative state and the lack of clear standards for review, ultimately weakening effective supervision of administrative power.

2.1. ***Blurred boundaries in expanding administrative sate***

As the administrative state expNADs, administrative power increasingly takes on legislative and judicial functions. Hamburger warns that administrative law is becoming "extralegal, supralegal, consolidated," moving towards absolute power (Hamburger 2014). Similarly, Adam Tucker notes that in the UK, there is insufficient scrutiny of the merits of delegated legislation, and such proposals are not vulnerable enough to defeat (Poole 2019, 7). China faces similar difficulties. While China lacks the formal legal bifurcations found in the U.S. (legislative vs. non-legislative rules) or Germany (*Rechtsnormen* vs. *Verwaltungsvorschriften*), its NADs are functionally equivalent to German *Verwaltungsvorschriften* and U.S. non-legislative rules. They share the same subordinate and non-statutory nature, primarily serving as internal administrative instructions rather than external legal norms with the force of law.

However, in Chinese governance practice, these documents frequently transcend their internal boundaries to function as de facto external legislation. Unlike their Western counterparts, which primarily bind the administration, Chinese NADs often directly establish new obligations or restrict the rights of citizens, legal persons, and other organizations. This externalization of internal rules is driven by the vast discretionary power afforded to local authorities to refine or concretize vague superior laws. Consequently, while they lack the formal rank of law under the Legislation Law, they exert a universal binding force that is immediately felt by the public, creating a persistent tension between administrative efficiency and the protection of fundamental rights. Yu Qi categorises legislation in China into operational elaboration, authorisation confirmation, and gap-filling types (Yu Qi 2017).

Authoritative domestic theories further divide NADs into three categories: creative documents, interpretive documents, and guidance documents. According to this view, creative documents refer to those which establish general rights and obligations for unspecified administrative counterparts without going through a formal legislative process; interpretive documents clarify laws, regulations, or rules; and guidance documents are issued in advance to provide written advice to unspecified administrative counterparts (Jiang Ming'an 2019, 172–174). These distinctions expose an internal tension with the official claim that NADs have "universal binding force." Guidance documents, in principle, do not generate binding effects on administrative counterparts. Hence, the meaning of "universal binding force" requires clarification: it first means internal binding on the issuing body and its subordinates. However, in practice, such documents are often used as direct legal bases for decisions affecting citizens, thereby producing factual constraints. Whether such constraints rise to the level of legal legitimacy depends on consistency with higher-level laws and whether they exceed the scope of legal reservation. According to Articles 11 and 12 of the *LLPRC*, only laws may impose deprivation of political rights, personal liberty constraints, and expropriation of private property. Whether other limitations on these fundamental rights or limitations on other fundamental rights also require statutory authorisation remains debated.

Zhang Xiang argues that the Chinese Constitution exhibits a dual-layered model of statutory reservation. For example, Article 40 concerning the right to communication entails both a simple statutory reservation for the freedom of communication and a stricter reservation for the secrecy of correspondence (Zhang Xiang 2021, 89). In contrast, Li Zhongxia contends that this article should be understood solely as a stricter statutory reservation clause. He further proposes a substantive test based on the theory of essential importance, which requires distinguishing between the essential, core, and peripheral content of fundamental rights, as well as the means and methods of restriction (Li Zhongxia 2025, 32). Regardless of the standard adopted, it is generally accepted that the regulation of citizens' fundamental rights and obligations should be set out in statutes, regulations, and administrative rules. However, as Wang Kai points out, due to historical deficiencies in China's legal system, many NADs in practice deviate from the normative ideal that they should have only internal effect, no universal binding force, and no binding authority over courts and instead function as *de facto* administrative legislation (Wang Kai 2023, 50). The creative nature of these other NADs blurs the boundary between administration and legislation.

2.2. *Indeterminate standards of review*

NADs, given their lower legal status, are most likely to harm individuals' rights. Despite this, courts often show excessive deference to the professional judgment of administrative bodies, and even when review occurs, clear and consistent standards are lacking. Empirical research shows that out of 2,005 incidental review cases, 1,779 (88.73%) were rejected by courts (Li Mingchao 2021, 135). For example, in *Wu Zhonglun and Others v Renhuai Municipal People's Government*, the appellants, including Wu Zhonglun, requested that the court conduct an incidental review of the legality of the Measures of Guizhou Province for Confirming and Issuing Certificates in the Reform of the Collective Forest Rights System.

The appellate court held that the Measures constituted the basic policy basis for implementing forest-rights reform in Guizhou Province, aiming to ensure the smooth progress of the province's collective forest rights reform, to standardise the methods for confirming forest rights and issuing certificates, and to unify operational steps. Its legality, the court stated, was beyond doubt, and the respondent's application of the Measures in making the administrative decision was therefore not improper. Although Article 64 of the *ALLPRC* stipulates the review of legality, standards for assessing such documents remain unclear.

Article 148 of the *Interpretation of the ALLPRC* provides five circumstances under which a normative document may be deemed unlawful: (1) where it exceeds the statutory powers of the issuing body or the scope of delegated authority granted by law, regulations, or rules; (2) where it conflicts with superior laws, regulations, or rules; (3) where it imposes obligations on, or diminishes the lawful rights or interests of citizens, legal persons, or other organisations without a legal basis; (4) where it otherwise contravenes provisions of laws, regulations, or rules.

However, these five categories often fail to provide courts with clear criteria for judgment. In response, scholars have proposed three major approaches to reconstruct the review framework. The first is the "four-element theory," which holds that review of legality should cover four dimensions: legitimacy of the issuing body, legitimacy of power exercised, legitimacy of content, and procedural legitimacy (Cheng Hu 2023). This model arguably introduces more ambiguity than the original five categories. The second approach is the "two-element theory." Wang Liuyi's "two-element theory" proposes a dual classification of NADs into interpretive standards and discretionary standards. This classification is based on the object of review and has corresponding two-tiered review criteria.

At the first level, the power review, interpretive documents are deemed *ultra vires* if they create or alter private rights or obligations. For discretionary documents, the test is whether the administrative authority explicitly claims the document to be legally binding; if so, it is deemed *ultra vires*. At the second level, the review of legality, both categories are subject to a unified set of standards: whether they exceed authority, violate due procedures, or conflict with higher legal norms (Wang Liuyi 2017). While Wang does not equate all concretisations with the creation of new rights and obligations, his standard for identifying “creation or alteration” remains vague and rigid.

In practice, administrative bodies often need to concretise vague legal provisions to give effect to superior legislation. Treating all such concretisations as unlawful “creations” overlooks the essential role of implementation guidance in law enforcement. Furthermore, the test based on whether an authority has “claimed” legal binding force is impractical. Administrative agencies rarely declare internal guidelines to be externally binding. Instead, binding effects are often reflected in enforcement practices. If a discretionary standard is strictly applied and affects private rights or obligations, it should not escape judicial scrutiny merely because it is not formally designated as legally binding. In addition, the twofold categorisation struggles to account for hybrid documents that contain both interpretive and discretionary elements, such as penalty standards that interpret legal terms while guiding administrative discretion. Rigid classification risks misapplying the appropriate standard or creating inconsistencies in judicial review. Finally, the framework lacks internal coherence between the two levels of review. For example, when a document neither formally claims legal effect nor creates new rights but is applied coercively in practice, the theory provides no clear guidance on how courts should respond. These weaknesses limit the framework’s ability to address the growing concern over internal documents being applied externally without a legal basis and hinder courts’ capacity to conduct effective substantive review of administrative rulemaking.

The third approach, known as the “contextual discretion theory,” was developed by Yu Qi. He proposes a model of judicial review based on the authority of normative documents. Where a document enjoys strong institutional authority (stemming from the agency’s statutory role) or theoretical authority (derived from the agency’s demonstrated expertise), courts should afford deference. Where such authority is lacking, a broader review of legality – including an assessment of reasonableness using tools such as the proportionality principle – should apply (Yu Qi 2016, 66–67). This theory, however, also presents challenges. How can the institutional or theoretical authority of a normative document be assessed objectively and consistently? Although the literature suggests several indicators, such as legislative authorisation, administrative urgency, political accountability, procedural complexity, and regulatory expertise, the relative weight of these factors and the potential for subjective judicial discretion remain unresolved. For instance, how should the “complexity of the drafting process” be measured? To what extent must “regulatory expertise” rise to qualify as “theoretical authority”? Furthermore, to assess a document’s authority, courts may require access to background materials, policy rationale, or expert input – information that is typically controlled by administrative agencies, raising significant concerns about informational asymmetry.

However, both theories face significant practical hurdles: Wang's dual-classification is often criticized for its rigidity and its ambiguity in defining newly created rights, while Yu's framework relies on subjective indicators of institutional authority that are difficult to measure objectively. Because neither theory offers a self-executing formula, their implementation depends heavily on judicial discretion. In sum, both Wang Liuyi's classification criteria and Yu Qi's authority-based assessment require continuous exploration and experiential accumulation in judicial practice. Moreover, they place higher demands on judges, not only requiring a solid grasp of legal doctrine but also competence in policy analysis, auxiliary expertise in specialised fields, and the ability to make nuanced judgments under complex circumstances.

3. Limited legal effect: Case-specific application and ongoing risks

One of the major challenges facing the system of incidental judicial review of NADs in China is the limited legal effect of judicial findings. This limitation stems primarily from the case-specific nature of judicial decisions, which creates a risk of repetitive litigation. As a result, it undermines both the substantive resolution of administrative disputes and the broader objective of improving the rule-of-law environment.

3.1. ***Limited effect: Case-specific constraints on judicial effectiveness***

There is considerable divergence in both academic and judicial understandings of the legal consequences when a court finds an AND unlawful in incidental review proceedings. Broadly, three positions have emerged: (1) the "invalidity theory," which holds that the AND becomes null and void *ab initio*; (2) the "general non-application theory," which contends that other courts should refrain from applying the document in similar cases; and (3) the "case-specific non-application theory," under which the document is inapplicable only in the case at hand and cannot serve as a legal basis for the administrative action under review (Xia Yu 2016). Considering Article 64 of the *ALLPRC*, the third view aligns more closely with prevailing Chinese theory and practice. While courts are required to "recommend" that the issuing authority address the problem, such recommendations are not legally binding. Whether, when, and how to act remains within the administrative authority's discretion. As a result, even the NADs deemed inapplicable in one case may formally remain valid within the legal system. The underlying policy rationales, bureaucratic interests, or institutional misunderstandings behind the document may persist, thereby continuing to pose risks of future disputes.

3.2. *Repetitive litigation: Systemic costs and judicial resource waste*

The case-specific limitation of judicial effect directly and inevitably leads to the risk of repetitive litigation over the same normative document. Although *res judicata* is a foundational judicial principle, its effect is confined to the parties and subject matter of a particular case. Other individuals or entities affected by the same unlawful NADs cannot obtain general legal protection from prior judgments. To safeguard their rights, such individuals must initiate fresh litigation and again request the court to review the same document. This imposes additional time, financial, and psychological burdens on claimants. Courts, meanwhile, are compelled to re-litigate similar cases, re-evaluate facts, and repeat legal analyses. This not only wastes scarce judicial resources but also undermines adjudicative efficiency. It runs counter to the principle of resolving administrative disputes in a final and substantive manner.

3.3. *Consequences: Weakened rule-of-law environment*

The lack of general legal effect may lead different courts to adopt inconsistent interpretations of the same NADs, resulting in divergent rulings and unpredictable outcomes. Such inconsistency damages the foreseeability and authority of judicial decisions and erodes public trust in the rule of law. Moreover, when judicial findings of unlawfulness lack broader binding force, administrative authorities face diminished external pressure to correct their conduct or revise problematic documents. This weakens incentives for rule-based governance. An effective and authoritative review mechanism for NADs is a cornerstone of legal state-building. If the incidental review mechanism lacks institutional potency, it cannot fully perform its supervisory and regulatory functions, thereby delaying progress toward a more comprehensive rule-of-law order in China.

III. CRITICAL EVALUATION OF EXISTING APPROACHES

The foregoing analysis reveals that China's incidental review mechanism for NADs faces a "triple dilemma" of conceptual ambiguity, weak scrutiny, and limited legal effect. These issues have led to procedural inefficiency and have prevented the mechanism from achieving its legislative goal of substantively resolving administrative disputes. In the context of an administrative state, where normative documents increasingly shape citizens' rights and public order, effective oversight of such instruments has become imperative. As China advances constitutional review and the newly revised *ARLPRC* positions reconsideration as the main channel for resolving administrative disputes, it is both timely and necessary to reflect on and reconstruct the judicial oversight framework for NADs in light of existing institutional constraints.

1. Necessity of path selection and existing explorations

In response to the institutional inefficiencies and lack of substantive dispute resolution under the current review regime, the legal community has proposed several reform paths, each with its respective merits and limitations. The most prominent include: revisions within the current framework, public interest litigation-based review, and a model of direct judicial review.

1.1. *Necessity: Addressing procedural stagnation and substantive resolution*

First, reform is necessary to address the institutional deficiencies of the current mechanism. The "three deficiencies", including unclear conceptual boundaries, limited scrutiny, and ineffective outcomes, have significantly diminished the utility of the current review framework. Without reform, a substantial number of unlawful or unreasonable "red-headed documents" will continue to be relied upon as the basis for administrative actions, thereby infringing upon individual rights and impeding the resolution of administrative disputes. Second, reform will enhance governance capacity. Effective judicial oversight can prompt administrative bodies to improve the legality and rationality of their rulemaking practices, thereby reducing disputes at their source and enhancing the overall quality of governance. Third, reform is crucial for safeguarding fundamental rights. Constructing an effective system for the judicial review of normative documents is indispensable for preventing administrative arbitrariness and ensuring the protection of citizens' legal entitlements. It also represents a core requirement in building a government based on the rule of law.

1.2. *Existing approaches: Exploration and evaluation*

Scholarly discourse has developed along three main lines of reform:

(a) Intra-system refinement

This approach proposes targeted improvements within the existing framework for incidental review. Measures include clarifying the legal definition of "normative documents" (Hu Dong, Yu Boyang 2023; Zhou Lejun, Zhou Youyong 2019; Ye Bifeng 2024), refining the criterion of whether a document serves as the legal basis for administrative acts (Zhou Lejun 2019; Wang Chunye 2021), encouraging courts to adopt a more proactive stance (Xu Xiaodong 2016), and enhancing the enforceability of judicial recommendations (Xia Yu 2016). This path benefits from low implementation costs and administrative feasibility, but may not fundamentally address the systemic limitations, particularly the lack of general legal effect resulting from court rulings.

(b) Public interest litigation model

This model advocates for empowering procuratorates or designated public bodies to file lawsuits against unlawful NADs, requesting that courts declare them invalid or repeal them. This approach facilitates proactive and specialised scrutiny and may produce judgments with more general legal effect (Zhang Bin 2024; Liu Jialiang 2022). However, it faces significant legal barriers: current legislation restricts the scope of administrative public interest litigation and expanding it to encompass all normative documents would require legislative amendments. Furthermore, its implementation must be carefully harmonised with existing mechanisms such as legislative oversight and administrative self-correction.

(c) Direct judicial review model

Jiang Mingan argues that where an NADs causes harm to the legitimate interests of an administrative counterpart without the need for a specific administrative act, the affected party should be entitled to initiate direct litigation, seeking the revocation or a declaration of illegality of the document (Jiang Ming'an 2021). Wang Qingbin further builds on this view, proposing an integrated model in which judicial review is coordinated with administrative reconsideration and legislative filing and review. He advocates for the removal of the term "incidental" from Article 53 of the *ALLPRC* and the reconsideration clauses that currently restrict judicial review to incidental scrutiny. Instead, he calls for the establishment of a reconsideration-first, direct-review-permitted model that includes administrative self-regulation, judicial review, and legislative supervision (Wang Qingbin 2024). This model offers the most effective remedy, enabling direct legal challenge to problematic documents and ensuring the general binding effect of judicial decisions. However, it presents substantial institutional challenges: it may trigger a surge in case volume, place heavy burdens on judicial capacity, and raise concerns about its compatibility with the principles of separation of powers and judicial restraint.

2. Evaluating the superiority and feasibility of direct judicial review

Despite facing significant practical challenges, the conditional adoption of a direct judicial review model demonstrates distinctive advantages over alternative reform pathways. Its capacity to achieve thorough resolution of administrative disputes, strengthen preventive oversight, and expand avenues for legal redress aligns more closely with the ongoing reform objective of "substantively resolving administrative disputes" in China's administrative litigation framework. However, incorporating NADs into the scope of direct judicial review is not self-evidently feasible. Existing justifications for such inclusion remain limited in persuasiveness. It is therefore essential to cautiously assess potential conflicts with the current legal norm system, possible disruptions to institutional power boundaries, and the implications for administrative efficiency and policy stability. Additionally, idealised models of multi-stage oversight mechanisms require more nuanced and pragmatic scrutiny.

2.1. *Relative advantages*

First, direct judicial review enables a more thorough resolution of disputes. By directly targeting and eliminating unlawful normative documents at their source, it prevents the inadequacy of fragmented, case-specific remedies and better serves the legislative objective of substantively resolving administrative disputes. Second, this model reinforces *ex-ante* oversight. Establishing an independent review mechanism places stronger external pressure on administrative authorities, compelling them to exercise greater caution and legal compliance at the rulemaking stage, thereby reducing the likelihood of unlawful rule issuance. Finally, direct judicial review significantly expands access to legal remedies. For normative documents that exert immediate legal effects or pose direct threats to individual rights while lacking a justiciable administrative act to trigger an incidental review, the availability of direct review ensures a viable and effective judicial review.

2.2. *Feasibility considerations*

Some prevailing views contend that there is no essential difference between direct and incidental review, and that the existing incidental review system provides a foundation for establishing a direct review mechanism, with the primary distinction lying in the degree of scrutiny. Moreover, courts have already accumulated practical experience and institutional resources in conducting incidental review (Wang Qingbin 2024, 83). However, such a justification is not without limitations:

First, there are fundamental differences between incidental and direct judicial review. Incidental review is tethered to a concrete administrative act, whereas direct review targets the normative document itself. The standing requirements and justiciable interest in direct review are often more complex. The legal and social implications of the "non-application in this case" conclusion typical of incidental review differ significantly from the potential annulment or revocation that direct review might entail. Framing this only as a difference in "degree" risks underestimating the systemic transformation direct review could bring. Moreover, the complexity and depth of direct review far exceed that of incidental review. It typically demands broader assessments, including legislative background, policy rationale, and societal impact, thus requiring more sophisticated judicial expertise. Given that courts sometimes avoid scrutiny even under the more limited incidental model, it remains questionable whether they can effectively and feasibly undertake direct review. Additionally, NADs vary in nature, impact, and necessity for review. While current case volumes remain modest (Wang Qingbin

2024, 84), the introduction of direct review, especially in its early stages, could lead to a surge in litigation. Consequently, it may be overly optimistic to assume that all normative documents below the level of administrative regulations are suitable for direct review.

Second, direct review may generate conflicts with existing legal and institutional frameworks. Most notably, it may contradict Article 13(2) of the *ALLPRC*, which explicitly precludes direct judicial review of abstract administrative acts, such as administrative regulations, rules, and generally binding decisions or orders. If direct review of low-level normative documents is permitted, while higher-level regulations remain immune from direct challenge, a structural paradox emerges: judicial control appears more available for lower norms than for higher ones. This would convey a contradictory message regarding the legal system's logic of hierarchical authority. Furthermore, empowering courts to directly review NADs implicates constitutional principles concerning the separation of powers. Under China's current constitutional structure, the ultimate supervisory authority over normative documents rests with the People's Congress. Judicial intervention through direct review could lead to institutional competition or even conflicting outcomes between courts and legislative bodies.

Finally, the proposed model of "reconsideration as prerequisite – judicial review as the midpoint – filing and review as the final step" presents challenges. The first stage, administrative reconsideration, faces concerns about independence and impartiality. While the revised *ARLPRC* introduces improvements, the mechanism remains internal oversight by administrative organs. Whether this system can earn public trust and function effectively as a preliminary filter is uncertain. Litigants sceptical of reconsideration organs' neutrality may opt to bypass it or pursue judicial review regardless of its outcome. Moreover, the capability and motivation of administrative authorities to review normative documents, particularly at lower levels, are questionable. These organs may lack the legal expertise or institutional autonomy required to evaluate complex legal issues or weigh competing policy interests. Their ability to review regulations issued by their own or peer departments may also be hampered by internal politics or bureaucratic alignment. If reconsideration is made a mandatory precondition, it may reduce case volumes but at the cost of prolonging dispute resolution and increasing litigant burdens, contrary to the goal of timely and effective redress. Therefore, it is necessary to clearly define the types of normative document disputes where reconsideration should be required.

In the judicial review stage, further questions arise regarding the scope and depth of judicial scrutiny. Should the court reassess the normative document independently, or limit itself to reviewing the legality of the reconsideration decision? How should courts resolve situations where their conclusions differ from those of reconsideration bodies? The level of deference courts afford to such decisions must also be clarified. In practice, if most cases proceed to judicial review even after reconsideration, with courts conducting substantive reassessments, the resource-saving function of mandatory reconsideration is effectively neutralised. At the final "legislative filing and review" stage, several concerns persist: how to initiate review, ensure institutionalisation, enhance professional capacity, and define the "finality" of such conclusions. Currently, the NPC filing and review process is largely reactive and selective. A more proactive, systematic mechanism is yet to be developed to ensure problematic documents are effectively flagged and addressed. The professional backgrounds of NPC Standing Committee members may also limit their capacity to assess technically complex regulations without external expertise. Furthermore, the meaning of "finality" in this context must be clarified. Does a legislative review conclusion have binding, unappealable force? How does it interact with the *res judicata* effect of judicial decisions, especially when conflicting outcomes arise? These issues cut to the core of China's constitutional structure and the distribution of power among branches.

2.3. ***Orientation toward the Substantive Resolution of Administrative Disputes***

In the field of administrative prosecutorial oversight, from November 2019 to December 2020, the Supreme People's Procuratorate launched a special campaign titled "Strengthening Administrative Procuratorial Supervision to Promote the Substantive Resolution of Administrative Disputes." While its functions overlap with those of a Western Attorney General or Public Prosecutor's Office, the SPP possesses a distinct constitutional status. It is an independent state organ parallel to the government and the courts, tasked with supervising the legality of both judicial and administrative activities. In June 2021, the Opinions of the CPC Central Committee on Strengthening Legal Supervision by Procuratorial Organs in the New Era emphasised that procuratorial organs should promote the substantive resolution of administrative disputes when performing their legal supervision functions, to ensure that cases are resolved both in form and in substance. In August 2021, Article 2 of the revised Rules on Administrative Litigation Supervision by People's Procuratorates stipulated: "Efforts shall be made to promote the substantive resolution of administrative disputes and to ensure the uniform and correct implementation of national laws."

Xue Gangling and Yang Xin argue that a distorted internal misalignment characterises China's administrative litigation system. Article 1 of the *ALLPRC* reflects a dual legislative purpose: a subjective aim (the protection of individual legal rights and interests) and an objective function (the maintenance and supervision of lawful administration). This framework does not correspond entirely to either a subjective or an objective litigation model (Xue and Yang, 2013, 34). However, with subsequent amendments to the *ALLPRC*, there has been a marked shift toward objective litigation. First, China's constitutional framework lacks a general provision analogous to Article 19(4) of Germany's Basic Law, which enshrines a right to legal remedies focused on the protection of subjective rights.

Second, Article 41 of the Chinese Constitution, which grants citizens the right to complaints, accusations, and petitions, is primarily aimed at safeguarding the legality of administrative order and upholding objective legal norms, rather than merely redressing individual grievances. This constitutes a constitutional foundation for a more objective orientation in China's administrative litigation (Cheng Xiezhong, 2020, 78). Nevertheless, the Supreme People's Court made it clear in *Liu Guangming v. Zhangjiagang Municipal People's Government* that the current *ALLPRC* generally adheres to a subjective litigation model rather than an objective one in determining the plaintiff's standing. It emphasised that the primary purpose of administrative litigation is to remedy the rights of the plaintiff, and, therefore, eligible plaintiffs should typically be limited to parties asserting the protection of their subjective public rights, rather than those seeking to safeguard mere reflexive interests (Liu Guangming 2006). Zhao Hong interprets this as a clear signal of China's shift toward a more subjectivist orientation in administrative litigation (Zhao Hong 2020, 102). On this basis, Zhao further argues that the recent introduction of concepts such as "stakeholder interest," "subjective public rights," and the theory of protective norms indicates that China's administrative litigation is predominantly subjectivist in orientation, with objective litigation serving a supplementary role (Zhao Hong 2020, 102). This reveals that China's administrative litigation system is currently undergoing a critical transitional phase.

We contend that the policy goal of substantive dispute resolution has led to the emergence of a model grounded in objective litigation, supplemented by subjective elements. Firstly, substantive resolution of disputes requires moving beyond individual relief and focusing on the root causes of disputes. Traditional subjective litigation centres on protecting the plaintiff's rights, with the effect of judgments largely confined to the specific case at hand. Even if a plaintiff prevails, similar disputes may recur if the underlying normative documents, administrative practices, or systemic issues remain unchanged. Substantive resolution thus entails not only individual relief but also addressing deeper causes, such as unlawful normative documents, improper administrative routines, or systemic misconduct by administrative agencies. Secondly, substantive resolution focuses more closely on maintaining the objective legal order. Traditional subjective litigation typically targets specific administrative acts, but a significant number of disputes stem from unlawful or unreasonable normative documents. Without effective judicial review and correction of such abstract administrative acts, it is impossible to resolve the cascading specific disputes that arise from them. Thirdly, substantive resolution requires judicial decisions to have broader radiating and preventive effects. Subjective litigation judgments typically apply only to the parties of the case. To truly resolve disputes substantively, judicial decisions must not only resolve the individual case but also guide the future conduct of administrative agencies and prevent similar disputes from recurring. This demNADs that judgments influence how administrative authorities interpret and apply legal norms and even push for the revision of inappropriate rules or practices. Such normative guidance and systemic influence transcend the scope of purely subjective litigation.

In other words, the implementation of direct judicial review of NADs is expected to foster a deeply integrated and functionally complementary relationship between subjective and objective elements within China's administrative litigation framework. Rather than simply favouring one model over the other, the evolution reflects a more nuanced effort to organically combine the strengths of both litigation types under the overarching aim of substantively resolving administrative disputes. Moving forward, the institutional design of NADs-based direct review should be oriented toward this substantive resolution goal, to minimise feasibility risks and ensure coherence with the broader reform agenda.

IV. SYNERGISTIC GOVERNANCE: CONSTRUCTING A COORDINATED MECHANISM

To achieve synergistic supervision of normative documents through administrative reconsideration, administrative litigation, and constitutional review, this section begins with a reflection on the theory of the administrative state and the evolving role of the courts, proposing a necessary shift in review philosophy as the theoretical foundation. Building upon this foundation, it puts forward a new multi-tiered and differentiated judicial review framework for normative documents. Finally, it justifies the legitimacy and feasibility of such a coordinated mechanism from a responsive perspective that transcends linear thinking.

1. Administrative state and the role of courts: Theoretical foundation and standard shift in review

In exploring the relationship between the administrative state and constitutional order, Emerson identifies three models: instrumental, generative, and displacive (Emerson 2022, 2). Under the generative and displacive models, the administrative state may serve as an experimental platform and a driver for advancing democratic legal and political life (Emerson 2022, 25). Within this context, the administrative state can alternately implement, replace, or generate constitutional norms and structures, including offering new constitutional interpretations for deliberation by other political institutions and the people themselves (Emerson 2022, 26). These three dimensions of the administrative state require that judicial review of NADs in China move beyond mere formal legality. Cohn proposes a model of internal tension to describe the dynamic oscillation between subordination and dominance within administrative power (Cohn 2021, 42). Meanwhile, Poole notes that state justifications, such as emergency powers, state of exception, and prerogative, have become "embedded exceptions" within the ordinary constitutional order (Poole 2015, 284).

The judicial decisions of the U.S. *Lochner* era illustrate the covert nature of such embedding: it is often difficult to discern whether administrative action is subordinate or dominant. The core issue in *Lochner* was not judicial activism *per se* but its specific understanding of "neutrality" and "inaction," which assumed the common law order as a natural and self-evident baseline (Sunstein 1987, 874). Administrative decision-making is deeply embedded with policy choices and distributive consequences that the public typically cannot alter. For instance, in 2021, the Bazhou Municipal Government issued the Measures for Assessment, Reward, and Punishment of Non-tax Revenue Collection and Management in Bazhou City. This document unlawfully proposed linking non-tax revenue collection to the expenditures of the collecting units and incorporated the fulfilment of revenue targets into the performance evaluations of township-level leadership groups and officials. By forcibly connecting fiscal revenue with departmental spending and political achievements, the document exposed a typical phenomenon of regulatory rent-seeking. An inspection conducted by the State Council subsequently determined that the policy exhibited a prominent profit-driven nature.

Thus, direct judicial review of NADs should not be limited to the simple application of categorical rules. Instead, courts must develop a more disclosive and reflective capacity to reveal the underlying policy preferences, value judgments, and distributive impacts behind seemingly neutral technical norms. Administrative agencies must then be required to justify how their choices align with public purposes and legal constraints, rather than hiding behind the façade of technical neutrality.

In U.S. law, the principle of judicial deference established in the *Chevron* case has become an important doctrine governing courts' review of administrative agencies' interpretations of law. The case articulated the well-known "two step framework": first, the court examines whether Congress has spoken clearly to the precise question at issue. If so, effect must be given to Congress's unambiguous intent. If not, the court must then consider whether the agency's interpretation is based on a permissible construction of the statute and defer to the agency's reasonable interpretation (*Chevron* 1984, 467, 842–843). For decades, the "*Chevron* deference" (1984) served as the cornerstone of administrative law, requiring courts to defer to an agency's reasonable interpretation of ambiguous statutes. However, this model raised concerns that judges were abdicating their constitutional duty to interpret the law. This trend culminated in the 2024 landmark decision, *Loper Bright Enterprises v. Raimondo*, which overturned the *Chevron* doctrine. The U.S. Supreme Court asserted that courts must exercise independent judgment rather than deferring to an agency simply because a statute is silent or ambiguous.

This U.S. shift from categorical deference to rigorous independent scrutiny provides a crucial comparative warning for China's ongoing reforms. It underscores that even within a technically complex administrative state, excessive judicial deference risks hollowing out the rule of law. For China, breaking through the current procedural stagnation necessitates a similar conceptual shift: courts must transition from formalistic deference toward a more substantive review that delineates the boundaries of normative administrative power. The fall of the *Chevron* doctrine reinforces the core argument of this article that judicial oversight must serve as an independent safeguard rather than a mere rubber stamp for administrative power.

Chinese courts frequently consolidate "blind spots" in legal protection by elevating the procedural thresholds for justiciability. This tendency is epitomized in *Zhu Hao v. Traffic Police General Corps of the Shanghai Municipal Public Security Bureau* (2017). In this case, the plaintiff sought an incidental review of a Circular that served as the direct grounds for the police's refusal to register his moped. The appellate court overturned the trial court's substantive assessment, ruling that since the Circular was issued after the mopeds had theoretically reached their scrap limit, its nature was merely that of informational notice rather than a formal legal basis. This case underscores a pervasive judicial trend: by drawing a formalistic dichotomy between a document's communicative function and its role as a legal basis, courts effectively insulate controversial normative documents from scrutiny. Following this logic, *Cai Xun v. Zhuhai Municipal Bureau of Justice and Zhuhai Municipal People's Government* (2018) further introduced what may be termed a restatement doctrine. The court ruled an "Announcement" non-reviewable because it merely echoed superior rules without independently altering the plaintiff's legal position – a reasoning that further narrows judicial oversight by denying the normative independence of subordinate acts.

Furthermore, courts often reduce the "conflict" standard to a mere search for manifest semantic contradictions. Meanwhile, judicial practice frequently tolerates the creation of new rights and obligations by NADs in the absence of explicit prohibitions. Consequently, as long as a document fills a legislative vacuum, courts tend to find no conflict. For instance, in *Wei Huangsheng & Wei Yaosheng v. Ninghua County People's Government* (2013), the court upheld a local requirement for notarized inheritance certificates – a condition not found in superior departmental rules – simply because it did not "explicitly contradict" the existing text. Nevertheless, rare instances of judicial proactivity offer a glimpse into a nascent conceptual shift toward substantive review. In *Wuhan Qiankun Technology Co., Ltd. v. Fourth Inspection Bureau of Wuhan State Taxation Bureau* (2016), the court articulated a groundbreaking stance: reviewing the legality of normative documents is inherently inseparable from the judicial task of choosing and interpreting applicable laws. By recognizing review as an *ex officio* duty regardless of a party's request, the court signalled a significant departure from passive restraint. A more radical step was taken in *Liu Can & Liu Mei v. Wangcheng District Land*

and Resources Bureau (2016), where the court issued an explicit negative evaluation, declaring that a local rule conditioning resettlement on a "villager vote" lacked a legal basis and thus could not serve as the basis for the case.

Currently, in the absence of clear statutory criteria, Chinese courts primarily rely on pragmatic strategies to justify the legality of NADs, leading to inconsistent reasoning. First, a status-based approach is often employed, where the administrative hierarchy of the issuing body confers a quasi-legislative aura upon the document. In the case of *Guiguan Electric Power Co., Ltd. v. Water Resources Bureau of Dahua Yao Autonomous County* (2022), the court granted supplementary power to State Council General Office documents based on the executive's supreme status, yet this logic fails to establish clear boundaries for lower-level authorities. Second, a functionalist logic is frequently applied; if an AND serves a legitimate purpose, such as maintaining social order in *Yan Caiyuan v. Jiaozuo Municipal Public Security Bureau* (2005), it is likely to be upheld. However, the judicial examination of the nexus between the document and its purported goal is often so broad that it leaves excessive discretionary space for the administration. Third, some courts have begun to invoke substantive reasonableness, citing "common academic standards" as seen in *Chu Yue v. Tianjin Normal University* (2009), or "general social cognition" as benchmarks for legality. In sum, these judicial efforts represent a search for legality rather than a rigorous exercise in boundary-setting. The legal reasoning remains largely principled and nebulous, reflecting the persistent lack of a unified, differentiated standard of scrutiny, which is the very institutional deficiency that this article seeks to address.

2. Pathway: A multi-level and differentiated judicial review

We argue that China should, in the future, adopt the "substantive resolution of administrative disputes" as the fundamental guiding principle, and take the nature of disputes triggered by normative administrative documents as the central focus for institutional design. Based on this, a supervisory framework should be established in which administrative reconsideration, administrative litigation, and constitutional review operate with clear divisions of responsibility while engaging in effective coordination. The aim is to ensure that administrative disputes are resolved in a fundamental, systematic, and forward-looking manner.

There is now a broad consensus that NADs are subject to review through administrative reconsideration and litigation. However, under Article 110 of *LLPRC*, the scope of constitutional review is limited to administrative legislation and does not explicitly encompass NADs. This raises questions about whether NADs can be incorporated into the constitutional review system. According to Zhu Xuelei (2022, 50), the authority to formulate various regulations, autonomous regulations, separate regulations, and NADs granted to entities other than the NPC and its Standing Committee can also serve as a constitutional basis for review. The

2023 Decision of the NPC Standing Committee on Improving and Strengthening the Filing and Review System explicitly requires the advancement of constitutional review under the framework of filing and review. It states:

> In the work of filing and review, attention shall be paid to examining whether regulations, judicial interpretations, and NADs contain content that contradicts constitutional provisions, principles, or spirit. Issues of constitutional concern shall be carefully studied, and documents that conflict with the Constitution or raise constitutional questions shall be timely addressed and rectified. In the filing and review process, efforts should be made to implement and improve the constitutional interpretation procedures, accurately grasp and articulate relevant constitutional provisions and principles, and respond to public concerns over constitutional issues.

This indicates that NADs should still be subject to constitutional review, either directly or indirectly through the filing and review mechanism. The Filing and Review System constitutes the centre of China's unique model of constitutional supervision, bridging the structural gap between administrative governance and the constitutional order. This mechanism requires formulating organs to submit their normative documents to the Standing Committee of the NPC or other competent authorities for filing within a statutory period. The legislative body then conducts a review of the document's constitutionality and legality, a process initiated either through active scrutiny or via passive review triggered by suggestions from citizens and organizations. Distinct from the judicial review performed by People's Courts, which is limited to incidental review and the power to refrain from applying a document in a specific case, the Filing and Review System grants the legislature the ultimate authority to annul or rectify unlawful norms with *erga omnes* effect.

In the multi-level framework proposed in this article, this system serves as the ultimate safeguard and institutional intermediary, ensuring that systemic legal conflicts identified during litigation or reconsideration can be substantively resolved at the highest normative level. More specifically, administrative disputes arising from normative documents can be categorised into three types: (1) Instrumental disputes typically emerge when administrative agencies misinterpret or misapply detailed rules while enforcing higher-level laws. (2) Generative disputes arise from the reconfiguration of existing interests or the vague or unreasonable regulation of new areas through the creation of new rules. (3) Displacive disputes tend to involve fundamental issues of power allocation or rights restriction, potentially raising deeper challenges concerning legality and even constitutionality. A linear model of "reconsideration as prerequisite – judicial review as the midpoint – filing and review as the final step" is inadequate for addressing the multidimensional nature of administrative disputes in the era of the administrative state (Wang Qingbin 2024, 85). We seek to construct a non-linear, multi-tiered, and interactive review framework tailored to these three types of disputes.

2.1. *"Main channel": Administrative reconsideration as a "front-end filter"*

We also endorse the positioning of administrative reconsideration as the "main channel" for resolving disputes, which aligns with the current legislative trend. Administrative reconsideration serves as the first line of defence and primary filter for addressing disputes involving normative administrative documents. It fully leverages advantages such as procedural convenience, strong expertise in specific fields, and internal error correction within the administrative system. However, differing from some scholars who argue that remedies based on administrative self-restraint should be exhausted as far as possible (Wang Qingbin 2024, 85), we contend that administrative reconsideration should play a "front-end filtering" role in the review of normative documents.

The comparative advantage and primary application of incidental review in administrative reconsideration lie in resolving "instrumental" disputes and conducting a preliminary rationality assessment and policy coordination for certain "generative" disputes of limited scope. This is because "instrumental" normative documents are primarily manifestations of the implementation, interpretation, or elaboration of superior laws, and the legal disputes surrounding them typically concern relatively clear technical legal questions, including whether the document exceeds the scope of delegated authority, conflicts with higher-level laws, applies accurately, or complies with procedural requirements. These issues often do not require complex value judgments or policy considerations.

Administrative reconsideration authorities are usually higher-level administrative agencies or the legal affairs departments of the same-level government, which often possess deeper and more concrete understandings of local administrative practices and relevant laws and regulations. They also have better knowledge of the background, objectives, and implementation contexts of interpretative, or enforcement documents issued by subordinate or parallel departments, allowing them to more readily identify errors or inappropriate elements. This helps mitigate the problem of informational asymmetry in judicial review. Unlawful or improper "instrumental" documents can be corrected more effectively and efficiently through the internal reconsideration process, which entails smoother hierarchical relationships, lower communication costs, and more immediate rectification effects. Administrative reconsideration authorities may invoke newly granted powers under the revised *ARLPRC*, such as "suspending execution and ordering correction," to promptly halt the application of unlawful documents and press for their substantive revision or repeal by the issuing authority.

Nevertheless, "generative" normative documents often involve more complex interest balancing, forward-looking policy choices, and broader social impacts. As part of the administrative system, reconsideration authorities may find it difficult to transcend departmental or local interests, which may lead to doubts about their impartiality and neutrality when handling such disputes. Administrative reconsideration agencies may also lack sufficient incentive or capacity to undertake the kind of "revelatory" scrutiny and inquiry akin to judicial review when it comes to deeply embedded policy logic, interest allocation, and latent risks underlying generative documents. "Displacive" disputes, meanwhile, often erode legislative power or challenge fundamental constitutional principles. Such issues exceed the legal competence and institutional capacity of administrative reconsideration authorities, and their conclusions lack the necessary authority. These disputes should therefore be addressed primarily through direct judicial review or constitutional review by the highest state organs. Accordingly, making administrative reconsideration a mandatory prerequisite for resolving all types of disputes over normative documents, or placing unrealistic expectations on its review capabilities, would both undermine its institutional positioning as the "main channel" and its effectiveness in resolving the types of disputes it is best suited to handle.

Based on fully leveraging the primary role of administrative reconsideration in resolving instrumental disputes and preliminarily assessing certain generative disputes, its review conclusions, especially the determination of the normative nature of documents, should serve as an important reference for subsequent judicial review. For matters beyond the authority of the administrative reconsideration organ, those requiring a more authoritative judicial judgment, or where the parties are dissatisfied with the reconsideration decision, a smooth mechanism should be established for transferring the case to the courts or making recommendations for review by the filing and review authority.

2.2. *Direct judicial review: Reconstructing differentiated standards of scrutiny*

In administrative litigation, courts should be empowered to directly review NADs, particularly those "generative" in nature, issued by administrative authorities in response to emerging issues or as part of institutional innovation. Such a review should adopt a "disclosive" model of scrutiny, delving into the policy considerations, value judgments, and interest-balancing embedded within these documents. This would ensure that administrative innovation remains aligned with the rule of law and responds meaningfully to the demands of democratic accountability.

As Raz observes, institutional choices should align with national traditions and conditions, entrusting those best suited to uphold the relevant values (Raz 1998, 52). From an institutional perspective, judicial restraint can be categorised into three types. The first is structural restraint, reflected in democratic objections to judicial review, which emphasise that courts should not overstep their authority to interfere with the decisions of the people or their elected representatives. A representative example is Bellamy's political constitutionalist approach (Bellamy 2007). The second is procedural restraint. Ely proposed the representation-reinforcing model, arguing that the Supreme Court's proper role is to "police the process of representation," acting not as a policymaker but as a referee ensuring that the democratic process functions fairly (Ely 1980). In his view, courts should only intervene when the fairness of democratic procedures or the representativeness of decision-making is compromised, rather than addressing the substance of policy decisions. This idea has further evolved in recent years into the theory of weak-form judicial review, with various models including dialogical review (Dixon 2023), experimentalist review (Gerstenberg 2012), catalytic review (Young 2012), and proportionate review (King 2012). The third type is selective restraint, exemplified by Sunstein's view that the choice between judicial minimalism and maximalism is highly contextual, dependent on pragmatic evaluations of various institutional and policy-related considerations rather than any *a priori* commitment to one approach as superior (Sachs, Sunstein, Loveland 2001, 51, 57).

This article argues that balancing the administrative state and judicial review requires clarifying the legitimate boundaries of judicial intervention and identifying how courts can respond flexibly to specific contexts. Such a task demands navigating the tension between strong-form and weak-form review, as well as between judicial activism and judicial restraint. In practice, especially regarding the judicial review of abstract administrative norms, Chinese administrative litigation has already exhibited signs of moving toward a weaker form of judicial review (Zhu Xuelei 2019; Cheng Xueyang 2011). We advocate for the introduction of direct judicial review for NADs. This proposal is not aimed at fully embracing strong-form review but rather conceptualises direct review as a limit on limits.

Initially, for "displacive" normative documents that potentially encroach on legislative authority, violate the statutory reservation principle, or unjustifiably restrict fundamental rights, direct judicial review serves as a critical safeguard against the overexpansion of administrative power. This article argues that the more "generative" a normative document is, the more intensive judicial scrutiny should become, leaving less room for judicial deference.

According to Article 107 of the *LLPRC*, laws, administrative regulations, local regulations, autonomous regulations, separate regulations, and rules shall be amended or annulled by the competent authority under Article 108 if any of the following circumstances exist: (1) where it exceeds the statutory powers of the formulating organ or the scope of delegated authority granted by laws, regulations, or rules; (2) where it conflicts with the provisions of superior laws, regulations, or rules; (3) where it unlawfully increases the obligations of, or diminishes the lawful rights or interests of, citizens, legal persons, or other organizations without a basis in laws, regulations, or rules; (4) where it fails to fulfil statutory approval or public issuance procedures, or otherwise severely violates prescribed formulation procedures; and (5) other circumstances in violation of laws, regulations, or rules. This reveals that the review of normative documents in China involves two distinct dimensions: legality and reasonableness. However, Article 64 of the *ALLPRC* currently confines judicial review to legality alone.

If a system of direct review over NADs is to be established, the primary issue is whether courts can also engage in reasonableness review. We contend that the term "legality" under Article 64 of the *ALLPRC* should be interpreted systemically. Article 70(6) of the *ALLPRC* provides that if an administrative act is "manifestly inappropriate," the court may annul or partially annul the act and order the authority to issue a new one. The phrase "manifestly inappropriate" may be construed to mean that administrative acts must not only conform to the literal text of the law, but also its underlying principles and spirit; they must be free not only from overt illegality, but also from implied illegality (Shi Bi, Cao Sheng, 2016). Therefore, regarding systemic consistency, if a normative document is manifestly inappropriate, it should be considered unlawful, and courts should be entitled to assess both legality and minimal reasonableness. However, in deference to the separation of powers, reasonableness review should be confined to a minimum threshold. The following section outlines the framework proposed by us for such review.

First, for "micro-generative" normative rules that are instrumental, technical, or purely executive, courts should exercise a high degree of judicial deference, and reasonableness review should remain minimal. The focus of the review should be limited to the five circumstances prescribed in Article 148 of the Interpretation of the *ALLPRC*. Reasonableness scrutiny, when applied, should centre on whether the content exhibits manifest unreasonableness, such as obvious logical inconsistencies, irrationality, or impracticality. Second, in the case of "exploratory generative" rules enacted in response to emerging fields or social transformations, courts should apply heightened standards of both legality and reasonableness review. When there is no explicit authorisation from superior law, courts must carefully assess whether the administrative authority's rulemaking power derives from a general mandate to govern or from an expansive interpretation of relevant legal principles. In such cases, the legitimacy of the rule's authority base must be critically examined.

Furthermore, this category of rulemaking demands enhanced procedural legitimacy. As these rules involve the initial formulation of norms, their enactment process must emphasise openness, public participation, and expert consultation. Procedural defects may directly affect their legality. Reasonableness review in such contexts should incorporate elements of risk assessment and the precautionary principle. For rules addressing new domains that may entail significant or irreversible risks, such as the protection of personal data, courts should assess whether sufficient risk assessments were conducted and whether the rules reflect the necessary preventive safeguards. In short, while courts ought to acknowledge the exploratory and experimental nature of administrative innovation, they must also ensure that such innovation does not come at the cost of fundamental rights or core public interests.

Third, for "reconstructive generative" rules that reshape existing legal understandings or institutional frameworks, such as through substantial modifications or overhauls, courts must apply the strictest standard of review. These rules often transform the traditional interpretation of legal concepts or fundamentally alter governance models in particular sectors, with potentially disruptive consequences for established patterns of rights and obligations. This type of rule exhibits a high degree of generativity, approaching the domain of "displacive" normative instruments. Courts must stringently assess whether such rules infringe upon legislative authority, violate the principle of statutory reservation, or fundamentally conflict with the spirit and core principles of superior laws, including the Constitution. The highest standards of procedural propriety must be applied. Under reasonableness review, if administrative authorities invoke "state reasons" such as public interest or national security to justify institutional transformation, the court must rigorously scrutinise the authenticity, urgency, and necessity of such justifications, as well as the proportionality between the measures adopted and the purported objectives. Most crucially, courts must examine whether the rule imposes a disproportionate restriction or deprivation of fundamental rights. On the procedural side, courts should also assess whether the reconstructive generation was subject to adequate public deliberation and democratic consultation, whether its final form garnered broad societal consensus, and whether it genuinely reflects the public will. In such cases, courts must assume a more proactive role as guardians of the law, subjecting administrative reconstruction to the highest level of scrutiny.

This article contends that the People's Courts should possess the ultimate authority to recognize whether a questioned NAD is instrumental, generative, or displacive during the judicial review stage. While the administrative reconsideration process provides a preliminary assessment of a document's function, the judiciary, as the final guardian of the legal order, must not be bound by the administration's own characterization of its rulemaking. Granting the courts this decisive power of recognition ensures that the administration cannot shield its generative innovations from intensive scrutiny by strategically labelling them as technical or internal rules. In this framework, the judiciary acts as the final arbiter of the appropriate level of deference, transforming the functional character of the dispute from a mere academic classification into a justiciable criterion that triggers specific intensities of review.

Secondly, whether Chinese courts may review "displacive" administrative disputes requires further examination. Within the current framework of China's constitutional evolution, the judiciary must respect the primary role of representative institutions, particularly as courts lack the formal procedural tools, such as the *erga omnes* effect of judgments or a binding system of precedents, to annul norms. Nevertheless, this institutional boundary should not be equated with judicial abdication. A crucial distinction must be drawn between the power of normative annulment, which remains the prerogative of the legislature through the filing and review system, and the duty of constitutional compatibility interpretation, which is inherent to the judicial function. As scholars such as Zhang Xiang, Xie Libin, and Li Haiping argue, such interpretation acts as a vital instrument of constitutional supervision rather than a substitute for legislative oversight. Together, compatibility interpretation and the filing and review mechanism constitute a dual-track approach to constitutional implementation. Consequently, far from encroaching upon the legislature's domain, judges fulfil their mandate by harmonizing administrative norms with constitutional values during ordinary adjudication (Zhang 2024; Xie, Song 2023; Li 2023).

From a comparative perspective, Italian administrative courts once assumed certain protective functions of the constitutional court, developing a multilevel structure from a centralised review model (Groppi 2008). However, since 2011, the Italian Constitutional Court has entered a phase of judicial power recentralization, with this trend becoming more pronounced after 2014 (Piccirilli 2018). Tega identifies four driving factors: legislative inaction, reduced sensitivity of the Supreme Court to rights protection, uncoordinated regulatory chaos, and the growing authority of the judiciary in defending rights (Tega 2020).

Mexico offers a parallel case. Its legal system oscillates between the decentralised American model and the centralised continental model. It thus combines case-based review through the *Amparo* writ with abstract review procedures. The rules, procedures, and legal effects of these two modes differ. The *Amparo* system, heavily influenced by the U.S., limits the effects of judgments to the parties involved. Meanwhile, Mexico has selectively incorporated mechanisms from the continental model, such as abstract review with *erga omnes* effect. This artificial separation of review types weakens the guiding function of constitutional interpretation, causing fragmented or inconsistent rulings on the same constitutional issue (Medécigo 2013, 17–22). Regardless of the chosen model, most constitutional adjudication involving fundamental rights should occur in lower courts operating within ordinary judicial proceedings (Medécigo 2013, 26). Accordingly, procedural rules must ensure that rulings in exceptional cases reviewed by constitutional bodies influence the broader legal system. The Supreme Court must maintain a coherent constitutional review system to secure fundamental rights and preserve the rule of law (Medécigo 2013, 39). In 2021, Mexico sought to elevate collegial courts in constitutional interpretation through structural reforms. One goal was to empower *Plenos de Circuito* (regional en banc courts) to unify legal interpretation and create *Jurisprudencia* (precedent), thereby supplementing the Constitutional Court and easing the limitations of centralised judicial interpretation. However, data shows these reforms did not significantly improve consistency or precedent volume. One reason is the longstanding preference of collegial courts for case-specific adjudication and their lack of incentive to formulate general standards. Although *Plenos de Circuito* are empowered to issue precedents, the stringent requirement for *Jurisprudencia*, requiring five consistent rulings, significantly delays the resolution of legal disputes (Suárez-Ávila

2025, 94–95). This trend of lower courts assuming partial protective functions of constitutional courts raises two institutional questions: (1) how they coordinate with constitutional review bodies; and (2) how they acquire effective tools for constitutional adjudication.

Drawing on the Mexican and Italian reforms, two conclusions follow: First, if lower courts do not possess the power to review the constitutionality of administrative acts, transfer mechanisms should operate smoothly to avoid symbolic constitutional courts. Second, if such powers are granted, courts must gain appropriate tools: (1) initiation mechanisms, (2) legal effect of judgments, and (3) a precedent system. China currently belongs to the first scenario. If China implements a direct review model for NADs in the future, it should place greater emphasis on coordinating a coherent system of constitutional interpretation.

Drawing on the experiences of Italy and Mexico, China should both avoid excessive reliance on interpretations issued by the NPC and prevent fragmentation and inconsistency in its interpretive framework. In cases of alternative administrative disputes, courts should transfer constitutional review requests via the filing and review mechanism. The rationale for proposing a referral mechanism via the filing and review system, rather than a purely legislative or purely judicial model, is rooted in the need to balance constitutional efficacy with legal uniformity.

Based on Italy's early experience, a centralized model that relies solely on a high-level political or constitutional body often leads to functional inertia. In China, the NPC Standing Committee (NPCSC) lacks the procedural capacity to address the thousands of individual administrative disputes that arise daily. Relying exclusively on the NPCSC's proactive interpretations would create a bottleneck, leaving citizens' fundamental rights without timely constitutional protection. Second, the experience of Mexico's *Amparo* system demonstrates that when lower courts are granted uncoordinated powers of constitutional interpretation, it leads to fragmented and inconsistent rulings on the same constitutional issue, undermining the authority of the law. In China's unitary system, which lacks a formal system of binding precedents, granting every local court the power to determine the constitutionality of NADs would trigger systemic legal chaos. Third, this article argues that the referral model represents a limit on limits. Unlike a purely legislative model, which is often too remote from individual disputes, or a purely judicial model, which risks violating the principle of legislative supremacy in China, the referral model leverages the courts' role as a "sensor" for constitutional issues. Courts identify the conflict during litigation and then transfer it to the filing and review mechanism of the NPCSC for an authoritative determination. This option is superior because it ensures that constitutional oversight is triggered by real-world disputes to promote efficiency, while the final interpretive authority remains centralized to ensure legal consistency. Thus, it reconciles the constitutional role of the NPC with the functional necessity of the People's Courts in the modern administrative state.

Finally, conclusions reached through administrative reconsideration should carry significant referential weight for the courts, which must adopt a differentiated approach depending on the nature of the case. On the one hand, in the context of instrumental disputes, where the reconsideration authority holds clear advantages in expertise or access to information, such as in the interpretation of internal regulatory norms within specific industries, the court may assign greater referential weight to its conclusions. In contrast, when the dispute involves pure questions of legal interpretation or the protection of fundamental rights, the court should assume its role as the ultimate interpreter of law and protector of rights. In such cases, the court may reduce the referential weight of the reconsideration conclusion and rely more heavily on its own independent legal reasoning. If the legality of the reconsideration procedure itself is challenged by a party, the court should focus its review on procedural legality, and the referential value of the reconsideration outcome will correspondingly diminish.

On the other hand, where the administrative reconsideration authority provides reasoned evaluations of generative normative documents or offers policy coordination judgments, courts may treat such assessments as important indicators of the administration's underlying policy considerations and interest-balancing processes. Nonetheless, courts must still conduct a deeper review of legality when exercising direct scrutiny. This form of reference carries multiple implications. First, it enhances the authority and effectiveness of administrative reconsideration. When courts take reconsideration outcomes seriously and engage with them substantively, it elevates the credibility and centrality of the reconsideration process. Second, it conserves judicial resources and improves adjudicative efficiency. Courts may draw on the prior work of reconsideration authorities that have already conducted thorough reviews, thus avoiding unnecessary duplication. Third, it contributes to legal coherence. Mutual referencing and alignment between judicial and administrative review standards can foster more uniform and predictable legal benchmarks for the review of normative documents. Finally, it helps protect the procedural interests of the parties. When conclusions reached through administrative reconsideration receive due regard in subsequent judicial proceedings, it reflects institutional respect for the party's procedural choices.

2.3. *Filing and review: From "back-end remedy" to "front-end prevention" and the intermediary of constitutional review*

We also argue that filing and review should not remain merely a final safeguard or remedial mechanism. Instead, it should take on a more proactive and central role, serving as a key tool for front-end prevention and ongoing monitoring, and functioning as the nodal link between routine review of legality and fundamental constitutional scrutiny.

First, filing and review should strengthen its preventive and supervisory functions. It should intervene as early as possible, including during the drafting stage of normative documents, by means such as consultation or public hearings. For newly issued documents, especially those with generative or displacive characteristics, a fast-track review mechanism should be established to detect potential legality or constitutionality risks on time and to issue early warnings or advisory opinions to the issuing authorities. This helps reduce the emergence of unlawful or inappropriate rules at the source. The review process and its results should be made as transparent as possible, and mechanisms for public input should be developed to enhance the democratic nature and accountability of the process.

Second, the filing and review should function as the nodal point that introduces and supports constitutional review. Although certain types of normative documents are not yet explicitly subject to constitutional review under current institutional arrangements, coordination between the filing system and constitutional review allows for indirect constitutional oversight in practice.

On the front end, NADs may involve complex constitutional implications, but not all of them warrant the immediate initiation of formal constitutional review. Filing and review bodies, drawing on their systemic perspective and understanding of legislative intent, can identify and screen documents that raise significant constitutional concerns. When these bodies detect possible conflicts between NADs and basic constitutional principles, fundamental rights, or core institutions, they should conduct a preliminary constitutional analysis. If serious constitutional doubts arise, they should prepare a formal report and, through statutory procedures, refer the matter to a competent organ, currently the Standing Committee of the NPC, for further review. On the back end, filing and review bodies should actively receive referrals or suggestions for review submitted by administrative reconsideration authorities or courts when handling cases involving potential constitutional or legal issues related to NADs. Their review conclusions should serve as an important reference for these bodies in adjudicating related disputes, helping to unify standards of legal interpretation and reduce unnecessary inconsistencies. While administrative reconsideration and judicial review primarily focus on case-specific disputes and the legality of particular rules, filing and review enable broader, systemic oversight. Only through the combined efforts of all three mechanisms can a comprehensive and effective oversight network for NADs be established.

Notably, Emerson argues that the constitutional rulemaking function of NADs may align more closely with social facts and values, and therefore their constitutional evaluation should go beyond mere conformity with constitutional text to encompass the realisation of democratic principles (Emerson 2022, 30). When conducting constitutional review, reviewing bodies should not only examine whether such documents directly conflict with constitutional provisions but also assess whether they have undergone sufficient democratic deliberation, even if through informal public discourse, whether they genuinely respond to social needs, whether they substantively promote democratic governance and public welfare, and whether they contribute to the evolution of constitutional values. This approach requires constitutional review institutions to uphold the Constitution's fundamental principles and core values while remaining open to "generative" innovations by the administrative state in specific contexts. It entails seeking a balance between safeguarding constitutional authority and accommodating social transformation. Such a more substantively oriented model of constitutional review offers critical insights for improving China's constitutional oversight system and enabling it to better support the goals of modern state governance.

3. Justification: Responsive mechanism beyond linear thinking

We propose a non-linear normative oversight system centred on the substantive resolution of administrative disputes, using the nature of the disputes triggered by NADs as the main criterion to differentiate between administrative reconsideration, direct judicial review, and constitutional review. Compared to existing incidental review mechanisms and proposals such as Wang's "three-step" model emphasizing sequential procedural escalation, the framework advanced herein demonstrates stronger theoretical coherence, practical feasibility, and institutional effectiveness. This is primarily reflected in its capacity to resolve deep-seated dilemmas associated with introducing a direct review model of NADs, its alignment with the internal logic of China's unique power operation structure, and its accuracy in addressing the multifaceted complexities of administrative disputes in the administrative state.

3.1. *Systemic conflict: The non-justiciability of abstract administrative acts*

The restriction on the direct justiciability of abstract administrative acts under Article 13(2) of the *ALLPRC* should be further interpreted. Systematically, this provision must be reconciled with the legislative purposes stated in Article 1 of the *ALLPRC*: the resolution of administrative disputes and the protection of citizens' lawful rights and interests. A strict adherence to the textual limitation in Article 13 would result in the judicial inaccessibility of numerous NADs that cause substantive harm, contradicting the law's foundational purpose. This tension underpinned the 2014 amendment that introduced incidental review of normative documents below the level of regulations. Article 53 permits such incidental review, reflecting the legislature's recognition of courts' competence and necessity to review these documents. Extending this capacity to direct review in specific circumstances is a logical step for protecting rights and resolving disputes. From the perspective of teleological interpretation, the primary goal of Article 13(2) is to preserve the stability of higher-level norms, prevent excessive judicial intervention in major policies, and avoid frivolous litigation. However, direct review of certain NADs does not fundamentally undermine these legislative aims; instead, it serves deeper rule-of-law objectives. This proposal does not advocate unrestricted direct review of all NADs. Rather, it promotes a differentiated review model based on the function of the normative document. Administrative regulations and departmental rules, due to their formalised procedures and elevated legal status, should primarily be overseen through legislative filing and review and constitutional scrutiny. Conversely, many low-level, substantively legislative NADs should not escape legitimacy and constitutionality control merely due to their lower legal hierarchy. The proposed formal differentiation allows for a substantive unification of review standards and partly explains why judicial control over lower-level norms may, in specific cases, appear "more direct."

3.2. ***Power conflict: Separation of powers and checks and balances***

In contrast to prior scholars' linear models, this framework avoids rigid procedural sequences and instead emphasises the comparative advantages of administrative reconsideration, judicial review, and legislative filing and review in different stages and dimensions of oversight. Administrative reconsideration's incidental review serves as a "filter" and internal correction mechanism for "instrumental" and some "generative" disputes, leveraging professional knowledge and internal administrative coordination. Judicial direct review, by contrast, focuses on conducting "disclosive" reviews of legality of "generative" and "displacive" disputes, safeguarding citizen rights and scrutinising rulemaking by administrative agencies. Its strength lies in judicial independence, procedural legitimacy, and the authoritative nature of judgments. Filing and review and constitutional review function as the "intermediary" and "ultimate safeguard," providing "preventive" and "process-monitoring" oversight while addressing "displacive" and fundamentally constitutional conflicts. The model recognises the NPC's authority in constitutional review of "displacive" disputes through the filing and review system, thereby transferring cases to the legislature without directly challenging its authority, which arrangement is more compatible with China's current power structure.

3.3. ***Goal conflict: Plural dimensions of administrative disputes***

Linear models fail to account for the plural dimensions of administrative disputes and therefore fall short of achieving substantive resolution. Administrative disputes do not always arise along a singular or predictable trajectory. Due to variations in function, content, scope of influence, and their integration with concrete administrative acts, normative documents generate diverse types of disputes. Rigid procedural flows cannot accommodate the differing demNADs for timeliness, expertise, and authority in various dispute types. Linear models tend to emphasise procedural sequencing and the orderly involvement of oversight actors, potentially at the expense of accurately grasping the substantive nature of the dispute and tailoring the response accordingly. Without identifying which aspect of the normative document lies at the core of the dispute, it becomes difficult to select the most effective resolution path.

We propose differentiated review standards and intensities based on dispute typology. For "instrumental" disputes, the review should focus on formal legality and manifest impropriety. For "generative" disputes, a further internal classification is warranted, with emphasis on procedural propriety, adequacy of reasoning, and proportionality. For "displacive" disputes, the most stringent scrutiny should apply, channelled through the central filing and review mechanism toward constitutional review. Such differentiation ensures effective allocation of judicial resources and focuses scrutiny on the most urgent substantive issues. Ultimately, this article aims to realise a non-linear, networked coordination among administrative reconsideration, judicial review, and legislative filing and review (as the intermediary of constitutional review). It allows for flexible combination and selection of oversight pathways according to the specific characteristics of the dispute, avoiding inefficiencies and remedial obstacles caused by rigid procedures. This approach is better suited to address the multifaceted nature of administrative disputes and ultimately achieve the institutional goal of substantive resolution of administrative disputes.

V. CONCLUSION: TOWARD A NEW FRAMEWORK FOR EFFECTIVE OVERSIGHT

In the face of an increasingly expansive administrative state and increasingly complex administrative functions, direct judicial review, when applied prudently and selectively, serves as a necessary safeguard against excessive infringement on fundamental rights by administrative rulemaking that escapes effective supervision under the current framework. It also provides a more robust institutional basis for resolving administrative disputes.

On this basis, the article further proposes a non-linear, multi-level, and differentiated model of normative oversight, centred on the substantive resolution of administrative disputes and tailored to the functional characteristics of NADs. This model distinguishes between instrumental, generative, and displacive types of administrative disputes and coordinates administrative reconsideration, administrative litigation (including direct review), and constitutional review (with filing and review by the NPC as the institutional intermediary). The core advantage of this framework lies in its ability to respond more effectively to the systemic tensions and practical challenges of introducing direct review. It better aligns with the logic of power allocation and checks and balances under China's constitutional structure and more precisely addresses the plural and complex nature of administrative disputes. It aims, ultimately, at realising the goal of substantive resolution of administrative disputes. In the future, improving China's supervisory framework over NADs remains a long-term endeavour. The theoretical and institutional proposals in this article offer only one possible pathway in this direction. Future research should focus on several key issues: (1) developing precise criteria for triggering direct review; (2) enhancing judicial capacity and supporting institutional mechanisms; (3) securing procedural and institutional coordination between constitutional review and other supervisory mechanisms.

In conclusion, considering the growing complexity of the administrative state and the people's heightened expectations for justice, reforming and innovating China's supervisory system over NADs demands both theoretical boldness and institutional pragmatism. Only by constructing a new normative oversight framework that is capable of effectively constraining administrative power and protecting citizens' rights while remaining adapted to China's national context can we truly advance toward a higher level of the rule of law. In this way, the goal of "substantive resolution of administrative disputes" can be meaningfully realised in each case, and the people can genuinely feel justice in every judicial outcome.

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THE SYSTEM OF THE CHAMBERLAIN'S COURTS IN THE GRAND DUCHY OF LITHUANIA (1764–1791)

Abstract. Under the system established by the Third Lithuanian Statute of 1588, each chamberlain's court (*sąd podkomorski*) was presided over by a sworn chamberlain (*podkomorzy*), assisted (at times even replaced) by one or two komorniks (*komornicy*). The Duchy of Samogitia was a notable exception. From 1764, boundary disputes there were also adjudicated by ciwuns (*ciwuni*) appointed by the monarch. In exercising their judicial duties, these officials could draw on the assistance of a deputy of their own choosing. The proceedings held on contested land, together with the judgements rendered, were recorded by registrars (*regenci*). From 1588, the office of chamberlain was elective. Until 1764, local sejmiks (*sejmiki*) nominated four candidates, from among whom the ruler made the final appointment. In 1764, however, this prerogative was limited from the monarch. In an effort to shorten the duration of boundary litigation, the nobility proposed adding assessors to the composition of the chamberlain's courts. The office of chamberlain remained a lifetime appointment, although in the latter half of the eighteenth century the nobility advanced proposals to introduce fixed terms of office.

Keywords: Polish–Lithuanian Commonwealth, Grand Duchy of Lithuania, chamberlain's courts, first instance courts of the nobility

USTRÓJ SĄDÓW PODKOMORSKICH WIELKIEGO KSIĘSTWA LITEWSKIEGO (1764–1791)

Streszczenie. Zgodnie z ukształtowanym przez III Statut litewski z 1588 roku ustrojem sądów podkomorskich w składzie każdego z nich zasiadał zaprzysiężony podkomorzy, którego wspierali, a czasami nawet zastępowali jeden lub dwaj komornicy. Wyjątkiem pozostawało Księstwo Żmudzkie, gdyż od 1764 roku rozstrzyganiem sporów granicznych zajmowali się w nim także mianowani przez monarchę ciwunowie. Przy wypełnianiu obowiązków jurysdykcyjnych mogli oni korzystać z pomocy jednego wybranego przez siebie komornika. Przebieg podejmowanych na spornym grun-

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cie czynności oraz wyroki spisywali regenci. Od 1588 roku urząd podkomorzego był elekcyjny. O ile jednak do 1764 roku sejmiki wyłaniały czterech kandydatów, spośród których władca dokonywał ostatecznego wyboru, o tyle od 1764 roku tego wyboru mu nie pozostawiano. W celu skrócenia czasu trwania procesów granicznych szlachta proponowała dołączenie do składu sądów podkomorskich asesorów. Urząd podkomorzego był dożywotni, choć w drugiej połowie XVIII wieku szlachta zgłaszała propozycje uczynienia go kadencyjnym.

Słowa kluczowe: polsko-litewska Rzeczpospolita, Wielkie Księstwo Litewskie, sądy podkomorskie, pierwszoinstancyjne sądy szlacheckie

The great importance of landed estates in the Grand Duchy of Lithuania made effective legal protection indispensable (Kiaupa 2018, 307). As early as 1468, the Sudebnik of Casimir IV Jagiellon, which prohibited acts of self-help such as the unlawful felling of trees and incursions upon another's property, provided for the adjudication of the so-called "land cases" (*sprawy ziemskie*) (Wilkiewicz-Wawrzyńczykowa 1938, 103–104)[1] by officials known as *jezdokowie* (Ćwikła 2011, 268; Zakrzewski 2013, 187; Łappo 1899, 342; Adamus 1937, 268).[2] The same role was ascribed to these officials by the First Lithuanian Statute of 1529 (Book VIII, art. 4) (Łazutka, Valikonis, Gudavičius 2004, 208). In the early sixteenth century, in Podlasie, on the border with the Crown of the Kingdom of Poland, the office of the chamberlain (*podkomorzy*) was introduced together with Polish law (Soszyński 2000, 93). In 1565 the Vilnius Sejm extended this institution to other Lithuanian voivodeships, and it was implemented in most of them the following year (Łappo 1899, 349–350; Zakrzewski 2013, 187).[3] Ultimately, the legal status of the chamberlain courts was regulated by the Third Lithuanian Statute,[4] together with Sejm constitutions (statutes) that supplemented its provisions. This arrangement remained in force until the proceedings of the Four-Year Sejm (the Great Sejm), during which a major reform of the nobility's first-instance courts was conducted. It also included the Lithuanian chamberlain courts. At the end of 1791, a constitution entitled *Rozgraniczenie normalne w Wielkim Księstwie Litewskim* (*Standard Demarcation in the Grand Duchy of Lithuania*) was adopted. It replaced chamberlain courts with district boundary commissions (*powiatowe komisje graniczne*) (Leśnodorski 1951, 349; Anipiarkou 2022, 228),[5] also referred

[1] Alina Wilkiewicz-Wawrzyńczykowa classified *as* land cases those "connected with land and its appurtenances and their economic exploitation, the resolution of which required an on-site examination of the facts".

[2] *Sudiebnik Kazimira* 1967, p. 30, art. 20.

[3] As early as 1565 the Grand Duke of Lithuania appointed Stanisław Narbutt to the office of chamberlain of Słonim.

[4] The principal part of these regulations is contained in Chapter Nine, entitled *O podkomorzych w powiatach i o prawach ziemnych, o granicach i o miedzach* (On Chamberlains in the Districts and on Land Laws, Boundaries and Borderlines), see: *Statut WKL* (1744), pp. 280–306 (IX, 1–32).

[5] *Rozgraniczenie normalne w Wielkim Księstwie Litewskim*, 1791, [in:] *Volumina Legum*, vol. 9, pp. 346–361. The boundary commissions operated in three different formations: divisional

to as standard courts (*sądy normalne*)[6] or standard boundary courts (*sądy normalne graniczne*) (Jusupović 2019, 500).[7] Under the new regulation, the election of boundary commissioners (*komisarze graniczni*), variously referred to in contemporary sources as standard commissioners (*komisarze normalni*), standard boundary (*komisarze normalnie graniczni*),[8] for standard demarcation (*komisarze do normalnego rozgraniczenia*)[9] or standard boundary judges (*sędziowie normalni graniczni*),[10] was to be carried out on 14 February 1792 by the local noble sejmiks (dietines).[11] At this time, the nobility of Nowogródek began their deliberations. The election of the boundary commissioners (twenty-four in total) was conducted unanimously on 20 February "after the voluntary withdrawal of those who, beyond the required number of twenty-four, had stood as candidates."[12] On the same day, the Słonim sejmik also proceeded to elect boundary commissioners (twenty-one in total). The task proved neither easy nor swift. It was completed only on 24 February at 3 p.m.[13]. Notably, in the Słuck district (*powiat słuczorzecki*) there were too few candidates to fill all the vacant posts (as many as thirty-three in total). To fill them, it was therefore necessary to obtain the consent of several more prominent individuals to stand as candidates (Anipiarkou 2020, 340; Anipiarkou 2022, 226–227). The Pińsk-Zarzecze sejmik unanimously elected the membership of its boundary commission, numbering eighteen commissioners.[14] The Kobryn district boundary commission had the same number of members. It was

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(three commissioners), appellate (seven commissioners), and plenary (all commissioners). The total number of commissioners could not be fewer than twelve. Exceptions were made for the Vitebsk voivodeship ("for which three commissioners shall suffice") and the Duchy of Livonia, the Smolensk voivodeship and the Starodub district, which, under the provisions of the Sejm constitution, "shall require no boundary commissioners at all."

[6] Lithuanian State Historical Archives in Vilnius, manuscript, f. 285, ap. 1, No. 74, *Zażalenie przeciwko działaniom marszałka sejmikowego Ignacego Przeciszewskiego i przedstawicieli stronnictwa Nagurskich podczas obrad sejmikowych*, Rosienie, 29 February 1792, p. 778v; see also: The Princes Czartoryski Library in Kraków, manuscript, No. 879, *Laudum sejmiku połockiego*, Czaszniki, February 1792, pp. 824–826.

[7] *Kredens dla komisarzy granicznych kowieńskich*, 18 February 1792.

[8] The Princes Czartoryski Library in Kraków, manuscript, sygn. 879, *Laudum sejmiku połockiego*, Czaszniki, February 1792, pp. 825–826.

[9] Lithuanian State Historical Archives in Vilnius, manuscript, f. 337, ap. 1, No. 2, *Laudum sejmiku telszewskiego*, Telsze, 18–19 February 1792, p. 3.

[10] The Princes Czartoryski Library in Kraków, manuscript, No. 879, *Laudum sejmiku szawelskiego*, Szawle, 22 February 1792, p. 811.

[11] *Rozgraniczenie normalne w Wielkim Księstwie Litewskim*, 1791, [in:] *Volumina Legum*, vol. 9, p. 346, art. 1.

[12] The Princes Czartoryski Library in Kraków, manuscript, No. 886, *Laudum sejmiku nowogródzkiego*, Nowogródek, February 1792, pp. 727–728.

[13] The Princes Czartoryski Library in Kraków, manuscript, No. 886, *Laudum sejmiku słonimskiego*, Słonim, February 1792, p. 735.

[14] The Central Archives of Historical Records in Warsaw, manuscript, archival collection (zespół) 354 (Archiwum Warszawskie Radziwiłłów), archive unit (dział) II, No. 3216, *Laudum sejmiku pińsko-zarzecznego*, Płotnica, February 1792, p. 2.

established on 22 February 1792, and the election there, too, was unanimous.[15] On 24 February 1792, the Połock nobility resolved to appoint thirty "standard, that is boundary", judges. As it turned out, however, only twenty-nine individuals put themselves forward and they were all elected unanimously. While awaiting the thirtieth candidate, the session was adjourned until the following day. The previously agreed-to composition was then completed. On that occasion as well, the nobility was entirely unanimous.[16] A little earlier, on 22 February 1792, the Szawle sejmik[17] likewise unanimously elected twenty-four standard judges. The Telsze nobility decided that the same number should be chosen "so that in their repartitions [districts – O.K.] they might form eight departmental judicial panels." These intentions were brought to fruition unanimously on 17 February 1792, following the withdrawal of some candidates.[18] A day later the Kaunas sejmik unanimously elected the twenty-four-member composition of the district boundary commission (Jusupović 2019, 500–501).[19]

According to Bogusław Leśnodorski, who examined the reforms of the Four-Year Sejm, the boundary commissions were not intended as a permanent solution; in future, adjudication of disputes over the demarcation of landed estates was to be entrusted to the gentry courts (*sądy ziemiańskie*) established in the same year (Leśnodorski 1951, 349; Szpoper 2015, 38). Stanisław Kutrzeba even argued that the gentry courts assumed, among other things, the functions of the abolished chamberlain jurisdictions (Kutrzeba 1917, 265). The basis for this conclusion is, however, puzzling, for according to the Sejm constitution that defined the organisation of the gentry courts, they were to hear at first instance "all those cases which had hitherto fallen within the competence of the land courts and the castle courts."[20] In any case, throughout most of the reign of Stanisław August Poniatowski, the responsible task of adjudicating boundary disputes continued to rest with the chamberlain courts.

Under the Lithuanian Statute of 1588, every district of the Grand Duchy of Lithuania was to have a chamberlain, resident in the district [i.e. holding land there – O.K.], and duly sworn into office. This applied also to the Duchy of Samogitia (*Księstwo Żmudzkie*).[21] The Sejm in 1764, however, observed that "a single chamberlain could not be deemed sufficient to adjudicate disputes in so

[15] The Princes Czartoryski Library in Kraków, manuscript, No. 886, *Laudum sejmiku kobryńskiego*, Kobryń, 22 February 1792, p. 613.

[16] The Princes Czartoryski Library in Kraków, manuscript, No. 879, *Laudum sejmiku połockiego*, Czaszniki, February 1792, pp. 824–825.

[17] The Princes Czartoryski Library in Kraków, manuscript, No. 879, *Laudum sejmiku szawelskiego*, Szawle, 22 February 1792, p. 811.

[18] Lithuanian State Historical Archives in Vilnius, manuscript, f. 337, ap. 1, No. 2, *Laudum sejmiku telszewskiego*, Telsze, February 1792, pp. 3–3v.

[19] *Kredens dla komisarzy granicznych kowieńskich*, Kaunas, 18 February 1792.

[20] *Sąd ziemiański*, 1792, [in:] *Volumina Legum*, vol. 9, p. 372, art. 3.

[21] *Statut WKL* (1744), p. 280 (IX, 1).

vast and populous a duchy", and therefore authorised fourteen Samogitian ciwuns (*ciwuni*) to resolve disputes falling within the chamberlain's jurisdiction as well. At the same time, they were forbidden to hold at the same time the office of land court judge or castle court judge, which had previously not been uncommon. Despite the absence of any formal prohibition, there were no instances of the offices of ciwun and chamberlain being held concurrently. Interestingly, although the ciwun possessed judicial powers more limited than those of the chamberlain, he ranked above him in the official hierarchy (Stankevič 2018, 93; Goldstein 1913, 128; Lulewicz, Rachuba, Romaniuk, Haratym 2015, 35).[22] It is therefore hardly surprising that candidates seeking a ciwun's office frequently applied for the patronage of powerful magnates.[23] The example of Colonel Wincenty Przeciszewski, appointed as ciwun of Korszew, demonstrates that such efforts could at times prove effective (Lulewicz, Rachuba, Romaniuk, Haratym 2015, 114). The granting of privileges for the offices of the Samogitian ciwuns remained subject to the discretionary decision of the monarch (Skrzetuski 1787, 237; Zakrzewski 2000, 154–155).[24]

Until 1588 the appointment of chamberlains remained the exclusive prerogative of the Grand Duke of Lithuania (Downar-Zapolski 2005, 151). In the end, however, the demands voiced by the Lithuanian nobility to make this office elective (in accordance with the Polish model) eventually bore fruit, for under the provisions of the Third Lithuanian Statute, the ruler was to make the final appointment from among four candidates previously selected by the sejmik (Zakrzewski 1997, 174; Liubawskij 1910, 13, 27; Kutrzeba 1914, 166; Radaman 2010, 82).[25] To this end, the king conferred upon the nominee a royal privilege.[26] In the eighteenth century, Wincenty Skrzetuski (1745–1791) observed that, in practice, for the office of starosta, "as for other land offices," the Lithuanian nobility often nominated only a single candidate, thereby imposing its will upon the monarch (Skrzetuski 1787, 240–241; Zakrzewski 1997, 175–177). While this practice, in the case of starostas, conflicted with the provisions of the Constitution on Starostwa and Crown Lands of 1775,[27] in respect of the office of chamberlain it was

[22] *Activitas ciwunów Księstwa Żmudzkiego*, 1764, [in:] *Volumina Legum*, vol. 7, p. 181.

[23] The Central Archives of Historical Records in Warsaw, manuscript, archival collection (zespół) 354 (Archiwum Warszawskie Radziwiłłów), archive unit (dział) V, No. 12482, *List pułkownika Wincentego Przeciszewskiego*, 17 July 1780, p. 10.

[24] According to Wincenty Skrzetuski, "the Samogitian offices of the ciwuns, of which there are fourteen, exist solely by royal privilege". It would appear that the office of ciwun was filled in the same manner in the Trakai district.

[25] *Statut WKL* (1744), p. 280 (IX, 1). At least initially, the new regulations were not observed everywhere.

[26] The Princes Czartoryski Library in Kraków, manuscript, No. 879, *Kredens zaświadczający wybór na urząd podkomorzego orszańskiego Tadeusza Przysieckiego*, Chołopienicze, 12 February 1790, p. 733.

[27] *Starostwa i królewszczyzny*, 1775, [in:] *Volumina Legum*, vol. 8, p. 93.

consistent with the regulations of 1764. For, according to the constitution adopted at that time for the Grand Duchy of Lithuania, the chamberlains of the land courts were to be "elected by *pluralitate votorum*,[28] not by choosing four candidates, but only one for each office" (Umiastowski 1782, 56).[29] Precisely one candidate for a vacant chamberlain's office was elected by the nobility at the sessions of the Vilnius sejmik in 1770,[30] the Trakai sejmik in 1771,[31] the Kaunas sejmik in 1784 (Jusupović 2019, 373–374),[32] and the Orsha sejmik in 1790. In the last of these a unified position was achieved after the remaining candidates[33] had been "prevailed upon" [persuaded – O.K.]. An unusual election, however, took place in Kaunas, where on 9 February 1791, as a result of a split in the local sejmik, two individuals were chosen to the office of chamberlain – Michał Kossakowski (Jusupović 2019, 457–458)[34] and Adam Kozakowski (Jusupović 2019, 466–467).[35] The latter even went so far as to sign a kredens (a letter of attestation) for the newly appointed Kaunas rotmistrz (captain of cavalry), Józef Szaniawski, styling himself "elected chamberlain of Kaunas" (Jusupović 2019, 489).[36] Ultimately, however, Kozakowski's election was declared void (Lulewicz, Rachuba, Romaniuk, Haratym, Macuk, Aniszczanka 2009, 401). The election was certified by a kredens.[37] The office was conferred for life,[38] and the very act of election by the nobility must have rendered it all the more prestigious and, at the same time, attractive (Lulewicz, Rachuba, Romaniuk, Haratym 2015, 35). In 1786, Józef Judycki (1719–1797), lieutenant general of the army of the Grand Duchy of Lithuania, reporting to the king on the deaths of the chamberlain and the marshal (*marszałek*)

[28] By a majority of votes.

[29] *Sądy ziemskie*, 1764, [in:] *Volumina Legum*, vol. 7, pp. 88–89.

[30] Lithuanian State Historical Archives in Vilnius, manuscript, f. 21, ap. 1, No. 128, *Kredens zaświadczający wybór na urząd podkomorzego wileńskiego Tadeusza Żaby*, Wilno, 7 February 1770, p. 18.

[31] Lithuanian State Historical Archives in Vilnius, manuscript, f. 345, ap. 1, No. 2, *Kredens zaświadczający wybór na urząd podkomorzego trockiego Stefana Dominika Romera*, Troki, 6 February 1771, pp. 598a–601v.

[32] *Kredens na podkomorstwo kowieńskie*, Kaunas, 11 February 1784.

[33] The Princes Czartoryski Library in Kraków, manuscript, No. 879, *Kredens zaświadczający wybór na urząd podkomorzego orszańskiego Tadeusza Przysieckiego*, Chołopienicze, 12 February 1790, p. 733.

[34] *Kredens dla podkomorzego*, Kaunas, 9 February 1791.

[35] *Kredens dla podkomorzego*, Kaunas, 9 February 1791; see also: Lithuanian State Historical Archives in Vilnius, manuscript, f. 163, ap. 1, No. 50, *Kredens na urząd podkomorzego kowieńskiego dany Adamowi Kozakowskiemu*, Kaunas, 9 February 1791, pp. 94–95.

[36] *Kredens dla rotmistrza kowieńskiego*, Kaunas, 9 February 1791.

[37] Lithuanian State Historical Archives in Vilnius, manuscript, f. 345, ap. 1, No. 2, *Kredens zaświadczający wybór na urząd podkomorzego trockiego Stefana Dominika Romera*, Troki, 6 February 1771, pp. 598a–601v.

[38] *Statut WKL* (1744), p. 280 (IX, 1); see also: *Sądy ziemskie*, 1764, [in:] *Volumina Legum*, vol. 7, p. 89.

of the Rzeczyca district (Rostworowski 1964–1965, 311–314), observed that the resulting vacancies aroused great interest among the nobility and that their rivalry might even lead to bloodshed. To prevent this, Judycki proposed that elections be suspended "until matters should in the meantime be settled" and postponed until the next session of the local sejmik.[39] Not everyone was content with the lifetime tenure of the office of chamberlain, for in 1790 the nobility of Pińsk instructed their envoys that, "as regards judicial offices held for life (…), their term should be reduced to a fixed number of years" [i.e. limited by a set term of office – O.K.] (Jurgaitis, Stankevič, Verbickienė 2015, 318).[40] What was clearly regarded as important, however, was the statutory requirement that candidates be resident [i.e. hold land in the given district – O.K.]. For instance, the election of Tomasz Wawrzecki (1753–1816) (Lulewicz, Rachuba, Romaniuk, Haratym, Macuk, Aniszczanka 2009, 401)[41] to the office of Kaunas chamberlain in 1784 was contested by the Zabiełło and Kossakowski factions precisely on the grounds that he held no estates in the district (Lulewicz, Rachuba, Romaniuk, Haratym, Macuk, Aniszczanka 2009, 401). The Convocation Sejm[42] of 1764 confirmed the residency requirement. Each newly elected chamberlain was to receive from the royal chancery a map of his district bearing the monarch's seal (Skrzetuski 1787, 443; Goldstein 1913, 131).[43] The chamberlain's registers kept by his deceased predecessor were to be handed over to the local land court, whose officials were obliged both to preserve them together with the land registers and to issue copies from them.[44]

To shorten the time needed for the adjudication of boundary disputes, the Third Lithuanian Statute authorised the chamberlains to appoint one or two komorniks (*komornicy*) to assist them. Candidates for this office were expected to be men of worth and stability, and further to demonstrate noble descent, residence in the given district, legal knowledge, and literacy. Crucially, however, the komorniks were to adjudicate boundary disputes "only in minor and insignificant matters, where a włóka of land or less was at issue, (…) in greater and weightier matters the chamberlain himself was to travel and decide."[45] The kredens attesting

[39] The Princes Czartoryski Library in Kraków, manuscript, No. 697, *List strażnika wielkiego litewskiego i generała lejtnanta wojsk Wielkiego Księstwa Litewskiego Józefa Judyckiego do Stanisława Augusta Poniatowskiego*, Rzeczyca, 22 February 1786, p. 459.

[40] *1790 m. lapkričio 18 d. Pinsko pavieto seimelio instrukcija.*

[41] Tomasz Wawrzecki held the chamberlain's office of Kaunas from 1784 to 1791.

[42] *Sądy ziemskie*, 1764, [in:] *Volumina Legum*, vol. 7, p. 89.

[43] *Statut WKL* (1744), p. 289, (IX, 8); see also: *Podkomorzy*, [in:] *Prawa z Statutu W. X. Litewskiego y konstytucyi, dla wygody pilnuiących z urzędu albo potrzeby sądów y dla innych obywatelów koronnych y litewskich wiadomości porządnie podług alfabetu zebrane, a ile w processa prawne wchodzących o pretensye wszelakie*, Warszawa 1783: printed and published at the expense of Michał Gröll, p. 415.

[44] *Statut WKL* (1744), p. 290 (IX, 9); see also: *Podkomorskie księgi…*, [in:] *Prawa z Statutu W. X. Litewskiego…*, p. 416.

[45] *Statut WKL* (1744), pp. 290–291, (IX, 10).

to the election of Michał Wnentowski as a Trakai komornik stipulated that he "shall have power to measure and delimit lands (…) and to perform all duties appropriate to that office."[46] In turn, Adam Woyniłłowicz, chamberlain of Nowogródek, appointed Piotr Welinowicz as a komornik "to assist in the work of the chamberlain's court, in view of his abilities and his excellent knowledge of the geometric art possessed by His Honour Mr Welinowicz."[47] The emphasis on the nominee's knowledge of geometry may have stemmed from the necessity of his preparing maps (Goldstein 1913, 131). In addition, chamberlains were also assisted by surveyors (*mierniczowie*), diggers (*kopacze*) (Liubawskij 1910, 13; Zakrzewski 2013, 187; Szpoper 2015, 33), and registrars (*regenci*).[48] The role of the latter was to receive the reports submitted by court ushers (*woźnych sądowych*) confirming the service of summonses[49] and, above all, record the course of procedural acts (inspections, hearings) conducted on the disputed land, and, once concluded, also the decree settling the proceedings (Umiastowski 1782, 61–62, 64). In 1790, when assessing the composition of the chamberlain's court, the Trakai nobility concluded that there was no need to appoint a clerk, since "the chancery and the chamberlain's records, remaining at the chamberlain's disposal, do not require the election of a separate clerk" (Jurgaitis, Stankevič, Verbickienė 2015, 106).[50]

The Samogitian ciwuns, too, were entitled to appoint one komornik to assist them.[51] It is evident, however, that this provision was not always observed, for, as the Samogitian advocate Antoni Jacek Klementt recorded, one of them acted "contrary to the prohibition laid down in national law, since Article 10 of Chapter 9 permits a chamberlain to elect one, or at most two, komorniks, yet His Lordship the ciwun (…), having chosen Narbutt, resolved to appoint a third."[52] The kredens issued on 9 April 1791 to komornik Maciej Gilwicki by Ludwik Gorski, ciwun of

[46] Lithuanian State Historical Archives in Vilnius, manuscript, f. 341, ap. 1, No. 1, *Kredens na urząd komornika trockiego dany Michałowi Wnentowskiemu*, 2 August 1778, pp. 758–759v.

[47] Lithuanian State Historical Archives in Vilnius, manuscript, f. 20, ap. 1, No. 35, *Kredens na urząd komornika nowogródzkiego wydany Piotrowi Welinowiczowi przez podkomorzego Adama Woyniłłowicza*, Sawicze, 24 May 1791, pp. 303–306.

[48] Lithuanian State Historical Archives in Vilnius, manuscript, f. 162, ap. 1, No. 17, *Kredens na pisarstwo aktowe ziemiańskie powiatu kowieńskiego*, 17 February 1792, p. 13; see also: Lithuanian State Historical Archives in Vilnius, manuscript, f. 20, ap. 1, No. 35, *Kredens na urząd komornika nowogródzkiego wydany Piotrowi Welinowiczowi przez podkomorzego Adama Woyniłłowicza*, Sawicze, 24 May 1791, p. 304.

[49] Lithuanian State Historical Archives in Vilnius, manuscript, f. 341, ap. 1, No. 1, *Zeznanie podanego pozwu*, 1781, pp. 819–819v.

[50] *1790 m. lapkričio 16 d. Trakų vaivadijos seimelio instrukcija*.

[51] *Activitas ciwunów Księstwa Żmudzkiego*, 1764, [in:] *Volumina Legum*, vol. 7, p. 181.

[52] Lithuanian State Historical Archives in Vilnius, manuscript, f. 1135, ap. 2, No. 73, *Dzieło własnoręczne moje odbywanych spraw w grodzie i ziem[stwie] czasu obowiązków palestranckich dopełnione w Rosiejniach od r[ok]u 1783 do r[ok]u 1792, czyli otwarcia sądów w Telszach m[iesiąca] Febr[uari] 18 d[nia], gdzie pisarzem aktowym zostałem, dla dowodu pracowitości w tej księdze zostawuję następcom*, vol. 1, p. 416.

Retów, emphasised his "aptitude and knowledge of the surveying art."[53] It seems that here too the law was violated,[54] since only a few days earlier Ciwun Gorski had issued a kredens for the office of komornik to Stanisław Mackiewicz.[55]

In addition, with a view to shortening the duration of boundary trials, the Vilnius nobility proposed in 1788 "that to each chamberlain of every voivodship and district, besides the court officials, the citizens should annually elect up to four assessors, and that the bench [adjudicating panel – O.K.] should necessarily consist only of three persons together with the chamberlain" (Jurgaitis, Stankevič, Verbickienė 2015, 43).[56] Similar proposals were put forward at the same time by the Starodub (Jurgaitis, Stankevič, Verbickienė 2015, 191)[57] and Nowogródek (Jurgaitis, Stankevič, Verbickienė 2015, 220)[58] sejmiks. Two years later, the nobility of Minsk (Jurgaitis, Stankevič, Verbickienė 2015, 332–333)[59] and of Trakai (Jurgaitis, Stankevič, Verbickienė 2015, 106)[60] also stressed the need to appoint two assessors, elected by the sejmik, to the chamberlain's court.

Assuming the office of chamberlain required taking an oath before the officials of the land court and the nobility assembled for the session. Its formula stipulated, in particular, that disputes be decided with regard to justice and impartiality, and that no heed be paid to attempts at bribery or intimidation.[61] The komorniks appointed by the chamberlains were obliged to take the same oath as chamberlains themselves. This act was to be carried out "at roki [court sessions

[53] Lithuanian State Historical Archives in Vilnius, manuscript, f. 367, ap. 1, No. 22, *Kredens na urząd komornika wydany Maciejowi Gilwickiemu przez ciwuna retowskiego Ludwika Gorskiego*, 9 April 1791, p. 783.

[54] *Activitas ciwunów Księstwa Żmudzkiego*, 1764, [in:] *Volumina Legum*, vol. 7, p. 181. The constitution entitled each of the Samogitian ciwuns to appoint one komornik.

[55] Lithuanian State Historical Archives in Vilnius, manuscript, f. 367, ap. 1, No. 22, *Kredens na urząd komornika wydany Stanisławowi Mackiewiczowi przez ciwuna retowskiego Ludwika Gorskiego*, 4 April 1791, p. 591–591v.

[56] *1788 m. rugpjūčio 20 d. Vilniaus vaivadijos seimelio instrukcija*.

[57] *1788 m. rugpjūčio 18 d. Starodubo pavieto seimelio instrukcija*.

[58] *1788 m. rugpjūčio 20 d. Naugarduko vaivadijos seimelio instrukcija*. The election of assessors was to follow the model of the election of land officials.

[59] *1790 m. lapkričio 21 d. Minsko vaivadijos seimelio instrukcija*.

[60] *1790 m. lapkričio 16 d. Trakų vaivadijos seimelio instrukcija*.

[61] *Statut WKL* (1744), pp. 280–281, (IX, 1). The oath of the chamberlain read as follows: "I, N., swear to Almighty God in the Holy Trinity that in this land office of chamberlain, which by the grace and from the hands of His Royal Majesty I receive, I shall remain loyal to His Royal Majesty […] and to the citizens of this district; and that I shall discharge this office faithfully and justly, both in my chamberlain's court and in defining boundaries, in raising boundary mounds and in correcting boundary lines, having regard in this office to nothing else but holy justice, allowing myself to be led astray by nothing, neither by friendship nor by enmity, neither gifts nor threats of any person, giving counsel to neither party, fearing no one, but the Lord God Himself having His holy justice before my eyes. Likewise, I shall diligently conduct all my chamberlain's business in every respect, entering in my court registers the disputes settled by me between the parties, and issuing extracts from those registers. So help me God."

– O.K.] before the castellan or the marshal and before the district land officials, and, in the absence of castellans or marshals, before the land court officials and the nobility assembled at roki."[62] The surviving sources confirm that this obligation was observed in practice.[63] The Samogitian ciwuns were also to be sworn in according to the oath formula proper to the chamberlain, at sessions of the Rosienie land court in the presence of its officials and the assembled nobility. In addition, before entering upon their duties, the komorniks were likewise required to take the oath "described in the Lithuanian Statute.[64]

The chamberlain's remuneration consisted of fees paid separately for such tasks as issuing a summons and a letter notifying of the date of the chamberlain's departure to the disputed land, lodging the aktorat (i.e. entering the case in the register), drafting a letter to another chamberlain,[65] adjourning proceedings (dylacje), raising boundary mounds (depending on their size), and issuing copies of documents entered in the court records (Wisner 2008, 197).[66] If, owing to the location of the disputed land in adjoining districts, two chamberlains took part in the proceedings, "each of them is to receive his chamberlain's income (…) from the actions carried out within his own district."[67] The komorniks' remuneration was to correspond to that of the chamberlains.[68]

Despite the Lithuanian nobility's complaints about the high costs of proceedings before the chamberlain's courts (Jurgaitis, Stankevič, Verbickienė 2015, 43, 191),[69] evaluations of chamberlains were not invariably critical. The adjudication of matters as important to the nobility as the demarcation of landed estates required a degree of maturity and considerable intelligence (Goldstein 1913, 132). In 1790 the nobility of Grodno commended Tomasz Wawrzecki, chamberlain of Kaunas, to the ruler "out of respect and attachment to this person, who has always served *publico*[70] faithfully and willingly" (Jurgaitis, Stankevič, Verbickienė 2015, 133).[71] Chamberlain Wawrzecki was also esteemed by the Smolensk nobility for his

[62] *Statut WKL* (1744), pp. 290–291 (IX, 10).

[63] Lithuanian State Historical Archives in Vilnius, manuscript, f. 367, ap. 1, No. 22, *Kredens na urząd komornika wydany Stanisławowi Mackiewiczowi przez ciwuna retowskiego Ludwika Gorskiego*, 4 April 1791, p. 591–591v.

[64] *Activitas ciwunów Księstwa Żmudzkiego*, 1764, [in:] *Volumina Legum*, vol. 7, p. 181.

[65] *Statut WKL* (1744), p. 289 (IX, 8). Two chamberlains took part in the settlement of a boundary dispute concerning land situated in adjoining districts. In such a case, a letter from the chamberlain to whom the matter had been referred was to be delivered to his counterpart from the other district by the plaintiff.

[66] *Statut WKL* (1744), p. 290 (IX, 9).

[67] *Statut WKL* (1744), p. 289 (IX, 8).

[68] *Statut WKL* (1744), p. 291, (IX, 10).

[69] *1788 m. rugpjūčio 20 d. Vilniaus vaivadijos seimelio instrukcija*; see also: *1788 m. rugpjūčio 18 d. Starodubo pavieto seimelio instrukcija*.

[70] publicly

[71] *1790 m. lapkričio 16 d. Gardino pavieto seimelio instrukcija*.

"zealous labours and exemplary devotion to His Majesty and to the good of the nation" (Jurgaitis, Stankevič, Verbickienė 2015, 185).[72] The nobility of Polotsk were of a similar opinion (Jurgaitis, Stankevič, Verbickienė 2015, 207).[73] In 1790 the Brześć sejmik resolved, in its instruction, to single out its chamberlain, Zenon Wysłouch (1727–1805), and at the same time to commend him to the king for higher offices (Lulewicz, Jaszczołt, Radaman, Rachuba, Romaniuk, Macuk, Danilczyk, Haratym 2020, 141).[74] The justification given was his merits and virtuous discharge of his functions as deputy to the Tribunal of the Grand Duchy of Lithuania and as deputy to the Sejm, with unstinting labour and solicitude (Jurgaitis, Stankevič, Verbickienė 2015, 305).[75]

At times, however, opinions expressed about the chamberlains were sometimes divided. In 1780 the Trakai sejmik petitioned the monarch to honour their chamberlain, Stefan Dominik Romer (1721–1793), who, in its view, was "renowned for the multitude of his services."[76] It is enough to note that by that time Romer already had considerable experience in holding public offices. He had held the office of chamberlain for nearly a decade,[77] and earlier had served, among other posts, as Trakai castle court clerk (1741–1752) and as land court judge (1752–1766) (Lulewicz, Rachuba, Romaniuk, Haratym, Macuk, Aniszczanka 2009, 160, 174, 197). Nevertheless, in 1791, during a hearing before the Trakai castle court, the advocate Andrzej Olechnowicz publicly insulted the widely respected chamberlain. In criticising the decision of the chamberlain's court, he did not hesitate to compare Romer to Adam Poniński (1732–1798) (Stankevič 2022, 285; Borucki 1979, 70).[78]

Adopted from the Crown of the Kingdom of Poland in the 1560s, the chamberlain jurisdictions remained an important component of the nobility's first-instance judiciary in the Grand Duchy of Lithuania for more than two centuries. Until the establishment of the district boundary commissions, they administered justice in the adjudication of land disputes, which were of particular importance to the nobility. This long period of operation saw numerous proposals for reform. Those put forward during the reign of Stanisław August Poniatowski most often aimed to shorten hearing times and reduce costs. Nevertheless, the system of the chamberlain courts, established already by the Third Lithuanian Statute, was only slightly reorganised at that time.

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[72] *1790 m. lapkričio 17 d. Smolensko vaivadijos seimelio instrukcija.*

[73] *1790 m. lapkričio 22 d. Polocko vaivadijos seimelio instrukcija.*

[74] Zenon Wysłouch became chamberlain of Brześć in 1781.

[75] *1790 m. lapkričio 20 d. Bresto vaivadijos seimelio instrukcija.*

[76] Lithuanian State Historical Archives in Vilnius, manuscript, f. 345, ap. 1, No. 3, *Instrukcja sejmiku trockiego*, Troki, 21 August 1780, p. 528.

[77] Lithuanian State Historical Archives in Vilnius, manuscript, f. 345, ap. 1, No. 2, *Kredens zaświadczający wybór na urząd podkomorzego trockiego Stefana Dominika Romera*, Troki, 6 February 1771, pp. 598a–601v.

[78] On 1 September 1790, the Sejm court deprived Adam Poniński of his nobility and offices and sentenced him to exile for conspiring with diplomatic representatives of the Russian Empire.

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LEGAL SURVIVALS: CONCEPT, THEORY, METHODOLOGY

Abstract. The present conceptual paper addresses selected issues concerning the emergent pluridisciplinary research topic on survivals – an essential part of the phenomenon of nomostasis – with particular emphasis on its theoretical underpinnings and methodological implications. It argues that the concept of a "legal survival" should be understood as a legal form (a legal institution, i.e. a set of functionally interconnected legal norms, a legal concept, a legal principle, or a legal rule) which had emerged in an earlier socio-economic, political or ideological-cultural context, and had had a specific function within that context but did not disappear despite a profound change of that context. A systemic transformation, such as the transition from feudalism to capitalism, from capitalism to state socialism, or back to capitalism, is a paradigmatic example of such a profound change of context, though not the only possible one. The paper addresses the ontology of legal survivals, drawing attention to the distinction between written law and legal practice, and formulates three tentative propositions concerning the theory of legal survivals: (1) the *law of juristic inertia*, which emphasises that lawyers tend to use old forms to express new content; (2) the *law of functional adaptation of legal forms*, which emphasises that old legal forms may be used to fulfil entirely new social functions; and (3) the *law of decontextualisation of legal form*, which emphasises that law oftentimes becomes entirely detached from its changing social context, even to the extent of becoming an irritant. Finally, the paper addresses the question of the methodology of studying legal survivals, arguing that it calls for a broadly inclusive pluridisciplinary approach, uniting the methods typical of legal history, comparative law, sociology of law and legal anthropology, with an overarching role for legal theory and the philosophy of law.

Keywords: legal survivals, legal form, legal continuity, evolution of law

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RELIKTY PRAWNE: POJĘCIE, TEORIA, METODOLOGIA

Streszczenie. Niniejszy artykuł koncepcyjny podejmuje wybrane zagadnienia związane z wyłaniającym się, pluridyscyplinarnym obszarem badawczym reliktów prawnych – stanowiących zasadniczy zrąb zjawiska nomostazy – ze szczególnym względnieneim jego teoretycznych podstaw oraz implikacji metodologicznych. Artykuł stoi na stanowisku, iż pojęcie „reliktu prawnego" należy rozumieć jako formę prawną (instytucję prawną, tj. zbiór funkcjonalnie powiązanych norm prawnych, pojęcie prawne, zasadę prawną lub normę prawną), która ukształtowała się w wcześniejszym kontekście społeczno-ekonomicznym, politycznym bądź ideologiczno-kulturowym i pełniła w tym kontekście określoną funkcję, lecz nie zanikła pomimo zasadniczej zmiany tego kontekstu. Przekształcenie systemowe – takie jak przejście od feudalizmu do kapitalizmu, od kapitalizmu do socjalizmu państwowego, bądź też powrót do kapitalizmu – stanowi paradygmatyczny przykład takiej głębokiej zmiany kontekstu, choć nie jest jedynym możliwym przypadkiem. Artykuł analizuje ontologię reliktów prawnych, zwracając uwagę na rozróżnienie między prawem pisanym a praktyką prawną, oraz formułuje trzy wstępne propozycje teoretyczne dotyczące reliktów prawnych: (1) *prawo bezwładności prawniczej*, które wskazuje, że prawnicy mają tendencję do posługiwania się dawnymi formami prawnymi w celu wyrażania nowej treści; (2) *prawo funkcjonalnej adaptacji formy prawnej*, które podkreśla, że dawne formy prawne mogą być wykorzystywane do realizacji całkowicie nowych funkcji społecznych; (3) *prawo dekontekstualizacji formy prawnej*, które wskazuje, że prawo nierzadko ulega całkowitemu oderwaniu od zmieniającego się kontekstu społecznego – niekiedy nawet do tego stopnia, iż staje się elementem drażniącym (irytantem). W końcowej części artykuł podejmuje problematykę metodologii badań nad reliktami prawnymi, wskazując na konieczność zastosowania szerokiego, pluridyscyplinarnego podejścia badawczego, łączącego metody typowe dla historii prawa, prawa porównawczego, socjologii prawa oraz antropologii prawnej, przy nadrzędnej roli teorii i filozofii prawa.

Słowa kluczowe: relikty prawne, forma prawna, ciągłość prawna, ewolucja prawa

1. INTRODUCTION

The growing interest in the phenomenon of legal survivals – evidenced *inter alia* by two recent workshops, one held in June 2024 at the Riga Graduate School of Law (Eckhardt, Mańko 2025a) and another in May 2025 at the International Institute for the Sociology of Law in Oñati,[1] as well as the gradually emerging body of literature on legal survivals[2] – makes it necessary to revisit the concept, theory and methodology of legal survivals in the light of its new applications to different areas of the law in various jurisdictions and historical periods. The key issues that will be addressed in this paper include, firstly, the exact scope and borders of the concept of a legal survival, especially the question of social function and socio-economic transformation; secondly, the ontology of legal survivals, and

[1] "Legal Survivals and Global Legal Pluralism," 8–9 May 2025. For more details see: https://www.iisj.net/en/workshops/legal-survivals-and-global-legal-pluralism (Accessed: 12.05.2025). See conference report: Mańko and Eckhardt (2025).

[2] See e.g. Kuźmicka-Sulikowska (2019); Stetsyk (2019); Ernst et al. (2024); Preshova, Markovikj (2024).

in particular the question of their identity over time; thirdly, the tentative claims of the proposed theory of nomostasis,[3] including the question of the proposed typology of legal survivals (Mańko 2024a, 105; 2025a, 75–81) and its theoretical status, and finally, selected questions of the pluridisciplinary[4] methodology for the study of legal survivals.

The present paper is therefore conceived of as a metatheoretical intervention, focused on restating, specifying and fine-tuning various elements of the concept, theory and methodology of studying nomostasis – the phenomenon of legal survivals. By contrast, the philosophical underpinnings and implications of the theory of legal survivals (cf. Mańko 2025a, 81–85) are not addressed here. Due to limitations of space, the paper also does not address concrete examples of legal survivals (with the exception of section 3.2.2), but rather focuses on providing abstractly formulated statements about the concept, theory and methodology of their study. It also does not address the relation of the concept of a legal survival to other concepts, such as legal tradition[5] or reception of law, as this has been done in earlier publications (Mańko 2015a, 18–19; 2016a, 9–11). Moreover, the paper focuses on legal survivals understood as *legal forms* that have survived (see below, section 2), and therefore does not encompass other kinds of survivals in legal culture ("juridico-cultural survivals"), such as the continuity of values, attitudes, beliefs or practices.[6]

The paper is structured as follows: section 2 focuses on the concept of a legal survival, including the question of the ontology of legal survivals; section 3

[3] The term "nomostasis" (Mańko 2025d) is coined from the Greek words denoting "law" (νόμος) and "resistance to change" or "stability" (στάσις), and a conscious reference to "homeostasis," a concept used in systems theory that has been applied to law by Artur Kozak in an article entitled "The Homeostasis of Law" (Kozak 2003). For a use of the notion of "stasis" in the context of legal continuity, see e.g. Abel 1982, 795: "the considerable difficulty of legitimating legal change (where the exercise of power is most clearly visible) is a *major reason for stasis* and for the limited range of the changes that do occur." Emphasis added.

[4] Alexandra Mercescu (2018, 162–164) identifies three forms of "pluridisciplinarity": (1) *multidisciplinarity*, i.e. the parallel use of tools from two or more disciplines; (2) *interdisciplinarity*, i.e. the "interpenetration of … disciplinary cultures"; and (3) *transdisciplinarity*, i.e. the "synthesis of … various [bodies of] knowledge in a global theory, [leading] to a higher level of integration". All three forms are necessary in the study of legal survivals.

[5] Legal survivals have been addressed especially in the context of the contemporary remnants of the socialist legal tradition, see e.g. Mańko (2007); Uzelac (2010); Starzhenetskiy (2017). Cf. Son Bui (2024, 27–50). For an analysis of legal survivals in a post-colonial context, see e.g. Iheme (2025).

[6] An example of an oft discussed juridico-cultural survival is *hyperpositivism* – an extreme version of legal formalism – considered to be a remnant from the times of state socialism (Uzelac 2010; Mańko 2013a; 2013b, 12–15; Preshova, Markovikj 2024; Kusik 2025a; 2025b, 262–264; cf. Cserne 2020; 2024), or Soviet "legal realism" based on the duality of official law, on one hand, and "real" law, on the other hand, the latter linked to the political will of the authorities (Antonov 2018). On a more general note, features of "legal style," such as the form of codification, are also examples of juridico-cultural survivals (see e.g. Poldnikov 2020).

addresses the status and basic claims of the theory of legal survivals; section 4 addresses selected practical aspects of the methodology of studying legal survivals; concluding remarks are formulated in section 5.

2. THE ONTOLOGY OF NOMOSTASIS: COUNTOURS OF THE CONCEPT OF A LEGAL SURVIVAL

2.1. The basic concept: A legal institution, concept, principle, or rule

A legal survival[7] may be defined as (1) a legal form[8] – such as a legal institution,[9] concept, principle, or sometimes even a single rule – which (2) had emerged under a previous socio-economic, political, ideological or cultural context, being (3) functionally linked to that earlier context, and which (4) has survived the demise of that context, such as notably a transformation, revolution or any other socio-economic, political, ideological or cultural transition (cf. Mańko 2015a, 20–26; 2016a, 11–17; 2016b, 212–216; 2025a, 69–70). It is assumed that "existing forms contain significant elements of adaptation to past environments" (Deakin 2012, 35), and despite that functional adaptation to a *past context*, they may still survive the demise of that context. For a given legal form to fall within the definition of a legal survival it is crucial that the transition in question be

[7] The concept of a "survival" in law was probably first used by Oliver Wendell Holmes (2009 [1881], 23, 153, 158, 163, 228, 239, 247), arguably inspired by Darwin's evolutionary ideas (Deakin 2002, 3, 9; cf. Malagoli 2024, 439–440). It is also known that Holmes read Edward Burnett Tylor (White 1993, 131), who is known for having championed the notion of "survival" in anthropology (Tylor 1871, 63–144; cf. Malagoli 2024, 439). In French-speaking literature, one of the champions of the concept of a "*survivance*" was historian of medieval law, Jean Gaudemet (2016 [1955], 149, 181; 1965, 368, 373). Gaudemet also used the noun "*la survie*" to denote the fact of survival (as opposed to a specific institution that survives) (see e.g. Gaudemet 2016 [1955], 159). An alternative term for a legal survival is, in English, "relic" (see e.g. Holmes 2009 [1881], 228), and in French "*persistance*" (see e.g. Gaudemet 2016 [1955], 160, 177).

[8] The concept of a "legal form" is inspired by Evgeny Pashukanis (2003 [1924]) and grounds the theory of nomostasis within a hylomorphic concept of law, which opposes legal *form* to its *matter* (object of regulation) and *content* (social function and effects) (Mańko 2024a; 2024b; 2026; cf. Fusco 2024). A deeper philosophical investigation about the concept of form in connection with legal survivals would exceed the scope of this paper. An alternative philosophical theory of legal survivals, grounded in the semiotics of law, has been recently proposed by Somby (2025). In that theory, a legal survival is not cosidered to be a form, but a sign. Acording to Somby: "Legal survivals are signs that outlive their doctrinal justification but continue to orient legal reasoning through historical inertia" (Somby 2025, [2]). He adds that: "a 'legal survival' can be understood as a legal sign – whether an institution, concept, principle, or rule – that originated in a previous socio-political context such as the colonial state's legal order but continues to exist despite a fundamental shift away from that context (…)" (ibid. [4]).

[9] This concept, used already by Friedrich Karl von Savigny (1840, 8–10), denotes a set of interconnected legal norms which jointly regulate a given typified social relationship.

sufficiently significant from the point of view of that legal form (Mańko 2025a, 70; cf. Mańko 2015a, 21–22). In other words, in order to be able to speak about a legal survival it is necessary that it "survives" something which can be called metaphorically a "trauma" or an "extinction event" or at least the disappearance of the original *causa* for which the legal form in question emerged.

Limiting the concept of a legal survival only to those legal forms which have survived a proper *systemic* transformation (as from capitalism to state socialism, or from state socialism back to capitalism) would be an unnecessary limitation of the research tool. Whilst a systemic transformation is certainly a paradigmatic example of the change of context, also other equally significant and profound economic, social, cultural, ideological and political changes – even if they were not abrupt – should be included within the definition.[10] Moreover, an overhaul of the legal system or part of it – such as a change of the property regime – should be included as a change of the legal survival's context (i.e. a change of *legal* context, as opposed to change of *social* context). This is because the legal environment is very important for the survival of individual legal rules or legal institutions (Hage 2024, 44–45). Likewise, the creation of a new, independent state in processes of empire breakup or decolonization also constitutes a sufficiently significant break with the past, allowing one to speak of the continuity of former imperial law as an example of legal survival. What remains crucial in all cases is that the legal form in question is causally or functionally linked to the earlier context, that its appearance was conditioned by that context, and that the legal form was in some way functional towards that context, but that the context has, in the meantime, disappeared, leaving the legal form patently "out of context" (Watson 2000) but, nonetheless, still in force.

2.2. Functional adaptation

A legal survival, in order to endure, usually – but not always – requires adaptation (Mańko 2016a, 28). Such an adaptation may include partial or complete change of its social function (its content) but it may also include a partial change of its legal form. However, adaptation *per se* – be it content-related or form-related – should not be part of the essential definition of the concept of a legal

[10] By contrast, legal forms created to address singular, but potentially repetitive events (such as wars, pandemics, or major sports events) would not count as legal survivals to the extent that such events may still occur in the future. Merely technological changes, such as the appearance of factory machines in the 19th century or computers and the internet in the 20th century, should not count as a relevant change of context – technology advances all the time, and virtually all legal institutions would become caught under the notion of a legal survival if technological changes were considered relevant. On the other hand, the application *per analogiam* of existing categories, such as *res incorporales*, in completely new technological contexts, such as digital "goods" (cf. Sitek 2021) could also be analysed in the context of nomostasis, although probably beyond the scope of legal survivals *sensu stricto*.

survival.[11] In fact, many legal forms are politically, economically, ideologically or technologically *neutral*, and can survive a transformation without a *prima facie* need for functional adaptation (cf. Sacco 1991, 393–394; Mańko 2016a, 28–30). Moreover, functional adaptation need not be complete: as Simon Deakin (2012, 35) underlines, "it is incorrect to assume that existing forms are fully functional with regard to existing environments. They may possess enough functionality to survive, but they have not acquired the features which they now have by way of adaptation to current conditions; these have been inherited as a result of past adaptations."

Legal forms that are not applied at all in practice, neither judicially nor extra-judicially (i.e. have no social function) should not, in principle, be considered as legal survivals due to the fact that they survive only on paper and are, therefore "apparent survivals" (Mańko 2015b, 196–197; 2016d, 215) which could be aptly described as "legal fossils."[12] However, unless a given legal system formally accepts *desuetudo* as a means of depriving a legal norm of binding force, a legal fossil may come back at any time, even after a long period of non-application.

2.3. Merely "formal" survivals

A theoretical question which requires additional research is the category of "formal survivals" (*survivances formelles* or *persistances formelles*) understood by Jean Gaudemet (2016 [1955], 205) as situations where only the old terminology survives, but the normative content of an institution or rule is no longer the same. *Prima facie* it seems that each individual case of an apparently "merely formal" survival should be studied in detail in order to verify whether it is indeed only the terminology which survived, or is there a *quantum* of normative continuity implied by that terminology, which may not be immediately visible (cf. Mańko 2025a, 74). In particular, terminology may imply the use of old concepts and structural principles, making such a survival something much more than a mere *persistance formelle*. Moreover, mere form – such as a formalistic conception of a code – may be considered as a (juridico-cultural)[13] survival in its own right (cf. Poldnikov 2020, 12–13).

2.4. The identity of a legal form in time: The question of *essentialia*

Given that legal survivals are defined as legal forms that have survived, it is crucial to clarify what is meant by the fact of survival and, more specifically, what degree of identity and continuity in time is required for that to be established.

[11] Although it does not belong to the *essentialia* of the concept (i.e. its *sine qua non* elements), it may well be treated as part of its *naturalia* (i.e. its usual elements).

[12] The term was proposed by Professor Tomasz Giaro at the Oñati workshop.

[13] See footnote 6 above.

Indeed, one of the fundamental assumptions upon which the whole concept of legal survivals is based is the possibility of claiming the *identity* of legal forms (institutions, concepts, rules, principles) over time. Without this assumption, the whole idea of continuity of form despite the change of content would simply fall: if there is no identity, there is no continuity – a substantially new form, which takes the place of an old one, is not a legal survival.[14]

To address this issue, I propose to proceed by identifying the *essence* of a legal form, and delimiting it from what can be described as its *accidentalia*, its non-essential elements.[15] In philosophical terms, the essence denotes those elements that make something what it is (Robertson Ishii, Atkins 2023). In our case, a given legal form is *that* legal form, and no other, if it possesses the essential elements of such a legal form (Mańko 2016a, 20–21; 2016d, 215). Thus, for instance, a contract providing for the permanent transfer of enjoyment of a thing in exchange for money will be a contract of sale, but if the transfer is gratuitous, it will not be sale but donation, and if the transfer is only temporary, it will be neither sale nor donation but lease or *commodatum* (loan of chattels for use) or pledge. Thus, the essence – the *essentialia negotii* – of each of these legal forms can be easily identified by comparing them to other ones. This applies both to a synchronic comparison (different legal forms in the same legal system, or in various existing legal systems) and to a diachronic comparison (legal forms in various historical epochs, from Roman law until today).

These criteria seem to work exceptionally well in the case of *legal institutions*, which consist of a set of interconnected legal norms that lay down the legal form of an abstract legal relationship (Savigny 1840, 8–10; Jhering 1852, 27; Mańko 2016d, 13–14; Neuner 2023, 222). A legal institution is a complex entity, comprising a number of rules and often also principles (which point to values and goals). The essence of a legal institution should be sought in those normative elements which typify it, i.e. make it *that* institution as opposed to *other* ones, especially if they are similar, sharing some elements. Thus, if the legal institution in question is an *in rem* right, its essence should be defined by comparison with other *in rem* rights, and if the legal institution is a contract, its essence should be sought by comparing to other (similar) types of contracts.

[14] Unless, of course, the new form shares the essential elements of the old one, effectively replicating them – which is the case of transfiguration (Mańko 2016a, 20; 2016d, 214; 2025, 77–78).

[15] The distinction of *essentialia* (*essentialia*), *naturalia* and *accidentalia* was elaborated by the Glossators (Dajczak 2013, 15). For the purposes of studying the identity of legal forms *qua* legal survivals, a simple dichotomy opposing *essentialia* and *accidentalia* is sufficient, without the need of resorting to the intermediate category of *naturalia* (i.e. the usual or typical, but nonetheless non-essential elements).

In the case of *legal principles*, which are defined as fundamental legal norms[16] which require the addressee to attain, to a maximum degree, a certain value and serve as a guidance in legal interpretation the essence will be connected to the value or goal that is to be achieved (Kordela 2020, 327–329; Leszczyński, Maroń 2013, 330–331; Leszczyński 2021, 31).

In the case of *individual legal norms*, their essence is their specific hypothesis (when the rule is applicable) and disposition (what does the rule command). Thus, in the case of a rule providing for the possibility for prosecutors to join civil proceedings,[17] its essence comprises the hypothesis of the existence of a civil lawsuit or an existing cause of civil action, and the disposition is that a prosecutor may bring an action or join on-going proceedings, exercising in both cases the full rights of a party.

The determination of essence of a *legal concept* is different, because a concept, in contrast to legal institutions, principles, and norms has a different nature. In order to determine its identity, one needs primarily to analyse the name ("label") of the concept, paying attention to the context in which such label is continuously used. The name of the concept can, of course, be transplanted[18] from one language to another (e.g. *bona fides* became *bonne foi* or *Treu und Glauben*), maintaining nonetheless its identity. Some cases are borderline: for instance, the "principles of *socialist* community life," upon their transplantation to Poland from the USSR, were renamed to "principles of *social* community life." Thus, there was some adjustment (modification) at the time of transfer. However, this latter name has been used without any changes until today, and therefore one can definitely speak about the continuity of the principles since their introduction in 1950 (cf. Mańko 2012). Despite renaming a general clause (e.g. from "principles of socialist community life" to "good morals" in Bulgarian law) does not necessarily mean that the understanding of the concept will change (Vassileva 2022, 65–66). And vice versa, the continuity of the mere name of a concept does not exclude a change in its actual content. Indeed, a legal concept, such as in particular a general clause,[19] comprises not only a given label (name), but also its associated content which, usually determined in the process of judicial application of law (Leszczyński 2022, 35–36, 143), and can, arguably, be reduced to a set of principles and rules

[16] I am only discussing here only legally binding ("directival") principles, as opposed to "descriptive principles" which can be formulated in order to describe the model of a legal institution or rule adopted by the legislator (cf. Wronkowska et al. 1974, 24–27; Radwański 1979, 23).

[17] Article 7 of the Polish Code of Civil Procedure of 1964 (consolidated version: Dz. U. z 2024 r. poz. 1568, 1841).

[18] On legal transplantation (nomophoresis) see e.g. Watson (1993); Mattei (1994); Ajani (1995); Trikoz, Gulyayeva (2024); Kusik (2024; 2025b).

[19] Understood here, following Leszek Leszczyński (2021, 24), as a reference to an extra-legal system of norms and values. Although the term "general clause" is not used in Anglo-American legal science, the phenomenon is well known – see e.g. the general clause of "reasonableness" (Whittaker 2006, 70–75; cf. Ibbetson 2012, 138–139).

(cf. Schlechtriem 2006, 43–44; Mańko 2016a, 15–16; 2016b, 218–221). In this vein, the essence of a concept (in particular a general clause) comprises a certain core portion of such principles (including their corresponding values) and rules which may stay the same, even if the name of the concept changes (see e.g. Vassileva 2022, 65–66).[20] A concept, such as "contract of employment" in English law, may survive even if the rules with which it is connected have radically changed their content (Deakin 2012, 31). In this way, *conceptual continuity* is possible despite substantive change of the law (ibid.). Indeed, it seems that from among various types of legal survivals – institutions, rules, and principles – legal concepts may well be the most durable ones (cf. Mańko 2016d, 113–114; Deakin 2012, 31). The nature of open-ended concepts, such as general clauses, *per se* entails a certain degree of indeterminacy, which may, in and of itself, be considered as a mechanism enabling the adaption of law to social change (Ibbetson 2012, 136–137) being a built-in mechanism of law's reflexivity (cf. Deakin 2012, 28).

2.5. The ontology of legal survivals

In the definition of legal survivals provided above, I referred to them as "legal forms." This, however, does not entirely solve the ontological question, namely the determination of the type of entity that legal survivals are. To this end, I consider it appropriate to introduce three ontological levels of the juridical phenomenon, and specifically:

1) the level of juridical (supralegal) ideas (*ius*);[21]
2) the level of the positive law (*lex*) which, in turn, can be divided into four sub-levels, drawing inspiration from Jerzy Wróblewski's (1991, 75–125) typology:[22]
   a) *lex lata* – the actual legal texts in force;
   b) *lex illata* – the actual texts plus the logical inferences that can be made from them;
   c) *lex intepretata* – the actual texts, plus the logical inferences, plus what can plausibly interpreted from them using accepted methods of juristic interpretation; and

[20] Conversely, the preservation of the sheer name of the concept, but coupled with a change of its essential content – if this were indeed the case – would not be a case of a legal survival, because the name *per se* does not determine the concept's actual content (cf. Leszczyński 2001, 77–80; 2022, 35–36). It would rather be a "formal survival" in the sense used by Jean Gaudemet (2016 [1955], 205).

[21] The *lex-ius* distinction is an important part of Western legal culture which emerged in Rome (Wołodkiewicz 2005; Pichlak 2017). *Ius* denotes the entirety of the juridical order, including the legal culture, whereas *lex* denotes chiefly the enactments of positive law, such as primarily legislative acts.

[22] The Latin terminology is mine (cf. Mańko 2025, 74) and it replaces Wróblewski's English acronyms.

d) *lex operativa* – the law as is actually applied by the courts (i.e. the abstract and general norms that can be reconstructed on the basis of judicial application of law);

3) the level of *infralegal practice* (the juristic "living law")[23] – comprised of individual judicial decisions, executive and administrative orders, regulations, and decisions, as well as acts of private practice (actual contracts, settlements, wills, trust instruments etc.) (cf. Ibbetson 2012, 137).

I posit that legal survivals can exist on all three levels. Some survivals exist predominantly on the highest level – that of juridical or supralegal ideas (cf. Eckhardt, Mańko 2025, 170, 176–178). For instance, the Roman idea of the *dictatura*, or the French idea of état de *siège* have made their repeated iterations in various legal orders.[24] The specific legal forms expressing the same legal idea can be described as instances of transfiguration (Mańko 2016d, 214; 2025, 77–78), if they were repeatedly enacted in legislative form, or as instances of judicial or executive palingenesia (Mańko 2025a, 78–79) if they simply reappeared in the case-law of the courts or the actual practice of the executive, and as examples of legal resurrection (Mańko 2025a, 80–81) or legal revival (Mańko 2024a) if they reappeared after a shorter (resurrection) or longer (revival) period of absence. For instance, the revival of *separatio a mensa et thoro* in Poland in 1999 is undoubtedly based on the survival of the very idea of this legal form distinct from divorce or annulment of marriage, despite the lack of a corresponding legal form within the *lex lata* between 1945 and 1999. Because the *idea of the legal form* survived, that legal form could have been reinstated (cf. Fiedorczyk 2007, 59). Sometimes, however, even the legal idea itself disappears, and in that case the revival of a legal form is an example of rediscovering the past, rather than reinstating an idea that continued to exist in the collective memory and consciousness of the juristic community. The revival of Roman law in medieval Western Europe is such an example: in contrast to Eastern (Byzantine) Europe, there was a discontinuity of a professional juristic community, and as a result there was nobody to remember Roman law: it had to be reintroduced, based on a renewed study of the *Digesta*, *Codex* and *Novellae* (cf. Van Caenegem 1987, 126; Giaro 2007, 288).

Secondly, legal survivals can and do exist on the level of the *lex*, i.e. the positive law. In fact, this is the usual and most typical form of existence of legal

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[23] Whereas Eugen Ehrlich, who introduced this notion (Ehrlich 1913/2017, 486–506), thought of folk customs, the research of Katharina Pistor (2019) has revealed that sub-legal living law – the law of contracts which never end up before the courts – is an increasingly important part of neoliberal capitalist legality. In fact, many years can pass before a given legal device, used in practice, is ever tested as to its legality before courts, and even if it ends up before a judge, the latter may not necessarily fully understand its complexity.

[24] These examples were discussed in the papers presented by C. Cercel, G.G. Fusco, and M.C. Dragomirescu during the Oñati workshop on legal survivals. See Mańko and Eckhardt (2025, 842, 846, 848, 853–854).

survivals: the legal institutions, principles, concepts and rules are preserved within the codes and laws (*lex lata*), and are given practical interpretation and application by the courts (*lex operativa*). If the level of *lex operativa* is, in a given instance, creative vis-à-vis the *lex lata* (interpretation *praeter* or even *contra legem*), the survival ought to be described as an example of judicial palingenesia (Mańko 2025a, 78–79).[25]

Thirdly, legal survivals subsist on the practical level of the living law, i.e. below the level of the *lex operativa* – at the level of *infralegal praxis*. Most typically, a legal survival's subsistence on this level accompanies its endurance on the legal level (at least of the *lex operativa*) but sometimes there are instances when the legal survival exists only on the practical level, but not on the level of positive law (not even judge-made law). For instance, parties may conclude contracts or make wills which go *contra legem*, and still honour their obligations.[26] Or the executive may rely on a law which has been abrogated, regardless of the lack of a proper legal basis.[27] If such practice finds support in the case-law, the legal survival can then be said to exist also on the level of the *lex operativa*. But if no case-law is available, or if the available case-law declares such private or public acts as null and void due to their illegality – the survival subsists only on the infralegal level of actual practice (*praxis contra* or *praeter legem*).

Given that the concept of a legal survival is first and foremost a sociological one, i.e. grounded in the empirical[28] legal material, examples of infralegal survivals

[25] In fact, for a legal form to come into existence (i.e. become formally enacted as part of legislation, or proclaimed in the case-law) it must always already first existed at the level of juridical ideas: someone within the juristic community must first have the idea of a legal form, before the legal form becomes actually positivised. However, not all juridical ideas are intended to be positivised: for example, the juridical idea of slavery is, in contemporary law, considered unacceptable. Yet it can be studied by legal historians or used for the purposes of its prohibition.

[26] For instance, in the past Polish peasants observed a system of informal transactions for the transfer of ownership of land, which were *contra legem*, but nonetheless the Supreme Court started granting protection to informal acquirors, using the concept of abuse of right to block the *rei vindicatio* brought by the legal (formal) owner against the informal acquiror (Galeński 2004).

[27] The Romanian practice of using the state of siege during the late 19th and early 20th century, as described by C. Cercel and M.C. Dragomirescu during the Oñati workshop on legal survivals, is an example of such a practical application of a legal form which was no longer in force (declaration of state of siege on the basis of a *lex abrogata* – the Act of 1864), as well as its application going beyond the limits of the original legal form (e.g. declaration of state of siege by prefects without any legal basis). Cf. Cercel 2013, 218–225; Cercel 2022; Mańko and Eckhardt (2025, 853–854).

[28] By "empirical" I mean here all kinds of legal texts produced by courts (judgments), practitioners (juridical acts such as contracts, wills, trust instruments, corporate statutes, etc.) and the administration acting in the legal sphere (e.g. administrative decisions). In practice, research into empirical material may require archival work (e.g. court archives, archives of notarial bureaus, law offices, etc.), as well as interviews with practitioners (given the limited access to private contracts or corporate documents).

– even if they exist *contra legem* and are rejected at the level of *lex operativa* – should nonetheless be taken into account when studying the phenomenon of legal continuity.

3. THE THEORY OF NOMOSTASIS: THREE LAWS AND SEVEN PATTERNS

3.1. Status of the theory

The concept of a legal survival, discussed in the previous section, is embedded within a broader *theory of nomostasis*, which is conceived of as a set of theoretical propositions aimed at conceptualising and explaining the observed phenomenon of legal survivals despite transformations, transitions and revolutions. The theory of nomostasis is based on law's interactions with its social environment, in particular such spheres as the economy, politics, ideology, culture, social values and patterns of behaviour, and the like. The theory in question seeks to build a model – an evolutionary and adaptive one (cf. Mańko 2015a, 17–27) – which will explain that relationship. Being built inductively on the observation of legal material (such as case-law and other documents of legal practice), the theory of nomostasis does not *per se* necessarily imply any specific overarching sociological or socio-legal paradigm.

However, certain areas of sociological research on law seem to be especially promising as a broader environment within which the empirical study of nomostasis could be pursued. These include, most notably, the historical sociology of law (cf. Bucholc 2022) and the sociology of juristic knowledge, both understood as sub-disciplines at the interstices of the sociology of law, on one hand, and, on the other hand, of historical sociology and the sociology of knowledge, respectively. Thus, the sociological environment within which the theory of nomostasis could be pursued and its empirical manifestations conceptualised and analysed would be a *historical sociology of juristic knowledge*, understood as a specialised sub-compartment of the sociology of law focused on the historical transmission, preservation and modification of juristic knowledge. As a sociology of knowledge in the spirit of Berger and Luckmann (1966), it would focus on the social construction of the institutional world of law. Indeed, the institutional world is, for Berger and Luckmann, primarily "a body of transmitted recipe knowledge, that is, knowledge that supplies the institutionally appropriate modes of conduct" (Berger, Luckmann 1966, 83). Legal survivals are certainly part of this historically transmitted legal knowledge.[29]

[29] Nomostasis, as analysed in this article, is but one part of the dynamics of juristic knowledge that could be addressed by the historical sociology of juristic knowledge. Other processes that could be studied include: *nomogenesis*, i.e. the process of creating new legal norms (including through reinterpretation of existing ones); *nomophoresis*, i.e. the process of transplanting legal norms (legal

In further research pursued within a historical sociology of juristic knowledge, the phenomenon of nomostasis could be conceptualised within one of the main paradigms mentioned explicitly as appropriate for the historical sociology of law by Marta Bucholc (2022, 662–669), i.e. Foucault's study of the epistemic dimension of law, Bourdieu's sociology of the legal field, or Luhmann's systems theory, but also within other sociological paradigms, such as notably the sociology of knowledge or analytical sociology. The latter focuses on identifying mechanisms for social processes (Hedström, Bearman 2009, 3–5) and formulating middle-range theories (Hedström, Udehn 2009, 26–27). Indeed, the approach of an "analytic historical sociology" (of law, or more specifically – of juristic knowledge) seems particularly promising for the development of the theory of nomostasis given that it "would focus on explaining why phenomena happen and how they happen, rather than relying only on description and interpretation" (Barkey 2009, 712).

However, providing for a full integration of the emergent theory of nomostasis with one or more of the existing sociological paradigms – such as those mentioned above – would exceed the scope of the present paper. Therefore, in what follows, I present certain tentative claims of the proposed theory in a "raw" fashion, without yet embedding them in any specific theoretical language; this is understood as a preliminary step towards further construction of the theory of nomostasis as a properly sociological theory of legal continuity in times of social change.

3.2. Tentative claims of the theory of nomostasis

3.2.1. *Three possible general claims ("laws")*

First of all, the theory of nomostasis, as developed so far, postulates three general claims about legal development and the adaptation of law to changing contexts. They can be provisionally labelled as "laws" (akin to the "laws of nature" in the natural sciences). They need to be formulated in abstract terms, so that they can be further tested based on empirical case-studies and, if need may be, refined or narrowed down.

The first claim can be described as the *law of juristic inertia* whereby one can expect that lawyers will prefer – for a variety of different reasons[30] – to stick to old, tested and tried legal forms also to address new, hitherto unknown social phenomena. Its seminal formulation can be found already in the writings of Savigny who noted that ancient Romans tended to stick to old legal forms in order to tackle new social phenomena (Savigny 1831, 49). But in fact its roots can found already

transplantation); *nomolysis*, i.e. the process of abrogation or desuetude of legal norms, leading to their disappearance; and *nomobiosis*, i.e. the revival of legal norms ("borrowing from the past"). Moreover, besides addressing legal doctrine (the content of rules and the legal science built around them), the historical sociology of juristic knowledge could also focus on continuity and change in juristic method as the second key ingredient of juristic knowledge.

[30] The exact nature of those reasons is the object for empirical historical and socio-legal research.

in the Ulpian's work on *fideicommissa*, where he famously noted: *In rebus novis constituendis evidens esse utilitas debet ut recedatur ab eo iure quod diu aequum visum est*.[31] More recently, David Ibbetson (2012, 140) poignantly noted that:

> Law is largely backward-looking and heavily inertial: it stays the same unless and until it is changed; energy has to be expended in the deliberate introduction of any change and scholarly reformulations are sterile until and unless they become accepted as part of the legal fabric.

In principle, the law of juristic inertia applies to the juristic community, i.e. to the professional epistemic community of lawyers, and not to legal forms as such – notably politicians *qua* legislators oftentimes seem to display an opposing approach, which could be summarised as a combination of absolute instrumentalism (cf. Morawski 1993; Sitek 2008, 66–78; 2017, 899; Ziętek 2012; Mańko 2017, 33–37, 42–44) with an "unchecked passion for novelty,"[32] even at the expense of inducing chaos into the doctrinal (dogmatic) construction of legal institutions, and thereby creating a tension between the *lex lata* and the *ius* (Kozak 2010, 149; cf. Mańko 2020b, 355–356; 2021a, 236–237).

The second general claim of the theory of nomostasis, which could be referred as the *law of functional adaptation of legal forms*, postulates that, in the process of adapting law to its changing societal context, the legal form may stay identical but at the same time its content – social function and effects – may change. Its seminal formulation is to be found in Oliver Wendell Holmes' *The Common Law* (2009 [1881], 7) where he observed:

> The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. *The old form receives a new content*, and in time even the form modifies itself to fit the meaning which it has received (emphasis added).

Karl Renner's monograph, *The Institutions of Private Law and their Social Functions* focused exactly on this phenomenon, studying how the legal form of the right of ownership assumed new social functions under conditions of industrialisation in 19th century Austria (Renner 1976 [1929]). In the words of Renner (1976 [1929], 293):

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[31] D. 1, 4, 2 (Ulpianus libro quarto fideicommissorum). This idea was taken up *inter alia* by St Thomas of Aquinas, who noted that a change of law is *per se* detrimental, and therefore needs to be justified: *Habet autem ipsa legis mutatio, quantum in se est, detrimentum quoddam communis salutis* (STh I-II, q 97, art 2, resp).

[32] The expression is borrowed from a theological context: Gregory XVI, encyclical *Singulari nos*, n. 8; St Pius X, encyclical *Pascendi*, n. 13.

> […] [I]n spite of the norm, the substratum changes, yet *this change of the substratum takes place within the forms of the law*; the legal institutions automatically change their functions which turn into their very opposite, yet this change is scarcely noticed and is not understood. (Emphasis added)

In the terminology used by Renner the concept of "substratum" corresponds to the notion of "matter" used here, i.e. it denotes the object which is regulated by the legal form (e.g. a certain economic relationship). Renner's analyses allowed him to formulate a number of more specific claims, namely that:

> […] [F]undamental changes in society are possible without accompanying alterations of the legal system. […] The form of law is not the *causa causans* that brings about the change. The social function undergoes change unaccompanied by a juridical change of the legal institution. […] [E]conomic change does not immediately and automatically bring about changes in the law. (Renner 1976 [1929], 252, emphasis omitted)

Without entering here into the vexed question of causation – which, in any case, seems to be more complex than Renner pictured it – let us focus more specifically on the dialectics of legal form, its matter (substratum) and its content (social function). What Renner's theory points to is the fact that legal form may remain the same, but on account of changes of its matter (the socio-economic substratum of regulation) a consequential change of its content (social function) will occur, possibly without any need for modification of the legal form. Simon Deakin (2012, 9) refers to this phenomenon as the "opportunistic adaptation of existing legal forms to new ends" and draws a parallel to what biologists and social anthropologists call "bricolage," whereby

> [I]nnovation in design, rather than involving the construction of a new model from scratch, tends to make use of structures or devices which lie immediately to hand. When a design feature is adapted from one use to another in this way, it remains embodied in the relevant structure long after its original function has disappeared. It is also possible that a design feature which is an essentially accidental by-product of an earlier adaptation finds a new use in a changed environment. (Deakin 2012, 10)

Deakin warns, in this context, against the "'qualified efficiency' or suboptimal nature of opportunistic adaptations or exaptations," noting that "there is a potential cost to making do with what lies to hand" (Deakin 2012, 12). Moreover, functional adaptation is only one side of the coin because "rules coevolve with other elements in the wider environment. While they may therefore reflect, in part, current social values and economic forms, they also influence them" (Deakin 2012, 41). Therefore, the law of functional adaptation should not be understood as postulating that *only* functionally adapted legal forms survive; in fact, legal forms may survive despite not being adapted or even by influencing their current environment.

This brings us to the third proposed generalisation of the theory of nomostasis, namely the *law of decontextualisation of legal form*. Its roots can be traced to Alan

Watson's writings, who specifically noted the tendency of the legal system to lag behind societal change, and hence become decontextualised:

> A society makes law; the society changes, politically or economically, but the law remains the same or little changed. (Watson 2000, 1)

> […] in the West rules of private law have been and are in large measure out of step with the needs and desires of society and even of its ruling elite to an extent which renders implausible the existing theories of legal development and of the relationship between law and society. […] [T]o a considerable extent law in most places at most times does not progress in a rational or responsive way, and that the divergence between law and the needs or wishes of the people involved or the will of the leaders of the people is marked. […] Legal rules, once created, live on. […] One of the most striking features of legal rules is their power of survival. Many, many rules endure for centuries with only minor modifications. (Watson 2001, xviii, 5, 8)

Whereas the law of juristic inertia accounts for legal development and adaptation through the use of old legal forms, and law of changing social function of legal forms explains that such forms can be filled with new content, the law of decontextualisation postulates that the legal order can simply remain out of joint with changed times, chiefly due to inertia of the legislature and juristic community.

These three laws of nomostasis – taken together – seem to account for the possibility of legal survivals and their actual presence in legal systems despite deep and far reaching societal changes affecting politics, ideology, culture, and the economy (cf. Mańko 2025c).

3.2.2. *An open-ended typology of patterns of survival*

Besides these three provisional *laws of continuity of the legal form*, the theory of nomostasis as proposed here encompasses a typology of possible patterns of survival (Mańko 2025a, 74–81). The idea behind developing such a typology is to provide for an explanation of the *mechanism of survival*, in particular taking into account Renner's law on the changing social function of legal institutions. The types themselves should be read in the context of the ontology of legal survivals (section 2 above), as they closely refer to the level at which a legal survival can be located. It is crucial to reiterate that the typology is conceived of as a heuristic tool, and it may need to be expanded or adapted in the light of the empirical material (Mańko 2025a, 75).

The first pattern of survival, known as "transsubstantiation" (Mańko 2025a, 75–76) refers to a situation in which the content (social function) of a legal survival was entirely changed. A good example is the English feudal title to immovable property ("fee simple absolute in possession") which preserves a feudal legal form but is filled with entirely modern content, not differing from the right of ownership in the Civil Law tradition (Getzler 1996, 647).

The second pattern of survival, known as "consubstantiation" (Mańko 2025a, 76–77) refers to a situation in which the social function of a legal form is partly modified, but partly the old one is retained. The English trust provides for a good example, as it still serves the original function of transmitting the enjoyment of property *inter vivos* and *mortis causa* but over time has played many more functions, including the locking-in of capital and providing for limited liability of shareholders between the 18th and early 20th century (Morley 2016), or the function of shielding property from taxes and creditors, from the 1970s onwards (Hofri-Winogardow 2015, 25–27; Spivack 2024, 90–94), or finally, the securitization of debts (Pistor 2019, 81–84).

The third pattern of survival, known as "transfiguration" (Mańko 2025a, 77–78) focuses not on the function, but on the form. The legal form is apparently changed but in fact preserves the *essentialia* of the old legal form. For instance, a new statute or code is re-enacted, which is formally new, but the essential outline of a given legal institution remains unmodified, despite a legislative overhaul (Mańko 2016d, 214). A particularly interesting example is the Polish hypothec (*hipoteka*), a creditor's right *in rem* to land owned by the debtor which maintained its identity since the 16th century, being repeatedly re-enacted in changing social and political contexts, up to the last enactment from 1982, which remains in force (see e.g. Szpringer 2003).

The fourth pattern of survival, known as "palingenesis" (Mańko 2025a, 78–79) is, in fact, a *sui generis* sub-type of transfiguration; however, the legal form disappears from the *lex lata* but is upheld in the *lex interpretata* and especially the *lex operativa*. Thus, despite a clear legislative decision to remove a certain legal form from the legal system, the judiciary (or the executive) still uphold it, purporting that it can still be applicable either through a creative interpretation of more general rules or principles in the legal system, or simply by finding loopholes in the abrogating legislation. The survival of uses/trusts after the Statute of Uses (Smith 1966; Fratcher 1969, 57–66) is one such example from the Common Law context; in the Civil Law context one can point to the judicial survival of *clausula rebus sic stantibus* in German law despite its disappearance with the enactment of the BGB (Luig 1999), or the rules on prescription of claims in Poland: prior to 1990, judges were explicitly authorised to decide, on the basis of discretion, whether to accept a counter-claim of prescription or to reject it, based on Article 117 § 3 of the Civil Code; despite the abrogation of that rule, judges now found a new justification for exactly the same practice in Article 5 of the Code which prohibits the abuse of subjective rights (Kuźmicka-Sulikowska 2019).

The fifth pattern of survival, known as "ideological repentance" (Mańko 2025a, 79) focuses on the ideological function of legal form. A legal form which was introduced with ideological goals in mind (cf. Eckhardt 2024, 11–15; Mańko 2025b, 59–63), and which was perceived as charged, may being ideologically – over time – become "purified" of its initial context, and henceforth treated as a legal technicality, rather than as part of an ideological project (cf. Mańko 2016c, 87; Vassileva 2020, 319; 2023, 622). General clauses, such as "principles of social community life," or "socio-economic purpose," are a good example of this pattern of survival (Mańko 2016d, 221, 223), entailing depoliticisation and deideologisation.

The sixth pattern of survival, known as "resurrection" (Mańko 2025a, 80–81) is, in fact, a special case of transfiguration: the *differentia specifica* is the fact that there is a certain time lag between the abrogation of the old legislation and the enactment of the new. If such a time lag is prolonged, and in particular if the new legal system is not generally in continuity with the old one, the resurrection would be better described as a "revival" (Mańko 2024), whereby an old legal form is brought back to life. However, the difference between the two is a question of degree, and many examples are borderline. For instance, the reintroduction in Poland of the extraordinary revision (labelled as "extraordinary complaint") in 2017, after 30 years of its absence (Ereciński, Weitz 2019, 8–9; Zembrzuski 2019, 35–37; Stasiak 2020, 1), is a resurrection if we look upon it from the perspective of the continuity of Polish legal culture, but has elements of revival if we take into account the element of a historical reconstruction of a legal form from the socialist period, having a clear Soviet pedigree (Jodłowski 1951, 45–46).

The object of the seventh and final pattern of survival can be described as a "relic" (Mańko 2025a, 80) and it refers to the situation where neither the form, nor the content, nor even the ideological colouring of a legal form changed, and yet it survived despite being apparently uprooted from its original context of introduction, to which it was initially causally linked. The preliminary ruling procedure in Polish criminal and civil procedure, introduced in 1949 and 1953, respectively, is a good example of a legal relic (Mańko 2007; 99–102; 2016c, 84–85). The reasons for introducing this procedure were highly contextual: a three-instance system of court proceedings modelled on French and German law was, following the obligatory Soviet muster, was reduced to a two-instance system where the appeal was mainly concerned with a point of law, not fact. Thus, access to the Supreme Court – hitherto possible under the cassation (itself a hybrid of the French *cassation* and the German *Revision*) – was cut off for all cases in which the Supreme Court was not a court of second instance. Therefore, to nonetheless allow access to the Supreme Court also in those cases where the lowest courts were hearing cases in the first instance, the preliminary ruling procedure was introduced. Surprisingly, it survived the reintroduction of the courts of appeal in 1990, and of the cassation in 1996, and is still used until today.

3.2.3. *Three further dichotomies (a note towards further research)*

Besides the overarching typology based on seven patterns of survival, outlined above (section 3.2.2), it is also possible to group legal survivals according to additional criteria in order to observe and analyse further regularities in the continuity of legal form within the empirical legal material. These criteria will enable any given legal survival to be situated on a dichotomous axis spanning between two opposing ideal types. The three dichotomies that are *prima* *facie* identifiable are based on the following *criteria divisionis*: (1) degree of preservation of original form (strong vs. weak); (2) degree of preservation of original function (robust vs. flexible); (3) functionality vis-à-vis the new extra-legal context (eufunctional vs. dysfunctional). It is important to underline that these dichotomies intersect with the overarching typology discussed in section 3.2.2 above: any legal survival falling within one (or more) of the seven patterns may be additionally analysed based on the three dichotomies that I discuss below.

The first dichotomy, based on the *degree of preservation of legal form*, may be described as opposing "strong" vs. "weak" legal survivals.[33] In section 2.2, when discussing the identity of legal survivals, I focused on the opposing categories of *essentialia* and *accidentalia*, assuming that if the *essentialia* of a legal form have been preserved, one can speak of its identity (Mańko 2016a, 20–21). However, it is true that beyond the zero-one question of survival, which is indeed determined by the preservation of essence, one may also enquire about the question of degree of preservation of the legal form, going beyond its bare *essentialia*. Thus, for instance, the legal forms of the *in rem* right to cooperative premises or the right of perpetual usufruct have survived the demise of state socialism, but at the expense of having their legal forms updated by the legislature and constitutional judiciary (Mańko 2015c; 2017b). True, they preserved their essence (they remain distinct from other *in rem* rights, and can therefore be said to have maintained their identity), but much of the non-essential elements of the legal forms in question have been modified (e.g. the principle of one family-one apartment has been abandoned in the case of the *in rem* right to cooperative premises). By contrast, since 1989 the legal form of the general clause of "principles of social community life" has remained largely unchanged (Mańko 2016b, 221). Therefore, it seems appropriate to introduce a distinction between "strong" and "weak" legal survivals: the former would denote those which have maintained their legal form entirely intact; the latter those where only the essential core of the legal form has been maintained (allowing one to speak of identity), but beyond that core, many modifications have been introduced. Obviously, the distinction into weak and strong legal survivals is one of gradation. What is important to note here, is that it is a distinction that pertains to *legal form*, not to its content (social function and societal effects), which are not part of the legal form, but its actual impact upon the extra-legal reality. A strong legal survival may have perfectly well changed its content entirely – and even many times – during its evolution, as is the case with the Common Law trust (see e.g. Alexander 1987; Hansmann, Mattei 1998; Waters 2007; Hofri-Winogradow 2015).

[33] The terminology is borrowed from German grammar, where verbs are described as "strong" (*stark*) if they preserve their unique form (irregular verbs), and "weak" (*schwach*) if they modify it following the general rules (regular verbs).

The second dichotomy, based on the *degree of preservation of the content* (social function and effects) distinguishes between "robust" legal survivals, i.e. those which have essentially maintained their original content, and "flexible" legal survivals, i.e. those which have been subject to far reaching modifications. Again, the distinction between robust and flexible is one of degree, and any legal survival can be placed somewhere on the axis spanning between full preservation of original function (as is the case with *remnants*) and its total overhaul (which is the case of *transsubstantiation*).

The third dichotomy, inspired by a distinction proposed by Denis Preshova and Nenad Markovikj (2024, 130), is based on the *degree of functional adaptation* of a legal survival to the new reality, and opposes eufunctional (well adapted, "compatible") legal survivals to dysfunctional (maladapted, "incompatible") ones. The opposition between eufunctional and dysfunctional survivals is not identical to the one between robust and flexible ones, presented above, because a given legal survival may happen to be perfectly eufunctional whilst being robust (i.e. not changing its social function). A good example is the Polish preliminary reference procedure, introduced in the period of state socialism, and eufunctional following the 1989 transformation without the need of any change of its essential function (Mańko 2007; 99–102; 2016c, 84–85). Dysfunctional legal survivals may, just as certain legal transplants, become "legal irritants" if they are constitute an exceptional misfit to the current legal culture (cf. Teubner 1998).

4. METHODOLOGY OF STUDYING LEGAL SURVIVALS

4.1. Importance of the social context

Commenting on legal transfers, French legal historian Jean Gaudemet observed that "the reception [of law] is not automatic. (...) [L]aw itself is only the work of men, and it is ultimately human will that determines reception" (Gaudemet 1976, 58). This observation can also be applied to legal survivals: the survival of a given legal institution is not automatic, but ultimately is based on human will (or, at least, the lack of will to abrogate an outdated institution). In this vein, it is crucial – in the context of studying legal survivals – to pay utmost attention to the social context of the endurance of old legal forms. This entails at least three aspects.

Firstly, the study of changing social functions of legal institutions (Mańko 2016a, 22–30),[34] something which rarely catches the doctrinal lawyer's attention

[34] "The functions of legal institutions – crucial for the study of legal survivals – should not be confused with the general functions of a legal system *in toto*, which are generally described in terms of "coordination and dispute settlement" (Ehrenberg 2016, 182), or as "lay[ing] down rules aimed at the avoidance of disputes (…) and (…) set[ting] out a normative framework to solve

(Hydén 2023, 2). These can be roughly grouped into four main types: (1) *economic functions* (i.e. those related to the exchange of goods, division of labour, allocation of capital, etc.); (2) *political functions* (i.e. those related to the division of power within the state, especially in the context of government, administration, etc.); (3) *ideological (symbolic) functions* (i.e. concerning the instrumentalisation of law for ideological purposes, or the bending of legal institutions to fit into a specific ideological project; (4) *socio-cultural functions* (i.e. those concerning the use of legal institutions in the context of non-economic relations between legal subjects, especially in the domain of family and personal life) (cf. Mańko 2016a, 25–27). This typology is not meant to be exhaustive nor set in stone, but is rather meant to provide for a rough framework within which the changing (or constant) social functions of legal survivals can be analysed. Indeed, the question of social function is integrated within the seven types of legal survivals discussed above (section 3.2.2): transsubstantiation and consubstantiation, as patterns of survival, are precisely based on the total or partial change of social function, whereas the concept of a legal relic is based on the continuity (lack of change) of the social function. Therefore, the concept of functions in the context of legal survivals should be understood as referring to actual, or "use" functions (Ehrenberg 2016, 24), i.e. those that the legal institutions are actually used for in practice. These may, and indeed often do vary from their "design functions" (ibid.), i.e. those that were intended originally.[35]

Secondly, the social context of legal survivals requires looking into the activity of the legislature in order to ascertain why a given legal institution was not removed. In particular, any parliamentary proposals and debates concerning the dismantling of a legal survival are of crucial importance, as well as the type of arguments raised (e.g. economic, ideological). For instance, in the Polish debates about retaining or abrogating the "principles of social community life" those advocating their abrogation raised mainly ideological arguments, such as their Soviet origin whereas those advocating their retention raised mainly pragmatic arguments (Mańko 2012, 547–548).

Thirdly, the persistence of legal survivals would not be possible without the juristic community (Mańko 2025a, 81–82; cf. Kozak 2010, 248), and therefore particular attention needs to be placed on doctrinal (scientific) literature, as well as case-law interpreting and applying the legal institutions in question (Mańko 2015b, 206).

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disputes which do arise" (Ibbetson 2012, 135) with some authors additionally emphasising the importance of the dynamisation (law promoting social change) vs. stabilisation (law preserving social *status quo*) dialectics (e.g. Redelbach et al. 1994, 270ff).

[35] Social functions – in the sense of the use made of legal forms by people – need to be distinguished from the broader notion of "effects" of legal forms (cf. Šulmane 2012).

4.2. The identity and continuity of the legal form

We must keep in mind that, as Rodolfo Sacco put it, "[l]aw cannot be applied unless it is interpreted" (Sacco 1991, 344).[36] Therefore, the legal form of a survival cannot be limited only to its legislative provisions. More realistically, it should be conceived of as a set of legal norms (in the sense of propositions reconstructed on the basis of provisions [Ziembiński 2020 (1960); cf. Jhering 1852, 49]), but, in fact, taking into account not only the legislative text (*lex lata*) and its possible understandings (*lex illata* and *lex intepretata*), but also the *lex operativa*[37] actually applied by the courts, as well as the views espoused by the leading doctrinal scholars. Thus, using Rodolfo Sacco's terminology, the legal form should be seen as the outcome of a complex interplay of legislative, scholarly and case-law formants (Sacco 1991, 343–384). This part of the research into legal survivals definitely requires applying typical doctrinal methods, albeit with particular regard to the historical evolution of an institution and its contemporary shape. Comparative legal materials, both employed synchronically and diachronically, can be extremely helpful in providing a *tertium comparationis*. One of the goals of the doctrinal analysis, in the context of the study of legal survivals, is to empirically address the question of identity (see above, sections 2.2 and 2.3), keeping in mind that without identity, one cannot speak of the legal form's endurance and, therefore, the presence of a legal survival is excluded.

4.3. The question of intra-legal functions

A question at the interstices of a socio-legal and doctrinal approach are the intra-legal functions of legal institutions. After all, a given legal form has not only functions *ad extra* (impacting upon the outside, non-legal reality) but also *ad intra* (impacting upon the legal system as such, and notably other institutions within that system) (Mańko 2016a, 24–25). For instance, the English trust has been described as having a "subversive" function vis-à-vis other areas of the law, such as contract, inheritance, family or taxation (Bennett, Hofri-Winogradow 2021; 2024); the prohibition of abusing subjective rights in Polish law is described as a "safety valve" (Stelmachowski 1998, 120) allowing judges to bypass the outcomes dictated by other legal institutions, whilst the institution of good faith in German law has been described as a "mouthpiece" through which judges proclaim new rules (Hesselink 2011, 645). Such intra-legal functions, just like extra-legal ones, can stay the same over time or change. For example, the principles of social community life in Polish civil law initially served as a vehicle for judicial law-making and for *de facto* abrogating certain pre-socialist legal

[36] For a deeper philosophical perspective on this thesis, see e.g. Łakomy (2019; 2020; 2025, 31–38).

[37] These notions, referring to Jerzy Wróblewski's theory of interpretation, have been introduced in section 2 above.

rules, to systematically subvert property rights held under pre-communist law, but once a socialist Civil Code was enacted, they became reduced to an exceptional measure of situational justice (Mańko 2016d, 219–221).

4.4. Mechanisms of functional adaptation

Finally, research on concrete legal survivals needs to precisely identify the moments of their functional adaptation – if any – and the mechanisms leading to such change in their content, despite continuity on the level of form. Given the possibility to distinguish, for analytical purposes, between interpretation and application of law, and within interpretation – between doctrinal and judicial interpretation – it is possible to identify at least three avenues of functional adaptation: through doctrinal interpretation, judicial interpretation, and judicial application. Moreover, given the broad sociological approach to legal survivals, which includes not only the state-backed law, but also the sphere of infra-legal praxis (actual juridical acts, including e.g. contracts, trust instruments, etc.), the functional adaptation could occur also at that level which, without fieldwork, may be difficult to detect.

5. CONCLUDING REMARKS

The goal of this paper was to restate the concept of a legal survival, its broader theoretical ramifications within the theory of nomostasis and the methodological tools that provisionally seem adequate for the study of this phenomenon. Concerning the *concept* of a legal survival, the paper restated the claim that the core type of a legal survival is a legal institution, concept, principle, or single legal norm, but that also juridical (metanormative) survivals could be included in the scope of the concept *sensu largo*. Concerning the importance of transformation for the presence of legal survivals, the notion itself was enlarged to include not only political and economic transitions, but also ideological and cultural ones. The paper also highlighted the importance of functionality of the legal survival to the old, outdated context and, more broadly, the importance of the social function of the legal form and its possible adaptation.

Concerning the theory of legal survivals – the *theory of nomostasis* – the paper presented a set of tentative claims, noting however that a further development of the theory is necessary. It seems that a combination of historical sociology of law, analytical sociology and the sociology of knowledge – in what was described as the *historical sociology of juristic knowledge* – could constitute an optimal environment for the further development of the theory. Within such an approach, the phenomenon of nomostasis could then be conceptualised using various theoretical languages, referring to the sociological paradigms of Foucault, Bourdieu or Luhmann (mentioned by Marta Bucholc as particularly relevant for the historical sociology of law), or, for instance, those of the sociology of knowledge (e.g. Berger, Luckmann 1966) or analytical sociology, which could allow a focus on the uncovering mechanisms of historical processes in law (cf. Barkey 2009).

In a provisional fashion, the paper posited three generalised claims ("laws") postulated by the theory of nomstasis at its current stage of development, namely: firstly, the *law of juristic inertia*, according to which the juristic community displays a general tendency of using old legal forms to approach new problems; secondly, the *law of functional adaptation*, according to which one of the methods of adaptation of legal forms to changed contexts is a modification of their social function, but without modifying the legal form itself; and thirdly the *law of decontextualisation* according to which legal forms can endure very well despite being entirely out of joint with the modified context.

In an equally provisional manner, the paper made certain preliminary remarks concerning the *methodology* of studying legal survivals, arguing that the phenomenon of nomostasis *ex definitione* calls for a broadly inclusive pluridisciplinary approach, uniting *inter alia* the methods typical of comparative legal history, comparative law, sociology of law and legal anthropology.

As Håkan Hydén noted, the sociology of law "uses inductive methodology aimed at relating empirical findings to theory. (....) The more empirical findings that can be added, the richer its contours become" (Hydén 2023, 2). Indeed, future research on legal survivals will create an opportunity to verify and possibly modify these three laws, and analyse more closely possible patterns of endurance of legal form, linking them to such variables as area of the law (private vs public), historical period, legal family (especially Common Law vs Civil Law), type of legal system (codified vs non-codified), or other factors, both internal to law and legal culture, and external to it (political, ideological, economic, sociocultural). As a theory of the continuity and adaptations of legal forms, the theory of nomostasis combines in a genuinely pluridisciplinary fashion the approaches typical of a social and conceptual history of law (in Koselleck's [2018] sense of the two concepts) with an overarching sociological approach, geared towards empirical case studies, at the same time seeking input from comparative legal studies, legal dogmatics (doctrinal research), and becoming thereby capable of producing important insights for the philosophy of law in its pursuit of the essence of juridicity. The proposed *analytically oriented historical sociology of juristic knowledge* – combining the insights of analytical sociology, historical sociology and the sociology of knowledge – could be envisaged as the optimal disciplinary environment within which the phenomenon of nomostasis could be further studied both theoretically and empirically.

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RETHINKING NEUTRALITY IN HUMANITARIAN ACTION: LEGAL AND PRACTICAL PERSPECTIVES[1]

Abstract. For decades, the importance and impact of the principle of neutrality in international humanitarian action has been debated in the context of its mission. Most publicists and scientists agree about the positive aspects of neutrality, as evidenced by the successful activities of the International Committee of the Red Cross for more than a century. However, there are also critics of neutrality. In particular, they argue that neutrality is based on "tolerating crimes in exchange for carrying out humanitarian activities." The main goals of this article are the following: to show the essence of the concept of "neutrality" in order to identify "stumbling blocks" that lead to a "distortion" of the understanding of the positive impact of neutrality in international humanitarian activities; to review the contribution of the International Committee of the Red Cross in the context of a strictly neutral international non-governmental organization; to present possible ways of diplomatically and legally developing the concept of "neutrality." In this research, general and special scientific methods of legal cognition are used. Among them we can note the following: the logical (including analysis and synthesis, deduction, and abstraction), structural, and comparative, as well as dogmatic, etc. legal methods.

Keywords: international humanitarian law, neutrality, human rights, International Committee of the Red Cross

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PONOWNE PRZEMYŚLENIE NEUTRALNOŚCI W DZIAŁANIACH HUMANITARNYCH: PERSPEKTYWY PRAWNE I PRAKTYCZNE

Streszczenie. Od dziesięcioleci trwa debata nad znaczeniem i wpływem zasady neutralności w międzynarodowych działaniach humanitarnych w kontekście ich misji. Większość publicystów i naukowców zgadza się z pozytywnym aspektem neutralności, o czym świadczy udana działalność Międzynarodowego Komitetu Czerwonego Krzyża od ponad wieku. Istnieją jednak również krytycy neutralności. W szczególności twierdzą oni, że neutralność opiera się na „tolerowaniu przestępstw w zamian za prowadzenie działań humanitarnych." Główne cele niniejszego artykułu są następujące: ukazanie istoty koncepcji „neutralności" w celu zidentyfikowania „przeszkód", które prowadzą do „zniekształcenia" rozumienia pozytywnego wpływu neutralności w międzynarodowej działalności humanitarnej; dokonanie przeglądu wkładu Międzynarodowego Komitetu Czerwonego Krzyża w kontekście ściśle neutralnej międzynarodowej organizacji pozarządowej; przedstawienie możliwych sposobów dyplomatycznego i prawnego rozwoju koncepcji „neutralności." W badaniach tych wykorzystywane są ogólne i specjalne metody naukowe poznania prawnego. Wśród nich można wyróżnić: metody logiczne (w tym analizę i syntezę, dedukcję i abstrakcję), strukturalne i porównawcze, a także dogmatyczne itp. metody prawne.

Słowa kluczowe: międzynarodowe prawo humanitarne, neutralność, prawa człowieka, Międzynarodowy Komitet Czerwonego Krzyża

1. INTRODUCTION

International humanitarian action is one of the key factors influencing the protection of human rights in the event of armed conflicts, man-made or environmental accidents, natural disasters, etc., in particular, in the cases when due to certain force majeure circumstances, representatives of public authorities are unable to fully regulate the protection of human rights for people who are or who live in a certain territory within which an emergency is taking place or has taken place. Moreover, "the prophylaxis of human rights violations is a key part of a protective policy of every country. It is implemented by states under great assistance of non-governmental organizations" (Myronets et al. 2019). So, such "international organizations can be considered an additional guarantee for the observance and protection of human and civil rights and freedoms" (Voitsikhovskyi et al. 2022, 305).

Neutrality is one of the principles of international humanitarian action. The observance of this principle by international humanitarian organizations, including situations of armed conflicts, is often criticized by the civilian population. At the same time, international level discussions about the appropriateness of such a principle or the required level of compliance with it, have been going on for decades. Despite the international community's agreement on the importance of this principle and its indispensability to provide humanitarian assistance to victims, including the cases of armed conflicts, the discussion continues, and this includes the so-called legal illusion of "tolerating crimes in exchange for carrying out humanitarian activities."

Let us consider some aspects of the modern understanding of neutrality based on a number of recent publications. In the main part of his article, Slim (1997), considered "current usage of the terms 'humanity', 'neutrality', 'impartiality', and 'solidarity', as they are used in the discourse of humanitarian operations." Really, "neutrality may be a legal status, an attitude to international relations, or a foreign policy dogma in peacetime; in wartime, it is a doctrine that governs all dimensions of foreign relations" (Danspeckgruber 2019). Furthermore:

> [T]he traditional rules of neutrality do not find scope of application. Yet, transposed into fundamental principles of humanitarian law, they continue to rule over peace-keeping and humanitarian operations. In addition, they complement the existing rules for military action mandated by the UN Security Council, especially during operations at sea. (Gavouneli 2012, 271)

Positive humanitarian practices based on the principle of neutrality, are noted in a number of papers on the examples of armed conflicts e.g., the Korean War (Turcotte 2022), the Libyan civil war of 2011 (Mačák 2014). Also, within the survey on new works, the following dilemma is interesting: "the law of neutrality, and whether it may be better situated within the jus ad bellum, the body of law governing the use of force, or the jus in bello, the body of law governing hostilities following the initial use of force" (Clancy 2022, 353). In addition, the negativity of discussions about neutrality and the role of neutrality in the devaluing humanitarian action, was noted by a number of researchers. For example, one can recall the following: "The International Committee of the Red Cross is one of the most widely recognized NGOs operating today. The important role played by the ICRC in developing and monitoring international humanitarian law is often overlooked in the midst of discussions on the controversial issue of neutrality […]" (Ku, Brum 2003, 73).

In author's opinion, according to the existing discussions, it is necessary to conduct a summary research with the following goals: to investigate the essence of the concept of "neutrality"; to identify the "cornerstones" in understanding its nature; to characterize the activity of the ICRC, which is the greatest supporter of this principle; to determine the place of neutrality in international humanitarian action; and to formulate further possible ways of developing neutrality in the context of international legal relations and as a legal category. This paper is devoted to these questions.

General and special legal research techniques are used. Let us note the main ones. The logical method (this technique includes analysis and synthesis, deduction, and abstraction) was used in the study of approaches to understanding the main existing concepts, as well as in the formulation of conclusions. The dogmatic method was useful for the analysis of legal norms. The structural method was used to study the role of neutrality in international humanitarian action. The comparative method was useful for creating an overview of scientific concepts and known discussions.

In this paper, the essence of the legal category "the principle of neutrality" and the relationship of neutrality with other principles of international humanitarian activity, are studied by an analytical overview of scientific publications. Also, attention is given to the activities of the International Committee of the Red Cross, to the importance of neutrality, and to further possible ways of its evolution and scientific investigations.

Finally, let us remark that in the context of this topic, an important issue is defining the boundaries between international humanitarian law, human rights law, and humanitarian activities. However, it should be noted that a number of lawyers have focused their attention on this discussion. Let us consider the most concise interpretations.

> Human rights law is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain rights that must be respected and protected by their States. […] Both IHL and human rights law strive to protect the lives, the health and the dignity of individuals, albeit from different angles – which is why, while very different in formulation, the essence of some of the rules is similar. […] There are however important differences between them: their origins, the scope of their application, the bodies that implement them, and so on." (ICRC 2015)

In general, the latter source focuses on the subjects and objects, as well as on such characteristics of International Humanitarian Law (hereafter IHL) and human rights law as the time and geography of application.

An interesting perspective on the distinction between international humanitarian law and human rights law was also presented by the United Nations Office on Drugs and Crime (UNODC), where the distinction was considered in terms of the nature of the regulation of legal relations, as well as aspects such as the right to life, the participation of children in hostilities, and compensation for psychological and physical harm. In particular, based on the latest discussion, the following features can be highlighted:

- IHL defines the legal regulation of hostilities and the protection of persons in armed conflicts, while human rights law does not disappear on its own, but its combination with IHL is characterized by a lack of regulation.
- International humanitarian law defines the minimum universally binding standards for the observance of human rights.
- International human rights law provides a higher level of protection than IHL.
- The scope of subjects and objects of IHL regulation is broader than the corresponding characteristics of human rights law.
- IHL does not have a mechanism for ensuring violated rights.
- "IHL does not provide compensation for moral damage, but only for physical damage," etc. (UNODC).

In general, in our opinion, the most concise and systematic list of distinctions between IHL and IHRL is provided by the Ukrainian Red Cross Society (2025). That is: “International Human Rights Law: applies both in peacetime and during armed conflict; protects everyone; allows for certain derogations; regulates the relationship between the state and the individual; applies only during armed conflicts.” Also, “the international human rights system emerged after World War II.” International Humanitarian Law: protects those who do not participate, or no longer participate, in hostilities, as well as combatants; allows no derogations; regulates the conduct of all parties involved in armed conflict.” Finally, “its rules and customs of warfare have a long history” (Ukrainian Red Cross Society 2025).

International humanitarian action involves implementing a system of comprehensive measures to save lives, alleviate suffering, and protect human dignity in various emergency situations and their aftermath, including activities in the field of preparedness and prevention of such crises. A key feature of humanitarian activities is that they are driven by the urgent needs of all persons in need of assistance, regardless of biological, social, political, religious, and other factors. The ideological and normative basis for such activities is the fundamental and widely recognized principles (humanity, impartiality, neutrality, and independence) based on international humanitarian law. In addition, the specific nature of humanitarian activities requires compliance with these principles when providing humanitarian assistance, as well as when planning humanitarian missions and sustainable recovery. With regard to humanitarian activities in armed conflicts, an important area is humanitarian negotiations (the main purpose of which is to ensure access and effective protection for persons in need of assistance), and compliance with these principles is a complex mechanism due to the large number of actors involved in the relevant relations (UNHCR).

2. THE ESSENCE OF THE PRINCIPLE OF NEUTRALITY

The principle of neutrality is one of the most controversial and complicated humanitarian principles (Sharpe 2023; Plattner 1996). In the context of human rights law and international humanitarian law, this principle is interpreted as a prohibition to “take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature” (ICRC 2015, 4). “Nowadays there tends to be a ‘for or against’ attitude to neutrality, based on its usual rather than on its legal definition, and this leads to misunderstandings which stand in the way of any objective appraisal of its meaning” (Plattner 1996, 179). “There is a great risk that neutrality may become an argument in defence of moral indifference.” The concept of neutrality must be convincing under the development of world consciousness (Red Cross 1969, 41). In the end of the nineteenth century, the concept of neutrality was based on the concept of a militarily neutral state, the modern meaning of which is rather difficult to understand (Plattner 1996, 163).

"To inquire into neutrality is to open up the contested and contingent basis of humanitarian-ness itself, and its relationship to politics" (Gilbert 2020, 150). It is difficult to form a correct idea of neutrality, because "humanitarians act in diverse contexts where people are likely to see politics everywhere" (Gilbert 2020, 150). Thus, to successfully describe their activity as neutral, "humanitarians must frequently submit their actions, and their status as humanitarians, to the evaluation of others who might have their own ideas about what constitutes "neutrality" or "politics." Indeed, neutrality is a semantic shifter; that is, its meaning can only be defined relatively and in relation to other definitions and categories (see Brada 2016), such as "politics" (as that which it is not)" (Gilbert 2020, 150). For example, the notion of "neutral humanitarian assistance" includes eleven (Plattner 1996, 175–177) mandatory factors. This is based on the opinion of lawyers, as well as the following legal norms: Articles 70 and 75 of Additional Protocol to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 8, 1977; para. 2 of article 18 of the Additional Protocol to the Geneva Conventions of August 12, 1949, relating to the protection of victims of armed conflicts of a non-international nature (Protocol II) of June 8, 1977; Resolution 5 "Armed Protection of Humanitarian Assistance" and Resolution 11 "Principles of Humanitarian Assistance" adopted by the Council of Delegates in 1993. In particular, the neutrality of humanitarian aid is noted in para. 1 of Article 70 of Additional Protocol I and para. 2 of Article 18 of Additional Protocol II, the guidelines annexed to UN General Assembly resolution 46/182 "Strengthening of the coordination of humanitarian emergency assistance of the United Nations" (December 19, 1991).

The discussion on the complexity of the concept of neutrality can be supplemented by a number of studies on the relationship between neutrality and other principles. One can note that:

> The more independence is definite and strong, the greater are the possibilities and guarantees for a neutral approach. […] A neutral movement, which refrains from participating in conflicts and controversies, is ready and in a position to give its whole attention to suffering individuals and help them in proportion to their suffering, without a secondary purpose and without discrimination. (Haug 1996, 630)

Non-discrimination and proportionality follow from neutrality, not the other way around, and are both the negative and positive poles of a neutral humanitarian operation (Plattner 1996, 169). As for the criticism of the use of neutrality in humanitarian action, one can remark that:

> [N]eutrality has been called into question by non-governmental organizations of French origin. […] their objections […] to be based on two premises: neutrality imposes silence and, from the standpoint of justice, silence is reprehensible. (Plattner 1996, 169–170)

Despite these contradictions, many humanitarian organizations recognize neutrality and impartiality as key principles of humanitarian action (Haug 1996). For example, neutrality is mentioned in the following documents: Resolutions 46/182 and 58/114 of the UN General Assembly, the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies, and Guiding Principles on the Right to Humanitarian Assistance, which was adopted by the Council of the International Institute of Humanitarian Law in April 1993.

3. INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) AND NEUTRALITY

"[D]ifferent humanitarian organizations have different comparative advantages and that the ICRC is arguably the most 'strictly' neutral" (Haug 1996, 629). Let us remark that according to the Geneva Conventions and Additional Protocol I, the ICRC as a neutral and impartial non-governmental humanitarian organization composed of individuals, has universally recognized legal personality in international relations, because it is intended to act as a substitute for a protecting state for persons in special emergencies, where it is necessary to ensure the implementation of the basic principles of human rights law. According to Article 5, para. 1, of the Statute of the International Red Cross and Red Crescent Movement, the Committee is single-national and is co-opted from citizens of neutral Switzerland.

The ICRC (1863), the International Federation of Red Cross and Red Crescent Societies (IFRC and ChP; 1919), and 190 national Red Cross and Red Crescent societies are components of the International Red Cross and Red Crescent Movement. The last-mentioned organization is the world largest volunteer humanitarian network of organizations, as well as was created to protect key human rights when the state is unable to fully or partially provide them to its citizens due to force majeure. According to para. 4 and para. 5 of Article 7 of the Movement's Statute, the internal and external cooperation of the Movement members is based on the observance and mutual respect of basic humanitarian principles, including neutrality. The Movement members provide the following activities: a wide range of assistance to non-combatants, victims of man-made and natural disasters; a support for military medical services, social program, and medical projects; they promote compliance with international humanitarian law and monitor its observance, as well as conduct research in this area, etc.

The Movement also provides significant assistance in activities related to the mission of the *Sustainable Development Goals (SDG)*. SDG were formulated by the UN General Assembly in 2015. In addition, one can note that the ICRC is a three-time laureate of the Nobel Peace Prize (1917; 1944; in 1963, the ICRC was awarded jointly with the League of Red Cross Societies).

The tendency to support the side affected by the armed conflict:

> [H]as put pressure on the Red Cross to take sides and has given rise to questions about the validity and legitimacy of its neutrality and impartiality, but also its confidential bilateral approach with all parties to an armed conflict. […] It's a recurring phenomenon that usually arises in connection with any kind of a watershed event that polarizes public opinion. (Melzer, Rushing 2023)

In the context of the presented discussion, attention should be given to the practical implementation of the principle of neutrality in order to achieve humanitarian goals. In the work of the ICRC, one of such tasks is the return of hostages. As noted by the British Red Cross (2025), the ICRC has a good track record in facilitating the release of hostages, having carried out such work in recent years in Afghanistan, Colombia, Nigeria, Palestine, and Peru. For example, October 10, 2025 (when the ceasefire agreement between Israel and Palestine came into force), the ICRC as a neutral mediator, facilitated the return and transfer of 20 Israeli and 1,809 Palestinian hostages, and in 2023, 109 and 154 hostages, respectively. However, the ICRC's neutrality in this area is reflected in the confidentiality of information regarding the conditions of detention of hostages by the parties to the conflict, as confidentiality plays a key role in achieving a positive outcome. In addition, the ICRC does not participate in negotiations between the parties but only facilitates the achievement of an agreement between them, as well as conducts confidential talks with the parties, using "open dialogue and urging parties to implement their obligations under international humanitarian law" (British Red Cross 2025).

Mouly (2024) examines the activities of humanitarian workers in the context of the dangers of their work and the difficulties of adhering to the principle of neutrality, including the situation in Ukraine and Gaza, appears to be of interest in the context of this study. In each of these situations, given factors such as the danger to foreigners, the effectiveness of the Ukrainian healthcare system, and restrictions on entry into Gaza, humanitarian aid is mainly provided by national humanitarian workers organized by existing national or local institutions and organizations. The situation in the Gaza Strip was characterized by a complete blockade of humanitarian support by Israel, and first aid began to arrive only after several weeks of negotiations. In turn, Ukraine and international solidarity aid faced intense and unpredictable Russian bombing. Such situations are factors in the ineffectiveness of international humanitarian aid, but national humanitarian actors are involved in humanitarian activities, becoming the first and key providers of humanitarian aid. However, they often become targets for enemy forces because of their effectiveness and involvement with the affected party. For example, In Ukraine, from the start of the war in February 2022 to August 2024, 13 Ukrainian humanitarian workers were killed, 35 were injured, and 39 were kidnapped, while 8 international workers were killed and 13 were injured. During the first three months of the war in Gaza, 163 humanitarian workers were killed, and between October 2023 and August 2024, 275 national humanitarian workers were killed and 79 were injured, while only seven international humanitarian workers were killed and only two were injured. In general, the effectiveness of humanitarian aid in Ukraine and Gaza is recognized precisely because of the activity of national humanitarian workers and medics, but the latter are unprotected. International humanitarian workers are less effective, but they are better protected. That is why it is believed that "neutrality is the cornerstone of humanitarian aid in armed conflicts", because there can be no better guarantee for humanitarian access and protection in wartime than the absence of affiliation or suspicion of affiliation with one of the parties (Mouly 2024).

In the context of the latter argument and respect for IHL, emphasis is placed on the positive impact and potential of the ICRC in terms of agreements on medical evacuation, the provision of vital humanitarian aid, visits to prisoners, etc. (Droege 2024). However, as virtually all recent legal sources indicate, humanitarian access is directly proportional to the degree of neutrality, which in turn is inversely proportional to accountability.

However, even neutrality is not a factor in security.

With the number of armed conflicts on the rise (130 in 2024, more than double the number 15 years ago), affecting 204 million people, medical and humanitarian workers are increasingly becoming targets. For example, between 2023 and 2024, there were more than 600 attacks on medical facilities and their staff, and in 2024, there were 338 attacks on humanitarian workers. In 2025, 25 volunteers and employees of the Red Cross and Red Crescent were killed (IRC 2025).

In 2025, ensuring access to medical care remained central to the ICRC's activities. The latter organization provided support to medical facilities in Ukraine, Sudan, South Sudan, eastern Democratic Republic of Congo, Afghanistan, Myanmar, Gaza, and many others. Confidential dialogues were also an important tool for the ICRC in helping people deprived of their liberty due to armed conflicts and other situations of violence. Humanitarian teams visited places of detention to assess the conditions of detention and treatment of prisoners (medical care, access to water and food, conditions of detention, and contact with family members, etc.), and assistance was provided to facilitate communication between detainees and their relatives. However, the ICRC's key role as a neutral organization was in humanitarian operations to release and/or transfer hostages or other detainees and to safely move people across the front line. "[S]ustained confidential dialogue with the parties has remained essential to enable humanitarian activities and promote respect for international humanitarian law. While often invisible, this intermediary role has had direct consequences for people's safety and well-being" (IRC 2025b).

Such conclusions are not uncommon. For example,

> [T]he Sudan case reaffirms that neutrality is not merely a guiding principle but a practical necessity. Ensuring safe and sustained humanitarian access demands constant vigilance, adaptive strategies and collaboration across sectors – lessons learned from Somalia that remain critically relevant today. […] The Somalia case provides a valuable lesson in how differing interpretations of neutrality among humanitarian, military and media actors can generate friction and undermine the effectiveness of aid operations. To achieve better results on the ground, these actors must understand each other's objectives, respect each other's roles and coordinate their efforts effectively. (Céspedes Navarro 2025)

4. THE IMPORTANCE AND FURTHER EVOLUTION OF NEUTRALITY IN INTERNATIONAL HUMANITARIAN ACTIVITIES

The right to life has been and remains the key among all possible human rights, even in the conditions of scientific and technological progress and the modern evolution of social relations, since this right gives rise to other rights. This right proclaimed in Article 3 of the Universal Declaration of Human Rights and duplicated in the International Covenant on Civil and Political Rights (Article 6.1), in the African Charter on Human and Peoples' Rights (Article 4), and the American Convention on Human Rights (Article 4) , as well as in the European Convention on Human Rights (Article 2).

Therefore, in order to answer the central problematic questions of this discussion, we must first ask: does neutrality help to save the life of at least one person? Experience shows that it does. Moreover, neutrality facilitates diplomatic negotiations, that involve the enforcement of human rights law, by improving respect for and compliance with international humanitarian law.

For the second, one can draw an analogy between the ecological system and the system of social organizations in society. Just as in the ecological system, the destruction of one living organism leads to the gradual 'dying out' of the system, so in the system of social relations (in our case, the area of humanitarian relations), each humanitarian organization is a component (the so-called "puzzle") of the 'mosaic' of social and humanitarian relations. Each organization has its own differences in the promoted principles, the means and characteristics of work, and the way negotiations are conducted. For example (as mentioned above), the ICRC has the strictest adherence to neutrality. If we conditionally imagine a complete rejection of neutrality in modern humanitarian action, the 'mosaic of the humanitarian sphere of social relations' will remain without key puzzles. That is, it will not be able to function fully. Each voluntary organization with its activities, influence on observance of legal norms and organization of work based on a certain combination of legal principles complement each other, form a single system and contribute to the observance and development, in particular, of international humanitarian law. It is worth noting that the International Red Cross and Red Crescent Movement, as a strictly neutral voluntary movement, has been carrying out its tasks with high quality for more than 100 years, despite the obstacles that have arisen in the course of its activities.

For the third, the debate on the appropriateness and relevance of the principle of neutrality in the activities of humanitarian organizations has been going on for more than a decade. Many conference reports, interviews (especially with representatives of the ICRC), and discussions has been held on the issue of the concept of neutrality and its leverage. In addition, this issue has been repeatedly addressed in legal scientific publications in the following international humanitarian law journals: International Review of the Red Cross, The Yearbook of International Humanitarian Law, Journal of International Humanitarian Legal Studies, Journal of Conflict and Security Law, The International Journal of Human Rights, Global Responsibility to Protect, The International Humanitarian Law Series, etc.

It is difficult to provide other arguments that do not duplicate someone else's opinion, given the considerable attention that has been paid to discussions, debates, and researches on the feasibility of neutrality in humanitarian action for decades. The question of whether *humanitarian organizations should adhere to the principle of neutrality in modern armed conflicts*, can be answered in the affirmative, i.e., neutrality should be present in humanitarian action. Each organization independently determines its own principles for the provision of humanitarian aid and, if it chooses the principle of neutrality as a fundamental principle of its action, it must not abandon it.

Taking into account the trends of the modern development of social relations, development of information technologies, science and engineering, etc., neutrality is most likely a catalyst of effective humanitarian action, although the specifics of the provision of humanitarian aid in one or another case depend on a whole system of circumstances and ideologies adhered to by subobjects of legal relations. Moreover, it should be emphasized that the last question should be studied in the following context: "What are the possible vectors of further rational development (evolution) of the concept of neutrality in humanitarian action under the existing conditions of the development of socio-political relations, science, culture and technologies?"

Such an extremely important issue would be appropriate for the research by contemporary legal researchers and publicists. To begin with, one can define some possible directions of the development of the concept of neutrality:

- *Conditional neutrality*. Given that the right to life is key among other human rights, it can be considered an inviolable foundation on which all principles of humanitarian action are based. That is, for example, if there are obstacles to the provision of humanitarian assistance that directly affect the enjoyment of this right, humanitarian organizations, without taking sides, publish or facilitate the publication of evidence of actions that cause the relevant obstacles. The main content: "The access of humanitarian organizations to the uninterrupted and proper provision of humanitarian aid is guaranteed by the influence of 'fear' of publication, open condemnation or collection of evidence of attacks on life, health, honor, and dignity, etc."

- *Strict neutrality*. A brief formulation of this direction is following: "Whatever happens, the main thing is not to get into any conflicts or contradictions, but to ask for access to people in need of help and the opportunity to provide this help." Negotiations are the maximum means of influence.
- *Democratic neutrality*. This is a direction that occupies an intermediate position between two directions, which were mentioned above. Here it is necessary to define and improve the system and technique of diplomacy in negotiations, to determine the limits of the leverage over obstacles to the provision of humanitarian aid. Here diplomatic negotiations, mutual assistance on equal terms without recognizing anyone's ideology, and contractual relations are the main tool. In order to avoid abuse, it is important that the specific tools available are clearly defined and recorded.

5. CONCLUSIONS

Neutrality is more likely to be a catalyst for effective humanitarian action, although the specifics of providing humanitarian aid in one case or another case depend on a whole system of circumstances and ideologies adhered to by the subjects of legal relations, a certain combination of legal principles complement each other, form a single system and contribute to the observance and development, in particular, of international humanitarian law. The main niches in the further development of the notion (concept) of neutrality can be singled out as 'conditional neutrality' (the access of humanitarian organizations to the uninterrupted and proper provision of humanitarian aid is guaranteed by the influence of 'fear' of publication, open condemnation or collection of evidence of attacks on life, health, honor, and dignity, etc.), 'strict neutrality' (the main goal is not to enter into any conflicts or contradictions, but to ask for access to people in need of help and the opportunity to provide this help; negotiations are the maximum means of influence), and 'democratic neutrality' (diplomatic negotiations, mutual assistance on equal terms without recognizing anyone's ideology, and contractual relations are the main tool). Further research may focus on improving or symbiosis of these types of neutrality.

Neutrality is one of the social mechanisms which provide the basis for volunteers and social workers to have the access to people in need of help and the opportunity to provide this help. The development of neutrality creates new opportunities in social work for expanding the possibilities of providing these people. In addition, the experience of the International Red Cross and Red Crescent

Movement shows the undeniable positive impact of neutrality on the availability of social assistance (social work and social security) for the most vulnerable or affected populations. This is particularly evident in cases of armed conflicts. Understanding the concept of neutrality is also important for social workers, because they are an integral part of society. The acquisition and development of certain neutrality skills by social workers is useful for improving social work and for providing access to social support for those who need it in certain conflict situations. Against this background, the topic of further scientific research on the development of the practical application of neutrality to improve the accessibility of social work in cases of conflicts is interesting. Such research will be considered in future articles of the author.

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